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

Corrected *Amicus Curiae* Brief of the Republican National Committee in Support of Petitioner

Justin Riemer
Christopher White
Republican National Committee
310 1st Street SE
Washington, DC 20003
(202) 863-8626

Patrick T. Lewis
Baker & Hostetler LLP
Key Tower
127 Public Square
Suite 2000
Cleveland, OH 44114
(216) 861-7096

Richard B. Raile
Counsel of Record
E. Mark Braden
Katherine L. McKnight
Trevor M. Stanley
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, DC 20036
(202) 861-1711
rraile@bakerlaw.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Does the First Amendment prevent Delaware from regulating the discretion its political branches exercise over the judicial-appointment process, even though it plainly does not prohibit state (or federal) officers from appointing or rejecting judicial candidates on the basis of their protected speech and association?

2. Does a plaintiff have standing to challenge judicial eligibility requirements that may not prevent him from obtaining a seat, in the hope of an injunction that would do nothing to assure him of even being considered for an appointment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

OTHER AUTHORITIES

INTEREST OF THE AMICUS

The Republican National Committee ("RNC") manages the Republican Party's business at the national level, supports Republican candidates for offices of all types, coordinates fundraising and election strategy, and develops and promotes the national Republican platform. The RNC has a vital interest in laws governing nominations and appointments to the highest state and federal offices. Major political parties play a central role in these processes by nominating candidates to office and providing a critical layer of quality-control vetting by officials with a vested interest in putting forward only those most likely to serve the common good honorably and competently. The Third Circuit's unprecedented and illogical importation of patronage principles into the judicial-appointment process risks defeating states' ability to vet candidates for their highest offices, and it hampers political parties' ability to participate in the process and advance the best candidates. The ruling below, if left uncorrected, would impact the RNC's members and constituents and Republican interests in Delaware and elsewhere.[1]

---

[1] Pursuant to Supreme Court Rule 37.6, the RNC states that no counsel for a party authored this brief in whole or in part and that no person other than the RNC or its counsel made a monetary contribution toward its preparation or submission. Pursuant to Supreme Court Rule 37.3, the RNC states that the petitioner has filed a blanket consent to amicus briefs with the clerk and that the respondent has consented in writing to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The judicial-appointment process is inherently political. Presidents, governors, legislators, and (in many states) voters select judges on the basis of their political affiliations and views—and they have done so ever since *Marbury v. Madison*. But the court below erroneously held that, all along, the First Amendment has restricted this very practice. This was an overzealous extension of this Court's political-patronage precedents into an arena where they cannot plausibly apply.

Instead, under bedrock principles of federalism, Delaware's choices in structuring its own constitutional offices merit the highest deference. It is undisputed that the First Amendment would not prevent Delaware's political branches from packing the courts with members of a favored party, if they chose to do so. It necessarily follows that Delaware has every right, through its Constitution, to restrict its officers' ability to do just that. Indeed, the court of appeals expressed a hope that, notwithstanding its ruling, Delaware's political branches will continue the State's tradition of "bipartisan excellence" and thus continue choosing judges on the basis of their speech and political affiliation. This decision illogically forbade the State from requiring conduct that the court of appeals itself identified as permissible and even admirable.

This absurd result follows from many errors of law. This brief examines just two of them.

First, Article IV, Section 3 of the Delaware Constitution is appropriately tailored to the highest order of state interests. The court below combined an unprecedented reading of this Court's patronage cases with a misunderstanding of the judicial-appointment process and how Article IV, Section 3 regulates it. Delaware's judges are not mere employees; they are among its most important officers. Delaware's interest in determining how they are appointed is among the highest a state could ever have. And its choice to forbid its political branches from appointing only members of one party, and to require that they choose members of the major opposition party, is carefully tailored to the State's particularized interests in fostering judicial independence and viewpoint diversity. At the same time, any impingement on the plaintiff's First Amendment rights is minimal, since his protected views and affiliations will be subject to scrutiny and may disqualify him even if he receives his requested relief.

Second, the plaintiff lacks standing. He cannot show a concrete injury until he applies for office, which he has not done and may never do. That is so because Article IV, Section 3 may be read to allow independents to sit on the courts, and the Court should not assume (as the courts below did) that it will prevent the plaintiff from being considered. That aside, the plaintiff also cannot show redressability. Even with his requested relief, he still may be rejected because he is not a Democrat. There is no reason to believe that, with or without Article IV, Section 3, the political branches would give the plaintiff any serious consideration.

The only real "right" this decision affords belongs to the State's political branches, and it is a newly invented *federal* right for *state* politicians to exercise unfettered partisan discretion in appointing judges. The ruling has almost no chance of increasing the number of independents on the bench; its likely result is single-party hegemony. Worse, it risks calling to sea an armada of federal claims by disappointed judicial candidates, every one of whom could plausibly claim to have been rejected on the basis of First Amendment protected speech or association. That error cannot be left uncorrected.

