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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The decision below threatens to upend one of the nation's most admired judiciaries—one with a sterling reputation for stable, nonpartisan decisionmaking—at the behest of a plaintiff with no actual injury, on a First Amendment theory at odds with this Court's precedents and longstanding historical practice. This Court should reverse.

I. Adams has not established standing.

In February 2017, days after he became an Independent, Adams filed a complaint alleging that he "desired to apply for a judgeship but has been unable to do so in certain circumstances because he was not of the required political party." JA17. Adams later elaborated that he "wanted to apply" for "a couple" of 2014 openings on the Superior and Supreme Courts, but "couldn't" because the positions were reserved to Republicans. JA35; JA62. As he admitted when pressed, however, those courts had three openings in 2014 for which he was eligible (JA43–45; JA51–56), and later there were seven more. Pet. Br. 9. Now, Adams says he had "less interest in a judgeship" in 2014, that he "only focused on being a judge" in 2017, and that "the existence and number of judicial openings prior to 2017 is irrelevant." Br. 17, 19. He has thus abandoned any claim based on pre-2017 injuries.

Having suffered no *past* injury when he sued, Adams had to demonstrate "concrete plans" to become a judge that would be thwarted by the challenged provisions. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992). He failed. His first complaint recited only now-abandoned claims about 2014. His first amended complaint added a conclusory allegation that he "still desires a judgeship." JA17. When asked for specifics,

he admitted he "has no knowledge of what judicial positions may become open in the next year." JA62.

Adams now rests on a statement in his interrogatory answer, which says he would "'consider *and apply for*' any judicial position for which he feels he is qualified." Br. 16 (quoting JA62) (italics in brief). Notably, he italicizes only "apply for," not "consider." *Considering* action is not a "concrete plan[]," or even a "some day" plan. *Lujan*, 504 U.S. at 564. It is at most a "maybe, someday" plan.

Moreover, Adams's actions speak louder than his words, and cast doubt even on that vague statement of intent. As an unaffiliated voter, Adams is eligible for appointments to the two courts that have no major party provision. Yet he had not applied for *any* of the many openings on those courts when he sued. Pet. Br. 9–10, 22. Adams ignores this difficulty.

Adams also improperly seeks to expand the questions presented. He says he has standing to challenge not only the major party provision, but the bare majority provision. Yet the court below held otherwise; and having failed to file a cross-petition, Adams cannot raise that issue now. S. Ct. R. 24.1(a); see *Raley* v. *Hyundai Motor Co.*, 642 F.3d 1271, 1275–1276 (10th Cir. 2011) (Gorsuch, J.) ("arguments in support of jurisdiction may be waived").

In any event, Adams' one-sentence argument (Br. 13) is unresponsive to the courts' reasoning. Because he is now an Independent, the bare majority provision cannot injure him. Adding an unaffiliated appointee to a court could never cause one of the major parties to exceed its constitutional limit.

II. The political balance provisions do not violate the First Amendment.

In our federal system, each State has the right to choose "the structure of its government" (*Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)), "the qualifications of its officers, and the manner in which they shall be chosen." *Boyd* v. *Nebraska*, 143 U.S. 135, 161 (1892). That authority "lies at the heart of representative government," and is protected by both the Guarantee Clause and the Tenth Amendment. *Gregory*, 501 U.S. at 463 (internal quotations omitted).

This Court has placed constitutional limits on this power as it relates to "low-level public employees" (*Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 65 (1990)), but never on the selection of "persons holding state elective or important nonelective executive, legislative, and judicial positions." *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973). Those "most important government officials" include "judges." *Gregory*, 501 U.S. at 463, 467. And the mis-named "policymaking exception" to *Elrod-Branti* covers *at least* those officials.

Whether or not state court judges make "policy" in a narrow sense—and they do (Pet. Br. 31–34)—their "position requir[es] the exercise of discretion concerning issues of public importance." *Gregory*, 501 U.S. at 467. Qualifications for state judgeships, therefore, are not subject to strict scrutiny. This does not mean that First Amendment interests are absent—just that the question is whether, giving deference to Delaware's judgment, using political affiliation in judicial selection is "appropriate." *Branti* v. *Finkel*, 445 U.S. 507, 518 (1980); *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 714, 719 (1996) ("reasonably appropriate," "reasonable," "reasonableness analysis").

