No. 19-309

IN THE
Supreme Court of the United States

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 THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* SUPPORTING PETITIONER

ALICIA L. BANNON
DOUGLAS KEITH
WENDY R. WEISER
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271-0202
(646) 292-8310

RICHARD W. CLARY
Counsel of Record
JUSTIN C. CLARKE
AMANDA R. BAKOWSKI
REILLY S. STEEL
SWARA SARAIYA
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
rclary@cravath.com

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Brennan Center for Justice at NYU School of Law is a nonprofit, nonpartisan public policy and law institute that recognizes fair and impartial courts are critical guarantors of liberty in our constitutional system and works to protect them from the undue influence of partisan politics.[2]

For more than 20 years, the Brennan Center has conducted extensive research on states' judicial selection systems and made recommendations as to best practices in light of the important values at play when selecting judges. *See Judicial Selection: Brennan Center Research*, BRENNAN CENTER FOR JUSTICE (Jan. 2, 2020), https://www.brennancenter.org/our-work/research-reports/judicial-selection-brennan-center-research. The Brennan Center also regularly participates in *amicus* briefs before this Court on issues pertaining to the judiciary. *See Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

The Brennan Center has an interest in this case because of its critical implications for the ability of states to protect the appearance and the reality of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certify that *amicus* and its counsel authored this brief in its entirety and that no party or its counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution to this brief's preparation or submission. All parties have provided written consent to the filing of this brief.

[2] This brief does not purport to convey the position of NYU School of Law.

judicial impartiality and to structure judicial selection in a manner that responds to existing needs and challenges.

SUMMARY OF ARGUMENT

This Court "ha[s] recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity'" of state judiciaries. *Williams-Yulee*, 575 U.S. at 445 (quoting *Caperton*, 556 U.S. at 889). A "strong and independent judiciary" serves as "a key source of . . . unity and stability," JOHN G. ROBERTS, JR., YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2019), making "[p]ublic *perception* of judicial integrity . . . 'a state interest of the highest order,'" *Williams-Yulee*, 575 U.S. at 446 (emphasis added) (quoting *Caperton*, 556 U.S. at 889).

There is more than one way to design a judicial selection system that furthers these ideals, and the question of how best to select judges "has sparked disagreement for more than 200 years." *Williams-Yulee*, 575 U.S. at 456. The states use widely different approaches to choosing judges, including contested elections, gubernatorial appointments with and without retention elections, and appointments by state legislatures. The vast majority of state judges in each of these systems undoubtedly serve with honor and integrity. However, without safeguards, the process of choosing judges is nevertheless vulnerable to patronage, gamesmanship, and attempts by interests with a strong stake in judicial outcomes to exert political pressure to influence judicial selection. These forms of politicization threaten the appearance and reality of judicial independence and impartiality.

The judicial selection provisions at issue in this case represent one state's novel—and highly successful—solution to these challenges. Debating the challenges faced by Delaware and other states in choosing judges, the Framers of the Delaware Constitution of 1897 established a partisan balance requirement providing that no more than a bare majority of the state's "law judges" be members of the same political party. In 1951, the General Assembly modified this requirement to apply to Delaware's three highest courts and added a provision measuring partisan balance by reference to membership in the two major political parties. These provisions have functioned to minimize the role of politics in Delaware's judicial selection process, protecting public confidence in the integrity of the judiciary and avoiding single party entrenchment. They have contributed to the development of a court system with a sterling reputation that is a preferred forum for complex corporate litigation.

The Third Circuit erred in concluding that Delaware's approach to judicial selection violates the constitutional anti-patronage principles established in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). For the reasons stated by Petitioner, the Third Circuit was wrong to conclude that state judges do not qualify as "policymakers": Delaware judges do, in fact, make policy. But the court erred even more fundamentally by invalidating an *anti*-patronage law on patronage grounds. *First*, while Delaware's provisions undoubtedly impact associational rights, the Third Circuit failed properly to consider the compelling state interests advanced by Delaware's judicial selection system: (i) ensuring

public confidence in the impartiality and integrity of the judiciary and (ii) avoiding single party entrenchment. The experiences of many other states show that groups with a stake in judicial rulings often have a strong incentive to politicize judicial selection. By limiting discretion in judicial appointments, and ensuring no party can attain a supermajority of seats, Delaware's system has largely avoided such pressures, furthering state interests by limiting opportunities for patronage, partisan influence, and political gamesmanship in judicial selection. *Second*, these provisions warrant deference due to their distinct nature: they reflect the state's considered approach, enshrined in its Constitution, to structuring its judicial branch, rather than the discretionary hiring or firing decisions by executive branch officials that the Court has subjected to scrutiny under *Elrod* and *Branti*.

This Court has recognized that our federal structure encourages innovation and experimentation by the states within constitutional limits. Delaware's "laboratory" of democracy yielded an approach to judicial selection that has been extremely successful for Delaware. This Court should not disrupt Delaware's decision to protect both the appearance and the reality of judicial integrity through balanced appointment requirements.

ARGUMENT

I. DELAWARE'S CONSTITUTIONAL PROVISIONS ARE DESIGNED TO REDUCE THE ROLE OF POLITICS IN JUDICIAL SELECTION.

There is a great deal of variation in how states select judges. With respect to high courts, for example, ten states, including Delaware, empower the governor to make judicial appointments, sometimes with legislative confirmation. *See* ALICIA BANNON, BRENNAN CENTER FOR JUSTICE, CHOOSING STATE JUDGES: A PLAN FOR REFORM 3 (2018) [hereinafter BANNON, CHOOSING], https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf. Twenty-one states use contested elections, and in two states, the legislature makes judicial appointments. *Id*. Fourteen states use a "merit/retention" system in which governors nominate judges from a short list created by a judicial nominating commission that vets judicial applicants. *Id*. The judges seek subsequent terms via retention elections in which they stand unopposed. *Id*. Three other states use a hybrid of these systems. *Id*.

