No. 19-309

In the Supreme Court of the United States

GOVERNOR OF DELAWARE, PETITIONER

v.

JAMES R. ADAMS, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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In an express and acknowledged split from other circuits, the Third Circuit has confined *Elrod-Branti*'s policymaking exception to "only the class of employees whose jobs 'cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority].'" App. 28a (brackets in original). This excludes not only judges, but members of judicial nominating bodies, regulators, and other agencies designed to be nonpartisan and independent of the appointing authority. Nothing in *Elrod* or *Branti* supports that result; it conflicts with every other decision on the issue; and it upends the state constitutional political balance requirements that have helped make Delaware's courts the preeminent forum for resolving disputes for businesses from all over the world.

Adams' brief in opposition opens with the point that no other State has a judicial selection system just like Delaware's. True. But the holding below jeopardizes any system that uses bipartisanship to ensure independence from political control. That includes sixteen States that require bipartisan balance on their judicial selection committees[1] and the many States that do so for regulatory commissions.[2]

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[1] Douglas Keith, *Judicial Nominating Commissions* 6, Brennan Ctr. for Justice (May 29, 2019); see, *e.g.*, Ky. Const. § 118 (mandating political balance between the two major parties); N.M. Const. art. VI, § 35 (same).

[2] See Alexandra B. Klass, *Public Utilities and Transportation Electrification*, 104 Iowa L. Rev. 545, 614 (2019) ("Most state [public utility] commissions also have political balance requirements[.]"); Haw. Const. art. IV, § 2; 220 Ill.

Even if the decision below affected only Delaware's judiciary, however, certiorari would be warranted. It is a weighty matter for a federal court to invalidate a State's longstanding system of choosing judges. See *Alaska* v. *Arctic Maid*, 366 U.S. 199, 202 (1961) (reviewing whether an Alaskan tax unduly burdened interstate commerce "because of the importance of the ruling to the new State of Alaska"). As this Court explained in *Gregory* v. *Ashcroft*, the States' sovereign right "to determine the qualifications of their most important government officials"—including "those who sit as their judges"—"lies at the heart of representative government." 501 U.S. 452, 460, 463 (1991).

That principle is especially important in the case of the Delaware courts, which are regarded as "exemplary" and "preeminent" by courts, scholars, the business community worldwide, independent studies, and a former Chief Justice of this Court. App. 38a, 39a. The "unique" character of the Delaware courts (Opp. 2) is a matter of national importance. And if the system of choosing judges that produced that "unique" reputation for objectivity and stability is to be struck down under the United States Constitution, the ruling should come from this Court—not from an isolated circuit court ruling that breaks from every other decision and rests on a questionable reading of precedent.

Comp. Stat. 5/2-101; Mo. Rev. Stat. § 260.365; N.C. Gen. Stat. § 143B-350(b)(1). Adams says that we "concede[] that such regulatory agencies make policy." Opp. 5. The point, however, is that regulatory commissioners are not "policymakers" *under the Third Circuit's definition*, which is limited to "jobs [that] 'cannot be performed effectively except by someone who shares the [appointer's] political beliefs.'" App. 28a; see Amicus Br. of Former Chief Justices 6–11.

1. Adams spends pages attempting to distinguish the cases that conflict with the decision below. Opp. 7–10. None of his novel factual distinctions, however, diminishes the acknowledged circuit split, which turns on the governing legal framework, not the precise details of the appointment scheme.

That is plain from the opinions. Immediately after describing its holding—"the policymaking exception does not apply to members of the judicial branch"—the Third Circuit acknowledged "that two of our sister Circuits have concluded otherwise." App. 27a. The court then offered "two reasons" it deemed those cases "unpersuasive"—both of them legal, not factual, in nature.[3] Notably, the Sixth and Seventh Circuits each considered and rejected the Third Circuit's test, stating: "'Neither *Elrod* nor *Branti* makes anything turn on the relation between the job in question and the implementation of the appointing officer's policies.'" *Newman* v. *Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993), quoting *Kurowski* v. *Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988).

a. Undeterred, Adams says the decisions we cited (with one exception) "do not involve mandatory political discrimination," just appointing authorities who "made a voluntary choice" to favor applicants on par-

