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 of *Amicus Curiae* Cato Institute in Support of Respondent

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Interest of the *Amicus Curiae*[1]

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case concerns *amicus* because Cato supports the rights of independents and members of third parties to participate in public life alongside Democrats and Republicans, without undue partisan discrimination.

Summary of Argument

The Delaware Constitution excludes independents and members of third parties—nearly a quarter of Delaware's citizens—from being eligible for the state's top three courts. Applicants may be at the top of their field, widely acknowledged as being among the leading lawyers in the state. The Governor may be willing to transcend partisan politics to appoint them; the state senate may be willing to confirm them. Yet the law would categorically forbid them from serving, simply because they do not belong to either major party.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief. The petitioner has given blanket consent to the filing of *amicus* briefs, and the respondent has expressly consented.

A place of honor and responsibility, to which truly accomplished lawyers could normally aspire as the capstone of distinguished careers, is thus by law denied to them—unless, of course, they conveniently join a party whose principles they cannot in good conscience endorse. That is not consistent with the First Amendment's right to freedom of political association (and non-association).

Nor do this Court's decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980), authorize such discrimination. Those cases acknowledge that "political loyalty" or "allegiance to the political party in control of the * * * government" can be important for certain positions that play key roles in implementing a political agenda at the behest of an elected executive. *Elrod*, 427 U.S. at 367 (plurality opinion); *Branti*, 445 U.S. at 519. Judges do have important discretionary authority, especially in developing the common law—but they are not subordinate to the will of an elected official, and are not supposed to act out of political loyalty. Nor have American traditions generally treated "party membership" as "essential to the discharge of [a judge's] governmental responsibilities," the test set forth by *Branti*, *id*.

Of course, Governors and Presidents have often considered a prospective judge's ideology or even political background in making an appointment. They need not ignore such factors, just as voters need not ignore judicial candidates' political beliefs in states where judges are elected. But there is a difference between elected officials or voters considering those factors as a matter of their political discretion, and a state con-

stitutional rule law that categorically excludes independents or members of third parties from judicial posts.

In recognizing such a difference, this Court need not cast doubt on the constitutionality of other partisan balance requirements. Most such requirements are not categorical lifetime exclusions from office—they merely require that no more than a bare majority of the body be made up of members of one party, leaving independents and members of third parties (as well as members of the other party) free to serve. And the rare examples of categorical party splits generally involve temporary and low-profile positions for which party affiliation really is necessary, such as election precinct supervisors.

Argument

I. Delaware severely burdens the expressive association rights of independents and members of third parties by categorically barring them from serving on the state's three highest courts.

The Delaware Constitution forbids independents and members of third parties from being appointed to the state's three highest courts (the Supreme Court, Court of Chancery, and Superior Court). Del. Const. art. IV, § 3. Indeed, it assigns seats on those courts by party, to only the members of the two largest parties. "There is no such thing as a Republican judge or a

Democratic judge. We just have judges in this country."[2] Except, apparently, in Delaware.

A judgeship in Delaware, as elsewhere, is a position of great honor and responsibility, to which many attorneys doubtless aspire. And such an aspiration may be quite realistic for those who have truly distinguished themselves. There are about 3,000 attorneys in Delaware, and 33 positions on the three senior courts.[3] Assuming judges spend one-third of their career on the bench, about 3% of all Delaware lawyers (33/3000×3) will serve on those courts. For lawyers whose talents and efforts place them in the top, say, 10% of their profession, a place on one of those three courts is a plausible hope for the culmination of a successful legal career, especially since not all their leading colleagues will seek a post. Or, rather, it is a plausible hope unless their political principles keep them from joining either of the two major parties.

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[2] *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, 115th Cong. 70 (2017).

