No. 21-226

In the Supreme Court of the United States

LIBERTARIAN PARTY OF OHIO AND HAROLD THOMAS,

Petitioners,

v.

DON MICHAEL CRITES, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the First Amendment prohibit the States from using partisan affiliation to determine eligibility for service on a public elections commission?

LIST OF PARTIES

The petitioners' list of parties is complete and correct.

LIST OF DIRECTLY RELATED PROCEEDINGS

The petitioners' list of related proceedings is complete and correct.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Constitutional Provisions

Other Authorities

INTRODUCTION

The Libertarian Party of Ohio and its member, Harold Thomas, filed this suit. They hoped to win a ruling making members of the Libertarian Party eligible to serve on the Ohio Elections Commission. They now have what they wanted. As they note, the Commission is composed of seven members. Three come from the majority party in the State's General Assembly; three come from the minority party; a seventh must be affiliated with no party at all. Thomas and the Libertarian Party object that this excludes members of the Libertarian Party from serving. That was once true. It no longer is: as of January 15, 2021, the Libertarian Party of Ohio is not a recognized party in Ohio. *See* Ohio Sec'y of St. Advisory 2021-01, at 2 (Jan. 15, 2021). As a result, Thomas and other members of the Libertarian Party of Ohio *are* eligible to serve on the Commission—they can serve in the seventh seat. Because the petitioners now have the eligibility they sued to obtain, the case is moot. This Court therefore lacks jurisdiction to resolve it. *Hall v. Beals,* 396 U.S. 45, 48 (1969) (*per curiam*).

Even if mootness were not an issue, a different jurisdictional problem has stalked this case from the outset: Thomas and the Libertarian Party lack Article III standing to sue. The record in this case reveals just one member of the Libertarian Party who ever expressed an interest in serving on the Commission. That member is Harold Thomas, one of the two plaintiffs. But at the time the Libertarian Party and Thomas filed their complaint, Thomas was prohibited from serving on the Ohio Elections Commission by a provision the petitioners never challenged. Because he was ineligible to serve, and because the

Libertarian Party introduced no evidence of any other party member who would consider serving, neither plaintiff sustained any injury from the eligibility laws they seek to challenge. Because the plaintiffs failed to prove that the challenged laws injured them, they failed to prove that they have standing to sue. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018).

On top of the jurisdictional problems, the petition suffers from numerous merits-based issues. For one thing, the petition rests on a misreading of state law. For another, it claims a circuit split yet identifies no circuit in which this case would have come out differently. As that suggests, the Sixth Circuit correctly rejected the petitioners' merits arguments.

At bottom, the petitioners seek error correction in a case that does not implicate any error, and that the federal courts lack jurisdiction to resolve regardless. The Court should deny the petition for a writ of *certiorari*.

STATEMENT

1. The Ohio Elections Commission is responsible for investigating and holding hearings on alleged violations of Ohio's campaign-finance laws. *See* Ohio Rev. Code §3517.153. The Commission may also "recommend legislation and render advisory opinions" concerning various sections of the Ohio Revised Code. §3517.153(D).

The Commission "is an independent agency consisting of seven members." *Project Veritas v. Ohio Election Comm'n*, 418 F. Supp. 3d 232, 236–37 (S.D. Ohio 2019). "Three members are appointed from each of the two major political parties and the sev-

enth is an unaffiliated elector appointed by the other six members." *Id.* at 237.

The appointment process can be thought of as consisting of three steps. *First*, "the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member … jointly submit to the governor a list of five persons who are affiliated with that political party." Ohio Rev. Code §3517.152(A)(1). The Governor then appoints three of the names submitted. *Id.* *Second*, "the two legislative leaders in the two houses of the general assembly of the major political party of which the speaker is not a member … jointly submit to the governor a list of five persons who are affiliated with" their party. *Id.* The Governor then appoints three of the people on that list. *Id.* *Finally*, the seventh member, "who shall not be affiliated with a political party," is chosen by a majority vote of the other commissioners. *Id.* This brief refers to these three eligibility requirements as Ohio's "party-affiliation requirements."

The six partisan seats are not restricted to specific parties. That is, three members will be selected from *any* party that wins enough seats in the legislature to qualify as one of the State's two major parties. *Id.* The only parties to win enough seats to date have been the Republican and Democratic parties. But "if a minor party builds its base and become[s] one of the two major parties in the state, it would secure an avenue for its members to serve on the Elections Commission." Pet.App.4a (quotation marks omitted).

The Commission has always read the party-affiliation requirements to operate in this manner.

In other words, it has always maintained that the Republican and Democratic parties would lose the ability to fill the party-affiliated seats on the Commission if they failed to qualify as one of the two major parties in the General Assembly. In the courts below, all parties and judges read the statute to leave the door open for new parties to gain control over the party-affiliated seats currently reserved for Republicans and Democrats. As a result, the state-law question whether that is what the law means is no longer at issue.