Within these systems there is also substantial diversity. In merit/retention states, for example, nominating commissions vary greatly in their composition, including some with partisan balance requirements. *See generally* DOUGLAS KEITH, BRENNAN CENTER FOR JUSTICE, JUDICIAL NOMINATING COMMISSIONS 5-7 (2019), https://www.brennancenter.org/sites/default/files/2019-10/2019_10_JudicialNominationCommissions_Final.pdf. In gubernatorial appointment states, some governors may nominate

whomever they choose, while others use nominating commissions to aid the appointment process, either voluntarily, as in Delaware, or as required by law. *See id*. at 3. Among states that hold contested elections for members of their high court, six hold partisan contests where party labels appear on the ballot, and fifteen hold nonpartisan elections. *See* BANNON, CHOOSING, *supra*, at 3. These designs reflect considered attempts to balance the many vital, and at times conflicting, values at stake in selecting judges. *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS 265-66 (2012); CHARLES GARDNER GEYH, WHO IS TO JUDGE? 24-43 (2019).

Delaware has taken a unique approach by including partisan balance requirements as part of its judicial selection system. These provisions are grounded in concerns about public confidence in the judiciary, the decisional independence of Delaware's judges, and the harms associated with entrenched single party control of the judiciary.

In the period before Delaware adopted its 1897 constitution, public confidence in the integrity of Delaware's democratic institutions was low, with widespread cynicism about the quality and impartiality of the judiciary. Poll-tax abuse and vote-buying in elections were common practices of both the Democratic and Republican Parties. *See* Henry R. Horsey et al., *The Delaware Constitutional Convention of 1897: December 1, 1896 – June 4, 1897*, *in* THE DELAWARE CONSTITUTION OF 1897: THE FIRST ONE HUNDRED YEARS 57, 57-58 (Harvey Bernard Rubenstein et al. eds., 1997) [hereinafter FIRST 100 YEARS]; Joseph T. Walsh & Thomas J. Fitzpatrick, Jr., *Judiciary: Article IV*, *in* FIRST 100 YEARS 123, 123;

I DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE 666 (1958) [hereinafter DEBATES]; IV DEBATES, *supra*, at 3091. At that time, judges were appointed for life by a governor with an unfettered appointment power, such that his "will is supreme and conclusive in the appointment. We have no appeal from it; none whatever." II DEBATES, *supra*, at 951.

Delegates to the 1897 constitutional convention perceived that governors limited judicial appointments to their own parties and practiced patronage, rather than appointing judges based on merit or fitness for judicial office. II DEBATES, *supra*, at 945, 955; IV DEBATES, *supra*, at 2763. One delegate, William Spruance, lamented: "You said, let the Governors alone and they will not appoint from their party. But experience is that they will. . . . The party demanded it, and he went right straight along. The consequence is we have had for twenty years a Judiciary composed of members of one political party." IV DEBATES, *supra*, at 2763. Spruance observed that this partisan control of judicial appointments "is not calculated to inspire confidence in the Judiciary." *Id.*

Responding to these concerns, the Delaware Framers sought to design a new system that would "secure a non partisan bench," II DEBATES, *supra*, at 943, composed of "able and upright Judges," *id.* at 945. The Framers considered a proposal to select judges by popular election, reflecting on the successes and "the scandals which characterized the election process" for other states' judges. *Id.* at 946-47, 950-54; Walsh & Fitzpatrick, *supra*, at 134. Ultimately, the Framers rejected this proposal because an elective system would only make it more difficult to insulate judges

from the pressure to curry favor with supporters or reward debts of gratitude. II DEBATES, *supra*, at 946-47; Walsh & Fitzpatrick, *supra*, at 123, 133 (citing *No Elective Judges*, THE MORNING NEWS, Feb. 10, 1897, at 1, 3). As one delegate summarized: "There is no man in this State whom you could run for Judge on the ticket of any party unless he would be under obligations to some people, first for his nomination, then again for his election." II DEBATES, *supra*, at 944.

The delegates ultimately decided that the best and least political option would be to grant appointment power to the governor, subject to the approval of the majority of the Delaware Senate. DEL. CONST. art. IV, § 3. At the same time, they chose to limit the number of judges that could be appointed from a single political party in order to "eliminate political influence from the judiciary to the fullest extent possible." RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE 128 (2002). The Framers hoped that this requirement would "ensure that the judiciary not be dominated by any political party." Walsh & Fitzpatrick, *supra*, at 134. As Spruance explained, "[a] partisan Judiciary is a Judiciary all of one party, or the overwhelming majority all of one party." IV DEBATES, *supra*, at 2764.

The "bare majority" requirement went an important step beyond the requirement of Senate approval because it ensured that a politically aligned governor and Senate could not fill judicial seats exclusively from the ranks of their own party. The Framers were responding to the danger that "[i]f the Governor appoints, and [] the Senate is of the same political faith as the Governor is, then we have a Judge, whoever he may be, appointed by one party."

