No. 19-309

IN THE
Supreme Court of the United States

GOVERNOR OF DELAWARE,
Petitioner,

v.

JAMES R. ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* LAWYERS AND PROFESSORS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

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John A. Butrick, a registered Libertarian voter at all relevant times, was the Libertarian nominee for Governor of Arizona in 1994 and recent Chair of the Arizona Libertarian Party. A Republican governor appointed him to serve on the Superior Court of Arizona in Maricopa County in 2001, and he was retained by elections in 2004 and 2008. He resigned upon his appointment in 2012 as a United States Magistrate Judge for the District of Arizona. He retired in 2016.

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[1] No counsel for a party authored this brief in whole or in part and no person or entity, other than *amici* or their counsel, contributed monetarily to the preparation or submission of this brief. *Amici* are filing this brief with the consent of the parties.

constitutionality under the First Amendment of Article IV, Section 3 of the Delaware Constitution. Joel Edan Friedlander, *Is Delaware's "Other Major Political Party" Really Entitled To Half of Delaware's Judiciary?*, 58 Ariz. L. Rev. 1139 (2016).

James P. Gray served 25 years as a trial judge in the Superior Court of Orange County, California. Originally a registered Republican appointed by a Republican governor, Judge Gray registered as a Libertarian during his judicial service and later was nominated by Libertarian Party convention delegates to be the running mate of former New Mexico Governor Gary Johnson in the Presidential election of 2012.

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Amici submit this brief out of concern that Article IV, Section 3 violates the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The provisions of the Delaware Constitution that the Third Circuit adjudged unconstitutional categorically disqualify independents and members of minor parties from serving on influential organs of American government—the business courts of the State of Delaware.

Two aspects of Article IV, Section 3 of the Delaware Constitution interact to disqualify independents and members of minor parties. One set of provisions limits the appointment of judges so that no more than a "bare majority" of the judgeships for each of two courts and for three courts in total belong to the "same major political party" (the "Bare-Majority Feature"). Another set of provisions allocates the remaining judgeships to members of the "other major political party" (the "Two-Party Feature"). The Bare-Majority Feature and the Two-Party Feature interact to prevent the appointment of anyone to the Delaware Supreme Court, the Court of Chancery, or the Superior Court who is not a member of either "one major political party" or "the other major political party":

Appointments to the office of the State Judiciary shall at all times be subject to all of the following limitations:

First, three 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.

Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the members of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.

Third, at any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.

The Third Circuit properly held that any benefit of balancing the number of judgeships between the two major political parties "cannot suffice as a justification to bar candidates who do not belong to either the Democratic or Republican parties from seeking judicial appointment." Pet. App. 32a—33a. The Third Circuit explained that "Delaware's practice of excluding Independents and third party voters from judicial employment is not narrowly tailored" to Delaware's asserted interest in a politically balanced judiciary. Pet. App. 30a.

The Third Circuit's First Amendment analysis was limited to the effect of the Two-Party Feature. The Third Circuit did not rule on the constitutionality of the Bare-Majority Feature. Standing alone, the Bare-Majority Feature does not categorically disqualify independents and third-party members from judicial service.

The disqualification of independents and third-party voters is no trivial matter. Of the 713,055 registered voters in Delaware as of January 2020, 47.41% were registered Democratic, 27.75% were registered Republican, and the remaining 24.84% had either no party affiliation or minor party affiliation. *See* OFF. OF THE STATE ELECTION COMMISSIONER, DEPT. OF ELECTIONS, STATE OF DEL., VOTER REGISTRATION TOTALS BY POLITICAL PARTY (Feb. 15, 2020, 2:07 AM).[2] In New Castle County, the county in which Delaware's largest law firms are based, independents outnumber Republicans. *Id.*

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[2] Available at: https://elections.delaware.gov/reports/e70r2601pty_20200102.shtml.

