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 STATE AND LOCAL GOVERNMENT ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Amici are not-for-profit organizations whose mission is to advance the interests of state and local governments and the public dependent on their services.[1]

National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on pressing issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs in cases, like this one, that raise issues of vital state concern.

The National Association of Counties (NACo) is the only national association that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with forty-nine state municipal

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for party, or person other than *amici curiae* or counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner filed a notice of blanket consent with the Clerk. Respondent has consented to the filing of this brief.

leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The U.S. Conference of Mayors (USCM) is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 12,000 appointed chief executives and assistants, serving cities, counties, towns, and regional entities. ICMA's mission is to advance professional local government through leadership, management, innovation, and ethics.

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

Amici have an interest in ensuring that this Court understands just how many state and local governments have incorporated partisan balance requirements into their governments, and why. The court

below called these governments' choices into question when it invalidated Delaware's system. This Court's decision will thus have a substantial impact on the ability of these governments to structure their own decision-making processes in the way they determine is best for their communities.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about whether a government can take steps to insulate certain decision-making bodies from the rough-and-tumble of partisan politics. The decision below invalidated Delaware's longstanding system for ensuring a balanced judiciary. But Delaware is not alone in deciding that there is value in filtering certain important decisions through a bipartisan body. Over and over again, states and local governments across this country have come to the same conclusion, in many different contexts. The decision below cast constitutional doubt on their choices about how best to structure their governments. This Court should make clear that these are reasonable, and constitutionally permissible, choices.

The decision below erred when it concluded that this Court's patronage cases "govern [the] analysis here." Pet. App. 19a (citing *Elrod*, *Branti*, and *Rutan*). Those cases addressed a different problem: "the raw test of political affiliation" inherent in patronage systems of firings and hirings. *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 719 (1996). Partisan-balance requirements like Delaware's are different in kind. When these requirements are put in place, the person making a hiring decision—here, the Governor—has no say in whether to take partisan affiliation into account;

patronage plays no part in this picture. Instead, the relevance of partisan affiliation is baked into the structure of government ahead of time, when no one can predict who will be making a given appointment at a given point in the future.

Even if the patronage line of cases does govern here, the decision below construed the so-called policymaking exception to the rule against consideration of partisan affiliation too narrowly. It held that the exception allows an appointing official to require a certain partisan affiliation only if she needs to appoint a person with a shared partisan affiliation to ensure that he "will not undercut or obstruct the [official's] administration." Pet. App. 23a. By definition, partisan-balance requirements will fail that test because these requirements stem from a determination that the connection between the appointing official's partisan affiliation and the appointee's partisan affiliation is *not* relevant—or at least has *diminished* relevance—to how the appointee should carry out his duties.

Getting the test right is important. Hundreds of state and local governments have made a thoughtful choice to use bipartisan decision-making processes, based on their conclusion that these processes will produce the best outcomes for their communities. They have reached this conclusion in myriad settings: from judicial selection, to elections administration, to ethics enforcement, and more. A test which deems these reasonable choices per se unconstitutional would upend state and local governments and would defy common sense.

Any doubt should be resolved in favor of a test that preserves flexibility for state and local government to

make decisions about how to constitute their own governments. These governments have adopted partisan-balance requirements in areas that "go to the heart of representative government," such as courts, elections, and government integrity. *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks omitted). This Court should not constrict the choices of these sovereign governments.

The longstanding, and widespread, practice shows that a government can reasonably decide that a given exercise of government authority should rest on reasoned decision-making, rather than naked partisan preferences. States and local governments should be given room to make these choices when it comes to shaping their own governments—"their house, their rules." *Church Joint Venture, L.P.* v. *Blasingame*, No. 18-6142, 2020 WL 284527, at *8 (6th Cir. Jan. 21, 2020) (Sutton, J., concurring). This Court should acknowledge the wisdom of these choices and reverse the decision below.

ARGUMENT

I. The Patronage Cases Do Not Control Here.

The *Elrod* line of cases addressed a specific problem—patronage systems—and settled on a constitutional rule specific to that problem. Partisan-balance requirements are different. True, under these requirements, political affiliation will limit who may fill a given position at a given time. But those constraints are imposed *ex ante*, when no political party knows who will be making any future appointment. And they are imposed to *blunt* the role that bare partisan politics will play in the decisions officials in these positions are entrusted to make. Given these

differences, this Court should not mechanically extend the *Elrod* line of cases to invalidate the partisan-balance requirement that Delaware has put in place.