II DEBATES, *supra*, at 954. The Framers hoped that the bare majority requirement would depoliticize and avoid single party control of judicial appointments, thereby strengthening public confidence in the integrity of the judiciary. They thought that a balanced judiciary would restore its reputation with the people of Delaware. As one delegate explained: "[T]here was not satisfaction given, no matter how able the Judges might be, when they were all from one political party. . . . [I]t would give more satisfaction to the people if the Judges were not all from the same political party." III DEBATES, *supra*, at 1769-70.

In 1951, the General Assembly amended the Delaware Constitution to create a separate Supreme Court, redesign other aspects of the existing court system, and modify the partisan balance scheme to include specific balancing requirements for the new Supreme Court, the Court of Chancery, and the Superior Court. 48 Del. Laws ch. 109 (1951). The amendment also added the "other major party" requirement that measured partisan balance by reference to the two major parties. *Id.* There is comparatively little legislative history explaining the addition of the other major party provision, but it functioned to close a potential loophole in the bare majority provision, guaranteeing that Republicans would sit on the new courts, not only Democrats and independents aligned with Democrats.

Taken together, Delaware's judicial selection provisions are designed to ensure a "good judiciary," filled with individuals "who are in every way capable of filling it, and who are in every way suitable to do the great and exalted duties that devolve upon Judges." II DEBATES, *supra*, at 947.

II. DELAWARE'S CONSTITUTIONAL PROVISIONS FURTHER COMPELLING INTERESTS BEYOND THOSE CONSIDERED BY THE THIRD CIRCUIT.

In analyzing the constitutionality of Delaware's judicial selection provisions, the Third Circuit applied the anti-patronage principles set forth in *Elrod* and *Branti*, focusing primarily on whether judges qualify as "policymakers" whose party membership may be a legitimate consideration in appointment decisions. *See Adams v. Governor of Delaware*, 922 F.3d 166, 178-81 (3d Cir. 2019). As Petitioner explains, Delaware judges do "make policy"—in the sense that they oversee the development of the common law,[3] regulate the legal profession,[4] establish rules of

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[3] This is particularly true in Delaware: "Delaware is one of the few commonwealths which still may be referred to as a common law state. . . . Much of the body of the civil law in Delaware has been developed by the courts. . . . [T]he legislature has been partially eclipsed in the formulation of law." Paul Dolan, *The Supreme Court of Delaware, 1900-1952*, 56 DICK. L. REV. 166, 169 (1952). This remains the case today, especially as to corporate law. *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CINCINNATI L. REV. 1061, 1064 (2000) ("Delaware uses an unusual process to make corporate law. Delaware relies heavily on judge-made law . . . . [T]he process by which Delaware courts make corporate law resembles legislation in some ways.").

[4] *State ex rel. Abbott v. Aaronson*, 206 A.3d 260, 2019 WL 925856, at *2 (Del. 2019) (Table) (observing the Delaware Supreme Court "regulate[s] the legal profession in Delaware," with "the inherent and exclusive responsibility for disciplining members of the Delaware Bar").

procedure,[5] and enjoy considerable discretion in determining remedies in specific cases.[6] Pet'r's Br. 28-34. This Court would therefore be justified in concluding that the "policymaker" exception applies to Delaware's judiciary, and reversing on that ground.

Ultimately, however, Delaware's compelling interests go well beyond those contemplated by the Third Circuit's application of *Elrod* and *Branti*. Delaware's judicial selection provisions further compelling state interests in public confidence in the judiciary and the avoidance of single party entrenchment. These provisions represent Delaware's unique approach to structuring its judiciary, codified in its Constitution, rather than the sort of one-off, discretionary hiring or firing decisions by political executive branch officials that are most typically subjected to scrutiny under *Elrod* and *Branti*. Therefore, in weighing the burdens Delaware's judicial selection provisions place on associational rights, the Court should focus not solely on whether state judges are policymakers, but also on the unique nature of, and specific interests furthered by, the provisions at issue.

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[5] *See* DEL. CODE tit. 11, § 5122 (providing that the Superior Court's Rules of Criminal Procedure override "[a]ny inconsisten[t] or conflict[ing]" statutory provision).

[6] *See, e.g., Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000) ("[W]e defer substantially to the discretion of the trial court in determining the proper remedy . . . to be awarded for a found violation of the duty of loyalty by a corporate fiduciary.").

A. Delaware Has Compelling Interests in Preserving Public Confidence and Avoiding Single Party Entrenchment in Its Judiciary.

Delaware has compelling interests at stake beyond those considered by the Third Circuit in applying the anti-patronage doctrine established in *Elrod* and *Branti*. The "policymaker" exception in the patronage cases was designed to identify circumstances in which political executive branch officials ought legitimately to be allowed to demand loyalty from the employees on whom they would rely to carry out their policy mandates. *See Elrod*, 427 U.S. at 367 (plurality opinion) (explaining that the relevant interest was "the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate"); *Adams*, 922 F.3d at 177 ("The [*Elrod*] plurality suggested that the government's interest in employee loyalty would allow it to discharge employees in policymaking positions based on political allegiance."). Delaware's judicial selection method is designed to do the opposite: ensure *independence* from politics, rather than loyalty, and *avoid* single party control, rather than safeguard it.

The Third Circuit's analysis failed properly to weigh two compelling state interests not captured by the *Elrod-Branti* framework: (i) ensuring public confidence in the fairness and integrity of the judiciary and (ii) avoiding single party entrenchment in the judicial appointment process.