Amici argue that Article IV, Section 3 is unconstitutional because the Two-Party Feature categorically disqualifies independents and third-party members who are otherwise constitutionally qualified under Article IV, Section 2 (*i.e.*, they are "citizens of the State and learned in the law"). *Amici* take no position respecting the constitutionality of the Bare-Majority Feature. *Amici* do not argue against a governor or legislator taking into account a judicial applicant's political affiliation. What makes the Two-Party Feature unconstitutional is that it prevents the appointment of *any* Independent or third-party member, irrespective of the applicant's qualifications and irrespective of the desire of a governor to appoint that individual. For example, if an independent or third-party nominee is elected governor,[3] that governor cannot nominate a single independent or third-party member to serve on any of Delaware's three highest courts. The Two-Party Feature permanently apportions a large swathe of Delaware's judicial power to members of both current major parties. It helps both major parties maintain political power.

The Bare-Majority Feature and the Two-Party Feature have different histories. The original version of the Bare-Majority Feature dates to 1897, when the Delaware Constitution was rewritten in a spirit of reform following a period of one-party dominance, unilateral appointment power of the

[3] This has happened on several occasions in recent years, such as Bill Walker of Alaska (2014—2018), Lincoln Chafee of Rhode Island (2011—2015), Charlie Crist of Florida (2007—2011), Jesse Ventura of Minnesota (1993—2003), Angus King of Maine (1995—2003), and Lowell Weicker of Connecticut (1991—1995).

governor over the judiciary, and rampant electoral fraud. *See* Friedlander, *supra*, at 1147—1149. In the same era, newly created federal agencies contained partisan balance requirements. Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Colum. L. Rev. 9, 17 (2018). The wording of partisan balance requirements for federal multi-member agencies is similar to the Bare-Majority Feature. "Typical language stipulates that not more than three (out of five) or two (out of three) shall be members of the same political party." Joshua Kershner, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process Is Constitutional*, 32 CARDOZO L. REV. 615, 635 (2010).

The constitutional debates of 1896, JA68—127, and the federal statutes containing political balance requirements do not shed light on why Delaware's Constitution was amended in 1951 to create a Two-Party Feature. *See* 48 Del. Laws 109 (1951). Even today, no other state judiciary or federal administrative agency imposes a Two-Party Feature. Of the purported analogues to the Two-Party Feature identified by *amici* supporting the petitioner, Campaign Legal Center Br. at 24—25, 27; Daunt and Shinkle Br. at 9, 13—19, 21, only a handful actually preclude the appointment of independents or third-party members: state election commissions in Illinois, Maryland, Oklahoma, and Virginia and museum and festival boards in Missouri.

Delaware's Two-Party Feature is the product of a local legislative bargain. Twenty years of

repeated legislative effort from 1931 to 1951 finally led to Delaware amending its constitution and becoming the last state to create a separate supreme court. Henry R. Horsey and William Duffy, *The Supreme Court After 1951: The Separate Supreme Court*[4]; Maurice A. Hartnett III, *Delaware Courts' Progression*, *in* DELAWARE SUPREME COURT GOLDEN ANNIVERSARY 1951–2001, at 16, 19-20 (Randy J. Holland & Helen L. Winslow eds., 2001). Amending the Delaware Constitution required super-majorities in both houses of the General Assembly in two consecutive legislative sessions. Del. Const. art. XVI, § 1. A proposed amendment passed both houses unanimously in 1937, but went nowhere in 1939. Horsey and Duffy, *supra*. That proposed amendment contained a Bare-Majority Feature, but not a Two-Party Feature. 41 Del. Laws 1 (1937). Following the election of a Democratic governor in 1948, a renewed legislative effort passed easily in 1949 and overcame Republican opposition in 1951. Horsey and Duffy, *supra*; Hartnett, *supra*, at 19-20. The Two-Party Feature in the 1949/1951 proposed constitutional amendment guaranteed that one of the three new Justices would be a Republican, aiding its passage. See Hartnett, *supra*, at 19 (noting that inclusion of a partisan balance requirement "led to its success").

