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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents assert that the Court lacks jurisdiction, that this case is a poor vehicle, that other circuits agree with the decision below, and that the First Amendment allows the states to bar members of small political parties from holding a public office. All these claims are wrong.

I. The Court has jurisdiction.

Respondents erroneously suggest (BIO 7-15) that petitioners lack standing and that the case is moot. Respondents made the same arguments below—the former in their brief and the latter in a letter filed after oral argument—but the Sixth Circuit rejected them both, for good reason.

A. Petitioners have standing.

Both petitioners have standing. Harold Thomas and the Libertarian Party of Ohio are both suffering concrete, particularized injuries that are directly caused by the categorical exclusion of Libertarian Party members from service on the Ohio Elections Commission.

Harold Thomas. The Sixth Circuit found that "[a]s the OEC [Ohio Elections Commission] concedes, Thomas has introduced evidence that he would like to be on the Ohio Elections Commission, but his membership in the Libertarian Party prevents him from being considered for the seventh commission seat." Pet. App. 7a (brackets and internal quotation marks omitted). The Sixth Circuit correctly concluded that in these circumstances, "'a plaintiff need not translate his or her desire for a job into a formal application' because 'that application would be merely

a futile gesture.'" *Id.* (quoting *Carney v. Adams*, 141 S. Ct. 493, 503 (2020)).

Unlike the plaintiff in *Carney v. Adams*, who had merely "an abstract, generalized grievance, not an actual desire to become a judge," *id.* at 501, Harold Thomas has an actual desire to become a member of the Elections Commission, as the court below found. The plaintiff in *Carney v. Adams* had done nothing in his entire life to suggest he might be interested in serving as a judge. *Id.* at 500-01. Harold Thomas, by contrast, has been involved in Ohio elections for decades. He ran for elective office twice. He was the chair of a state political party. In his declaration filed in the District Court, Thomas stated that "[i]t is my desire to be considered for membership on the Ohio Elections Commission," but that "[b]ecause I am a member of the Libertarian Party of Ohio, I cannot be a member of the Ohio Elections Commission." Thomas Decl. (Nov. 19, 2019), ¶¶ 28-29. Harold Thomas filed this suit because he wants to serve on the Elections Commission, not merely because he considers it unfair in the abstract that members of small political parties are ineligible to serve.

As the court below also correctly found, Thomas's position as chair of the state Libertarian Party when the complaint was filed did not deprive him of standing. State law "poses no obstacle to Thomas's eligibility" to serve on the Commission, the court noted, "because it prohibits a person only from *simultaneously* holding public office as an OEC commissioner and a leadership position in a political party." Pet. App. 8a (citing Ohio Rev. Code § 3517.152(F)(1)(c)). "Accordingly, if Thomas had been selected for a seat on the OEC, he could have resigned his party leader-

ship role (and has now done so while this appeal was pending)." Pet. App. 8a. Just as a member of Congress is eligible to be considered for a cabinet position but must resign from Congress before serving in the cabinet, an officer of an Ohio political party is eligible to be considered for a position on the Elections Commission but must resign his party office before serving on the Commission.

Respondents did not argue that Thomas lacks standing until this case reached the Court of Appeals, but had they raised the issue in the District Court, Thomas would have testified that he was willing to step down from his leadership position in the party to serve on the Commission. Previous members of the Commission have done just that—they have been considered for the Commission while serving in leadership positions in the Democratic and Republican Parties, and they have resigned their party positions once they were named to serve on the Commission.

The Libertarian Party of Ohio. The Libertarian Party of Ohio also has standing, both in its own right and on behalf of its members. The party has standing in its own right because it is injured by the state's exclusion of Libertarians from the Elections Commission. The Commission adjudicates disputes between political parties. When the Libertarians are aggrieved by something the Democrats and Republicans have done during a campaign, the Commission is where they must seek redress. But the Commission is stacked against them because state law bars Libertarians from serving on it. The unconstitutional composition of the Commission causes the Libertarian Party to compete less successfully in elections

than it would otherwise. If Ohio had a law barring Democrats from serving in the state legislature, the Democratic Party would have standing to challenge that law for the same reason—because the party would suffer in elections by virtue of the inability of its members to serve. The same is true here.