A. The *Elrod* line of cases addressed patronage systems.

In *Elrod*, the Court confronted "the practice of the Sheriff of Cook County" of "replac[ing] non-civil-service employees" with "members of his own party" upon taking office. *Elrod* v. *Burns*, 427 U.S. 347, 351 (1976) (plurality op.). That is, "public employees" in mine-run positions "h[e]ld their jobs on the condition that they provide, in some acceptable manner, support for the favored political party." *Id.* at 359. Finding that this practice "unquestionably inhibits protected belief and association," the plurality proceeded to ask whether it furthered a "vital government end by a means that is least restrictive." *Id.* at 359, 363. It answered no, and thus concluded "that the practice of patronage dismissals is unconstitutional." *Id.* at 373.

The plurality recognized, though, that there will be times when political affiliation may be relevant to the position an official holds, or wishes to hold. *See id.* at 367 (recognizing the need to avoid "obstructing the implementation of policies of the new administration"). That did not save patronage dismissals outright. *See id.* But it did support limiting the plurality's bright-line rule against patronage dismissals, so that the rule did not extend "to policymaking positions." *Id.* The plurality declined to set out the scope of those positions, explaining only that "the political loyalty justification is a matter of proof, or

at least argument, directed at particular kinds of jobs." *Id.* at 368 (internal quotation marks omitted).

In *Branti*, a majority embraced the *Elrod* plurality's reasoning. The case involved the dismissal of assistant public defenders on the basis of their partisan affiliation. These dismissals presented the same risk of "coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." *Branti* v. *Finkel*, 445 U.S. 507, 516 (1980).

Once again, the Court "recognize[d] that party affiliation may be an acceptable requirement for some types of government employment." *Id.* at 517. It made plain that the "policymaking" test was not very helpful; "rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. *Branti* described one "obvious" example of when such a requirement would be appropriate: "if a State's election laws require that precincts be supervised by two election judges of different parties." *Id.*

This Court's other cases addressing patronage systems restated the reasoning of *Elrod* and *Branti*. *Rutan* extended the logic of these cases to "promotion, transfer, recall, and hiring decisions based on party affiliation and support." *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 79 (1990). *O'Hare* then applied the rule from these cases to "[i]ndependent contractors, as well as public employees." *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 723 (1996). Here again, the Court reiterated that a court asking whether the per se prohibition on patronage systems applies must "ask[] whether the

[political affiliation] requirement was appropriate for the employment in question." *Id.* at 719. In doing so, its task is to determine "whether the affiliation requirement is a reasonable one." *Id.*

The common thread that ties the *Elrod* line of cases together is a recognition of, and objection to, the coercive effects of *patronage* practices. *See Elrod*, 427 U.S. at 369–370 (plurality op.) (concluding that "*patronage* is a very effective impediment to the associational and speech freedoms" (emphasis added)); *id.* at 374 (Stewart, J., concurring) ("This case * * * does not require us to consider the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular political party * * * ."); *Branti*, 445 U.S. at 513 (explaining that *Elrod* "analyzed the impact of a political patronage system"); *Rutan*, 497 U.S. at 69, 75 (agreeing that "government interests generally asserted in support of patronage fail to justify th[e] burden on First Amendment rights" and that "patronage decidedly impairs the elective process").

B. Partisan-balance requirements do not resemble patronage systems.

The partisan-balance requirement at issue here—and used by state and local governments across the country—do not resemble "these patronage practices," *Rutan*, 497 U.S. at 74. First, these requirements do not have the kind of systemic effect that patronage systems do. Second, and relatedly, these requirements avoid the concerns that patronage systems present. And third, these requirements further an important government interest that patronage systems do not. As a result, *Elrod*'s bright-line

prohibition against patronage systems does not control challenges to partisan-balance systems.

The problem with patronage systems is their pervasive effects on political belief and association. As the *Elrod* plurality emphasized, patronage systems reached all government employees, or a substantial set of government employees. By making this many employees subject to wholesale removal (or other employment actions) unless they associate with the political party in power, a patronage system "tips the electoral process in favor of the incumbent party." *Elrod*, 427 U.S. at 356 (plurality op.) ("[W]here the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant.").

Partisan-balance requirements, in contrast, employ a surgical consideration of political affiliation, not a systemic one. States and local governments use these requirements only when they determine that certain agencies or offices should be insulated from the political fray when making decisions. And these governments confine consideration of political affiliation to the top positions, stopping far short of the rank-and-file employees at issue in the patronage cases. *See infra* pp. 18–26 (describing how states and local governments have used partisan-balance requirements). Partisan-balance requirements are thus different in kind than patronage systems; they do not pose the same risk of entrenchment.

