No. 19-309

IN THE

Supreme Court of the United States

JOHN C. CARNEY, GOVERNOR OF DELAWARE,

Petitioner,

v.

JAMES R. ADAMS,

Respondent.

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

BRIEF OF *AMICI CURIAE* PROFESSORS BRIAN D. FEINSTEIN AND DANIEL J. HEMEL IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI*

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[1] Neither party nor any party's counsel authored this brief in whole or in part, and no person other than *amici* and their counsel contributed money intended to fund the preparation or submission of it. Both parties consent to the filing of this brief. *Amici*'s institutional affiliations are provided for identification purposes only.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Partisan balance requirements have been a feature of adjudicative and administrative bodies in the United States for most of the nation's history. In 1882, Congress created the five-person Utah Commission with the requirement that no more than three commissioners could be members of the same party. *See* Act of Mar. 22, 1882, ch. 47, 22 Stat. 30. Since then, Congress has created more than fifty commissions, courts, and other bodies subject to statutory partisan balance requirements. *See* Ronald J. Krotoszynski, Jr., Johnjerica Hodge, and Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 Notre Dame L. Rev. 941, 1009-1017 tbls.1-3 (2015) (listing federal bodies subject to partisan balance requirements); *see also* 12 U.S.C. § 1812(a)(2) (partisan balance requirement for Federal Deposit Insurance Corporation, which is not included in Krotoszynski et al.'s list). Among these are one Article III court (the Court of International Trade), one other court (the Court of Appeals for Veteran Claims), and a number of commissions performing "quasi-judicial" functions. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935); *see, e.g.*, 15 U.S.C. § 41 (Federal Trade Commission); 47 U.S.C. § 154 (Federal Communica-

tions Commission); 15 U.S.C. § 78d (Securities Exchange Commission).[2] States, too, have adopted parti-

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[2] Partisan balance requirements are not the only statutory restrictions on appointments to federal agencies. *See, e.g.*, 12 U.S.C. § 1752a(b)(2)(B) (no more than one member of the National Credit Union Administration board may have recent professional involvement in a credit union); 42 U.S.C. § 2286(b)(1) (members of the Defense Nuclear Facilities Safety Board must be appointed from civilian life); 49 U.S.C. § 1301(b)(1)(B) (at least two of the five members of the Surface Transportation Board must have private-sector experience). As with party identification, one's choice of employment or professional identity often has expressive and associational elements. *See* Donald Super, *A Theory of Vocational Development*, 8 Am. Psycholog. 185 (1953). Other agency leadership requirements involve classifications that typically receive heightened judicial scrutiny. *See, e.g.*, 25 U.S.C. § 2704(b)(3) (at least two of the three members of the National Indian Gaming Commission must be enrolled members of an Indian tribe); 29 U.S.C. § 12 (the director of the Women's Bureau of the Department of Labor must be a woman). A ruling for the respondent would thus potentially implicate not only the widespread partisan balance requirements in federal agency organic statutes, but also a range of non-party-based appointment restrictions.

san balance requirements for hundreds of public entities, ranging from police and parole boards[3] to administrative appellate tribunals[4] to election and redistricting commissions.[5]

Partisan balance requirements come in multiple flavors. The most common are "bare majority" limitations, which mandate that no more than a bare majority of a body's members may be registered in the same political party. *See* Krotoszynski et al., *supra*, at 962. Other provisions stipulate that no more than fifty percent of a body's members may be co-partisans.[6] Some States layer—on top of a "bare majority" or "fifty percent" limitation—an additional "other major party" reservation, which sets aside remaining seats for members of the second leading party in the relevant jurisdiction.[7]

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[3] *See, e.g.*, Ind. Code § 36-8-9-3.1(a)(1) (local police commissions); Ky. Rev. Stat. § 439.320(1) (parole board); Wis. Stat. § 62.50 (local police and fire commissions).

[4] *See, e.g.*, Iowa Code § 431.1A(2)(b) (Property Assessment Appeal Board); N.Y. Lab. Law § 534 (Unemployment Insurance Appeals Board).

[5] *See, e.g.*, Ariz. Const. Art. IV, Pt. 2 § 1 (redistricting commission); Ill. Const. Art. IV, § 3(b) (redistricting commission); Kan. Stat. § 25-2802 (election board judges).

