

In The  
Supreme Court of the United States

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GOVERNOR OF DELAWARE,  
*Petitioner,*

v.

JAMES R. ADAMS,  
*Respondent.*

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

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**BRIEF OF *AMICI CURIAE*  
ANTHONY DAUNT AND NORMAN SHINKLE  
IN SUPPORT OF PETITIONER**

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Jason Torchinsky  
*Counsel of Record*  
Dennis W. Polio  
Andrew D. Watkins  
Holtzman Vogel Josefiak Torchinsky PLLC  
45 North Hill Drive  
Suite 100  
Warrenton, VA 20186  
(540) 341-8808  
(540) 341-8809  
Jtorchinsky@hvjt.law

*Counsel for Amici Curiae*

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

*Amici curiae*, Anthony Daunt and Norman Shinkle, are individuals who are active members of the Republican Party and Plaintiffs-Appellants in an action challenging Michigan's Citizens Redistricting Commission for State Legislative and Congressional Districts. *Amicus curiae* Daunt serves as an officer and member of the governing body of the Clinton County, Michigan Republican Party and as a member of the governing body of the Michigan Republican Party Committee. *Amicus curiae* Shinkle has served as the 8th Congressional District Chair of the Michigan Republican Party and as a member of its governing State Central Committee. Due to the extent of their exercise of their First Amendment rights of free speech and association through their active membership in the Republican Party, *Amici curiae* are unconstitutionally prohibited from serving on Michigan's Citizens Redistricting Commission.

*Amici curiae's* challenge is not to the Michigan Citizens Redistricting Commission's partisan balance requirement, but to its structure, which allows the state to disqualify citizens from service based on the extent of their exercise of First Amendment Freedoms. *Amici curiae* write here to encourage the Court to decide this appeal in a way that does not endanger their challenge, or other

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<sup>1</sup> Pursuant to Supreme Court Rule 37, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici curiae* and their counsel made any monetary contribution toward the preparation and submission of this brief. Petitioner filed a blanket consent to the filing of all amicus briefs on January 17, 2020. On January 28, 2020 counsel for Respondent stated that he does not object to the filing of this brief.



similar challenges, while preserving the various structures of government that seek to maintain some levels of partisan balance.

## INTRODUCTION & SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Third Circuit invalidated a provision of Delaware's Constitution because it mandated a partisan balance of Delaware Supreme Court Justices between the two major political parties. The Third Circuit applied heightened scrutiny because it held that the Delaware judgeships affected by the partisan balance requirement do not fall within the policymaking exception in this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); and *Rutan v. Republican Party*, 497 U.S. 62 (1990). The Third Circuit ultimately determined that Delaware's judicial partisan balance requirement was not narrowly tailored because it was not the least restrictive means of achieving political balance.

In doing so, the Third Circuit nullified a methodology used by many government institutions at both the federal and state levels. Institutions using partisan-balance criteria of some kind range from the smallest bodies with the most limited jurisdiction to those with national significance. The Third Circuit's decision threatens all of these institutions. Given how prolific these bodies are throughout American government, the threat to their membership requirements will cause disruption nationwide. Additionally, while partisan balance requirements may be a constitutionally

permissible method by which state and federal government may further their vital interests, it is unconstitutional for government to determine arbitrarily who is too Republican or too Democratic to serve on these institutions.

*Amici curiae* submit this brief to inform the Court of the prevalence of politically balanced government bodies and to urge the Court not to decide this appeal in a manner that pre-decides the pending litigation over Michigan's Citizens Redistricting Commission and other, similar challenges.

## ARGUMENT

### **I. STRUCTURAL PARTISAN BALANCE REQUIREMENTS FOCUSING ON PARTISAN AFFILIATION ARE PREVALENT IN FEDERAL AND STATE GOVERNMENT INSTITUTIONS.**

#### **A. Partisan Balance Requirements Are Widespread.**

“Partisan balance” requirements are prevalent among both state and federal government entities. Partisan balance requirements exist, in one form or another, in federal institutions wielding broad powers, small municipal institutions with narrow jurisdiction, and everything in between. Such balancing requirements also exist in judicial nominating commissions across the country, which are especially akin to the Delaware courts at issue in this case. The structure of all of these institutions

would be placed in doubt if the Third Circuit's decision is affirmed.

Institutional political requirements take many forms. Some requirements focus on partisan affiliation, where the governmental body is limited to those affiliated with one or any political party. Others focus on party maximum, where no more than a certain number or percentage of members may be affiliated with one particular party, but the balance of the organization can hail from any or no party. Still others focus on partisan symmetry, where an entity is limited to an equal or predetermined number of members from political parties. And there are partisan balance requirements that include elements of multiple forms.

### **1. Federal Institutions Rely On Partisan Balance Requirements.**

Many federal agencies have some form of partisan balance requirement governing their composition, including the Securities and Exchange Commission (SEC), the Federal Deposit Insurance Corporation (FDIC), the Federal Communications Commission (FCC), the Federal Election Commission (FEC), and the United States Commission on Civil Rights (USCCR), among others.<sup>2</sup> Most of these examples take the form of party maximum requirements.