Indeed, partisan-balance requirements *avoid* the very problems that patronage systems present. These requirements do not subject people to the "daily pressure" inherent in patronage systems: to support the political party that holds the reins of

power. *Rutan*, 497 U.S. at 73. A person who aspires to a position subject to a partisan-balance requirement knows that when such a position opens up, he will face *no* pressure to conform to the appointing official's political affiliation. Whether his political affiliation will affect his ability to seek the position will be outside his, or anyone else's, control; it will turn on the happenstance of when the position opens up. In this way, these requirements avoid the institutionalized corruption that patronage systems permit. *See, e.g.*, *O'Hare*, 518 U.S. at 721 (noting that the result of the patronage system was just as if the mayor had "solicited the contribution as a quid pro quo for not terminating O'Hare's arrangement with the city"). By ensuring that the party out of power has a voice, these requirements guard against a "state-selected orthodoxy." *Rutan*, 497 U.S. at 75.

The unique nature of partisan-balance requirements means that they further government interests distinct from those that were offered up to justify patronage systems. These requirements insulate an agency or official from bare partisan politics, preventing any one political party from exercising total control over the decisions the agency or official is charged with making. They thus serve "governmental" rather than "partisan" interests. *Elrod*, 427 U.S. at 362 (plurality op.) ("[C]are must be taken not to confuse the interest of partisan organizations with governmental interests."); *accord Rutan*, 497 U.S. at 88 (Stevens, J. concurring) ("[D]efense of patronage obfuscates the critical distinction between partisan interest and the public interest.").

Partisan-balance requirements offer benefits beyond avoiding the problems inherent in patronage-

style appointments. States and local governments adopt these requirements to insulate certain decisions from political or other influence, to guarantee minority viewpoints will be expressed, and to increase public confidence in political institutions. These are all important government interests.

First off, states and local governments adopt partisan-balance requirements to help insulate certain decisions from bare-knuckle partisan fights. Take state ethics commissions as an example. *See infra* pp. 22–24. Partisan-balance requirements prevent a single party, or interest group aligned with a party, from capturing these commissions. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 17, 24–25 (2010). This mitigates the risk that one party will selectively enforce the state's ethics rules. In this way, these requirements increase the chances that the commission will act in the public's interest. *Cf. Branti*, 445 U.S. at 532 (Powell, J., dissenting) ("[I]nfluence of special interest groups whose only concern all too often is how a political candidate votes on a single issue" impairs "the capacity of government to function in the national interest.").

State and local governments also adopt partisan-balance requirements to ensure that minority viewpoints will be heard. These requirements make it more likely that "ideological diversity" will inform the decision and, when the requirements are imposed on panels, that the panel will debate those diverse viewpoints. *See* Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Colum. L. Rev. 9, 77–78 (2018). It is not yet clear how ideological diversity and deliberation affect the eventual

decision, *see id.* at 78 (explaining that this question is debated), but fostering debate on important questions of state and local government is a valid interest standing alone. *See* The Federalist No. 70, at 426–27 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (opining that "differences of opinion" can "promote deliberation and circumspection" and can "serve to check excesses in the majority"); *see also* Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 1, 3 (2010) ("[T]here is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation."). And when minority viewpoints are involved in decision-making processes, they can report back to those that share their views. This allows the public to understand why their arguments did or did not win the day and to prepare for the next round of debate. *See, e.g.*, Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 Am. J. Pol. Sci. 165, 166 (1984) (describing the federal approach of designing a "fire-alarm" system that "enable[s] individual citizens and organized interest groups to examine administrative decisions").

Both of these effects increase the public's faith in government institutions. It is not just "important that the Government and its employees in fact avoid practicing political justice," it is "*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." *U.S. Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973) (emphasis added). This interest is at its height in the settings in which states and local governments have most often adopt-

ed partisan-balance requirements, which go to the heart of how these governments work: courts, elections, ethics, and the public fisc. *See infra* pp. 18–26; *see also Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 446 (2015) (explaining that when it comes to the judiciary, "public perception of * * * integrity is a state interest of the highest order" (internal quotation marks omitted)).

C. Partisan-balance requirements are constitutional.

The decision below viewed this case through the lens of this Court's patronage cases, even though partisan-balance requirements bear no resemblance to patronage systems. This led it to make two serious errors along the way to striking down Delaware's system for ensuring a bipartisan judiciary. First, it construed the so-called policymaking exception in the patronage cases too narrowly. And second, it gave short shrift to the important government interests that partisan-balance requirements serve. Because of these errors, it deemed Delaware's system unconstitutional.

The patronage cases should not be the starting point for this case. It is wrong to equate these requirements with patronage systems simply because, under both systems, political affiliation plays a role in whether a given person will be eligible for a given position. That is because, as explained, partisan-balance requirements *avoid* the problems that patronage systems cause and serve *additional* government interests. *See supra* pp. 8–13.