[6] *See* 19 U.S.C. § 1330(a) (International Trade Commission); 52 U.S.C. § 20923(b)(2) (Election Assistance Commission); 52 U.S.C. § 30106(a)(1) (Federal Election Commission).

[7] *See, e.g.*, Ohio Rev. Code § 3501.06(B) (instructing Secretary of State to appoint four members to each county's board of elections—two from the party with the highest number of votes in the most recent gubernatorial election and two from the party

Delaware's Constitution combines all three types of partisan balance requirements in its Article IV, Section 3, which sets out rules and procedures for the appointment of judges. *See* Del. Const. Art. IV, § 3. For the State Supreme Court, the Constitution establishes a bare-majority limitation: no more than three of five Justices may be members of the same party. *See id.* For the Superior Court, the Court of Chancery, the Family Court, and the Court of Common Pleas, the Constitution imposes a bare-majority limitation when there is an odd number of members and a fifty-percent limitation when there is an even number of members. *See id.* And for the Supreme Court, the Superior Court, and the Court of Chancery, the Constitution adds an other-major-party reservation on top of the bare-majority and fifty-percent limitations. *See id.* The Court of Appeals below concluded that this last provision violated respondent's freedom of association and that the bare-majority and fifty-percent limitations were inseverable from the other-major-party reservation. *See* Pet. App. 32a-36a.

Delaware's Governor argues that the partisan balance requirements in Article IV, Section 3 ensure political and ideological diversity on the State's courts and reduce partisanship and extremism in judicial decisionmaking. Pet. Br. 37-47. A growing literature in law and the social sciences sheds light on those claims. Three key lessons emerge from that literature:

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with the second highest number of votes); Ohio Rev. Code § 3501.06(B); Va. Code § 24.2-102 (providing for State Board of Elections with three members—two from the party with the highest number of votes in the most recent gubernatorial election and one from the party with the second highest number).

— *First*, political and ideological diversity on courts can lead to less polarized judicial decisionmaking;

— *Second*, bare-majority and fifty-percent limitations—even without other-major-party reservations—can promote diversity on multimember bodies when political parties are ideologically coherent and checks on opportunistic appointment practices are in place;

— *Third*, when one political party dominates the appointment and confirmation process, bare-majority and fifty-percent limitations can be vulnerable to "gaming" by politicians who appoint nominal independents once their own party's quota is filled.

All these conclusions were reached by scholars studying adjudicative and administrative bodies other than the Delaware courts, and none were developed with a view to the present case. These findings nonetheless have profound implications for the challenged provisions of Delaware's Constitution:

— *First*, the documented depolarizing effects of viewpoint diversity in adjudication add force to Delaware's claim that Article IV, Section 3 of the State Constitution serves interests of "vital importance." *Cf. Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion) (stating that party affiliation can be legitimate criterion for public employment where reliance on party affiliation advances interest "of vital importance");

— *Second*, the conditional success of bare-majority and fifty-percent limitations in other contexts

reveals that these provisions can produce their intended results—at least under certain circumstances—even without a mandate that members of the other major party occupy all of the remaining positions. This finding illustrates why the Court of Appeals below was wrong to conclude that caps on the number of judges from one political party could not be severed from the other-major-party reservations in the Delaware Constitution;

— *Third*, and notwithstanding the fact that bare-majority and fifty-percent limitations *can* produce political and ideological diversity under certain circumstances even without an other-major-party reservation, the other-major-party proviso in Article IV, Section 3 meaningfully enhances Delaware's ability to achieve its diversity-promoting ends.

For all these reasons, *amici* urge the Court to reverse the decision below and hold that the partisan balance requirements in Article IV, Section 3—including the other-major-party reservation—are constitutional exercises of the State's power to determine the structure of its own Judiciary. If the Court affirms the judgment below with respect to the other-major-party reservation, then the bare-majority and fifty-percent limitations should still stand as severable elements of a constitutional scheme; that scheme will be somewhat weaker without the other-major-party reservation, but far from powerless. And whatever result this Court reaches, it should do so with full knowledge of the benefits that partisan balance requirements potentially bring and the conditions under which they are most effective.