Delaware has created a politically balanced judiciary unique among the States. Its governors not only are forbidden to stack the courts with supermajorities of their own political persuasion, but must accord as-equal-as-possible representation to the political opposition. This excludes some otherwise-qualified applicants, but it effectuates the framers' judgment "that we should not have [judges] all of the same political party," and that "minority party represent[ation] on our Bench" would "bring about a fuller and freer discussion of these matters that come before them." JA107, JA110–111.

A. Adams lacks any convincing argument that the *Elrod-Branti* line of decisions invalidates Article IV, Section 3.

Adams doubles down on the Third Circuit's implausible holding that political affiliation is a proper consideration only for officials who "make policies that necessarily reflect the political will and partisan goals of the party in power." Br. 25. Adams says this limitation "comes directly from *Branti*." Br. 25–26, 28. It does not.

Granted, *Branti* recognized that the need for political loyalty is a reason why party affiliation is relevant to *some* positions. 445 U.S. at 518. But neither *Branti* nor any other decision of this Court suggests that the need for political loyalty is the *only* legitimate reason to consider party affiliation. Both the States and the federal government use party affiliation to achieve political balance on regulatory commissions, judicial nominating committees, redistricting commissions, and courts. Campaign Legal Center Br. 12–27 (collecting examples). Nothing in logic—let alone precedent—supports the notion that the anti-patronage

cases had the paradoxical effect of outlawing efforts to *prevent* turning the courts into patronage machines.

Ironically, Adams proclaims that "[j]udges are not supposed to represent any special constituency" or "party or whoever appointed them." Br. 26. But his theory would free governors to choose judges based on political loyalty, while invalidating Delaware's efforts to *restrain* partisan appointments. See Former Governors Br. 8 (the ruling below "opened the door to partisan pressures"); Delaware State Bar Br. 2–3; Former Chief Justices Br. 14–15; Brennan Center Br. 3.

Further, Adams' theory that party affiliation may be considered only for "loyal" positions cannot be confined to this case. It would condemn virtually all political balance provisions, jeopardizing hundreds of commissions, boards, and agencies. Pet. Br. 44–47; see State and Local Government Associations Br. 18–26; Feinstein/Hemel Br. 2–4. No precedent supports a constitutional theory so contrary to widespread and salutary practices.

Adams' theory would fuel suits by disappointed aspirants to high offices who claim the jobs they were denied do not properly require political loyalty. To be sure, Adams forswears the claim that political affiliation cannot be used "by a Governor" in his discretion. Br. 1. But *Elrod* and *Branti* govern executive appointments, and nothing in his theory precludes such cases.

Adams' discussion of *Branti*'s approval of political balance requirements for election judges is especially revealing. By his lights, "election judges are typically chosen to represent the partisan interests of their respective parties." Br. 29. But election judges are *not* supposed to favor their own party; they are chosen from both parties in the expectation that, in the main,

this will result in *less* partisan election decisions than a system with judges representing one side. So too with Delaware's courts.

Of course "people of all political viewpoints can serve effectively as judges." Resp. Br. 28. But common human experience—backed up by numerous empirical studies—teaches that institutions with diverse viewpoints will reach better informed and less partisan decisions than institutions dominated by persons of one view. *Infra* at 12–13. The superiority of ideological diversity over homogeneity is not a commentary on the qualifications of any one person, but on the behavioral characteristics of multi-member groups.

In many States, judges are elected on party tickets, and in many others governors choose judges largely or entirely from their own party. See Former Chief Justices Br. 10; *Judicial Selection: Significant Figures*, Brennan Ctr. for Justice (May 8, 2015). If these practices are lawful—and no one, including Adams, suggests otherwise—States plainly may use party affiliation to *reduce* the risk of partisan decisionmaking.

