No. 21-226

In the Supreme Court of the United States

LIBERTARIAN PARTY OF OHIO
AND HAROLD THOMAS,
Petitioners,

v.

DON MICHAEL CRITES, OTTO BEATTY, III,
DENNIS BROMMER, CATHERINE A.
CUNNINGHAM, NATASHA KAUFMAN, A. SCOTT
NORMAN, AND CHARLETA B. TAVARES,
IN THEIR OFFICIAL CAPACITIES,
*Respondent*s.

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

BRIEF OF *AMICI CURIAE* LIBERTARIAN NATIONAL COMMITTEE, GREEN PARTY OF THE UNITED STATES, CONSTITUTION PARTY, AND COALITION FOR FREE AND OPEN ELECTIONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Libertarian National Committee is the governing body of the Libertarian Party, the third-largest political party in the United States. The Libertarian Party was founded in 1971 to elect candidates at all levels of government who support the principles of liberty set forth in the party's Statement of Principles.[2]

The Green Party of the United States is the fourth largest political party in the United States. A coalition of 47 state parties, the National Green Party was established in 2001 to elect candidates at all levels of government who support fundamental principles of non-violence, ecological wisdom, grassroots democracy, and social justice.

The Constitution Party was formed in 1992 and recognized by the Federal Election Commission as a national political party in 1995. Its mission is to elect candidates at all levels of government who will uphold the principles of the Declaration of Independence and the Constitution of the United States.

The Coalition for Free and Open Elections ("COFOE")

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[1]Pursuant to Supreme Court Rule 37.2(a) counsel of record for all parties received timely notice of the intent to file this brief and all parties have consented to its filing. Pursuant to Rule 37.6, *Amici* counsel certifies that no counsel for a party authored this brief in whole or in part and no person other than *Amici Curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2]*See* Libertarian Party, *Statement of Principles*, available at https://www.lp.org/platform/ (last visited February 22, 2020).

is a nonprofit advocacy organization dedicated to the idea that full and fair access to the electoral process is central to democracy. As of August 2021, members of COFOE include the Libertarian Party, the Green Party, the Constitution Party, the American Solidarity Party, the Reform Party, the Prohibition Party, and the Socialist Party, USA.

The interests of these *Amici* and other smaller political parties are frequently implicated by state election laws, including those that burden candidates and voters who seek to participate in the political process without joining the Democratic Party or the Republican Party. Accordingly, these parties frequently must present their views on such issues to the courts. For example, the Libertarian Party and its state affiliates have repeatedly presented their views on such issues to this Court, both as a party (for example, in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), and *Clingman v. Beaver*, 544 U.S. 581 (2005)) and as an *amicus* (for example, in *Burdick v. Takushi*, 504 U.S. 428 (1992), *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

These *Amici* and other smaller parties have a direct interest in this case in that, by operation of Ohio Rev. Code § 3517.152(A), their members in Ohio are prohibited from serving on the Ohio Elections Commission. This prohibition harms not only the core First Amendment rights of the minor party voters subject to it, but also those of the parties themselves, who cannot exercise their freedom to develop and grow as parties, and to participate in all aspects of the

political and electoral processes in Ohio on an equal basis with the state's two major parties.

The Libertarian National Committee, for example, has a direct interest in that members of the Libertarian Party reside in the State of Ohio and are registered to vote as Libertarian. Further, in each election cycle, the Libertarian Party runs hundreds of candidates nationwide for local, state and federal office. There are currently no fewer than 229 Libertarian Party members who have been elected to serve in public office in the United States. *See* Libertarian Party, *Elected Officials*, available at https://my.lp.org/elected-officials/?page=CiviCRM&q=civicrm/profile&gid=38&force=1&crmRowCount=100&reset=1 (last visited September 13, 2021).

If other states adopt prohibitions like the one in Ohio Rev. Code § 3517.152(A), the ability of members of these *Amici* and other minor parties to continue their service in public office would be jeopardized. Such a result would imperil the "basic function" of these parties "to select the candidates for public office to be offered to the voters at general elections." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973).

The Libertarian Party, Green Party, Constitution Party, and the Coalition for Free and Fair Elections therefore submit this brief as *Amici Curiae* in support of Petitioners, because the prohibition set forth in Ohio Rev. Code § 3517.152(A) violates their First Amendment rights and furthers, not legitimate state interests, but the partisan interests of the two major political parties.

SUMMARY OF ARGUMENT

Ohio Rev. Code § 3517.152(A) categorically excludes members of minor parties from serving on the Ohio Elections Commission. It does so pursuant to a major party requirement which precludes anyone who is a member of a political party other than the Republican Party or the Democratic Party from serving on the Elections Commission. As such, the major party requirement violates this Court's long-settled precedent invalidating statutes that condition public service on "patently arbitrary or discriminatory" grounds. *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952).

