

No. 19-309

In the Supreme Court of the United States

GOVERNOR OF DELAWARE, PETITIONER

v.

JAMES R. ADAMS, RESPONDENT

*ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT*

BRIEF FOR PETITIONER

RANDY J. HOLLAND
*Wilson Sonsini Goodrich
& Rosati, PC
222 Delaware Avenue
Suite 800
Wilmington, DE 19801
(302) 304-7600*

DAVID C. MCBRIDE
MARTIN S. LESSNER
PILAR G. KRAMAN
*Young Conaway
Stargatt & Taylor, LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600*

MICHAEL W. MCCONNELL
Counsel of Record
STEFFEN N. JOHNSON
BRIAN J. LEVY
G. EDWARD POWELL III
*Wilson Sonsini Goodrich
& Rosati, PC
1700 K Street, N.W.
Washington, DC 20006
(202) 973-8800
mmccconnell@wsgr.com*

Counsel for Petitioner

QUESTIONS PRESENTED

1. Has Respondent Adams demonstrated Article III standing?*

2. Does the First Amendment invalidate a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a “bare majority” on the State’s three highest courts, with the other seats reserved for judges affiliated with the “other major political party”?

3. Did the Third Circuit err in holding that a provision of the Delaware Constitution requiring that no more than a “bare majority” of three of the state courts may be made up of judges affiliated with any one political party is not severable from a provision that judges who are not members of the majority party on those courts must be members of the other “major political party,” when the former requirement existed for more than fifty years without the latter, and the former requirement, without the latter, continues to govern appointments to two other courts?

* The Court added this question when it granted the petition for certiorari.

**PARTIES TO THE PROCEEDINGS AND
RULE 29.6 CORPORATE DISCLOSURE
STATEMENT**

The parties to the proceedings include all those listed on the cover. No party is a nongovernmental corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES.....	vi
INTRODUCTION.....	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	4
A. The history of Delaware’s political balance provisions	4
B. The parties to this dispute	7
C. The district court’s decision	10
D. The court of appeals’ decision	11
SUMMARY OF ARGUMENT.....	15
ARGUMENT	19
I. Adams failed to establish Article III standing.	19
A. Plaintiffs must establish injury in fact.	19

	Page
B. Adams does not have standing to challenge the bare majority provision.	20
C. Adams’ standing to challenge the major party provision rests on a self-serving statement contradicted by the rest of the record.	20
II. The Delaware Constitution’s partisan balance provisions for state court judges do not violate the First Amendment.	24
A. Under the <i>Elrod-Branti</i> line of decisions, partisan affiliation is an appropriate requirement for state officials who exercise significant legal-political authority.	25
B. State judges exercise discretion and judgment in interpreting legal texts and developing the common law, and thus are “policymakers” under <i>Elrod-Branti</i>	28
1. State judges generally exercise substantial policymaking authority.	28
2. The Third Circuit’s definition turns the <i>Elrod-Branti</i> principle on its head.	30
3. Delaware judges’ responsibilities for developing the common law plainly call for “policymaking.”	31

	Page
C. <i>Gregory v. Ashcroft</i> confirms the States’ broad constitutional authority to structure their governments and set party affiliation requirements for state judges.....	34
1. <i>Gregory</i> requires applying a “less exacting” standard to state laws that establish judicial qualifications.....	35
2. The Third Circuit’s “least restrictive alternative” test is incompatible with both <i>Branti</i> and <i>Gregory</i>	36
D. Even if Delaware’s political balance rules must satisfy heightened First Amendment scrutiny, they are narrowly tailored to ensuring a politically balanced judiciary.....	37
III. The court’s severability ruling is plainly incorrect and should be reversed.....	47
A. Federal courts may not use severability as an excuse for striking down state laws that do not injure the plaintiff.....	47
B. Under the federal or state severability tests, the bare majority provision is indisputably severable.	50
CONCLUSION	53

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Albuquerque Indian Rights v. Lujan</i> , 930 F.2d 49 (D.C. Cir. 1991)	22
<i>Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n</i> , 135 S. Ct. 2652 (2015)	36
<i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43 (1997)	19
<i>Ayotte v. Planned Parenthood of N. New Eng.</i> , 546 U.S. 320 (2006)	49, 50
<i>Bernal v. Fainter</i> , 467 U.S. 216 (1984)	35, 37
<i>Boyd v. Nebraska ex rel. Thayer</i> , 143 U.S. 135 (1892)	35
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980)	10–13, 16–17, 25–28, 30, 34, 36–37, 41, 46
<i>Brockett v. Spokane Arcades, Inc.</i> , 472 U.S. 491 (1985)	48
<i>Cede & Co. v. Technicolor, Inc.</i> , 634 A.2d 345 (Del. 1993)	33
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991)	29
<i>Clapper v. Amnesty Int’l USA</i> , 568 U.S. 398 (2013)	20

	Page(s)
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006).....	18
<i>District of Columbia v. Murphy</i> , 314 U.S. 441 (1941).....	23
<i>Doherty v. Rutgers Sch. of Law-Newark</i> , 651 F.2d 893 (3d Cir. 1981)	22
<i>E.I. DuPont de Nemours & Co. v. Pressman</i> , 679 A.2d 436 (Del. 1996).....	33
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	10–13, 16, 25–28, 30, 34, 36, 45–46
<i>Exec. Benefits Ins. Agency v. Arkison</i> , 573 U.S. 25 (2014).....	50–51
<i>Exhaustless Inc. v. FAA</i> , 931 F.3d 1209 (D.C. Cir. 2019).....	22
<i>Farmers for Fairness v. Kent County</i> , 940 A.2d 947 (Del. Ch. 2008).....	51
<i>FEC v. Democratic Senatorial Campaign Comm.</i> , 454 U.S. 27 (1981).....	45
<i>Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.</i> , 561 U.S. 477 (2010).....	49–50
<i>Gill v. Whitford</i> , 138 S. Ct. 1916 (2018).....	20, 47

	Page(s)
<i>Governor of Del. v. Adams</i> , 914 F.3d 827 (3d Cir. 2019).....	14
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	16–17, 28–29, 31, 34–37
<i>Hechinger v. Martin</i> , 411 F. Supp. 650 (D.D.C. 1976), aff’d, 429 U.S. 1030 (1977).....	37
<i>Humphrey’s Ex’r v. United States</i> , 295 U.S. 602 (1935).....	30
<i>Int’l Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977).....	23
<i>James B. Beam Distilling Co. v. Georgia</i> , 501 U.S. 529 (1991).....	29
<i>Kelty v. State Farm Mut. Auto. Ins. Co.</i> , 73 A.3d 926 (Del. 2013).....	33
<i>Kurowski v. Krajewski</i> , 848 F.2d 767 (7th Cir. 1988).....	13, 31
<i>Leavitt v. Jane L.</i> , 518 U.S. 137 (1996).....	50
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996).....	47
<i>LoFrisko v. Schaffer</i> , 341 F. Supp. 743 (D. Conn.), aff’d, 409 U.S. 972 (1972).....	37
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	15, 19–20, 22

	Page(s)
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	25
<i>In re McCann</i> , 894 A.2d 1087 (Del. 2005).....	33
<i>New York v. United States</i> , 505 U.S. 144 (1992).....	49
<i>Newman v. Voinovich</i> , 986 F.2d 159 (6th Cir. 1993).....	13
<i>NFIB v. Sebelius</i> , 567 U.S. 519 (2012).....	49
<i>N. Pipeline Construction Co. v. Marathon Pipeline Co.</i> , 458 U.S. 50 (1982).....	49
<i>O'Hare Truck Serv., Inc. v. City of Northlake</i> , 518 U.S. 712 (1996).....	27
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	48
<i>Randall v. Sorrell</i> , 548 U.S. 230 (2006).....	50
<i>Reese v. Hartnett</i> , 73 A.2d 782 (Del. Super. Ct. 1950).....	51
<i>Regan v. Time, Inc.</i> , 468 U.S. 641 (1984).....	48
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	43, 49

	Page(s)
<i>Republican Party of Minn. v. White</i> , 536 U.S. 765 (2002).....	31
<i>Rutan v. Republican Party of Ill.</i> , 497 U.S. 62 (1990).....	16, 25, 27, 37, 46
<i>Scott v. Harris</i> , 550 U.S. 372 (2007).....	23
<i>Shelby County v. Holder</i> , 570 U.S. 529 (2013).....	48
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016).....	19, 21
<i>Sugarman v. Dougall</i> , 413 U.S. 634 (1973).....	35
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	49
<i>United States v. Playboy Entm't Grp., Inc.</i> , 529 U.S. 803 (2000).....	43
<i>United States v. Windsor</i> , 570 U.S. 744 (2013).....	48
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989).....	44
<i>Williams-Yulee v. Florida Bar</i> , 575 U.S. 433 (2015).....	17, 36, 38
<i>Zobel v. Williams</i> , 457 U.S. 55 (1982).....	50
Federal Constitutional Provisions	
U.S. Const. Art. IV, § 4.....	3, 35
U.S. Const. Amend. I.....	3

	Page(s)
U.S. Const. Amend. X.....	4
Federal Statutes	
2 U.S.C. 199.....	46
15 U.S.C. 41.....	51
15 U.S.C. 78d.....	45
19 U.S.C. 1330.....	45
28 U.S.C. 251.....	45
28 U.S.C. 1254.....	2
42 U.S.C. 1975.....	46
Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No 110- 53, § 1853(a), 121 Stat. 266	46
State Constitutional Provisions	
Del. Const. Art. IV, § 3.....	2, 4, 6, 51
Del. Const. Art. IV, § 3 (1897).....	51
Del. Const. Art. IV, § 13.....	33
State Executive Orders	
Del. Exec. Order 16 (Oct. 18, 2017)	6
State Statutes	
10 Del. C. § 161.....	33
10 Del. C. § 361.....	33
10 Del. C. § 915.....	8
Act of June 25, 2019, 82 Del. Law c. 64.....	33