B. The political balance provisions are not subject to strict scrutiny.

The lynchpin of the decision below is its conclusion that the anti-patronage cases require applying strict scrutiny here. Only strict scrutiny requires the "least restrictive alternative" analysis that the court cited in invalidating Article IV, §3. Pet. App. 32a–33a.

Neither *Elrod* and *Branti* nor *Gregory*, however, require applying strict scrutiny here. *Branti* framed the question as whether considering political affiliation in connection with high-level positions is "appropriate." 445 U.S. at 518. More recent precedent confirms that States may require party affiliation if "the

affiliation requirement is a reasonable one." *O'Hare Truck*, 518 U.S. at 719. *Gregory* did not specify a standard of review, but it held that fundamental state decisions about constitutional structure, including judicial qualifications, are subject to "less exacting" scrutiny than would otherwise apply. 501 U.S. at 463; cf. *Bd. of Cty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 685 (1996) (state interests are "deferentially viewed").

In cases involving far greater interference with protected speech, the Court has upheld restrictions in the interest of efficient operations or the appearance of nonpartisanship, usually under a reasonableness standard. *E.g.*, *United Pub. Workers of Am. (CIO)* v. *Mitchell*, 330 U.S. 75, 99–103 (1947); *U.S. Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564–568 (1973); *Connick* v. *Myers*, 461 U.S. 138, 150–154 (1983); *City of San Diego* v. *Roe*, 543 U.S. 77, 81–85 (2004); *Garcetti* v. *Ceballos*, 547 U.S. 410, 417–422 (2006). Indeed, "unconstitutional conditions" cases such as this (*Umbehr*, 518 U.S. at 679–681) generally allow conditions "germane" to the benefit's purpose. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1457 (1989) ("The more germane a condition to a benefit, the more deferential the review[.]"). "Germaneness" is essentially the same inquiry as *Branti*'s "appropriateness" test—and far less demanding than strict scrutiny.

According to Adams, *Gregory* "did not suggest that federalism concerns can override the strictures of the First Amendment." Br. 36. True, but *Gregory* did reaffirm that "States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment," and "scrutiny under the Equal Protection Clause 'will not be so demanding where we deal with matters resting firmly

within a State's constitutional prerogatives.'" 501 U.S. at 468, 469. Speaking more generally of federal "constitutional provisions," *Gregory* explained that judicial scrutiny of state qualifications for judges "is not absent," but is "less exacting." *Id*. at 463.

The First Amendment is plainly one of the "constitutional provisions" to which *Gregory* referred. Even *Williams-Yulee* v. *Florida Bar*, a strict scrutiny case, cited *Gregory* in upholding restrictions on state judges' speech, holding that States' "considered judgments" as to what "is necessary to preserve public confidence in the integrity of the judiciary * * * deserve our respect." 575 U.S. 433, 454 (2015) (quoting *Gregory*, 501 U.S. at 460). Adams ignores *Williams-Yulee*.

Citing *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358–359 (1997), Adams says strict scrutiny applies because the challenged provisions have a "severe" impact on associational rights. Br. 36–37. Adams never made that argument below, however, so the parties never developed a record on it, the courts never passed on it, and it is waived. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273 (2009) ("respondents' alternative arguments for affirmance have been forfeited").

In any event, the burdens that Article IV, §3, imposes on Adams' associational rights, "though not trivial—are not severe." *Timmons*, 520 U.S. at 363. First, his complaint is purely one of form, not substance. He concedes that governors may consider political affiliation for judicial appointments, provided doing so is not "mandatory." Br. 1. That distinction makes no practical difference to a judicial candidate not of the governor's party. Where this Court has found severe impacts on associational rights, the challenged law was

the only obstacle to exercising them. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 784–786 (1983) (filing deadline alone prevented ballot access); *Wieman* v. *Updegraff*, 344 U.S. 183, 184–186 (1952) (mandatory oath alone determined whether employees got paid). Article IV, §3's impact cannot be "severe" when Adams' political affiliation will be held against him either way.