ARGUMENT

I. Delaware's Regulation of Politics Is Appropriately Tailored to Its Overwhelming Sovereign Interests and Justifies a Comparatively Small Burden on the Plaintiff's First Amendment Rights

This Court's First Amendment inquiry weighs state interests against impingements on First Amendment rights, assessing both "the legitimacy and strength of [the] interests" and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (internal quotation marks omitted) (standard for assessing state election laws); *see also Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion) (similar approach under "exacting scrutiny"). Those considerations apply both at the threshold stage of assessing what level of scrutiny applies and at the application stage of determining whether the burden on First Amendment rights is justified. Thus, where

First Amendment scrutiny reaches arenas of unique state sensitivity, such as its interest as an employer, *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006), this Court has permitted restraints "that would be plainly unconstitutional if applied to the public at large." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465 (1995).

The balance here tilts decidedly in favor of the State. Delaware's interest in regulating its own judicial-appointment process is of the highest order, and the plaintiff's interests in a marginal difference in scrutiny of his protected speech and association is comparatively minimal. This means that, on the front end, the Court should choose a comparatively lenient standard of review and, on the back end, conclude that Article IV, Section 3 satisfies it.

A. A State's Compelling Interest in Controlling Its Judicial-Appointment Process Necessitates a Comparatively Deferential Standard of Scrutiny

Delaware's interest in controlling its own judicial-appointment process is of the highest magnitude. Control of this process is among the most "fundamental" and inalienable elements of sovereignty—going even "beyond an area traditionally regulated by the States" to the very peak of internal state concern. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The states' power "to preserve the basic conception of a political community" necessarily implies the "power and responsibility" to establish appointment methods for "important nonelective executive, legislative, and *judicial* positions." *Sugarman v.*

Dougall, 413 U.S. 634, 647 (1973) (emphasis added) (internal quotation marks omitted). Accordingly, this Court's scrutiny has not been as "demanding" in this context as in others, and classifications normally deemed invidious can be justified here if they are employed in a "narrowly confined" way. *Id.* at 648–49.

The court of appeals failed to give these paramount interests their due weight. Instead, it treated Delaware's judiciary as akin to "a veterans' administrative services department, an assistant director of public information, assistant district attorneys, city solicitors and assistant city solicitors, a solicitor for the Northeast Pennsylvania Hospital and Education Authority, and a city manager, among others." Pet.App. 22a–23a (footnotes omitted). These analogies are wrong. Delaware's judges, like its governor, senators, and representatives, are "its most important government officials." *Gregory*, 501 U.S. at 463. As this Court is to the Nation, Delaware's courts are to the State. Its very "judicial power" is "vested in a Supreme Court, a Superior Court, a Court of Chancery, a Family Court, a Court of Common Pleas, a Register's Court, Justices of the Peace, and such other courts as the General Assembly" may create. Del. Const., art. IV, § 1. In their official capacities, Delaware's judges exercise a piece of the State's sovereignty and constitute one of its three co-equal branches of government.

For these reasons, the plaintiff cannot seriously contend that "the legal principles set down by this Court in the patronage cases" apply here in full force. Cert. Opp. 2. To the contrary, there is no "litmus-paper

test" for balancing sensitive state interests against First Amendment burdens. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (internal quotation marks omitted). A state's judicial-appointment process is like its election process. Just as a state has a right and duty to "preserv[e] the integrity of the electoral process" and even to "regulat[e] the number of candidates on the ballot," *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986), it has the right and duty to vet potential judges and regulate the appointment process. "[T]o subject every" state burden on judicial candidacies "to strict scrutiny and to require that the [act] be narrowly tailored to advance a compelling state interest…would tie the hands of States seeking to assure" that judges are fit to serve by the standards they have, by their sovereign right, identified. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

Yet, under the plaintiff's erroneous view, *all* of a judicial candidate's First Amendment-protected speech and association would be off limits—since a candidate's writings on judicial philosophy and associations with public-interest groups are, no less than the candidate's political-party membership, protected by the First Amendment. *Cf. Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018) (treating collective-bargaining speech as no different from "the platform of one of the major political parties"). Similarly, under this Court's patronage cases, the but-for motive to restrict positions on the basis of protected speech and association is no less suspect than the codification of those classifications in law. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977) (plurality opinion). A strict First Amendment standard,

if applied, may well "render unlawful *all* consideration of political affiliation" in judicial nominations. *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) (plurality opinion).

That is untenable. Speech and association are the principal factors on which judicial candidacies rise and fall. They, in virtually every instance, are the but-for cause of the executive's choice to nominate or not and the legislature's choice to confirm or not. *See* Erwin Chemerinsky, Ideology and the Selection of Federal Judges, 36 U.C. Davis L. Rev. 619, 624 (2003) ("Every President has appointed primarily, if not almost exclusively, individuals from the President's political party. Ever since George Washington, Presidents have looked to ideology in making judicial picks.").