First, this Court has recognized that "States have a compelling interest in preserving public confidence in their judiciaries." *Williams-Yulee*, 575 U.S. at 457; *see also Caperton*, 556 U.S. at 889 (noting that "public confidence in the fairness and integrity" of the judiciary is "a vital state interest"); *cf. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565-66 (1973) (explaining, in upholding the Hatch Act's restrictions on free speech, that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they *appear to the public to be avoiding it*, if confidence in the system of representative Government is not to be eroded to a disastrous extent") (emphasis added). "[P]ublic perception of judicial integrity is 'a state interest of the highest order.'" *Williams-Yulee*, 575 U.S. at 446 (quoting *Caperton*, 556 U.S. at 889).

> "The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse; ... neither force nor will but merely judgment.' The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, 'justice must satisfy the appearance of justice.'"

Id. at 445-46. Thus, a state may enact requirements to "assure its people that judges will apply the law without fear or favor." *Id.* at 438.

Second, Delaware has a compelling interest in avoiding single party entrenchment in its judicial selection process that it had experienced in the past. Avoiding "manipulation . . . by politicians and factions in the States to entrench themselves" has been a goal of government since the Founding era. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015) (observing that the Elections Clause was established to serve this purpose in the context of election rules). The danger of single party entrenchment was in fact one of the concerns animating this Court's original decision in *Elrod* to hold certain patronage-based firings unconstitutional. *See Elrod*, 427 U.S. at 369 (plurality opinion) ("Patronage can result in the entrenchment of one or a few parties to the exclusion of others.").

Just as *Elrod* and *Branti* held certain governmental action unconstitutional where it would further single party entrenchment, this Court has also *upheld* governmental restrictions on political activity designed to reduce such entrenchment. *See United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 99-103 (1947) (upholding application of Hatch Act restriction on federal employee from acting as partisan campaign worker and acknowledging a governmental interest in "avoid[ing] a tendency toward a one-party system"); *Letter Carriers*, 413 U.S. at 565 (1973) (upholding Hatch Act restrictions on political activity by federal employees, in part out of concern that such activities could help to build a "powerful, invincible, and perhaps corrupt political

machine" for use by "the party in power—or the party out of power, for that matter").

B. Delaware's Partisan Balance Requirements Successfully Further Those Compelling Interests.

Delaware's method of selecting judges appropriately furthers its compelling interests in both preserving public confidence and avoiding single party entrenchment in its judiciary.

Because state court judges play an important role in making policy at the state level (*see supra* notes 3-6)—and Delaware judges play a leading role nationwide in developing corporate and commercial law—political interests have strong incentives to attempt to influence the judicial selection process. Such influence risks eroding public confidence in the judiciary and can, under certain conditions, result in single party entrenchment in the judicial branch.

Delaware's system avoids these risks by placing substantial constraints on the governor's discretion over judicial appointments, making it impossible to attain a partisan supermajority in the judiciary. As a result, Delaware's system: (i) reduces the risk and perception of cronyism or partisan dealmaking in judicial appointments; (ii) limits the politicization of the judicial appointment process; and (iii) limits the governor's ability to entrench single party control over the state's judiciary. In addition, the other major party requirement prevents gamesmanship and ensures that governors adhere not just to the letter of the bare majority rule, but the spirit as well.

1. Delaware's partisan balance requirements have limited the risk and perception of cronyism and partisan dealmaking in judicial appointments.

As Delaware's Framers recognized, state judicial appointments are highly vulnerable to political self-dealing and cronyism. IV DEBATES, *supra*, at 2763. A recent study by the Center for Public Integrity found, for example, that governors, both Democrats and Republicans, regularly appoint major donors, friends, and political advisors to judicial vacancies. Rachel Baye, *Donors, Friends of Governors Often Get State Supreme Court Nod*, CTR. FOR PUB. INTEGRITY (May 1, 2014), https://publicintegrity.org/politics/donors-friends-of-governors-often-get-state-supreme-court-nod; *see also* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1089 (2010); DOUGLAS KEITH & LAILA ROBBINS, BRENNAN CENTER FOR JUSTICE, LEGISLATIVE APPOINTMENTS FOR JUDGES: LESSONS FROM SOUTH CAROLINA, VIRGINIA, AND RHODE ISLAND 2-3 (2017), https://www.brennancenter.org/sites/default/files/analysis/North_Carolina.pdf (finding similar dynamics in appointments by state legislatures). Delaware's system reduces the risk that judicial appointments will become a patronage vehicle, because it functions to set judicial selection apart from the pathways and gatekeepers that exist for political offices. This is particularly important because judges regularly hear cases with strong partisan overtones and are tasked with holding the political branches to account.

Delaware's judicial selection method neither requires nor encourages loyalty to the appointing governor's party, as demonstrated most clearly by the fact that many judges must be appointed by governors associated with the *opposing* party. Accordingly, Delaware's system reduces the threat that its judges would feel pressure to demonstrate loyalty to the governor or to a political party when deciding cases, whether to achieve reappointment at the end of their 12-year term or appointment to higher office. *Cf. Letter Carriers*, 413 U.S. at 566 ("A related concern, and this remains as important as any other, was to further serve the goal that . . . employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs."). Lowering the partisan stakes of each judicial appointment has also likely facilitated the establishment of other protections not required by law, such as the state's bipartisan judicial nominating commission, that reinforce anti-patronage culture. For these reasons, Delaware's system promotes public confidence in an independent judiciary and reduces the risk that judicial selection will entrench party allies in the state judiciary.

Importantly, there is evidence that Delaware's system has avoided politicization. Delaware's courts have an excellent reputation, which has led the state to become the favored forum for the resolution of large and complex corporate and commercial disputes, attracting corporate charters and boosting Delaware's

economy.[7] *See* LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 5 (2007); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1993). Prominent Delaware jurists have attributed this success in part to the partisan balance requirements, which have "served well to provide Delaware with an independent and depoliticized judiciary." E. Norman Veasey & Christine T. DiGuglielmo, *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); *see also* 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) (arguing that partisan balance has "result[ed] in a centrist group of jurists committed to the sound and faithful application of the law").

