No. 21-226

In the Supreme Court of the United States

LIBERTARIAN PARTY OF OHIO
AND HAROLD THOMAS,
Petitioners,

v.

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

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state violates the First Amendment by barring members of small political parties from holding a public office.

TABLE OF CONTENTS

Question Presented i
Table of Authorities iiii
Interest of *Amicus Curiae* 1
Summary of Argument 1
Argument 3
I. Ohio Severely Burdens the Expressive Association Rights of Third-Party Members by Categorically Barring Them from Serving on the State's Elections Commission 3
II. Political Affiliation May Be a Permissible Factor for Elected Officials to Consider in Evaluating Applicants, But It Cannot Be the Basis of a Categorical Legal Restriction 8
Conclusion 13

TABLE OF AUTHORITIES

Page(s)

Cases

Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 6

Branti v. Finkel, 445 U.S. 507 (1980) 2, 8

Carney v. Adams, 141 S. Ct. 493 (2020)..... 1

Elfbrandt v. *Russell*, 384 U.S. 11 (1966)..... 6

Elrod v. *Burns*, 427 U.S. 347 (1976) 2, 6, 8, 12

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 9

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 6, 8, 9

United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 12

Williams-Yulee v. *Fla. Bar*, 575 U.S. 433 (2015) 9

Statutes

7 U.S.C. § 2 (a)(2)(A)(ii) 10

15 U.S.C. § 2053(c)..... 10

15 U.S.C. § 41..... 10

15 U.S.C. § 78d..... 9

19 U.S.C. § 1330(a) 9

28 U.S.C. § 251..... 10

42 U.S.C § 5841 (b)(2)..... 10

42 U.S.C. § 1975..... 10

42 U.S.C. § 7171 (b)(1)..... 10

47 U.S.C. § 154 (b)(5)..... 10

49 U.S.C. § 1111(b) 10

49 U.S.C. § 1301 (b) 10

52 U.S.C. § 20923(b)(2) 10

52 U.S.C. § 30106(a)(1) 9

Ohio Rev. Code § 3517.152(A) 4, 5, 12

Ohio Rev. Code § 3517.153 3

Other Authorities

"Catholics and the Supreme Court," in *Encyclopedia of Religious Controversies in the United States* (2d ed. 2013) 11

"Hiram Johnson," *Encyclopaedia Britannica*, (last updated Aug. 29, 2021) 7

Brief of Amicus Curiae Cato Institute in Support of Respondent, *Carney v. Adams*, 141 S. Ct. 493 (2020) (19-309) 1

Daniel Victor, Obama Nominates First Muslim to Be a Federal Judge, *N.Y. Times*, Sept. 7, 2016 11

Frank James, "Sen. Joe Lieberman Leaves Divided Legacy," NPR (Jan. 19, 2011) 7

Nick Ravo, "Renegade's Victory—The Independence of a Maverick Republican: Lowell Palmer Weicker Jr.," N.Y. Times (Nov. 7, 1990) 7

Ohio Rev. Code § 3517.152(E) 7

Peter Charles Hoffer et al., *The Supreme Court: An Essential History* (2d ed. 2018) 11

Vote Smart, "Ohio Political Parties" 5

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case concerns Cato because it involves the right of members of third parties to participate in public life alongside Democrats and Republicans, without undue partisan discrimination. Cato has previously participated as *amicus curiae* to support that right in *Carney v. Adams*, 141 S. Ct. 493 (2020).

SUMMARY OF ARGUMENT

Ohio law excludes members of third parties from being eligible for a seat on the state's Elections Commission. Applicants may be eminently qualified experts in election law and may possess unimpeachable impartiality. The other six members of the Elections Commission may be willing to appoint them, or the chief justice of the Ohio Supreme Court may be willing

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission. While one author of this brief, Prof. Volokh, is on faculty at the same law school as the petitioners' counsel of record, this brief was adapted from a brief that he filed for *amicus* in a different case, which predates this petition. *See* Brief of *Amicus Curiae* Cato Institute in Support of Respondent, *Carney v. Adams*, 141 S. Ct. 493 (2020) (19-309).

to do so if the six members are deadlocked. Yet Ohio's law would still categorically forbid them from serving, simply because they belong to a party that is not the Republican or Democratic Party.