Then-Supreme Court nominee Hugo Black had to account for his prior membership in the Ku Klux Klan (and renounce that group's principles) to obtain the Senate's trust—and rightly so.[2] *But see Cuffley v. Mickes*, 208 F.3d 702, 709 (8th Cir. 2000) (applying ordinary patronage rules to invalidate prohibition on Klan members' participation in government program). Similarly, it is no secret that some viewpoints (originalist, living-constitutionalist, etc.) and some associations (Federalist Society, ACLU, etc.) are deemed essential in some appointment and confirmation environments and fatal in others. This is so even though all of these associational engagements "occup[y] the highest rung of the hierarchy of First

---

[2] Virginia Van Der Veer, Hugo Black and the K.K.K., American Heritage (April 1968), reprinted at https://www.americanheritage.com/hugo-black-and-kkk (last visited Jan. 27, 2020).

Amendment values and merit[] special protection." *Janus*, 138 S. Ct. at. 2476 (internal quotation and edit marks omitted). The prerogative to vet a judicial candidate's memberships, affiliations, and views is an indispensable feature, not a defect, in the American system of government.

Subjecting this process to restrictive First Amendment scrutiny would run counter to national tradition. The political war over judicial appointments is as old, literally, as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See id.* at 138 (describing the battle over judicial commissions); *see also* James M. O'Fallon, Marbury, 44 Stan. L. Rev. 219, 221 (1992) (citing events leading up to that decision as "ensur[ing] that the Judiciary would be a focal point of partisan conflict under the new administration."). And it has continued at the federal and state levels ever since. That this "tradition" of appointing judges on the basis of their First Amendment-protected speech and association "dates at least to" the founding generation is powerful evidence that First Amendment protection does not reach judicial candidates in the same way it reaches public-school janitors. *See N.L.R.B. v. Noel Canning*, 573 U.S. 513, 516 (2014). The federal judiciary cannot plausibly entertain lawsuits subjecting these processes to discovery and adjudication.

B. Delaware Has Tailored Its Regulation to Its Overriding Sovereign Interests

Unlike many states, Delaware has attempted to limit its officers' otherwise unlimited discretion over appointments. But this does not diminish its interest in "establishing its own form of government." *Sugarman*,

413 U.S. at 642 (internal quotation marks omitted). Its choice to be "the only State" with a provision like Article IV, Section 3, Cert. Opp. 4, only underscores its interest in being free from other states' choices (or the federal government's). *Evenwel v. Abbott*, 136 S. Ct. 1120, 1141 (2016) (Thomas, J., concurring in the judgment) (observing that states' status as "laboratories of democracy" "extends to experimenting about the nature of democracy itself"). Reasonable minds may disagree with Delaware's approach, but its right to choose is fundamental to our constitutional framework.

Because the First Amendment does not constrain state actors' discretion over appointments, it also cannot be read to forbid Delaware's choice in regulating that discretion. It is odd that the court of appeals hoped its ruling will not dissuade Delaware's officers from adhering to Article IV, Section 3 in their discretionary choices and that they will continue to make "bipartisan" appointments from across the spectrum. Pet.App.41a. But if the First Amendment permits Delaware's officers to do this of their own will, it equally permits the body politic to demand it of them in the State's Constitution. *See Snowden v. Hughes*, 321 U.S. 1, 11 (1944) ("If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature."); *Gregory*, 501 U.S. at 460 ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); The Federalist No. 43, at 292 (J. Madison) (Jacob Cooke ed., 1961) ("Whenever the states may chuse to substitute other

republican forms, they have a right to do so…."). The court of appeals did not explain how permissible—even admirable—state action becomes impermissible because of how the state achieves it.

Indeed, Article IV, Section 3 stands on the firmest ground because it is tailored to Delaware's compelling interests in judicial independence and balance. Its use of partisan affiliation is, in particular, tailored because it is the only workable metric for administering its interests. No one has identified a better approach or one that imposes a lighter burden on First Amendment rights.

1. Delaware's Interests Are Compelling and the Means Tailored

a. *The State's Interests.* The means of Article IV, Section 3 are closely connected to specific, compelling state ends, which justify any burden on First Amendment freedoms. This is so in at least two respects.

First, a state has a compelling interest in creating and preserving its own balance of powers. Delaware is well within its rights to curtail the permissible discretion its political branches exercise over judicial appointments. Although most states do not regulate that discretion, Delaware has the right to view the political branches' ability to pack the courts with members of a favored party as a threat to that balance (whether that view is right or wrong). State judges review the actions of the state legislative and executive branches, and Delaware is free to think that partisan hegemony over all three branches is detrimental to its

balance of power. This is especially so given that Delaware's political branches are frequently controlled by one political party.