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<sup>2</sup> See also, *e.g.*, Federal Trade Commission, 15 U.S.C. 41 (“Not more than three of the [five] commissioners shall be members of the same political party.”); Federal Energy Regulatory Commission, 42 U.S.C. 7171(b)(1) (“Not more than three [of the five] members of the Commission shall be members of the same

The SEC is an independent federal agency holding primary responsibility for enforcing federal securities law, proposing security rules, and regulating the securities industry. See 15 U.S.C. 78a *et seq.* The SEC is composed of five commissioners appointed by the President and confirmed by the United States Senate and holding terms of five years. 15 U.S.C. 78d(a). The five commissioners are limited by a partisan maximum requirement, requiring that “[n]ot more than three \* \* \* commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.” *Id.*

The FDIC is an independent federal agency whose purpose is to maintain stability and public confidence in the nation's financial system by insuring deposits; examining and supervising financial institutions for safety, soundness, and consumer protection; making large and complex financial institutions resolvable; and managing receiverships. See 12 U.S.C. 1811 *et seq.* The FDIC is managed by a board of directors consisting of five members, one of whom is the Comptroller of the Currency, another of whom is the Director of the

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political party.”); Privacy and Civil Liberties Oversight Board, 42 U.S.C. 2000ee(h)(2) (“[I]n no event shall more than 3 [of the five] members of the Board be members of the same political party. The President shall, before appointing an individual who is not a member of the same political party as the President, consult with the leadership of that party, if any, in the Senate and House of Representatives.”); National Mediation Board, 45 U.S.C. 154 (The Board is “to be composed of three members \* \* \* not more than two of whom shall be of the same political party.”).

Consumer Financial Protection Bureau, and three others who are appointed by the President and confirmed by the United State Senate. 12 U.S.C. 1812(a)(1). The membership of the FDIC board is restricted by a party maximum requirement, directing that no more than three members hail from the same political party. 12 U.S.C. 1812(a)(2).

The FCC is an independent federal agency responsible for implementing and enforcing America's communication laws and regulations. See 47 U.S.C. 151 *et seq.* The FCC is composed of five commissioners appointed by the President, confirmed by the United States Senate, and serving five-year terms. 47 U.S.C. 154(a) and (c)(1)(A). Like other independent agencies, the FCC membership is limited by a partisan maximum requirement where "[t]he maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitute a majority of the full membership of the Commission." 47 U.S.C. 154(b)(5).

The FEC is an independent federal agency charged with administering and enforcing federal campaign finance law. See 52 U.S.C. 30106 *et seq.* The FEC is composed of six members appointed by the President and confirmed by the United States Senate, serving six-year terms. 52 U.S.C. 30106(a)(1) and (2). The FEC is governed by a partisan maximum requirement, mandating that "[n]o more than 3 members of the Commission \* \* \* may be affiliated with the same political party." 52 U.S.C. 30106(a)(1). The affirmative vote of four members of the FEC is required in order for it to initiate, defend, or appeal actions to enforce federal campaign finance law; render advisory opinions; undertake

rulemaking; or conduct investigations, meaning that bipartisan support is needed for any of those actions. 52 U.S.C. 30106(c). Further, the FEC's chair and vice chair may not be affiliated with the same political party. 52 U.S.C. 30106(a)(5).

The USCCR is an agency established by Congress pursuant to section 101 of the Civil Rights Act of 1957, and charged with investigating, studying, and collecting information regarding deprivations of both civil rights and equal administration of justice. 42 U.S.C. 1975 *et seq.*<sup>3</sup> The USCCR is required to submit interim reports, as well as a final report of its activities, findings, and recommendations to the President and to the Congress. 42 U.S.C. 1975a(c). To perform its duties, the USCCR may hold hearings and issue subpoenas for the attendance and testimony of witnesses and the production of evidence. 42 U.S.C. 1975a(e). The USCCR is composed of eight members, four appointed by the President, two by the President Pro Tempore of the Senate, and two by the Speaker of the House of Representatives. 42 U.S.C. 1975(b). The USCCR, like the independent agencies discussed *supra*, also contains a partisan maximum requirement in regard to its membership, where “[n]ot more than 4 of the [eight] members shall at

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<sup>3</sup> All statutory authority for the Commission terminated on September 30, 1996, and Congress has not passed new legislation to reauthorize the Commission; however, it has continued to appropriate funding for the Commission. See 42 U.S.C. 1975d; see also Garrine P. Laney, Cong. Research Serv., RL34699, *The U.S. Commission on Civil Rights: History, Funding, and Current Issues* 9 (2008) (“Congress has not passed legislation to reauthorize the Commission on Civil Rights since 1994, although it has continued to appropriate funding for the agency.”).

any one time be of the same political party.” *Ibid.* This, like the FEC partisan balance requirements, could functionally become a partisan symmetry requirement, because it prohibits members affiliating with any specific political party from becoming a majority. Compare 52 U.S.C. 30106(a)(1), with 42 U.S.C. 1975(b).

## **2. State Judicial Nominating Commissions Rely on Partisan Balance Requirements.**

Many states have judicial nominating commissions that rely on partisan balance requirements in the selection of their membership. States that possess judicial nominating commissions relying on partisan balance requirements of one kind or another include Connecticut, New Mexico, New York, Nebraska, Arizona, Colorado, Idaho, Delaware, West Virginia, Kentucky, Nevada, South Dakota, Utah, Oklahoma, and Vermont. These examples are especially relevant to the present appeal due to the parallel implications for the judiciary.

Connecticut’s Judicial Nominating Commission is made up of 12 commissioners, six lawyers and six nonlawyers. Conn. Gen. Stat. § 51-44a(a) (2019). No more than six commissioners may belong to the same political party. *Ibid.* The Governor appoints six commissioners while the President Pro Tempore, the House Majority Leader, the House Minority Leader, the Speaker of the House, the Senate Majority Leader, and the Senate Minority Leader each appoint one commissioner. *Id.* § 51-44a(b).