The legislative history in Delaware suggests the potential nationwide effect of upholding the Two-Party Feature. Future legislators will be tempted to condition support for the creation, expansion, or reform of multi-member governmental bodies on

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[4] Available at: http://courts.delaware.gov/supreme/history/.

legislation that allocates permanent representation in that body to members of their political party. Legislators will seek to convert bare-majority political balance requirements into two-party political balance requirements. Permanently allocating government power to members of the two major parties will come at the expense of categorically disqualifying independents and members of minor parties.

The arithmetic of the Bare-Majority Feature and the Two-Party Feature would not prevent partisan court-packing respecting the development of Delaware corporate law and commercial law. Hypothetically, if Delaware remains a solidly Democratic State and the Republican Party remains a major party, a succession of partisan Democratic governors could pack the judiciary as follows:

- Supreme Court seats could be allocated to 3 Democrats (including the Chief Justice) and 2 Republicans;
- Court of Chancery seats could be allocated to 4 Democrats (including the Chancellor) and 3 Republicans;
- A Democrat could be appointed President Judge of the Superior Court;
- the President Judge could assign 5 Democrats and 0 Republicans to the Superior Court's Complex Commercial Litigation Division, which hears cases that either include a claim with an amount in controversy of $1 million or more, that involve an exclusive choice of court agreement, or are otherwise deemed qualifying by the President Judge, but

excluding personal injury actions, mortgage foreclosure actions, mechanics' lien actions, and condemnation proceedings;[5]

- 11 of the remaining 15 seats on the Superior Court could be allocated to Republicans, to adjudicate lower-stake civil disputes and to preside over criminal trials.

Additionally, a Delaware Governor could issue an Executive Order terminating the Judicial Nominating Commission or eliminating its current bi-partisan composition. See Gov. John C. Carney, Exec. Order No. 16, at § 4 (Oct. 18, 2017).

The Two-Party Feature is not a "major reason" for the widely admired virtues of Delaware's judiciary. Pet. Br. at 1. Even if this Court invalidates Article IV, Section 3 in its entirety there are significant reasons to expect that Delaware's judiciary will remain populated by strong, non-partisan judges. A leading corporate law scholar who joined an *amici curiae* brief supporting the petitioner recently explained that it "seems implausible that the quality of Delaware corporate law would suffer significantly were the constitutional provisions in question to be struck down." Stephen M. Bainbridge, *Delaware's Judiciary in the U.S. Supreme Court*, WLF Legal Pulse (Dec. 13, 2019).[6]

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[5] See Administrative Directive of the President Judge of the Superior Court of the State of Delaware, No. 2010-3 (May 1, 2010), available at https://courts.delaware.gov/superior/complex.aspx.

[6] Available at: https://www.wlf.org/2019/12/13/wlf-legal-pulse/delawares-judiciary-in-the-u-s-supreme-court/.

The chief reason is that the franchise tax imposed by Delaware on domestic corporations, limited partnerships, and limited liability companies accounts for over 26% of Delaware's net General Fund revenue collections. *See* FY20 GOVERNOR'S RECOMMENDED OPERATING BUDGET – FINANCIAL OVERVIEW.[7] That economic reality favors a professional-minded approach to judicial nominations and judicial decision-making.

The only clear effect of the Two-Party Feature is that it excludes independents and third-party members from the State's three highest courts. That categorical disqualification does not apply across the breadth of Delaware's judiciary. In 2005, the Delaware Constitution was amended to make the Family Court and the Court of Common Pleas constitutional courts, with appointment to those courts governed by the Bare-Majority Feature, but not the Third-Party Feature. JA135—143. There is no reasonable explanation why independents and members of third parties may serve on the Family Court and the Court of Common Pleas, but not on the Supreme Court, the Court of Chancery, or the Superior Court.

The current choice facing any judicial applicant to the three highest courts—or any current judge seeking reappointment—is stark. The applicant must either affiliate with a major party or forswear any ambition of high judicial service.

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[7] Available at: https://budget.delaware.gov/budget/fy2020/documents/operating/financial-overview.pdf.