	Page(s)
Del. Sup. Ct. R. 69.....	8
Other Authorities	
William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., <i>The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide</i> , 69 U. Chi. L. Rev. 1067 (2002).....	32
Robert Daines, <i>Does Delaware Law Improve Firm Value?</i> , 62 J. Fin. Econ. 525 (2001).....	40
Daniel Epps & Ganesh Sitaraman, <i>How to Save the Supreme Court</i> , 129 Yale L.J. 148 (2019).....	45
Brian D. Feinstein & Daniel J. Hemel, <i>Partisan Balance with Bite</i> , 118 Colum. L. Rev. 9 (2018)	43
Henry J. Friendly, <i>Reactions of a Lawyer—Newly Become Judge</i> , 71 Yale L.J. 218 (1961).....	29
Ruth Bader Ginsburg, <i>The Role of Dissenting Opinions</i> , 95 Minn. L. Rev. 1 (2010).....	39
The Harris Poll, <i>2019 Lawsuit Climate Survey: Ranking the States</i> (Sept. 18, 2019).....	7
Randy J. Holland, <i>Delaware’s Business Courts: Litigation Leadership</i> , 34 J. Corp. L. 771 (2009).....	39

	Page(s)
Randy J. Holland, <i>Delaware Directors’ Fiduciary Duties: The Focus on Loyalty</i> , 11 U. Pa. J. Bus. L. 675 (2009)	32
Randy J. Holland & David A. Skeel, Jr., Deciding Cases Without Controversy, in <i>Delaware Supreme Court Golden Anniversary 1951-2001</i> (Randy J. Holland & Helen L. Winslow ed. 2001).....	39
O. Holmes, <i>The Common Law</i> (1881).....	17, 31
Douglas Keith, <i>Judicial Nominating Commissions</i> , Brennan Ctr. for Justice (May 29, 2019).....	45
Pauline T. Kim, <i>Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects</i> , 157 U. Pa. L. Rev. 1319 (2009)	41
Thomas J. Miles, <i>The Law’s Delay: A Test of the Mechanisms of Judicial Peer Effects</i> , 4 J. Legal Analysis 301 (2012).....	41
Thomas J. Miles & Cass R. Sunstein, <i>Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron</i> , 73 U. Chi. L. Rev. 823 (2006).....	43
Geoffrey P. Miller, <i>Independent Agencies</i> , 1986 Sup. Ct. Rev. 41.....	45
Milton Rakove, <i>We Don’t Want Nobody Nobody Sent: An Oral History of the Daley Years</i> (1979)	46

	Page(s)
William H. Rehnquist, <i>The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice</i> , 48 Bus. Law. 351 (1992)	39
Richard L. Revesz, <i>Environmental Regulation, Ideology, and the D.C. Circuit</i> , 83 Va. L. Rev. 1717 (1997)	43
Roberta Romano, <i>The Genius of American Corporate Law</i> (1993)	40
Antonin Scalia, <i>Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws</i> , Tanner Lectures on Human Values (Mar. 8–9, 1995)	32
Bernard S. Sharfman, <i>The Importance of the Business Judgment Rule</i> , 14 N.Y.U. J.L. & Bus. 27 (2017)	33
David A. Skeel, Jr., <i>The Unanimity Norm in Delaware Corporate Law</i> , 83 Va. L. Rev. 127 (1997)	7, 39
Cass R. Sunstein, <i>Deliberative Trouble? Why Groups Go to Extremes</i> , 110 Yale L.J. 71 (2000)	43
Cass R. Sunstein et al., <i>Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation</i> , 90 Va. L. Rev. 301 (2004)	41

	Page(s)
Leo E. Strine, Jr., <i>The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face</i> , 30 Del. J. Corp. L. 673 (2005)	40
Brian Z. Tamanaha, <i>The Distorting Slant in Quantitative Studies of Judging</i> , 50 B.C. L. Rev. 685 (2009)	29
E. Norman Veasey & Christine T. Di Guglielmo, <i>What Happened in Delaware Corporate Law and Governance from 1992–2004?: A Retrospective on Some Key Developments</i> , 153 U. Pa. L. Rev. 1399 (2005)	40
Joseph T. Walsh & Thomas J. Fitzpatrick, Jr., <i>Judiciary: Article IV</i> , in <i>The Delaware Constitution of 1897: The First One Hundred Years</i> (1997)	5, 6, 52
John T. Wold, <i>Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges</i> , 27 W. Pol. Q. 239 (1974)	32

INTRODUCTION

Delaware's judiciary is widely admired for its stability, consistency, and nonpartisanship. One major reason for these virtues is that the Delaware Constitution contains political balance provisions preventing the State's governors from packing the courts with appointees from any particular political party. The necessary consequence, however, is that some who aspire to be nominated are ineligible on account of their party affiliation. If there is already a bare majority of one political party on the relevant courts, no one of that party may be considered for appointment; for the three most significant courts, only members of the other major political party are eligible.

The question is whether the First Amendment prohibits this incidental burden on the freedom of association, notwithstanding the sovereign right of States like Delaware to structure important aspects of state government, such as the qualifications of judges, in light of their needs. As explained below, Delaware's system is constitutional.

OPINIONS BELOW

The Third Circuit's opinion (Pet. App. 1a–41a) is reported at 922 F.3d 166. The order denying rehearing en banc (Pet. App. 44a–45a) is unreported. The district court's clarified and restated opinion (Pet. App. 61a–82a) is unreported but is available at 2018 WL 2411219. The district court's order denying reconsideration (Pet. App. 46a–60a) is unreported.

JURISDICTION

The Third Circuit entered judgment on April 10, 2019. Pet. App. 42a–43a. The court denied a timely rehearing petition on May 7, 2019. On July 16, 2019,

Justice Alito extended the time for filing a petition for certiorari to September 4, 2019. The Governor filed his petition for certiorari on that date. This Court has statutory jurisdiction under 28 U.S.C. 1254(1). As discussed below (at 19–24), the Court lacks Article III standing to address Adams’ claims.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 3 of Article IV of the Delaware Constitution states in relevant part:

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.

Fourth, at any time when the total number of Judges of the Family Court shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.

Fifth, at any time when the total number of Judges of the Court of Common Pleas shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.

Section 4 of Article IV of the United States Constitution provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Tenth Amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT

A. The history of Delaware’s political balance provisions

Article IV, § 3, of the Delaware Constitution contains detailed political balance requirements for its five constitutional courts. Delaware’s three major courts—commonly called “the business courts”—individually and collectively may not have more than a single-judge majority from any political party; we call this the “bare majority provision.” The other judges must be from the other major political party; we call this the “major party provision.” The Family Court and the Court of Common Pleas individually may have no more than a bare majority of judges from one political party. Although no other State has such provisions for its courts, political balance requirements apply to one Article III court as well as many judicial nominating commissions and regulatory agencies.

1. Delaware’s political balance provisions date to the State’s comprehensive constitutional revision in 1896. Previously, judges were simply appointed by

the governor. Some delegates hoped to change to popular elections, a widespread alternative among the States. The convention rejected popular elections, concluding that electoral politics had no place in the judiciary. Specifically, delegates argued that the winner of an election would be “the man who had the greatest pull politically.” JA76. Others worried that elected judges would become “mixed up * * * in politics” and subject to undue “political influence.” JA82–83. One delegate shared the story of a New York judge who contributed \$20,000 to his party in exchange for a nomination. JA89. See generally Joseph T. Walsh & Thomas J. Fitzpatrick, Jr., *Judiciary: Article IV, in The Delaware Constitution of 1897: The First One Hundred Years* 131–132 (1997).

In a further effort to avoid partisan control of the judiciary by either party, the delegates adopted political balance requirements—an innovation for that day. One delegate explained: “The time has been in the history of this State when they have all been from one political party and also the time when they have been all from another political party, which is the case now. I think it would give more satisfaction to the people if the Judges were not all from the same political party.” JA116. Another called it “desirable to have the minority party represented on our Bench,” so “they may bring about a fuller and freer discussion of these matters that come before them” and “make fair and impartial decisions.” JA110–111. The sentiment “that [Delaware] ought to do something by which we would make our Bench non-partisan, or if it be a better word, bi-partisan,” carried the day. JA106–107.

Some delegates worried that partisan balance requirements would make judges feel obligated to their party. JA113–114. That argument, however, “did not

prevail in the face of the widespread belief that every effort should be made to ensure that the judiciary not be dominated by any political party.” Walsh & Fitzpatrick, *supra*, at 134.

2. In 1951, the constitution was amended to create a new five-Justice Supreme Court. To prevent any governor from using his appointments to dominate the new court, the framers not only carried forward the bare majority provision, but also required that the minority seats on the business courts be members of the “other major political party.” This would prevent governors from circumventing the bare majority provision by appointing nominal Independents or members of allied third parties to seats intended to be representative of the other side. Pet. App. 34a.

In 2005, the Delaware Constitution was further amended to elevate the Family Court and the Court of Common Pleas to the status of constitutional courts. See JA135–143. The bare majority provision—but not the major party provision—applies to those courts. *Ibid.*; Del. Const. Art. IV, § 3.

3. As a matter of discretion, recent governors have issued executive orders creating Judicial Nominating Commissions and committing to nominate judges that these commissions recommend. *E.g.*, Del. Exec. Order 16 (Oct. 18, 2017). The twelve-member commission has its own bare majority provision: “No more than seven members of the Commission shall be registered members of the same political party at the time of their appointment.” *Id.* ¶ 4.

4. Delaware’s unique political balance provisions have helped create a judiciary that is the envy of the Nation. One recent survey, for example, found that

Delaware’s trial judges are regarded as the most competent and most impartial of any judges in the country, and that Delaware’s appellate review is likewise the Nation’s best. See The Harris Poll, *2019 Lawsuit Climate Survey: Ranking the States* 19, 20, 22 (Sept. 18, 2019) (conducted for U.S. Chamber Institute for Legal Reform).¹ In part because of Article IV, § 3, Delaware’s judiciary is unusually apolitical and harmonious, with high rates of unanimous Supreme Court opinions. David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 Va. L. Rev. 127, 132, 174–175 (1997). As the court below noted, Delaware courts have been lauded as “exemplary” and “preeminent” by courts, scholars, a former Chief Justice of this Court, and the business community worldwide. Pet. App. 38a, 39a. As a result, a majority of large American corporations are chartered in Delaware.

