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 FOR FORMER GOVERNORS OF THE STATE OF DELAWARE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

THEODORE N. MIRVIS
Counsel of Record
KEVIN S. SCHWARTZ
DAVID E. KIRK
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1204
tnmirvis@wlrk.com

Counsel for Amici Curiae Former Governors of the State of Delaware

January 28, 2020

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 19-309

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 FOR FORMER GOVERNORS OF THE STATE OF DELAWARE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici Michael Castle, Dale Wolf, Thomas Carper, Ruth Ann Minner, and Jack Markell are the five most recent former Governors of the State of Delaware (1984-2016). Two *amici* are Republicans; three are Democrats. In total across their tenures as Governors,

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, contributed any money to fund the preparation or submission of this brief. All parties have consented in writing or by blanket consent to the filing of this brief.

amici made dozens of cross-party judicial nominations, in which a Republican Governor nominated a Democrat as a judge or vice versa.

Amici nominated judges pursuant to the political balance requirements of the Delaware Constitution. Del. Const. art. IV, § 3. They not only are personally familiar with the constitutional requirements, but also have personal experience with the various political and practical factors that shape the judicial appointment process in Delaware. In particular, as former Governors responsible for judicial appointments, *amici* have unique insight into the partisan considerations that may come into play in the absence of the Delaware Constitution's political balance requirement.

As former Governors of Delaware, *amici* have a substantial interest in ensuring the continued excellence of the State's judiciary. *Amici* believe that the Third Circuit's decision has upended a judicial selection system carefully chosen by the State of Delaware and cultivated for generations. In so doing, *amici* believe that the Third Circuit has removed constitutional protections that are essential to preserving a judicial system that is both nationally significant and vitally important to Delaware's self-governance.

SUMMARY OF ARGUMENT

The Third Circuit's unprecedented expansion of this Court's anti-patronage doctrine to reach the appointment of judges is an overreach that should be reversed. If allowed to stand, the decision below will permanently damage a nonpartisan system that has provided Delaware with an unparalleled judiciary of unique historical and economic importance to the State. Based on their experience as Governors of Delaware, *amici*

submit that Delaware's judicial excellence has been facilitated by the State's constitutional commitment to nonpartisanship, and that the loss of that constitutional promise jeopardizes the character of a judiciary that has been carefully fostered for more than a century. The Third Circuit's ruling also risks fracturing the *de facto* center of the nation's corporate law and wiping away decades of effort in building a cohesive legal framework for corporations across the nation. The ruling also appears to upend judicial selection processes in numerous other states that rely on partisan balancing in their judicial nominating commissions. *See infra* Part I.

Amici submit that the Third Circuit's assumption that judges' roles are limited to deciding cases and controversies overlooks clear policymaking and regulatory functions that Delaware chose to entrust to its courts rather than to administrative agencies. That assumption exposes the far-reaching flaw in the Third Circuit's rationale. If, regardless of the responsibilities of their office, Delaware's politically balanced judges cannot be "policymakers" because they do not reflect the "partisan goals of the party in power," Pet. App. 25a, the same goes for any other politically balanced commission or committee in the nation. *See infra* Part II.

These counterintuitive results of the Third Circuit's decision suggest a deeper issue: *Elrod* and *Branti* are cases designed to address the problem of political patronage; they cannot be sensibly applied to *anti*-patronage measures, such as Delaware's political balance requirement. *See infra* Part III.

ARGUMENT

I. THE THIRD CIRCUIT'S RULING SHOULD BE REVERSED TO PREVENT PERMANENT INJURY TO DELAWARE AND ITS JUDICIARY.

The establishment of judicial qualifications "is a decision of the most fundamental sort for a sovereign entity." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). The Third Circuit's extension of *Elrod* to forbid states from using political balancing requirements in their judicial appointment processes deprives states of that essential decision-making power. And in second-guessing Delaware's chosen method of shaping its judiciary, the ruling jeopardizes a historically independent bench that is critical to the State's sovereign interests. *Amici* write to describe the importance of Delaware's model of judicial independence and the profound harm created by the Third Circuit's disruption of that model.