2. A few months before Ohio's 2018 gubernatorial election, the Libertarian Party of Ohio and Harold Thomas—at the time, the chair of the Party's Executive Committee, Hear'g Tr., R.48, PageID#651—filed formal complaints with the Elections Commission. Pet.App.20a. (This brief will sometimes refer to the plaintiffs collectively as the "Libertarian Party.") The complaints accused "three organization[s] responsible for facilitating [gubernatorial] debates throughout Ohio in 2018" of making illegal campaign contributions to the Democratic and Republican parties. *Id.* More precisely, the complaint alleged "that these organizations" violated campaign-contribution laws "by staging an exclusive debate between the Democratic and Republican [gubernatorial] candidates" without notifying or inviting the Libertarian candidate or "employing objective criteria in selecting debate participants." *Id.* The Commission considered the complaints, "held a hearing, and issued a decision after listening to forty-five minutes of legal arguments from both sides." Order, R.29, PageID#459. Ultimately, "the Commission dismissed" the complaints, "finding no violation had occurred." Pet.App.20a.

At that point, the Libertarian Party sued all of the Commission's members in their official capacities. The complaint contained three counts. *First*, the Libertarian Party argued that Ohio violates the First Amendment by restricting membership on Ohio's Elections Commission based on party membership. *Second*, the Party alleged that the Commission violated the First Amendment by failing to prosecute the alleged campaign-finance violations because of its "animus favoring the Democratic and Republican Parties in Ohio." *Finally*, the Libertarian Party alleged that this lack of impartiality in prosecutorial decisions violated the Fourteenth Amendment's Equal Protection Clause. Compl., R.1, PageID#48–52.

The Commission moved to dismiss. The District Court granted in part and denied in part. It denied the motion as to count one, meaning the challenge to the party-affiliation requirements would go forward. Op., R.29, PageID#465. But the court dismissed the second and third claims, reasoning that the Libertarian Party lacked standing to challenge the non-prosecution decisions. *Id.* at PageID#461.

Following discovery, the Commission moved for summary judgment on the remaining claim—the one challenging the party-affiliation requirements under the First Amendment. The District Court granted the motion. It first determined that the Commission's bipartisan structuring "imposes only a reasonable, nondiscriminatory restriction upon the First Amendment rights of minority political parties seeking membership on Ohio's Elections Commission." Pet.App.32a. The court viewed the party-affiliation requirements as "nondiscriminatory," as they do not

"limit political participation by an identifiable political group." Pet.App.30a. Instead, they "limit[] service" on the Commission "to affiliates of the two major political parties in the state of Ohio, without reference to a specific party." *Id.* So, while "the statute currently prohibits any person affiliated with a minor political party … from being considered for membership on the Commission, the statute does not foreclose the opportunity for a minor political party to build its base and become one of the two major parties in the state, which would in turn provide an avenue for its members to serve" on the Commission. *Id.*

The District Court then looked to Ohio's interest in a politically balanced Commission. The Libertarian Party had *conceded* that "political balance on [the] Elections Commission protects the fairness of the deliberative process and that judicial and policy-making decisions are well rounded and diversified." Pet.App.31a. The court further observed that "requiring bipartisanship on an Elections Commission is universally regarded as an effective means of preventing fraud and ensuring honest elections." Pet.App.32a. Thus, the party-affiliation requirements were appropriate "for the effective performance of the public office involved." Pet.App.35a. As a result, the Libertarian Party's challenge failed.

3. The Libertarian Party timely appealed the District Court's judgment. The Sixth Circuit, after concluding that the plaintiffs had standing to sue, affirmed. The circuit explained that the case had to be assessed under the unconstitutional-conditions doctrine—that doctrine, it said, was the only one that any party asked it to apply. Pet.App.8a–9a. Under

the unconstitutional-conditions doctrine, party-affiliation requirements pass muster when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Pet.App.10a (quoting *Branti v. Finkel*, 445 U.S. 507, 518 (1980)). The affiliation requirements here satisfied that standard: ensuring partisan balance on a commission that oversees elections is "appropriate." And staffing the Commission with three members of one major party, three from the other, and one member unaffiliated with any party ensured partisan balance. Pet.App.15a–16a.

The Sixth Circuit denied *en banc* review after no judge requested a vote. Pet.App.38a.

REASONS FOR DENYING THE PETITION

I. The Court lacks jurisdiction to resolve this case.

Neither plaintiff had standing to bring this suit. And even if one did, the case is now moot. As a result, the Court lacks jurisdiction to decide this case.

A. No plaintiff in this case had Article III standing when they filed their complaint.

1. Article III permits courts to hear only "cases" and "controversies." *See* U.S. Const. art. III, §2. A "case" or "controversy" requires a plaintiff with standing to sue. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Because a plaintiff with standing is a prerequisite for the exercise of judicial power, it is a "jurisdictional requirement" that "cannot be waived or forfeited." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019).

To establish Article III standing, a plaintiff must demonstrate: (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury is "fairly traceable" to the challenged conduct or provision; and (3) that the injury would likely be redressed by the requested judicial relief. *California v. Texas*, 141 S. Ct. 2104, 2113 (2021); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

"Foremost among these requirements is injury in fact." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). To qualify, an injury must be "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). Three rules relevant to this case govern the injury-in-fact inquiry. *First*, the alleged injury may not be an "undifferentiated, generalized grievance about the conduct of government." *Lance v. Coffman,* 549 U.S. 437, 442 (2007) (*per curiam*). For example, a citizen's "abstract interest in policies adopted by the legislature" does not confer standing. *Gill*, 138 S. Ct. at 1931. *Second*, an injury must be concrete in a "temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). A plaintiff cannot satisfy Article III by pointing to "hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *accord Whitmore*, 495 U.S. at 158. Thus, courts must not "endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414. *Finally*, standing is assessed "at the time the complaint is filed." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quotation omitted); *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 830 (1989).