New Mexico's Appellate Judges Nominating Commission screens applicants for vacancies on the New Mexico Supreme Court and Court of Appeals. N.M. Const. art. VI, § 35. The Commission consists of 14 members: the chief justice of the supreme court; two judges of the court of appeals; two persons appointed by the Governor; two persons appointed by the Speaker of the Rouse of representatives; two persons appointed by the President Pro Tempore of the Senate; the Dean of the University of New Mexico School of Law; and four members of the state bar of New Mexico. *Ibid.* The members of the Commission must have equal representation between the two political parties. *Ibid.* If the initial 14 members are not balanced politically, the state bar president and judges on the Commission may make additional appointments "as is necessary to make each of the two largest major political parties be equally represented on the commission." *Ibid.*

New York's Commission on Judicial Nomination is made up of 12 commissioners. N.Y. Const. art. VI, § 2(d)(1). Four commissioners are appointed by the Governor with no more than two from the same political party. *Ibid.* Four commissioners are appointed by the Chief Judge of the Court of Appeals with no more than two from the same political party. *Ibid.* One commissioner each is appointed by the Speaker of the Assembly, the Temporary President of the Senate, the Minority Leader of the Senate, and the Minority Leader of the Assembly. *Ibid.*

Nebraska's Constitution establishes a nine-member judicial nominating commission for its "Supreme Court or [] any district court or [] such other court or courts made subject to this provision



by law.” Neb. Const. art. V, § 21(1). Each Commission includes a judge of the state supreme court who serves as a nonvoting member, as well as four nonlawyers appointed by the Governor. *Id.* § 21(4). The remaining four members are lawyers designated by members of the State Bar residing in the area from which additional nominees are to be selected. *Ibid.* No more than four of the voting members of the Commission shall be from the same political party. *Ibid.*

Arizona’s Commission on Appellate Court Appointments is made up of 16 commissioners. Ariz. Const. art. VI, § 36(A). The Chief Justice of the Supreme Court serves as a commissioner and is chair of the Commission. *Ibid.* In addition, the Governor appoints 10 nonlawyer members to the Commission, subject to Senate confirmation, and the State Bar Association Board of Governors nominates five lawyer members to be appointed by the Governor and confirmed by the Senate. *Ibid.* No more than five nonlawyer members on the Commission may be from the same political party, and no more than three of the lawyer members of the Commission can be from the same political party. *Ibid.*

Colorado’s Supreme Court Nominating Commission is made up of 15 voting commissioners. Colo. Const. art. VI, § 24(2). Voting members include one lawyer and one nonlawyer from each of the state’s seven congressional districts and one additional nonlawyer member from anywhere in the state. *Ibid.* No more than one-half plus one of the voting commission members may be members of the same political party. *Ibid.* Lawyer commissioners are appointed by the majority action of the Governor,

Attorney General, and Chief Justice. *Id.* § 24(4). Nonlawyer commissioners are appointed by the Governor. *Ibid.*

Idaho's Judicial Council is made up of seven permanent members and one adjunct member. Idaho Code § 1-2101(1) (2019). Three permanent members are nonlawyers who are appointed by the Governor with Senate confirmation, three permanent members are lawyers appointed by the Idaho State Bar, and the seventh permanent member is the Chief Justice of the Supreme Court. *Ibid.* No more than three of the permanent appointed members may be from the same political party. *Ibid.*

In addition to the judicial balancing requirements at issue in this appeal, Delaware has also established a Judicial Nominating Commission by Executive Order. Exec. Order No. 7 (Mar. 9, 2017), <https://governor.delaware.gov/executive-orders/eo07>. The Commission is made up of 12 commissioners—11 commissioners are appointed by the Governor, with the twelfth commissioner appointed by the Governor, but recommended by the President of the Delaware State Bar Association. *Ibid.* No more than seven members may be registered members of the same political party. *Ibid.*

West Virginia's Judicial Vacancy Advisory Commission is made up of eight appointed members selected by the Governor. W. Va. Code Ann. § 3-10-3a(b) (2019). No more than four appointed members shall be from the same political party. *Ibid.* The Governor, the President of the West Virginia State Bar, and the Dean of West Virginia University College of Law also serve on the commission as ex officio members. *Id.* § 3-10-3a(d).

Kentucky's Supreme Court and Court of Appeals Judicial Nominating Commission consist of seven members. Ky. Const. § 118(2). The Governor appoints four members—two from each of the two political parties having the largest number of voters in the Commonwealth, two members are lawyers, elected by members of the Kentucky State Bar, and the Chief Justice of the State Supreme Court serves as chair. *Ibid.*

Nevada's Commission on Judicial Selection consists of seven members, including the Chief Justice of the Supreme Court or an Associate Justice designated by him; three members who are lawyers appointed by the Nevada State Bar; and three nonlawyer members appointed by the Governor. Nev. Const. art. 6, § 20(3). Each appointing authority may not appoint more than two members of the same political party to the Commission. *Id.* § 20(7)(b).