Delaware's judiciary is a crown jewel of the State. Delaware's courts, and in particular its Court of Chancery, enjoy a reputation of excellence in the nation and around the world. *See* Pet. App. 38a (noting that "[p]raise for the Delaware judiciary is nearly universal, and it is well deserved"). The Court of Chancery's expertise in corporate law is recognized as preeminent in the nation, having been developed over the course of "thousands of opinions interpreting virtually every provision of Delaware's corporate law." 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 (1992). The result is Delaware's sophisticated, specialized bench, its reputation as a fair litigation environment, and its selection as the preferred destination of incorporation.

Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 772 (2009). And while Delaware's judiciary may be most famous for its expertise in corporate law, its independence and thought leadership have proven to be of historical significance to the State and the nation. *See, e.g.*, *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955) (affirming judgment of Delaware Supreme Court; reversing judgments in all other cases below).

Much of this success is owed to Delaware's commitment to the political balance and independence of its judiciary. *Amici* affirmed that truth during the course of their tenures as Governor. In executive orders continuing Delaware's judicial nominating commission, several *amici* (as well as the current Governor) noted that "Delaware has received national recognition for the quality and impartiality of its judiciary" and acknowledged that "this recognition results from the State's long-standing commitment to a bipartisan judiciary composed of judges of high integrity, independence, and excellent legal abilities." *See, e.g.*, Gov. Thomas R. Carper, Exec. Order No. 3 (Mar. 29, 1993); Gov. Ruth Ann Minner, Exec. Order No. 4 (2001); Gov. Jack Markell, Exec. Order No. 4 (Mar. 26, 2009); Gov. John C. Carney, Exec. Order No. 16 (Oct. 18, 2017). This commitment to judicial independence and integrity, manifested in the political balance requirement of Delaware's Constitution and through the voluntary creation of bipartisan judicial nominating commissions, is "one reason that Delaware's courts are the forums of choice for litigants throughout the country." Gov. Ruth Ann Minner, *Opinion: The Delaware Way*, N.Y. TIMES, June 22, 2001, at A20.

The impact of Delaware's constitutional commitment to political balance has been profound. Cross-

party judicial appointments are a rarity in the federal courts. Not so in Delaware. *Amici* themselves were responsible for dozens of cross-party judicial appointments. Through such appointments, Delaware's Governors assess a wider array of judicial candidates, thereby promoting the consideration of diverse ideological perspectives and the selection of the most qualified and competent judges. The first Chief Justice of the Delaware Supreme Court was the result of a cross-party appointment that allowed Governor Carvel to form "one of the finest Supreme Courts in the United States," an accomplishment he considered to be one of his greatest. THE DELAWARE BAR IN THE TWENTIETH CENTURY 373-74 (Helen L. Winslow et al. eds., 1994). With the dangers of judicial partisanship so forcefully mitigated, "it is no surprise that the public perceives Delaware courts as fair arbiters of justice." Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 244 (2009).

That reputation for fairness carries weight not only within the State, but nationally. A recent survey ranked Delaware's state liability system as the best in the nation, coming in first place in several categories, including Trial Judges' Impartiality, Trial Judges' Competence, and Quality of Appellate Review. *See 2019 Lawsuit Climate Survey: Ranking the States*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM 16, 20, 21 (Sept. 18, 2019).[2] This was no one-time recognition: Delaware ranked first in ten of the previous eleven surveys as well. *Id.* at 92.

---

[2] Available at: https://www.instituteforlegalreform.com/uploads/pdfs/2019_Harris_Poll_State_Lawsuit_Climate_Ranking_the_States_Full_Report_with_Questionnaire.pdf.

Amici submit that Delaware's political balance requirement is essential to maintaining the State's judicial independence. Delaware's Constitution has allowed its Governors to shape a uniquely successful nonpartisan judiciary free from the pressures of party politics that otherwise would inevitably arise to impede the faithful balancing of the State's courts. This Court is no stranger to the political reality that judicial appointments are influenced by party politics. *See Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 93 (1990) (Scalia, J., dissenting) (noting that it is and always has been "rare that a federal administration of one party will appoint a judge from another party") (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)); *see also* Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J. L. & PUB. POL'Y 521, 522 (2018) (citing arguments that courts are political institutions and that parties shape the federal judiciary through placements of like-minded judges).