Starting in the wrong place led the court below to the wrong outcome. It held that the so-called policymaking exception allows an appointing official to

require a certain partisan affiliation *only* if she needs to appoint a person with a *shared* partisan affiliation to ensure that the appointee "will not undercut or obstruct the [official's] administration." Pet. App. 23a. This "narrow[]" approach to the policymaking exception is wrong. *Id.* at 28a. By definition, a partisan-balance requirement will fail that test. That is because these requirements stem from a determination that the connection between the appointing official's partisan affiliation and the appointee's partisan affiliation is *not* relevant—or at least has *diminished* relevance—to how the appointee should carry out his duties. The test adopted below thus leads to an outcome where a government can use partisan affiliation as the basis for employment decisions to advance patronage interests—so long as the employee in question passes the policymaking exception test—but cannot use partisan affiliation to advance *anti-patronage* interests in ensuring all parties have representation. *See supra* pp. 9–10. This cannot be right.

To see why, consider the example of election judges. In *Branti*, this Court concluded it was "obvious" that party affiliation can be an "appropriate[]" consideration in government employment decisions. 445 U.S. at 518. Under the test adopted below, a Democratic election official would be permitted to appoint a Democratic election judge, presumably so that the judge can further political beliefs she "shares" with the Democratic official, but a Republican official could not appoint the same Democratic judge to serve as a *check* on that official because the judge would not be a "loyal employee[]." Pet. App. 23a, 26a (internal quotation marks omitted). That is as

arbitrary an outcome as any, one that no one has been able to defend.[2]

The better test is the one this Court made quite clear in *O'Hare*. The question a court must ask is "whether the [political affiliation] requirement [i]s appropriate for the employment in question." *O'Hare*, 518 U.S. at 719. All this means is that "the affiliation requirement" must be "a reasonable one." *Id.* For the reasons just discussed, partisan-balance requirements are reasonable. *See supra* pp. 8–13. The per se prohibition on "raw test[s] of political affiliation" does not apply to these requirements. *Id.*

Associating partisan-balance requirements with patronage systems led the court below further astray: The sweeping invalidation of Delaware's system calls into question the constitutionality of all partisan-balance requirements. Pet. App. 32a (concluding that Delaware's system failed heightened scrutiny). Even if heightened scrutiny applies, *but see* Pet. Br. 34–37, the decision below was wrong. Partisan-balance requirements affect only a "narrow slice" of government positions. *Williams-Yulee*, 575 U.S. at 452. They do not have the purpose or effect of "seek[ing] to control political opinions or beliefs, or to interfere with or influence anyone's vote at the

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[2] Respondent tries to cabin this part of *Branti* by claiming that "[e]lection judges, engaged in a partisan battle, are intended to act and advocate to protect the interests of their respective parties." Opp. 10. Not so. Election judges are not appointed to advocate at all; they ensure the fairness of the electoral process. This is precisely why the *Branti* court widened the policymaking inquiry: to include positions that do not "involve[] participation in policy decisions." *Branti*, 445 U.S. at 518.

polls." *Letter Carriers,* 413 U.S. at 564.[3] They serve important government interests in insulating decisions from bare partisan control, in ensuring that minority viewpoints will be heard, and in increasing the public's confidence in government. *See supra* pp. 10–13. And they are tailored to advance those interests, as party affiliation can serve as a proxy for ideological viewpoints. Feinstein & Hemel, *supra*, at 12.

All of this applies to Delaware's system at issue here. Its partisan-balance requirements apply only to judicial appointments. *See* Pet. App. 6a–8a. These requirements serve important government interests. *See Williams-Yulee*, 575 U.S. at 445 (holding that the government has a "vital" interest in "safeguarding public confidence in the fairness and integrity of the nation's elected judges" (internal citations and quotation marks omitted)). And these requirements are tailored to furthering those inter-

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[3] This Court has long recognized that "[n]either the right to associate nor the right to participate in political activities is absolute." *Letter Carriers*, 413 U.S. at 567. On this basis, it has repeatedly affirmed that a government "may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system." *United Pub. Workers of Am. (CIO)* v. *Mitchell*, 330 U.S. 75, 100 (1947); *see O'Hare*, 518 U.S. at 721 ("Our cases make clear that the government may not coerce support in this manner, *unless it has some justification beyond dislike of the individual's political association*." (emphasis added)); *Letter Carriers*, 413 U.S. at 563–564 (upholding the Hatch Act and affirming "the judgment of Congress, the Executive and the country" that "partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly * * * and employees themselves are to be sufficiently free from improper influences").

ests. *See id.* at 454 (explaining that the standard is "narrowly tailored" not "perfectly tailored" (internal quotation marks omitted)). The bare-majority requirement is, of course, "perfectly" tailored—to Delaware's interest in creating a bipartisan institution. *See* Del. Const. art. IV. And that requirement works only with its companion major-party requirement. Without it, the Governor could side-step the bare majority requirement by appointing persons who, though formally registered as independents or as members of a third party, still share the Governor's political beliefs. *See* Pet. App. 34a (recognizing that the major-party requirement is needed for Delaware's system to "fulfil[l] its purpose of preventing single party dominance while ensuring bipartisan representation"). As this shows, there is no real alternative that would guarantee a truly bipartisan judiciary.[4]