A position of consequence and responsibility, to which accomplished public servants could normally aspire as a highlight of their careers, is thus by law denied to them—unless, of course, they conveniently leave the party whose principles they wish to endorse and support. That is not consistent with the First Amendment's right to freedom of political association.

Nor does the Court's decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976), or *Branti v. Finkel*, 445 U.S. 507 (1980), authorize such discrimination. Those cases acknowledge that "political loyalty" or "allegiance to the political party in control of the . . . government" can be important for certain positions that play key roles in implementing a political agenda at the behest of an elected executive. *Elrod*, 427 U.S. at 367 (plurality op.); *Branti*, 445 U.S. at 519. But neither case dealt with what we have here: a law that *forbids* the appointment of members of certain parties to an office no matter who is in control of the state government.

Of course, governors and presidents have often considered a prospective official's political background in making appointments. They need not ignore such factors, just as voters need not ignore the political beliefs of candidates for election commissions in states where such officials are elected. But there is a difference between elected officials or voters considering those factors as a matter of their political discretion and a state law that categorically excludes members of third parties from holding any seat on a state commission.

In recognizing such a difference, this Court need not cast doubt on the constitutionality of other partisan-balance requirements. Most such requirements are not categorical lifetime exclusions from office; they merely require that no more than half or a bare majority of the body be made up of members of one party, leaving members of third parties free to serve alongside members of the major parties. Assuming Ohio does have a compelling interest in partisan balancing on its Elections Commission, that interest would be just as well served by mandating that the Commission's seventh and tie-breaking seat be held by either an independent *or* a third-party member. Categorically banning members of all third parties from all seven seats is an unjustified abridgment of the freedom of association and violates the First Amendment.

ARGUMENT

I. OHIO SEVERELY BURDENS THE EXPRESSIVE ASSOCIATION RIGHTS OF THIRD-PARTY MEMBERS BY CATEGORICALLY BARRING THEM FROM SERVING ON THE STATE'S ELECTIONS COMMISSION

The Ohio Elections Commission is a seven-member body charged with adjudicating potential violations of Ohio election law. Ohio Rev. Code § 3517.153. With that adjudicative power come several other investigative and oversight authorities related to Ohio election law, including the power to issue subpoenas and impose fines. Pet. Br. 6. A seat on the Commission is thus an important position of honor and responsibility.

But for many Ohioans, such a position is off limits. Ohio law forbids members of third parties from being

appointed to the Commission. The law assigns six of the seven seats on the Commission to only members of the Democratic and Republican parties, reserving the seventh seat for a member of no party at all. Ohio Rev. Code § 3517.152(A).

There is no possibility of a third-party member ever occupying one of the six seats reserved for Democrats and Republicans. Below, the Sixth Circuit incorrectly held that Ohio's law "does not single out any ideology, viewpoint, or protected class. It instead operates such that whichever parties are the two most represented factions in the Ohio legislature—for now the Republicans and the Democrats, but subject to change should another party achieve greater electoral success—receive three seats each." Pet. App. 16a.

