No. 19-309

IN THE

Supreme Court of the United States

JOHN C. CARNEY, GOVERNOR OF DELAWARE,

Petitioner,

v.

JAMES R. ADAMS,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1949, *amicus curiae* Conference of Chief Justices (the "Conference") enables the highest judicial officers of U.S. states and territories to discuss important matters of common interest, including improvement of the administration of justice, rules and methods of procedure, rules of legal and judicial ethics, and the organization and operation of state courts and judicial systems. The Conference is comprised of the Chief Justices or Chief Judges of the courts of last resort in all fifty states, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands. For over 60 years, the Conference has been a leading national voice on important issues concerning the administration of justice in state courts.

The Conference files this brief pursuant to a policy unanimously approved by the Conference's Board of Directors. The policy authorizes the filing of a brief if critical interests of state courts are at stake, as they are in this case. Pursuant to the Conference's policy, this brief has been reviewed and approved by a special committee of the Conference composed of the current or former Chief Justices of North Dakota, Texas, Utah, Indiana, North Carolina, New Jersey, and Pennsylvania.

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1. No counsel for either party authored this brief in whole or in part. No person or entity, other than *amicus curiae* or its counsel, contributed to the preparation or submission of this brief. Both petitioner and respondent consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Conference submits this brief to provide its perspective on two issues at the center of this case.

The first is the import of a State's sovereign right to choose a method of structuring its judiciary in the manner which it believes will best foster public confidence in the fair and impartial nature of its judges. The Constitution was designed on the theory that the division of authority between a more remote federal polity and a more directly responsive state government would increase liberty and accountability of government to the People. The interest in preserving this division is at its zenith when applied to the structure of state government and the manner in which the people serving in that government are chosen. States are permitted to design their structures in a way that maximizes the public's belief in the impartiality of those wielding judicial power. Thus, the Court should approach the Delaware constitutional provision at issue with considerable deference in favor of state autonomy and sovereignty.

The second issue is the status of judges as "policymakers," whose ability to serve in government is outside First Amendment limitations on the consideration of political affiliation as a qualification. Judges engage in a wide variety of tasks that make policy, from interpreting statutes and constitutions, to developing non-statutory common law, to setting judicial management policies, which affect both the judiciary and the public, and to regulating the ethical conduct of lawyers, judicial officers, and non-judge employees of the judicial branch. The Third Circuit's decision gave inadequate attention to these roles and largely focused on the requirement of impartiality as

demonstrating that judges are not policymakers. But that impartiality does not alter the reality that judges make law, and therefore make policy, in a variety of ways.

ARGUMENT

I. AT THE HEART OF A STATE'S SOVEREIGNTY IS ITS CHOSEN METHODOLOGY OF JUDICIAL SELECTION.

This Court has repeatedly acknowledged that the structure of federalism "'contemplates that a State's government will represent and remain accountable to its own citizens.'" *Alden* v. *Maine*, 527 U.S. 706, 751 (1999) (quoting *Printz* v. *United States*, 521 U.S. 898, 920 (1997)). "[B]ecause the Framers recognized that state power and identity were essential parts of the federal balance, see The Federalist No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring).

The architecture of this federal system, and its preservation, were as important to the Framers as anything else in the federal Constitution. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White*, 79 U.S. (7 Wall.) 700, 725 (1869). "The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves,

and second by protecting the people, from whom all governmental powers are derived." *Bond* v. *United States*, 564 U.S. 211, 221 (2011); see *New York* v. *United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 756 (1991) (Blackmun, J., dissenting)) ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.").

"The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Bond*, 564 U.S. at 221. Adopted by the Framers as a bulwark against federal encroachment upon state sovereignty and individual rights, the Tenth Amendment reinforces this design, and requires that whatever governmental authority is neither delegated by the Constitution to the federal government "nor prohibited by it to the States" must be "reserved to the States respectively, or to the People." U.S. Const. Amend. X. In short, "[t]he Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Murphy* v. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) (quoting The Federalist No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961)).

Fundamental to the preservation — and, indeed, the viability — of that guarantee of state sovereignty is the ability of each State to choose "the structure of its government, and the character of those who exercise government authority." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991); *Bond*, 564 U.S. at 221 ("Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the

political processes that control a remote central power."). To that end, "[e]ach state has the power to prescribe the qualifications of its officers, and the manner in which they shall be chosen." *Boyd* v. *Nebraska*, 143 U.S. 135, 161 (1892). "And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973).