Second, Delaware also has a compelling interest in ensuring that the judges reflect the mainstream philosophical and policy views of the body politic as a whole. In assessing "the basic conception of a political community," *Sugarman*, 413 U.S. at 647 (internal quotation marks omitted), Delaware has chosen a process designed to produce an ideologically balanced bench that reflects the broader philosophical and ideological views of the State's general public. This is *every* state's interest, and it plainly justifies the inquiries routinely made into judicial candidates' political and philosophical speech and association (discussed above, § I.A). Candidates' right to join extremist organizations does not vitiate a state's power to weed out candidates on this basis—as all states do—since this is a strong indicator that a candidate is unlikely to serve the public's values as a constitutional officer.

This interest also justifies Delaware's limitation of the political branches' discretion. Delaware is among the smaller states, and, as the framers recognized, one-party control tends to be more durable "[t]he smaller the society." The Federalist No. 10, at 63–64 (J. Madison) (Jacob Cooke ed., 1961). In Delaware's current political environment, conservative philosophies would be chronically underrepresented, absent a check on the political branches' discretion. In other environments, liberal philosophies may otherwise be underrepresented. In this way, the views of a bare

majority (or even a predominant majority) may come to be outsized, reflected in all of the judgeships, even though a substantial subset of the population adheres to different views.

As one of 50 laboratories of democracy, Delaware is permitted to counteract this hegemony by promoting political balance. A counter-majoritarian mechanism like Delaware's is a choice against a winner-take-all judicial system.

One need not agree with this choice to see that, since state actors will make political decisions in all events, Delaware has a compelling interest directing those considerations toward these ends, if it so chooses. The court of appeals did not discount these interests and hoped that Delaware will continue to pursue them.

b. *Tailoring*. Article IV, Section 3 is tailored to these ends through the bare-majority and majority-party components. *See* Pet.App.6a–8a.

The bare-majority components prevent the political branches from appointing more than a bare majority of judges "of the same political party," Pet.App.6a, and thereby employ a simple curtailment on discretion. Limiting political actors' ability to appoint members of their own party is self-evidently tailored to the State's interests. Provisions like this are a common means of preventing the political branches from obtaining outsized control over bodies that are intended, like Delaware's judiciary, to be independent. Pet.App.31a (listing the various agencies "that use some form of political balance requirement"). The court of appeals did not (and could not) find that this provision violates

the First Amendment on its own.[3] *See* Pet.App.33a–34a.

Meanwhile, the major-party requirement necessitates that a minority of seats (or half, where there is an even number) be held by members of the "other major political party," Pet.App.6a, and it is appropriately tailored to prevent gaming. Without it, a governor and friendly state senate could rig the process by appointing favored party members to the majority of seats and then stacking the remaining seats with persons known to be favorable to that party, but who are not its card-carrying members. As the court of appeals recognized, it would "allow a Governor to appoint a liberal member of the Green Party to a Supreme Court seat when there are already three liberal Democrats on that bench." Pet.App.34a. By the same token, it would allow a conservative Republican governor to appoint a conservative member of the Libertarian Party to a bench that already contains three conservative Republicans.

That result would undermine the State's interests in independence and balance. Both interests can only be met if judges who are meaningfully different from the major-party judges sit on the remaining seats. Allowing the political branches unfettered discretion over the remaining seats undermines the State's interests. The court of appeals agreed with this in finding the provisions inseverable. *See id.* (finding that the State purpose was fulfilled "[o]nly with the…major

[3] The court of appeals invalidated this provision only because it deemed it inseverable from the major-party provision.

political party component"). But it failed to see that this very reasoning justified the major-party component under any applicable level of First Amendment scrutiny.

2. Party Membership Is the Best Available Proxy for Achieving These Compelling Ends

Party membership is an effective proxy for all these purposes, and it is the only workable proxy. The court of appeals ignored this in finding party membership irrelevant to the State's interests, since (as it correctly observed) judges do not go to the bench to effectuate "the political will and partisan goals of the party in power." Pet.App.25a. No one here claims otherwise.

But this is beside the point. The question is not whether party membership is an important component of, or qualification for, judging. It is instead whether party affiliation is an effective and tailored proxy by which the State can police partisanship in appointments and pursue the above-described ends. It plainly is.

a. *An Effective Proxy*. Party membership is a highly useful piece of information. Political parties do more than send politicians to elected office to achieve a "partisan political interest." Pet.App.25a (quotation marks omitted). They also serve the more fundamental purpose of facilitating an organized and coherent politics—in the broadest, Aristotelian sense. *See* E.E. Schattschneider, Party Government 1 (1942). Political parties facilitate governmental order by organizing societal groups into identifiable units. They, in turn,

vet candidates to high offices and assist the general public and state officers in identifying qualified persons who can honorably and competently participate in governance. Party membership is therefore a useful proxy to help voters identify candidates' philosophies—i.e., what they think is conducive to the greater good—and predict how they will respond to particular issues.