B. The parties to this dispute

Petitioner John Carney became Governor of Delaware in January 2017. He is litigating this case in his official capacity as the officer charged with enforcing Article IV, § 3.

Respondent James Adams graduated from college in 1979, but became an attorney 21 years later, in 2000. JA61. Most of his relatively short legal career, 2003 to 2015, was spent in the Delaware Department of Justice, largely in family-law-related roles. JA58–59. Throughout this period, Adams was a registered Democrat. JA61.

¹ Available at: https://www.instituteforlegalreform.com/uploads/pdfs/2019_Harris_Poll_State_Lawsuit_Climate_Ranking_the_States_Full_Report_with_Questionnaire.pdf.

While practicing as an attorney, Adams unsuccessfully applied to serve as a family court commissioner (JA34–35; JA62), a statutory position not subject to political balance requirements (10 Del. C. § 915). But he never applied for *any* judgeship. JA61; JA35–36. In December 2015, he retired from his job, and in February 2016, he took “emeritus” status with the Delaware bar (JA32, JA61)—a category for lawyers over 65 years of age who may represent only nonprofits and certain pro bono clients. See Del. Sup. Ct. R. 69(g).

“[V]ery shortly before” he filed this lawsuit, Adams read an article critical of Delaware’s political balance provisions, called up the author, and said, “I’d like to pursue this.” JA38. He says concerns about those provisions were “on [his] radar” for “[f]ifteen” or “twenty years”—it “wasn’t something that just came up now.” *Ibid.* Adams then re-activated his bar membership and changed his voter registration to Independent. JA61; JA67. He stated that he changed his affiliation because he is “much more progressive and liberal than democrats in Delaware,” grew “frustrat[ed] with the Delaware democratic party,” and is now “more of a Bernie [Sanders] independent.” JA41–42. Seven days after the State mailed Adams his new registration card (JA67), he filed this lawsuit, alleging that it violates the First Amendment for Delaware to exclude him from judgeships based on his partisan affiliation.

Adams testified at his deposition that he has a generalized interest in serving in “any judicial position,” with no preference for any state court over another:

Q. Your interest now is applying for a judicial vacancy of some sort.

A. Uh-huh.

Q. Could you elaborate a little bit on what particular judicial positions interest you?

A. I would apply for any judicial position that I thought I was qualified for, and I believe I'm qualified for any position that would come up.

Q. On any of the courts?

A. On any of the courts.

JA33–34.

In his response to the Governor's interrogatories and at his deposition, Adams stated that in 2014 he was interested in applying for Superior Court and Supreme Court judgeships, but did not apply because the positions were reserved, under Article IV, § 3, to Republicans. JA35; JA62. Adams must have misremembered, because official records showed that, in 2014, there were at least two Supreme Court vacancies and one Superior Court vacancy open to Democrats. When confronted with these records, Adams admitted as much. JA44–46; JA51–56.

Several more openings occurred in 2015 and 2016, including three on the Family Court, for which Adams' professional experience would have been most pertinent. All told, from 2014 to 2016, there were at least ten openings for which he was constitutionally eligible as a Democrat. JA147–148, JA158–164 (three family court openings); JA149–151 (family court and court of chancery); JA154–155 (superior court); JA152–153 (court of chancery). He applied for none of them.

Adams' 2017 change of registration rendered him ineligible for seats on the business courts, but eligible for any vacancies on the Family Court or Court of

Common Pleas. As an unaffiliated voter, his appointment to either court could not violate the bare majority provision, and the major party provision does not apply to them.

C. The district court's decision

On cross-motions for summary judgment and the Governor's motion for reconsideration or clarification, the district court granted judgment to Adams.

1. The district court initially held that Adams had standing to challenge the Delaware Constitution's requirements governing the Supreme Court, Superior Court, and Court of Chancery based on his allegation that "he would apply for a position on either the Delaware Superior Courts or the Delaware Supreme Court." JA175. According to the court, an unaffiliated voter's application to serve on those courts would be futile because the major party provision applied to them. *Ibid.* At the same time, the court initially held that Adams lacked standing to challenge the provision governing the Family Court and Court of Common Pleas, as only a bare majority requirement applied to those courts. JA174. On reconsideration, however, the court held that Adams had *prudential* standing to challenge the political balance provisions as they applied to all five courts, even though he lacked Article III standing as to the Family Court and Court of Common Pleas. Pet. App. 70a–75a.

2. On the merits, Adams invoked *Elrod v. Burns*, 427 U.S. 347 (1976), which held that the First Amendment bars state officials from making employment decisions involving nondiscretionary jobs, such as process servers and security guards, based on the employees' partisan affiliation or political beliefs. See also *Branti v. Finkel*, 445 U.S. 507 (1980) (extending

Elrod to assistant public defenders). The Governor pointed to language in *Elrod* and *Branti* distinguishing “policymaking positions” (e.g., *Elrod*, 427 U.S. at 367 (plurality op.)) and other positions where “party affiliation is *an appropriate requirement* for the effective performance of the public office involved” (*Branti*, 445 U.S. at 518 (emphasis added)).

The district court sided with Adams, holding that judges are not policymaking officials for First Amendment purposes because they merely apply the law, and invalidating both the bare majority provision and the major party provision. Pet. App. 75a–81a.²

D. The court of appeals’ decision

The Third Circuit held that Adams lacked standing to challenge the provisions governing eligibility for service on the Family Court and Court of Common Pleas, but otherwise affirmed.

1. In holding that Adams had standing to challenge the political balance provisions governing the three business courts, the court uncritically accepted Adams’ factual allegations, even where inconsistent with his deposition testimony or other record evidence. For instance, the court stated that Adams would have applied to “the Supreme Court and the Superior Court” in 2014, but “the positions were open only to Republican candidates” (Pet. App. 10a–11a)—even though the record shows, and Adams later admitted, that those positions were open to Democrats. *Supra* at 9.

The court also stated that Adams had earlier “applied to similar positions,” when he had applied only

² The court later stayed its decision pending appeal. JA201–207.

to be family court commissioner. Pet. App. 10a. And the court declared that Adams had “resume[d] searching for a judicial position,” even though there is no evidence that he “search[ed],” much less applied, for *any* judgeship before filing suit. Pet. App. 11a. His sole allegation was that he “would apply” for future openings. JA175.

The court held that Adams had standing to challenge the major party provision, which applies only to the three business courts, but not the bare majority provision, which does not disadvantage Independents. Pet. App. 15a–16a. This meant Adams had no standing to challenge the provisions governing the Family Court and Court of Common Pleas. Pet. App. 36a.

2. On the merits, the court rejected the Governor’s positions that partisan affiliation could be an appropriate consideration for judges and that, even if the political balance provisions were subject to strict scrutiny, they were narrowly tailored to ensuring politically balanced courts, a compelling interest.

a. As to whether “partisan affiliation” can be an appropriate consideration for judges, the court applied circuit precedent that extended *Elrod-Branti* to all government jobs except those that “cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority].” Pet. App. 28a (brackets in original). The court thus confined its inquiry to whether the job required “political loyalty” (Pet. App. 24a (emphasis added)), rather than whether party affiliation is “an appropriate [job] requirement” (*Branti*, 445 U.S. at 518). This sweeps within the ambit of *Elrod-Branti* independent regulatory commissioners and other clear policymakers who make decisions independently of those who appoint

them. Indeed, by definition, it applies *Elrod-Branti* to any political balance requirement or other use of partisan affiliation for the purpose of preserving independence, while leaving it inapplicable to patronage policies based on guaranteeing political loyalty.

In so holding, the court noted that “two of our sister Circuits have concluded otherwise.” Pet. App. 27a, citing *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988) (“A judge both makes and implements governmental policy.”), and *Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993) (“We agree with the holding in *Kurowski* that judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters.”).

b. Having concluded that *Elrod-Branti* applied, the Third Circuit turned to the State’s justifications. Although the court did not question Delaware’s “vital” interest in political balance, it faulted the Governor for failing to explain why the major party provision is “the least restrictive means of achieving political balance.” Pet. App. 32a–33a. Elsewhere, however, the court itself explained why the political balance provision is necessary to achieving that interest:

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 fulfil its purpose of preventing single party dominance while ensuring bipartisan representation.

Pet. App. 34a.

3. On petition for rehearing, the court vacated its first opinion and issued a revised opinion addressing severability. See 914 F.3d 827 (3d Cir. 2019) (vacated). Although the court accepted that Adams lacked standing to challenge the bare majority provision (Pet. App. 16a), it went on to invalidate that provision as to Delaware’s business courts, reasoning that it was “not severable” from the major party provision. Pet. App. 33a. In the court’s view, severability doctrine is not limited by standing doctrine. Pet. App. 16a–17a n.32.

In so holding, the court acknowledged “that the bare majority component is capable of standing alone, as it does in the provisions of Article IV, Section 3 involving the Family Court and the Court of Common Pleas,” and it pointed to no evidence that Delaware’s framers would have wanted the provisions to stand or fall together. Pet. App. 34a–35a. A bare majority provision existed on its own, without a major party provision, from 1897 until 1951. See JA208–227. Nevertheless, the court declared that the two components “are interdependent and equally integral to the political balance scheme Delaware envisioned for the Supreme Court, Superior Court, and Chancery Court.” Pet. App. 34a, 35a (footnote omitted).

4. A concurrence written by Judge McKee, joined by all three judges, recognized that the invalidated provisions contributed to the high quality of Delaware’s judiciary:

Praise for the Delaware judiciary is nearly universal, and it is well deserved. Scholars and academics routinely refer to Delaware’s courts as the preeminent forum for litigation, particularly for cases involving business disputes. * * *

Members of the Delaware bench credit the political balancing requirement for at least part of this success.