Respondent James Adams was unwilling to affiliate with a major political party that did not reflect his beliefs. JA40—42, 67. A then-pending Notice of Vacancy mandated the appointment of a Republican. JA156—157. Adams's "loss of a job opportunity for failure to compromise one's convictions states a constitutional claim." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77 (1990).

The Two-Party Feature is infirm under three lines of First Amendment jurisprudence: (i) unconstitutional conditions to government employment; (ii) protection of minor political parties from partisan lockups; and (iii) speech restrictions on judicial candidates.

1. The Two-Party Feature is an unconstitutional condition on employment under the settled law that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'" *Wieman v. Updegraff*, 344 U.S. 183, 191—192 (1952) (internal quotation omitted). This Court's loyalty oath cases, including *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), protect members of the Communist Party from categorical disqualification for state employment or bar admission. If Communist Party membership is not itself a permissible disqualification for public employment or admittance to the bar, then lawyers who register as an independent or members of any minor party (whether the Libertarian Party or the Socialist

Workers Party) cannot be categorically disqualified for appointment as a Delaware judge.

2. The Two-Party Feature operates as a bi-partisan lockup of Delaware's judiciary. A minor party cannot hope to get its members appointed to the three highest courts, even if the minor party aligns with a major party. This is a severe burden on associational rights, warranting strict judicial scrutiny under *Clingman v. Beaver*, 544 U.S. 581, 592 (2005). The Two-Party Feature is not a reasonable regulation that "may, in practice, favor the traditional two party system." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). It is a legislative bargain to ensure permanent equal allocation of judgeships between the two major parties.

3. This Court applies strict scrutiny when reviewing speech restrictions on candidates seeking election to judicial office. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The Two-Party Feature restricts the speech of candidates seeking appointment to the judiciary. The federalism concerns of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), do not lesson Petitioner's burden of establishing that the Two-Party Feature is "narrowly tailored to serve a compelling government interest." *Williams-Yulee*, 575 U.S. at 455.

ARGUMENT

I. THE TWO-PARTY FEATURE IMPOSES AN UNCONSTITUTIONAL CONDITION ON GOVERNMENT EMPLOYMENT

Article IV, Section 3 makes service on Delaware's highest courts the exclusive province of Democrats and Republicans. It mandates that all judges on the Delaware Supreme Court, the Court of Chancery, and the Superior Court be members of either "one major political party" or "the other major political party." Del. Const. Art. IV, § 3. This Two-Party Feature categorically disqualifies all independents and all members of minor parties.

Delaware's Governor and State Senate cannot circumvent this exclusion. They have no discretion to appoint to the State's highest courts an eminent attorney who belongs to neither major party. This lack of discretion binds even a governor who is an independent.

Categorical exclusions from government employment are unconstitutional under "decades of landmark precedent." *Janus v. AFSCME*, 138 S. Ct. 2448, 2469 (2018). As this Court has long maintained, "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office . . . .'" *Wieman*, 344 U.S. at 191—192 (quoting *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947)). "[N]either a State nor the Federal Government can constitutionally force a person [seeking public employment] to profess a belief or disbelief in any religion," *Torcaso v.*

Watkins, 367 U.S. 488, 495 (1961), or to forswear membership in a disfavored political organization, *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966); *Keyishian*, 385 U.S. at 606. This bar on unconstitutional conditions is fatal to the Two-Party Feature.

The Two-Party Feature cannot be defended under the Court's "patronage" cases, such as *Elrod v. Burns*, 427 U.S. 347, 353 (1976). The patronage cases recognize a zone of discretionary employment decisions based on party affiliation. See *id.* at 351 (discretionary dismissals); *Branti v. Finkel*, 445 U.S. 507, 509 (1980) (discretionary dismissals); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 67 (1990) (discretionary hiring, rehiring, transfer, and promotion); *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 715 (1996) (discretionary dismissal). The patronage cases have no application to the Two-Party Feature because the Two-Party Feature operates as a categorical disqualification. It admits of no discretion. No governor can choose to appoint an independent or third-party member to Delaware's highest courts. Whether or not judges are policy-makers for purposes of the patronage cases is irrelevant to the constitutional analysis of the Two-Party Feature. The Two-Party Feature violates the First Amendment because it categorically disqualifies a class of applicants based solely on party affiliation.