Just as a State, as an ensign of its sovereignty, "may regulate at pleasure the modes of proceeding in its courts," *Bronson* v. *Kinzie*, 42 U.S. (1 How.) 311, 315 (1843), its authority to determine the qualifications of its government officials "lies at the heart of representative government" and as such is "reserved to the states under the Tenth Amendment and guaranteed them by [the Guarantee Clause]." *Gregory*, 501 U.S. at 463 (citing U.S. Const. Art. IV, § 4 and *Sugarman*, 413 U.S. at 648).

A vital part of "defining itself as a sovereign," *id.* at 460, — determining who may exercise governmental authority — is the autonomy to choose the method by which it selects its judges. Judicial review, both as a matter of history and as a mainstay of American society that de Tocqueville found so remarkable,[2] is simultaneously an awesome power and an awesome responsibility. The ultimate guardian of liberty and individual rights, it encompasses the authority to invalidate the acts of officials

2. See, *e.g.*, Alexis de Tocqueville, 1 *Democracy in America* 280 (1945 ed.).

of the other two branches of government and the ability to annul duly enacted laws.

Given these prerogatives, States are entitled to design their judicial systems in ways that maximize public confidence in the impartiality and integrity of those exercising judicial power. "The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (quotation omitted); *Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433, 445–46 (2015) (because "the judiciary "has no influence over either the sword or the purse,'" its authority "depends in large measure on the public's willingness to respect and follow its decisions") (quoting THE FEDERALIST No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961)).

Some States employ judicial election, whether partisan or non-partisan, as a means of filling their judiciaries; others, like Delaware, use an appointment system. See *Williams-Yulee*, 575 U.S. at 456–57. In either case, States are permitted to enact measures to reduce the role and influence of partisan politics related to the judicial branch and, in particular, on the performance of judicial duties, "because the role of judges differs from the role of politicians." *Id.* at 446–47.

In pursuit of these laudable goals and in response to its own, idiosyncratic history, Delaware designed an appointive system featuring a mandatory partisan balance in the ranks of the judiciary to avoid overcrowding judicial positions by the political branches as the spoils of victory in a particular election. Del. Const. art. IV, § 3 thus mandates that no more than a "bare majority" of judges

may belong to any one political party. The purpose of this provision, which has served Delaware admirably for over a century, is to achieve political balance and preserve the public's confidence in, and the integrity of, the courts.

Delaware has thus chosen a different path from those other states in which judicial selection is accomplished by overtly partisan methods. See *Republican Party of Minnesota* v. *White*, 536 U.S. 765, 790–91 (2002) (O'Connor, J., concurring) (describing the evolution of methods of judicial selection in the United States). For example, six States choose the judges of their courts of last resort through partisan elections,[3] where voters are clearly informed of each candidate's political party affiliation. Two States (South Carolina and Virginia) reach the same result indirectly by legislative selection of the justices, so that successful candidates for judicial office must obtain the support of the majority party. Like Delaware, nine other States (Connecticut, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont) are strictly appointive regimes. The other major approach is the "Missouri Plan" — also referred to as "merit selection" or "merit/retention" systems — a hybrid in which an independent nominating commission (similar to that used in the majority of purely appointive jurisdictions) presents a binding list of potential nominees to the governor, whose choice is limited to those named on the list, and thereafter judges so selected must, if they wish additional terms of judicial office, stand for retention

3. Contested elections take place in 22 States. Six of these (Alabama, Illinois, Louisiana, North Carolina, Pennsylvania, and Texas) have partisan elections, and 15 (Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, West Virginia, and Wisconsin) hold nonpartisan elections.

elections (a binary "Yes" or "No" vote with no opposing candidates).