If a requirement like this were applied to impose a prohibition against Republicans or Democrats serving on Ohio's Election Commission, there would be little doubt as to its unconstitutionality. *See* Id. at 191-92. Time and again, this Court has held that the Constitution does not permit the federal or a state government to condition public service – either as an elected official, an appointed official, or an employee – solely upon the official's or employee's political affiliation. *See*, *e.g.*, *Quinn v. Millsap*, 491 U.S. 95 (1989); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). But Republicans and Democrats enjoy no special protection under the Constitution. Indeed, the Constitution makes no mention of political parties, much less does it afford a higher degree of protection to any two particular parties. Consequently, just as Ohio could not bar Republicans or Democrats from serving on its Elections Commission based on their political affiliation, it may not impose such a prohibition

against members of the minor political parties.

This Court's ballot access jurisprudence is instructive. In 1968, when the Court first ruled on the constitutionality of a state ballot access law, it concluded that the state cannot restrict access to the ballot in a manner that "in effect, tends to give" Republicans and Democrats a "monopoly on the right to have people vote for or against them." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Here, the major party requirement does not merely "tend" to give Republicans and Democrats a monopoly on the right to serve on the Elections Commission: it imposes an absolute, categorical prohibition against all other political party members from serving in that capacity. That Ohio accomplishes this impermissible purpose by restricting eligibility for appointment to public office rather than by restricting access to the ballot is of no moment, because constitutional protection extends to those who seek appointed office. *See Quinn*, 491 U.S. 95.

"Good government" justifications for the major party requirement, such as "balancing out political party representation," should therefore be treated with skepticism. The major party requirement does not further Ohio's asserted interest in a politically balanced government, but rather assures an elections commission narrowly confined to members of two – and only two – political parties. And there is ample reason to conclude that those two parties, who have jointly imposed the major party requirement upon their fellow citizens, did so to further their own partisan interests rather than any legitimate state interest. Indeed, the academic scholarship

overwhelmingly suggests that the major party requirement is precisely the sort of partisan interference that led the Framers to view "factions" with such disdain. This Court should not permit Republicans and Democrats to seize for themselves a permanent monopoly on service as a member of the Ohio Elections Commission.

ARGUMENT

I. THE MAJOR PARTY REQUIREMENT VIOLATES MINOR PARTY MEMBERS' CONSTITUTIONAL RIGHTS

Does the Constitution of the United States of America permit the State of Ohio to prohibit members of the Republican Party or the Democratic Party from serving on the Ohio Elections Commission? It does not. "[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman*, 344 U.S. at 192. Thus, while this Court has held that the federal government may "properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service," it found it necessary to "cast this holding into perspective by emphasizing 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.'" *Id.* at 191-92 (quoting *United Public Workers v. Mitchell,* 330 U.S. 75, 100 (1947)). The same constitutional protection extends to public servants who serve in state offices, including offices filled by appointment. *See Quinn*, 491 U.S. 95 (holding that

property ownership requirement as qualification for appointment to local office violated the Equal Protection Clause).

But if the Constitution does not permit Ohio to preclude Republicans or Democrats from serving on its Elections Commission, on what basis could the Constitution permit Ohio to impose that same prohibition on other citizens, solely by virtue of their partisan affiliation? There is none. Yet, that is what the major party requirement does. Thus, the major party requirement is unconstitutional under this Court's long-settled precedent. The major party requirement categorically excludes voters who are members of non-major political parties. The categorical exclusion of voters from appointment to such offices, based solely on their political affiliation, is no less invidious as applied to smaller party members than it would be as applied to Republicans and Democrats. *See Wieman*, 344 U.S. at 191-92.

This Court has consistently held that citizens who choose not to associate with the Republican Party or Democratic Party have the "freedom to associate as a political party, a right we have recognized as fundamental." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (citing *Williams*, 393 U.S. at 30-31). This entails that non-major political parties have a constitutional right to run candidates for elective office. *See Illinois Bd. of Elections*, 440 U.S. at 184 (right to form a party "has diminished practical value if the party can be kept off the ballot"); *Williams*, 393 U.S. at 31 (right to form a party "means little if a party can be kept off the election ballot and thus denied an equal opportunity to

win votes"); *see also Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) (holding that burdens on new or small parties and independent candidates impinge on First Amendment associational choices). As the Court observed in *Williams*, there is "no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them." *Williams*, 393 U.S. at 32.

