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 PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues. Among Public Citizen's interests is the preservation of First Amendment rights for individuals who are independent voters or affiliated with third parties. Public Citizen recognizes the importance of protecting the rights of such individuals to associate (or not to associate) with the political party of their choice to foster the expression of a variety of viewpoints on political and social issues. A state interferes with these rights when it enacts laws conditioning the receipt of a government benefit, such as public employment, on one's political affiliation.

At the same time, Public Citizen also has a longstanding interest in the actual and perceived fairness and integrity of our judicial systems. That concern is implicated in this case by Delaware's attempt to produce an impartial judiciary through political balance requirements for state court judges found in the Delaware Constitution.

Public Citizen submits this brief to assist the Court in assessing these competing interests.

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[1] This brief was not written in whole or in part by counsel for a party and no one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. The petitioner has filed a blanket consent to amicus briefs, and the respondent has consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

Both parties to this case have assumed that the constitutionality of Delaware's requirement that state Supreme Court, Superior Court, and Chancery Court judges be members of one of the two major political parties turns on whether those judges are "policymakers." The policymaker inquiry, however, was developed to address issues concerning the constitutionality of political patronage that are irrelevant to whether a state can by law prohibit individuals who are not members of major political parties from serving as judges.

Instead, to assess the burden on association entailed by the major-party requirement, the Court should apply its standard freedom-of-association analysis, which calls for strict scrutiny of laws imposing severe burdens on associational rights. Under such scrutiny, the major-party requirement fails. By contrast, a prohibition on one-party domination of the courts imposes a much more modest burden that, if not linked to a major-party requirement, would trigger less stringent scrutiny. Such a requirement would pass muster because of its direct advancement of the substantial state interest in the balance and fairness of the state's judiciary.

I. The First Amendment right to associate encompasses the right to affiliate with the political party of one's choice. Laws that impose a severe burden on that right are subject to strict scrutiny: They must be narrowly tailored to advance a compelling state interest. Laws imposing lesser burdens, however, trigger less exacting review.

Delaware's constitution provides that all members of its three highest courts—the Supreme Court,

Superior Court, and Court of Chancery—must be members of one of the two major political parties. State law thus categorically disqualifies the approximately 25% of the state's citizens who have no party affiliation, or who are members of minor parties, from serving as judges on these courts, unless they alter their affiliation to either the Democratic or Republican Party. Such an outright exclusion of a broad swath of the population from eligibility to hold public office based on their choices regarding political affiliation imposes a severe burden on the right to associate.

The major-party requirement is not narrowly tailored to serve a compelling state interest. No one asserts that citizens who are not Democrats or Republicans are unqualified to do justice or that their presence on a court would necessarily result in an imbalance that would result in either the appearance or reality of damage to the impartiality and nonpartisanship of the court. Rather, the justification offered for the major-party requirement is that it is a prophylactic measure aimed at preventing circumvention of the separate and more limited requirement that no more than a bare majority of any of the courts in question may be made up of members of the same major party. Although prophylactic measures may sometimes satisfy strict scrutiny, the sweeping disability imposed on unaffiliated citizens here does not. Significantly less restrictive alternatives—such as a bipartisan nominating commission or a cooling-off period after a judicial nominee changes party affiliation—are available to Delaware to prevent circumvention of the purposes served by the bare-majority limitation. Therefore, the major-party requirement violates the First Amendment.

II. In contrast to the major-party requirement, a bare-majority limitation, operating alone, does not severely burden the right to associate. It imposes no outright disqualification from office on affiliates of any party or on unaffiliated citizens; rather, it is a conditional limitation that only disqualifies from consideration for specific appointments candidates affiliated with a political party that already occupies a majority of the seats on the court on which there is a vacancy.

Because it does not impose a severe burden on freedom of association, a bare-majority limitation is subject only to intermediate scrutiny, to ensure that the interests it serves are sufficiently substantial to justify whatever limitations it imposes on associational freedoms. Under such scrutiny, even a significant interference with the right to associate must be sustained if it is closely drawn to advance a sufficiently important interest without unnecessarily abridging associational freedoms. A bare-majority limitation by itself would pass muster here, because it would serve Delaware's compelling interest of maintaining an impartial, nonpartisan balance on its courts, and be no broader than necessary to do so.