Pet. App. 38a–39a. Calling it “as paradoxical as it is ironic” that the court felt compelled to invalidate the “excellent” and “exemplary” judicial system “that has resulted from Delaware’s political balance requirements,” the judges expressed hope that the existing “political and legal culture” was “so firmly woven into the fabric of Delaware’s legal tradition that it will almost certainly endure in the absence of the political affiliation requirements.” Pet. App. 38a, 41a.

SUMMARY OF ARGUMENT

I. Adams has not established Article III standing to challenge Delaware’s political balance provisions. The standing issue was resolved at summary judgment, where he bore the burden of showing that there was no disputed question of material fact.

The bare majority provision could not possibly injure Adams, who does not belong to either major party. Adams supposedly suffered *past* harm from that provision because he wanted to apply for judgeships in 2014, when only Republicans were eligible. Not so. As official records show, at least three positions were then open to Adams, and he admits that he was eligible. Ultimately, he passed on applying for at least *ten* judgeships.

Adams supposedly suffers *future* harm because he became an Independent days before suing and “would consider applying” for judgeships if not barred by the major party provision. Pet. App. 14a. But Adams has no “concrete plans,” and “‘some day’ intentions” cannot satisfy Article III. *Lujan v. Defenders of Wildlife*,

504 U.S. 555, 564 (1992). Given his alleged interest in “any judicial position” (JA34), Adams’ failure to apply for courts open to Independents is damning. He reaffiliated just before suing so he could complain that his new party affiliation bars him from seeking jobs that he never sought when eligible. That is a “self-inflicted” harm.

II. If the Court reaches the merits, it should hold that Delaware’s longstanding political balance provisions for judges satisfy the First Amendment.

For as long as the Nation has existed, elected officials have considered party affiliation in appointing government employees, including judges. In the late 1900s, *Elrod* and *Branti* imposed First Amendment limits on this practice as it affects “low-level public employees,” whose jobs do not involve discretionary governmental authority. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990). But every Justice in *Elrod* distinguished “policymaking” jobs, which naturally involve “the exercise of discretion concerning issues of public importance”—a role that “certainly describes the bench.” *Gregory v. Ashcroft*, 501 U.S. 452, 466–467 (1991).

Under *Branti*, the “ultimate inquiry” is “whether the hiring authority can demonstrate that party affiliation is *an appropriate requirement* for the effective performance of the public office involved.” 445 U.S. at 518 (emphasis added). Because party affiliation is a proxy for how would-be judges might understand their role, it is entirely appropriate for States to use it—especially as a means of ensuring bipartisan decisionmaking, which Delaware has achieved in spades. Indeed, even if “policymaking” referred only to those who, strictly speaking, make policy, Delaware judges

develop the common law. That calls for making “a well-considered judgment of what is best for the community,” and “at bottom [is] the result of more or less definitely understood views of public policy.” *Gregory*, 501 U.S. at 466 (quoting O. Holmes, *The Common Law* 35–36 (1881)).

The Third Circuit limits “policymaking” to “only the class of employees whose jobs ‘cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority].’” Pet. App. 28a (brackets in original). That view improperly excludes not only judges, but regulatory commissioners, solely because they act with considerable independence in carrying out what all agree are substantial policymaking functions.

The Third Circuit’s self-described “narrow[]” definition of “policymaking” and its exacting application of strict scrutiny (Pet. App. 28a) cannot be reconciled with *Branti*—or with *Gregory*’s holding that States have broad latitude, under the Tenth Amendment and Article IV’s Guarantee Clause, “to determine the qualifications of their most important government officials,” including their “judges.” 501 U.S. at 463. This Court’s “standard of review” is “less exacting” in evaluating state qualifications for “important elective and nonelective positions whose operations ‘go to the heart of representative government.’” *Ibid.*

Even if Delaware’s political balance requirements were subject to heightened First Amendment scrutiny, however, they are narrowly tailored to ensuring a politically balanced judiciary. “No one denies” that “public confidence in judicial integrity” is a “genuine and compelling” interest. *Williams-Yulee v. Florida*

Bar, 575 U.S. 433, 447 (2015). And as the Third Circuit itself acknowledged, “[o]nly with the * * * major political party component does the constitutional provision fulfil its purpose of preventing single party dominance while ensuring bipartisan representation.” Pet. App. 34a. This Court should reverse.

III. If it needs to reach severability, the Court should hold that the bare majority provision is severable from the major party provision.

First, as the Third Circuit recognized, Adams lacks standing to challenge the bare majority provision—which does not injure Independents. Although this Court has not explicitly addressed whether severability creates an implied exception to standing principles, such an exception would be problematic. It would allow parties to obtain sweeping relief against whole statutory schemes even if injured by only part of them—in violation of the Court’s repeated holdings that “standing is not dispensed in gross.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006).

Second, “the bare majority component is capable of standing alone.” Pet. App. 34a. Indeed, it stood alone for 54 years—from 1897 until 1951—and even today two of Delaware’s courts are subject only to a bare majority provision. There is simply no evidence that the Delaware Constitution’s framers would have preferred no political balance provisions at all to a system with just the bare majority provision.

ARGUMENT

I. Adams failed to establish Article III standing.

The question of Adams’ standing was resolved at summary judgment. At that stage, the question was whether Adams had borne his burden of showing that there was no disputed issue of material fact. Faced with considerable circumstantial evidence that his purpose in suing was an abstract interest in vindicating his view that Article IV, § 3, is unconstitutional, JA38–39, Adams claimed that he had refrained from applying for judgeships in 2014 because the available positions were open only to Republicans, and that he would apply for a future judgeship but for the fact that, as a newly-reregistered Independent, he would be ineligible for appointment to three of the five courts. Those claims are untenable.

A. Plaintiffs must establish injury in fact.

To establish standing, Adams must show that he “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U. S. at 559–560). This injury must have existed “at the commencement of the litigation.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). Adams must allege (in his complaint) and prove (at summary judgment or trial) each element. It is not the Governor’s burden to *disprove* standing.

Adams’ injury must also be “‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 136 S. Ct. at 1548 (citing *Lujan*, 504 U.S. at 560). A mere desire to remedy a perceived

constitutional violation is insufficient. His personal interests must be affected. *E.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018).

Moreover, Adams “cannot manufacture standing merely by inflicting harm on [himself] based on [his] fears of hypothetical future harm that is not certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013). As to claims of future injury, “some day’ intentions” to act “without any description of concrete plans * * * do not support a finding of [an] ‘actual or imminent’ injury.” *Lujan*, 504 U.S. at 564.

B. Adams does not have standing to challenge the bare majority provision.

As “standing is not dispensed in gross,” Adams must show injury from each provision he challenges. *Gill*, 138 S. Ct. at 1934. Both courts below concluded that Adams lacks Article III standing to challenge the bare majority provision, which could not possibly injure any judicial applicant who does not belong to either major political party. Pet. App. 70a–75a, 16a. As an unaffiliated voter, Adams could never create an unlawful supermajority on any court. Thus, he cannot challenge the bare majority provision as to any of the five constitutional courts.

C. Adams’ standing to challenge the major party provision rests on a self-serving statement contradicted by the rest of the record.

To establish injury from the major party provision, Adams had to prove that the following three things were true when he sued: (1) he genuinely wished to become a judge and had concrete plans to do so; (2) his failure to be evaluated on equal footing was caused by

the challenged provisions; and (3) absent those provisions, he had a reasonable probability of becoming a judge. Adams did not prove any of these elements—certainly not with undisputed evidence that warranted summary judgment.

Adams based his claim of injury on both the past and the future. See JA17 (“He has desired and still desires a judgeship.”). He alleged that he wished to apply for Supreme Court and Superior Court positions in 2014, but was barred because those positions were closed to Democrats. As to the future, “he would consider applying for a judicial seat on any of Delaware’s five constitutional courts” (Pet. App. 14a), but those positions are closed to Independents.

The claims based on 2014 are simply false. As explained above (at 9), at least three such positions were then open to Democrats. From 2014 to 2016, while Adams was a Democrat, there were at least *ten* positions for which he was eligible. He manifested not the slightest interest in pursuing any of them.³

Adams’ claim about the future—that “he would consider applying for a judicial seat on any of Delaware’s five constitutional courts” (Pet. App. 14a)—falls far short of an “actual or imminent, not conjectural or hypothetical” injury. *Spokeo*, 136 S. Ct. at 1548. Even his complaint contains no straightforward statement that he actually will seek a particular judgeship—just that he “desires” a judgeship and

³ Inexplicably, the Third Circuit accepted Adams’ allegations that he was barred from applying in 2014. Those allegations were conclusively discredited by official records and contradicted by Adams himself at his deposition. Compare Pet. App. 10a–11a with JA43–45 and JA51–56.

“would consider applying” but for the political balance provisions. “[S]ome day’ intentions,” however, cannot support Article III jurisdiction; Adams needs to show “concrete plans.” *Lujan*, 504 U.S. at 564. Indeed, his allegations powerfully resemble the *Lujan* plaintiffs’ claims that they “intend[ed] to go back to Sri Lanka,” where the elephants and leopards roam, but “had no current plans” to do so. *Ibid.*

Moreover, since Independents are not barred from two of the “five constitutional courts” that Adams says he is considering (Pet. App. 14a)—including the Family Court, for which he is most qualified—his claim is self-refuting. If, as he testified, he has an undifferentiated interest in serving on “any of the courts” (JA34), he should have applied for one of those two courts. A person who is allergic to three of five items on a restaurant menu cannot complain that there is nothing for him to eat.