With the loss of existing guardrails, however, partisan forces would naturally be incentivized to target governors' greater discretion in making appointments. Governors and elected members of the state legislature would have little reason to appoint, reappoint, or confirm individuals who were not popular within their political parties. And, with greater discretion, future governors may also have an

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[7] A substantial portion of Delaware's budget comes from corporate and alternative-entity franchise taxes—about $1.2 billion out of the governor's recommended $4.4 billion budget in 2020. FINANCIAL OVERVIEW, THE GOVERNOR'S FISCAL YEAR 2020 RECOMMENDED GENERAL FUND OPERATING BUDGET, https://budget.delaware.gov/budget/fy2020/documents/operating/financial-overview.pdf.

incentive to abandon the bipartisan judicial nominating commission that governors have used voluntarily since 1978. *See Adams*, 922 F.3d at 171. Without the partisan balance provisions, Delaware would face new vulnerabilities in its appointment process, threatening public confidence in the fairness and integrity of Delaware's well-regarded judicial system.

2. Delaware's partisan balance requirements promote public confidence in judicial integrity by discouraging the politicization of judicial appointments.

Delaware's partisan balance requirements promote public confidence in the judiciary by limiting the ability of and incentives for a wide array of political interests to influence the judicial selection process. At their core, Delaware's constitutional provisions impose substantial limits on the governor's discretion when making appointments and eliminate the possibility of establishing a partisan supermajority on the state's most powerful courts. With limited potential to have a long term impact on the makeup of Delaware's judiciary, political interests that are regularly affected by Delaware's judicial decisions have less reason to use their resources to seek to influence the appointment process—and the public has less reason to worry that politicization could threaten judicial integrity.

While Delaware has eschewed a judicial election system in favor of appointments subject to partisan balance requirements, the experience of states that have adopted judicial elections help illustrate the

politicization that can manifest itself with fewer structural constraints. When judges are considering high-stakes cases, electoral support by key interests has often been used as either a carrot or a stick. In 2018, for example, a former Republican legislator and political commentator in Michigan wrote that a sitting justice who would be facing election in a few months should "expect that funding from the Republican Party and its major donors and allies in her election campaign WILL DRY UP," if she ruled that a redistricting reform ballot measure satisfied constitutional requirements and could move forward. Brian Dickerson, *GOP Justices Face Tough Choice in Gerrymandering Case*, DETROIT FREE PRESS (July 11, 2018), https://www.freep.com/story/opinion/columnists/brian-dickerson/2018/07/11/justices-gerrymandering-case/776776002. After the justice ruled with the majority of the court to allow the ballot measure to proceed, party activists retaliated by campaigning against her endorsement, and party leadership left her name off campaign materials. *See* DOUGLAS KEITH, BRENNAN CENTER FOR JUSTICE, THE POLITICS OF JUDICIAL ELECTIONS 2017-18, at 13-14 (2019) [hereinafter KEITH, POLITICS], https://www.brennancenter.org/sites/default/files/2019-12/2019_11_Politics%20of%20Judicial%20Elections_FINAL.pdf. The message to the justice, her judicial colleagues, and the public was unmistakable—judicial rulings may carry political consequences for a judge.

Removing restraints on gubernatorial discretion could create incentives for concentrated interest groups with a stake in the composition of Delaware's judiciary to influence the appointment process. Given the economic magnitude of many of the disputes

resolved by Delaware courts, the temptation for such groups—on both the plaintiffs' *and* defendants' side of the bar—to try to influence judicial selection would be especially strong in Delaware. Research shows that when courts decide disputes with high financial stakes, concentrated interest groups tend to be active in trying to influence judicial selection. *See* ALICIA BANNON ET AL., BRENNAN CENTER FOR JUSTICE, WHO PAYS FOR JUDICIAL RACES? 12 (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_New_Politics_of_Judicial_Elections_1516.pdf (observing that elections "where the court is involved in a highly-contentious issue that is important to deep-pocketed interests" tend to "attract heavy spending"). Such attempts to influence judicial selection can occur regardless of whether the elections are nominally partisan or nonpartisan,[8] and they can occur as part of broad strategies to influence the composition of the judiciary or in response to specific decisions, *see* Melissa S. May, *Judicial Retention Elections After 2010*, 46 IND. L. REV. 59 (2010) (describing anti-retention campaigns against state supreme court justices based on one or a series of cases). With the loss of existing protections, Delaware would be vulnerable to lobbying, political advertisements, and other forms of influence—creating a new set of pressures for Delaware's judges.

Even in states with a lower concentration of high-stakes commercial disputes, concentrated interest groups have contributed to the politicization of

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[8] In the 2017-2018 election cycle, the two most expensive elections for a single seat on a state supreme court were nonpartisan races in Arkansas and Wisconsin. KEITH, POLITICS, *supra*, at 3.

judicial selection. As a result, over the last 20 years, more than a half-billion dollars has been spent on campaigns for state high courts. KEITH, POLITICS, *supra*, at 1.