Second, the political balance provisions affect only voter registration of a small number of people—Delaware lawyers seeking judicial office—and registration itself merely determines which primary one votes in. Adams can participate in third parties and work with fellow Independents to his heart's content. Yes, party registration has communicative and associational significance. But thousands of voters switch registration for particular primary elections, and then switch back. See Xerxes Wilson, *Republicans, Independents Seek Voice in Wilmington Mayor Race*, News Journal (July 4, 2016). And most nominal Independents are in fact aligned with one party, and not with other Independents. John Laloggia, *6 Facts About U.S. Independents*, Pew Research Ctr. (May 15, 2019) (roughly 44% of Independents align with Democrats and roughly 34% with Republicans); see Bruce E. Keith et al., *The Myth of the Independent Voter* (1992).

Amicus Public Citizen argues that the major party requirement is severe because it "'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." Br. 8 (citation omitted). Not so. Viewing Article IV, §3, as a whole, registered Republicans and Democrats are excluded from all five courts roughly half the time; third-party and unaffiliated voters are excluded from three courts all the time, but are eligible for two courts all the time.

C. Delaware is free to achieve politically balanced courts by constitutional rule.

Adams says the "mandatory" nature of the constitutional provisions here make them more problematic than a governor's discretionary use of the same criteria, as only the former compels him "to choose between giving up the opportunity for a judgeship and violating [his] political conscience." Br. 1–2, 32. In other words, what is permissible for the executive branch is impermissible for the legislature.

Whether the legislature or a governor excludes Independents, however, they face the same choice. And outside of the separation-of-powers context, constitutional rights generally run against legislative (or constitutional) and executive state action to the same extent. "If the action of the [executive] is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature." *Snowden* v. *Hughes*, 321 U.S. 1, 11 (1944). This is especially clear of constitutional claims against States, which may not "*make or enforce* any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV §1 (emphasis added). The Constitution thus places state legislative and executive action on equal footing. If governors may consider political affiliation in appointing judges, then legislatures may consider political affiliation in constraining that power.

D. The political balance provisions are narrowly tailored to a compelling interest in promoting public confidence in the courts.

Even if strict scrutiny applies, that standard is satisfied. Adams basically admits that the requirements

serve a compelling interest, and no one can identify an alternative approach that would be as effective.

1. The compelling interest requirement

Adams essentially admits that the interests served by Delaware's political balance requirements—"to maintain the quality and independence of the judiciary, and to promote public confidence in the judiciary" (Br. 37)—withstand strict scrutiny. As this Court has held, "States have a compelling interest in preserving public confidence in their judiciaries." *Williams-Yulee*, 575 U.S. at 457.

By all accounts, Delaware has achieved these state interests: Its courts enjoy an unparalleled reputation for stable, nonpartisan, consensual decisionmaking. Pet. Br. 6–7. Adams, however, denies any causal connection between the political balance provisions and that achievement. In his view, "it cannot be said that the Provisions played *any role* as to the quality or independence of judges, or *any effect* on the public's perception of Delaware's judiciary." Br. 40 (emphasis added). Although a given law's effect on interests "as intangible as public confidence in the integrity of the judiciary" cannot be documented with empirical precision (*Williams-Yulee*, 575 U.S. at 454), all available evidence rebuts Adams' claim.

Amicus briefs from all living former Chief Justices of the Delaware Supreme Court, all reachable Delaware Governors, the Delaware State Bar, the U.S. Chamber of Commerce, and the Brennan Center for Justice, among others, attest that Delaware's political balance provisions have produced unusually nonpartisan and independent courts. As the Brennan Center explains, the provisions "have functioned to minimize

the role of politics in Delaware's judicial selection process, protecting public confidence in the integrity of the judiciary and avoiding single party entrenchment." Br. 3; accord Delaware State Bar Br. 1–4; Former Chief Justices Br. 14–15. Even the judges below acknowledged that Article IV, §3, has "produced an excellent judiciary." Pet. App. 38a.