The court below disagreed because it concluded that "the logic of political balance and minority

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[4] Without the major-party rule, any effort to produce a similarly balanced judiciary would require intrusive examinations of applicants' political beliefs to determine whether those beliefs would disrupt the goals of ideological diversity or balance. *See Pirincin* v. *Bd. of Elections of Cuyahoga Cty.*, 368 F. Supp. 64, 72 (N.D. Ohio) (recognizing that if "each county board enlarged to include representatives of all minority parties as well as independent voters," the problem would be that "[e]ach independent voter can really only represent himself"), *aff'd*, 414 U.S. 990 (1973). And if state and local governments were required to permit representation of any and all partisan affiliations, the resulting bodies "would be too large to function." *Id.*; *see also Werme* v. *Merrill*, 84 F.3d 479, 486 (1st Cir. 1996) ("It is certainly reasonable to assume that, at some point, 'more' is not 'better.' ").

representation" does not extend "from multimember deliberative bodies, like a school board, to Delaware's judiciary, most of whom sit alone." *Id.* at 31a. But nothing in its opinion turned on that distinction. More fundamentally, Delaware's system encourages *selection* of moderate judges because it gives a Governor the incentive to appoint centrist members of the opposing party.

II. The Decision Below Threatens To Upend State And Local Governments.

In equating Delaware's partisan-balance system with patronage systems, and in undervaluing the government interests that motivate the use of partisan-balance requirements, the decision below threatens longstanding state and local government structures across the country. This is not just a case about judges. It is a case about when these governments can decide that policy decisions should be run through a non-partisan process.

States and local governments have turned to partisan-balance requirements in a number of contexts. These choices reflect a judgment that decisions made by these bodies should not be dominated by, and should not be viewed by the public as being subject to, partisan politics. These governments have used these requirements in diverse settings, reflecting the fact that different states and local governments have made different judgments about when their communities would be best served by insulating decisions from partisan politics. *See, e.g.*, Fla. Stat. § 14.29(3)(a) (Florida Commission on Community Service); Ind. Code § 21-21-3-1 (Indiana State University Board of Trustees); Ky. Rev. Stat. Ann. § 98.350 (Kentucky County Welfare Advisory

Boards); N.M. Stat. Ann. § 77-2-3(B) (New Mexico Livestock Board).[5]

Through this experimentation, states and local governments have coalesced around the use of partisan-balance requirements in certain areas that go to the heart of self-governance.

States often use partisan-balance requirements for judicial selection committees. These choices—made by fourteen states—reflect a judgment that judicial selection should not be determined by bare political will.[6] This judgment is not just sensible, it is consid-

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[5] The federal government too has turned to these requirements, as early as the early 1880s. *See* Feinstein & Hemel, *supra*, at 9, 17. This Court has recognized that such a long, unquestioned practice counts for something in the constitutional analysis. *See, e.g.*, *Town of Greece* v. *Galloway*, 572 U.S. 565, 577 (2014) (concluding, in the Establishment Clause context, that a practice is likely to be constitutional when it "has withstood the critical scrutiny of time and political change"); *see also Rutan*, 497 U.S. at 102 (Scalia, J., dissenting) (reasoning that in this area, a "clear and continuing tradition" should receive if not "dispositive effect" then at least "substantial weight in the balancing"). The same should hold true here.

[6] Ariz. Const. art. 6, § 36(A) (no more than three out of five lawyer members and no more than five out of ten non-lawyer members may belong to the same political party); Colo. Const. art. VI, § 24(2) (no more than half of the supreme court nominating commission members plus one may belong to the same political party); Conn. Gen. Stat. § 51-44a(a) (no more than six out of twelve commission members may belong to the same political party); Del. Exec. Order No. 7, ¶¶ 2, 4 (2017) (no more than seven out of twelve commissioners may be members of the same political party); Idaho Code § 1-2101(1) (no more than three of the six appointed members may belong to the same political party); Ky. Const. § 118(2) (requiring at least two out of four non-lawyer members to come from each of the state's

ered the best practice. *See* Alicia Bannon, Brennan Ctr. for Justice, *Choosing State Judges: A Plan for Reform*, 2, 6–9, 11 (2018) (describing bipartisanship in selecting nominating commissioners for state judges as among the "best practices"). That is because "[e]nsuring a mix of appointing authorities and requiring bipartisan representation reduces the likelihood that the commission could be 'captured' in support of a special interest or in service of an inappropriate political motive." *Id.* at 8.