Delaware's purpose in identifying candidates as party members is not to create an expectation that they will serve partisan platforms. It is as true in Delaware as everywhere else that judges are not beholden to special interests and do not view themselves as party representatives. (Were it otherwise, "[p]raise for the Delaware judiciary" would not be "nearly universal." Pet.App.38a.) Nor need judges be partisans for partisan affiliation to be an effective proxy for the State's purposes. Even elected officials should, as a matter of principle, serve the greater good and not be beholden to one segment of the electorate at the expense of others. But this principle does not prevent a state from identifying candidates as members of a party on a ballot or in office. Rather, a state's "legitimate interest in fostering an informed electorate" allows it to identify candidates as members of a party. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989). Party is a helpful indicator of what a candidate is likely to view as conducive to the good of the whole.

Likewise, a judicial candidate's party membership is a good indicator of the candidate's judicial philosophy and likely views on matters of constitutional and common law in future cases. Judges' separation from

partisan politics does not exempt them from the more fundamental, broader political sphere, which includes the administration of law. In turn, the philosophical and doctrinal approaches a judicial candidate might take in future cases are of intense public interest. Political candidates campaign on the judicial philosophies they believe should be represented on the bench, and televised judicial confirmation hearings have garnered astounding ratings. Partisan affiliation is a piece of information that the general public finds informative—because it *is* informative—and that is highly relevant to the State's legitimate goals in appointments. Judges certainly must take the law they find it, but party affiliation is a good indicator of what a given judge will find when ambiguities arise.

Moreover, states are allowed to subscribe to the suspicions, right or wrong, of many political scientists that political biases influence judging–often unintentionally. *See, e.g.*, Cass R. Sunstein et al., Are Judges Political? An Empirical Analysis of the Federal Judiciary 10 (2006) ("In most of the areas investigated here, the political party of the appointing president is a fairly good predictor of how individual judges will vote.") Thus, states, for example, may legitimately "require that precincts be supervised by two election judges of different parties" precisely because of the valid concern that the judges will be biased towards their own parties and perspectives. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). This is a compelling interest even though—actually, *because*—the election judges *should* rule on the basis of the law and the facts. The neutrality expectation is precisely why a State is justified in pursuing balance and viewpoint diversity;

the court of appeals' rationale that judicial non-partisanship defeats the State's goal of balance is exactly backwards.

In this respect, a state's conception of its own "political community" merits special deference. *Sugarman*, 413 U.S. at 647. Delaware does not have to view its judges how the federal Constitution views judges (or, for that matter, how the American Bar Association views them, *see* Pet.App.24a). By comparison, many states require judges to stand for election and campaign for office,[4] *see Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002), and they routinely raise money for supporters for that purpose, *see Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445 (2015). State courts also engage in highly partisan adjudications, like redistricting cases. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 33 (1993) (requiring federal judicial deference to state courts in the "highly political task" of redistricting). Some even exercise legislative functions. *See, e.g.*, *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980). In opining that party membership is unrelated to the concerns of judging in Delaware, the court of appeals improperly rendered a value judgment that is Delaware's to make.

---

[4] A recent survey found that 29 states conduct elections for their trial-court seats, and nine employ partisan elections; meanwhile, 21 states conduct elections for their state supreme court seats, and six employ partisan elections. *See* Brennan Center for Justice, Judicial Selection: An Interactive Map, available at http://judicialselectionmap.brennancenter.org/?court=Supreme (last visited Jan. 27, 2020).

b. *The Only Proxy*. The Delaware Constitution cannot plausibly reduce a better proxy into law. It cannot say that only a majority of judges can be "conservative or liberal"; these requirements are hopelessly vague. It cannot identify specific viewpoints (e.g., "originalist" or "living constitutionalist") because issues of the day change and cease to be relevant over time. Referencing membership in other types of associations, like the Federalist Society or American Constitution Society, would create more problems than it would solve.

None of these alternatives is "appropriate" to ensure the "effective" achievement of the State's interests. *Branti*, 445 U.S. at 518. For that matter, none provides "means significantly less restrictive on associational freedoms." *Janus*, 138 S. Ct. at 2465 (internal quotation marks omitted). Any other criterion of speech or association burdens First Amendment rights at least as much as, if not more than, a party-membership proxy.

By comparison, the major-party requirement is narrowly tailored. It is set to adjust with the times—that is, with new parties and new philosophies for which they serve as proxies. This tethers the judicial appointment process to the organically developing body politic and to jurisprudential developments. Similarly, by linking the restriction on discretion to the major parties then in power, the proxy ties the nominations to objective measures of the mainstream, much like a proportional-representation system in voting might do. It also provides the maximum opportunity for candidate participation,

since everyone from the (relatively) far right to the (relatively) far left can be at home in one of these parties. This is quite different, for example, from regimes requiring citizens to associate with a single narrow segment of the political spectrum, such as by joining only one available labor union, to obtain a meaningful voice with government decisionmakers. *Cf., generally*, *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271 (1984).