ARGUMENT

I. Politically and Ideologically Diverse Courts Produce Less Polarized Decisions.

Viewpoint diversity serves vital ends. Study after study shows that groups whose members have a mix of viewpoints reach less polarized decisions than groups of likeminded members. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L.J. 71, 85-86 & nn.57-62 (2000) (compiling studies). In other words, viewpoint diversity reduces the risk that homogeneous groups will veer toward extreme outcomes. *See, e.g.*, Craig McCarty et al., *Group Polarization as Conformity to the Prototypical Group Member*, 31 Br. J. Soc. Psycholog. 1 (1992). Viewpoint diversity is particularly important in the judicial context, as the Governor emphasizes, because it fosters a legal system that produces stable and sensible rules, and that thus commands the respect of individuals and firms. Pet. Br. 38-41.

Empirical research regarding the effects of viewpoint diversity on judicial behavior generally uses the political party of the appointing President as proxy for a federal judge's ideology. The party of the appointing President is, to be sure, an imperfect proxy for any particular judge's views and perspectives. Judges are independent of—not appendages to—the President. *See* John Anthony Maltese, Joseph A. Pika & W. Phillips Shively, *American Democracy in Context* 354 (2019) (quoting statement of Chief Justice Roberts) ("'We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.'"). Judges

are charged with resolving cases based on the facts and the law, not based on partisan politics. *See Confirmation Hearing on the Nomination of Hon. Neil Gorsuch To Be an Associate Justice of the Supreme Court of the United States*, Hearing Before the S. Comm. on the Judiciary, 115th Cong. 70 (statement of then-Judge Neil Gorsuch) ("There is no such thing as a Republican judge or a Democratic judge. We just have judges in this country."). *Amici* understand this, and our argument is emphatically *not* that judicial behavior can be explained by the political party of the appointing President or Governor.

It is equally true, however, that a person's ideas and intellectual commitments may influence her or his decisionmaking. And party affiliation is an indicator—though a highly imprecise indicator—of a judge's ideas and intellectual commitments. What the empirical research on judicial behavior finds is that party affiliation is a much weaker predictor of judicial behavior when courts are composed of a more diverse set of judges.

A long line of research supports the claim that judges are less likely to behave according to predictable partisan patterns when courts are more diverse. For example:

> — A landmark study of 155 D.C. Circuit administrative law decisions over a five-year period found that the influence of ideology was much weaker on "divided panels" (two Democratic appointees and one Republican appointee, or vice versa) than "unified panels" (three Democratic or three Republican appointees). Specifically, unified panels overrode agency statutory interpretations in 67 percent of cases when those interpretations cut

against the panel's estimated ideological preferences, while divided panels overrode agency interpretations in only 38 percent of cases when those interpretations conflicted with the panel majority's ideological preferences. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155, 2172 tbl.3 (1998);

— A larger study of 6,408 federal court of appeals cases across twenty-four ideologically charged issue areas found that judges were much less likely to vote according to their estimated ideological preferences when they sit on panels with both Republican and Democratic appointees. The presence of one Republican appointee reduced the probability that a Democratic appointee would vote in the direction coded as "liberal" by 12 percentage points, and the presence of one Democratic appointee increased the probability that a Republican appointee would vote in a "liberal" direction by 6 percentage points. Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* 23-24 (2006);

— Another study of more than 200 administrative law cases across circuits found that the effect of party alignment between the President and an individual judge virtually vanished when panels included both Republican and Democratic appointees. Democratic appointees on unified panels were 31 percentage points more likely to affirm federal agency statutory interpretations when the current President was a Democrat than when the

> current President was a Republican, and Republican appointees on unified panels were 30 percentage points more likely to affirm federal agency statutory interpretations when the current President was a Republican rather than a Democrat, but the party of the current President had no statistically significant effect on an individual Democratic or Republican appointee's propensity to side with the agency on divided panels. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy—An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823, 857 tbl.10 (2006).