These same principles apply equally to "the right to be considered for public service" by appointment to public office. *See Quinn*, 491 U.S. at 105. Just as there is "no reason why two parties should retain a permanent monopoly on" elected offices, there is no reason why two parties should retain a permanent monopoly on appointed offices. Both kinds of offices, after all, represent the people. And this Court's cases make clear that exclusion because of political affiliation can be no less pernicious in the workplace than it is at the polling place. *See*, *e.g.*, *Branti*, 445 U.S. at 516 (First Amendment protects public employees from discharge based on speech and private belief); *Elrod*, 427 U.S. at 355-58 (requirement that public employees pledge allegiance to Democratic Party violates First Amendment).

This is not to say that a state's use or consideration of political affiliation is always impermissible. On the contrary, the political affiliation of candidates is often printed on ballots, and it is not only known but used by voters to aid in their selections at the polls. Similarly, political affiliation can be considered by governors in making appointments to public offices -- arguably including the Ohio Elections Commission. But the ability to use information such as political affiliation to

make appointments to public office is a far cry from *categorical exclusion* from appointment to such offices based on political affiliation. Just as a law that prohibits citizens from voting for a minor party is unconstitutional, *see Anderson*, 460 U.S. at 793; *Williams*, 393 U.S. at 32, a law like Ohio's major party requirement, which prohibits the appointment of minor party members, is unconstitutional.

II. THE MAJOR PARTY REQUIREMENT FURTHERS THE PARTISAN INTERESTS OF OHIO'S PREDOMINANT POLITICAL PARTIES, NOT LEGITIMATE OR COMPELLING STATE INTERESTS

This Court's decisions in cases like *Anderson* and *Williams* are consistent with the Framers' conception of the role of political parties in regulating the nation's political and electoral processes. The original Constitution expressly recognized the likelihood that multiple presidential candidates would receive votes in the Electoral College. Should no single candidate win a majority of Electoral College votes, Article II stated, the House of Representatives would pick the President "from the five highest on the List." *See* U.S. Const., art. II, § 1. And when the Twelfth Amendment was ratified in 1804, it provided that the candidates who received "the highest numbers not exceeding three on the list of those voted for as President" would proceed for selection by the House. Thus, both the Framers of 1787 and those a half a generation later expected that more than two political parties would exist and play an active role in the nation's political process.

The Framers feared the damage that two competing

factions could do to the republican form of government they sought to establish. As Professors Issacharoff and Pildes explain, "the constitutional structure was specifically intended to preclude the rise of political parties, which were considered the quintessential form of 'faction.'" Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 713 (1998) (footnote omitted). "[W]hen the Constitution was formed and early elections held, the very idea of political parties was anathema to the reigning conception of democracy …." *Id.* at 677.

For the nation's first 150 years, the American political system hewed more closely to the Framers' intent. "In the nineteenth century," Professors Issacharoff and Pildes explain, "American partisan and ideological competition was far more robust. Third parties were a consistent and enduring presence, including the Liberty, Free Soil, Know-Nothing, Constitutional Union, Southern Democrat, Greenback, People's, and Prohibition Parties." *Id.* at 644 (footnote omitted). The resulting robust field of candidates translated into electoral interest: "[v]oter turnout dwarfed that in the present era." *Id.* (footnote omitted). Meanwhile, because they "generated more intense and pervasive personal ties," *id.*, pluralistic political parties thrived.

The dawn of the Twentieth Century and the advent of official state ballots supplied the two dominant political parties of the day, the Republicans and Democrats, with the ability to begin unraveling the Framers' intent. *See* Mark R. Brown, *Ballot Fees as Impermissible Qualifications for Federal Office*, 54 Am. U. L. Rev. 1283, 1288 (2005) ("By 1916, the Australian

pre-printed paper ballot had become the universal norm throughout the United States. … The development of pre-printed paper ballots … supplied government its first real opportunity to limit the number of candidates running for office"). By 1950, in the midst of the Second Red Scare, states across the country began categorically excluding minor parties and independent candidates from their official ballots. *See*, *e.g.*, Richard Winger, *Ballot Format: Must Candidates Be Treated Equally?*, 45 Cleve. St. L. Rev. 87, 90-92 (1997) (describing how experience in Ohio and the Democrats' and Republicans' fear of Socialist and Progressive candidates resulted in party restrictions on ballot access). Such categorical exclusions continued until at least 1968, when this Court in *Williams* ordered Ohio to place George Wallace and his American Independent Party on Ohio's presidential ballot. *See Williams*, 393 U.S. 23.

Professors Issacharoff and Pildes have observed that "state regulations that purportedly reflect state interests in 'stability' or the 'avoidance of factionalism' can be seen as tools by which existing parties seek to raise the cost of defection and entrench existing partisan forces more deeply into office." Issacharoff & Pildes, *supra*, at 643. Far from serving a legitimate state interest, history teaches that duopolistic restrictions serve only the interests of the nation's two predominant political parties. This result is not surprising. *See id.* at 682-83 ("we should expect the two dominant parties to seek to close off avenues of third-party challenge. … Such efforts to close off third-party challenges should be a shared objective of both of the major parties, regardless of their immediate position as the majority or opposition party").