Accounting for these political realities, party considerations in judicial appointments are inevitable, whether mandated by constitutional provision or by party politics. With the political balance requirement, however, the Governor's hands are tied; without it, the Governor's hand is forced. Delaware's constitutional political balance requirement empowers its Governors over time to foster a nonpartisan judiciary consisting of the most suitable candidates from both sides of the aisle, continuing a tradition that has shaped the judiciary's success.

Delaware's political balance requirement protects against the evils of patronage that this Court warned about in the very cases the Third Circuit relied upon in holding the requirement unconstitutional. *See*

Elrod v. *Burns*, 427 U.S. 347, 356 (1976). The requirement is, if anything, an *anti*-patronage measure—one that limits a Governor's ability to fill the courts exclusively with appointees from his or her own party, and that accordingly mitigates the risk that judicial appointments could ever be misused as political favors, tools, or weapons. *See infra* Part III.

The political balance requirement has illuminated a path that Delaware's Governors for generations have followed to maintain an independent, nonpartisan judiciary to serve the State and to serve as a model for the nation. However storied and economically vital Delaware's judiciary may be, without the protection of Delaware's Constitution it is not immune to partisan pressures. Judge McKee's concurrence in the decision below expressed confidence in the "continuation of the bipartisan excellence of Delaware's judiciary" despite the invalidation of the political balance requirement. Pet. App. 41a. But that confidence is only aspirational following the ruling below. Delaware's difference is its unequivocal commitment to restraint promised in and protected by its Constitution. By removing this constitutional commitment, the Third Circuit has opened the door to partisan pressures, and in doing so may have inadvertently shut the door on Delaware's politically balanced judiciary. If the federal courts are any indication, cross-party appointments in the wake of the ruling below will dwindle, if not disappear. And that unfortunate development will portend the loss of a historically successful bipartisan judiciary that is vital to Delaware.

The end of Delaware's guarantee of judicial bipartisanship will be a loss not only for Delaware but for the nation. Litigants in the nation's most important

corporate disputes are drawn to Delaware's nonpartisan, specialized, highly competent judiciary. Delaware's reputation as a venue for fair and efficient corporate dispute resolution is perhaps its most significant selling point as a destination for incorporation, which in turn serves the nation's corporations through the articulation of a single, cohesive body of corporate law. But that is a fragile position. The mere possibility of partisanship in judicial appointments, the loss of a constitutional guarantee of political balance, or the potential for a judiciary that may one day lack the independence and excellence that Delaware's Constitution has fostered for more than 120 years, could lead to a loss of confidence that causes long-term corporate planners to take their business elsewhere. That loss could hinder the development of corporate law and policy for Delaware's corporations through its judiciary, the State's policymaker of choice. *See infra* Part II. Consequently, Delaware would lose "[t]he important coherence-generating benefits" of consistently handling corporate disputes in-state. *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 959 (Del. Ch. 2007); *see also* John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1349 (2012) (recognizing that "the depth and clarity of Delaware corporate law could be compromised if case flow were to shrink").

Worse still, without the draw of Delaware's specialized, nonpartisan judiciary, entities may choose to incorporate in different jurisdictions throughout the country, thereby irreparably fragmenting the nation's currently unified corporate law. The consistency that Delaware furnishes in pronouncing the *de facto* corporate law of the United States has been a significant benefit to American businesses seeking capital in the domestic and international markets. *See* Omari Scott Simmons, *Delaware's Global Threat*, 41 J. CORP. L.