Post-complaint events do not "retroactively" create Article III jurisdiction "that did not exist at the outset." *Lujan*, 504 U.S. at 569 n.4 (plurality op.).

2. Applying these principles, the plaintiffs lack Article III standing to challenge Ohio's party-affiliation requirements. The federal courts, including this one, thus lack jurisdiction to decide this case.

The Libertarian Party and Harold Thomas challenged Ohio's party-affiliation requirements. To win, they had to carry their burden of proving, with evidence, that the challenged laws injured them. *Gill*, 138 S. Ct. at 1934; *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016). They failed to do so; there is no sufficient evidence any Libertarian Party member, including Harold Thomas, was unable to serve *because of* the party-affiliation requirements.

Start with Harold Thomas. For two distinct reasons, he failed to show that the party-affiliation requirements injured him.

First, because he did not adequately show that he wanted to serve on the Commission, he failed to establish that the party-affiliation requirements kept him from serving. To be sure, Thomas submitted a declaration stating that he would like to be on the Ohio Elections Commission. Thomas Decl., R.44-1, PageID#608. But, as this Court recently held in a challenge to a similar party-affiliation requirement, "a bare statement of intent alone against the context of a record that shows nothing more than an abstract generalized grievance" is not enough to confer Article III standing. *Carney v. Adams*, 141 S. Ct. 493, 502 (2020). Here, all that Thomas's declaration contains is a bare statement of intent to serve. Thomas can-

not show that, "at the time he commenced the lawsuit," he was "able and ready to apply for a [Commission seat] in the reasonably foreseeable future." *Id.* at 501 (quotation marks omitted). What is more, and as was true of the plaintiff in *Carney*, Thomas's statement of intent "stand[s] alone without any actual past injury, without reference to an anticipated timeframe, without prior … applications, without prior relevant conversations, without efforts to determine likely openings, without other preparations or investigations, and without any other supporting evidence." *Id.* That "suggests" Thomas is suing to redress "an abstract, generalized grievance." *Id.* In other words, there is no evidence differentiating Thomas from the "general population of individuals" opposed to "the legal provision he attacks." *Id.* at 502. Abstract, generalized grievances do not constitute injuries in fact.

Second, and more fundamentally, the party-affiliation requirements could not have injured Thomas because he was ineligible to serve on the Commission *without regard* to those requirements. In other words, any injury Thomas suffered was not fairly traceable to the party-affiliation requirements. The reason is that Ohio law bans any "officer of the executive committee … of a political party" from serving on the Commission. Ohio Rev. Code §3517.152(F)(1)(c). The Libertarian Party was a recognized party at the time the complaint in this case was filed; it did not cease to be a recognized party until 2021. *See* Ohio Sec'y of St. Advisory 2021-01, at 2 (Jan. 15, 2021). But at the time he filed the complaint, Thomas was the chair of the Libertarian Party's Executive Committee. Hear'g Tr., R.48, PageID#651. That made him an "officer of the executive

committee … of a political party" and thus ineligible to serve on the Commission without regard to the party-affiliation requirements. It follows that the party-affiliation requirements did not injure Thomas. Thus, Thomas lacks Article III standing to sue.

Thomas is comparable to some of the plaintiffs in *Harris v. McRae* who, because they were not "eligible to receive Medicaid," lacked standing to challenge a limit on Medicaid coverage. 448 U.S. 297, 320 (1980). Thomas, just like these plaintiffs, was not injured by the party-affiliation requirements because he would have been in precisely the same position—unable to serve on the Commission—even if those requirements did not exist

The Libertarian Party's case for standing is even weaker than Thomas's. Aside from Thomas's declaration, the party introduced no evidence of *any* member willing and qualified (but for the party-affiliation requirements) to serve on the Commission. Thus, while political parties sometimes have standing to assert the interests of their members, *see, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (op. of Stevens, J.), the Party failed to prove that the party-affiliation requirements injured any of its members in any way. When an organization claims standing on behalf of its members, it must identify at least one member who "suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009); *see, e.g.*, *Ouachita Watch League v. United States Forest Serv.*, 858 F.3d 539, 544 (8th Cir. 2017); *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 244 (D.C. Cir. 2015). The Party has not done that.

3. The Sixth Circuit wrongly held that the plaintiffs had standing to sue. Its holding rested primarily on a recognition that neither Thomas nor a Libertarian Party member needed to file an actual application in order to have standing. Pet.App.7a. The legal principle is correct: as long as parties show that they are prohibited from serving in a role they want, they need not file a futile application before challenging the qualifications. *See Carney*, 141 S. Ct. at 503. That, however, has nothing to do with the standing problem in this case. Thomas lacks standing because he failed to establish any concrete interest in serving and because he was ineligible to serve without regard to the party-affiliation requirements. And the Libertarian Party lacks standing to sue because it did not identify any other member interested and eligible (but for the party-affiliation requirements) in serving. Those points defeat the petitioners' claim to standing *without regard* to whether either petitioner submitted a futile application to serve.