III. Although the Third Circuit correctly held that the major-party requirement unconstitutionally infringes on associational rights, both it and the parties wrongly approach the question by asking whether judges are "policymakers." Under this Court's decisions concerning political patronage in government employment, whether a government official is a "policymaker" is shorthand for whether the official occupies a position for which loyalty to the party in power is a relevant qualification. Under such circumstances, elected officials and governmental decisionmakers who answer to them may make discretionary hiring

and firing decisions based on a subordinate's political affiliation without running afoul of the First Amendment. Whether government personnel decisions may be based on an individual's loyalty to or affiliation with the party in power, however, is a different question from whether a state can by law make political party membership a requirement for office. Furthermore, the "policymaker exception" does not apply when the government's asserted interest is something other than the need to maintain politically loyal employees. Here, no one asserts that loyalty to any political party is a relevant qualification for holding a judgeship or that the major-party requirement is intended to ensure such loyalty.

In short, the "policymaker" criterion is ill-suited to informing the resolution of whether the tens of thousands of Delaware citizens who are not and do not wish to be members of a major political party may be completely excluded by law from serving on Delaware's most important courts. Such exclusion is indefensible, regardless of whether judges make policy. And because the conclusion that the major-party requirement is unconstitutional does not depend one way or the other on application of the "policymaker" label, it does not imply that political affiliations and beliefs are impermissible considerations in the selection of judges.

IV. The court of appeals correctly held that the question whether Delaware's major-party requirement is severable from its bare-majority limitation is a question of state law. This Court cannot authoritatively resolve that question.

ARGUMENT

I. The major-party requirement violates the First Amendment.

A. Laws imposing severe burdens on the right to associate must be narrowly tailored to advance a compelling state interest.

This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). In addition, "[f]reedom of association … plainly presupposes a freedom not to associate." *Id.* at 623.

"The right to associate with the political party of one's choice is an integral part of this basic freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Indeed, "political belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976); *see also Williams v. Rhodes*, 393 U.S. 23, 30 (1968) ("[T]he right of individuals to associate for the advancement of political beliefs … rank[s] among our most precious freedoms.").

Like other First Amendment rights, however, the right to associate is not absolute. *Roberts*, 468 U.S. at 623. To determine whether a government-imposed restriction on associational freedoms violates the First Amendment, a court "must first consider the character and magnitude" of the infringement on protected interests. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). "It then must identify and evaluate the precise

interests put forward by the State as justifications for the" restriction. *Id.* Finally, the court must "determine the legitimacy and strength of each of those interests, [and] consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* A law that burdens the right to associate will be struck down if it "sweeps broader than necessary to advance" the state's asserted interests. *Norman v. Reed*, 502 U.S. 279, 290 (1992).

Under this Court's freedom of association jurisprudence, "the rigorousness of [the] inquiry … depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review[.]" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citing *Burdick*, 504 U.S. at 434); *Clingman v. Beaver*, 544 U.S. 581, 586–87 (2005). Burdens on associational rights that are not severe must be supported by interests "sufficient to outweigh" the burden and must serve those interests in a "reasonable" way. *Burdick*, 504 U.S. at 440–41. Under this approach, "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (internal quotation marks omitted). However, "strict scrutiny" remains appropriate "if the burden is severe." *Clingman*, 544 U.S. at 592.

B. The major-party requirement imposes a severe burden on the right to associate.

"A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment" and thus is likely to be severe. *Anderson*, 460 U.S. at 793. In contrast, a restriction that "applies to major and minor parties alike" is less likely to constitute a severe burden on the right to associate. *See Timmons*, 520 U.S. at 360.

Here, the major-party requirement "falls unequally"—in fact, exclusively—on Delaware citizens who have either chosen to affiliate with third parties or chosen not to affiliate with a party at all. Specifically, Delaware's constitution prohibits anyone who is not a member of the Democratic or Republican parties from serving on the Delaware Supreme Court, the Superior Court, or the Court of Chancery. *See* Del. Const. art. IV, § 3. The major-party requirement ensures that, regardless of the political affiliations of the current judges on those courts, no candidate who is unaffiliated or who is affiliated with a third party can ever be considered for a judgeship on one of those courts. *See* Pet. App. 8a; Pet'r Br. 1, 4, 6.

These provisions of Delaware law exclude a broad swath of the state's citizens from eligibility for service on the state's principal courts. The latest available figures on party membership of Delaware voters show that approximately 47% are Democrats, 28% are Republicans, and the remaining 25% of the electorate is split between unaffiliated voters (approximately 23% of all voters) and members of minor parties (approx-

imately 2%).[2] The major-party requirement thus makes one in four Delaware citizens constitutionally ineligible for high judicial office solely because of their exercise of associational rights.