South Dakota's Judicial Qualifications Commission is made up of seven members. S.D. Codified Laws § 16-1A-2 (2019, Executive Order 2019-1 and Supreme Court Rule 19-18). Two circuit court judges elected by the judicial conference shall serve on the Commission. *Ibid.* In addition, the Commission includes three lawyer members appointed by a majority vote of the State Bar commissioners, no more than two of whom are from the same political party. *Ibid.* The final two members can be of any profession and are appointed by the Governor, but neither one can be from the same political party. *Ibid.*

Utah's Appellate Court Nominating Commission is made up of seven commissioners. Utah Code Ann. § 78A-10-202(1) (2019). No more

than four commissioners may be from the same political party. *Id.* § 78A-10-202(3). The Governor appoints six commissioners and the Chief Justice of the Utah Supreme Court appoints the seventh commissioner who is an ex officio member. *Id.* §§ 78A-10-202(4)-(6).

Oklahoma's Judicial Nominating Commission is made up of 15 members. Okla. Const. art. VII-B, § 3(a). Six nonlawyer members are appointed by the Governor, including one from each of Oklahoma's congressional districts. Six lawyer members are elected by the Oklahoma State Bar, including one from each congressional district. *Ibid.* The final three members are "at-large" nonlawyer members. *Ibid.* One at-large member is selected by at least eight of the other members on the Commission, and one each is appointed by the President Pro Tempore of the State Senate and the Speaker of the State House of Representatives. *Ibid.* No more than two of the at-large members may be from the same political party. *Ibid.* In addition, no more than three of the commissioners named by the Governor shall be from the same political party. *Id.* § 3(d).

Vermont's Judicial Nominating Board consists of 11 members. Vt. Stat. Ann., Tit. 4, § 601(b). The Governor appoints two nonlawyer members; the State Senate and State House each elect three of their members, not all of whom may be from the same political party; and the State Bar elects three lawyers as members. *Ibid.*

### **3. State Elections Boards Rely on Partisan Balance Requirements**

Nine states have a board or commission—rather than an elected or appointed chief election

official—that acts alone in overseeing the administration of elections. These states are Hawaii, Illinois, Maryland, North Carolina, New York, Oklahoma, South Carolina, Virginia, and Wisconsin. Because these commissions possess exclusive authority for election administration, they are most often structured using partisan balance requirements for their membership.

Hawaii’s Election Commission is responsible for investigating and holding hearings on any allegation of election law violations. Haw. Rev. Stat. § 11-7.5 (2019). The nine-member Commission is composed of two members appointed by the President of the Senate; two members appointed by the Senate Minority Leader; two members appointed by the Speaker of the House; two members appointed by the House Minority Leader; and one member selected by a two-thirds vote of the Elections Commission that serves as chair. *Id.* § 11-7(a). Assuming legislative leaders select commission members that are of the same party or are at least sympathetic to that party, the Hawaii commission structure presents an example of a partisan symmetry requirement.

Illinois’ State Board of Elections has “general supervision over the administration of the registration and election laws throughout the State.” Ill. Comp. Stat., ch. 10, § 5/1A-1 (2019). The Board is made up of eight members appointed by the Governor and confirmed by the State Senate, four of whom must be from Cook County and four of whom must be from outside Cook County. *Id.* § 5/1A-2. Within each group of four members, two must be “affiliated with the same political party as the Governor,” and two must be “affiliated with the

political party whose nominee for Governor in the most recent general election received the second highest number of votes.” *Ibid.* This partisan symmetry requirement is nearly identical to Delaware’s judicial requirement.

Maryland’s State Board of Elections “manage[s] and supervise[s] elections in the State and ensure[s] compliance with the” election laws. Md. Elec. Law Code Ann. § 2-102(a) (2019). The Board is made up of five members who are appointed by the Governor, with confirmation by the Senate. *Id.* §§ 2-101(a) and (c). Each member of the Board must be a member of one of the State’s principal political parties, and the Governor must make his appointment from a list of individuals submitted by the State Central Committee of the principal political party who is entitled to the appointment. *Id.* §§ 2-101(c)(2) and (e). The partisan makeup of the Board must not consist of more than three or less than two members from the same political party. *Id.* § 2-101(e). These partisan balance requirements have been interpreted to mean that three members should be appointed from the majority party and two from the minority party. See *About SBE, Maryland State Board of Elections*, <https://elections.maryland.gov/about/index.html>.

North Carolina’s State Board of Elections has “general supervision over the primaries and elections in the State.” N.C. Gen. Stat. Ann. § 163-22(a) (2019). The Board is made up of five members appointed by the Governor. *Id.* § 163-19(b). North Carolina uses a partisan maximum requirement where no more than three members of the State Board of Elections can be members of the same political party. *Ibid.* Members are appointed from a

list of nominees submitted to the Governor by the State party chair of each of the two political parties that have the highest number of registered affiliates. *Ibid.*

New York's State Board of Elections is generally charged with enforcing, administering, and supervising compliance with New York's election laws. N.Y. Elec. Law Ann. § 3-102 (2019). The Board is made up of four commissioners who are appointed by the Governor. *Id.* § 3-100(1). Two of the commissioners are chosen from recommendations from the chairs of the state committee of each major political party, one commissioner from each. *Ibid.* One commissioner is appointed from a list of joint recommendations by the legislative leaders of one major political party in each house of the legislature, and the final commissioner is from a list of joint recommendations by the legislative leaders of the other major political party in each house of the legislature. *Ibid.*

Oklahoma's State Board of Elections is made up of three members and two alternate members, each of whom is appointed by the Governor with Senate confirmation. Okla. Stat., Tit. 26, § 2-101 (2019). Appointments are made from lists compiled by the state central committees of the two political parties with the largest number of registered voters. *Id.* § 2-101.1. The Governor must appoint two members and one alternate from one political party, and one member and one alternate from the other party. *Ibid.*

South Carolina's State Election Commission is made up of five members appointed by the Governor. S.C. Code Ann. § 7-3-10(a) (2019). At least one member must be a member of the majority political

party represented in the General Assembly and at least one must be a member of the largest minority political party represented in the General Assembly. *Ibid.* The South Carolina Commission is an unusual example of partisan minimum requirements. Alternatively, it can be interpreted as a partisan maximum requirement, where no more than four of the five commissions may be from the same party.