[3] *See* American Bar Association, *National Lawyer Population Survey Lawyer Population by State* (2019), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2019.pdf. Five justices of the Supreme Court, seven chancellors of the Court of Chancery, and twenty-one judges of the Superior Court make up the three senior courts of the state. *See* Del. Const. art. IV, § 3; Delaware Courts, *Judicial Officers: Supreme Court* (last visited Feb. 21, 2020), https://courts.delaware.gov/supreme/justices.aspx; Delaware Courts, *Judicial Officers: Court of Chancery* (last visited Feb. 21, 2020), https://courts.delaware.gov/chancery/judges.aspx; Delaware Courts, *Judges in the Delaware Superior Court* (last visited Feb. 21, 2020), https://courts.delaware.gov/chancery/judges.aspx.

This Court has long recognized that conditioning public employment on political affiliation "serves to compromise the individual's true beliefs," and violates one of the most significant rights protected by the Constitution, the "freedom to associate with others for the common advancement of political beliefs and ideas." *Elrod*, 427 U.S. at 355, 357. Independent and third-party lawyers seeking a Delaware judgeship will "feel a significant obligation to support political positions" needed to hold a judicial seat, and "to refrain from acting on the political views they actually hold, in order to progress up the career ladder." *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 73 (1990). While the judiciary should welcome integrity and candor, Delaware law pressures independent and third-party attorneys who seek to become judges to hide their true political allegiances from the public, or else to "forgo their calling rather than * * * compromise their commitment to intellectual and political freedom." *Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966).

And independents and members of third parties are a large segment of Delaware's population; of all registered voters in the state in February 2020, 24.84% are unaffiliated or registered as adhering to a third party.[4] The "'fixed star in our constitutional constellation'" is that "'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,'" *Elrod*, 427 U.S. at 356 (quoting *Bd. of Ed.* v. *Barnette*, 319 U.S. 624,

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[4] Office of the State Election Commissioner, *State of Delaware: Party Tabulation of Registered Voters* (Feb. 2020), https://elections.delaware.gov/reports/pdfs/20200201_partytotals.pdf.

642 (1943)). The Delaware Constitution's judicial appointments provisions, though, declare the two largest parties to be the only orthodox ones, treating a quarter of Delawareans as so heterodox that they are excluded by law from the three higher courts. To be sure, governors do, and may, consider political beliefs and affiliations in making judicial appointments—whether to neglect citizens who are not members of the major parties, or to deliberately reach out to them. But Delaware cannot ban them from office by force of law.

Worse still, the Delaware scheme strongly deters current judges from leaving their political parties during their term, even if they conclude that their views (or the parties' views) have sharply shifted and that they cannot in good conscience remain in the party. The Delaware Constitution lets judges seek reappointment after serving a 12-year term, but any "[a]ppointments to the office of the State Judiciary shall *at all times* be subject to" the major-party membership requirements. Del. Const. art. IV, § 3 (emphasis added). Say the Superior Court consists of 11 Republicans and 10 Democrats; if one of the Democrats switches parties, or if one of the Republicans decides to become an independent, then that judge would by law be ineligible for reappointment.

The magnitude of this burden becomes particularly clear when we compare it to other offices—including the most political ones. Governors and legislators who earn the confidence of voters may sometimes retain their seats, or be elected to new offices, even if they leave their party and become independents or join a third-party: Consider Connecticut Senator Joe Lieberman or Governor Lowell Weicker, or Rhode Island Governor Lincoln Chaffee, who were elected or

reelected as independents or members of third parties.[5] Angus King was elected Maine Governor and then Senator as an independent even without having held office.[6] But Delaware judges, however strong a reputation they have developed with the Governor, Senators, and the public, must forfeit any chance of reappointment if they leave the major parties.

Indeed, the Delaware rule may even prompt some conscientious judges to feel obligated to resign in the middle of their terms, if they can no longer adhere to their major party. To be sure, the major party provisions apply only to "[a]ppointments to the office of the State Judiciary," Del. Const. art. IV, § 3. But if a judge switches to being an independent, then at the very next retirement of a different judge it will become constitutionally impossible for the court to maintain the two-major-party split.