And states and local governments have turned to these requirements for another fundamental aspect of government: the electoral process. At least five states have adopted partisan-balance requirements

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two largest political parties); Neb. Const. art. V-21(4) (no more than four out of eight voting members may be of the same political party); Nev. Const. art. 6, § 20 (state bar appoints three lawyers, no more than two from the same political party; governor appoints three non-lawyers, no more than two from the same political party); N.Y. Jud. Law § 62(1) (the governor and the chief judge of the court of appeals each appoint four members, with no more than two belonging to the same political party); Okla. Const. art. VII-B-3(d) (no more than three out of six members appointed by the governor may be of the same political party; no restrictions on members appointed by the state bar); S.D. Codified Laws § 16-1A-2 (state bar commissioners appoint three lawyers, with no more than two belonging to the same political party; governor appoints two citizens, not of the same political party); Utah Code Ann. § 78A-10-202(3)(c) (no more than four out of seven members may be of the same political party); Vt. Stat. Ann. tit. 4, ch. 15, § 601 (the governor appoints two non-lawyers; the house and the senate each elect two non-lawyers and one lawyer, not all of whom may be members of the same party); W.V. Code § 3-10-3a(b) (no more than four out of eight appointed members may be of the same political party).

for election boards.[7] Numerous local governments have too.[8] In upholding these requirements, courts recognize "valid" government interests in "dispelling confusion, warding off fraud, and ensuring administrative efficiency at the polls." *Werme*, 84 F.3d at 486, 487; *see also id.* at 482 (calling a New Hampshire statute that restricted membership on the

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[7] *See, e.g.*, Me. Stat. tit. 1, § 1002(1-A)(C) (no more than two members may be enrolled in the same political party); Wash. Rev. Code § 42.17A.100(1) ("No more than three commissioners shall have an identification with the same political party."); N.Y. Elec. Law § 3-100(1) (elections board "composed of four commissioners appointed by the governor," two drawn from recommendations from each of the major political parties and two drawn from recommendations from the majority and minority parties in the state houses); N.C. Gen. Stat. § 163-19(b) (election board consists of five members from two political parties having the highest number of registered affiliates; no more than three members can be from the same party); N.H. Rev. Stat. Ann. § 658:2 ("[e]ach state political committee of the [two] political parties which received the largest number of votes cast for governor" in previous election appoints two inspectors of election).

[8] *See, e.g.*, Mo. Rev. Stat. § 115.047 (county election board members "selected in equal numbers from the two major political parties"); N.J. Stat. Ann. § 19:6-17 (county election boards comprised of two members of the party that secured the largest number of votes in last election and two members of the party that secured the second-largest number of votes in last election); 17 R.I. Gen. Laws § 17-8-1 (the "legislative body of each city and town" appoints a "canvassing authority of three (3) qualified electors * * *, not more than two (2) of whom shall belong to the same political party"); Ohio Rev. Code Ann. § 3501.06 (secretary of state appoints two board members from the political party which cast the highest number of votes in the previous gubernatorial election and two members from the party which cast the second-highest number of votes).

election board to the two major parties "pretty standard stuff" and upholding the statute against a political association challenge); *Gill* v. *Rhode Island*, 933 F. Supp. 151, 156 (D.R.I. 1996) (upholding a partisan-balance requirement on a canvassing board because at-large selection might result in "the dominant party of the locality" winning "all the seats on the board"), *aff'd*, 107 F.3d 1 (1st Cir. 1997) (per curiam). This Court has too. *See Pirincin*, 368 F. Supp. 64 (upholding an Ohio statutory scheme for selecting members of bipartisan county boards of election from the two parties which cast the highest number of votes for governor at the previous election), *aff'd*, 414 U.S. 990 (1973).

States and local governments have also turned to these requirements when setting up entities that guard against government abuse or self-dealing. Texas, for example, created its ethics commission "in 1991 due to a crisis of public confidence," and its partisan-balance requirement is credited for producing decisions that are "unanimous and consistently nonpartisan." Steve Wolens, *The Texas Ethics Commission Is Surprisingly Nonpartisan. What Can This Group Teach the Rest of Us?*, Dallas Morning News (Feb. 26, 2019). At least fourteen states and the District of Columbia have adopted partisan-balance requirements for ethics commissions.[9] Many