The proportion of Delaware's population that is excluded from judicial office is growing: Among new voters registered between 2010 and 2018, unaffiliated and minor-party voters outnumbered Republicans by approximately 2.5 to 1, and unaffiliated voters will outnumber Republicans statewide within twenty-five years if this trend continues.[3] Even then, however, Democrats and Republicans will retain their monopoly on judicial office because unaffiliated citizens are, by definition, not members of a major party.

The major-party requirement forces those who aspire to judicial office and who are independents or members of third parties to choose between exercising their constitutionally protected right not to associate with a major political party or seeking a state judgeship. But the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests," *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), including the right to associate (or not) with a political party. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77 (1990) ("The government 'may not enact a regulation providing that no

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[2] These percentages are based on the Delaware Department of Elections' tabulation of registered voters by party. *See* State of Del., Party Tabulation of Registered Voters, https://elections.delaware.gov/reports/pdfs/20200201_partytotals.pdf (Feb. 1, 2020).

[3] *See* Scott Gross, *Ominous Trend for Delaware GOP: The Voter Registration Gap Is Widening*, Wilmington News Journal, Aug. 9, 2018, https://www.delawareonline.com/story/news/politics/2018/08/09/delaware-gops-dirty-secret-voter-registration-gap-widening/937223002/.

Republican … shall be appointed to federal office.'" (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 100 (1947))); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 609–10 (1967) (holding unconstitutional a state law that disqualified individuals for public employment based solely on membership in the Communist Party). And because freedom of association "plainly presupposes a freedom not to associate," *Roberts*, 468 U.S. at 623, it is no solution to say that one who wants to be considered for a judgeship in Delaware can affiliate with whichever of the two major parties more closely reflects his or her views, even if the fit is not perfect. *Cf. Storer v. Brown*, 415 U.S. 724, 746 (1974) (holding that states cannot require an independent candidate to affiliate with a political party in order to appear on the ballot).

This Court has long recognized that provisions that grant a "complete monopoly" on public office to the two major political parties are subject to strict scrutiny because they severely burden the associational rights of citizens who are not members of those parties. *Rhodes*, 393 U.S. at 32; *see also Storer*, 415 U.S. at 729 (explaining that the restrictions in *Rhodes*, which effectively barred independents and members of third parties from running for office, "severely burdened the right to associate for political purposes"). The Court has emphasized that restrictions that "place[] a particular burden on an identifiable segment of … independent-minded voters" by precluding their participation in public life are "especially difficult for the State to justify." *Anderson*, 460 U.S. at 792–93. Conversely, when concluding that a law does *not* impose a severe burden on association, the Court has frequently observed that it does not "exclude[] a particular group of citizens, or a political party, from

participation," *Timmons*, 520 U.S. at 361, or "disqualify [a minor party] from public benefits or privileges," *Clingman*, 544 U.S. at 587 (plurality opinion).

The major-party requirement has exactly those consequences. It "den[ies] a benefit to a person because of his constitutionally protected speech or associations," and thus "penalize[s] and inhibit[s]" "his exercise of those freedoms." *Perry*, 408 U.S. at 597. Indeed, if "Republican" is replaced with "independent," this Court's description in *Rutan* of a law that would be per se unconstitutional—one "providing that no Republican … shall be appointed to … office," 497 U.S. at 77—perfectly describes Delaware's major-party requirement.

C. The major-party requirement is not narrowly tailored to serve a compelling state interest.

Because the major-party requirement severely burdens the associational rights of Delaware's many citizens who are not major-party members, it cannot be upheld unless it is "narrowly tailored and advance[s] a compelling state interest." *Timmons*, 520 U.S. at 358 (citing *Burdick*, 504 U.S. at 434). The requirement does not do so.