The record contains no evidence suggesting that Adams had a reasonable probability of becoming a judge. As many lower courts have explained, standing requires “[a] realistic possibility [that] those competing for a position [will] receive it once the supposed illegality is corrected.” *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 56 (D.C. Cir. 1991); see also *Exhaustless Inc. v. FAA*, 931 F.3d 1209, 1213 (D.C. Cir. 2019) (“[T]here must be a ‘realistic possibility’ of winning the eventual competition.”); *Doherty v. Rutgers Sch. of Law-Newark*, 651 F.2d 893, 899–900 (3d Cir. 1981). Here, the record at most shows that Adams “believes that he meets the minimum qualifications” to be a judge. JA62–63. That is like saying that any runner with two sound legs can win the marathon.

There is more than a whiff of self-inflicted harm when a lifelong Democrat changes his party registration just seven days before filing suit to complain that his new registration keeps him from pursuing opportunities that he never pursued when he was free to do so. The trier of fact might reasonably doubt Adams' story, or find that he manufactured an occasion for suing when, after retiring, he read an "excellent" law review article about the Delaware Constitution. JA38.

Finally, Adams makes these claims about future intentions in his Complaint and briefs, but proof, not assertion, is required at summary judgment. At a minimum, it was error for the district court to grant summary judgment to Adams without an evidentiary hearing, and for the court of appeals to affirm on such a sketchy and implausible record. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 367–368 (1977) (a plaintiff who failed to submit a job application in the face of a purportedly discriminatory policy has the "not always easy burden of proving that he would have applied for the job had it not been for those practices"); *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). Adams' "testimony with regard to his intention is, of course, to be given full and fair consideration," but it is "self-serving," "lack[s] persuasiveness," and is "contradicted" by "inconsistent acts." *District of Columbia v. Murphy*, 314 U.S. 441, 456 (1941).

Adams failed to prove, as a matter of law, that he genuinely intended, and had a concrete plan, to apply for a judgeship. Without that intent and plan, he suffered no harm. His claim should thus be dismissed for lack of standing.

II. The Delaware Constitution’s partisan balance provisions for state court judges do not violate the First Amendment.

The fifty States use a variety of methods for choosing judges, including direct partisan elections and unfettered executive appointment, both of which focus on partisan alignment as well as other factors. The attempt to declare partisan affiliation irrelevant cannot be reconciled with the First Amendment, particularly when the Constitution guarantees States the right to structure their own governments and to establish the qualifications for important state officials. That may explain why every other court to consider whether judges are policymaking officials for First Amendment purposes has rejected the Third Circuit’s view. Pet. 14–18. And even if the provisions here were subject to strict scrutiny, they are narrowly tailored to Delaware’s vital interest in maintaining its nonpartisan judiciary—which has a preeminent reputation for being objective, maintaining a stable jurisprudence, and achieving consensus across party lines.

A. Under the *Elrod-Branti* line of decisions, partisan affiliation is an appropriate requirement for state officials who exercise significant legal-political authority.

Ever since the Nation's founding, presidents, governors, senators, and other public officials have considered party affiliation in making appointments to all types of government posts. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). That is how voters impose accountability on those who rule in their name: They throw the rascals out. Because not every position is directly elected by the people, voters can throw the rascals out only by throwing the rascals' *party* out.

In the late twentieth century, however, this Court imposed a narrow constitutional limitation on that practice. The Court held that, for low-level public jobs with little or no discretionary component, firing or refusing to hire people based on their party affiliation could coerce them to compromise their political beliefs without sufficient justification, in violation of the First Amendment. *Elrod*, 427 U.S. at 367 (plurality op. of Brennan, J.); *id.* at 374 (Stewart, J., concurring in the result); *Branti*, 445 U.S. at 517; *Rutan*, 497 U.S. at 65. Commentators speak of a “policymaker exception” to *Elrod* and *Branti*, but in truth they carved out a “nondiscretionary employee exception” to the general rule that, in a democracy, government officials are chosen through politics. To say that political affiliation is irrelevant to a government position is to say that democracy is irrelevant to that position.

The leading decision, *Elrod*, held that the First Amendment barred the Democratic Sheriff of Cook County from dismissing several “non-civil-service em-

employees”—including a “process server,” “bailiff,” “security guard,” and “supervisor”—solely because they were Republicans. 427 U.S. at 350–351 (plurality op.). *Elrod* did not produce a majority opinion. But all nine Justices agreed that the Court’s holding did not apply to “policymaking positions.” *Id.* at 367; *id.* at 374 (Stewart, J., concurring in result) (“nonpolicymaking, nonconfidential” employees); *id.* at 386 n.10 (Powell, J., dissenting) (“The judgment today is limited to nonpolicymaking positions.”); see *Branti*, 445 U.S. at 517. Even Justice Brennan’s plurality opinion acknowledged that “[a]n employee with responsibilities * * * of broad scope more likely functions in a policymaking position.” *Elrod*, 427 U.S. at 367–368.

Four years later, the Court in *Branti* followed *Elrod* in concluding that two assistant public defenders could not be replaced merely because they were Republicans. The “ultimate inquiry,” the Court held, “is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position,” but “whether the hiring authority can demonstrate that party affiliation is *an appropriate requirement* for the effective performance of the public office involved.” 445 U.S. at 518 (emphasis added). The Court held that this standard was not met, reasoning that “[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State.” *Id.* at 519. As the Court explained, their responsibility “is not to the public at large, except in [a] general way.” *Ibid.*

The Court’s opinion in *Branti* specifically approved of a partisan balance provision for election judges, calling it “obvious” that such a provision would be valid:

As one obvious example, 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. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee's governmental responsibilities.

Id. at 518.

The Court has not further defined the scope of employees to whom *Elrod* and *Branti* apply, but none of its cases has involved anything other than “low-level public employees.” *Rutan*, 497 U.S. at 65. *Rutan*, which extended *Elrod* and *Branti* to employment decisions other than dismissals, involved a “rehabilitation counselor,” “road equipment” operator, “prison guard,” “garage worker,” and “dietary manager”—all jobs that, the defendants conceded, fell within the rule of *Elrod* and *Branti*. *Id.* at 67, 71 n.5. And *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 715 (1996), which extended *Elrod* and *Branti* to independent contractors, did not address the meaning of “policymaking”—likely because it was plainly inapplicable to a “tow truck operator.”

In short, none of this Court's anti-patronage decisions remotely involved “state elective and important nonelective executive, legislative, and judicial positions”—“officers who participate directly in the formulation, execution, or review of broad public policy [and]

perform functions that go to the heart of representative government.” *Gregory*, 501 U.S. at 462. Moreover, none of the Court’s decisions involved a regime where party affiliation was considered to ensure bipartisanship or party balance. As explained below, this case involves both elements—and for that and many other reasons, Delaware’s consideration of party affiliation in appointing judges is entirely “appropriate” under the First Amendment. *Branti*, 445 U.S. at 518.

B. State judges exercise discretion and judgment in interpreting legal texts and developing the common law, and thus are “policymakers” under *Elrod-Branti*.

Elrod and its progeny should not be extended beyond low-level public employees with “only limited responsibility” (*Elrod*, 427 U.S. at 367 (plurality op.)), let alone to those with duties of “broad scope” (*id.* at 368) or duties “to the public at large” (*Branti*, 445 U.S. at 519). Those decisions should apply only to positions for which political views and affiliations are irrelevant. No one can honestly say that of judges.

1. State judges generally exercise substantial policymaking authority.

As the Court has recognized, judges “perform functions that go to the heart of representative government.” *Gregory*, 501 U.S. at 462. Judges are at the opposite end of the spectrum from the process servers, road construction workers, and rehabilitation counselors who are subject to the *Elrod-Branti* rule.

Some may be squeamish about using the term “policymaker” to refer to judges, but the point of *Elrod-Branti* is not to draw a line between law and policy; it is to distinguish between government employees who

perform nondiscretionary functions and government officers whose functions relate to “representative government.” *Id.* at 463. When interpreting the statutory phrase “appointee on the policymaking level” in *Gregory*, this Court stated that “[i]t may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance.” *Id.* at 466–467. As the Court recognized, this “certainly describes the bench.” *Ibid.*; see *Chisom v. Roemer*, 501 U.S. 380, 399 n.27 (1991) (*Gregory* “recognized that judges do engage in policymaking at some level”).

Even if “policymaking” is interpreted literally, to refer to those who “make policy,” judges who determine the common law qualify. As the late Justice Antonin Scalia wrote, “I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense ‘make’ law.” *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment). Similarly, Judge Henry Friendly spoke of “the unfeasibility, under our legal system, of divorcing the deciding from the law-making functions of the judge.” Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 *Yale L.J.* 218, 221 (1961); see Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 *B.C. L. Rev.* 685, 714–722 (2009) (collecting similar statements from a wide variety of judges).

Alone among the circuits, the Third Circuit limits “policymaking” to “only the class of employees whose jobs ‘cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority].’” Pet. App. 28a (brackets in original). That definition cannot be right. It would exclude most commissioners of regulatory agencies on the ground

that their agency is intended to be “independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.” *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625–626 (1935). If regulatory commissioners are not “policymakers,” who is?

2. The Third Circuit’s definition turns the *Elrod-Branti* principle on its head.

The Third Circuit held that the “policymaking exception” applies *only* when the appointing authority exercises control over the appointee’s decisions. Pet. App. 28a. In other words, political affiliation can be used to “put in place loyal employees” (Pet. App. 23a), but not to put in place independent judges. That interpretation of the *Elrod* “exception” is not only wrong, but perverse. By definition, it excludes every use of partisan affiliation to *insulate* decisionmaking from political control—even in unquestionably policymaking roles such as regulatory commissions. That turns *Elrod* and *Branti* on their head. Those decisions were intended to *prevent* partisan control of public service. They should not be twisted to prohibit constitutional safeguards against partisan control.

Affirmance would also create a constitutional anomaly: The people of the States could consider partisan affiliation directly in voting for judges, but an elected official could not consider the same factor in carrying out their wishes. As Judge Easterbrook has observed, however, “[a] Governor” is “entitled to consider * * * [a judge’s] political affiliation[] when making [an] appointment, just as the voters may consider these factors without violating the first amendment

when deciding whether to retain [a judge] in office.” *Kurowski*, 848 F.2d at 770.