Greater politicization of Delaware's selection process could undermine the public's confidence that judges are capable of being impartial when these interests appear before them. *See Williams-Yulee*, 575 U.S. at 460 (Ginsburg, J., concurring) ("Disproportionate spending to influence court judgments threatens both the appearance and actuality of judicial independence."). There is clear evidence that the public believes political pressures associated with judicial selection may influence state judicial decisions. *See id.* at 461 (Ginsburg, J., concurring) ("Multiple surveys over the past 13 years indicate that voters overwhelmingly believe direct contributions to judges' campaigns have at least some influence on judicial decisionmaking." (internal quotation marks omitted)); James L. Gibson & Gregory A. Caldeira, *Judicial Impartiality, Campaign Contributions, and Recusals: Results from a National Survey*, 10 J. EMPIRICAL LEGAL STUD. 76, 96 (2013) (concluding, based on a survey experiment using several judicial campaign scenarios, that both direct and indirect campaign support "undermine[] fairness perceptions"). Of course, judges are often capable of ignoring the noise and pressures associated with highly politicized selection processes, and most serve with "fairness and honor." *See Williams-Yulee*, 575 U.S. at 447. But even if judges can "suppress their awareness" of these pressures, "the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable

to do so." *Republican Party of Minn. v. White*, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring).

Research suggests that these concerns are not unwarranted. For example, while causality is difficult to establish with precision, there is substantial evidence that job security pressures affect judicial decisionmaking, including in states that appoint judges. *See* Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L. J. 1589, 1624 (2009) ("[J]udges facing gubernatorial or legislative reappointment vote strategically to avoid reappointment denials."); KATE BERRY, BRENNAN CENTER FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 1-2 (2015), https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf (detailing social science research showing that "the pressures of upcoming re-election and retention election campaigns make judges more punitive toward defendants in criminal cases"). Numerous studies of judicial elections have also found strong correlations between donor support and favorable rulings for those donors. *See* Thomas E. McClure*, Do Contributions to Judicial Campaigns Create the Appearance of Corruption?*, *in* CORRUPTION, ACCOUNTABILITY AND DISCRETION 85, 88 (Nancy S. Lind & Cara E. Rabe-Hemp eds., 2017) (reviewing social science literature and concluding that "most scholars have found a correlation between campaign contributions and high court rulings"). Although the Delaware Framers designed their judicial selection system before such social science evidence existed, they were reacting to similar concerns about preserving public confidence in Delaware's judiciary. *See supra* Part I.

3. Delaware's partisan balance requirements limit governors' discretion to entrench a single political party on the state's judiciary and limit political gamesmanship.

Because political affiliation can act as a "proxy" for jurisprudential outlook, Delaware's partisan balance provisions work to restrain single party entrenchment in the judiciary.[9]

First, by limiting the governor's discretion, the partisan balance requirements constrain any individual governor's ability to lock in a long term partisan majority on the judiciary that would render the makeup of the bench unresponsive to the will of future governors and their electorates. To foster judicial independence, Delaware judges serve lengthy 12-year terms, potentially giving governors the ability to shape the composition of the bench long after their time in office. The partisan balance requirements further ensure that the governor of a state whose citizens hold a wide range of views cannot structure a judiciary with a predominant or homogenous judicial philosophy, addressing Delaware's Framers' thinking that "it would give more satisfaction" to such diverse

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[9] Acknowledging that partisan balance requirements help to avoid single party domination of judicial appointments does not mean that judges decide cases on the basis of politics or party. Rather, it is simply a recognition that jurisprudential views and political party can be correlated, even though the two concepts are distinct and can diverge. *See* Jeffrey A. Segal, *Ideology and Partisanship*, *in* THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 303, 306 (Lee Epstein & Stefanie A. Lindquist eds., 2017).

citizens "if the Judges were not all from the same political party." III DEBATES, *supra*, at 1770.

Second, the partisan balance requirements reduce the incentives for officials to engage in political gamesmanship to alter courts' ideological makeup (*e.g.*, by adding seats to a particular court in order to manufacture vacancies and obtain partisan advantage).[10] Without these requirements, a politically aligned governor and legislature would have an incentive to tinker with courts' size and structure in order to establish partisan supermajorities on the state's courts,[11] with potentially transformative effects on jurisprudence for years to come. Numerous states have seen such efforts in recent years. *See, e.g.*, BRENNAN CENTER FOR JUSTICE, *Legislative Assaults on State Courts – 2019* (Feb. 11, 2019), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2019.

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[10] *See* Maria Polletta, *By Adding Justices to the Arizona Supreme Court, Did Ducey Help the State — Or Help Himself?*, AZCENTRAL (July 8, 2019), https://www.azcentral.com/story/news/politics/arizona/2019/07/08/arizona-governor-said-expanding-supreme-court-would-bring-benefits-has-it-doug-ducey/2842733002.

[11] Single party domination of judicial appointments would be possible in Delaware today. Delaware has not elected a Republican governor since 1988, and both chambers of the General Assembly are currently controlled by Democrats. *See* Off. of the State Election Commissioner, *Election Results Archive*, STATE OF DEL., https://elections.delaware.gov/electionresults/election_archive.shtml (last visited Jan. 24, 2020).

4. The "other major party" provision furthers these state interests by enforcing the spirit of Delaware's bare majority requirement.

Delaware's related requirement that judicial seats be divided between the state's two major parties ensures that the governor honors not only the letter but the spirit of the bare majority requirement. Without the other major party requirement, the governor would be able to fill minority slots with registered "independents" or members of third parties who in fact share the governor's political ideology (*i.e.*, "independents in name only"). This provision works in concert with the bare majority requirement to further Delaware's compelling interests.

Other states' recent experiences underscore that political gamesmanship is no abstract concern. Built-in protections and informal norms—including certain partisan balance requirements—have in many instances broken down or proven ineffective against elected officials' incentives to lock in their party's majority on the judiciary.