217, 239 (2015) ("Delaware corporate law functions as a common language or *lingua franca* among domestic and foreign firms, investors, bankers, and legal advisors."). Should the articulation of corporate law become scattered across numerous jurisdictions, reconsolidation would be difficult or impossible. The loss of Delaware's status as the center of United States corporate law, anchored by a specialized, nonpartisan judiciary, would harm Delaware-incorporated businesses nationwide. *See id.* at 264 ("Damage to Delaware's global brand could undermine firm value to the extent that equity markets discount for weak or unpredictable governance structures—including courts."). Without the unique benefits offered by Delaware, multinational firms may no longer find value in the "package" of Delaware corporate law and federal securities law offered by incorporating in the United States, *see id.* at 224, and may choose to incorporate in a different country altogether. *See* William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 21-26 (forthcoming 2020) (describing rise in international competition for corporate law). The resulting long-term economic harm will be potent for both Delaware and the nation.

The framework imposed by the Third Circuit also endangers judiciaries beyond Delaware's borders. Delaware and fifteen other states rely on some type of partisan balance in their judicial nominating commissions. *See* Douglas Keith, *Judicial Nominating Commissions*, BRENNAN CENTER FOR JUSTICE 6 (May 29, 2019).[3] The Third Circuit's ruling renders constitutionally suspect the process of nominating judges in those jurisdictions. *See* Pet. Br. 44-45. For example,

[3] Available at: https://www.brennancenter.org/sites/default/files/publications/2019_05_29_JudicialNominationCommissions_Final.pdf.

Delaware's judicial nominating commission includes a maximum of seven members of the same party. *See* Gov. John C. Carney, Exec. Order No. 16, at ¶ 4. And Kentucky's constitution contains a major-party requirement, by which the governor appoints the four non-attorney members to Kentucky's judicial nominating commission, and "these four shall include at least two members of each of the two political parties of the Commonwealth having the largest number of voters." Ky. Const. § 118; *see also* N.M. Const. art. VI, § 35 (appointments to appellate judges nominating commission "shall be made in such manner that each of the two largest major political parties . . . shall be equally represented on the commission"). Absent reversal, the Third Circuit's ruling will improperly interfere with these states' sovereign interests in choosing the structure of their judiciaries.

II. THE THIRD CIRCUIT'S HOLDING IGNORES THE REGULATORY ROLES OF DELAWARE'S JUDICIARY AND OTHER POLITICALLY BALANCED BODIES.

Amici join petitioner in his arguments that members of the judiciary fall squarely within the policymaker exceptions set forth in *Elrod* and *Branti*, as recognized by every other court that has addressed this question. *See* Pet. Br. 28-31. "Judges are lawmakers. . . . That judges act as policymakers in making common law is obviously true." Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of* Schnell v. Chris-Craft, 60 BUS. LAW. 877, 877 (2005) ("*The Implicit Corollary*"). That belief may ring true across many jurisdictions, but *amici* write to show that it is clearly so in Delaware.

Ignoring the undeniable regulatory and policy-making functions that Delaware has entrusted to its judges, the Third Circuit incorrectly treated judges as a monolithic category and erroneously concluded that they were not policymakers. More problematically, by the Third Circuit's reasoning, these regulatory functions could never fit within the *Elrod* policymaker exception, because the role of a *nonpartisan* regulator (whether a judge or not) cannot, as a matter of logic, be "tied to the will of the Governor and his political preferences." Pet. App. 27a. Accordingly, under the ruling below, every commission, agency, or regulatory body appointed pursuant to a political balance requirement, including Delaware's judiciary, is constitutionally deficient. Pet. Br. 44-47.

The Delaware Court of Chancery is the leading corporate law regulator and policymaker in the United States. When creating the Delaware General Corporation Law, the Delaware General Assembly could have chosen to craft an intricately detailed statutory framework spelling out the rights and obligations of corporations and their directors and stockholders. It could have chosen to create a regulatory agency to oversee and approve the actions of boards of directors. The General Assembly chose instead to enact an "enabling statute that provides corporate directors with capacious authority to pursue business advantage by a wide variety of means." Leo E. Strine, Jr., *The Implicit Corollary*, 60 BUS. LAW. at 879. That sparsely detailed statute is silent as to many of the fundamental rights and obligations of stockholders and directors, which are "supplied by judges, performing their traditional roles of making and applying common law." *Id.* Entrusting the judiciary with the creation of corporate law and policy "reflects a policy choice made by the Delaware General Assembly." *Id.* In its

blanket determination that judicial figures cannot be policymakers, the Third Circuit ignored these "characteristics that cause [Delaware's judiciary] to resemble the legislative process." Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1075 (2000); *see id.* at 1079 (noting that the Delaware Supreme Court's decisionmaking process "closely resembles legislative decisionmaking").