Amici Former Governors are particularly well positioned to explain why "Delaware's political balance requirement is essential to maintaining the State's judicial independence." Br. 7. "[W]ithout the protection of Delaware's Constitution," they explain, "partisan pressures" will prevail and "cross-party appointment" will "dwindle, if not disappear." Br. 8. This will "portend the loss of a historically successful bipartisan judiciary that is vital to Delaware." *Ibid.* In short, the judiciary would likely return to what it was like before Delaware's constitutional reforms, when it "had for twenty years a judiciary composed of members of one political party," undermining public "confidence in the Judiciary." IV *Debates and Proceedings of the Constitutional Convention of the State of Delaware* 2763 (1958); see JA116 ("[I]t would give more satisfaction to the people if the Judges were not all from the same political party.").

Adams ignores the empirical evidence that political balance requirements like those in Article IV, §3, have the salutary effects that the Delaware framers intended. See Pet. Br. 38–44; Brennan Center Br. 6–9 (chronicling the reforms). "Study after study shows that groups whose members have a mix of views reach less polarized decisions than groups of likeminded members." Feinstein/Hemel Br. 8 (citations and studies omitted). The effect is especially well documented for courts. *Id.* at 9–13. The frequency of unanimous

Delaware Supreme Court decisions testifies that the political balance provisions have minimized such polarization.

We especially commend to the Court the amicus brief of Professors Feinstein and Hemel. They review the empirical literature, concluding that (1) it shows that political diversity on judicial panels tends to produce less polarized judicial decisions; (2) bare majority provisions themselves can promote this consensus-based decisionmaking, particularly when parties are ideologically coherent and checks on "opportunistic" appointments practices exist; and (3) the major party provision "enhances Delaware's ability to achieve its diversity-promoting ends." Br. 6–7.

By contrast, Adams merely speculates that "political balance does not serve its claimed purpose" (Br. 40):

- Noting that there will always be a one-judge majority from one party, Adams says the system does not achieve real "balance." *Ibid*. True, but mixed panels are less polarized than one-party panels.
- Adams says Article IV, §3, does not require political balance on the Court of Chancery. *Ibid*. That is a misunderstanding. Because of the overall balance requirement and the individual balance requirements for the other two business courts, the provisions guarantee balance on Chancery as well.
- Adams declares that, for courts where cases are heard by one judge, "balance serves no purpose." *Ibid*. But "[e]ven when judges decide cases individually, they do not decide cases in isolation

> * * * . They contribute to and draw from a common pool of binding or persuasive precedent, and that pool will reflect a greater diversity of ideas when the contributors are politically and ideologically heterogeneous themselves." Feinstein/Hemel Br. 13.

- Adams says the need for balance on the Superior Court is "undercut by the right to a jury trial" (Br. 41), as if judges' decisions no longer matter in jury cases.
- Adams notes that even with the major party safeguard, the system could be "gamed" by naming Republican-leaning Democrats or Democrat-leaning Republicans, or by a potential applicant changing party. True, but the phenomenon of "partisan sort" makes such "gaming" difficult to pull off. Feinstein/Hemel Br. 20–22.

Thus, the evidence shows that Delaware's political balance provisions genuinely advance the State's compelling interest in a balanced judiciary.

2. The narrow tailoring requirement

a. Some of Adams' amici defend the bare majority rule and assert only that the major party rule is not "narrowly tailored" to Delaware's interest. *E.g.*, Public Citizen Br. 2–4. That is not Adams' position. He denies any need for "the Provisions," but states that the "conclusion is justified" that "the Major Party Provision was a 'necessary' addition to the law to prevent a Governor from gaming the Political Balance Provision." Br. 52 (citation omitted). Indeed, that view is essential to his severability argument. *Infra* at 24.

On this point, Adams is correct and his amici are wrong, especially given the States' broad latitude in structuring their judiciaries. Where, as here, the positive effects of a State's constitutional requirements are obvious (even if the precise causal mechanisms are not), courts should exercise caution before second-guessing a State's time-tested means of achieving that result.