3. Delaware judges’ responsibilities for developing the common law plainly call for “policymaking.”

Whatever may be said of federal judges, who may resolve only cases and controversies, Delaware judges exercise every type of policymaking authority discussed in *Gregory*.

Delaware’s judges not only “resolve factual disputes and decide questions of law,” but also “fashion[] and apply[] the common law”—which, “unlike a constitution or statute, provides no definitive text,” is “derived from the interstices of prior opinions and a well-considered judgment of what is best for the community,” and “at bottom [is] the result of more or less definitely understood views of public policy.” See *Gregory*, 501 U.S. at 465–466 (quoting O. Holmes, *supra*, at 35–36). Further, Delaware’s Supreme Court exercises “supervisory authority over inferior courts” and sets “rules of practice and procedure for the [state] court[s],” and Delaware’s courts “exercise policy judgment in establishing local rules of practice.” *Id.* at 466. And, of course, “[Delaware’s] courts have supervisory powers over the state bar, with [its] Supreme Court given the authority to develop disciplinary rules.” *Ibid.*

If any judges make law, state common law judges do. As this Court explained in *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002): “Not only do state-court judges possess the power to ‘make’ common law, but they have the immense power to shape the States’ constitutions as well.” In a similar vein, Justice Scalia observed: “Common-law courts

performed two functions: one is to apply the law (interpret the statute) to the facts. All adjudicators—French judges, arbitrators, even baseball umpires and football referees—do that. *But the second function, and the more important one, was to make the law.*⁴ Not surprisingly, in one study, two of three Delaware Supreme Court justices saw their role as somewhere between a “Law Interpreter” and a “Lawmaker.” John T. Wold, *Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges*, 27 W. Pol. Q. 239, 241 (1974).

In Delaware, this power is most notable in the area of business law. As one former chancellor and two former vice chancellors wrote, “the policy of the corporation law is inevitably shaped at least in the first instance through judicial decisions.” William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. Chi. L. Rev. 1067, 1068 (2002). For instance, Delaware fiduciary-duty law, cited by courts around the world, is judge-made. See Randy J. Holland, *Delaware Directors’ Fiduciary Duties: The Focus on Loyalty*, 11 U. Pa. J. Bus. L. 675, 700 (2009). Similarly, Delaware’s internationally emulated business-judgment rule—which “creates a presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith”—is a product of judge-made common law.

⁴ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, Tanner Lectures on Human Values 82 (Mar. 8–9, 1995) (emphasis added), available at: https://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf.

Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993) (internal quotation mark omitted); see also Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U. J.L. & Bus. 27 (2017).

Every area of the common law includes policymaking. *E.g.*, *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 440–442 (Del. 1996) (recognizing that a “public policy exception” to at-will employment is created by the common law covenant of good faith and fair dealing). Indeed, even statutory interpretation has a public-policy component under Delaware law. For instance, Delaware courts look to policy in determining how to interpret ambiguous statutes: “If we determine that a statute is ambiguous, we ‘will resort to other sources, including relevant public policy,’ to determine the statute’s purpose.” *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, 929 (Del. 2013) (citation omitted).

Delaware judges also administer the judicial system—roughly 2.3% of Delaware’s budget. See Act of June 25, 2019, 82 Del. Law c. 64. The Chief Justice, with the approval of a majority of the justices, “adopt[s] rules for the administration of justice.” Del. Const. Art. IV, § 13. Delaware judges thus create the rules by which the courts operate, and those rules supersede conflicting statutory provisions. 10 Del. C. § 161 (Supreme Court); 10 Del. C. § 361 (Court of Chancery).

Finally, Delaware judges regulate lawyers. Under Delaware’s Constitution, the State’s high court has exclusive authority for licensing and disciplining Delaware attorneys. *In re McCann*, 894 A.2d 1087, 1088 (Del. 2005). That court discharges these responsibilities through the Board of Bar Examiners, the Board

of Professional Responsibility, and the Commission on Continuing Legal Education. It both adopts rules for these boards and promulgates the Delaware Lawyers' Rules of Professional Conduct.

In these and many other ways, Delaware judges fall outside the *Elrod-Branti* principle.

* * *

It makes no difference whether road crews, prison guards, or process servers are politically balanced. The same cannot be said of courts. It is thus “appropriate” for governors to consider party affiliation as a proxy for how applicants might carry out such roles—particularly in seeking to ensure bipartisan *balance* (and the perception thereof). *Branti*, 445 U.S. at 518. No one is suggesting that judicial partisanship is desirable. Rather, Delaware law pays attention to party affiliation precisely to counteract unchecked partisanship. By mandating balance, the State has created a judicial branch that is “nearly universal[ly]” admired for its objectivity, stability, and degree of consensus. Pet. App. 38a. That system is also constitutional.

C. *Gregory v. Ashcroft* confirms the States' broad constitutional authority to structure their governments and set party affiliation requirements for state judges.

Beyond its analysis of how judges engage in “policymaking,” *Gregory* powerfully confirms that States should receive substantial deference in determining whether partisan affiliation is an “appropriate” qualification (*Branti*, 445 U.S. at 518) for “state elective and important nonelective executive, legislative, and judicial positions” (*Gregory*, 501 U.S. at 462). The

Third Circuit’s “least restrictive means” analysis cannot be reconciled with Delaware’s authority “to determine the qualifications of [its] most important government officials”—including its “judges”—an authority that “lies at “the heart of representative government” and is “reserved to the States under the Tenth Amendment and [Article IV],” which “guarantee[s] to every State in this Union a Republican Form of Government.” *Id.* at 463 (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984), and U.S. Const. Art. IV, § 4).

1. *Gregory* requires applying a “less exacting” standard to state laws that establish judicial qualifications.

Gregory, a leading federalism decision, affirmed a decision holding that a state constitutional mandatory retirement age for state court judges did not violate federal age discrimination law. Citing a century of precedent, the Court reaffirmed that “each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.” *Id.* at 462 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (in turn quoting *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892))).

The Court in *Gregory* extensively quoted earlier decisions involving constitutional challenges to state qualifications for government office, noting: “We * * * have lowered our standard of review when evaluating the validity of [state qualifications for] important elective and nonelective positions whose operations ‘go to the heart of representative government.’” *Id.* at 463 (quoting *Bernal*, 467 U.S. at 220); see also *id.* at 462 (“[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State’s constitutional prerogatives.”) (citation omitted). The

Court’s review in such cases “is not absent,” but “is less exacting.” *Id.* at 463.

The Court recently applied *Gregory*’s holding in the First Amendment context. *Williams-Yulee*, 575 U.S. at 454. As the Court there explained, “how to select those who ‘sit as [state] judges’” involves “sensitive choices by States in an area central to their own governance.” *Ibid.*; see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2673 (2015).

The Third Circuit’s self-described “narrow[]” definition of the policymaking exception (Pet. App. 28a) puts *Elrod* and *Branti* on a collision course with this venerable body of precedent. Read in light of *Gregory*, that exception must extend at least “to persons holding state elective and important nonelective executive, legislative, and judicial positions.” *Gregory*, 501 U.S. at 462 (emphasis added). Those are the “officers who participate directly in the formulation, execution, or review of broad public policy [and] perform functions that go to the heart of representative government.” *Ibid.* And as *Gregory* plainly holds, the category includes “those who sit as [state] judges.” *Id.* at 460.

2. The Third Circuit’s “least restrictive alternative” test is incompatible with both *Branti* and *Gregory*.

Rather than apply the “less exacting” standard prescribed by *Gregory*, the court below subjected Article IV, § 3, to the unforgiving test of strict scrutiny, including its least restrictive means prong. According to the Third Circuit, petitioner “must show both that the [political balance] rule promotes ‘a vital state interest’ and that it is “the least restrictive means” of doing so. Pet. App. 32a–33a. The court derived that

test from *Rutan* (Pet. App. 29a–30a), which involved low-level government employees—not, as in *Gregory*, “important elective and nonelective positions whose operations ‘go to the heart of representative government.’” 501 U.S. at 463 (quoting *Bernal*, 467 U.S. at 221). The latter positions are governed by more deferential rules.

Even apart from *Gregory*, the court below improperly read a “least restrictive means” requirement into the *Elrod-Branti* framework. Those decisions do not require that the State’s particular use of party affiliation be the “least restrictive means”—only that party affiliation be in some sense “appropriate” to the job. Compare Pet. App. 32a–33a with *Branti*, 445 U.S. at 518. That is not a demanding requirement; and as *Gregory* confirms, it is clearly met with respect to state court judges.

D. Even if Delaware’s political balance rules must satisfy heightened First Amendment scrutiny, they are narrowly tailored to ensuring a politically balanced judiciary.

The proper question here is whether, under *Gregory*’s deferential standard and *Branti* itself, partisan affiliation is an “appropriate” consideration in selecting judges. *Branti*, 445 U.S. at 518. Even under strict scrutiny, however, Delaware’s political balance provisions are narrowly tailored to a compelling interest. Indeed, the Court has twice summarily affirmed lower court decisions upholding political balance requirements. See *LoFrisco v. Schaffer*, 341 F. Supp. 743, 750 (D. Conn.), *aff’d*, 409 U.S. 972 (1972); *Hechinger v. Martin*, 411 F. Supp. 650, 653 (D.D.C. 1976), *aff’d*, 429 U.S. 1030 (1977). The Court has held that “[t]he First Amendment requires that [the challenged restriction]

be narrowly tailored, not that it be ‘perfectly tailored.’” *Williams-Yulee*, 575 U.S. at 447. And “[t]he impossibility of perfect tailoring is especially apparent when the State’s compelling interest is as intangible as public confidence in the integrity of the judiciary.” *Ibid.*

The court below did not question the vital nature of Delaware’s interest in maintaining a politically balanced judiciary. Nevertheless, it invalidated the challenged provision, asserting that “the Governor fails to explain why this is the least restrictive means of achieving political balance.” Pet. App. 32a–33a.