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[3] App. 28a (rejecting the view "that the policymaking exception" is "'shorthand for a broad category of public employees whose work is politically sensitive and who exercise significant discretion in the performance of their duties'"); App. 29a (rejecting "the approach of the Sixth and Seventh Circuits," which "would allow governors both to weigh an individual candidate's political beliefs *and* to condition judicial positions on party allegiance").

tisan grounds. Opp. 7, 4. But the same is true of *Elrod*, *Branti*, and *Rutan*. See *Elrod* v. *Burns*, 427 U.S. 347, 351 (1976) (involving the "practice of the Sheriff"); *Branti* v. *Finkel*, 445 U.S. 507, 509–510 (1980) (public defender's discretionary hiring); *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 65–66 (1990) (governor's discretionary exemptions from hiring freeze). No decision has drawn any distinction between partisan affiliation requirements imposed by law and those employed as a matter of discretion. And such a distinction would be perverse, since any use of partisan affiliation to restrict the appointing authority's freedom to populate the courts or other bodies with appointees of a particular party will in practice take the form of a "mandatory" limit.

b. Adams next argues that the cases we cited involved "temporary appointments pending the next judicial election," rather than appointments "for a full term." Opp. 2. But that makes no *constitutional* difference. Neither *Newman* nor *Kurowski* mentioned the temporary nature of the position in analyzing this issue, and the Seventh Circuit has expressly rejected the distinction. See *Walsh* v. *Heilmann*, 472 F.3d 504, 506 (7th Cir. 2006) (denying that "*Kurowski* is a sport that should be limited to appointed part-time judges").

c. Adams also declares that "none of Petitioner's cases explain how 'party affiliation is an appropriate requirement for the effective performance of the public office involved.'" Opp. 9. That is simply untrue. As the Sixth and Seventh Circuits have explained: "A judge may be suspicious of the police or sympathetic to them, stern or lenient in sentencing, and political debates rage about such questions. In most states judges are elected, implying that the office has a political component," and those who appoint judges

"may seek to ensure that judges agree with them on important jurisprudential questions." *Newman*, 986 F.2d at 162–163, quoting *Kurowski*, 848 F.2d at 770. Others have provided similar analysis. *E.g.*, *Newman*, 965 F.2d at 165 (Jones, J., concurring) ("Party affiliation may provide some insight to the types of philosophies a prospective judge maintains."); *Walsh*, 472 F.3d at 505; *Garretto* v. *Cooperman*, 510 F. Supp. 816, 819 (S.D.N.Y. 1981), *aff'd*, 794 F.2d 676 (2d Cir. 1984). And extensive scholarship that Adams ignores supports the conclusion that the bipartisan composition of judicial panels makes a difference. Pet. 22–24.

d. Finally, Adams asserts that "[our] cases appear to ignore the rationale for the 'policymaker' exception, *i.e.*, to ensure that those employees will promote and implement the agenda of the administration." Opp. 9. On the contrary, other courts have not "ignored" this point; they have considered and rejected it: "Neither *Elrod* nor *Branti* makes anything turn on the relation between the job in question and the implementation of the appointing officer's policies." *Newman*, 986 F.2d at 163; *Kurowski*, 848 F.2d at 770.

2. Certiorari is also warranted to preserve the sovereign authority of Delaware and other States "to determine the qualifications of their most important government officials," including their "judges"—"an authority that lies at the heart of representative government." *Gregory*, 501 U.S. at 460, 463; Pet. 27–30. Adams barely touches on this important point, dismissing *Gregory* in two sentences as an "Equal Protection case" that has not been applied "to First Amendment claims." Opp. 12. Not so.

In *Williams-Yulee*, a First Amendment challenge to Florida's rule barring candidates for elected judgeships from personally soliciting campaign contributions, the Court cited *Gregory* in upholding the law:

> [M]ost States with elected judges have determined that drawing a line between personal solicitation by [judicial] candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary. These considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance—how to select those who "sit as their judges."