Virginia's State Board of Elections supervises and coordinates the work of county and city electoral boards and ensures uniformity in application of the election laws. Va. Code Ann. § 24.2-103 (2019). The Board consists of three members appointed by the Governor and confirmed by the General Assembly. *Id.* § 24.2-102. Representation on the Board must be given to each of the two political parties that received the highest number of votes for Governor at the last preceding gubernatorial election. *Ibid.* Two members are from the party with the highest number of voters, and one member is from the party with the second highest number. *Ibid.* Each party entitled to an appointment may make recommendations to the Governor for the appointment. *Ibid.*

Wisconsin's Elections Commission is comprised of six commissioners. Wis. Stat. § 15.61(1)(a) (2019). Of the six commissioners, one is appointed by the Senate Majority Leader, one by the Senate Minority Leader, one by the Speaker of the Assembly, one by the Assembly Minority Leader, and two are nominated by the Governor with confirmation by the senate. *Ibid.* The individuals nominated by the Governor are selected from lists prepared by the legislative leadership of the two political parties that received the largest number of



votes for president, with the Governor choosing one nominee from each list. *Id.* § 15.61(1)(a)(5). There is the possibility of additional commissioners from political parties other than the two major political parties who received at least 10% of the vote in the most recent gubernatorial election; however, the current Commission has no such commissioners. *Id.* § 15.61(1)(a)(6); see *Wisconsin Elections Commission Members*, Wisconsin Elections Commission, <https://elections.wi.gov/about/members>.

#### **4. Other State and Local Institutions Rely on Partisan Balance Requirements.**

Partisan balance is hardly limited to powerful federal agencies or state commissions relating to judicial appointments and elections. Partisan balance is used by some of the most commonplace state and local boards and commissions affecting Americans' everyday life. While a complete survey is beyond the scope of this brief, *Amici curiae* highlight a representative sample here.

The State of Missouri allows some counties to establish museum and festivals board for the purpose of funding museums that are considered to be tourist attractions and other non-profit organizations that promote cultural heritage tourism. Mo. Rev. Stat. § 67.571 (2019). These museum and festival boards use a partisan symmetry requirement similar to the Delaware judicial balance requirement. Museum and festival boards in Missouri are comprised of six members, appointed from a list of candidates supplied by the chair of each of the two major political parties of the

county. *Id.* § 67.571(5). The six members of museum and festival boards are comprised of “three members from each of the two [major] political parties.” *Ibid.*

Massachusetts has created an Industrial Accident Board and an Industrial Accident Reviewing Board within its Division of Dispute Resolution to adjudicate disputed workers’ compensation cases and other accident related disputes. Mass. Gen. Laws, ch. 23E, §§ 4 and 5 (2019). The Massachusetts Industrial Accident Board is made up of 21 members who are administrative judges. *Id.* § 4. This board contains a partisan maximum requirement where not more than 11 of the members may be from the same political party. *Ibid.* These administrative judges are just that—judges. They do not have any significant rulemaking authority, but rather exercise purely judicial functions by presiding alone over disputed workers’ compensation cases from the conference proceeding to the hearing stage. *Ibid.*; see also *Division of Dispute Resolution*, Commonwealth of Massachusetts, <https://www.mass.gov/service-details/division-of-dispute-resolution>.

The Massachusetts Industrial Accident Reviewing Board functions as an appellate body of the Department of Industrial Accidents, presiding over lump sum settlements, Mass. Gen. Laws, ch. 152, § 48, medical lien disputes, *id.* § 46A, petitions for approval of third party settlement, *id.* § 15, and others. Mass. Gen. Laws, ch. 23E, § 5. After an administrative judge renders a decision in a hearing an aggrieved party can request that the Industrial Accident Reviewing Board review that decision. Mass. Gen. Laws, ch. 152, § 11C. The Industrial Accident Reviewing Board is made up of six

members who sit as administrative law judges. Mass. Gen. Laws, ch. 23E, § 5. The Industrial Accident Reviewing Board, like the Industrial Accident Board, uses a partisan maximum requirement, where not more than three of the administrative law judges may be members of the same political party. *Ibid.* This body, like the Industrial Accident Board, contains no discernable rulemaking authority but is purely adjudicative. *Ibid.*

The West Virginia State Board of Education exercises general supervision of and promulgates rules regarding West Virginia public schools. W. Va. Code Ann. § 18-2-5 (2019). West Virginia's State Board of Education consists of nine voting members appointed by the governor and confirmed by the State Senate. *Id.* § 18-2-1. West Virginia imposed a partisan maximum requirement, wherein no more than five of the voting members may belong to the same political party. *Ibid.* Similarly, Montana's seven-member Board of Public Education imposes a partisan maximum requirement restricting no more than four board members from being affiliated with the same political party. Mont. Code Ann. § 2-15-1508 (2019). The Board of Governors of West Virginia University, the public university of West Virginia, which exercises general control, supervision and management of the business and educational affairs of the university and of Potomac State College, is circumscribed by a similar partisan maximum requirement. W. Va. Code Ann. § 18-11-1 (2019) ("No more than five [of the nine] members [of the Board of Governors] shall belong to the same political party.").