The plaintiff has identified no other means to achieve the State's ends, and it is not even in dispute that this means *does* meet the State's ends. The court of appeals found that "the constitutional provisions which we today invalidate have resulted in a political and legal culture" of "bipartisan excellence." Pet.App.41a. This is powerful evidence that this century-old provision has operated as intended and to the State's benefit. The court of appeals' express encouragement of the same (supposedly) discriminatory decisions proves the incoherence of its ruling.

True, the party-membership proxy is not perfect. A member of the "other major" party may be clandestinely a majority-party sympathizer who joined the "other" party solely for opportunistic reasons—just as an election judge designated a "Democrat" may secretly be a Republican operative. *But see Branti*, 445 U.S. at 518 (signaling approval of a party requirement for election judges anyway). But this proxy is still better than any alternatives because it places a steep cost on this gamesmanship. It requires this clandestine candidate to go so far as to associate formally with the

opposition party—an act that itself may draw valid scrutiny. By comparison, eliminating the major-party rule, but maintaining the bare-majority rule, would allow dominant-party members to be appointed to the "minority" seats simply by choosing not to formally associate with the dominant party. Many persons who favor one party over another simply do that by accidentally failing to register as members.

Hence, the major-party rule protects against gamesmanship in a way that an "independence" requirement would not and in a way that the bare-majority rule alone does not. No one, not the district court, not the court of appeals, and not the plaintiff, has identified a better proxy for achieving the State's ends.

C. The First Amendment Interests at Issue Are Comparatively Weak

On the other side of the balance stand the plaintiff's First Amendment interests. The burden on these interests is not "severe" and therefore does not override the State's interests. *Burdick*, 504 U.S. at 434 (internal quotation marks omitted).

First, there appears to be no flat bar on an independent's service on the judiciary. The political branches are prohibited from filling more than a bare majority of seats with members of the majority party, but the courts below erred in interpreting this limit on discretion as a *mandate* to appoint major-party members. *See* below § II.A. Although Article IV, Section 3 restricts which seats the plaintiff may obtain, which may qualify as a burden on First Amendment rights

(perhaps because not all seats are open at the same time), this burden is more limited than an outright prohibition.

Second, the First Amendment interests here exist only on the margins. No one disputes that the plaintiff's First Amendment views can prove disqualifying, depending on what they are and on the views of those in the political branches. The plaintiff can even be excluded for leaving the Democratic Party. And this is the more likely outcome. A Democratic governor seems unlikely to appoint a person who declines to affiliate with the Democratic Party, and an independent who cannot persuade the political branches to appoint an independent to the seats over which those branches currently exercise unlimited discretion is unlikely to persuade them when they exercise unlimited discretion over all seats. Thus, as far as the plaintiff's asserted rights are concerned, the difference between the regime that exists and the one he wants is small, perhaps indistinguishable. (By comparison, the difference is significant as far as the State's interests are concerned.)

Third, the positions here are relatively few in number, and Article IV, Section 3 therefore does not negatively impact a broad segment of the populace. The "widespread impact" of a burden on First Amendment rights is a factor favoring higher scrutiny, *Nat'l Treasury Emps. Union*, 513 U.S. at 468, and the restricted impact here counsels in favor of a lower standard. The restrictions do not impact anyone's ability to earn a livelihood, since lawyers with a reasonable shot at a judgeship are presumably already

successful attorneys. *Cf. Janus*, 138 S. Ct. at 2461 (striking down burden on the rights of "35,000 public employees").

To be clear, these restrictions would be deemed burdens on First Amendment rights in most circumstances, and the Court may be justified in treating them as burdens here.[5] But this Court's First Amendment jurisprudence requires a balance, and the plaintiff's interest here, under these unique circumstances, is comparatively light and the State's is comparatively weighty. The balance here favors the State.

D. Upholding Article IV, Section 3 Will Not Impact Other Applications of First Amendment Doctrine; Striking It Down Will Raise a Host of New Questions

The State's highly unique interests here, and the individual's muted interests, exist only in the most limited circumstances, and a ruling in the State's favor has no chance of upsetting the settled application of law in other areas. On the other hand, a ruling for the plaintiff may threaten established practice, if not settled law, because it risks exposing the judicial-

---

[5] This would be the difference between reversing under First Amendment balancing, as the RNC proposes here, and reversing under the policymaking exception, as the petitioner proposes in his lead merits argument. The latter option would result in a bright-line rule exempting judicial-appointment cases from First Amendment scrutiny, and it finds support in much of the RNC's reasoning here. It may, however, be more prudent for the Court to reverse under the more narrow balance-of-interests inquiry and leave the policymaking exception for development in future cases.

appointment process to federal oversight—a serious invasion of state sovereignty.