The court did not suggest any alternative; nor did Adams. Elsewhere in its opinion, moreover, the court recognized that “[o]nly with the (unconstitutional) major political party component does the constitutional provision fulfil its purpose of preventing single party dominance while ensuring bipartisan representation.” Pet. App. 34a. Under these circumstances—when the interest is compelling, no less restrictive alternative can be identified, and the court itself recognizes that the provision cannot “fulfil its purpose” without the challenged component—the tailoring requirement, if there is one, is plainly satisfied.

1. “No one denies” that “public confidence in judicial integrity” is a “genuine and compelling” interest. *Williams-Yulee*, 575 U.S. at 454. This is especially true in Delaware, whose judiciary’s reputation—particularly in corporate law—has made this small State a beacon for business and business litigation all over the country.

All three judges below agreed that “[p]raise for the Delaware judiciary is nearly universal” and “well deserved.” Pet. App. 38a (concurring op.). The late Chief Justice William Rehnquist remarked that “[c]orporate

lawyers across the United States have praised the expertise of the Court of Chancery,” which “has so refined the law that business planners may usually order their affairs to avoid law suits.” William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351, 354 (1992) (internal quotation mark omitted). As he recognized, the Delaware bench is worthy of “one of the highest forms of praise the judiciary can receive.” *Ibid.* A recent survey found that Delaware’s trial and appellate judges are the most competent and impartial of any judges in the country. *Supra* at 6–7.

One fruit of partisan balance has been Delaware judges’ ability to reach consensus. From 1960 to 1996, an average of 97 percent of reported Delaware Supreme Court decisions were unanimous. Skeel, *supra*, at 132, 174–175; Randy J. Holland & David A. Skeel, Jr., Deciding Cases Without Controversy, in *Delaware Supreme Court Golden Anniversary 1951-2001* at 41 (Randy J. Holland & Helen L. Winslow ed. 2001). And many have recognized the value of unanimous decisionmaking. *E.g.*, Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 1, 3 (2010) (“[A]s Chief Justice Roberts suggested in his confirmation hearings, the U.S. Supreme Court may attract greater deference, and provide clearer guidance, when it speaks with one voice.”). In short, greater consensus leads to greater doctrinal stability.

Delaware’s well-earned reputation for impartiality and expertise is one reason that companies charter there. Delaware “is the state of incorporation for more than 60% of the Fortune 500 companies and for more than half of all companies whose stock is traded on the New York Stock Exchange and NASDAQ.” Randy J.

Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. Corp. L. 771, 772 (2009). Indeed, "several [studies] have found significant positive stock price effects on firms' reincorporation to Delaware." Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. Fin. Econ. 525, 555 (2001); Roberta Romano, *The Genius of American Corporate Law* 18 (1993).

Delaware judges, who are best positioned to know, readily attribute this in significant part to Delaware's political balance provisions. As the most recently retired chief justice has written, "the Delaware judiciary is, by the state's Constitution, evenly balanced between the major political parties, resulting in a centrist group of jurists committed to the sound and faithful application of the law." Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673, 683 (2005). Another former state chief justice similarly noted that Delaware's system for selecting judges "has served well to provide Delaware with an independent and depoliticized judiciary and has led, in my opinion, to Delaware's international attractiveness as the incorporation domicile of choice." E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004?: A Retrospective on Some Key Developments*, 153 U. Pa. L. Rev. 1399, 1402 (2005).

Scholarly research on "panel effects" persuasively shows that bipartisan panels are less likely to reach extreme results than unmixed panels: "Apparently a large disciplining effect comes from the presence of a single panelist from another party. Hence all-Republican panels show far more conservative patterns than majority Republican panels, and all-Democratic pan-

els show far more liberal patterns than majority Democratic panels.” Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 306 (2004). In fact, “[t]he presence of ‘peer effects’, that an ideologically homogenous panel decides a case in a more characteristically partisan way than an ideologically mixed panel, is now a standard finding in studies of appellate decision-making.” Thomas J. Miles, *The Law’s Delay: A Test of the Mechanisms of Judicial Peer Effects*, 4 J. Legal Analysis 301, 302 (2012); see also Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. Pa. L. Rev. 1319, 1323–1324 (2009) (summarizing research).

By generating mixed panels, the Delaware Constitution’s political balance provisions counteract this “panel effect” by sharply reducing ideologically homogeneous courts. That is an “appropriate” use of partisan affiliation. *Branti*, 445 U.S. at 518.

2. Regarding tailoring, the Third Circuit insisted that the Governor “show that the goals of political balance could not be realized without the [challenged provisions]” and “explain why this is the least restrictive means of achieving political balance.” Pet. App. 32a–33a. But the court did not identify any less-restrictive alternative. The three-judge concurrence expressed hope that the virtue of political balance is now “so firmly woven into the fabric of Delaware’s legal tradition that it will almost certainly endure in the absence of the political affiliation requirements.” Pet. App. 41a. That is a hope, not a plan.

The rationale for Article IV, § 3, is plain. At the 1896 convention, delegates made it clear: “[I]t would

give more satisfaction to the people if the Judges were not all from the same political party.” JA116. Another delegate called it “desirable to have the minority party represented on our Bench,” so “they may bring about a fuller and freer discussion of these matters that come before them” and “make fair and impartial decisions.” JA110–111. Another insisted that they “ought to do something by which we would make our Bench non-partisan, or if it be a better word, bi-partisan.” JA106–107.

Indeed, the Third Circuit itself explained why the major party provision is the only realistic means of securing political balance:

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 fulfil its purpose of preventing single party dominance while ensuring bipartisan representation.*

Pet. App. 34a (emphasis added). Respondent Adams perfectly illustrates the problem. A lifelong Democrat of the “progressive” variety, he switched his registration because he thought that the Delaware Democrats were too “moderate.” JA41. If a governor were to name him to a court that already has a Democratic majority, it would skew the court even further. Only by requiring that the seat be filled by a nominee from the other side can political balance be maintained.

Again, empirical research supports the conclusion. Studies of judicial behavior show that political and

ideological diversity on courts can lead to less polarized decisions and mitigate the risk that homogeneous groups will reach extreme results. *E.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823, 852 (2006); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717, 1719 (1997); see also Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L.J. 71, 85–86 (2000) (collecting evidence of group polarization across contexts). Moreover, a recent study of federal agency appointees finds that when one party dominates the appointment and confirmation process, partisan balance requirements without other-major-party provisos are vulnerable to “gaming.” See Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Colum. L. Rev. 9, 20–21 (2018). Delaware’s major party provision avoids that problem by preventing governors from appointing nominal “independents” once their own party’s quota is filled.

The bare majority provision thus mitigates against partisanship even without a major party provision, but the latter makes the former more difficult to circumvent and thus more effective—which is all that is needed to satisfy the less restrictive alternative prong of strict scrutiny. See *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (under strict scrutiny, a provision is unconstitutional “if less restrictive alternatives would be *at least as effective* in achieving the legitimate purpose that the statute was enacted to serve”) (emphasis added); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 840 (2000) (Breyer, J., dissenting) (“As *Reno* tells us, a ‘less restrictive alternativ[e]’ must be ‘at least as effective in achieving the legitimate purpose

that the statute was enacted to serve.”); cf. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (“[N]arrow tailoring is satisfied ‘so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’”).

3. The Third Circuit’s only explanation for its tailoring holding was that “Delaware’s practice of excluding Independents and third party voters from judicial employment is not narrowly tailored to” Delaware’s interest in a politically balanced judiciary. Pet. App. 30a. This suggests the court perceived a difference of constitutional dimension between the major party component, which affects only Independents and third parties, and the bare majority component, which affects only Republicans and Democrats. But Adams’ constitutional theory does not distinguish between the two. He contends that anyone who satisfies the “minimum qualifications to be a judge” is entitled to be considered without regard to party affiliation. JA62–63. That theory applies to Republicans and Democrats affected by the bare majority component just as it applies to Independents affected by the major party component. Indeed, Adams’ theory of standing rests in part on the (incorrect) claim that the bare majority provision excluded him from judgeships in 2014 because he was a Democrat.

The Third Circuit’s reasoning cannot be cabined to the major party provision. If judges are not policy-makers and political affiliation cannot be considered in the nomination of judges, as that court held, then the processes by which all state and federal judges are selected are subject to First Amendment challenge. For example, Delaware and other States have merit-based judicial selection commissions that winnow the

contenders for vacancies but require partisan balance among members. See *supra* at 6; Douglas Keith, *Judicial Nominating Commissions* 6, Brennan Ctr. for Justice (May 29, 2019) (describing political balance provisions). Beyond the judiciary, the theory calls into question the political balance requirements applicable to federal, state, and local bodies all over the country. All have the effect of denying would-be appointees the right to be considered for positions without regard to their political affiliation.

For example, the statute creating the Court of International Trade—an Article III court whose judges are appointed by the President “by and with the advice and consent of the Senate”—provides that “[n]ot more than five of [its nine] judges shall be from the same political party.” 28 U.S.C. 251(a). Similarly, many federal and state regulatory commissions are, by law, run by multi-member, partisan-balanced commissions. For example, the FEC “is inherently bipartisan in that no more than three of its six voting members may be of the same political party.” *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Similarly, Congress has directed the President to “alternate[]” between the parties for appointments to the Securities and Exchange Commission (15 U.S.C. 78d(a)) and International Trade Commission (19 U.S.C. 1330(a)); see Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 51 (“[a]lmost uniformly,” “no more than a majority” of members of independent federal agencies may “come from one party”). Indeed, “dozens of agencies” have “some form of partisan-balance requirement” that “courts have never held [unconstitutional].” Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*,

129 Yale L.J. 148, 203 (2019) (footnote omitted). Under the Third Circuit’s reasoning, however, all these requirements are likely invalid.