[9] Fla. Stat. § 112.321(1) ("Of the nine members of the Commission, no more than five members shall be from the same political party at any one time."); Wash. Rev. Code 42.17A.100(1) ("No more than three commissioners shall have an identification with the same political party."); N.C. Gen. Stat. § 120-99 (president of the senate, speaker of the house, minority leader of the senate, and minority leader of the house

local governments have done the same.[10] These commissions are typically tasked with investigating

each appoint three members); Del. Code Ann. tit. 29, § 5808(b) ("Not more than 4 members shall be registered with the same political party."); D.C. Code § 1-1162.03(a) ("The Board shall consist of 5 members, no more than 3 of whom shall be of the same political party * * * ."); Ga. Code Ann. § 21-5-4(b) ("[N]ot more than two [appointees] shall be from the same political party * * * ."); Ind. Code § 4-2-6-2(c) ("No more than three (3) commission members shall be of the same political party."); Ky. Rev. Stat. Ann. § 6.651(2) ("The commission shall be composed of nine (9) members, not less than three (3) of whom shall be members of the largest minority party in the state."); Me. Stat. tit. 1, § 1002(1-A)(C) (no more than two members may be enrolled in the same political party); Md. Code Ann. Gen. Provisions § 5-202(a)(2) ("[A]t least one [commission member] shall be a member of the principal political party of which the Governor is not a member."); Minn. Stat. § 10A.02, subd. 1 ("No more than three of the members of the board may support the same political party."); N.M. Const. art. V, § 17 (commission may have no more than three members of the same political party); 65 Pa. Cons. Stat. § 1106(a) ("No more than two of the members appointed by the Governor shall be of the same political party."); S.C. Code Ann. § 8-13-310(A)(1) (four members "appointed by the Governor, no more than two of whom" may belong to "the appointing Governor's political party"; four members appointed by the majority and minority parties in each state house); Tenn. Code Ann. § 3-6-103(c)(1) (governor, speaker of the senate, and speaker of the house of representatives each appoint one member of the majority party and one member of the minority party).

[10] *See, e.g.*, Baltimore County, Md. Code § 3-3-1002(a)(2) (two out of five commissioners must be "members of a political party to which the County Executive does not belong"); Montgomery County, Md. Code, ch. 19A-5(b)(3) ("No more than 3 members may be registered to vote in primary elections of the same political party."); N.J. Stat. Ann. § 40A:9-22.19(a) ("No more than three members of the ethics board shall be of the same political party."); N.C. Gen. Stat. § 163-30 ("[o]f the appoint-

alleged ethics laws violations by public officials, providing binding ethics advice, and conducting trainings on the relevant Code of Conduct. *See, e.g.*, Md. Code Ann. Gen. Provisions § 5-205(b) (ethics board empowered to promulgate regulations regarding financial disclosures, conflicts of interest, and lobbying practices).

Thirteen states have adopted partisan-balance requirements for redistricting commissions.[11] These commissions are responsible for drawing electoral district boundaries. *See, e.g.*, N.Y. Legis. Law § 94(1) (commission "established to determine the district lines for congressional and state legislative offices").

And at least nine states have adopted partisan-balance requirements for state audit commissions.[12]

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ments to each county board of elections by the State Board, two members each shall belong to the two political parties having the highest number of registered affiliates").

[11] *See, e.g.*, Ariz. Const. art. 4, pt. 2, § 1(3); Cal. Const. art. XXI, § 2(c)(2); Colo. Const. art. V, § 44.1(b)-(c); Haw. Const. art. IV, § 2; Idaho Const. art. III, § 2(2); Me. Const. art. IV, pt. 3, § 1-A; Mich. Const. art IV, § 6; N.J. Const. art. 2 § 2(b)-(c); Mont. Code Ann. §§ 5-1-102 to -103; N.Y. Legis. Law § 94(1); 2011 R.I. Pub. Laws ch. 106, § 1(a); Utah Code Ann. § 20A-19-201; Wash. Const. art. II, § 43(2)-(3).

[12] *See, e.g.*, Ariz. Rev. Stat. Ann. § 41-1279(A) ("Not more than three appointees of each house shall be of the same political party."); Idaho Code § 67-457 (membership is "evenly divided between the two (2) largest political parties represented in the legislature"); Kan. Stat. Ann. § 46-1101 (senate and house majority leaders each appoint three members; senate and house minority leaders each appoint two); Minn. Stat. § 3.97, subd. 2 (Subcommittee on Committees of the Committee on Rules and Administration of the senate, senate minority leader, speaker of the house, and house minority leader each appoint three

Local governments have done so too.[13] These commissions are typically charged with auditing state agencies, evaluating public programs, and investigating alleged misuse of public money. *See, e.g.*, Minn. Stat. § 3.97, subd. 2 (commission reviews spending funds and auditor reports to make recommendations for improvements of state financial management).

These commissions are frequently structured along the same lines as Delaware's system here. That is, they contain both a partisan-balance requirement and a provision that resembles—or functions similarly to—the bare-majority requirement. *See, e.g.*, Ky. Rev. Stat. Ann. § 6.651(2) ("The commission shall be

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members); Mont. Code Ann. § 5-13-202(1) (three of the appointees of each house must be members of the majority political party and three of the appointees of each house must be members of the minority party); N.M. Stat. Ann. § 2-5-1 (members appointed from each house so as to give the two political parties having the most members in each house the same total proportionate representation on the committee as prevails in that house); Wash. Rev. Code § 44.28.010 ("Not more than four members from each house shall be from the same political party."); Wis. Stat. § 13.53(1) (committee consists of the chairpersons of the joint committee on finance, two majority-party and two minority-party senators, and two majority-party and two minority-party representatives); Wyo. Stat. Ann. § 28-8-107(a) ("[N]ot more than four (4) members appointed by each presiding officer shall be from the same political party.").