The Sixth Circuit offered one more reason for concluding that Thomas had standing. It began by acknowledging that Thomas, at the time he filed his complaint, was ineligible to serve on the Commission because of his role as the chair of a political party's executive committee. Pet.App.7a–8a. But it reasoned that Thomas would have been free to resign the chair position had he been selected. Pet.App.8a. Therefore, the court held, he was injured by the party-affiliation requirements.

The trouble with this reasoning is that there is no evidence suggesting that Thomas was willing to resign his position at the time he filed his complaint.

While Thomas later resigned, *see* Mot. to Supp. Record on Appeal, Doc.32–1, at 1–2 (Aug. 13, 2020), he introduced no evidence in the trial court suggesting a willingness to do so earlier. Because standing must be established "at the time the complaint is filed." *Already, LLC*, 568 U.S. at 90 (quotation omitted), and because there is no evidence Thomas would have resigned at that time, Thomas failed to prove that he would have been eligible for a spot on the Commission but for the party-affiliation requirements.

B. This case is now moot.

Even if the plaintiffs had standing to sue, the case is moot because Ohio law now permits Thomas and other members of the Libertarian Party to serve on the Commission.

1. "Although rulings on standing often turn on a plaintiff's stake in initially filing suit, Article III demands that an actual controversy persist throughout all stages of litigation." *Bethune-Hill*, 139 S. Ct. at 1950–51 (quotation omitted). "A case that becomes moot at any point during the proceedings is no longer a 'Case' or 'Controversy' for purposes of Article III, and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (internal quotation marks omitted).

A case is "moot" only when "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160 (2016) (quoting *Knox v. Serv. Emps.*, 567 U.S. 298, 307 (2012)). The party asserting mootness—here, the Commission—bears the burden of proving that it is no longer possible to grant relief with any real-world consequence.

Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 222 (2000). But if the moving party carries that burden, the court lacks jurisdiction to decide the matter.

2. This case is now moot because the party-affiliation requirements no longer preclude Thomas or any other member of the Libertarian Party from serving on the Commission. Remember, the party-affiliation requirements create a Commission of seven members: three affiliated with each of the two major parties in the General Assembly, and one affiliated with no party at all. Ohio Rev. Code §3517.152(A)(1). Today, Thomas and all other members of the Libertarian Party are eligible to fill this seventh seat. The reason is that, as far as Ohio is concerned, the Libertarian Party of Ohio is not a party, for statutory purposes, at all. Because Libertarian Party candidates performed so poorly in the November 2020 elections, the Libertarian Party of Ohio "lost recognized minor political party status" after the November 2020 election. Ohio Sec'y of St. Advisory 2021-01, at 2 (Jan. 15, 2021); *see also* Ohio Rev. Code §3501.01(F); §3517.01(A)(1). As a result, its members are not "affiliated with a political party," and may serve on the Commission in the seventh seat. Ohio Rev. Code §3517.152(A)(1).

Because Thomas and the Libertarian Party's members are now eligible to serve on the Commission without regard to the party-affiliation requirements, it is no longer possible "to grant" them "any effectual relief whatever." *Campbell-Ewald*, 577 U.S. at 160 (quoting *Knox*, 567 U.S. at 307). After all, the party-affiliation requirements no longer injure Thomas or the Libertarian Party's members, and so an order enjoining the requirements or declar-

ing them unconstitutional will do the parties no concrete good. This Court has held that a claim for injunctive relief is moot when the legal landscape shifts such that the plaintiff is now eligible to do whatever he was prohibited from doing by the law he sued to enjoin. *See, e.g.*, *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020) (eligibility for air travel); *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) (*per curiam*) (eligibility to transport firearm). Harold Thomas and the thousands of other members of the Libertarian Party of Ohio are now free to serve on the Ohio Elections Commission, the party-affiliation requirements notwithstanding. There is nothing left to litigate—the petitioners have what they wanted.

II. Even if the Court has jurisdiction to hear the case, it should decline to do so.

If the Court determines it has jurisdiction to hear this case, it should nonetheless deny the petition for a writ of *certiorari*. The petitioners ask this Court to decide whether "a state violates the First Amendment by barring members of small political parties from holding a public office." Pet.i. Even if that question were worthy of this Court's time, this would be a poor vehicle for answering it. The petition is predicated on a misreading of Ohio law and a First Amendment theory that the petitioners never advanced below; the case does not implicate a circuit split; and the Sixth Circuit correctly upheld Ohio's law. At bottom, the Libertarian Party's petition seeks pure error correction in a case involving no error on the merits.

A. This is a poor vehicle for addressing the Libertarian Party's arguments.

The Libertarian Party argues that Ohio law *forever* bars any member of a party other than the Republican or Democratic Party from serving on the Ohio Elections Commission. And it says any such law "is unconstitutional full stop, without regard to the strength of the government's asserted interests." Pet.13. The Libertarian Party, however, did not advance that reading of state law or that legal theory before the Sixth Circuit. Because this is a "court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005), it should not consider a petition that rests so heavily on arguments that the lower courts had no chance to consider.