A. The Two-Party Feature Is a Form of Unconstitutional Condition

States may not "prescribe what shall be orthodox in politics." *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). In particular, States may not impose unconstitutional conditions respecting political affiliation on would-be public employees or officeholders. *Wieman*, 344 U.S. at 191—192; *Keyishian*, 385 U.S. at 609–610. Delaware violates that prohibition by categorically disqualifying all independents and members of minor parties from high judicial office.

Wieman and *Keyishian* both involved loyalty oaths. In *Wieman*, an Oklahoma statute prohibited state agencies from hiring (or continuing to employ) anyone who declined to swear an oath denying past or presented association with any "party" or other group deemed "a communist front or subversive organization." 344 U.S. at 186. The Court invalidated this statute, holding that the Constitution did not permit a categorical exclusion "solely on the basis of organizational membership." *Id.* at 190. The Court analogized a bar on Communist Party members to a bar on Republicans: "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." *Id.* at 191—92 (quoting *United Public Workers*, 330 U.S. at 100).

Subsequently, the Court clarified that political party membership cannot be a disqualification.

Even knowing and willful membership in the Communist Party after taking a loyalty oath is not a valid ground for dismissal of a state employee. *Elfbrandt v. Russell*, 384 U.S. 11, 13 (1966). The State's interest in national security could be vindicated by excluding only those "who join [the Communist Party] with the specific intent to further illegal action." *Id.* at 17 (internal quotation omitted).

Keyishian reaffirmed this principle and added the concept of narrow tailoring. 385 U.S. at 602—603. New York could not make teaching at a state university conditional upon a declaration of non-membership in the Communist Party. *Id.* at 596. The legitimate goal of protecting New York's educational system from subversion "can be more narrowly achieved.'" *Id.* at 602 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). Proscribing "knowing membership" in a political party swept too broadly. *Id.* at 609. As stated in a subsequent case involving public employees: "Employment may not be conditioned on an oath denying past, or abjuring future, associational activities within constitutional protection; such protected activities include membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose." *Cole v. Richardson*, 405 U.S. 676, 680 (1972).

Wieman and *Keyishian* are "[l]andmark precedent[s]." *Janus*, 138 S. Ct. at 2469. Their protection of government employees who are knowing members of the Communist Party applies with more force to judicial applicants who are independents or members of any minor party. Non-

major-party affiliation does not reflect negatively on the abilities or character of applicants for judgeships.

The Two-Party Feature operates in the same manner as a loyalty oath. It creates a categorical disqualification from a governmental office based solely on the political party affiliation of the applicant. Article IV, Section 3 cannot be interpreted to permit the appointment of independents. See RNC Br. at 27-29. Under the ordinary meaning of the words, judicial service on the courts at issue is limited to members of "one major political party" or "the other major political party." Del. Const. Art. IV, § 3. This categorically excludes independents and members of minor parties. The State's notices of vacancy confirm this plain reading. JA144 ("the appointee must be a member of the Democratic Party"); JA147 ("the appointee may be a member of either the Democratic Party or the Republican Party"); JA156 ("the appointee must be a member of the Republican Party").

B. The Patronage Cases Create No Defense

This Court's precedents recognize a limited scope for "political patronage" in public employment decisions. *Elrod*, 427 U.S. at 353. Public employment hiring decisions within that limited scope may be based on party affiliation. For purposes of this case, *amici* do not contest that trial judges and appellate judges may occupy "policymaking positions" under *Elrod* and its progeny. *Id.* at 367; *see also* Pet. Br. at 28–34;

Newman v. Voinovich, 986 F.2d 159, 163 (6th Cir. 1993) ("With respect to gubernatorial appointments to the state judiciary, we hold that judges are policymakers within the meaning of *Elrod* and *Branti*. Therefore, Governor Voinovich is free to make judicial appointments based on political considerations."). *Amici* disagree with the Third Circuit's statement that a Delaware governor may not exercise his discretion nominate judges based on the principle "Communists need not apply." Pet. App. 29a.