The petitioner asserts that Delaware's interest in the major-party requirement is the same one served by provisions in the same section of its constitution that limit any one party to no more than a bare majority on a court: the interest in "maintaining a politically balanced judiciary." Pet'r Br. 38. That interest is closely tied to the undoubtedly compelling interest in maintaining the appearance and reality of a fair and impartial judiciary. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). And this Court has

recognized that states can legitimately "discourage party monopoly" over their court systems. *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 208 (2008). But unlike the bare-majority limitation, which, as explained further below, *see infra* pp. 19–21, directly serves that interest by preventing one-party domination of the judiciary, the major-party requirement does not advance the interest in political balance. No one suggests that independents and members of minor parties are intrinsically less likely to possess the qualities of judgment and impartiality that are essential to preserving the courts' fairness and appearance of fairness. Similarly, there is no reason to believe that judges who lack party affiliation, or who are members of minor parties, have a greater tendency to make courts politically "unbalanced" than judges who are members of major parties. *Lack* of partisan affiliation is hardly a sign of partisanship, and the petitioner does not argue otherwise.

Rather, the "precise interest[] put forward by the State as justification[] for the" major-party requirement, *Anderson*, 460 U.S. at 789, is that it is a prophylactic measure intended to prevent governors from circumventing the provisions that limit one party to a bare majority on any court. Pet'r Br. 43. The petitioner claims that, without the major-party requirement, governors seeking to pack the courts with like-minded judges would be able to "appoint[] nominal 'independents' once their own party's quota is filled." *Id.*

Even where First Amendment associational and speech rights are implicated, prophylactic measures aimed at preventing circumvention of laws that serve legitimate state interests are constitutional if they meet the applicable standard of scrutiny. *See*, *e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533

U.S. 431, 456 (1996). When strict scrutiny applies, prophylactic measures must not burden constitutionally protected interests more broadly than reasonably necessary to achieve compelling interests. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798–801 (1988).[4] "Broad prophylactic rules" that severely burden free expression and association "are suspect," and "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Here, however, the state has not shown that broadly excluding citizens who are not affiliated with a major party from serving as judges is a narrowly tailored anti-circumvention measure that serves the interest in achieving a balanced judiciary. In attempting to justify the major-party requirement, the petitioner relies on "a recent study of federal agency appointees" that purportedly found that, "when one party dominates the appointment and confirmation process, partisan balance requirements without other-major-party provisos are vulnerable to 'gaming.'" Pet'r Br. 43 (citing Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Colum. L. Rev. 9, 20–21 (2018)). In reality, the authors of that study reviewed 216 cross-party appointments to twenty-three federal agencies that have political balance requirements ("PBRs") but not major-party membership requirements, and they "identified *only seven cases* in which

[4] This Court has struck down anti-circumvention and prophylactic measures that it determined to be insufficiently tailored to the harm to be avoided in such cases as *McCutcheon v. FEC*, 572 U.S. 185 (2014). *See also FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) ("[A] prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny.").

a President named an independent at a time when a PBR prohibited him from appointing a member of his own party to an agency." Feinstein & Hemel, *supra*, at 19 (emphasis added). The authors concluded that "[t]hese seven cases, moreover, *do not suggest* a pattern of Presidents attempting to manipulate PBRs by filling cross-party seats with like-minded independents." *Id.* (emphasis added).

Beyond unsupported speculation about executive gamesmanship, the petitioner has not presented any reason why the major-party requirement is necessary to serve Delaware's interest in maintaining political balance on its courts. There is little reason to believe that Delaware cannot achieve its interest in political balance by limiting any one political party to no more than a bare majority of seats on its principal courts, without excluding citizens who are not affiliated with a major party from the privilege of serving.

Furthermore, even if the state has a genuine need to prevent circumvention of the bare-majority limitation, the major-party requirement is not narrowly tailored to advance that interest. Indeed, a categorical exclusion of individuals based solely on their constitutionally protected political affiliations (or lack thereof) will rarely qualify as "narrowly tailored." *See Timmons*, 520 U.S. at 367 (explaining that states cannot "completely insulate the two-party system from minor parties' or independent candidates' competition and influence").

Delaware could enact other prophylactic measures that are significantly less restrictive of associational freedoms than the categorical exclusion imposed by the major-party requirement. For example, if there were reason to fear that major-party members might

disaffiliate from their party so that they could be appointed to courts where that party already had a majority, Delaware could provide that persons who had left a party less than, say, one year before appointment would be counted as members of that party for purposes of bare-majority limitations. *Cf. Storer*, 415 U.S. at 735–36 (holding that a state may exclude persons who have been disaffiliated from a party for less than twelve months from running as independents); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (upholding similar waiting period before voters who switch parties may vote in their new party's primary). Such a provision would be more effective in preventing circumvention than the major-party requirement, which does nothing to stop judicial nominees from evading the bare-majority limitation simply by switching from one major party to another.