The finding that partisan balance reduces the effect of estimated ideological preferences and the appointing President's party on judges' votes has been documented in cases involving affirmative action, campaign finance, environmental regulation, labor relations, state sovereign immunity, and voting rights, among other issues. *See* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717, 1719 (1997); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 305 (2004); Sunstein, Schkade, Ellman & Sawicki, *supra*, at 24-40; Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 Colum. L. Rev. 1, 26-27 (2008). Several factors potentially explain the depolarizing effects of political and ideological diversity on judicial behavior:

> — *First*, judges on more politically and ideologically diverse courts will be exposed to a wider scope of arguments, facts, and perspectives. In some cases, the force of the better argument may persuade a judge to change her mind. In other

cases, judges with different starting stances may persuade each other to move towards a consensus position. *See* Frank B. Cross, *Decision Making in the U.S. Court of Appeals* 154-55 (2007). Members of politically and ideologically homogeneous groups, by contrast, may encounter only a "limited argument pool" that reinforces and radicalizes their initial inclinations. *See* Sunstein, *Deliberative Trouble?*, *supra*, at 89-90;

— *Second*, judges on politically and ideologically diverse courts may moderate their positions for reasons of "collegiality." *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decisionmaking*, 151 U. Pa. L. Rev. 1639, 1684 (2003). The natural human impulse to pursue comity may motivate judges who differ politically and ideologically to seek out potential areas for compromise. Moreover, judges on politically and ideologically diverse courts know that they will not always be in the majority, and they may therefore have an incentive to treat minority views seriously so that their views are accorded similar treatment when they are in the minority. *See* Cross, *Decision Making in the U.S. Court of Appeals*, *supra*, at 156;

— *Third*, judges in the political or ideological minority may have a moderating effect on the majority through their role as potential "whistleblowers." *See* Cross & Tiller, *Judicial Partisanship and Obedience to Legal Doctrine*, *supra*, at 2156. If the majority overlooks evidence or doctrine in order to achieve its preferred outcome, the whistleblower may sound an alarm through a dissent. The majority, knowing about the prospective whistleblower, may therefore be more attuned to

the facts and the law. *See* Jonathan P. Kastellec, *Panel Composition and Judicial Compliance on the US Courts of Appeals*, 23 J. L. Econ. & Org. 421, 437-38 (2007). This whistleblower effect will only arise, though, if not all members share the majority view.

Most of the theoretical and empirical literature examining the effects of political and ideological diversity on judicial behavior focuses on contexts in which courts hear cases in panels or en banc. *See* Del. Sup. Ct. Rule 4 (2019) (cases decided in panel or en banc). The conclusions also are highly relevant to lower courts on which judges resolve cases solo. *Cf.* 28 U.S.C. § 254 (general rule that cases in Court of International Trade are tried by a single judge); 38 U.S.C. § 7254(b) (allowing Court of Appeals for Veterans Claims to resolve cases by single judge). Even when judges decide cases individually, they do not decide cases in isolation: they converse with each other through their opinions (and often face to face outside the courtroom as well). They contribute to and draw from a common pool of binding or persuasive precedent, and that pool will reflect a greater diversity of ideas when the contributors are politically and ideologically heterogenous themselves. Judges resolving cases solo also can operate as "whistleblowers" by calling attention in their opinions to disconcerting doctrinal trends. And political and ideological diversity at multiple levels of the Judiciary may deter lower-court judges from issuing partisan or extreme decisions because they do not know whether the reviewing judge will share their political and ideological priors. *See* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399, 424 (2001).

In sum, political and ideological diversity in the Judiciary can enrich deliberation and embed checks on partisanship and polarization. States therefore have an interest—and a compelling one—in fostering and preserving diversity on their courts.

II. Bare-Majority and Fifty-Percent Limitations Can Foster Political and Ideological Diversity.

The Court of Appeals below held that Delaware's bare-majority and fifty-percent limitations could not fulfill their purpose of promoting political and ideological diversity in the State's Judiciary unless accompanied by an other-major-party reservation, which the court deemed to be unconstitutional. *See* Pet. App. 34a. The Governor argues that this conclusion is mistaken: the bare-majority and fifty-percent limitations in Article IV, Section 3 can advance the State's diversity interests even without the other-major-party proviso. Empirical research focusing on independent regulatory agencies at the federal level—which are generally subject to bare-majority (or in some cases fifty-percent) limitations but not other-major-party reservations—can aid this Court in its evaluation of the parties' competing claims.

