No. 19-309

IN THE

Supreme Court of the United States

JOHN C. CARNEY, GOVERNOR OF DELAWARE,
Petitioner,

v.

JAMES R. ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* FORMER CHIEF JUSTICES OF THE DELAWARE SUPREME COURT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Honorable Myron T. Steele, the Honorable E. Norman Veasey, and the Honorable Leo E. Strine, Jr., all former Chief Justices of the Supreme Court of Delaware.

In 2000, Myron T. Steele (Democrat) was nominated to the Supreme Court of Delaware by Governor Thomas Carper (Democrat). Governor Ruth Ann Minner (Democrat) elevated him to the position of Chief Justice in 2004, where he served until 2013. He had previously served on the Superior Court of Delaware, as a judge of the Kent County Superior Court and as Vice Chancellor of the Delaware Court of Chancery. Prior to his appointment to the Superior Court, he served as chair of the Democratic Party in Kent County. He was appointed to the Kent County Superior Court by Republican Governor Mike Castle to maintain that court's political balance. During his tenure as Chief Justice, he was President of the Conference of Chief Justices and Chair of the National Center for State Courts Board of Directors. Former Chief Justice Steele teaches, speaks, and publishes frequently on issues of corporate law.

In 1992, E. Norman Veasey (Republican) was nominated to be Chief Justice of the Supreme Court of Delaware by Governor Mike Castle (Republican). He served in that position until 2004, when his twelve-

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[1] Pursuant to Supreme Court Rule 37, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici curiae* and their counsel made any monetary contribution toward the preparation and submission of this brief. Both petitioner and respondent consented to the filing of this brief.

year term as Chief Justice expired. During his tenure as Chief Justice, then-Governor Minner awarded Chief Justice Veasey the Order of the First State, the highest honor the Governor can bestow. Like Chief Justice Steele, Chief Justice Veasey was President of the Conference of Chief Justices and the Chair of the National Center for State Courts Board of Directors. He had previously served as Deputy Attorney General and Chief Deputy Attorney General of Delaware. Former Chief Justice Veasey teaches, speaks, and publishes frequently on issues of corporate governance, ethics, and professionalism.

In 2013, Leo E. Strine, Jr. (Democrat) was nominated to be Chief Justice of the Supreme Court of Delaware by Governor Jack Markell (Democrat); he was confirmed in 2014 and served until October 2019. In December 2000, Governor Carper awarded him the Order of the First State. Chief Justice Strine had previously served on the Delaware Court of Chancery from 1998 through 2014, first as Vice Chancellor and then as Chancellor. He also was the special judicial consultant to the ABA's Committee on Corporate Laws. Before his judicial career, he was Counsel to Governor Carper, responsible for legal advice and policy coordination. Like his predecessors, former Chief Justice Strine teaches, lectures, and publishes frequently on the subjects of corporation law and the role of the judge.

All three former Chief Justices have lengthy and deep experience within the Delaware judiciary, in corporate law practice, in public service for the State, and in national organizations focused on the administration of justice. Each has also studied and written about the Delaware judiciary. Accordingly, *amici* are uniquely positioned to address the importance of Del-

aware's judicial-selection provisions to the State, its political culture and processes, and its judiciary.

Specifically, *amici* can speak to the legitimacy of the consideration of political party affiliation in the judicial-selection process that States, including Delaware, have employed since the Founding—processes the court of appeals' decision calls into doubt. Moreover, within this historical context, *amici* explain that Delaware's judicial-selection process embodies the State's legitimate choice about the appropriate balance between independence and democratic accountability in the judiciary. Finally, *amici* show that, operating within the traditional methods of judicial decision-making Delaware judges (like all judges) make decisions that determine or affect policy on important and controversial issues, particularly when making common law. Accordingly, the court of appeals' view—that party affiliation may not be considered in judicial selection because judges do not make law—is incorrect and misunderstands this Court's precedent.