Even if strict scrutiny applied (and it does not), it would require only "that [the subject restriction] be narrowly tailored, not that it be 'perfectly tailored.'" *Williams-Yulee*, 575 U.S. at 454. Challengers cannot just throw out proposals and assert that they might serve the same end as well as the challenged law. The test is whether a proffered less restrictive alternative would be "at least as effective in achieving [Delaware's] legitimate purpose" as the combination of the bare majority and major party requirements. *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997).

Williams-Yulee, this Court's most recent decision involving restrictions on the First Amendment rights of judges, confirms that even under strict scrutiny, a State's "considered judgments" as to what "is necessary to preserve public confidence in the integrity of the judiciary * * * deserve [the courts'] respect." *Id*. at 454 (quoting *Gregory*, 501 U.S. at 460). That is especially true when the stakes are as high as protecting the character of the Delaware courts. Whatever associational freedoms are at stake, "political affiliation" need only be "a reasonably appropriate requirement" for ensuring a stable, nonpartisan bench. See *O'Hare Truck*, 518 U.S. at 714, 719.

b. Those most familiar with Delaware's judiciary have no doubt that the combination of the two components is "necessary" or "essential" to achieving political balance. Former Chief Justices Br. 14 & n.8; Former Governors Br. 7. The Former Governors warn that the decision below "open[s] the door to partisan pressures" and "will portend the loss of a historically successful bipartisan judiciary that is vital to Delaware." Br. 8. Outside observers agree. Brennan Center Br. 26–29 (the major party requirement "ensures that the governor honors not only the letter but the spirit of the bare majority requirement"); Feinstein/Hemel Br. 6 (the bare majority provision would be "vulnerable to 'gaming' by politicians who appoint nominal independents once their own party's quota is filled"); State and Local Government Ass'ns Br. 17.

We cannot explain the rationale any better than the Third Circuit:

> Operating alone, the bare majority component could be interpreted to allow a Governor to appoint a liberal member of the Green Party to a Supreme Court seat when there are already three liberal Democrats on that bench. Only with the (unconstitutional) major political party component does the constitutional provision fulfill its purpose of preventing single party dominance while ensuring bipartisan representation.

Pet. App. 34a. In other words, the major party provision is an indispensable anti-circumvention backstop to the bare majority provision. It ensures that governors do not "comply" with the latter requirement by naming sympathetic "Independents" or third-party applicants to seats intended for the other side.

This concern is not hypothetical. Adams calls himself a "Bernie [Sanders] independent." JA41–42. To name him to a court with a Democratic majority would only exacerbate the imbalance. Moreover, the risk of gamesmanship is greater when one party controls both the appointing and confirmation authorities for long periods. Although control of the White House and the Senate regularly shifts between the major parties, many States are persistently either "red" or "blue." In Delaware, one party has controlled both the governorship and the senate for 27 years.[1]

Beyond deliberate circumvention, moreover, the major party provision better ensures the "fuller and freer discussions" that the framers hoped to foster. JA110. The "other major party" will always reflect the views of a significant segment of the population having perspectives contrary to the majority's. That cannot necessarily be said of third parties and independents. Delaware's 1897 delegates scoffed at the notion that the "Single Taxers," "Prohibitionists," or other minor parties would serve the purpose. JA109–110.

c. While concluding that the major party provision is indispensable for severability purposes, the court below reached the opposite conclusion for merits purposes. Pet. App. 33a. That is a blatant contradiction.[2]

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[1] *Delaware State Senate*, Ballotpedia, https://ballotpedia.org/Delaware_State_Senate.

[2] The Governor's converse position is not contradictory. The major party provision makes the bare majority provision as effective as possible, but the latter provision does some good on its own.