Reflective of the Delaware courts' approach is the frequent and intentional deployment of dicta, the importance of which disproves the Third Circuit's restrictive view that Delaware's judges merely decide the cases before them. In their roles as regulators of corporate transactions, "Delaware judges have frequently crafted dicta to give valuable guidance to deal lawyers on unanswered questions." Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 207 (2007) (describing examples of dicta provided to guide transactional planners). This use of dicta "allows Chancery to prospectively regulate fiduciary conduct, without requiring the litigants before it to bear the cost (through retrospective application) of prospective rulemaking. . . . Chancery's use of dicta is thus substantially in the nature of an agency issuing enforcement guidelines." William D. Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 590 (2012). Though issued through judicial opinions, dicta setting out rules for transactions not yet undertaken or situations not yet contemplated is a clear departure from the artificially narrow view of Delaware's courts that the Third Circuit espoused.

Other aspects of the Court of Chancery are administrative in nature. Without the need for a live

controversy, the Court of Chancery may hear applications to validate defective corporate acts, order the Delaware Secretary of State to accept the filing of certain instruments, declare stock issuances to be effective, and order the holding of stockholder meetings or director elections. Del. Code tit. 8, §§ 205(b); 211(c); 215(d); *see, e.g.*, Order Granting Baxter International Inc.'s Motion for an Order Under Section 205, *In re Baxter Int'l Inc.*, C.A. No. 11609-CB (Del. Ch. June 22, 2016) (declaring valid unopposed application to amend certificate of incorporation). Delaware could have delegated non-adversarial administrative functions to a corporate administrative authority—Delaware's decision to entrust some of those functions to the Court of Chancery does not transform them into "cases and controversies."

So too is the specialized jurisdiction of the Delaware Supreme Court to determine questions of law certified to it by the United States Securities and Exchange Commission. Del. Const. art. IV, § 11(8). Through that procedure, the Division of Corporation Finance of the Securities and Exchange Commission has certified questions of Delaware corporate law to inform the Division's regulatory decisions—in a context lacking any underlying litigation, in Delaware or elsewhere. *See* Securities and Exchange Commission, Certification of Questions of Law Arising from Rule 14a-8 Proposal by Shareholder of CA, Inc. (June 27, 2008); *see also* John W. White, Director, Div. of Corp. Fin., Address at the American Bar Association, Section of Business Law, Committee on Federal Regulation of Securities: Corporation Finance in 2008—A Year of Progress (Aug. 11, 2008) (describing certification process as a "very useful tool to have available to the Corp Fin staff as we review the hundreds of no-action requests we receive each year on shareholder proposals").

As these examples make clear, Delaware's judges are *the* policymakers with respect to the State's (and indirectly the nation's) corporation law. Even were the Third Circuit correct that judges elsewhere serve only as referees of adversarial proceedings, that rubric does not fit Delaware.

If the broad responsibilities of Delaware's judiciary fail to fit the role required of a "policymaker" under *Elrod*, then it is difficult to see how any politically balanced commission, including the Delaware courts' regulatory counterparts at the Securities and Exchange Commission, could satisfy the test. By definition, the politically balanced members of any such commission do not make policies that "necessarily reflect the political will and partisan goals of the party in power." Pet. App. 25a. That is the core holding and the core problem of the decision below. The Third Circuit did not conclude that judges do not make policy; it concluded that judges appointed pursuant to a political balance requirement do not "creat[e] partisan agendas that reflect the interests of the parties to which they belong." *Id.* 25a-26a. No politically balanced commission or committee—judicial or otherwise—will pass muster under that rationale.[4] Absent reversal, the eventual result of that overreach will be the dismantling not only of Delaware's independent judiciary, but of myriad

[4] Judge Easterbrook's opinion for the Seventh Circuit recognized the impossibility of such a standard, noting that *Elrod* and *Branti* could not "turn on the relation between the job in question and the implementation of the appointing officer's policies," which would prevent a Governor from considering a prospective judge's politics at all, and would likewise prevent the President from considering the political views of a prospective appointee to the Federal Trade Commission. *Kurowski* v. *Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988).

independent regulatory authorities on which the nation depends.