But that is not what the statute says. The statute's only reference to the two largest factions in the Ohio legislature is in laying out the procedure for the *initial* appointments to the Commission upon the establishment of its current incarnation in 1995. As the statute set out, the Commission's first six appointments were chosen by the governor from party-made lists submitted "[n]ot later than forty-five days after August 24, 1995." Ohio Rev. Code § 3517.152(A)(1). Three of those initial six appointments in 1995 came from the party of the speaker of the Ohio House of Representatives, and three came from "the major political party of which the speaker is not a member." *Id.*

Since those six initial appointments in 1995, the six seats have been held by three Republicans and three Democrats serving in staggered terms. When any of those six seats becomes vacant, by term expiration or

for any other reason, the seat must be filled by someone of the same party as "the political party from whose list of persons the member being replaced was appointed." *Id.* § 3517.152(A)(2). Thus, eligibility for a seat is *not* based on the identity of the two largest parties in the Ohio legislature today. Rather, because the Republicans and Democrats were the two largest parties in the Ohio legislature *in 1995*, those two parties are entitled by law to hold the six seats in perpetuity. A Republican member must be replaced by a Republican, whether or not Republicans are currently one of the "top two" Ohio parties. And a Democratic member must be replaced by a Democrat, whether or not Democrats are currently one of the "top two" Ohio parties.

Six of the Commission's seats are therefore reserved for Republicans and Democrats, and the seventh is reserved for an independent who is a member of no party. *Id.* § 3517.152(A)(1). That means Libertarian Party members, Green Party members, and members of all other third parties are legally banned from holding any seat on the Commission.[2]

This Court has long recognized that conditioning public employment on political affiliation "serves to compromise the individual's true beliefs," and violates one of the most significant rights protected by the Constitution, the "freedom to associate with others for the common advancement of political beliefs and ideas."

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[2] There are at least seven other political parties in Ohio besides the Republican and Democratic parties, and they run the ideological gamut from the Constitution Party to the Unity Party to the Communist Party. *See* Vote Smart, "Ohio Political Parties," https://votesmart.org/political-parties/OH#.YS1N8o5KgdU (last accessed Aug. 27, 2021).

Elrod, 427 U.S. at 357. Third-party members seeking a seat on the Commission will "feel a significant obligation to support political positions" needed to hold a such a seat, and "to refrain from acting on the political views they actually hold, in order to progress up the career ladder." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990). While the Ohio Elections Commission should welcome integrity and candor, Ohio law pressures third-party members who seek to become Commission members to hide their true political allegiances from the public, or else to "forgo their calling rather than . . . compromise their commitment to intellectual and political freedom." *Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966).

The "'fixed star in our constitutional constellation'" is that "'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,'" *Elrod*, 427 U.S. at 356 (quoting *Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943)). But Ohio law declares 1995's two largest parties to be the only orthodox ones, treating Ohio's third-party members as so heterodox that they are excluded from the Commission forever. To be sure, governors do, and may, consider political beliefs and affiliations in making appointments; they may neglect the non-major-party members, or they may deliberately reach out to them. But Ohio cannot ban them from office by law.

Worse still, the Ohio scheme strongly deters current or former Commission members from leaving their major political parties and joining a third party, even if they conclude that their views (or the parties' views) have sharply shifted and that they cannot in good conscience remain in the party. Any member

whose conscience dictates a third-party switch would become categorically ineligible for reappointment.[3]

The magnitude of this burden becomes particularly clear when we compare it to other offices—including the most political ones. Governors and legislators who earn the confidence of voters may sometimes retain their seats, or be elected to new offices, even if they leave their party and join a third party. Consider Connecticut Senator Joe Lieberman and Governor Lowell Weicker, who were elected or reelected on third-party tickets.[4] Or delving a little deeper in the history books, California Governor Hiram Johnson was first elected in 1910 as a Republican, but joined Teddy Roosevelt to run for vice president as a Progressive ("Bull Moose") halfway through his term. He lost that national race, but easily won reelection as governor under his new party's banner.[5] But members of the Ohio Elections Commission, however strong a reputation they have developed with the governor, their fellow commissioners, and the public, must forfeit any chance of reappointment if they leave a major party.

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[3] While Ohio law prohibits Commission members from serving two *consecutive* full terms, former Commission members may be reappointed for additional non-consecutive terms. Ohio Rev. Code § 3517.152(E).