What is critical for present purposes is that the Two-Party Feature operates as a categorical disqualification based on political party affiliation. It forbids the exercise of discretion by a governor to nominate an independent or member of a minor party. Cases delimiting a zone of permissible decision-making based on political party affiliation do not extend to categorical disqualifications in a statute or State constitution.

Elrod and its progeny govern discretionary hiring and firing decisions, not statutory categorical disqualifications. The *Elrod* litigation arose from a newly elected Sheriff's practice of discharging some or all departmental employees who belonged to the vanquished party. 427 U.S. at 351. The plaintiffs were "not covered by any statute, ordinance, or regulation protecting them from arbitrary discharge" by the Sheriff. *Id.* at 350. In labeling these partisan dismissals as "political patronage," the Court offered several examples to clarify its meaning. *Id.* at 353. All involved the exercise of discretion in a politically motivated way; none involved categorical exclusions

from office. The Court spoke, for example, of practices such as "placing loyal supporters in government jobs," directing "improved public services" to "[f]avored wards," and making co-partisans "the beneficiaries of lucrative government contracts" or of "receiverships, trusteeships, and refereeships." *Id.* The Court cited a political science text that defines patronage as "the allocation of the discretionary favors of government in exchange for political support." Martin Tolchin & Susan Tolchin, *To the Victor* 5 (1971), *cited in Elrod*, 427 U.S. at 353 n.2.

Subsequent decisions confirm that *Elrod*'s patronage framework governs only discretionary decisions. *Branti* involved partisan dismissals by a County Public Defender of several assistant attorneys who, under the relevant law, "serve[d] at his pleasure." 445 U.S. at 510. *Rutan* extended the framework to a Republican governor's decisions related to hiring, rehiring, transfer, and promotion, that were committed to his authority by state law. 497 U.S. at 65—67. *O'Hare Truck Service* considered a municipality's discretionary firing of one of its independent contractors. 518 U.S. at 714.

Petitioner's assertion that "*Elrod* and its progeny apply . . . to formal written exclusions based on party registration" is incorrect. Pet. Br. at 46. This Court has never performed a patronage analysis to evaluate a categorical disqualification such as the Two-Party Feature.

Nor could such analysis remove the Two-Party Feature's infirmity under the First Amendment.

Whether or not judges occupy "policymaking positions," *Elrod*, 427 U.S. at 367, the Two-Party Feature is unconstitutional because it categorically disqualifies a class of applicants based solely on party affiliation. *Keyishian*, 385 U.S. at 606.

Petitioner's argument that members of the Delaware Supreme Court, the Court of Chancery and the Superior Court occupy policymaking positions, Pet. Br. at 30-34, undermines Petitioner's defense of the Two-Party Feature. The Two-Party Feature forbids the appointment by any Delaware governor of any independent or any member of any minor party from these critical offices for no reason other than their political party affiliation, without regard for the political party affiliation of the governor. This categorical disqualification cannot be justified by dictum in *Branti* hypothesizing about a particular low-level form of on-the-spot adjudication in which political party affiliation may be "essential": "if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration." 445 U.S. at 518. That hypothetical cannot cover the high offices in question.

II. THE TWO-PARTY FEATURE IMPERMISSIBLY BURDENS MINOR PARTIES, NEW PARTIES, AND INDEPENDENTS

This Court's decisions protecting the associational rights of minor parties and

independent candidates create a distinct ground for invalidating the Two-Party Feature.