Thus, as in Justice Brandeis's oft-quoted dictum, the States truly have served, when it comes to judicial selection, as laboratories for trying "novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This is at the core of what the Tenth Amendment protects.[4] Proper respect for Tenth Amendment principles would allow the States to choose the method of judicial selection — so long as it is not overtly discriminatory on certain, though not all,[5]

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4. Cf. *EEOC* v. *Wyoming*, 460 U.S. 226, 264 (1983) (Burger, C.J., with Powell, Rehnquist, and O'Connor, JJ., dissenting) (expressly linking Tenth Amendment values with Justice Brandeis's "states as laboratories" concept); *FERC* v. *Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., with Burger, C.J. and Rehnquist, J., dissenting) (linking discussion of Tenth Amendment federalism values to state laboratory function).

5. Cf. *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (upholding a State's mandatory retirement age for judges against a challenge under the Age Discrimination in Employment Act). Political party affiliation is likewise not a prohibited category. It is well-settled, in both the state and federal systems of judicial selection, that politics may permissibly play a role. Nowhere is this more obvious than in states in which judges run for election, though even the appointive system for Article III judges, requiring advice and consent of the U.S. Senate, is a palpably political process. See, *e.g.*, Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 Ohio St. L.J. 221, 226–41 (2003).

Indeed, this Court has held that political parties have the right under the First Amendment right of association to advance the candidates of their choice. *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000). The Court has also upheld the system for selecting judges of the trial level court in New York (the New

federally proscribed bases (*e.g.*, race, ethnicity, religion, sex) — that best serves their respective polities. "The federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond*, 564 U.S. at 221 (quoting *Gregory*, 501 U.S. at 458).

Delaware is not alone in its policy of promoting political balance as a means of avoiding excessive partisan influence in government. There are myriad examples of commissions, agencies, and boards across federal, state, and local government that employ political balance requirements:

- The majority of independent federal agencies "limit[] the number of appointed members who may belong to the same political party, usually to no more than a bare majority of the appointed members."[6]

- Judicial selection in the States is a complex tapestry and continues to be a source of discussion and debate in many jurisdictions. Even within an individual State, there can be differences in the

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York Supreme Court) against a challenge that local party officials exercised undue control over who could appear on the ballot. See *N.Y. State Bd. Of Elections* v. *Lopez Torres,* 552 U.S. 196 (2008).

6. See Congressional Research Service, Jared D. Nagel & Michael F. Greene, *Presidential Appointments to Full-Time Positions on Regulatory and Other Collegial Boards and Commissions During the 114th Congress* 3 (Nov. 28, 2017), *available at* https://fas.org/sgp/crs/misc/R45028.pdf.

methodology used for judicial selection in trial courts, intermediate appellate courts, and courts of last resort. Focusing on the latter, at present, a majority of U.S. jurisdictions (34 States and the District of Columbia) have mandated the use of judicial nominating commissions as part of their selection process; of these jurisdictions, 27 do so via a constitutional or statutory provision (or both), and eight (one of which is Delaware) do so by gubernatorial Executive Order.[7] Sixteen

7. See Alaska Const. art. IV, §§ 5, 8; Ariz. Const. art. VI, §§ 36, 37; Colo. Const. art. VI, §§ 20(1), 24; Conn. Const. art. V, § 2 & Conn. Gen. Stat. § 51-44a; Del. Exec. Order No. 7 (Mar. 9, 2017), *available at* http://governor.delaware.gov/ executive-orders/ eo07/; D.C. Code § 1-204.34; Fla. Const. art. V, § 11(a) & Fla. Stat. Ann. § 43.291; Ga. Exec. Order (Feb. 7, 2019), *available at* https://gov.georgia.gov/executive-action/executive-orders-0/2019-executive-orders; Haw. Const. art. VI, § 4; Idaho Code §1-2101; Ind. Const. art. VII, § 9 & Ind. Code § 33-27-2 *et seq.*; Iowa Const. art. V, §§ 15 & 16; Iowa Code § 46.1 *et seq.*; Kan. Const. art. III, §§ 5(d)–(g) & Kan. Stat. Ann. § 20-119 *et seq.*; Ky. Const. § 118; Maine Exec. Order No. 2015-003 (Mar. 3, 2015), *available at* https://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=639063&v=article2011; Md. Exec. Order No. 01.01.2015.09 (Feb. 3, 2015), *available at* https://governor.maryland.gov/wp-content/uploads/2015/02/EO0101201509.pdf; Mass. Exec. Order No. 566 (Feb. 10, 2016), *available at* https://www.mass.gov/executive-orders/no-566-order-constituting-the-supreme-judicial-court-nominating-commission; Mo. Const. art. V, §§ 25(a), (d); Mont. Const. art. VII, § 8 & Mont. Code Ann. § 3-1-1001 *et seq.*; Neb. Const. art. V, § 21(4) & Neb. Rev. Stat. § 24-801.01 *et seq.*; Nev. Const. art. VI, § 20 & Nev. Rev. Stat. §§ 1.380–1.410; N.H. Exec. Order No. 2017-01 (Feb. 6, 2017), *available at* https://sos.nh.gov/nhsos_content.aspx?id=8589967037; N.M. Const. art. VI, § 35; N.Y. Const. art. VI, § 2 & N.Y. Jud. Law § 61 *et seq.*; N.D. Const. art. VI, § 13(1) & N.D. Cent. Code § 27-25-02 *et seq.*; Okla. Const. art. VII-B, § 3; R.I. Const. art. X, § 4 & R.I. Gen. Laws § 8-16.1-2 *et seq.*; S.C. Const. art. V, § 27 &