1. *Limited Impact of Reversal.* This case is distinguishable from practically every First Amendment dispute that might come before the Court, save those by aspirants claiming a First Amendment right to a gavel. Allowing Delaware to restrict its own officers' political discretion over appointments will not translate into broad rules allowing widespread (or even isolated) discrimination in public employment. A ruling upholding Article IV, Section 3 may not even apply to other higher-level offices that are not core constitutional offices or are not subject to a longstanding tradition, traceable to the founding generation, of political appointments. *Cf. Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 577 (2014) ("Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.").

And the State's choice here is not like other choices that would rightly trigger skepticism. This is not at all like a requirement that all judges join one identified party; that would work against the compelling interests in independence and balance Delaware has identified here and could not be justified under any level of scrutiny. For that matter, Article IV, Section 3 is not like a requirement that a judge or other officer belong to *no* party, since an "independence" requirement is an especially bad proxy for actual independence—there being no way to ensure that someone claiming no

affiliation is not, in fact, among the most extreme of partisans.[6]

2. *Potentially Unlimited Scope of Affirmance.* On the other hand, an affirmance would raise troubling questions. The First and Fourteenth Amendments do not normally recognize a distinction between a but-for cause—which certainly occurs in judicial nominations—and a codified classification. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990) ("What the First Amendment precludes the government from commanding directly, it also precludes from accomplishing indirectly."). Thus, subjecting Article IV, Section 3 to strict scrutiny would call into question all political considerations in all judicial-appointment processes and may subject those processes to judicial review—including through broad discovery. This would contravene bedrock federalism and separation-of-powers principles.

The court of appeals did little to mitigate this potentially revolutionary aspect of its ruling. It said the ruling would not prevent "a governor [from] asking a judicial candidate about his philosophy on sentencing" but did not clarify whether it would allow a governor to reject the applicant because of the answer given. Pet.App.29a. Worse, the court of appeals explained that its ruling may prevent a governor from "posting a sign

---

[6] Thus, the Court need not decide here whether a state may prohibit persons who belong to a political party from serving on a redistricting commission. *See Daunt v. Benson,* No. 1:19-cv-00614, 2019 WL 6271435 (W.D. Mich. Nov. 25, 2019).

that says 'Communists need not apply.'" Pet.App.29a. But this is quite close to what administrations do—and always have done: decline even to consider candidates based on political affiliations and speech. Many administrations would not consider a Communist, not to mention an active Klansman.

Seeking a line between permissible and impermissible political considerations in the nominations process is like seeking that line in legislative-redistricting process. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019). The process itself "turns out to be root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality opinion). Judicial selection is inherently political, it is entrusted to politicians, and there is no judicially manageable standard differentiating valid and invalid political considerations in the appointments process.

Whether or not these problems justify exempting Article IV, Section 3 from any scrutiny, they at least call for an appropriately tailored standard and judicial intrusion in only the most extreme cases. Any decision invalidating Article IV, Section 3 that does not provide crystal-clear limits risks opening the door to innumerable new lawsuits by disappointed judicial candidates, complete with unlimited funding by special interests looking to rig the judiciary for their own ends. The Court should avoid this at all costs.

Where, as here, the political-party requirement is tailored toward balance and independence, there is no extreme case and no cause for federal intervention into this most sensitive of state matters.

II. The Plaintiff Cannot Show Injury Where He May Obtain an Appointment, or Redressability Where a Favorable Ruling Would Allow Him Still To Be Rejected for Purely Political Reasons

The plaintiff's claim fails for the additional reason that he lacks standing. He cannot show injury in fact without first applying to a judicial office. And he cannot show redressability because no injunction can protect him from the political "discrimination" he claims as his injury.

A. *Injury in Fact*. The plaintiff has not sought a judicial appointment and may never do so. The court below found merely that "he would consider applying for a judicial seat on any of Delaware's five constitutional courts." Pet.App.14a. But an asserted interest in sometime—maybe—seeking a seat is academic and insufficient to confer standing. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *Warth v. Seldin*, 422 U.S. 490, 503 (1975).

The court of appeals excused the plaintiff from tendering an application before suing because it believed the effort would be "futile." Pet.App.15a. But it may not be futile; Article IV, Section 3 may permit an independent to be appointed to most seats. Its bare-majority rule merely requires that "not more than one-half of the members of all such offices shall be of the same political party." Del. Const., art. IV, § 3 ("Second," "Third," "Fourth," "Fifth," and "Sixth" paragraphs). This language does not prevent the appointment of an independent; it operates under current circumstances merely to *limit* the number of Democratic members on

these seats, rather than as a *bar* on non-Democrats. Pet.App.34a.