The public universities in the state of Kentucky, including Eastern Kentucky University, Morehead State University, Murray State University, Western Kentucky University, Kentucky State University, Northern Kentucky University, and the Kentucky Community and Technical College System, are governed by Boards of Regents. Ky. Rev. Stat. Ann. § 164.321 (2019). These Boards of Regents are made up of eight members appointed by the Governor, and use partisan balance/symmetry requirements similar to those used by the Delaware judiciary. *Ibid.* Appointments to the Boards of Regents of Kentucky’s public colleges must “reflect the proportional representation of the two (2) leading political parties of the Commonwealth.” *Ibid.* The 10-member Board of Trustees of the University of Louisville also uses a similar requirement. *Id.* § 164.821(5)(a).

Like many other states, Kansas has created a Crime Victims Compensation Board to provide victims with financial assistance for loss of earning and out-of-pocket loss for injuries sustained as a direct result of violent crime. See Kan. Stat. Ann. § 74-7301 *et seq.* (2019). Kansas’s Crime Victims Compensation Board is made up of three members appointed by the Kansas Attorney General and confirmed by the State Senate. *Id.* § 74-7303. Board membership is restricted by a partisan maximum requirement, where no more than two board members may be from the same political party. *Ibid.*

The State of Illinois provides that certain counties may appoint boards of review to review the tax assessments made by the county supervisor of assessments. Ill. Comp. Stat., ch. 35, §§ 200/6-5, 200/6-30, 200/6-34 and 200/6-35 (2019). These boards

of review are to be made up of three members appointed by the board of county commissioners. *Id.* § 200/6-34. These boards use a partisan symmetry requirement where they are made up of two members “affiliated with the political party polling the highest vote for any county office in the county” and one member affiliated with “the party polling the second highest vote for the same county office” in the last general election. *Ibid.*

In Missouri, the State Board for Respiratory Care is tasked with promulgating rules regarding, managing licensing for, and disciplining practitioners in the practice of respiratory care. Mo. Rev. Stat. § 334.800 *et seq.* (2019). The Board for Respiratory Care consists of seven members, appointed by the governor and confirmed by the State Senate. *Id.* § 334.830. Interestingly, even a board with such narrow jurisdiction, and presumably far removed from the political process, uses a partisan maximum requirement in the composition of its members. Specifically, no more than four members of the seven-member board may be from the same political party. *Ibid.*

Indiana’s State Board of Cosmetology and Barber Examiners is responsible for adopting rules and overseeing licensing requirements pertaining to beauty culture salons and schools, as well as for the practice of cosmetology, barbering, electrology, esthetics, and manicuring. Ind. Code § 25-8-3-23 (2019). This board is made up of seven members who are appointed by the governor. *Id.* § 25-8-3-2. Even the Indiana State Board of Cosmetology and Barber Examiners uses a political balance requirement. Specifically, no more than five of the seven members of the Board of Cosmetology and Barber Examiners

may belong to the same political party. *Id.* § 25-8-3-6.

And the list goes on. This non-exhaustive list barely scratches the surface of state and municipal institutions relying on partisan balance of one type or another. However, this list highlights how integrated partisan balance requirements are across the nation in institutions of even the narrowest authority.

**B. Invalidating Delaware's Judicial  
Partisan Balance Requirement In A  
Broadly Worded Opinion Will Create  
Chaos.**

As the above listed sample clearly demonstrates, the Third Circuit's decision invalidating Delaware's judicial partisan balance requirements will have wide ranging effects across the nation if affirmed by this Court. Given the fact that so many institutions, regardless of size or jurisdiction, rely on partisan balance requirements in the selection of their membership, declaring partisan balance requirements unconstitutional would have far- and deep-reaching effects. If partisan balance requirements are held to be unconstitutional, all these entities would be threatened.

If this Court affirms, innumerable governmental institutions relying on partisan balance requirements in the selection of membership would be called into question. To disrupt so many duly enacted entities, and their membership, would create chaos. Many states and localities would have to use valuable resources in defending new

challenges to the composition of these entities, potentially resulting in their structure being invalidated altogether. Other governments would also have to scramble to amend the selection processes for membership in their institutions that have partisan balance requirements imbedded within them. Moreover, given the array of different partisan balance requirements, such a decision would create uncertainty as to the constitutionality of certain partisan balance requirements, since not all partisan balance requirements are identical.

**II. ALTHOUGH PARTISAN BALANCE REQUIREMENTS MAY BE LEGALLY ACCEPTABLE, IT IS UNCONSTITUTIONAL FOR GOVERNMENTS TO DETERMINE WHO IS 'TOO REPUBLICAN' OR 'TOO DEMOCRATIC' WITHIN THESE STRUCTURES.**

**A. Challenges To Governmental Partisan Determinations.**

There are a number of active legal actions pending in federal and state courts challenging government assessment of individuals who are deemed too partisan to serve on certain commissions or boards. These cases concern statutes which punish the exercise of First Amendment rights by prohibiting individuals from serving on commissions or being considered for public employment. These individuals are punished because of things like a prior candidacy for elected office, prior work for a political campaign, or simply having a family

member who has engaged in similar First Amendment activity.