SUMMARY OF ARGUMENT

Under Delaware's Constitution, the Governor appoints judges for twelve-year terms, subject to confirmation by a majority of the Senate. Del. Const. art. IV, § 3. The Governor's appointment power is limited by the requirement that no more than a "bare majority" of judges on the Delaware Supreme Court and the principal lower courts may be affiliated with "one major political party," while the other judges "shall be of the other major political party." *Id.* The two major political parties in Delaware today are the Democratic Party and the Republican Party. Thus, the practical effect of these provisions is to require the Governor to fill a judicial vacancy with a Democrat or a Republican, depending on the political affiliation of the other

judges. This has been the lasting effect of the judicial selection system under the Delaware Constitution since 1897, a period of more than 122 years of bipartisan and respected jurisprudence.

The Third Circuit readily acknowledged that these provisions have given Delaware "an excellent judiciary" that has earned "nearly universal" praise for its fairness, efficiency, and "'national preeminence in the field of corporation law.'"[2] The court held, however, that the provisions "must be stricken" from the State's Constitution. The court concluded that Delaware's judicial-selection process violates the First Amendment of the U.S. Constitution by prohibiting the governor from appointing a judge due to his or her "affiliation with a particular political party." Pet. App. 29a, 35a. There are compelling reasons for this Court to reverse that decision.

First, the decision below ignores the Nation's longstanding historical use of party affiliation in the *selection* of judges to federal and state courts and the legal significance of this history. The method used to achieve Delaware's balanced bipartisan judicial system—the selection of judges based on party affiliation—is both widespread and longstanding. From the founding of the country through today, party affiliation has frequently—indeed, almost universally—been used as a criterion for selecting or rejecting judges within the United States. In some states, the voters in partisan elections choose judges. In others,

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[2] Pet. App. 38a-39a (McKee, J., joined by Restrepo and Fuentes, JJ., concurring) (quoting William H. Rehnquist, Chief Justice of the U.S., Address at the Bicentennial of the Delaware Court of Chancery (Sept. 18, 1982), *in The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351 (1992)).

judges are appointed by governors who often exercise their discretion to select or reject individual candidates based on whether they are affiliated with, or supported by, a particular party. Federal judges, too, are usually selected by the President—and sometimes accepted or rejected by the Senate—on partisan grounds. See *infra* § I.

The Third Circuit's decision that Delaware's judicial-selection process is unconstitutional because it requires that a nominee be the member of a particular party would render unconstitutional any system in which party affiliation is a prerequisite for nomination, whether that requirement is imposed by positive law, or by the policy of the President or governor who makes the nomination, or by the voters who pull the lever for a judicial candidate based on his or her party affiliation. Yet the Third Circuit's decision fails to recognize the ahistorical nature of its ruling.

Second, the decision below fails to respect Delaware's sovereign authority to structure its judiciary. The decision cannot be reconciled the Court's analysis in *Gregory* v. *Ashcroft*, 501 U.S. 452, 463 (1991), which instructs federal courts to apply "less exacting" scrutiny to, and thus give more deference to, state constitutional provisions establishing the qualifications of judges. Delaware's constitutional judicial-selection process is the product of a thoughtful political choice. It has "historically produced an excellent judiciary," Pet. App. 38a, that is lauded for the competence and impartiality of its judges, and has resulted in a centrist jurisprudence that enhances public confidence in the judiciary and yields significant benefits to the State as a whole, *infra* § II.A.

Finally, the court of appeals misunderstood and misapplied this Court's decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality opinion), and *Branti* v.

Finkel, 445 U.S. 507 (1980). Those decisions address when political party affiliation may be considered in selecting executive and legislative branch employees. They do not address the relevant constitutional history and tradition of judicial appointments, which reflect the judgment that judges should be accountable to the people (in varying degrees depending on the mode of selection) as well as independent in the execution of their role. Nothing in *Elrod* and *Branti* suggests that that judgment and longstanding tradition violate the First Amendment. To the contrary, *Branti* recognized that it is appropriate to select precinct election judges based on party affiliation. 445 U.S. at 518.