In addition, by executive order, Delaware already employs a judicial nominating commission composed of a diverse range of Delaware citizens, of whom no more than a bare majority may be from any one political party. In most cases, the governor must select a nominee from lists of qualified candidates supplied by the commission.[5] This procedure renders it especially unlikely that nomination of a disguised partisan would undermine requirements aimed at preventing partisan imbalance. And if there were, nonetheless, a realistic possibility that a major party might be shut out of the courts altogether, Delaware might require that at least one position on its Supreme Court, and some minimum number on its other courts, be occupied by members of each of the major political parties,

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[5] *See* Gov. John Carney, Executive Order No. 7 (Mar. 9, 2017), https://governor.delaware.gov/executive-orders/eo07/.

respectively. Such a requirement would provide a backstop to a bare-majority limitation without categorically excluding individuals who do not belong to a major party from serving on the courts.

In sum, although political balance in the abstract is a worthy goal, a state's interest in enforcing a conception of political balance that excludes a quarter of the state's population from consideration is not compelling. The state has no legitimate interest in categorically excluding from consideration for judicial office an otherwise-qualified candidate who is independent or affiliated with a third party. Just as there is "no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them," *Rhodes*, 393 U.S. at 32, there is also no reason why the two major parties should retain a permanent monopoly on the most important state judgeships in Delaware. *Cf. Anderson*, 460 U.S. at 794 ("[T]he primary values protected by the First Amendment … are served when election campaigns are not monopolized by the existing political parties."). Thus, Delaware's "interest in securing the perceived benefits of a stable two-party [judiciary] will not justify unreasonably exclusionary restrictions" against independents and members of third parties. *Timmons*, 520 U.S. at 367. The interest in political balance does not require making courts the exclusive domain of the major parties.

D. The major-party requirement does not survive even "closely drawn" scrutiny.

By forcing a choice between exercise of associational rights and eligibility for judicial office, the major-party requirement is, at a minimum, "a significant interference with protected rights of political

association." *Buckley*, 424 U.S. at 25 (internal quotation marks omitted). Even if that interference were not severe enough to require strict scrutiny, it could be sustained only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id*. The major-party requirement fails even this less-demanding level of scrutiny because it is not reasonably necessary as a prophylactic measure to protect against partisan imbalance. The state has not shown that whatever incremental increase in balance it might bring about is sufficient to outweigh the significant burden on association caused by the exclusion of independents and minor party members. And that exclusion is not closely drawn to achieve political balance in light of the significantly less restrictive alternatives that the state could implement to serve its interests. Categorical exclusion of independents and members of third parties from the Delaware judiciary is thus an "unnecessary abridgement of associational freedoms." *Id.*

II. By itself, a bare-majority limitation would not violate the First Amendment.

In holding that the major-party requirement is unconstitutional, the Third Circuit did not address the constitutionality of a bare-majority limitation by itself. This Court should likewise avoid any suggestion that such a limitation, by itself, is unconstitutional. A true political balance requirement, such as a bare-majority limitation, without the additional major-party-membership requirement, would not violate the First Amendment. Unlike the major-party requirement, a bare-majority limitation serves the state's substantial interest in maintaining political balance on its state

courts without unnecessarily abridging associational freedoms.

A. A bare-majority limitation is not a severe burden on the right to associate.

Delaware's constitution limits the number of judicial positions on Delaware courts that can be occupied by members of the same political party to "not more than a bare majority." Del. Const. art. IV, § 3.[6] Unlike the major-party requirement, which operates as a categorical exclusion for independents and members of the third parties, the bare-majority limitation presents a conditional infringement on the right to associate that is disqualifying only in limited circumstances and applies evenhandedly. It excludes from consideration only those candidates who are affiliated with the political party that already occupies a majority of the seats on a particular court at the time of a vacancy, and it does so only as long as that majority persists. Thus, a bare-majority limitation neither categorically excludes anyone from consideration for state judgeships based on political affiliation, nor by itself operates unequally on members of major or minor parties or on citizens unaffiliated with political parties.