1. The party-affiliation requirements envision a Commission consisting of seven members. Three must be members of the same party as the speaker of Ohio's House of Representatives. Three must be from the major party of which the speaker is *not* a member. And one must be affiliated with no party at all. Ohio Rev. Code §3517.152(A)(1). To date, the speaker has always been a member of either the Republican or Democratic party. And to date, the major party of which the speaker *is not* a member has always been the Republican or Democratic party. But that can change. And if it does, so too will the composition of the Commission. As the State explained to the Sixth Circuit: "a political party, upon losing its major-party status, loses to the *new* major party its ability to nominate members to fill" the party-affiliated seats. Appellee Br., Doc.22 at 6.

In the proceedings below, the Libertarian Party accepted this reading. *See, e.g.,* Appellants' Reply Br., Doc.23, at 30–31. Accordingly, both the District Court and the Sixth Circuit accepted this understanding of the party-affiliation requirements. *See, e.g.*, Pet.App.4a, 30a. Now, however, the Libertarian Party changes course. It argues that, in fact, the party affiliations of the six party-affiliated seats are set in stone. In other words, it claims that Ohio law requires the Republican and Democratic parties to receive three seats each, *regardless* of whether either ceases to be a major party. Pet.6; *accord* Am. Br. of Cato Institute, at 4. Under this reading, members of parties that are minor parties today will never be eligible to serve, regardless of how prominent those parties become.

It is unclear whether this late-raised interpretation has any *practical* relevance; if the law meant what the Libertarian Party says it means, and if a minor party were to become a major party, the law would presumably be amended to account for that. Nonetheless, this dispute about the meaning of state law may well have *legal* relevance. After all, it is at least conceivable that the First Amendment analysis might come out differently depending on whether Ohio law: (1) guarantees partisan balance between the two major parties, whatever they happen to be; or (2) guarantees three seats for Republicans and three seats for Democrats, regardless of whether those parties retain their major-party status.

The Libertarian Party's decision to introduce this dispute militates against granting *certiorari*. If the question *might* bear on the law's legality, then the Court *must* resolve the question of what the law

means before deciding whether the law is constitutional. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 78–79 (1997). Federal courts, however, have no power to definitively interpret Ohio law—only the Supreme Court of Ohio can do that. That makes this case a poor vehicle for reviewing the question presented. This Court has long recognized the need to avoid the "friction-generating error" that can arise when it interprets "a novel state Act not yet reviewed by the State's highest court." *Id.* at 79. Such a "sensitive issue" of Ohio law is not the kind of open question that this Court should consider on its own without the Ohio Supreme Court's input. *Cf. Carney*, 141 S. Ct. at 503 (Sotomayor, J., concurring); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1897 (2018) (Sotomayor, J., dissenting). Even if the Court wishes to address the question presented, it should do so in a case where no one disputes the meaning of the statute under review.

2. In addition to urging a new reading of state law, the petitioners advance an altogether new argument. The petition criticizes the Sixth Circuit as "mistakenly" looking to this Court's "political patronage cases," including *Branti v. Finkel*, 445 U.S. 507 (1980). Pet.15. According to the Libertarian Party, this Court should instead hold that any law prohibiting minor-party members from filling a government job is *per se* unconstitutional. Pet.15. But the Libertarian Party below sought relief under the patronage precedents it now says are irrelevant. It specifically asked the Sixth Circuit to decide whether the party-affiliation requirements "violated" the First Amendment "under [this Court's] patronage precedents." *See* Appellants' Br., Doc.20 at 1; *see also, e.g.*, *id.* at 33–38, 47.

This Court typically refuses to consider arguments that the party "did not raise" in the lower court and that the lower court "did not address." *United States v. Jones*, 565 U.S. 400, 413 (2012). Such arguments are "forfeited." *See id.* Applying that principle here, the late-raised theory on which the Libertarian Party relies is forfeited.

B. The petition identifies no circuit in which this case would have come out differently.

The Libertarian Party argues that this case implicates a circuit split and is therefore worthy of the Court's attention. Specifically, the Party says this case would have come out differently in the First, Third, and Seventh Circuits. That is not true—at least, it is not clearly true. The Court should therefore let the matter percolate in the courts of appeals.

Start with the Third Circuit's vacated decision in *Adams v. Governor of Delaware*, 922 F.3d 166 (3d Cir. 2019), *vacated sub nom. Carney v. Adams*, 141 S. Ct. 493 (2020). In that case, the Third Circuit held unconstitutional a law that imposed party-affiliation requirements on judges. But the ruling does not conflict with the Sixth Circuit's ruling below. For one thing, this Court vacated the Third Circuit's opinion in *Carney*, meaning the decision is no longer binding and thus incapable of creating a circuit split. More importantly, the Third Circuit expressly cabined its reasoning to party-affiliation requirements *for judges*. It recognized that concerns regarding "political balance and minority representation" *may* justify party-affiliation requirements on multi-member commissions. *See Adams*, 922 F.3d at 182. It determined, however, that this "logic" had no bearing on

party-affiliation requirements in their application to members of the "*judiciary*, most of whom sit alone." *Id.* (emphasis added). Whatever one makes of this argument, it provides no reason to suspect that the Third Circuit would have resolved *this case*, which does not involve party-affiliation requirements in their application to judges, differently than the Sixth Circuit.