Moreover, the court of appeals failed to grapple with the extent to which judges—within the constraints of due process and traditional methods of judicial decision making—make law in interpreting and applying statutes and constitutional provisions and, most obviously, in developing the common law. The Third Circuit's decision is, as a result, inconsistent with this Court's decisions, with devastating effect on Delaware and far-reaching implications for states and the country as a whole. See *infra* § II.B. It should be reversed.

ARGUMENT

I. OUR CONSTITUTIONAL TRADITION EMBRACES THE SELECTION OF JUDGES BASED ON PARTY AFFILIATION.

More than 100 years ago, Delaware chose to strive for a politically balanced judiciary. The method it chose to achieve this goal—the selection of judges based on party affiliation—is consistent with the longstanding and common practice in most other states and in the federal system. As we now show, in

holding that party affiliation cannot be an appropriate qualification for selecting a judge, the Third Circuit entirely ignored the Nation's long history and tradition of selecting federal and state court judges based on party affiliation and support.

By itself, that is reason to reverse the court's judgment, because "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change" is likely to be constitutional. *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014) (Establishment Clause). See also, *e.g.*, *Burson* v. *Freeman*, 504 U.S. 191, 206 (1992) (plurality opinion) (deferring to the "widespread and time-tested consensus" that a prohibition on political speech and campaigning around polling booths is necessary to prevent "voter intimidation and election fraud"); *id.* at 214 (Scalia, J., concurring in the judgment) (refusing to invalidate restrictions that are a "venerable" part "of the American tradition"); *Mistretta* v. *United States*, 488 U.S. 361, 398-99 & n.22 (1989) ("contemporaneous practice by the Founders themselves is significant evidence" that it is consistent with the separation of powers).

The historical practice of selecting judges on partisan grounds is a permissible byproduct of the Founders' view that the judiciary should be both accountable to the people and independent of the other branches. The U.S. Constitution gives the people a "say" in the selection of federal judges indirectly, through the election of the officials who appoint and confirm them; thus, courts are accountable. However, once selected, judges and courts operate independent of the other branches of government and "of popular opinion when deciding the particular cases or controversies that come before them." William H. Rehnquist, *The Supreme Court* 236 (1987).

Like federal judicial-selection processes, state judicial-selection processes have long been designed to be both accountable and independent. Although States balance these goals differently, and use somewhat different procedures, partisan politics has long played a role in judicial selection of state and federal judges.

Indeed, from the founding of the country, those with the power to select judges have used party affiliation or support as a criterion for selecting or rejecting judicial nominees. John Marshall, "universally referred to as 'the great Chief Justice'" of this Court, was selected in that manner. See Rehnquist, *supra*, at 103. He was nominated to fill a vacancy created by the resignation of Chief Justice Oliver Ellsworth in December 1800. "By then it already appeared that the election of 1800 had gone against the Federalists, and John Adams felt a strong need to put a dedicated Federalist on the bench before the government should come into the hands of Jefferson and the Republicans." *Id.*

Since then, Presidents have looked "almost entirely to their own party for appointments to the federal bench despite pleas from various quarters for bipartisan—or apolitical—appointment." Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 Ohio St. L.J. 221, 227 (2003). President Franklin Roosevelt "almost never looked outside the Democratic Party for judicial appointments." *Id.* "President Reagan appointed no Democrats to the courts of appeals." Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Geo. L.J. 965, 978 n.47 (2007). "From FDR's first term through [President] Clinton's last, 91% of Democratic appointees have been Democrats and 92% of Republican appointees have been Republicans." George, *supra*, at 227.