III. THE PATRONAGE CASES OF *ELROD*, *BRANTI*, AND *RUTAN* SHOULD NOT BE APPLIED TO ANTI-PATRONAGE JUDICIAL POLITICAL BALANCE MEASURES.

From the perspective of *amici*, there is a disconnect in determining the constitutionality of Delaware's political balance requirement for judicial appointments by reference to the "policymaking" exception recognized by a plurality of this Court in *Elrod*. Applying the "policymaking" exception in the manner of the court below would perversely threaten to inject politics into judicial selection—the very sort of "patronage" impact that this Court's decisions have sought to protect against. *See* Pet. Br. 30.

The "policymaking" exception was an escape valve to the *Elrod* plurality's effort to protect First Amendment interests from "political patronage"—there, the Cook County Sheriff's practice of "dismissing public employees for partisan reasons." *Elrod*, 427 U.S. at 353. The opinion traced patronage back to the presidency of Thomas Jefferson and its ascendancy under Andrew Jackson, and noted patronage's "significant role in the Nazi rise to power in Germany and other totalitarian states." *Id.* The opinion focused on "patronage dismissals" on a broad scale as "but one form of the general practice of political patronage"—buttressed by the observation that as government employment becomes "more pervasive," "the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise." *Id.* at 353-56. The plurality viewed the evil of "political patronage" as so great as to "tip[] the

electoral process in favor of the incumbent party." *Id.* at 356.

Those concerns seem inapt in important ways to the political balance requirement at issue here. Political partisanship or patronage is not furthered by Delaware's political balance provisions. The opposite is the case. Those provisions insulate judicial selections from political pressures. They free Delaware's Governors and legislature from any possibility of politics playing a central role in judicial appointments. Judicial appointments are for a fixed number of years (12), and so there is no danger of long-term entrenchment of any political viewpoint. No widespread or wholesale employment discharge is at stake. There is no danger of any individual being made to contribute financially or otherwise to an "incumbent party" on pain of suffering a "patronage dismissal," and no occasion to worry that "the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties"—the concerns that underlay the *Elrod* plurality's view of patronage dismissals as constraining an individual's ability "to associate with others of his political persuasion." *Id.* at 355-56. If anything, Delaware's political balance requirement frees prospective judicial candidates from the need to "associate" with the party in power in order to be considered.

The same inaptness comes through in considering the dissenting opinion in *Elrod*. The dissent rested in important part on the view that "patronage hiring practices have contributed to American democracy by stimulating political activity and by strengthening parties"—and pointed in particular to the "vital" goal of enlarging public participation in the electoral process, as well as the view that "patronage hiring" is

"peculiarly important for minority groups" in that "[e]ach first appointment given a member of any underdog element is a boost in that element's struggle for social acceptance." *Id.* at 382 & n.6 (Powell, J., dissenting). The dissent invoked the need of "lesser offices" of government (there, of the sheriff) to "dispense the traditional patronage" in order "to attract donations of time or money." *Id.* at 384. Whatever the merits of the plurality-dissent divide, the very nature of that debate suggests how far removed that analysis, pro or con, lies from the present question of the political balance requirements applicable to the small in number but vital in importance judicial positions on the key Delaware courts.