"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." *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). The First Amendment "protects the right of citizens 'to band together in promoting among the electorate candidates who espouse their political views.'" *Clingman*, 544 U.S. at 586 (quoting *California Democratic Party v. Jones,* 530 U.S. 567, 574 (2000)). "Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest." *Id.* (citing *Timmons,* 520 U.S. at 358). In *Clingman*, the Court reaffirmed its prior holding in *Keyishian* that it impermissibly infringes on associational rights "to disqualify [a minor party] from public benefits or privileges." *Id.* at 587 (citing *Keyishian,* 385 U.S. at 595—596).

A plurality in *Clingman* reasoned that strict scrutiny did not apply to a mandated semiclosed primary because the statute at issue did not prevent the Libertarian Party of Oklahoma from "engag[ing] in the same electoral activities as every other political party in Oklahoma." *Id.* The law did not limit the minor party's "capacity to communicate with the public." *Id.* at 590.

By contrast, the Two-Party Feature must be tested by strict scrutiny because it necessarily limits the "electoral activities" and "capacity to

communicate" of all present and future minor parties in Delaware. Delaware's citizens cannot form or advance a political party with the objective of securing the appointment of like-minded members to the Delaware Supreme Court, the Court of Chancery, or the Superior Court. The Two-Party Feature confers that public benefit or privilege only on the two major parties. So long as a minor party remains a minor party, its members are categorically disqualified from high judicial office, even if the minor party is allied with a major party or represents a significant constituency.

The inability to elect politicians who can appoint like-minded judges is akin to an election law that renders it "virtually impossible for a new political party" to get its candidates on the ballot. *Williams v. Rhodes*, 393 U.S. 23 (1968). Writing for the Court, Justice Black rejected a proffered justification for laws that tend to give the Republican and Democratic parties "a complete monopoly." *Id.* at 32. "New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." *Id.* Delaware may not "completely insulate the two-party system from minor parties' or independent candidates' competition and influence." *Timmons,* 520 U.S. at 367. "[A]n interest in securing the perceived benefits of a stable two-party system will not justify unreasonably exclusionary restrictions." *Id.* The same reasoning applies to an interest in securing the perceived benefits of a bi-partisan judiciary.

Unlike a "reasonable, non-discriminatory restriction[]" in a complex election code, the Two-Party Feature cannot be defended on the basis that it serves "the State's important regulatory interests." *Anderson*, 460 U.S. at 788. The Two-Party Feature is not a "reasonable election regulation[] that may, in practice, favor the traditional two-party system." *Timmons,* 520 U.S. at 367. It expressly allocates judicial power between the two major parties.

The fear that a minor party might gather support from members of a major party is not "a compelling interest, it is an impermissible one." *Clingman*, 544 U.S. at 617 (Stevens, J., dissenting) (citing *Timmons,* 520 U.S. at 367). Yet, the proffered defense of the Two-Party Feature is essentially that impermissible purpose. Petitioner seeks to maintain political balance on the judiciary between the two major parties. Petitioner considers it a problem that a Democratic governor might appoint an independent who was formerly a Democrat, but left the Democratic Party because it was not sufficiently "progressive." Pet. Br. at 42. Petitioner also seeks to prevent the appointment of a sincere third-party member. *Id.* According to Petitioner, the appointment of a third-party member would be a form of circumvention. *Id.* at 43. To defenders of the Two-Party Feature, there are two legitimate political parties, they correspond with two legitimate judicial perspectives, and they are entitled to equal representation on the judiciary. This power-sharing arrangement impermissibly entrenches a political duopoly. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998);

Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (1997).

Bi-partisan entrenchment is not an accidental consequence of the Two-Party Feature. In the face of constitutional amendment procedures that require sustained supermajorities, Democratic and Republican politicians adopted the Two-Party Feature and reaffirmed it. The two major parties bargained to share control over the state judiciary to the exclusion of independents and members of minor parties.

Upholding the Two-Party Feature would unleash a wave of legislative efforts in which the two major parties bargain with each other to secure mutual representation in national, state, and local governmental bodies. Such express, two-party power-sharing arrangements are virtually unheard of in current American political structures, much less any non-Delaware judiciary.