Even when Presidents look outside their own party for judicial nominees, they nevertheless often base their decisions on the nominee's party affiliation. For example, President Truman nominated Republican Senator Harold Burton to fill the vacancy created by the retirement of the lone Republican Justice on the Court whose other members had all been appointed by Franklin Roosevelt, because there was "[c]onsiderable public sentiment" that the "new justice ought to be a Republican." Rehnquist, *supra*, at 86. And "[f]acing a Senate that was split down the middle, and an impending election, President Herbert Hoover, a Republican, decided to nominate a prominent Democrat," Benjamin Cardozo, "to fill the seat vacated by Justice Oliver Wendell Holmes." Jonathan H. Adler, *The Senate Has No Constitutional Obligation to Consider Nominees*, 24 Geo. Mason L. Rev. 15, 28 (2016).

These examples highlight the role of the Senate, which has long "appreciated the patronage potential of [its] Article II role in judicial appointments."[3] "There is a long history of Senate refusal to fill judicial vacancies, including by a simple refusal to consider Presidential nominees," based on their party affiliation. Adler, *supra*, at 26-27 (discussing instances where the Senate, controlled by Democrats, refused to take action on Republican Presidents' nominees); see also, *e.g.*, Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires*, Wall St. J. (Jan. 3, 2017) (discussing Republi-

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[3] George, *supra*, at 234 (discussing role of "Senators, particularly from the President's party" in influencing "the selection of nominees to the lower federal courts"); *see also, e.g.*, Sheldon Goldman, *Judicial Appointments to the United States Courts of Appeals*, 1967 Wis. L. Rev. 186, 189, 199-200 (1967) (same).

can-controlled Senate's refusal to take action on the Supreme Court nominee of a Democratic President).

State judges, too, are frequently selected based on party affiliation. Supreme court justices in six states are elected in partisan elections, where voters choose judges from candidates affiliated with a political party.[4] In two states, justices are selected by the legislature, which typically means that successful judicial candidates must obtain the support of the majority party.[5] And twenty-seven states use some form of gubernatorial appointment system.[6] In many of these states, the governor must appoint someone from a list of judicial candidates screened by an independent nominating commission. See Bannon, *supra* note 4, at 3. Even there, however, governors often make selections based on party affiliation and political support.[7]

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[4] *See* Alicia Bannon, Brennan Ctr. for Justice, *Choosing State Judges: A Plan for Reform* 3 (2018), https://www.brennancenter.org/sites/default/files/publications/2018_09_JudicialSelection.pdf.

[5] *See* Bannon, *supra* note 4, at 3; *see also* Douglas Keith & Laila Robbins, Brennan Ctr. for Justice, *Legislative Appointments for Judges: Lessons from South Carolina, Virginia, and Rhode Island* 3 (2017), https://www.brennancenter.org/sites/default/files/analysis/North_Carolina.pdf (viable judicial candidates in South Carolina must secure "commitments" from state legislators, while "in Virginia, the majority party selects judges in closed-door caucus meetings").

[6] In seventeen of these twenty-seven states, justices are appointed by the governor for a set term and must be re-elected in single-candidate retention elections (in sixteen states) or partisan retention elections (in one state) to continue for additional terms. Bannon, *supra* note 4, at 3. In the remaining ten states, judges are appointed by the governor and not subject to retention elections. *Id.*

[7] *See* Rachel Baye, Ctr. for Pub. Integrity, *Donors, Friends of Governors Often Get State Supreme Court Nod* (May 19,

Delaware's judicial-selection process is unique in that it is the Delaware Constitution—rather than the governor's personal decision—that requires consideration of the political party affiliation of a judicial nominee. But there is no relevant distinction for First Amendment purposes between Delaware's process and the process in a state like Ohio where the governor had a "practice of considering only members of his party," *Newman* v. *Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993). See *id.* (rejecting First Amendment challenge by judicial candidate from the other major political party). In both situations, the decision-maker for judicial appointments has excluded from consideration candidates for judicial office based on their political affiliation. And in both instances, the decision-maker is a state actor subject to the requirements of the Constitution, however those requirements are construed in this setting.