of these States require, by various means, some level of partisan balance on these judicial nominating commissions,[8] but none of them requires representation by independents or members of political parties other than the two principal parties. The objective is to assure that no one political party will dominate the judicial selection process.

- Likewise, "as a means to curtail partisan gerrymandering," a number of States have "provided for the participation of commissions in redistricting," and "given nonpartisan or bipartisan commissions binding authority over redistricting." *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2662 (2015). These regimes often cap the number of members of a single party who can serve on the commission.[9]

S.C. Code Ann. § 2-19-10; S.D. Const. art. V, § 7 & S.D. Codified Laws § 16-1A-2 *et seq.*; Tenn. Exec. Order No. 54 (May 17, 2016), *available at* https://publications.tnsosfiles.com/pub/execorders/exec-orders-haslam54.pdf; Utah Const. art. VIII, § 8 & Utah Code Ann. § 78A-10-201 *et seq.*; Vt. Const. ch. II, §§ 32–33 & Vt. Stat. Ann. tit. 4, § 601; W. Va. Code § 3-10-3a; Wisc. Exec. Order No. 29 (May 11, 2011), *available at* https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2011-29.pdf; Wyo. Const. art. V, § 4 & Wyo. Stat. Ann. § 5-1-102.

8. New Mexico, for example, mandates that appointments to its nominating commissions "be made in such manner that each of the two largest major political parties, as defined by the Election Code, shall be equally represented on the commission." N.M. Const. art. VI, §§ 35, 36.

9. See Common Cause, Independent and Advisory Citizen Redistricting Commissions (online report, undated), *available at* https://www.commoncause.org/independent-redistricting-commissions/.

In evaluating the Delaware Constitution provision at issue in this case, the Court should, as *Gregory* teaches, defer to the States' sovereign interests in choosing the methodology by which their judicial officers are selected. See *Williams-Yulee*, 575 U.S. at 454 (a State's "considered judgments" regarding what is "necessary to preserve public confidence in the integrity of the judiciary . . . . deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance").

II. THE THIRD CIRCUIT ERRED IN HOLDING THAT JUDGES ARE NOT "POLICYMAKERS."

The court below, in construing this Court's decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), failed fully to appreciate the policymaking role that judges have played in our common law system for centuries and therefore did not grasp the relationship of that role to Delaware's efforts to attain political balance via the "bare majority" limitation in the State constitution.[10]

To be sure, the "policymaking" function of the judiciary is often misunderstood. See Brief for Professors

10. The context of this challenge is worth noting. The purpose of the *Elrod-Branti* line of cases was substantially to limit the spoils system of political patronage, the effect of which was to politicize what are, in truth, non-political government jobs. As even the Third Circuit recognized, the challenged Delaware constitutional provision here sought to achieve the antithesis: to "enable judges to remain free from political cronyism and partisanship." Pet. App. 4a. Applying *Elrod-Branti* to a system with such a purpose seems counterintuitive, to say the least.