Say, for instance, the Superior Court contains 10 Republicans, 10 Democrats, and one independent who has just switched from one of the major parties. Then,

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[5] *See* Frank James, *Sen. Joe Lieberman Leaves Divided Legacy*, NPR (Jan. 19, 2011), https://www.npr.org/sections/itsallpolitics/2011/01/21/133056239/joe-lieberman-its-time-to-turn-page; *Ex-Rhode Island Politician Changes Political Parties—Again,* AP News (June 5, 2019), https://apnews.com/5a9074b0abb74f6fb3b92698860a5e90; Nick Ravo, *Renegade's Victory—The Independence of a Maverick Republican: Lowell Palmer Weicker Jr.*, N.Y. Times B9 (Nov. 7, 1990).

[6] Michael Shepherd, *How Angus King Went From a Democratic Party Exile to a Darling of Progressives*, Bangor Daily News (Apr. 2, 2017), https://bangordailynews.com/2017/04/02/the-point/how-angus-king-went-from-a-democratic-party-exile-to-a-darling-of-progressives/.

whenever a Republican or Democrat retires, no possible appointment could bring the court back to its constitutionally mandated 11–10 division. The independent judge may then feel compelled by the oath of office (which requires the judge to "always uphold and defend the Constitutions of my Country and my State," Del. Const. art. XIV, § 1) to step down and allow a major-party member to be appointed instead, since that is the only way that the constitutional mandate can be satisfied.

II. Though political affiliation may be a permissible factor for elected officials to consider in evaluating judicial applicants, it cannot be the basis of a categorical legal restriction.

This Court has never had to decide what role political affiliation may play in judicial appointments. *Elrod*, *Branti*, and *Rutan* had to do with elected officials' power to choose their subordinates. Those decisions stated that political affiliation is a permissible criterion for some such positions, because those positions call for "political loyalty" or "allegiance to the political party in control of the * * * government." *Branti*, 445 U.S. at 519; *see also Elrod*, 427 U.S. at 367 (plurality opinion); *Rutan*, 497 U.S. at 70. But political loyalty and allegiance are of course the opposite of what we seek in judges.

And judges are appointed to "apply the law fairly and impartially," *Common Cause Ind.* v. *Individual Members*, 800 F.3d 913, 923 (7th Cir. 2015), rather than being executive-branch appointees "who are appointed to fulfill the political or policy objectives of a governor," *Newman* v. *Voinovich*, 986 F.2d 159, 164

(6th Cir. 1993) (Jones, J., concurring). Their belief or lack of belief in some party platform would not "interfere with the discharge of [their] public duties." *Branti*, 445 U.S. at 517.

Having said that, American traditions do approve of Presidents and Governors considering judicial applicants' ideology and political affiliation as a factor in choosing whom to appoint. Certainly voters, in the many states that elect judges, are free to consider ideology and politics; parties can endorse candidates,[7] and in some states judges run for office in partisan elections. And this makes sense, because judges do exercise their discretionary judgments on important matters, especially when they develop state common law.

But this ought not justify categorical exclusions from office, unwaivable even for the best potential nominees. When the state substantially burdens First Amendment rights, even in systems of government employment, it must use "the least restrictive means for fostering [its] interests." *Rutan*, 497 U.S. at 69. Categorical exclusion is the most restrictive alternative, not the least restrictive.[8]

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[7] *See, e.g.*, *Sanders County Republican Cent. Comm.* v. *Bullock*, 698 F.3d 741 (9th Cir. 2012).

[8] Petitioner relies on *Gregory* v. *Ashcroft* for the proposition that state laws that establish judicial qualifications require a "less exacting" standard. Pet'r Br. 35–36. But even in cases involving "sensitive choices by States in an area central to their own governance," laws that burden First Amendment rights must be narrowly tailored to a compelling government interest. *Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433, 454 (2015) (citing *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)).