The Third Circuit's analysis would subject judicial appointment processes that have existed since the Founding of our federal and state governments to First Amendment challenge. That circumstance by itself strongly suggests that the decision below is wrong.

2014), https://publicintegrity.org/federal-politics/donors-friends-of-governors-often-get-state-supreme-court-nod. Even a leading critic of the election of state court judges agrees that the judicial-selection process should be "*publicly accountable*," and recommends a system in which judicial candidates are screened by an "independent, bipartisan judicial nominating commission" and then appointed by the governor who "may consider whatever factors she wishes—judicial philosophy, political party membership, even personal friendship." Bannon, *supra* note 4, at 6.

II. DELAWARE'S CHOSEN JUDICIAL-SELECTION PROCESS IS CONSTITUTIONAL.

The court of appeals' judgment should also be reversed because it failed to respect Delaware's sovereign authority to structure its judiciary and misunderstood this Court's decisions in *Elrod* and *Branti*.

A. Delaware's Judicial-Selection Process Is Within Its Authority As A Sovereign And Has Produced An Excellent Judiciary.

This Court has long held that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Gregory*, 501 U.S. at 462 (alteration in original) (quoting *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973) (quoting *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892))). A state constitutional provision establishing the qualification of state judges is a constitutional provision "of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id.* at 460. A State's power to prescribe the qualifications of judges is therefore "exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Id.* (quoting *Taylor* v. *Beckham*, 178 U.S. 548, 570-71 (1900)).

The Third Circuit acknowledged Delaware's constitutional judgment that the political balance requirement has been integral to the success of the Delaware judiciary, but it failed to accord the State's judgment any weight in the First Amendment analysis. See Pet. App. 39a-41a & n.5. That mode of analysis is flatly inconsistent with this Court's decision in *Gregory*, 501 U.S. at 463, which requires federal courts to

apply "less exacting" scrutiny to state constitutional provisions establishing the qualifications of judges.

The Delaware Constitution has required a politically balanced judiciary since 1897. Pet. App. 3a-4a. The adoption of this provision was no accident. It was the considered response to the prior system in which judges had been appointed by the governor for life, without the need for confirmation by the Senate. See Joseph T. Walsh & Thomas J. Fitzpatrick, Jr., *Judiciary: Article IV*, *in* THE DELAWARE CONSTITUTION OF 1897: THE FIRST ONE HUNDRED YEARS 130, 131 (Harvey Bernard Rubenstein ed., 1997). A few infirm judges declined to retire, and there was debate in the 1897 Convention about how to improve the judiciary and the judicial-selection process. *Id.* at 132. Some urged Delaware to follow the trend in other states at that time and switch to an elected judiciary, which would directly reflect the will of the people. *Id.* Others countered that qualified members of the bar would not subject themselves to the election process, and that elections would result in politically oriented judges. *Id.* Some urged the adoption of an appointive system subject to Senate confirmation, while others worried that there could be gridlock if the Senate were controlled by a different political party. *Id.*

In the end, the Convention "adopted the system that has endured to this day: appointment by the governor for twelve-year terms subject to Senate confirmation." *Id.* at 133. To this, the delegates added the political balance requirement "in the face of the widespread belief that every effort should be made to

ensure that the judiciary not be dominated by any political party." *Id.* at 134.[8]

As the court below acknowledged, this selection process "has historically produced an excellent judiciary" in Delaware. Pet. App. 38a. The political balance requirement means that the governor cannot "stack" the judiciary with members of his or her own party, so the Delaware Senate feels less political pressure to reject the governor's judicial nominees in times of divided government.

In *amici*'s experience, this selection system has also depoliticized the issue of judicial appointments in Delaware. Because both major parties know that they will have members on the judiciary, they have less incentive to stake out partisan positions on the type of judges they will appoint and to urge voters to vote for a governor and senators who will select "their" type of judges.