[4] *See* Frank James, "Sen. Joe Lieberman Leaves Divided Legacy," NPR (Jan. 19, 2011), https://www.npr.org/sections/itsallpolitics/2011/01/21/133056239/joe-lieberman-its-time-to-turn-page; Nick Ravo, "Renegade's Victory—The Independence of a Maverick Republican: Lowell Palmer Weicker Jr.," *N.Y. Times*, at B9 (Nov. 7, 1990).

[5] *See* "Hiram Johnson," *Encyclopaedia Britannica*, (last updated Aug. 29, 2021), https://www.britannica.com/biography/Hiram-Warren-Johnson.

II. POLITICAL AFFILIATION MAY BE A PERMISSIBLE FACTOR FOR ELECTED OFFICIALS TO CONSIDER IN EVALUATING APPLICANTS, BUT IT CANNOT BE THE BASIS OF A CATEGORICAL LEGAL RESTRICTION

Elrod, *Branti*, and *Rutan* had to do with elected officials' power to choose their subordinates. Those decisions stated that political affiliation is a permissible criterion for some such positions, because those positions call for "political loyalty" or "allegiance to the political party in control of the . . . government." *Elrod*, 427 U.S. at 367; *Rutan*, 497 U.S. at 70. But political loyalty and allegiance are of course not interests furthered by Ohio's law, which mandates a static partisan makeup for the Elections Commission regardless of which party is in power.

This Court's only discussion of anything close to such a mandate appeared in *dicta* in Justice Stevens's *Branti* opinion. There, Justice Stevens assumed, without further analysis, that "if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration" because party membership would be "essential to the discharge of the employee's governmental responsibilities." *Branti*, 445 U.S. at 518.

This rationale was not fleshed out in *Branti* because such a scheme was not before the Court. But even assuming Justice Stevens was right, this observation only goes so far as to justify some partisan balancing requirements, *not* categorical exclusions of third-party members. If indeed Ohio has a compelling interest in maintaining an equal number of Democrats

and Republicans on the Elections Commission, that interest can be achieved while still allowing third-party members to serve in the Commission's seventh seat.

Thus, the interest in partisan balance cannot justify categorical exclusions from office, unwaivable even for the best potential nominees. When the state substantially burdens First Amendment rights, even in systems of government employment, it must use "the least restrictive means for fostering [its] interests." *Rutan*, 497 U.S. at 69. Categorical exclusion is the most restrictive alternative, not the least restrictive.[6]

Examples abound of entities that successfully implement partisan-balancing requirements without imposing categorical bans. Federal agencies with partisan-balance rules—such as the Securities and Exchange Commission, the Federal Election Commission, and the International Trade Commission—fulfill their goal of being non-partisan by requiring only that at most barely-more-than-half the members belong to one party.[7] They do not categorically forbid third-party

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[6] Even in cases involving "sensitive choices by States in an area central to their own governance," laws that burden the First Amendment must be narrowly tailored to a compelling government interest. *Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433, 454 (2015) (citing *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)).

[7] *See* 15 U.S.C. § 78d ("[n]ot more than three of such commissioners [on the SEC] shall be members of the same political party"); 52 U.S.C. § 30106(a)(1) ("[n]o more than 3 members of the [Federal Election] Commission appointed . . . may be affiliated with the same political party"); 19 U.S.C. § 1330(a) ("[n]ot more than three of the commissioners [on the International Trade Commission] shall be members of the same political party, and . . . members of different political parties shall be appointed alternately as nearly as may be practicable").

members from serving. Other politically balanced government commissions likewise only cap the number of members of any one party and do not ban members of third partie.[8] The same is true for the Court of International Trade.[9] And the same is also true for many state commissions across the country. Pet. Br. 16–18. None of these entities substantially burden potential members' First Amendment rights in the way that the rule for Ohio's Elections Commission does.