In a recent article in the *Columbia Law Review*, *amici* collected and analyzed data on appointees to twenty-two federal independent regulatory commissions subject to bare-majority and fifty-percent limitations. Brian D. Feinstein & Daniel J. Hemel, *Partisan*

Balance With Bite, 118 Colum. L. Rev. 9 (2018) (Feinstein & Hemel).[8] We identified the partisan affiliation of each member of these commissions based on publicly available sources. *Id.* at 38. We then employed a measure that assigns ideological scores to individuals based on their histories of political campaign contributions. *See* Adam Bonica, *Mapping the Ideological Marketplace*, 58 Am. J. Pol. Sci. 367 (2014).[9] These scores

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[8] These agencies are: the Commodity Futures Trading Commission, Consumer Product Safety Commission, Defense Nuclear Facilities Safety Board, Equal Employment Opportunity Commission, Export-Import Bank, Farm Credit Administration, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Energy Regulatory Commission, Federal Election Commission, Federal Labor Relations Authority, Federal Maritime Commission, Federal Trade Commission, International Trade Commission, Merit Systems Protection Board, National Credit Union Administration, National Mediation Board, National Transportation Safety Board, Nuclear Regulatory Commission, Postal Regulatory Commission, Securities and Exchange Commission, and Surface Transportation Board. *Id.* at 31. All but one of these agencies is subject to a bare-majority limitation. Appointments to the Federal Election Commission are constrained by a fifty-percent limitation. 2 U.S.C. § 437c. (The article also included data on one agency—the National Labor Relations Board—which is subject to a longstanding informal norm favoring bare-majority partisan balance. *See* Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 Am. J. Pol. Sci. 197, 197-98 (1982). That agency is excluded from the analysis reported here.)

[9] The measure generates "ideological scores" using an algorithm that places donors along a left-right scale such that the distance between donors with similar donation patterns is minimized. For instance, an individual who donated $500 to then-Senator Barack Obama during the 2008 presidential campaign

are centered around zero; a score of -1 denotes a donor who is one standard deviation more liberal than the mean, and a score of +1 denotes a donor who is one standard deviation more conservative. *Id.* at 369. Finally, we compared these commissioners' ideological scores to the scores for other high-level appointees to executive departments and independent agencies not subject to bare-majority or fifty-percent limitations. Feinstein & Hemel, *supra*, at 51.

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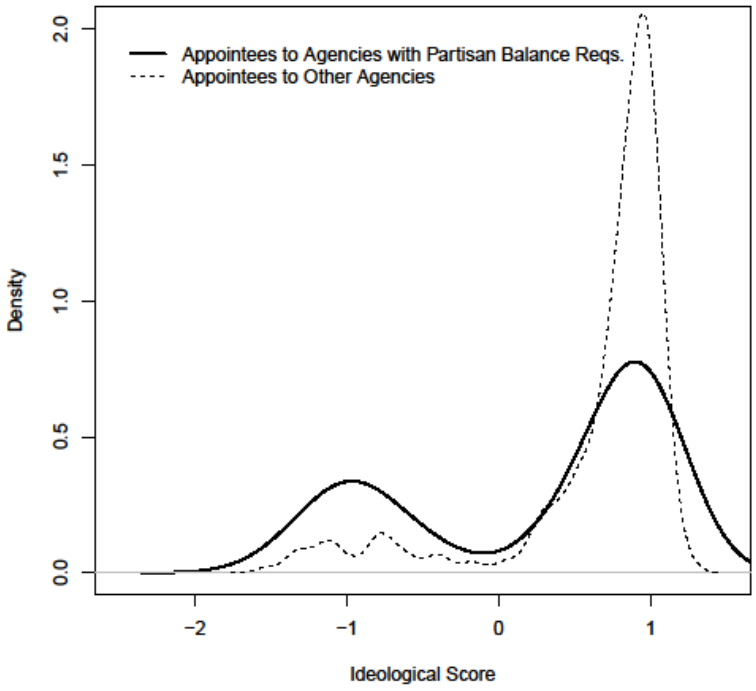
and another $500 to Senator Bernie Sanders in 2020 would be assigned a score halfway between Obama and Sanders. (The algorithm simultaneously classifies recipients based on the identities of the other candidates to whom their donors also contribute.)