as *Amici Curiae* in Support of Pet. for Cert. 8–11 (discussing the misnomers associated with "policy"-related terminology). Certainly, "the role of judges differs from the role of politicians," because the former are expected to be "'perfectly and completely independent,'" while the latter "are expected to be appropriately responsive to the preferences of their supporters." *Williams-Yulee*, 575 U.S. at 446–47 (citation omitted). Nonetheless, it is undeniable that judges partake in at least some level of the creation and shaping of law. This is particularly true of state judiciaries, where the accretive, common law process is very much alive and well. "Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well." *Republican Party of Minnesota*, 536 U.S. at 784; *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law.").[11]

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11. Cf. *Hagan* v. *Quinn*, 867 F.3d 816, 827–28 (7th Cir. 2017) (concluding arbitrators, like judges, "occupy policymaking roles" because they "shape the direction of policy" through the exercise of discretion in adjudicating disputes to a resolution and citing cases in support); Oliver Wendell Holmes, Jr., *The Common Law* 35–36 (1881) ("Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy"). See also Pet. for Cert. 18–21 (offering examples of ways in which Delaware judges make and shape policy); Brief of Professors as *Amici Curiae* in Support of Pet. for Cert. 8–14, 14–16) (same); Brief of Former Governors of the State of Delaware as *Amici Curiae* in Support of Pet. for Cert. 12–16 (same).

In holding that judges are not policymakers, the Third Circuit focused upon the fact that judges are required by law to be independent, rather than politically allegiant. Pet. App. 23a–24a. To be sure, any "policymaking" role undertaken by a judge is guided first and foremost by impartial compliance with the law and the code of judicial conduct, but that imperative of basic fairness, which traces its lineage back to Magna Carta, does not vitiate the judicial policymaking role.

Animating that role is the common law heritage. Common law is defined as "[t]he body of *law derived from judicial decisions* rather than from statutes or constitutions." Black's Dictionary at 345 (11th ed. 2019) (emphasis added). Similarly, a common-law rule is "[*a*] *judge-made rule* as opposed to a statutory one." *Ibid.* (emphasis added). One scholar describes the common law as, essentially, a judge-perpetuated progression, stating:

> Common law reasoning depends, fundamentally, on interpreting the past in light of the present. As judges attempt to resolve present disputes, they apply the precedent of the past to guide, explain, and justify the outcomes that they reach. Subsequently, the decisions that judges write go on to become precedent for future judges to refer to and cite.

Ryan Whalen, Brian Uzzi, and Satyam Mukherjee, *Common Law Evolution and Judicial Impact in the Age of Information*, 9 Elon L. Rev. 1, 115, 118 (2017).

Furthermore, state court judges, like their federal counterparts, perform a quasi-legislative function

in the promulgation and amendment of a variety of rules governing the operation of the courts, including rules of civil, criminal, and appellate procedure and rules of evidence. Beyond cavil, these, like enactments of the legislative branch, exemplify the exercise of a policymaking function.

State judges are likewise responsible for the promulgation of codes of conduct affecting both judges and other judicial branch employees, as well as disciplinary procedures for violation of those codes. These are also legislative in nature and frequently supplant earlier legislative forays into regulation in these areas.[12] Finally, each state court of last resort is responsible for the creation of rules and professional conduct governing the legal profession and oversight of disciplinary procedures, and they are also responsible for the promulgation of standards for admission to the bar and the licensing of other professionals who provide more limited legal services to their corporate employers (including the licensing of foreign lawyers) or to the public.

12. For example, a number of state courts have held that, under the separations of powers principles of their respective constitutions, the legislative and executive branches are forbidden from intruding upon the regulatory prerogatives of the judicial branch. See, *e.g.*, *Beyers* v. *Richmond*, 937 A.2d 1082, 1089 (Pa. 2007) ("Any legislative enactment encroaching upon this Court's exclusive power to regulate attorney conduct would be unconstitutional."); *State ex rel. Fiedler* v. *Wisconsin Senate*, 454 N.W.2d 770, 774 (Wisc. 1990) (holding that statute unconstitutionally impinged upon "the judiciary's inherent and exclusive authority to regulate the practice of law").

In short, judges are policymaking officials of government, even if their primary "policymaking" function is circumscribed to the incremental development of the law through written decisions.

CONCLUSION

The Conference of Chief Justices requests that this Court reaffirm the deference to a State's sovereign right to choose the method of selecting its judges and clarify that judicial officers are "policymakers" within the meaning of the *Elrod-Branti* line of cases.

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