In for a penny need not be in for a pound where consideration of politics is involved—elected officials may be *allowed* to exclude certain prospective nominees based on their politics, but it does not follow that the law may *require* them to impose categorical exclusions. And indeed the cases upholding political affiliation discrimination in judicial appointments have generally dealt with discretionary decisionmaker judgments, not with categorical statutory or state constitutional disqualifications. *See, e.g.*, *Kurowski* v. *Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988) (noting only that a judge "may apply political criteria" in selecting public defenders who could serve as a judge pro tempore); *Newman* v. *Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993) (holding that a governor could consider political affiliation when making judicial appointments); *Levine* v. *McCabe*, 2007 WL 4441226, at *7–9 (E.D.N.Y. Dec. 17, 2007) (holding that a Chief Administrative Judge and judicial hearing officer selection advisory committee could consider political affiliation in appointing a judicial hearing officer), *aff'd*, 327 F. App'x 315 (2d Cir. 2009). *Davis* v. *Martin*, 807 F. Supp. 385, 387 (W.D.N.C. 1992), did uphold a statute specifying that appointments to seats vacated by elected judges must be filled for the remainder of the term with a judge from the same political party—but that statute allowed independents and members of third parties to run for any elected judicial position, and merely preserved the voters' party choice in the relatively rare cases of judicial vacancies.

Religion may be a helpful analogy. In the mid-twentieth century, the Supreme Court was considered to have an informal "Catholic seat"; "[d]etermined to restore the 'Catholic seat' to the Court, President

Dwight Eisenhower nominated William J. Brennan shortly before the 1956 Presidential election, immediately after he received confirmation from Brennan's priest that Brennan was a faithful Catholic."[9] There was at times a "Jewish seat" as well.[10] In 2016, Abid Riaz Qureshi became the first Muslim to have been nominated a federal judge; some news accounts praised the appointment in part because of the nominee's religion, though it is unclear if this was a factor that President Obama had considered.[11] A governor in a place and time in which religion is politically salient to voters might likewise consider religion in choosing nominees.

But it does not follow that the Delaware Constitution could divide the state Supreme Court seats into, say, three for the largest religion in the state and two for the second largest, and categorically exclude the irreligious and members of smaller religions from the judiciary. The same should apply to political affiliation; though religion and political affiliation may not be constitutionally identical when it comes to government employment, this Court has treated them comparably—indeed, the *Elrod* plurality expressly quoted *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100

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[9] *Catholics and the Supreme Court*, *in Encyclopedia of Religious Controversies in the United States* 160, 161 (2d ed. 2013).

[10] *See* Peter Charles Hoffer et al., *The Supreme Court: An Essential History* 343 (2d ed. 2018).

[11] Daniel Victor, *Obama Nominates First Muslim to Be a Federal Judge*, N.Y. Times (Sept. 7, 2016), https://www.nytimes.com/2016/09/08/us/obama-nominates-first-muslim-to-be-a-federal-judge.html.

(1947), for the proposition that "Congress may not enact a regulation" excluding prospective employees either by party or by religion, 427 U.S. at 357 (internal quotations omitted).[12]

III. Delaware's categorical bar of independents and members of third parties from its judiciary may undermine more than advance the state interests.

Petitioner asserts that the rigid two-party criterion for judicial appointment is necessary to serve a compelling interest in "ensuring a politically balanced judiciary," Pet'r Br. 37, and thus promoting "'public confidence in judicial integrity,'" *id.* at 38 (citation omitted), and the Delaware courts' "reputation for impartiality," *id.*at 39. Yet the Delaware Constitution's partisan selection provisions may actually undermine these interests. First, assigning judgeships to members of a particular political party announces to the public that the legal system views judicial decisions as heavily influenced by party affiliation. Second, the partisan balancing requirement could increase partisanship, by leading judges to feel some obligation to represent the "Democratic" or "Republican" seats they hold. And, third, the requirement would preclude the appointment of the many independents who are ideologically centrist, and thus are more likely to be nonpartisan.

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[12] Of course, we speak here of the constitutional mandate as to government action; when it comes to private action, Congress has chosen not to ban political-affiliation discrimination, even where it has banned religious discrimination.

Moreover, political balance can be potentially helpful only on the Delaware Supreme Court, in which the judges deliberate together. *See* Pet'r Br. 40–41 (discussing "panel effects"). But the two-party requirement also applies to the Court of Chancery and Superior Court, though the judges there hear cases individually. "[P]artisan balance * * * says little about the impartiality of individual members [of a court]" who are deciding cases by themselves. *Common Cause Ind.*, 800 F.3d at 924.