The premise underlying this approach is that individuals' decisions to contribute to political candidates reveal information about their political preferences; namely, more conservative donors give to more conservative candidates, and more liberal donors give to more liberal candidates. This premise is rooted in a large political-science literature finding that donors make political contributions sincerely based on the alignment between their ideological preferences and the preferences of the recipient. *See, e.g.*, Michael J. Ensley, *Individual Campaign Contributions and Candidate Ideology*, 138 Pub. Choice 221, 230 (2009); Nolan McCarty & Lawrence Rothenberg, *Commitment and the Campaign Contribution Contract*, 40 Am. J. Pol. Sci. 872, 875-81 (1996). It also finds support in the fact that appointees to one prominent federal independent regulatory commission do not tend to change their donation patterns after their appointment, which suggests that they were not engaged in strategic giving to obtain a commission seat. *See* Feinstein & Hemel, *supra*, at 50. A large and growing number of political scientists utilize the same measure, further testifying to its validity and reliability. *See* Adam Bonica, *Are Donation-Based Measure of Ideology Valid Predictors of Individual-Level Policy Preferences?*, 81 J. Pol. 327, 327 (2018) (collecting citations).

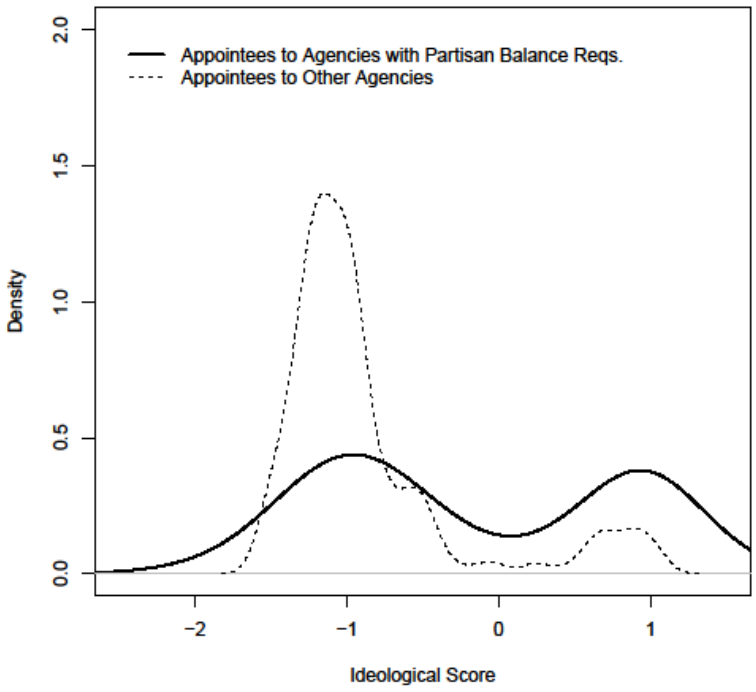
This comparison reveals that both President George W. Bush and President Obama appointed a much more ideological diverse set of individuals to commissions with bare-majority and fifty-percent limitations than they did to independent agencies and executive departments without partisan balance requirements. *See* Feinstein & Hemel, *supra*, at 50-54. Figure 1 plots the ideological distribution of these two types of appointees during the George W. Bush administration. Appointees to positions without partisanship restrictions (represented by the dashed line) were almost uniformly conservative. By contrast, appointees to commissions with bare-majority and fifty-percent limitations (the solid line) exhibited much greater ideological diversity, with clusters of both conservative and liberal appointees.

Figure 1: Ideologies of Appointees to Commissions with Bare-Majority or Fifty-Percent Provisions vs. Other Appointees, George W. Bush Administration (2001-2008)



President Obama's appointments exhibited a largely symmetrical pattern. As the dashed line in Figure 2 shows, President Obama's appointees to positions without partisan balance requirements tended to be liberal. Appointees to commissions with bare-majority and fifty-percent limitations, represented by the solid line, were spread more evenly across the ideological spectrum.

Figure 2: Ideologies of Appointees to Commissions with Bare-Majority or Fifty-Percent Provisions vs. Other Appointees, Obama Administration (2009-2014)



Figures 1 and 2 show that bare-majority and fifty-percent limitations can promote ideological diversity even when unaccompanied by other-major-party reservations. President George W. Bush appointed genuine liberals when he was statutorily barred from appointing another Republican, and President Obama appointed bona fide conservatives when he was prohibited from appointing another Democrat. Further, both Presidents' appointments to bodies with bare-majority and fifty-percent limitations demonstrated far

greater ideological diversity than did their appointments to executive-branch positions not subject to partisan balance requirements. *See* Feinstein & Hemel, *supra*, at 50-54. These results cast considerable doubt on the view of the court below that bare-majority and fifty-percent limitations without other-major-party reservations will not "prevent[] single party dominance" of the Delaware Judiciary. *See* Pet. App. 34a. A standalone bare-majority or fifty-percent limitation still can further the State's vital interest in political and ideological diversity on its courts whether or not the other-major-party reservation remains in effect.