135 S. Ct. 1656, 1671 (2015), quoting *Gregory*, 501 U.S. at 460.

Quite apart from *Williams-Yulee*, *Gregory* built on more than a century of precedent, and it has repeatedly been cited in contexts other than equal protection. Pet. 28–29. Indeed, this Court has described *Gregory* as "recogniz[ing] that judges do engage in policymaking at some level," and it has reaffirmed *Gregory*'s explanation that, in assessing that question, "[i]t may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance"—which "certainly describes the bench." *Chisom* v. *Roemer*, 501 U.S. 380, 399 n.27 (1991), quoting *Gregory*, 501 U.S. at 466–467 (internal quotation marks omitted). Given the core state sovereignty issues at play, this conflict between the decision below and precedent itself warrants review.

3. Adams' assertion (at 6) that the petition "does not claim that the Third Circuit misinterpreted [*Elrod*

and *Branti*]," but "merely seeks correction of a purported misapplication of a properly stated rule of law," requires little response. The petition squarely challenges the Third Circuit's holding "that partisan affiliation is relevant *only* when the appointing authority exercises control over the appointee's decisions"—i.e., only when "jobs 'cannot be performed effectively'" without "'shar[ing] the [appointer's] political beliefs.'" Pet. 13, 24, 26. The petition also maintains that the "test" adopted below "conflicts with" and "cannot be reconciled with *Elrod* and *Branti*." Pet. 24, 27. Those points are not mere quibbling about the application of a correct rule; they are arguments that the rule itself conflicts with this Court's precedents—a traditional ground for granting certiorari. Rule 10(c).

4. On the second question presented, Adams says the Court does not review state-law severability. But severability is integrally related to the first question. As the court below stated: "Only with the (unconstitutional) major political party component does the constitutional provision fulfil its purpose of preventing single party dominance while ensuring bipartisan representation." App. 34a.

In any event, this Court often applies federal severability rules in analyzing the constitutionality of state laws. *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 328–331 (2006); *Zobel* v. *Williams*, 457 U.S. 55, 64–65 (1982); *Randall* v. *Sorrell*, 548 U.S. 230, 262 (2006) (plurality); see Ryan Scoville, *The New General Law of Severability*, 91 Tex. L. Rev. 543, 547 (2013) (recent "decisions suggest that the state or federal nature of a statute under review is irrelevant to the source of [federal] severance doctrine"). In *Ayotte*, for example, after invalidating various applications of a state law, the Court cited seven of its

own cases in holding that it "must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" 546 U.S. at 330. Upon concluding that the lower courts wrongly "invalidated the law wholesale," the Court remanded for the lower courts to address "whether New Hampshire's legislature intended the statute to be susceptible to [a narrower] remedy." *Id.* at 330–331. That approach would make sense here too.

Nothing in the Third Circuit's severability analysis is distinctive to Delaware law, and there is no reason to think Delaware law would countenance the Third Circuit's decision. In *Leavitt* v. *Jane L.*, 518 U.S. 137 (1996) (per curiam), which Adams invokes (at 11), the Court overturned a Tenth Circuit holding that a statute regulating "later-term" term abortions was nonseverable from a statute regulating "earlier-term" abortions. 518 U.S. at 137–138. After acknowledging that it did not often "review what purports to be an application of state law," the Court explained that it should "undoubtedly" intervene "where the alternative is allowing blatant federal-court nullification of state law." *Id.* at 144–145; see also *id.* at 145 (calling the decision "plainly wrong"). The same is true here. Indeed, Adams says not a word in defense of the merits of the Third Circuit's severability analysis.

5. Adams' other points are merits arguments that can be considered if certiorari is granted. Opp. 11–21. We briefly address some of them below, but preliminarily note that Adams caricatures Delaware law.

a. Adams ignores the indisputable facts showing that *Delaware* judges engage in policymaking. Pet. 18–21. However one views their other judicial duties, or those of federal judges, administering the courts

and developing the common law plainly call for "policymaking." As Justice Scalia observed: "Common-law courts performed two functions: one is to apply the law (interpret the statute) to the facts. All adjudicators—French judges, arbitrators, even baseball umpires and football referees—do that. *But the second function, and the more important one, was to make the law*."[4] See also *Gregory*, 501 U.S. at 466 (common-law courts must render their own "well-considered judgment[s]" about "what is best for the community").