The burden on the right to associate imposed by a conditional limitation, such as a bare-majority limitation, is much less likely to be severe than one imposed by a categorical exclusion, such as the major-party requirement. For example, in *Timmons*, the Court

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[6] The provision regarding the Supreme Court is not written in those terms but has the same effect. It provides: "[T]hree of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party." Del. Const. art. IV, § 3.

concluded that the burdens imposed by Minnesota's antifusion laws, which prohibit candidates from appearing on the ballot as the candidate of more than one political party—"though not trivial—are not severe." 520 U.S. at 363. In reaching this conclusion, the Court noted that the Minnesota laws did not "exclude[] a particular group of citizens, or a political party, from participation in the election process." *Id.* at 361. Similarly, a bare-majority limitation does not exclude a particular political group from consideration for a position on the state judiciary. To the contrary, it ensures that courts will not be dominated by a single party and thus expands the opportunity of persons of all affiliations to serve as long as it is not coupled with the major-party requirement.

B. Operating alone, a bare-majority limitation would be closely drawn to serve the substantial interest in maintaining political balance on Delaware's courts without unnecessarily abridging associational freedoms.

Because a bare-majority limitation is not a severe burden on the right to associate, it "trigger[s] less exacting review" than does the major-party requirement. *Timmons* 520 U.S. at 358; *see Clingman*, 544 U.S. at 592. At most, a bare-majority limitation is a "significant" burden on association that is subject to *Buckley*'s "closely drawn" variant of intermediate scrutiny. *Buckley,* 424 U.S. at 25.

As explained above, this Court has recognized that the states have a "compelling interest in preserving public confidence in the integrity of the judiciary[.]" *Williams-Yulee*, 575 U.S. at 444. The "judiciary's authority … depends in large measure on the public's

willingness to respect and follow its decisions." *Id.* at 445–46. Thus, "public perception of judicial integrity is 'a state interest of the highest order.'" *Id.* at 446 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

Maintaining political balance on the courts is one component of the "public perception of judicial integrity." The public is much more likely to "respect and follow" the decisions of "a centrist group of jurists committed to the sound and faithful application of the law," Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673, 683 (2005), than the decisions of a bench composed of partisan judges who are perceived (rightly or wrongly) as effectuating the will of the person who appointed them. Maintaining political balance on the courts is thus a significant component of "preserving public confidence in the integrity of the judiciary." *See Williams-Yulee*, 575 U.S. at 444.

At the very least, maintaining political balance on the courts is a substantial state interest that is closely related to undisputedly compelling state interests. "The concept of minority representation, or stated in another fashion, limitations on majority representation, is entirely consistent with First Amendment principles of freedom of expression and association, and appears altogether legitimate as a legislative objective." *Hechinger v. Martin*, 411 F. Supp. 650, 653 (D.D.C. 1976) (three-judge court), *aff'd mem.*, 429 U.S. 1030 (1977). Whether the Court deems this interest to be "compelling" or "important," it is certainly "sufficiently weighty to justify the limitation" imposed by a bare-majority limitation. *See Norman*, 502 U.S. at 288–89.

Unlike the major-party requirement, a bare-majority limitation is closely drawn to serve the state's interest in maintaining political balance, without unnecessarily abridging associational freedoms. A bare-majority limitation only disqualifies party members from consideration for a state judgeship when their party already occupies the majority of seats on a court, and it always allows replacement of a retiring judge by a member of the same major party, a minor party member, or an independent, and, frequently, by a member of the other major party. A bare-majority limitation thus neither penalizes party affiliation (or non-affiliation) nor "sweeps broader than necessary to advance" Delaware's interest in maintaining a politically balanced judiciary. *See Norman*, 502 U.S. at 290. A bare-majority limitation also promotes the representation of minority political viewpoints by "preventing single party dominance." *See* Pet. App. 34a. Thus, a bare-majority limitation standing alone would be "closely drawn" to serve its purpose, and "the character and magnitude of the" infringement on the right to associate corresponds to the state's important interest. *See Anderson*, 460 U.S. at 789.

III. Whether judges are "policymakers" is irrelevant to the questions presented here.

Although the Third Circuit correctly concluded that the major-party requirement is unconstitutional, it erred in holding that the validity of that requirement turns on whether judges are "policymakers" within the meaning of this Court's decisions concerning patronage-based government personnel decisions. *See Rutan*, 497 U.S. 62; *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod*, 427 U.S. 347. Those decisions hold that although government decisionmakers generally

cannot permissibly make employment decisions based on an employee's association (or lack thereof) with the political party then in power, those decisionmakers can permissibly make employment decisions on that basis when loyalty to the party in power is a relevant job qualification, as is frequently the case for employees with "policymaking" authority.