Elrod and its progeny apply not only to formal written exclusions based on party registration, but to discretionary executive policies and practices as well. See *Elrod*, 427 U.S. at 351 (involving the “practice of the Sheriff”); *Branti*, 445 U.S. at 509–510 (public defender’s discretionary hiring); *Rutan*, 497 U.S. at 65–66 (governor’s discretionary exemptions from hiring freeze). Moreover, the cases apply not only to policies that refer explicitly to party affiliation, but to practices having the same effect, such as requirement of “proper political sponsorship.” *Branti*, 445 U.S. at 516; see Milton Rakove, *We Don’t Want Nobody Nobody Sent: An Oral History of the Daley Years* (1979). This would seem to encompass the familiar practice of appointing board members based on the nominations or recommendations of the legislature’s majority and minority leaders. *E.g.*, Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No 110-53, § 1853(a), 121 Stat. 266, 501–502 (Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism); 42 U.S.C. 1975(b) (Commission on Civil Rights); 2 U.S.C. 199 (requiring the president pro tempore to take the recommendations of the Senate’s leaders when appointing commissioners). The Third Circuit’s decision lacks a limiting principle to keep it from swallowing up widespread efforts to combat and prevent partisan overreach.

In short, the Third Circuit’s “narrow[] appli[cation of] the policymaking exception” would bar States and the federal government from ensuring minority-party representation on any of these bodies, as such appointees would not be “loyal” to the “new administration.”

Pet. App. 28a, 23a. That test would upend decades of federal and state appointment practice. This Court should reverse.

III. The court’s severability ruling is plainly incorrect and should be reversed.

The Third Circuit held that Adams lacked Article III standing to challenge the bare majority component of Article IV, § 3. Pet. App. 16a. Nevertheless, the court invalidated the bare majority provision as it applies to the Supreme Court, Superior Court, and the Court of Chancery, reasoning that it is “not severable” from the major party provision. Pet. App. 33a. That was error. First, Adams lacks standing to obtain that relief against a provision that has no effect on him. Second, even if Adams had standing, the provision is unquestionably severable.

A. Federal courts may not use severability as an excuse for striking down state laws that do not injure the plaintiff.

Ordinary Article III principles require plaintiffs to have standing for each provision of law they challenge. *Gill*, 138 S. Ct. at 1934; see *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (“[S]tanding is not dispensed in gross.”). If those principles are applied in the usual way here, Adams cannot challenge the bare majority provision. As a registered Independent, he cannot possibly be injured by that provision. Whether a court has a Republican or Democratic majority, the addition of an Independent would be permissible.

The Third Circuit recognized “that Adams does not have standing to challenge the sections of the provision that contain only the bare majority component.” Pet. App. 16a. Yet the court proceeded to invalidate

the bare majority provision, as applied to the business courts, even though Adams is not injured by it.

Contrary to the Third Circuit’s assumption in footnote 32 of its opinion (Pet. App. 16a–17a n.32), this Court has never explicitly addressed whether there should be an implied exception to standing principles for severability. As to cases where the question of standing and severability has been present but not discussed, candor compels us to note that the Court’s precedent goes both ways.

In *Printz v. United States*, 521 U.S. 898 (1997), the Court invalidated sections of the Brady Act that applied to the plaintiff law enforcement officers. But it refused to address the “severability question, which the parties have briefed and argued” because the other subsections at issue “burden only firearms dealers and purchasers, and no plaintiff in either of those categories is before us here.” *Id.* at 935. The Court “decline[d] to speculate regarding the rights and obligations of parties not before the Court.” *Ibid.*; accord *Regan v. Time, Inc.*, 468 U.S. 641, 649–650 n.6 (1984) (plurality op.).⁵

In other cases, by contrast, the Court has addressed severability without considering whether the plaintiff had standing to challenge the other provisions. In *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506–507 (1985), the Court concluded that an ob-

⁵ In some cases, the Court has refrained from addressing severability after holding a part of a statute unconstitutional, without even mentioning it. *E.g.*, *United States v. Windsor*, 570 U.S. 744, 774–775 (2013); *Shelby County v. Holder*, 570 U.S. 529, 556–557 (2013).

scenity statute was unconstitutional as to the plaintiffs but went on to review and reverse the lower court's holding that related provisions were not severable, even though those provisions were inapplicable to the plaintiff. Accord *Reno v. ACLU*, 521 U.S. 844, 883 (1997); *N. Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 89–92 (1982) (Rehnquist, J., concurring in the judgment).⁶

An implied exception to standing for severability would create numerous opportunities for litigation mischief. A party could obtain sweeping relief against an entire statutory scheme even though it is harmed by only a small part of it. Here, for example, the bare majority requirement has existed for 120 years without controversy or legal challenge, but it has been invalidated at the behest of a litigant who could not possibly be injured by it. Something is wrong with that. We respectfully ask the Court to resolve the clash of precedents in favor of rejecting the implied exception to ordinary standing rules in cases of severability.

⁶ In many cases where the Court addressed severability without first considering standing, it appears that the plaintiffs, or other parties, did have standing to challenge the allegedly unseverable provisions. *E.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 586–588 (2012); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508–510 (2010); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–331 (2006); *United States v. Booker*, 543 U.S. 220, 245–246 (2005); *New York v. United States*, 505 U.S. 144, 186–187 (1992).

B. Under the federal or state severability tests, the bare majority provision is indisputably severable.

Standing aside, the bare majority provisions are severable from the remainder of Article IV, § 3, under ordinary severability law. This Court has repeatedly held that, “when confronting a constitutional flaw in a statute,” courts must “try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.” *Free Enter. Fund*, 561 U.S. at 508 (internal quotation marks omitted). Under that approach, the Third Circuit erred.

The severability of state statutes is a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). At the same time, the Court has recently applied federal precedent in state-law severability cases. See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (plurality op.) (applying federal precedent to a Vermont statute); *Ayotte*, 546 U.S. at 328–331 (applying federal cases to a New Hampshire statute); *Zobel v. Williams*, 457 U.S. 55, 64–65 (1982) (applying federal cases to an Alaska statute while reserving interpretation of a severability clause to the state courts). There are no relevant differences between Delaware and federal severability law, and the Third Circuit cited them interchangeably. *E.g.*, Pet. App. 33a n.86 (citing *Ayotte* and a Delaware decision for the proposition that the touchstone of severability is legislative intent). Because federal and Delaware severability law are so similar, the Court need not determine which applies.

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. *Exec. Benefits Ins. Agency v. Arkison*,

573 U.S. 25, 37 (2014); *Farmers for Fairness v. Kent County*, 940 A.2d 947, 962 (Del. Ch. 2008). Both are true here.

First, as the Third Circuit acknowledged, “there is no question that the bare majority component is capable of standing alone.” Pet. App. 34a. The bare majority provision stood alone from 1897 until 1951—54 years. Del. Const. Art. IV, § 3 (1897); JA212. More recently, in 2005, two statutory courts—the Family Court and Court of Common Pleas—were given constitutional status with a bare majority provision but no major party provision. Del. Const. Art. IV, § 3; Pet. App. 34a (recognizing that the bare majority provision “stand[s] alone” as to those two courts); JA135–143. Moreover, numerous federal and state agencies and commissions have standalone bare majority requirements. *E.g.*, 15 U.S.C. 41 (FTC).

Second, the valid portion of a law remains operative “so long as it is not “evident” from the statutory text and context that [the drafters] would have preferred no statute at all.” *Arkison*, 573 U.S. at 37. The burden is on the party opposing severability. *Reese v. Hartnett*, 73 A.2d 782, 784 (Del. Super. Ct.) (the legislature intended provisions to be severable where “nothing in the acts themselves demonstrates a legislative intent to make the two objects inseparable”), *reversed on other grounds by* 75 A.2d 266 (Del. 1950).⁷

⁷ The Third Circuit flipped the burden, stating that “the Governor has offered no evidence suggesting that the Delaware General Assembly, which authorizes constitutional amendments, intended for the bare majority component to stand even if the major political party component fell.” Pet. App. 34a.

There is not a scrap of evidence that the Delaware Constitution’s framers would have preferred to have no political balance provisions at all if they could not have a major party provision. On the contrary, in 1951, the bare majority provision had been part of the constitution for more than 50 years, and the framers sought to *strengthen* that provision by preventing one potential means of circumventing it. The notion that they would want to jettison the basic prohibition if the method they chose to strengthen it were held unconstitutional is incredible.

Delegates at the 1896 Constitutional Convention argued that Delaware “ought to do something by which we would make our Bench non-partisan, or if it be a better word, bi-partisan” and believed that “every effort should be made to ensure that the judiciary not be dominated by any political party.” JA106–107; Walsh & Fitzpatrick, *supra*, at 134. The political balance provisions may be less effective without the major party provision, but they still constitute an “effort” to accomplish that end.

The Third Circuit’s severability analysis directly contradicts its “less restrictive alternative” analysis, discussed above (at 41). When considering whether the major party provision was the least restrictive alternative, the court concluded, without analysis, that the objective of political balance could be achieved in other ways. But in considering severability, the court concluded the opposite—that the major party provision is *so essential* that the remainder of the political balance provision would be toothless without it:

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 fulfil its purpose of preventing single party dominance while ensuring bipartisan representation.

Pet. App. 34a. Both conclusions cannot be right.

In reality, the major party component is an important means of enforcing political balance; without it, the bare majority component remains valuable but more susceptible to contravention. Thus, even if the Court invalidates the major party provision, it should reverse the decision to invalidate the “bare majority” provision on severability grounds.

CONCLUSION

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

Respectfully submitted,

RANDY J. HOLLAND
*Wilson Sonsini Goodrich
& Rosati, PC*
222 Delaware Avenue
Suite 800
Wilmington, DE 19801
(302) 304-7600

DAVID C. MCBRIDE
MARTIN S. LESSNER
PILAR G. KRAMAN
Young Conaway
Stargatt & Taylor, LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

MICHAEL W. MCCONNELL
Counsel of Record
STEFFEN N. JOHNSON
BRIAN J. LEVY
G. EDWARD POWELL III
*Wilson Sonsini Goodrich
& Rosati, PC*
1700 K Street, N.W.
Washington, DC 20006
(202) 973-8800
mmccconnell@wsgr.com

Counsel for Petitioner

JANUARY 2020