In Arizona, for example, state law requires that judicial nominating commissions have no more than a bare majority of members from a single political party, but does not include an other major party provision. In 2019, the governor appointed only members of his own party and independents who had family ties to, or had previously themselves served as, party officials. Maria Polletta, *Democrats Cry Foul, Say Ducey Is Stacking Commission That Helps Pick Arizona's Top Judges and Others*, AZCENTRAL (May 3, 2019), https://www.azcentral.com/story/news/

politics/arizona/2019/05/02/doug-ducey-stacking-arizona-commission-appellate-court-appointments-democrats-say/3630708002. When the state bar association submitted a list of 30 nominees (including nine Democrats) to serve on the commission, the governor appointed only Republicans and independents. Mark I. Harrison, Opinion, *Why Doesn't Gov. Doug Ducey Want Democrats to Screen Judges? That Hurts Arizona*, AZCENTRAL (June 14, 2019), https://www.azcentral.com/story/opinion/op-ed/2019/06/12/gov-doug-ducey-refuse-appoint-democrats-judges-hurts-arizona/1433612001.

Similarly, in New Jersey, governors traditionally did not appoint more than four members of their party to sit on the seven member New Jersey Supreme Court, and reappointed sitting justices at the conclusion of their initial terms regardless of their political views. Robert L. Clifford et al., Statement by Retired Justices of the New Jersey Supreme Court 2-3 (May 13, 2014), https://lawprofessors.typepad.com/files/wallace-statement.pdf; Deborah T. Poritz, *The New Jersey Supreme Court: A Leadership Court in Individual Rights*, 60 RUTGERS L. REV. 705, 707 (2008) (describing the tradition of politically balanced appointments as "a long-standing practice . . . not easily rejected by an incumbent governor"). These norms were "seen as a powerful restraint on court 'packing' or other means of exerting political pressure on an independent judiciary." Clifford et al., *supra*, at 2. But in 2010, a Republican governor declined to reappoint a sitting justice following a series of judicial

decisions criticized by the governor's political allies.[12] He then sought to appoint several current or former members of the Republican Party to the state supreme court in 2012 and 2016, which was widely perceived as violating longstanding practices: some Democratic lawmakers insisted that the governor's appointments would, in substance, give the seven member court five Republicans, as one nominally independent member of the court had been appointed by a Republican governor, served in that governor's Republican administration, and made political contributions to Republican lawmakers.[13] Although the governor ultimately nominated a Democrat to restore the court's balance in 2016, he did so only after a years-long impasse caused by intense opposition from the Democratic senate.[14]

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[12] *See* Richard Pérez-Peña, *Christie, Shunning Precedent, Drops Justice From Court*, N.Y. TIMES (May 3, 2010), https://nyti.ms/381h3Jh.

[13] *See* David M. Halbfinger, *Democrats Reject Christie Choice for New Jersey's Top Court*, N.Y. TIMES (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/nyregion/democrats-reject-christie-choice-for-new-jerseys-top-court.html; Karen Yi, *Christie Nominates Democrat to Supreme Court*, APP (Apr. 11, 2016), https://www.app.com/story/news/politics/new-jersey/chris-christie/2016/04/11/christie-nominates-democrat-supreme-court/82899000/.

[14] *See* Kate King, *Chris Christie Nominates Democrat to New Jersey Supreme Court*, WALL ST. J. (Apr. 11, 2016), https://www.wsj.com/articles/chris-christie-nominates-democrat-to-new-jersey-supreme-court-1460423587. Had the governorship and the senate been held by the same party (as is currently the case in Delaware), no such opposition would have been available to enforce the norm.

Without Delaware's other major party requirement, a potential judicial candidate easily could change his or her party affiliation to "independent" in the days before applying for the judicial position, as the Respondent's own allegations illustrate. Adams alleges that whenever he considered applying for judgeships he was ineligible because he "was an active registered Democrat" throughout his career and the appointment at issue was required to be filled by a Republican.[15] *See* Opp'n to Pet. for Writ of Cert. 3. Adams changed his registration to independent only shortly before filing this lawsuit. *Adams*, 922 F.3d at 172 & n.14. In the absence of the other major party requirement, Adams could have changed his registration earlier and applied to the open appointments as an independent—resulting in a self-described "Bernie [Sanders] independent," *Adams*, 922 F.3d at 172, qualifying for a vacancy meant for a Republican. Given the potential for gamesmanship, the other major party requirement reflects a reasonable determination by Delaware that some measure in addition to the bare majority requirement is necessary to ensure judicial appointments honor the spirit of the law.[16]

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[15] The Brennan Center takes no position on whether Adams has demonstrated Article III standing.

[16] If this Court nonetheless holds the other major party requirement unconstitutional, then it should hold the bare majority and other major party requirements severable. From 1897 to 1951, Delaware had only a bare majority requirement, showing that such a requirement *is* workable standing alone, even if there remains a possibility for abuse.

In striking down Delaware's partisan balance requirements, all three members of the Third Circuit panel joined a concurrence expressing confidence that a "political and legal culture . . . firmly woven into the fabric of Delaware's legal tradition" would endure in the absence of the constitutional provisions at issue, allowing the public to remain confident in the "bipartisan excellence" of its courts. *Adams*, 922 F.3d at 187 (McKee, J., concurring). But recent history in other states suggests that the durability of such culture and norms cannot be taken for granted.