The Court's patronage decisions have nothing to do with the constitutionality of laws disqualifying classes of citizens—here, individuals who do not belong to a major party—from holding an elected or appointed office. Such laws are no more acceptable when directed to "policymakers" than to other government officers and employees. The governor of a state, for example, is the quintessential policymaker, but no one would suggest that a state could for that reason provide in its constitution that only a Democrat or Republican may serve as governor. The same is true of a state's judicial officers.

A. The "policymaker exception" is limited to patronage-based employment decisions.

In the patronage cases, this Court considered the constitutionality of hiring, firing, promoting, and demoting government employees based on their affiliation with "the political party in power." *Rutan*, 497 U.S. at 64. Consistent with the Court's other freedom-of-association decisions, these cases establish that a government official's practice of hiring or firing public employees based on their political affiliation violates the First Amendment unless the practice is "narrowly tailored to further vital government interests." *Id.* at 74.

The "policymaker exception" defines one circumstance in which patronage practices are narrowly

tailored to further vital government interests and thus do not violate the First Amendment. In *Elrod*, a plurality of the Court held that patronage dismissals cannot be justified by the government's interest in "the need for political loyalty of [its] employees [to further] the implementation of policies of the new administration" unless the dismissals are limited to only those employees in "policymaking positions." *Elrod*, 427 U.S. at 367.

In *Branti*, the Court reformulated the so-called "policymaker exception" announced in *Elrod*. *Branti* held that, in deciding whether a particular dismissal on the basis of political affiliation violates the First Amendment, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. If "party affiliation is an appropriate requirement for the effective performance of the public office involved," then the government official's dismissal of that particular employee is narrowly tailored to further the government's asserted interest in retaining employees with "allegiance to the dominant political party," *id.* at 520, and thus does not violate the First Amendment.

In *Rutan*, the Court reaffirmed that "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so." *Rutan*, 497 U.S. at 78. Moreover, the Court explained that hiring decisions concerning most public employees cannot be justified by the government's interest in maintaining politically loyal employees because "a

government can meet its need for politically loyal employees to implement its policies by the less intrusive measure of dismissing, on political grounds, only those employees in policymaking positions." *Id.* at 70 (citing *Elrod*, 427 U.S. at 367).

In each of these cases, the Court was concerned with defining the circumstances in which a government decisionmaker (usually an elected official or political appointee) could consider political affiliations (usually of subordinates) when making employment decisions without running afoul of the First Amendment right to associate. When the government's asserted interest for such decisions is a "need for politically loyal employees," *id.* at 70, the decisionmaker is free to consider the employee's political affiliation if the employee is a "policymaker"—or, more precisely, if "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

B. The "policymaker exception" does not apply to laws disqualifying citizens from judicial office based on political affiliation.

The so-called "policymaker exception" is only relevant in the circumstances that gave rise to it: when political loyalty to the "party in power" is necessary to serve the government's asserted interest "in securing employees who will loyally implement [that party's] policies," *Rutan*, 497 U.S. at 64, 70, and will not "support … competing political interests," *Elrod*, 427 U.S. at 356. If the government asserts some other interest to justify a challenged practice, the policymaker exception is inapplicable. A constitutional or statutory provision that requires party membership as a qualification for public office for reasons wholly unrelated

to the need to advance the policy agenda of the political party currently in power, by definition, does not serve the interest identified in *Rutan*, *Branti*, and *Elrod*.

Moreover, laws such as the major-party requirement impose far more onerous and lasting disabilities on disfavored groups than do the more transitory choices of political officials to appoint their allies to office during the time they are in power. Thus, while a Democratic governor may legitimately prefer a Democrat as a speechwriter, and his Republican successor may likewise hire a Republican for the same position, *see Branti*, 445 U.S. at 518, a state law that said gubernatorial speechwriters must be Democrats or Republicans would not even arguably serve any interest sufficient to justify the burden it imposed on associational freedoms. Nothing in the "policymaker" exception suggests otherwise.

Here, the major-party requirement has no relationship to the concerns that gave rise to this Court's recognition of a policymaker exception. Delaware's asserted interest in the major-party requirement is in maintaining political balance on the judiciary, not in securing politically loyal employees to faithfully implement the administration's policies. *See* Pet'r Br. 28 ("[N]one of the Court's [patronage] decisions involved a regime where party affiliation was considered to ensure bipartisanship or party balance."). Furthermore, the petitioner does not suggest that political loyalty to the party in power is a relevant qualification for service as a judge, and any such suggestion would be contrary to the basic principle that a judge's duty is to "apply the law without fear or favor." *Williams-Yulee*, 575 U.S. at 438.