To be sure, the adjacent major-party components of some paragraphs (i.e., the "Second" and "Third") set aside the "remaining" seats for "members" of the "other major political party"—here, the Republican Party. The decision below apparently read the phrase "other major party" to link with the phrase "same major political party" and together to create a binary structure, so that all judges who are not Democrats must be Republican and vice versa. *See* Pet.App.34a. But that is not the only reading, or even the best. Both phrases link to the identical verbiage "such offices," which seems to signify a static number of seats for members of the "other major party," not a fluid number depending on how many judges of the "same political party" are appointed. Under current circumstances, a majority of "offices" (or half, if the number is even) *may* be held by Democrats but *may* also be held by independents; only a minority (or half, if the number is even) are set aside for Republicans.

In fact, the court of appeals admitted that the bare-majority provision can, standing alone, "be interpreted to allow a Governor to appoint a liberal member of the Green Party" to a judgeship. Pet.App.34a. It can continue to be read this way even after the major-party provision is tacked on; it is not necessary to read the major-party provision as injecting a different, more restrictive meaning into the bare-majority provision.

And there is still more ambiguity. For one thing, the different courts are governed by different language. For example, the "Second" paragraph governing the

Delaware Superior Court contains no major-party component when it has an "even number of seats," even though a major-party component kicks in when it has an "odd number" of seats. Even the language of the "First" paragraph, which seems to require that "three of the five Justices" of the Delaware Supreme Court must be from the dominant "major political party" (i.e., Democrats) and "two" must be of the other major political party (i.e., Republicans), may be amenable to a not-strictly-literal reading—in light of the provision's structure, the apparent overlap with the "Third" paragraph, and the overriding purpose of limiting discretion, rather than of mandating that politicians appoint members of their own party (as they need hardly be told to do). *See, e.g.*, *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 638 (Del. 2017) (identifying purpose of constitutional provision as relevant to its meaning). Even this Court does not always assign a constitutional provision its strictest, literal meaning. *See, e.g.*, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019). The "First" paragraph, then, may be read as permissive rather than as mandatory.

All of this means that it is unknown whether the plaintiff might not only be *eligible* for a seat, but also *obtain* one—if he would only try. The court of appeals assumed the most restrictive possible interpretation, taking as a given that this web of differently worded components operate as an outright bar on independents. But federal courts should do the opposite: they should generally refrain from "unnecessary ruling[s]" that may be "supplanted by a controlling decision of a state court." *R.R. Comm'n of*

Tex. v. Pullman Co., 312 U.S. 496, 500 (1941). The Delaware Supreme Court has not definitely construed Article IV, Section 3 as forbidding an independent from obtaining a judicial seat, and the Delaware judiciary remains open to the plaintiff and able to provide relief, through either a more limited interpretation or an adjudication of the First Amendment issues.[7] At a bare minimum, the plaintiff should at least apply so that it will be clearer how this provision would be construed in his case.

B. *Redressability*. The plaintiff also cannot show redressability because an injunction is unlikely to increase his odds of obtaining an appointment, and it would not even prevent the plaintiff from being rejected for purely political reasons—even for not being a Democrat.

For all anyone knows, the plaintiff's application, if tendered, would be rejected for reasons unrelated to his party affiliation. Judgeships are not easy to obtain. There are over 3,200 attorneys in the Delaware Legal Directory, any of whom may well aspire to be a judge and may be more qualified or have more support from the appointment authorities.[8]

---

[7] Although the Delaware Supreme Court declined a request for an advisory opinion on this subject, *In re: Request for an Opinion of the Justices*, 155 A.3d 371, 373 (Del. 2017), the Delaware courts would presumably treat a lawsuit differently.

[8] Delaware State Bar Association, Legal Directory, available at https://www.dsba.org/publications/delaware-legal-directory/ (last visited Jan. 27, 2020).

The governor may have any number of reasons to decline to nominate, or the senate to confirm, the plaintiff. In fact, the injunction below does not prevent the governor from rejecting the plaintiff because he is not a Democrat. It only makes it easier, not harder, for the governor to reject non-Democrats.

Accordingly, the plaintiff's injury cannot be redressed in this lawsuit. There can be no Article III standing if, even after the plaintiff prevails, the plaintiff's redress still hinges on the "unfettered choices made by independent actors not before the courts…." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); *see also Lujan*, 504 U.S. at 562; *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45–46 (1976). A federal court cannot compel the governor to appoint the plaintiff or even to read his application or to interview him. Nor can a federal court require any of these things from Delaware's senate. Nor does the injunction below limit their discretion to reject the plaintiff. It adds no meaningful likelihood to the plaintiff's hope of becoming a judge. Because there is no redress available, the case should be dismissed for lack of standing.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Justin Riemer
Christopher White
Republican National Committee
310 1st Street SE
Washington, DC 20003
(202) 863-8626

Patrick T. Lewis
Baker & Hostetler LLP
Key Tower
127 Public Square
Suite 2000
Cleveland, OH 44114
(216) 861-7096

Richard B. Raile
Counsel of Record
E. Mark Braden
Katherine L. McKnight
Trevor M. Stanley
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, DC 20036
(202) 861-1711
rraile@bakerlaw.com

Counsel for Amicus Curiae