III. Other-Major-Party Reservations Can Meaningfully Enhance Political and Ideological Diversity on Delaware's Courts.

Why have bare-majority and fifty-percent limitations succeeded in promoting political and ideological diversity among appointees to federal independent regulatory commissions in recent years? The answer to this question can shed light on the durability of Delaware's judicial diversity and the potential value-added from the other-major-party reservation in Article IV, Section 3. Our research suggests three explanations—each of which has important implications for the present case.

First, over the past four decades, ideology and party identification have become increasingly correlated. *See* Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 Polity 411, 415 (2014). This growing nexus—known as "partisan sort"—is particularly pronounced among the class of educated elites who account for most appointees to executive and judicial positions. *See* Daniel Q.

Gillion, Jonathan M. Ladd & Marc Meredith, *Party Polarization, Ideological Sorting and the Emergence of the US Partisan Gender Gap*, 2018 Brit. J. Pol. Sci. 1, 18-19 & fig.6; Morris P. Fiorina, Samuel A. Abrams & Jeremy C. Pope, *Polarization in the American Public: Misconceptions and Misreadings*, 70 J. Pol. 556, 557-58 (2008); Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 Am. Pol. Sci. Rev. 619, 622-23 (2001). Thus, a Democratic President or Governor seeking a well-qualified non-Democratic nominee for an administrative or adjudicative post will be hard-pressed to find a viable liberal candidate (since most liberals will be registered Democrats), and a Republican President or Governor searching for a well-qualified non-Republican will face difficulty in identifying a conservative (since most conservatives will be registered Republicans).

The phenomenon of partisan sort is, as noted, relatively new in the scheme of American history. Forty years ago, many more liberals were "Rockefeller Republicans" and many more conservatives—especially in the South—registered as Democrats. At that time, bare-majority and fifty-percent limitations were much less effective at promoting ideological diversity. Thus, President Carter could (and did) appoint liberal and moderate Republicans to independent regulatory commissions once he filled his limit of Democrats, while President Reagan could (and did) appoint conservative Democrats once he hit his cap on Republicans. *See* Feinstein & Hemel, *supra*, at 14, 42-43 & tbl.3.

The dramatic division of political elites into liberal Democratic and conservative Republican camps has ambiguous normative implications for American poli-

tics writ large. *See* Matthew Levendusky, *The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans* 138 (2009) (arguing that "sorting is a 'good' thing" insofar as it "helps voters vote 'correctly' by connecting their beliefs to their vote choice," but that "at the same time, sorting also balkanizes the electorate in potentially harmful ways"). For purposes of the partisan balance requirements in Delaware's Constitution, the implications of partisan sort are more straightforward. Partisan sort has transformed party affiliation—which was once a noisy signal of underlying preferences—into a more accurate proxy for ideology. Insofar as Delaware aspires to have a Judiciary that balances liberal and conservative views, its current combination of bare-majority and fifty-percent limitations with other-major-party restrictions is well-designed to do so, at least as long as the present sorting of elites into parties on the basis of ideology persists.

Second, the confirmation process operates as a safeguard against strategic appointments by Presidents who otherwise might seek to "game" bare-majority and fifty-percent limitations. For example, a Democratic President who nominated a Green Party member to a seat on a commission that already had a bare majority of Democrats would likely face resistance from the Senate, and so too for a Republican President who nominated a Libertarian Party member after reaching the maximum number of Republicans. Through almost the entire period analyzed by *amici*, moreover, the opposition party had enough seats in the Senate to block a presidential appointment—either by filibuster or by up-or-down vote. *See* Feinstein & Hemel, *supra*, at 30-31, 59-60.