Next, consider the Seventh Circuit's decision in *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, 800 F.3d 913 (7th Cir. 2015). That case, like the Third Circuit's decision in *Carney*, addressed party-affiliation rules in their application to judges. The laws in question governed ballot access. Through a complicated series of rules, the laws all but assured that each major party would nominate candidates to fill exactly half of the open seats on the Marion County Superior Court in Indiana, while minor-party candidates would fill none. *Id.* at 915–16. The Seventh Circuit enjoined the law. But its ruling did not rest on *the candidates*' rights to be considered for government employment. Instead, the Court held that the law effectively stripped voters of *their right* to vote: by effectively guaranteeing that the sixteen Republican nominees would fill half the seats and that the sixteen Democratic nominees would fill the other half, the law "render[ed] any vote meaningless." *Id.* at 918.

This logic sheds no light on how the Seventh Circuit would assess Ohio's party-affiliation requirements. Because the Commission is not elected, Ohio's requirements do not implicate the right to vote. In any event, *Common Cause* recognized a "crucial difference" between the law before it and

laws that "speak to an interest in protecting minority party representation in the context of multi-member or legislative bodies." *Id.* at 922–23. Thus, much like the Third Circuit, the Seventh Circuit expressly declined to address questions about how its ruling might apply to bodies like the Commission. The more-relevant Seventh Circuit decision actually accords with the Sixth Circuit's decision in this case. The Seventh Circuit, more than three decades ago, held that "political beliefs may be the basis for the appointment of a judge." *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988) (per Easterbrook, J.). If that is true of judges, it is presumably true of members on multi-member commissions, too. So all signs suggest that the Seventh and Sixth Circuits would resolve this case the same way.

That leaves only the First Circuit. The Libertarian Party claims a split between the Sixth Circuit decision below and the First Circuit's decision in *Werme v. Merrill*, 84 F.3d 479 (1st Cir. 1996). The claim is curious, since the First Circuit *upheld* a New Hampshire law that required election inspectors to be chosen from the two most popular political parties. *Id.* at 485. *Werme* held that the law placed only a "slight" burden on libertarians' rights to associate. *Id.* at 484. More precisely, it determined that, because there is no "abstract right" to serve as an election inspector, and because New Hampshire Libertarians faced no direct obstacles to ballot access as candidates or voters, the law passed constitutional muster. *Id.* The same logic would support upholding Ohio's party-affiliation requirements: there is no abstract right to serve on the Ohio Elections Commission, and Libertarian Party members face no direct obstacles to ballot access as candidates or voters.

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In sum, the Libertarian Party cannot identify even one circuit in which Ohio's party-affiliation requirements would be held unconstitutional. As a result, this case does not implicate any circuit split.

Even if the case presented a split, however, it would be wise to let the issue percolate in the lower courts a bit longer. The answer to the question presented will be of immense importance to States around the country. And it arises in the context of cases governing the First Amendment's relevance to government employment—an area where this Court's decisions notoriously withhold clear guidance. *See, e.g.*, Mark Strasser, *Pickering, Garcetti, & Academic Freedom*, 83 Brook. L. Rev. 579, 580 (2018) (calling the employee-speech cases "increasingly muddled"). Given the difficulty that novel First Amendment questions so often present, *see, e.g.*, *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 141 S. Ct. 2038 (2021), the Court would likely benefit even more than usual from letting this question percolate longer in the lower courts.

C. The partisan-balance requirement is not an unconstitutional condition.

Two other related considerations militate against review. *First*, the Sixth Circuit correctly upheld Ohio's party-affiliation requirements, meaning the petition seeks error correction in a case involving neither an error nor a circuit split. *Second*, a holding to the contrary would upend innumerable laws. The Libertarian Party attempts to elide that consequence only by proposing an unprincipled limit on the ques-

tion presented—a limit that, because it is unprincipled, could not possibly hold.

1. Patronage—the practice of linking government jobs to political affiliation—was "entrenched in American history for almost two hundred years." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 83 (1990) (Stevens, J., concurring) (internal quotation marks omitted). "For most of that period it was assumed, without serious question or debate, that since a public employee has no constitutional right to his job, there can be no valid constitutional objection to his" being fired or never hired in the first place. *Id.* (quotation omitted). One well-known judge, in an opinion rejecting a police officer's suit over a politically-motivated firing, correctly stated the original understanding of the First Amendment's relevance to this context: a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor, etc., of New Bedford*, 155 Mass. 216, 220 (1892) (per Holmes, J.). In sum, if the First Amendment were given its original meaning, it would permit public employees to be hired or fired, demoted or promoted, based on their political affiliations. *Rutan*, 497 U.S. at 94 (Scalia, J., dissenting).

That is no longer the law. Beginning in the 1970s, the Court began applying "the principles of the unconstitutional conditions cases to public employees dismissed" or otherwise discriminated against "on account of their political association." *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 717 (1996). The unconstitutional-conditions doctrine "forbids burdening the Constitution's enumerated rights by coercively withholding benefits

from those who exercise them." *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013). Thus, the States (and state officers) will, in *some* circumstances, be held to violate the First Amendment if they restrict public employment based on political affiliation.