### **1. Challenge to the Michigan Citizens Redistricting Commission Disqualification Criteria.**

*Amici curiae*, along with 13 other individuals, are currently challenging the Michigan Citizens Redistricting Commission (MCRC) in federal court.<sup>4</sup> The recently created MCRC is a bipartisan commission tasked with redrawing Michigan's congressional and state legislative districts every 10 years following the decennial census. *Daunt v. Benson*, No. 1:19-cv-614, 2019 U.S. Dist. LEXIS 203940, at \*4-5 (W.D. Mich. Nov. 25, 2019). The MCRC replaces the preexisting legislative redistricting process and eliminates nearly all legislative oversight of that process. *Ibid.*

Accompanying the creation of the MCRC, a complicated application and selection process was established whereby citizens apply to serve on the committee so long as they do not meet certain exclusionary criteria. *Id.* at \*7-12. The MCRC is to be made up of 13 Michigan registered voters who submitted applications and were eventually randomly selected after majority and minority leaders in the legislature rejected a certain number of applicants from the pool. *Ibid.* Of the 13 randomly selected commission members, there must be four

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<sup>4</sup> The Michigan Republican Party and its current chair, members, affiliates, and/or relatives also filed a separate suit challenging the MCRC, which was consolidated with *Amici curiae*'s case.



that self-affiliate with the Democratic Party, four that self-affiliate with the Republican Party, and five that do not affiliate with either major party. *Id.* at \*6-7.

There are certain prior activities such as serving as a lobbyist, officeholder, or candidate; family relationships; and associational relationships that disqualify an individual from serving on the MCRC, a position which earns roughly \$40,000 or more a year.<sup>5</sup> Specifically, no commissioner shall be, or, in the past six years, have been:

- A candidate or elected official of a partisan federal, state or local office;
- An officer or member of the leadership of a political party;
- A paid consultant or employee of an elected official, candidate, or political action committee;
- An employee of the legislature;
- Registered as a lobbyist or an employee of a registered lobbyist;
- A political appointee who is not subject to civil service classification;
- Any parent, stepparent, child, stepchild, or spouse of any individual that falls into one of the above categories.

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<sup>5</sup> Commissioners on the MCRC receive compensation equal to at least 25% of the Governor's salary, which is approximately \$160,000 a year as of 2019. *Frequently Asked Questions*, Michigan Citizens Redistricting Commission, [https://www.michigan.gov/sos/0,4670,7-127-1633\\_91141-488602--,00.html](https://www.michigan.gov/sos/0,4670,7-127-1633_91141-488602--,00.html).

*Id.* at \*8-9. For example, if a parent has a daughter in the employ of a registered lobbyist, that parent is barred from serving simply because of that familial relationship.<sup>6</sup> *Amici curiae* and their co-plaintiffs in *Daunt v. Benson* fall into one or more of the ineligibility categories and are therefore prohibited from even being considered for positions on the MCRC solely because of political activity or employment in which they or a family member have been engaged. *Id.* at \*17-22.

The MCRC is problematic not because it possesses partisan balance requirements, but because its exclusionary criteria essentially determine who is “too Republican” or “too Democratic” to serve on the Commission. These criteria prohibit service on the MCRC based on the degree or extent of the prior exercise of First Amendment rights. The D.C. Circuit held, in *Autor v. Pritzker*, that a similar governmental prohibition—namely, lobbyists serving on certain federal advisory boards—created a serious constitutional question. 740 F.3d 176 (D.C. Cir. 2014).

On July 30, 2019, *Amici curiae* and 13 other individuals filed suit in the United States District Court for the Western District of Michigan alleging that the MCRC’s membership exclusion scheme violates the First and Fourteenth Amendments. See *Daunt v. Benson*, 2019 U.S. Dist. LEXIS 203940, at \*17-22. They sought a declaration that the MCRC’s exclusionary criteria were unconstitutional and a

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<sup>6</sup> Additionally, “[f]or five years after the date of appointment, a commissioner [would be] ineligible to hold a partisan elective office at the state, county, city, village, or township level in Michigan.” *Daunt v. Benson*, 2019 U.S. Dist. LEXIS 203940, at \*9.

preliminary injunction directing the Secretary of State to suspend her implementation of all provisions of the Michigan Constitution relating to the MCRC. *Id.* at \*21-22.

On November 25, 2019, the District Court denied Plaintiffs-Appellants' Motion for Preliminary Injunction. Although the District Court correctly held that *Amici curiae* and their co-plaintiffs have standing and that their claims are not barred by laches, it erroneously denied their Motion for Preliminary Injunction. *Id.* at \*28-35. Specifically, the District Court held that *Amici curiae* and their co-plaintiffs had not shown that they were likely to succeed on the merits of either their First or Fourteenth Amendment claims because it quizzically applied the deferential *Anderson-Burdick* standard to their claims, which is reserved solely for challenges to election *administration*. *Id.* at \*41-44; *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); *McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 345-46 (1995). The District Court applied the incorrect standard to *Amici curiae's* case, which "involves a limitation on political expression subject to exacting scrutiny." *McIntyre*, 514 U.S. at 346.

*Amici curiae* and their co-plaintiffs have appealed the District Court's decision to the Sixth Circuit, have filed their opening brief, and are scheduled for oral argument on March 17, 2020. *Daunt v. Benson*, appeal pending Nos. 19-2377 (6th Cir. docketed Nov. 27, 2019).

## 2. Challenge to the Oklahoma Redistricting Commission Proposal.

A proposed initiative petition in Oklahoma, Initiative Petition 420, State Question 804 (IP 420) is poised to make several significant changes to how that state redistricts its legislative and congressional districts. One of the most significant changes IP 420 proposes is the creation of a bipartisan redistricting commission. IP 420, § 3, <https://www.sos.ok.gov/documents/questions/804.pdf>. The nine-person commission would be made up of three people affiliated with the largest political party, three people in the second largest political party, and three people not affiliated with either of the two largest political parties in the state. *Id.* § 4(B).