In addition, in *amici*'s view, the depoliticized nature of the selection process has helped attract to the Delaware Bench quality lawyers who tend to be "a centrist group of jurists committed to the sound and faithful application of the law." Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673, 683 (2005) [hereinafter Strine, *The*

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[8] The requirement that all judicial positions be filled from one of the two "major" political parties is necessary to prevent the prevailing political party from manipulating the "bare majority" provision by making judicial appointments from non-major parties that share the views and positions of the prevailing party. The court of appeals recognized this aspect of the constitutional provision. *See* Pet. App. 34a.

Delaware Way].[9] Delaware is a small state, with fewer than one million people and just three counties. However, the "independent and depoliticized judiciary" has led, "in [our] opinion, to Delaware's international attractiveness as the incorporation domicile of choice." E. Norman Veasey with Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. Pa. L. Rev. 1399, 1402 (2005). It may well be the central reason why more than half of the Fortune 500 companies and half of the New York Stock Exchange corporations are incorporated in Delaware. See E. Norman Veasey, *The Drama of Judicial Branch Change in This Century*, 17 Del. Law. 4, 4 (1999).

Finally, Delaware has reasonably determined that its judicial-selection system enhances the public's belief in the fairness and legitimacy of the court system, by depoliticizing appointments and limiting discussion of judicial appointments during political campaigns and by mandating selections across party lines. See Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 14 Penn St. L. Rev. 217, 244 (2009) ("[I]t is no surprise that the public perceives Delaware courts as fair arbiters of justice.").

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[9] *See also* Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's* Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1257, 1263 (2001) (corporations are drawn to Delaware, *inter alia*, because they know that the "litigation they face . . . will likely be administered by a Delaware judiciary well schooled in corporate law and with a track record of producing rational results").

In sum, the political balance requirement has endured for decades and across many political administrations in Delaware. In the view of *amici*, this norm helps to further public confidence in the Delaware Supreme Court as a fair and impartial arbiter of the law. Political affiliation may constitutionally be taken into account in judicial selection, and the specific way Delaware has chosen to do so has provided significant benefits to the State[10] and is well within its sovereign power. Its choice should have been respected.

B. This Court's Decisions In *Elrod* And *Branti* Confirm The Constitutionality Of Delaware's Judicial-Selection Process.

The First Amendment does not prohibit Delaware from considering a judicial candidate's party affiliation as a condition of appointment for the salutary purpose of ensuring a politically balanced judiciary. The Third Circuit's contrary holding is based on a misunderstanding of this Court's decisions in *Elrod* and *Branti*.

Specifically, the Third Circuit interpreted those decisions as allowing selection based on political affiliation only for those "employees whose jobs 'cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority].'" Pet. App. 28a (alteration in original). Because the judicial branch is supposed to be independent of the political branches, *id.* at 23a-24a, and because "[t]here can be no serious question that judicial candidates of

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[10] *See also* Strine, *The Delaware Way*, *supra*, at 683 ("Although the Delaware system is not perfect, the value it generates for the United States is considerable and would be difficult for the federal government to replicate.").

different political parties can effectively serve as state judges," the court held that "states cannot condition judicial positions on partisan political affiliation alone," *id.* at 28a. The Third Circuit's reasoning contains two fundamental errors.

First, "[n]either *Elrod* nor *Branti* makes anything turn on the relation between the job in question and the implementation of the appointing officer's policies." *Kurowski* v. *Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988). Instead, the question whether the appointing official may consider a candidate's partisan affiliation depends on whether the "position is one in which political affiliation is a legitimate factor to be considered." *Branti*, 445 U.S. at 518.