Much the same is true as to this Court's application of *Elrod* in *Branti* v. *Finkel*, 445 U.S. 507 (1980). *Branti* restated the "policymaking" question as "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. That formulation allows for a divide based on whether one's work "relate[s]" to concerns (there, the needs of individual clients being represented by public defenders) other than "any partisan political interests." *Id.* at 519. But that formulation also distances the test from the "patronage" concerns that animated *Elrod*. If one's work is not impacted by "partisan political interests," there would seem to be little danger that the identified evils of patronage would come into play in either discharge or hiring decisions. In the present circumstance, it is not apparent how one could sensibly contend that Delaware's political balance provisions applicable to three key courts (with some 33 judicial positions in total) serve to further the evils of "political patronage" identified by the plurality in *Elrod*. And as applied to judicial positions, there is

much force in the simple point that requiring political balance serves the obvious goal of enhancing respect for the rule of law and avoids the far graver danger to that respect were all judges of the same political party or from the same side of political spectrum—regardless of the political affiliation of the incumbent Governor or the passing majority of the legislature.

From another angle, the Delaware political balance provisions do not make judicial appointments dependent on a candidate's "affiliation and support" of one of the two major political parties versus the other. *Rutan*, 497 U.S. at 65.[5] Requiring political balance does the opposite. It makes certain that political candidates from both parties will be considered, and appointed, regardless of the party in power. It ensures that judicial positions will *never* be subject to the cynical proposition that "[t]o the victor" belong the "spoils." *Id.* at 64. At the same time, the requirement that all judicial positions be filled from one of the two major political parties adds the additional protection that the "victor" party will not manipulate the "bare majority" provision by appointing persons associated with other "non-major" parties aligned with the "victor" party's views or registered independents holding the

[5] *Rutan* applied *Elrod* and *Branti* to "promotion, transfer, recall, and hiring decisions involving low-level public employees," involving approximately 60,000 state positions. 497 U.S. at 65. *Rutan* noted that *Elrod* had involved the replacement of "certain office staff," *id.* at 68, and extended its jurisprudence to "patronage hiring" by reference to the "valuable" nature of state employment, highlighting the fact that there are "occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards." *Id*. at 77.

same views—as the opinion below acknowledges. *See* Pet. App. 34a; Pet. Br. 42-44.

Taken together, *Elrod* and *Branti* bring into sharp relief the question whether the tests advanced there to protect against "patronage dismissals" across the government workforce should be utilized as the measure of the constitutionality of political balance provisions applicable to judges appointed by a Governor, subject to legislative approval, each for a fixed number of years. It is one thing to assess whether government employees as a large and generalized group are "policymaking." That test can be applied, albeit not without difficulty, to sheriff office employees, as in *Elrod*, or to assistant public defenders, as in *Branti*.

The two Courts of Appeals decisions that conflict with the decision below well illustrate the difficulty in applying the *Elrod*/*Branti* "policymaking"/"effective performance" test to judges. The court in *Kurowski* reasoned that *Elrod* and *Branti* did not turn on whether a job entailed implementing the appointing officer's policies, and that they accordingly allowed politically-based dismissals "when the office involves making on the state's behalf the sort of decisions about which there are political debates." 848 F.2d at 770. The court concluded that a judge "both makes and implements governmental policy" since "political debates rage" about issues such as suspicion of police and leniency in sentencing. *Id.* The court in *Newman* v. *Voinovich* noted that *Kurowski* allowed consideration of political affiliation notwithstanding that "judges must be non-partisan decisionmakers," and agreed with *Kurowski* that "judges are policymakers because their political beliefs influence and dictate

their decisions on important jurisprudential matters." 986 F.2d 159, 162-63 (6th Cir. 1993).[6]

In contrast, the opinion below listed various "criteria" to aid in that court's application of *Elrod*/*Branti*, including the "key factor" of whether the employee "has meaningful input into decisionmaking concerning the nature and scope of a major program." Pet. App. 22a. The court found it "clear" that judges were not policymakers because the applicable ABA and Delaware Codes of Judicial Conduct eschewed partisanship, and because the very political balance requirements at issue could require a Governor to nominate judges belonging to a different party. Pet. App. 23a-25a.