III. THE TWO-PARTY FEATURE IMPERMISSIBLY BURDENS THE SPEECH OF JUDICIAL CANDIDATES

"A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee*, 575 U.S. at 444. Speech restrictions on judicial candidates must be tested by strict scrutiny even though "they reflect sensitive choices by States in an area central to their own governance—how to select

those who "'sit as their judges.'" *Id.* at 454 (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991)). Petitioner places great weight on *Gregory*, but concedes that *Gregory* was properly applied "in the First Amendment context" in *Williams-Yulee*, Pet. Br. at 36, which meant imposing strict scrutiny.

Williams-Yulee was a "rare case[] in which a speech restriction with[stood] strict scrutiny." 575 U.S. at 454. *Williams-Yulee* upheld a prohibition contained in the American Bar Association Model Code of Judicial Conduct and the judicial codes of conduct of over 30 States[8]—that judges "cannot supplicate campaign donors." *Id.* at 445. A narrowly tailored restriction on personal solicitations by judicial candidates advanced the compelling interest in preserving judicial integrity and did not conflict with the principle that "[j]udicial candidates have a First Amendment right to speak in support of their campaigns." *Id.* at 457.

The rare upholding of a speech restriction in *Williams-Yulee* contrasts with the Court's prior holding in *Republican Party of Minnesota v. White*, 536 U.S. at 765. In *White*, the Court struck down an unusual prohibition against a judicial candidate announcing his or her views on disputed legal or political issues. *Id.* at 770, 786. This "announce clause" failed strict scrutiny "because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times

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[8] *Florida Bar v. Williams-Yulee*, 138 So. 3d 379, 386 & n.2 (Fla. 2014), *aff'd sub nom. Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015).

and in certain forms." *Id.* at 783. Justice Scalia wrote for the Court: "As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous." *Id.* at 780.

The Two-Party Feature is similarly a woefully underinclusive speech restriction. It imposes on candidates for judicial office (and judges seeking reappointment) a requirement to register with a major party. Yet, it does not advance public confidence in judicial integrity because it does not require the dominant political party to do anything other than appoint a certain number of judges affiliated with the other major party. The dominant party, if it chooses, can fill the most influential judicial positions with loyalists. A governor can avoid nominating outspoken or influential partisans from the other major party. Instead, a governor can nominate judicial candidates from the other major party who (i) have donated to political candidates affiliated with the dominant party or (ii) make no political donations and do not publicize their voting records or political preferences. These scenarios mock the purported goal of a politically balanced judiciary. Party affiliation is not necessarily a meaningful or accurate signal of an individual's political posture. It conveys nothing about a judicial candidate's professionalism or integrity.

In *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, 800 F.3d 913 (7th Cir. 2015), the United States Court of Appeals for the Seventh Circuit evaluated the

constitutionality of a State statute that imposed true political balance on the court of Indiana's most populous county. The statute prohibited the two major parties from nominating candidates for more than half of all available positions, thereby guaranteeing that the nominees of the two major parties did not compete against each other in the general election. *Id.* at 918. The Court rejected the notion that true political balance served a compelling State interest: "We disagree that partisan balance in the context of judicial elections improves the public's confidence in an impartial judiciary. The emphasis on partisan balance could just as easily damage public confidence in the impartiality of the court." *Id.* at 925.

The Bare-Majority Feature is a less restrictive alternative to the Two-Party Feature. The Bare-Majority Feature prevents the appointment of a judiciary consisting entirely of outspoken partisans from one side of the aisle. Precluding the appointment of independents while permitting the appointment of nominal members of the "other major party" adds nothing to the equation. The only certain effect of the Two-Party Feature is to disqualify categorically a large percentage of otherwise-qualified candidates who choose not to affiliate with the dominant party.

Delaware is blessed with public confidence in the impartiality of its judges and high regard for the professionalism by which they adjudicate disputes involving corporate law and commercial law. There is no basis to conclude, however, that public

confidence, impartiality, or professionalism is a function of the Two-Party Feature.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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