History and logic show that Delaware's partisan balance provisions further the state's interests in achieving public confidence and eliminating single party entrenchment in its judiciary—and that eliminating these guardrails poses a serious risk of politicizing judicial selection. This is not to say that a judicial selection system *must* be like Delaware's for courts to be trusted or effective; rather, it is that the Framers of the Delaware Constitution and the people of Delaware are justified in structuring their judicial selection process so as to further these interests. *Cf. Williams-Yulee*, 575 U.S. at 447-48 (recognizing that although "[t]he vast majority of elected judges in States that allow personal solicitation serve with fairness and honor," the state could impose restrictions on such solicitation and was not required to "tolerate [the] risks" of undermining the public's confidence in the judiciary); *id.* at 454 ("The 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.").[17] Delaware's judicial selection provisions reflect a judgment that the best way to achieve these goals is through a balanced appointment process. This Court should recognize those compelling state interests when assessing whether Delaware's judicial selection provisions are constitutional.

C. The Third Circuit's Application of *Elrod-Branti* Ignored the Structural Nature of Delaware's Partisan Balance Requirements and Distinctions Between Judicial and Executive Branch Appointments.

The Third Circuit further erred in applying *Elrod-Branti*'s anti-patronage doctrine to strike down structural restrictions on appointments to the state's judicial branch. For good reason, this Court has never used the *Elrod-Branti* framework to invalidate such a provision, and has in fact shown deference to state determinations in similar contexts.

First, unlike the decisions at issue in *Elrod* and *Branti*, which concerned political executive branch officials, Delaware's partisan balance requirements apply to its judicial branch. That matters because judges are different from executive branch officials. *See Williams-Yulee*, 575 U.S. at 446 ("States may regulate judicial elections differently than they

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[17] The Brennan Center's own recommendations for judicial selection differ from Delaware's, but similarly reflect an effort to balance the complex and competing values at stake in selecting judges. *See generally* BANNON, CHOOSING, *supra* (recommending a publicly accountable appointment system and single, lengthy terms to minimize reselection pressures on sitting judges).

regulate political elections, because the role of judges differs from the role of politicians."). Whereas *Elrod* and *Branti* turned on the relevance of loyalty in a hierarchical relationship between an elected official and his or her employees, *see supra* Part II.A, there is no equivalent hierarchical relationship between Delaware's governor and its judges. The governor cannot fire judges out of disagreement with them. The only ways to remove or discipline a Delaware judge are impeachment by two thirds of the House of Representatives and conviction by two thirds of the Senate, DEL. CONST. art. VI, § 1, or a two-thirds vote of the Court on the Judiciary, *id.* art. IV, § 37.

These protections against removal make sense given that "judges are not politicians." *Williams-Yulee*, 575 U.S. at 455. While "[p]oliticians are expected to be appropriately responsive to the preferences of their supporters[,] . . . [t]he same is not true of judges." *Id.* at 446. Unlike politicians and their advisers, "[a] judge instead must 'observe the utmost fairness,' striving to be 'perfectly and completely independent, with nothing to influence or [control] him but God and his conscience.'" *Id.* at 447 (quoting Address of John Marshall, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830, at 616 (1830)).

Second, unlike *Elrod* and *Branti*, which involved discrete decisions about individual government employees, Delaware's partisan balance requirements are structural. This Court has traditionally afforded the states flexibility in structuring their governments, including by prescribing "the qualifications of their most important government officials." *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (recognizing "the

authority of the people of the States to determine the qualifications of their most important government officials" as lying "at the heart of representative government" (internal quotation marks omitted)); *see also Williams-Yulee*, 575 U.S. at 454 ("[H]ow to select those who 'sit as [state] judges'" involves "sensitive choices by States in an area central to their own governance." (quoting *Gregory*, 501 U.S. at 460)).

Here, the judicial positions covered by Delaware's other major party requirement—the judicial officers of the Supreme Court, the Superior Court, and the Court of Chancery—are certainly important ones, affecting only the three highest of Delaware's six courts. Out of the 120 authorized state judgeships in Delaware, the bare majority requirement affects only 59; the other major party requirement applies in combination with the bare majority requirement to only 33. *See* DEL. CONST. art. IV, § 2; DEL. CODE tit. 10, §§ 307, 509, 906(b), 1302(a), 9202(e), 9203.

Third, unlike the discretionary decisions reviewed in *Elrod* and *Branti*, Delaware's partisan balance requirements are part of the state's constitutional framework. Because they are embodied in a constitutional provision that must undergo a much more rigorous approval process than a discretionary decision by a single individual, *see* DEL. CONST. art. XVI (describing the amendment process), this Court should be cautious before striking it down. *Cf. Gregory*, 501 U.S. at 471 ("In this case, we are dealing not merely with government action, but with a state constitutional provision . . . .").

By experimenting "in an area central to [its] own governance—how to select those who 'sit as [its]

judges,'" *Williams-Yulee*, 575 U.S. at 454 (quoting *Gregory*, 501 U.S. at 460), Delaware serves as a "laboratory" of democracy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."). This Court should be hesitant to overturn that experiment. *See Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2673 ("Deference to state lawmaking allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." (internal quotation marks omitted)). This is especially true because Delaware's judicial system has special importance for the nation, and because it represents a successful effort to avoid the problems that so many other states have faced in designing their own judicial selection systems.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD W. CLARY
Counsel of Record
JUSTIN C. CLARKE
AMANDA R. BAKOWSKI
REILLY S. STEEL
SWARA SARAIYA
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
rclary@cravath.com

ALICIA L. BANNON
DOUGLAS KEITH
WENDY R. WEISER
THE BRENNAN CENTER FOR
JUSTICE AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271-0202
(646) 292-8310

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