But the qualifier "in some circumstances" is critical. The Court has recognized that, for some jobs, public employers can permissibly make personnel decisions based on the employee's political affiliation. These jobs are often referred to as "policymaking or confidential" positions. *Branti*, 445 U.S. at 518. The label, however, is something of a distraction: "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* If party affiliation is an appropriate requirement, the First Amendment permits the employee to be hired or fired, or promoted or demoted, based on party affiliation. *Id.*

This Court has said that political balance is an appropriate reason to use political affiliation as a job requirement. State law, the Court said, might validly "require that [voting] precincts be supervised by two election judges of different parties." *Id.* As a result, *Branti* explained, it would be "obvious[ly]" constitutional to dismiss an election judge who changes parties, as "party membership" would be "essential to the discharge of the employee's governmental responsibilities." *Id.*

Branti accords with this Court's other cases. For example, the Court has affirmed lower-court deci-

sions rejecting First Amendment challenges to statutes requiring a minimum partisan balance. *See LoFrisco v. Schaffer*, 409 U.S. 972 (1972), *aff'g*, 341 F. Supp. 743, 744–45, 750 (D. Conn.); *Hechinger v. Martin*, 429 U.S. 1030 (1977), *aff'g*, 411 F. Supp. 650, 653 (D.D.C. 1976). The Court has also said that States may pursue some partisan balance when drawing legislative districts. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1303 (2016); *Gaffney v. Cummings*, 412 U.S. 735, 738, 754 (1973).

Beyond the case law, permitting States to account for affiliation, and the ways in which it bears on the administration of state government, accords with our federalist design. Our Constitution leaves States with great leeway regarding how best to structure and fill their governments. It is, after all, "[t]hrough the structure of its government, and the character of those who exercise government authority," that "a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,* 576 U.S. 787, 814 (2015). By allowing States to acknowledge the reality that the partisan balance of government entities can affect the actual and perceived fairness of government action, the Court leaves the States with leeway to determine how best to serve the public.

2. From all this, it follows that Ohio's party-affiliation requirements are constitutional.

Begin with first principles. Courts "should resolve questions about the scope of … precedents in light of and in the direction of the constitutional text and constitutional history." *See Free Enter. Fund v.*

Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 698 (2008) (Kavanaugh, J., dissenting); *see, also e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2021 (2020). Since party-affiliation requirements are constitutional under the First Amendment as originally understood, this principle favors affirming the judgment below to the extent no case compels the opposite conclusion.

No case compels the opposite conclusion. To the contrary, the party-affiliation requirements pass constitutional muster under settled doctrine. The unconstitutional-conditions analysis here turns on whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. Here, party-affiliation requirements are appropriate. They "protect[] the fairness of the deliberative process"; and they ensure that decisions "are well-rounded and diversified," because they ensure "political balance" between the two major parties (whatever those parties happen to be). Pet.App.31a. Recall the Ohio Elections Commission's duties: it investigates certain election-law complaints, recommends legislation, and issues advisory opinions that members of the public may rely on when deciding what they may legally do. The party-affiliation requirements are appropriate as to the Commission's legislation-proposing role because legislation is most likely to be passed and deemed fair if it is truly bipartisan, and it is more likely to be truly bipartisan if it comes from a perfectly bipartisan commission. The need for bipartisan participation is equally "obvious" when it comes to investigating complaints and issuing advisory opinions. For the very same reasons that "a State's election laws" may "require that precincts be super-

vised by two election judges of different parties," *Branti*, 445 U.S. at 518, States may require bipartisan oversight and enforcement of their campaign-finance laws: equal oversight increases the odds of actual and apparent fairness.

One might respond by asking: Why keep minor-party members from serving on the Commission, either in one of the six governor-appointed seats or in the seventh, unaffiliated seat? There are two reasons. *First*, allowing minor-party members to serve would eliminate the balance between the major parties. Minor parties tend to caucus, or align more closely, with one of the two major parties. Thus, allowing minor-party members to serve would risk watering down the Commission's actual and apparent bipartisanship. Especially since nearly all potentially election-changing actions by the Commission are likely to favor one major party's candidate over another major party's candidate, it is most important to maintain actual or apparent evenhandedness as to the major parties. Just as state law may require each precinct to have a perfectly bipartisan balance of election judges, so too may it require the commission that oversees campaign-finance law to have a perfectly bipartisan balance of election commissioners. *Branti,* 445 U.S. at 518.

Second, limiting participation to the major parties and to one person aligned with no party is "appropriate" because allowing participation by minor-party members would not serve the Commission's interests. Minor-party members would, by virtue of having limited or no representation in the General Assembly, have little to offer in terms of legislation. Indeed, they might be counterproductive, as they

would most likely be seen as being more closely aligned with one party. But more fundamentally, there is no need to include minor-party members to assure fair treatment of minor-party candidates. The reason is that minor parties tend not to compete with both major parties equally—some pull more Republican-leaning voters, and some attract more Democratic-leaning voters. *See* David Kirby & David Boaz, *The Libertarian Vote in the Age of Obama,* CATO Inst. 9 tbls.3 & 4 (Jan. 21, 2010), https://perma.cc/B3PS-8BWT; Gerald M. Pomper, *The 2000 Presidential Election: Why Gore Lost*, 116 Political Science Quarterly, 201 n.4 (2001) (noting exit polls reporting Nader voter's hypothetical preference for Gore), https://perma.cc/BG29-7283; *contra* Am. Br. of Cato Institute at 8–9. Thus, favoring or disfavoring a minor party entails favoring or disfavoring a *major* party. By achieving balance among the major parties, the Commission is set up to treat *all* parties fairly.