When, as in *Elrod* and *Branti*, the position is in the executive branch, "political loyalty" to the appointing official may be an appropriate criterion so "that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod*, 427 U.S. at 367 (plurality opinion); see also *Branti*, 445 U.S. at 518 (governor may appoint people who "share his political beliefs and party commitments" to staff positions that help him "perform[] effectively"). But neither *Elrod* nor *Branti* says that the same test applies to the selection of *judges*, which, as shown above, has a separate, constitutionally significant history. See *supra*, pp. 7-10. *Elrod* and *Branti* had no occasion to consider that history, and nothing in either opinion suggests that the longstanding practice of selecting judges based on party affiliation contravenes the First Amendment.

In fact, an example in *Branti* suggests that the practice of selecting judges based on party affiliation is constitutional. The Court illustrated its scope of its holding by citing the position of an election judge,

whose job is to ensure the fair administration of the election laws, not to implement the partisan policies of the appointing official. This Court nevertheless said that the "position may be appropriately considered political," because the state could decide to have a precinct supervised by two judges from different parties, and then "party affiliation" would be an "appropriate requirement" for the position. *Branti*, 445 U.S. at 518. This reasoning applies with full force to judicial selection.

Second, the Third Circuit failed to recognize that the duties performed by judges, and the role of the judiciary in our constitutional system, make it permissible to consider party affiliation in the selection of judges. Judges make policy on important and controversial issues, although they do so in a different manner and subject to constraints that do not bind members of the executive or legislature. This point is clear in *Gregory*, where this Court described judges as "in a position requiring the exercise of discretion concerning issues of public importance." 501 U.S. at 466-67. It is also clear in appellate court decisions that acknowledge that judges' "political beliefs influence and dictate their decisions on important jurisprudential matters." *Newman*, 986 F.2d at 163 (citing *Kurowski*, 848 F.2d at 770).

Finally, this point is clear to us from our experience as judges:

> Judges are lawmakers. Judges do not simply apply settled principles of constitutional and statutory law to particular disputes. Rather, in important ways, judges themselves determine what the law is. For example, there are many cases in which even the most principled of judges, adhering as loyally as possible to traditional methods of finding the law . . . will still be left with a

> great deal of policy freedom to decide what practical meaning a statute has.

Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of* Schnell v. Chris-Craft, 60 Bus. Law. 877, 877 (2005) [hereinafter Strine, *The Implicit Corollary*].

Even more obviously, judges act as policymakers in making common law. "[M]any of the important principles of American-style corporate law come in the form of judge-made common law." *Id.* at 878. See *id.* n.1 ("Little in life is value free and certainly not the making of common law."). The truth of this proposition is particularly evident in Delaware corporate law. The relevant statute is not detailed; it authorizes the States' courts to create common law. Indeed, "Delaware judges have frequently crafted dicta to give valuable guidance to deal lawyers on unanswered questions." Myron T. Steele & J. W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 Va. L. & Bus. Rev. 189, 207 (2007).

Of course, "[t]he judicial making of common law is, by tradition and by . . . prevailing current practice, bounded by conventions that help curb the leeway that individual judges have to shape the law in a manner that is heavily influenced by their idiosyncratic policy views." Strine, *The Implicit Corollary*, *supra*, at 877 n.1. We thus agree with the Third Circuit that the judiciary is a separate branch of government that is independent of the executive and legislative branches in Delaware, Pet. App. 24a, as in other states and the federal government. Moreover, there is "no serious question that judicial candidates of different political parties can effectively serve as

state judges." *Id.* at 28a. But neither of those facts means that States may not select judges based on "partisan political affiliation." *Id.*

Given their important policy-making role, it is entirely legitimate for political considerations to play a role in the selection of judges. This practice allows the public to play some role in the selection of judges and confers legitimacy on the judiciary that will interpret and apply the law to citizens and the other branches of government alike. It does not violate the First Amendment or compromise the independence of the judiciary. This Court's cases, history, and common sense demonstrate that after Presidents, governors, legislators, and electorates choose judges based on their political affiliation, judges thereafter fulfill their judicial role in an independent and non-partisan manner.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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