b. Adams equates policymaking with "partisanship" and the lack of "independent judiciary." Opp. 1. But "policymaking" can mean simply that the appointee's job "'requir[es] the exercise of discretion concerning issues of public importance.'" *Chisom*, 501 U.S. at 399 n.27. Recognizing that Delaware judges exercise such a role does not demean them—or make them partisan hacks. Nor is it "inappropriate" for governors to consider party affiliation as a proxy for how applicants might view that role. See Professors Amicus Br. 7–14.

c. Adams ignores that the bare majority and major party provisions together serve to *check* partisan decisionmaking. By focusing on individual appointments in isolation, he insists that state law reinforces "fears" that "judges will decide cases based on political affiliation." Opp. 1. Viewed *as a whole*, however, Del-

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[4] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, Tanner Lectures on Human Values (Mar. 8–9, 1995) (emphasis added), available at: https://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf.

aware's system is designed to *prevent* partisan judging—and, as the high rate of unanimous Delaware Supreme Court opinions confirms, it works. Pet. 32.

d. According to Adams, "nothing in the record" shows that Delaware's political balance requirements have wrought "better decisions" or improved its courts' "reputation." Opp. 13. That would come as a surprise to the panel below, all of whom agreed—on the record—that the "exemplary" and "preeminent" reputation of the Delaware judiciary "result[s] from Delaware's political balance requirements." App. 38a–39a.

That view is shared not only by "Delaware judges" (Opp. 13), but by others including former Chief Justice Rehnquist, independent groups that study the courts, scholars, and much of the Fortune 500. Pet. 31–32; see Amicus Br. for Former Governors 6–7; U.S. Chamber Institute for Legal Reform, *2019 Lawsuit Climate Survey: Ranking the States* 19, 20, 22 (Sept. 28, 2019) (ranking Delaware's courts first in Trial Judges' Impartiality, Trial Judges' Competence, and Quality of Appellate Review). Given Delaware's sovereign authority and the importance of democratic experimentation, that is more than ample grounds for Delaware to conclude that its system is an "appropriate" means of ensuring public confidence in its courts. *Branti*, 445 U.S. at 518; see also Opp. 9 (acknowledging that "the central question" is whether Delaware's requirements are "appropriate" given "the public office involved").

e. Adams quotes at length from *Common Cause Indiana* v. *Individual Members of Indiana Election Commission*, 800 F.3d 913 (7th Cir. 2015) (Opp. 14–16), which does not cite *Elrod*, *Branti*, *Rutan*, or even *Kurowski*, but expresses skepticism about the value of bipartisan requirements in the context of elected

judges. The drafters of the Delaware Constitution, however, took a different view, as was their right. Tellingly, even the Third Circuit panel acknowledged that the Delaware provisions have contributed to the "exemplary" reputation of the Delaware courts. App. 38a–39a; see also *Common Cause Indiana*, 800 F.3d at 924 (acknowledging that "partisan balance can serve as a check against contrary partisan interests").

Moreover, former Delaware governors of both parties agree that "Delaware's Constitution has allowed its Governors to shape a uniquely successful nonpartisan judiciary free from the pressures of party politics that otherwise would inevitably arise to impede the faithful balancing of the State's courts." Amicus Br. of Former Governors 7. In short, "Delaware's political balance requirement protects against the evils of patronage that this Court warned about in the very cases the Third Circuit relied upon in holding the requirement unconstitutional." *Id.* at 8.

f. Adams does not question that Delaware's interest in ensuring public confidence in an impartial judiciary is compelling. On the "least restrictive means" prong, he asserts that the petition "does not challenge [the lower court's] finding" that he did not "show that there were no less restrictive alternatives." Opp. 20–21. That is false. The petition pressed this point (at 34–35), and Adams ignores the Third Circuit's own observation that "[o]nly with the (unconstitutional) major political party component does the constitutional provision fulfil its purpose of preventing single party dominance while ensuring bipartisan representation." App. 34a. Further, as explained in the petition (at 34), "[t]he impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the

judiciary." *Williams-Yulee*, 135 S. Ct. at 1671. Here too, Adams offers no answer.

CONCLUSION

For the foregoing reasons, and those stated in the petition, certiorari should be granted.

Respectfully submitted,

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