The court's only explanation for its conclusion was that "the Governor fails to explain why [the major party provision] is the least restrictive means of achieving political balance." *Ibid*. That was error. The government bears the burden of rebutting less restrictive alternatives "proposed" by the plaintiff (*Ashcroft* v. *ACLU*, 542 U.S. 656, 669 (2004)), but it need not anticipate alternatives that have never been suggested. *United States* v. *Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000) ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals"). Below, Adams suggested no alternative to the major party requirement. Indeed, this may be the first time a court has held that a law is not the least restrictive alternative without naming an alternative.

d. For the first time, Adams now proposes "less restrictive alternatives," none of them convincing:

- Citing alternatives "already in place," Adams says the Code of Judicial Conduct "negates any concern about a judge's ability or impartiality." Br. 43–44. Yet political balance requirements are designed not to prevent improper behavior by individual judges, but to counteract systemic polarization caused by one-party control. The Code does nothing about that. Indeed, such codes exist in every State, including those with the lowest rankings for judicial independence.
- Adams also suggests that judicial confirmation can root out bias. The record, however, contains no evidence that a senate of the same party as the Governor would demand cross-party nominations. In fact, senators might be

the source of the "partisan pressures" that the Former Governors warn against. Br. 8.

- Next, Adams says "Delaware already has strong motivation for avoiding politically biased judges." Br. 44. But a motivation is not a less restrictive means.
- Adams also says the risk of "court packing" is minimized by use of staggered 12-year terms. That will not preserve bipartisanship when a State elects governors of the same party for 27 years straight.

Adams then suggests two changes that could "gain comparable results without infringing Adams's rights." Br. 45. First, he proposes grilling candidates about political philosophy. *Ibid.* Shifting the focus to political philosophy, however, would not better protect First Amendment rights; would-be judges have no less right to choose their political philosophy than their party. Moreover, such a shift would not serve Delaware's purposes as effectively. Voter registration is a simple, ascertainable fact; political philosophies come in myriad shades of grey.

Second, Adams suggests that Delaware adopt a supermajority requirement for confirmation. Anyone who has observed the federal-level confirmation battles, however, knows the benefits of such requirements are hotly contested.[3] It is hardly clear that

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[3] Compare Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 Utah L. Rev. 803 (calling for elimination of the "permanent" judicial filibuster), with John O. McGinnis & Michael B. Rappaport, *The Judicial*

they reduce either the level or public perception of partisanship during judicial confirmations.

In any event, supermajority requirements would not serve Delaware's purpose nearly as well. Delaware's system guarantees cross-party appointments regardless of the State's political makeup. Supermajority requirements might or might not induce governors to nominate more moderate persons from their party, but they do not lead to bipartisan appointments. Democrats held the Delaware governor's mansion *and* a senate supermajority from 1996 until 2014, and they are just one seat short of a supermajority today. *Supra* at 17 n.1. Thus, in many periods a supermajority requirement would provide no check on governors.

E. Amici's alternative theories should either be disregarded or rejected.

Recognizing the difficulties with the *Elrod-Branti* theory, Adams' amici gin up theories based on loyalty-oath and ballot-access cases. But it is too late for new theories, and certainly those raised by amici. *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983) ("'only in exceptional cases'" will the Court consider arguments of respondents that are not "raised below"); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979) (finding "no occasion to reach" amicus theories not "presented" below or "urged by either party").

In any event, the loyalty-oath cases involved animus-driven viewpoint discrimination against Communists—discrimination having no reasonable relation to legitimate public purposes. Indeed, where the

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Filibuster, the Median Senator, and the Countermajoritarian Difficulty, 2005 Sup. Ct. Rev. 257 (the filibuster "promote[s] a more democratic form of judicial review").

Court discerned some relation between the oath and legitimate public policy, it upheld the oath requirement. *Am. Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 405 (1950). Article IV, §3, by contrast, is a good-faith attempt to achieve political balance in a largely two-party system, and nothing in the law prevents any party from one day becoming a major party.

The ballot-access cases involve not simply associational rights, but voting rights—which receive extra protection.[4] This case does not. When States rely on appointments rather than elections, they effectively exclude those who do not belong to the appointing official's party. No one thinks that is unconstitutional. Ever since the Founding, judges have been chosen with political affiliation in mind. *Rutan*, 467 U.S. at 92–93 (Scalia, J., dissenting). Delaware allows governors to appoint judges, but counteracts the tendency to confine appointments to one party by requiring balance. That *expands* the pool of eligible appointees.