Consequently, "good government" claims, like that adopted by the Court of Appeals here -- that Ohio's purpose is "balancing out political party representation" -- should be met with a measure of skepticism. (*See* Petition at 10-11.) Not only does history cast a large shadow of doubt over such "good government" claims, *see*, *e.g.*, Issascharoff & Pildes, *supra*, at 682-83, but also, common sense and logic refute it outright. It is far more likely that the Republicans and Democrats have joined to legislate a categorical ban on their competitors serving in appointed office for the same reason they seek to exclude outsiders from elected office – to maintain power for themselves. *See* Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 Wm. & Mary L. Rev. 1939, 1993 (2003) ("'partisan lockups' are easiest to identify when a single political party controls a jurisdiction, but they may also result from the two major parties' collective efforts to bar minor parties from the political stage") (footnotes omitted).

These types of "good government" arguments are not new. For some time, "responsible party government scholars [] have argued that the two-party system promotes political stability, combats factionalism, and provides a valuable voting cue." 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 S. Ct. Rev. 331, 342. "[T]hese scholars," however, "have not proven that the two-party system, especially the modern system since the advent of capital-intensive, candidate-centered campaigns, actually has these effects." *Id.* Professor Hasen offers at least three good

reasons why the Court should be skeptical of speculative empirical claims made in support of legislation favoring the two-party system:

> First, there is a severe agency problem here: virtually all of the legislators who will make these decisions are members of one of the two major political parties, and the choice may be less the product of reason than of self-interest. … Second, there are informational losses associated with restrictions on third parties. … Favoring the two-party system ultimately provides voters with less information about the choices available to them in terms of candidates, parties, and issues.[3] … Finally, the lack of a competitive political market may have other costs as well. … A strong duopoly could make it less likely that the Democrats and Republicans will feel pressure to become the encompassing parties that responsible party government theorists hope they will become.

Id. at 343-44, 358, 360 (footnote added). For these

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[3]In this case, for example, the Ohio Elections Commission allowed the two major parties to exclude all minor party candidates from the three debates conducted during Ohio's 2018 gubernatorial campaign, thereby depriving Ohio voters of important information about the choices available to them. The Libertarian Party of Ohio filed two complaints challenging the legality of staging debates for the exclusive benefit of the Democratic and Republican candidates. The Ohio Elections Commission dismissed both complaints with no explanation. (*See* Petition at 7-9.)

reasons, "the unproven conjecture that the [two-party] system maintains political stability" cannot be sustained. *Id.* at 358. Instead, "circumstantial evidence and underlying theory point in the opposite direction. In short, neither political stability nor antifactionalism justifies the Supreme Court's decision to favor the two-party system." *Id.* at 360 (discussing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (concluding that "the States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two party system").

Many scholars have echoed this view. Professor Magarian, for example, has observed that "[t]he theory of responsible party government reflects a pessimistic and elitist view of politics." Magarian, *supra*, at 1991. "The trouble with this vision is that its fixation on stability exacts a heavy price in political vitality. Members of the political community, especially but not exclusively those who are uncomfortable in the major party coalitions, have little reason to participate in the political process." *Id.* Consequently, "[i]n recent years, the legal literature has revealed an increasing level of concern about the judiciary's embrace of the responsible party government theory. A diverse group of academic commentators has questioned the major party duopoly's representative character and effectiveness and, accordingly, the Court's role in sustaining the duopoly." *Id.* at 1992; *see*, *e.g.*, Joel Rogers, *Two-Party Systems: Pull the Plug*, 52 Admin. L. Rev. 743 (2000) (arguing that the modern duopoly has not achieved good government and charging the major parties with two central shortcomings: failure to develop and implement coherent programs, and insufficient representation of partisan and ideological

minorities); Mark R. Brown, *Policing Ballot Access: Lessons From Nader's 2004 Run for President*, 35 Cap. U. L. Rev. 163, 169 (2006) ("Far from facilitating a robust marketplace of ideas, America's two-party system often suppresses meaningful discussion" (footnote omitted)).

The reality is that Ohio's major party requirement does not foster good government within any understandable sense of those words. It does not promote nonpartisanship. It does not in a meaningful way serve as a proxy for people's preferences. It does not foster principled developments in the law. It does not obviate the possibility of political gamesmanship. It has nothing to do, in short, with achieving constitutionally acceptable political balance. Far from it. The major party requirement is designed to achieve an unconstitutional imbalance in the State's electoral system, and it achieves that purpose. It is therefore unconstitutional.

CONCLUSION

For these reasons, and the reasons stated in the Petition, the Petitioner's Writ of Certiorari should be granted.

September 15, 2021

Respectfully submitted,

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