---

[6] A concurring opinion in *Newman* further dilated on the difficulties of applying the "policymaker" test to judicial appointments:

> Judicial appointments present an interesting twist on that analysis. For example, while a judge may be a "policymaker" in a broad sense, a judge is not a "policymaker" for the appointing governor. Rather, the judiciary is an independent arm of the government, unconnected by oath or duty to the governor's office or political party. Once appointed, a judge does not and should not answer to a governor's directives or opinions. Therefore, the link between an appointee judge and the appointing governor is fundamentally different from the link between a governor and other gubernatorial appointees who are appointed to fulfill the political or policy objectives of a governor.

Id. at 164 (Jones, J., concurring). The concurrence nonetheless joined in the holding that the governor could fill interim judgeships solely with members of his party, reasoning that "a judge does create a particular brand of governmental policy" since judges are "influenced by an infinite number of factors." *Id*. at 165. *See also id*. at 166 (likening the appointment practice upheld to Tammany Hall).

In this regard, it is notable that the opinion below, in the course of rejecting the argument that Delaware judges fit within the "policymaking" exception, reset the *Elrod*/*Branti* test in rather stark terms: "But the question before us is not whether judges make policy, it is whether they make policies that necessarily reflect the political will and partisan goals of the party in power." Pet. App. 25a (footnote omitted). The posited distinction between "policymaking" and partisanship obedience distorts the concept of the exception and re-tailors it to strike down any political requirement applicable to judges. Of course, judges ought not be viewed as obliged to obey the "political will and partisan goals" of any party. But it would be odd indeed if that fundamental truth led to the conclusion that a long-standing state constitutional political *balance* requirement violated the First Amendment.[7]

Judges are different. Judges dispense justice to litigants. Judges are the face of government to litigants. Respect for their integrity, and *non*-partisanship, is essential to their role. A transparent political balance requirement furthers that vital interest, and removes the danger of political pressures producing a judiciary that is overly weighted to the political party that happens to be in power when judicial appointments arise. The Delaware political balance provisions cannot fairly be viewed as any form of "patronage" of the sort confronted in *Elrod* and *Branti*. Subjecting those provisions to a scrutiny intended to cabin patronage as a bulwark to protect First Amendment

---

[7] *See also Rutan*, 497 U.S. at 92-93 (Scalia, J., dissenting) ("[I]f there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable.").

interests seems inappropriate. Testing the constitutionality of balance provisions by the litmus of whether or not judgeships are "policymaking positions" (*Elrod*, 427 U.S. at 367), or whether "party affiliation is an appropriate requirement for the effective performance of the public office involved" (*Branti*, 445 U.S. at 518) misses the special role the judiciary plays in government and society—the one place that should, indeed must, be *non*-partisan, in both appearance and reality, in order to effectively perform the judicial function: to provide justice without regard to party affiliation. And providing for balance between the two major political parties in judicial appointments complements that salutary goal by ensuring that litigants will have their matters adjudicated by courts populated with judges from both sides of the political mainstream.

There is little need for concern about the required selection of judges from persons affiliated with either of the two major political parties. In so cabining the Governor's choices, that requirement provides comfort to the citizenry of the State that judges will be associated with the political mainstream—the middle of the fairway, so to speak—regardless of the then-occupant of the Governor's position. There is nothing suspect about such a requirement. It is not insidious in the least. It is not discriminatory. It is, to the contrary, broadly inclusive. It ensures that regardless of the political affiliation or political views of the State's chief executive, the judiciary will remain balanced. It wards off excessive partisanship in the courts, while serving the compelling need of advancing broad public respect for and confidence in the judiciary.

The opinion below did not consider the threshold question whether, in the case of a judicial political balance requirement, the "*Elrod*/*Branti* inquiry" should

be applied at all. Pet. App. 19a. This Court has never applied *Elrod*/*Branti* scrutiny in those distinct circumstances. Respectfully, this Court's assessment of that question would be a welcome development. There is no cause for applying that scrutiny—borne of a desire to protect governmental employees from wholesale dismissal on "political patronage" grounds—to the carefully balanced appointment of judges under the Delaware Constitution.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

THEODORE N. MIRVIS
Counsel of Record
KEVIN S. SCHWARTZ
DAVID E. KIRK
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1204
tnmirvis@wlrk.com

Counsel for Amici Curiae Former Governors of the State of Delaware

January 28, 2020