[13] *See* Ulster County, N.Y. Code § A2-5.1 (committee consists of two members appointed by chairman of the legislature, two members appointed by minority leader, chairman of the legislature, county executive, and comptroller); *County Auditors*, Venango County, Pennsylvania, http://bit.ly/venangocty (last visited Jan. 28, 2020) ("The office of the County Auditors consists of an elected board of three auditors: two from the majority party and one from the minority party * * * .").

composed of nine (9) members, not less than three (3) of whom shall be members of the largest minority party in the state."); Vt. Stat. Ann. tit. 4, ch. 15, § 601(b)(1-3) (the governor appoints two non-lawyers; the house and the senate each elect two non-lawyers and one lawyer, not all of whom may be members of the same party); N.J. Stat. Ann. § 19:6-17 (board comprised of two members of the party that secured the largest number of votes in last election and two members of the party that secured the second-largest number of votes in last election).

The Third Circuit suggested that its decision would not bear on such state and local bipartisan institutions because they "explicitly make policy," and thus fall within the policymaking exception, whereas "judges perform purely judicial functions," and thus do not. Pet. App. 31a. But the court's limitation of the policymaking exception to "loyal employees" by definition excludes all cross-party appointees—judicial, legislative, or executive—making such superficial distinction untenable. *Id.* at 23a. The decision below thus forces lower courts into a swamp of line-drawing litigation that will call on them to pass judgment on exactly which government interests justify the bipartisan structures these states and local governments have adopted.[14]

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[14] The severability ruling makes matters worse. The decision below does not explain whether *this* bare majority provision was uniquely severable because "[f]or nearly seventy years, the bare majority component and the major political party component have been intertwined," or that these provisions will always be severable because, "[o]perating alone," they can be circumvented by, for example, "appoint[ing] a liberal member of

III. Federalism Principles Justify Deference To State And Local Governments' Use Of Partisan-Balance Requirements When Setting Up Their Own Governments.

As this all shows, states and local governments have experimented with partisan-balance requirements and determined that they are useful in certain settings. The decision below treated this like any other case. But this experimentation and the choices it has led to deserve more respect. Federalism principles require more deference when federal courts review other sovereigns' judgments about how to structure their own decision-making processes. *See Gregory*, 501 U.S. at 462.

This Court is familiar enough with the benefits that our federal system provides. A decentralized government is "more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* at 458 (citing Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987)). These federalism values are most relevant where, as here, the structure of government is at issue because "the structure of its government, and the character of those who exercise government authority" is how "a State defines itself as a sovereign." *Id.* at 460.

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the Green Party to a Supreme Court seat when there are already three liberal Democrats on that bench." Pet. App. 34a.

In this context, it would be an error to mechanically apply judicial tiers of scrutiny. *See Williams-Yulee*, 575 U.S. at 457 (Breyer, J., concurring) ("I view this Court's doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied."); *id.* at 443 (majority op.) (referencing *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and suggesting that a lower standard of scrutiny may be appropriate to resolve challenges based on "freedom of political association" rather than freedom of speech). This Court's cases confirm this commonsense conclusion. *See Gregory*, 501 U.S. at 463, 468 (affirming States' "power to define the qualifications of their officeholders" under "less exacting" scrutiny); *Bernal* v. *Fainter*, 467 U.S. 216, 220 (1984) (lowering the standard of review for laws through which states exclude aliens from positions "intimately related to the process of democratic self-government"); *Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) ("[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives.").

Adopting the approach in the decision below, of failing to recognize how federalism concerns weigh in the constitutional analysis will dissuade States from engaging in their "long recognized * * * role * * * as laboratories for devising solutions to difficult legal problems." *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009). If federal courts refuse to honor such "innovation and experimentation," there will be less space for state and local governments to be "sensitive to the diverse needs of a heterogeneous society," and fewer incentives for "those who seek a voice in shaping the destiny of their own times" to shape the law "without having to rely solely upon the political processes that

control a remote central power." *Bond* v. *United States*, 564 U.S. 211, 221 (2011) (internal quotation marks omitted). Delaware's system shows just why this kind of experimentation is so valuable. "Praise for the Delaware judiciary is nearly universal, and it is well deserved." Pet. App. 38a (McKee, J., concurring).

CONCLUSION

For these reasons, this Court should reverse the judgment below.

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