Like Michigan's MCRC, the redistricting commission proposed by IP 420 not only contains partisan balance requirements, but also disqualifies individuals from participation based on the exercise of their First Amendment freedoms. Under IP 420, Oklahomans would be prohibited from serving on the redistricting commission if they or a family member:

- Held partisan elective office;
- Registered as a state or federal lobbyist;
- Were nominated as a candidate for political office; or
- Were employed by the state legislature.

*Id.* § 4(B)(2)(a)-(f).

Additionally, individuals who switch political parties in the four years immediately preceding the

date of apportionment are disqualified from serving on IP 420's redistricting commission. In this way, IP 420 also determines who is "too partisan" to serve on a commission. Essentially, IP 420 determines that if someone, for example, worked for a political party or was related to someone who had, they would be "too Republican" or "too Democratic" to serve on the commission. IP 420's "too partisan" determination is perplexing for the same reasons as the MCRC's disqualifying criteria: the Oklahoma commission is designed to be bipartisan rather than non-partisan. Why then does a certain *level* of partisanship trigger disqualifying treatment? Such treatment does not make sense. Even more mystifying is the fact that Oklahoma's law is not geographically or party limited, so a Democrat in Oklahoma with a brother who is a lobbyist in San Diego or a sister who is a Republican Party official in Oregon could be prohibited from serving on the Oklahoma redistricting commission.

On November 15, 2019, two Oklahoma voters filed a protest with the Oklahoma Supreme Court challenging the legality of IP 420 under, *inter alia*, the First Amendment. Specifically, the Oklahoma petitioners, like *Amici curiae* and their co-plaintiffs, assert that IP 420 violates the First Amendment because the activities that disqualify individuals from serving on the redistricting commission are at the core of those protected by the First Amendment. *Gaddis v. Moore*, No. 118405 (Okla. filed Nov. 15, 2019). On January 21, 2020, the Oklahoma Supreme Court heard oral argument in *Gaddis v. Moore*, and its decision is forthcoming. Carmen Forman, *Oklahoma Supreme Court Hears Challenges to Independent Redistricting Petition*, *The Oklahoman*

(Jan. 23, 2020), <https://oklahoman.com/article/5652923/oklahoma-supreme-court-hears-challenges-to-independent-redistricting-petition>.

**B. Government should not be in the business of determining who is “too Republican” or “too Democratic.”**

While *Amici curiae* recognize that federal, state, and local government structures use partisan balance requirements in structuring institutions, the issue in the Sixth Circuit and before the Oklahoma Supreme Court is whether it is unconstitutional for government to make an assessment to determine how *much* First Amendment activity justifies barring someone from serving in a government position. The complainants in these cases argue that disqualifying or categorizing people in such a way offends the First and Fourteenth Amendments. This is because these schemes exclude otherwise-qualified individuals from serving in government simply because of the level of their previous exercise of one or more constitutionally protected interests, or their close relation to someone who has exercised those interests. These interests include freedom of speech (for example, by the exclusion of candidates for partisan office or by the activities of certain relatives), right of association (for example, by the exclusion of members of political parties or by the activities of certain relatives), and/or the right to petition (for example, by the exclusion of registered lobbyists or by the activities of certain relatives). Each of these rights is well established. For instance, this Court has made clear that lobbying is a quintessential example of the exercise of the right to

petition that is protected by the First Amendment. “In a representative democracy \* \* \* [the] government act[s] on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.” *E. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961); see also *Autor*, 740 F.3d at 176.

**C. The Court Should Decide This  
Appeal In A Way That Does Not  
Endanger *Amici Curiae*’s Challenge  
Or Similar Challenges.**

However this Court decides the present case, *Amici curiae* urge the Court to decide it in a way that does not foreclose or pre-decide *Amici curiae*’s challenge to the MCRC, the challenge in Oklahoma to IP 420, or other similar challenges brought to combat government determination of who is “too partisan.” There are numerous distinguishing characteristics to both the MCRC scheme and Delaware’s judicial balancing requirements so that this Court can decide the issues discretely. For example, the MCRC scheme excludes individuals based on activity that occurred over half-a-decade prior to that commission’s establishment, while the Delaware judicial balance requirements are concurrent or nearly concurrent with an individual’s application and service in the Delaware judiciary. Further, both the MCRC and IP 420 actually permit individuals who are unaffiliated or affiliated with minor parties to serve on the commissions, unlike the Delaware judiciary. Accordingly, it is not

necessary for this Court to decide this case broadly, but instead to limit any decision in a way that does not negatively affect *Amici curiae's* challenge to the MCRC.

### CONCLUSION

For the aforementioned reasons, *Amici curiae* respectfully request that this Court uphold the notion that partisan balance in certain government institutions can be a worthy and constitutional objective, while not deciding the case in a manner that would foreclose or decide in advance how to handle statutes that engage in line drawing and exclusions beyond self-declared partisan affiliations.

Respectfully submitted,

Jason Torchinsky  
*Counsel of Record*  
Dennis W. Polio  
Andrew D. Watkins  
Holtzman Vogel Josefiak Torchinsky PLLC  
45 North Hill Drive  
Suite 100  
Warrenton, VA 20186  
(540) 341-8808  
(540) 341-8809  
Jtorchinsky@hvjt.law  
*Counsel for Amici Curiae*