Third, norms of reciprocity among Democrats and Republicans in Congress and the White House historically have acted as a check on opportunistic behavior by either party. For the past half century, the two major parties have generally alternated control of the Executive and Legislative branches, and no party has controlled both the White House and the Senate for more than six consecutive years since 1969. Democratic Presidents and Senators thus may expect that if they push through a Green Party member after running into a bare-majority or fifty-percent limitation, future Republican Presidents and Senators will respond in kind.[10]

An episode from the early 2000s illustrates the potential fallout when these latter two checks break down. The eight-member United States Commission on Civil Rights is subject to a statutory fifty-percent limitation: no more than four of the members may be members of the same political party. 42 U.S.C. § 1975(b). Presidential appointees to the Civil Rights Commission are not subject to Senate confirmation, however, and reciprocity norms regarding partisan balance at other federal agencies historically have been much weaker with respect to the Civil Rights Commission. *See* Charlie Savage, *Maneuver Gave Bush a Conservative Rights Panel*, Bos. Globe (Nov. 6, 2007), https://perma.cc/E8EU-THGE ("Especially

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[10] The combination of alternating control and life tenure also has yielded political and ideological diversity—though not necessarily parity—on the federal Judiciary. Neither party has occupied the White House for more than twelve consecutive years since 1953. As a result, appointees of Republican Presidents and appointees of Democratic Presidents regularly serve alongside each other on the federal bench.

since the 1980s, presidents and lawmakers have tried to tilt the panel by appointing independents who shared their party's views on civil rights."). In 2004, with the number of Republicans on the Commission already at a maximum, one Republican member re-registered as an independent, thus paving the way for another Republican appointee. And in 2007, another independent joined the Commission who had been registered as a Republican until seven months before her appointment and previously had been active in Republican Party politics. The result was that only two of the Commission's eight members were registered Democrats. *Id.*

We are aware of no similar case in Delaware where re-registrations have undermined the bare-majority, fifty-percent, or other-major-party limitations in Article IV, Section 3. The concern is not an idle one, though. The Governor's Mansion and the State Senate majority have been in the hands of Democrats for the past twenty-seven years. *See* Matt Bittle, *A (Mostly) True Blue Tale of Delaware Politics*, Del. State News (Feb. 13, 2016), https://delawarestatenews.net/government/a-mostly-true-blue-tale-of-delaware-politics. Without an other-major-party reservation, a Democratic Governor might be tempted or pressured to appoint a Green Party member to the State's Judiciary once the maximum number of Democrats is reached. *Cf.* Br. for Former Gov'rs of the State of Del. as *Amici Curiae* in Support of Pet'r 7 (cert. stage) (noting that Article IV, Section 3 serves a useful hands-tying function for Governors who otherwise would face appointment-related pressure from members of their own parties). Neither the power of the opposition party in the State Senate nor the norm of alternating control provides a strong

check on "gaming" given current political trends in Delaware.

To be sure, even with an other-major-party reservation, "gaming" of Delaware's partisan balance requirements is theoretically possible. For example, a Democratic Governor might urge a potential liberal-leaning appointee to drop her Democratic affiliation and re-register as a Republican. The psychic costs to a longtime Democrat of claiming to be a Republican, though, are significantly higher than the psychic costs of claiming to be an independent. *See* Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 Am. J. Pol. Sci. 690, 696 (2015) (reporting that survey respondents exhibit strong animus to members of the other major party and a neutral affect towards independents). Re-registration as a Republican, moreover, could have negative reputational consequences for a Delaware Democrat embedded in liberal-leaning social and professional networks in the event that she did not receive the desired appointment. *See* Del. Code tit. 15, § 1305(a) (providing that Delaware voter registration records will be available for public inspection). A bare-majority or fifty-percent limitation with an other-major-party reservation is not a foolproof check on appointment opportunism, but it is a much more robust check than the bare-majority or fifty-percent limitations alone.

In sum, bare-majority and fifty-percent limitations can advance Delaware's important interest in the political and ideological diversity of its Judiciary regardless of whether the other-major-party reservation remains. But bare-majority and fifty-percent limitations are only conditionally effective: they are likely

to lead to political and ideological diversity only when the parties are sorted ideologically, the confirmation process exerts a check on appointment opportunism, and members of the two parties abide by norms of reciprocity fostered by alternations of political power. When these latter two conditions are absent, an other-major-party reservation can bolster a State's effort to produce a Judiciary whose members reflect a broad spectrum of views.

CONCLUSION

For these reasons, *amici* urge the Court to reverse the judgment below.

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