To be clear, it would not be unconstitutional for an *appointer* to a state's election commission to consider the political party of potential nominees to a tie-breaking seat. In for a penny need not be in for a pound where consideration of politics is involved: elected officials may be *allowed* to exclude prospective nominees based on their politics, but it does not follow that the law may *require* them to impose categorical exclusions.

Religion may be a helpful analogy. In the mid-20th century, the Supreme Court was considered to have an informal "Catholic seat"; "[d]etermined to restore the 'Catholic seat' to the Court, President Dwight Eisenhower nominated William J. Brennan shortly before

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[8] The Commodity Futures Trading Commission (7 U.S.C. § 2 (a)(2)(A)(ii)), the Federal Communications Commission (47 U.S.C. § 154 (b)(5)), the Federal Energy Regulatory Commission (42 U.S.C. § 7171 (b)(1)), the Federal Trade Commission (15 U.S.C. § 41), the Consumer Product Safety Commission (15 U.S.C. § 2053(c)), the National Transportation Safety Board (49 U.S.C. § 1111 (b)), the Nuclear Regulatory Commission (42 U.S.C § 5841 (b)(2)), the Surface Transportation Board (49 U.S.C. § 1301(b)), the Election Assistance Commission (52 U.S.C. § 20923(b)(2)), and the Civil Rights Commission (42 U.S.C. § 1975).

[9] *See* 28 U.S.C. § 251 ("[n]ot more than five of such judges shall be from the same political party").

the 1956 presidential election, immediately after he received confirmation from Brennan's priest that Brennan was a faithful Catholic."[10] There was at times a "Jewish seat" as well.[11] In 2016, Abid Riaz Qureshi became the first Muslim to have been nominated to a federal judgeship; some news accounts praised the appointment in part because of the nominee's religion, though it is unclear if this was a factor that the president had considered.[12] A governor in a place and time in which religion is politically salient to voters might likewise consider religion in choosing nominees.

But it does not follow that a state could divide the seats of a statewide commission into, say, three for the largest religion and two for the second-largest, and categorically exclude the irreligious and members of smaller religions. The same should apply to political affiliation; although not constitutionally identical to religion when it comes to government service, the Court has treated the two characteristics comparably. Indeed, the *Elrod* plurality expressly quoted *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100 (1947), for the proposition that "Congress may not enact a regulation" excluding prospective employees by either party or religion, 427 U.S. at 357 (cleaned up).[13]

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[10] "Catholics and the Supreme Court," in *Encyclopedia of Religious Controversies in the United States* 160, 161 (2d ed. 2013).

[11] *See* Peter Charles Hoffer et al., *The Supreme Court: An Essential History* 343 (2d ed. 2018).

[12] Daniel Victor, Obama Nominates First Muslim to Be a Federal Judge, *N.Y. Times*, Sept. 7, 2016, https://nyti.ms/3zcZPWO.

[13] Of course, we speak here of the constitutional mandate as to government action; when it comes to private action, Congress

Just so here. In the many states where election commissions do not categorically exclude third parties, the appointers might nonetheless choose to take party membership into account. Some appointers might consider independents to be the safest bet for a tie-breaking seat, while others may find the best compromise is to cycle appointments through all minor parties. If the Court eventually invalidates Ohio's third-party ban, then appointers to the Ohio Elections Commission's seventh seat (normally the other six members, or if they deadlock the chief justice of the Ohio Supreme Court, Ohio Rev. Code § 3517.152(A)(2)) might similarly take party into account. But it will no longer be etched into the law that third-party members are categorically disqualified from even being considered.

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has chosen not to ban political-affiliation discrimination, even where it has banned religious discrimination.

CONCLUSION

Ohio's complete exclusion of members of third parties from its Elections Commission violates the First Amendment. American traditions and political realities allow elected officials to consider applicants' politics in deciding whom to nominate, but the law cannot make political membership in certain parties a categorical disqualification. The Court should grant the petition and reverse the Sixth Circuit.

Respectfully submitted,

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