Other boards and commissions aim for partisan balance by excluding any member not associated with one of the two most successful parties in the jurisdiction. The Tennessee Election Commission, for example, is composed of four members of the majority party and three members of the minority party, but no members of any minor party. *See* Tenn. Code §2-11-103(a). Maryland structures its Board of Elections the same way. *See* Maryland Code Elec. Law §§2-101(2); 1-101(dd), (jj), (kk). In Kentucky, the Board is balanced four members each from the top two vote-getting parties. *See* Ky. Rev. Stat. §11.015(2), (5), (6). Ohio's local boards of election have a similar structure, with two slots each for the

top two parties. *See* Ohio Rev. Code §3501.06(B)(1), (2).

Perhaps the States with such requirements could have achieved their ends through a different arrangement. That, however, is irrelevant; the "ultimate inquiry … is whether" party affiliation "is an appropriate requirement," not whether it is a narrowly tailored requirement. *Branti*, 445 U.S. at 519. Here, the party-affiliation requirements are appropriate. As explained above, the Commission is structured so as to balance power, thereby giving the Commission both actual and apparent political independence and bipartisanship. Just as a State might assure fair elections by "requir[ing] that precincts be supervised by two election judges of different parties," *id.* at 518, Ohio assures fair oversight of all the matters within the Commission's portfolio by making sure those matters are supervised by three officials of different parties and one from neither party.

3. The Libertarian Party's merits argument sounds a single note—that Ohio can no more exclude Libertarians from serving on the Elections Commission than exclude communists from all public employment. Pet.14.

That argument fails to appreciate that the government *can* consider party-affiliation when filling some jobs. Every case on which the Libertarian Party relies involved a law that forbade those with certain ideas from thousands of potential jobs. *Baird*, for example, considered a law that denied admission to the bar—and therefore access to *private* employment—based "solely" on an "applicant's beliefs" that the State "found objectionable." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 9 (1971) (Stewart, J., concurring);

see id. at 7–8 (lead op.). *Wieman* involved a loyalty oath that the Court decided "violated due process." *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952). And *Mitchell* upheld the Hatch Act's restrictions on political activity, while commenting that the law could not bar public employment for all religious minorities or all Republicans. *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 100 (1947). None of these cases considered a party-affiliation law in a context where party affiliation bore on the ability of a government employer to discharge its duty. Ohio's law does that; much like the law in *Branti*, the party-affiliation requirements at issue here makes party affiliation a prerequisite for *one* particular government job (election commissioner) in a context (election administration) where party-affiliation is obviously relevant.

Perhaps recognizing this, the Libertarian Party suggests that the party-affiliation requirements serve no legitimate interest. At times, its argument seems to rest on the view that the Commission's six party-affiliated seats will go to Republicans and Democrats even if one of those parties is overtaken by a now-minor party. Since the Republicans and Democrats are forever guaranteed these six seats, the thinking seems to go, the affiliation requirements are illogical. *E.g.* Pet.22. (This is also linchpin of the amicus briefs. *See, e.g.*, Am. Br. of Libertarian Nat'l Party, et al., at 4; Am. Br. of Cato Institute at 4–5.) But as already explained, that is not what Ohio law says, and any argument to the contrary was forfeited long ago. What is more, even if the Libertarian Party were right about what the law meant, the law would still serve a legitimate interest today, while the Republican and Democratic parties are indisput-

ably the only two major parties in Ohio. *If* that ceases to be true, and *if* the party-affiliation law means what the Libertarian Party thinks it means, the Party can bring an as-applied challenge arguing that the law no longer serves any legitimate interest.

The Libertarian Party offers one last riposte: the Commission's interest in a neutral tiebreaker can be achieved by letting Libertarians serve where independents currently serve. Pet.18–19. But even if it is true empirically that a Libertarian could serve as even-handedly as an independent, Ohio has a valid interest in "[b]oth the appearance and reality" of impartiality. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). As explained above, a minor-party member would likely be viewed as favoring one major party more than the other. The First Amendment leaves Ohio ample room to account for that.

4. The radical nature of the Libertarian Party's theory is clear from its attempt at limiting the scope of the question presented. The petition proclaims several times that it is not challenging two aspects of Ohio's party-affiliation requirements. *First*, the petition does not dispute the constitutionality of preventing any party from having majority representation on the Ohio Elections Commission. Pet.12, 24. *Second*, it does not challenge the many state and federal laws that cap partisan representation on a multi-member board or commission at a bare majority. *Id.* at 13, 16–18, 24. The petition thus insists that, by reversing the Sixth Circuit, the Court will not call such laws into question.

These reservations are impossible to square with the logic of the Libertarian Party's arguments. For example, the Party argues that the First Amendment

prohibits any law that "disqualifies members of certain political parties from holding public office." Pet.15. If that is true, all laws that account for party affiliation are unconstitutional, regardless of whether they reserve certain seats for certain parties (as Ohio's law does) or cap the number of seats open to any one party (as bare-majority laws do). After all, bare-majority laws exclude from government positions members of political parties whose members already fill the maximum permissible number of seats. If Ohio's law is unconstitutional because it denies some applicants work based on their party affiliations, so too are the many federal and state laws requiring a partisan balance. *Contra* Pet.12, 13, 16–18, 24.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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