IV. Delaware's partisan-balance requirement is more burdensome than party membership requirements for other offices.

The agencies the Petitioner cites as having partisan balance requirements—the Securities and Exchange Commission, the Federal Election Commission, and the International Trade Commission, Pet'r Br. 45—fulfill their goal of being non-partisan by requiring only that *at most* half or barely-more-than-half of the members belong to one party.[13] They do not categorically forbid independents or members of third parties from serving, and thus do not substantially burden potential members' First Amendment rights the way that the rules for Delaware's three top courts

[13] *See* 15 U.S.C. § 78d ("[n]ot more than three of such commissioners [on the SEC] shall be members of the same political party"); 52 U.S.C. § 30106(a)(1) ("[n]o more than 3 members of the [Federal Election] Commission appointed * * * may be affiliated with the same political party"); 19 U.S.C. § 1330(a) ("[n]ot more than three of the commissioners [on the International Trade Commission] shall be members of the same political party, and * * * members of different political parties shall be appointed alternately as nearly as may be practicable").

do. Pet'r Br. 45. Indeed, Steven T. Walther, an Independent, currently serves as Vice Chairman of the Federal Elections Commission.[14] Other politically balanced government commissions likewise only cap the number of members of any one party, and do not ban independents or members of third parties from serving;[15] Gail Heriot, for instance, is an Independent on the Civil Rights commission.[16] The same is so for the Court of International Trade,[17] and for that matter for Delaware's own Court of Common Pleas and Family Court, Del. Const., art. IV, § 3.

There are some rare exceptions, such as the election precinct supervisors discussed by this court in *Branti*, 445 U.S. at 518. But such positions tend to be

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[14] *See* Fed. Election Comm'n, *Leadership and Structure* (last visited Feb. 15, 2020), https://www.fec.gov/about/leadership-and-structure/.

[15] The Commodity Futures Trading Commission (7 U.S.C. § 2(a)(2)(A)(ii)), the Federal Communications Commission (47 U.S.C. § 154(b)(5)), the Federal Energy Regulatory Commission (42 U.S.C. § 7171(b)(1)), the Federal Trade Commission (15 U.S.C. § 41), the Consumer Product Safety Commission (15 U.S.C. § 2053(c)), the National Transportation Safety Board (49 U.S.C. § 1111(b)), the Nuclear Regulatory Commission (42 U.S.C. § 5841(b)(2)), the Surface Transportation Board (49 U.S.C. § 1301(b)), the Election Assistance Commission (52 U.S.C. § 20923(b)(2)), and the Civil Rights Commission (42 U.S.C. § 1975).

[16] U.S. Commission on Civil Rights: Commissioners, https://www.usccr.gov/about/commissioners.php (last visited Feb. 21, 2020).

[17] *See* 28 U.S.C. § 251 ("[n]ot more than five of such judges shall be from the same political party").

minor and often temporary posts, rather than the prospective pinnacles of a successful legal career; and an election judge's role concerns partisan political activity—making sure that the judge's party is not unfairly treated in an election—that presents a uniquely strong case for a requirement of political balance.[18]

Conclusion

Delaware's complete exclusion of independents and members of third parties from its three highest courts violates the First Amendment. American traditions and political realities allow elected officials to consider applicants' politics in deciding whom to nominate to the bench—but the law cannot make major political membership a categorical requirement for eligibility.

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[18] See, *e.g.*, Office of Cook County Clerk Karen A. Yarbrough, *Strengthen Local Democracy: Serve as an Election Judge*, https://www.cookcountyclerk.com/sites/default/files/pdfs/EJ%20FAQ_1.pdf (last visited Feb. 21, 2020), and Prince George's County Board of Elections, *Become an Election Judge*, https://www.princegeorgescountymd.gov/962/Become-an-Election-Judge (last visited Feb. 21, 2020), for examples of election judge qualifications and responsibilities.

Respectfully submitted,

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FEBRUARY 26, 2020