Moreover, in the ballot-access cases, striking down the challenged provisions remedied the claimed injury. Here, by contrast, even without the provisions, Independents always can and usually will be excluded based on party affiliation, since all agree that governors may exclude them at will.

Finally, while direct prohibitions on associational freedoms typically receive strict scrutiny, denials of privileges like employment are subject to lower-wattage scrutiny—the conditions on the benefit need only be "reasonably appropriate" to its purpose. *O'Hare*

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[4] That is why *Common Cause Indiana* v. *Individual Members, Indiana Election Commission*, 800 F.3d 913 (7th Cir. 2015) (Resp. Br. 41–42), is inapplicable.

Truck, 518 U.S. at 714, 719. Supporters of authoritarian governments have full First Amendment rights to espouse their views, but they may be excluded from the National Endowment for Democracy's grants. *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991).

III. The severability ruling cannot be defended.

If the Court invalidates the major party provision, whether the bare majority provision is severable assumes great practical importance. The bare majority requirement itself advances the State's interest in a stable, nonpartisan judiciary. That interest might survive without the major party provision, but invalidating the bare majority requirement would fundamentally alter the courts' character.[5]

A. The Court should not invalidate a bare majority provision that does not and cannot injure Adams.

As we have explained (Pet. Br. 47–49), Adams cannot challenge the bare majority provision, including on severability grounds, because it could not possibly injure an unaffiliated voter like him. Adams' one-sentence response is that "whenever there is a bare majority of one he will be limited in his opportunities." Br. 13. But that would only be true if he were still a

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[5] Adams says severability is waived, but in the cases he cites (Br. 50) the issue was not "passed upon" below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see Pet. App. 33a–35a. Further, severability was the second question presented, yet he said nothing about waiver in his brief in opposition. Thus, it is Adams who has a waiver problem. *City of Canton* v. *Harris*, 489 U.S. 378, 384 (1989).

Democrat, as appointing an unaffiliated voter could not increase any party's majority.

Precedent points both ways on the existence of a severability exception to ordinary standing rules, but the Court's general standing jurisprudence requires plaintiffs to prove standing for any claim, including severability, that would lead to additional relief. Pet. Br. 47–49. Adams apparently disagrees (Br. 52–53), but his only citation, *Murphy* v. *National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring)), supports our position.

B. The bare majority provision is severable under the traditional two-part test.

Under both Delaware and federal law, a provision is severable if (1) it can stand alone, and (2) it is not clear that the legislature intended the entire statute to be displaced. Pet. Br. 50–51. Adams neglects the first element, and on the second he cannot overcome the presumption of severability.

1. The bare majority component plainly can stand alone: It stood alone from 1897 until 1951, and even today two Delaware courts are subject only to a bare majority provision. Pet. Br. 51. Adams ignores this history, confusingly asserting that the bare majority provision does not *currently* "stand independent" and that "political affiliation and balance have been intertwined requirements from the beginning." Br. 51. Neither response addresses the question, "Is the unobjectionable part, standing alone, capable of enforcement?" *Farmers for Fairness* v. *Kent County*, 940 A.2d 947, 962 (Del. Ch. 2008). It is.

2. Adams' attempts to overcome the presumption that Delaware's legislature would want the bare majority provision to stand alone are unconvincing.

First, Adams says "the Legislature would not have added the Major Party Provision if it did not deem the amendment necessary and integral to the proper functioning of the Political Balance Provision. Otherwise, why would it have been added?" Br. 52. That rhetorical question could be asked of every statutory amendment, and thus would upend the presumption of severability. Further, there is an obvious answer: Without the major party component, the bare majority component could be circumvented.

Second, Adams notes that the provisions are found in the same paragraphs of the Delaware Constitution. *Ibid.* But a glance at Article IV shows why: Each of the paragraphs discusses the appointment limitations for each court. Although the two types of provisions are independent, both must be located in the paragraphs pertaining to the courts at issue. That says nothing about legislative intent on severability.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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