That the major-party requirement is not aimed at placing politically loyal employees in policymaking positions is confirmed by the fact that the constitutional provisions in which it is embedded compel the governor to appoint a judge who is *not* a member of his own party when the governor's political party already holds a majority of the seats on the court on which there is a vacancy. And because of the major-party requirement, an independent or third-party governor could *never* appoint a member loyal to his own political orientation to a Delaware court. The reasons underlying the policymaker exception are not implicated by the major-party requirement, and the policymaker exception is therefore irrelevant to whether the burdens on association imposed by that requirement serve a compelling governmental interest.

C. The First Amendment does not prevent consideration of political affiliation in judicial appointments.

Because the conclusion that the major-party requirement is unconstitutional does not depend on the premise that judges are not policymakers, that conclusion also does not imply that judicial appointments cannot be based on partisan considerations. Rather, political affiliation can be an appropriate consideration in making judicial appointments, and it is precisely for that reason that states may choose to pursue partisan balance in their laws governing judicial appointment.

The Third Circuit's reasoning, however, suggests otherwise: By looking to the *Elrod* line of cases and grounding its holding that the major-party requirement is unconstitutional on the view that Delaware judges are not "policymakers," the lower court's

decision implies that elected officials may not consider political affiliation when making judicial appointments. Thus, as the petitioner puts it, the Third Circuit's rationale appears to "create a constitutional anomaly: The people of the States could consider partisan affiliation directly in voting for judges, but an elected official could not consider the same factor in carrying out their wishes." Pet'r Br. 30.

No such anomaly arises, however, from recognizing that the major-party requirement is unconstitutional—regardless of whether judges are characterized as "policymakers"—because it imposes a severe and unjustified burden on associational rights. That conclusion is entirely consistent with recognition that elected officials may consider political affiliation when making judicial appointments—not because, in *Rutan*'s terms, loyalty to the "political party in power" is "an appropriate requirement for the position involved," 497 U.S. at 64, but because the nature of a judge's responsibilities are such that considerations of political association and belief are appropriate to, and perhaps inseparable from, evaluation of potential judicial appointees. "In resolving disputes, although judges do not operate with unconstrained discretion, they do choose from among alternatives and elaborate their choices in order to guide and … determine present and future decisions." *Gregory v. Ashcroft*, 501 U.S. 452, 482 (1991) (White, J., concurring) (ellipsis in original; internal quotation marks omitted). Thus, a government official should be "entitled to consider" a judicial appointee's "views about the role of judges—or even simply [the appointee's] political affiliation—when making the appointment, just as the voters may consider these factors without violating the first amendment when deciding whether to retain [the

judge] in office." *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988); *see also Newman v. Voinovich*, 986 F.2d 159, 162–63 (6th Cir. 1993).

Without Delaware's bare-majority limitation, a governor could "pack[] the courts with appointees from [a] particular political party," Pet'r Br. 1, undermining the public's perception of judicial integrity and impartiality. The First Amendment does not prohibit appointing authorities from making such choices, but it likewise does not deny states the power to constrain them. *See López Torres*, 552 U.S. at 208. Recognition that Delaware cannot by law exclude citizens who are neither Democrats nor Republicans from serving as judges does not foreclose all consideration of political affiliation in judicial appointments.

IV. The Third Circuit's holding that the unconstitutional major-party requirement is not severable is controlled by state law.

The Third Circuit's conclusion that the major-party requirement unconstitutionally infringes on associational freedom is correct. The remedial question whether an otherwise constitutional bare-majority limitation must also be struck down as inseverable is, as the Third Circuit held and the petitioner agrees, "a question of state law." Pet. App. 33a; Pet'r Br. 50. This Court cannot provide an authoritative ruling on the question, and its prediction of state law, like the Third Circuit's, would have preclusive effect only on the parties. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 101 n.4 (1976) (White, J., concurring in judgment in part and dissenting in part). The Court ordinarily does not address such questions. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988). However, if the Court is concerned about

the Third Circuit's severability analysis, it has the option of certifying the question to the Delaware Supreme Court to allow the state court to decide the issue of severability definitively under state law. *See* Del. Sup. Ct. R. 41(a)(ii).

CONCLUSION

For the foregoing reasons, the Court should affirm the Third Circuit's holding that the major-party requirement violates the First Amendment.

Respectfully submitted,

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