This is why so many of the Court's cases addressing the constitutionality of election procedures have involved political parties as plaintiffs. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). Parties can be harmed by unconstitutional election rules just like individuals can.

The Libertarian Party of Ohio also has standing on behalf of its members. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). All three requirements are easily satisfied here. Harold Thomas is just one of many members of the Libertarian Party who would have standing in their own right because they would like to serve on the Elections Commission but are barred from doing so because of their party membership. The interests at stake—fair election procedures—are central to the Libertarian Party's purpose, which is to compete in fairly-run elections. And the claim asserted in this case could have

been brought by the party itself, without the participation of individual party members.

The court below thus correctly rejected all of respondents' arguments relating to standing.

B. The case is not moot.

Respondents also err in claiming (BIO 13-15) that the case is moot. The Libertarian Party of Ohio is still a political party. What it lost in January 2021 was not its status as a party but its automatic access to the ballot.

In Ohio, a small political party is entitled to place its candidates on the ballot if it qualifies as a "minor political party." *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 388 (6th Cir. 2016). There are two ways to qualify. First, a party qualifies as a "minor political party" if the party's candidate for governor or its presidential electors win at least three percent of the vote. Ohio Rev. Code § 3501.01(F)(2)(a). A party that reaches this threshold will remain a "minor political party" for four years. *Id.* A party that fails to meet this threshold can qualify the second way, by filing a ballot access petition signed by a certain number of voters. *Id.* § 3501.01(F)(2)(b). A party that files such a petition will be a "minor political party" for the next election, at which it must win three percent of the vote to remain qualified. *Id.*

The Libertarian Party of Ohio qualified as a "minor political party" for the 2020 election by the latter method. But its presidential candidate did not win three percent of the vote, so now the party must file another ballot access petition before it can place candidates on the ballot for the next election.

The Ohio Secretary of State accordingly notified state election officials in January 2021 that the Libertarian Party is no longer a "minor political party" entitled to place its candidates on the ballot. Ohio Sec. of State Advisory 2021-01.[1] This is the document respondents seize upon (BIO 14) to argue that the Libertarian Party is no longer a political party. But this is a play on words. The Libertarian Party is still a political party. It just isn't a "minor political party" for purposes of ballot access, as that phrase is defined in Ohio law.[2]

The Libertarian Party's members, moreover, are still "affiliated with" the party, Ohio Rev. Code § 3517.152(A)(2), so they are still barred from service on the Elections Commission. "Party affiliation in Ohio is purely a matter of self-identification." *State ex rel. Bender v. Franklin Cty. Bd. of Elections*, 132 N.E.3d 664, 668 (Ohio 2019) (internal quotation marks omitted). The State has no role to play in deciding who is or is not affiliated with a political party. *Libertarian Party of Ohio v. Husted*, 831 F.3d at 402. Although the Libertarian Party is no longer entitled to ballot access until it files another petition, it is still a political party, and its members are thus still excluded by statute from serving on the Elections Commission.

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[1] Available at https://www.ohiosos.gov/globalassets/elections/advisories/2021/adv2021-01.pdf.

[2] Even if we indulged respondents' wordplay, the case would still not be moot, because as soon as the Libertarian Party files its next ballot access petition, any Libertarians on the Elections Commission would become ineligible for their positions. They would have to leave the party or resign from the commission.

For this reason, the court below correctly reached the merits of this case.

II. This case is an excellent vehicle.

Respondents err in suggesting (BIO 16-19) that this case is a poor vehicle because the certiorari petition includes arguments different from those made below. In fact, we made these arguments below.

1. The statute we are challenging plainly requires that three members of the Elections Commission be Democrats and three Republicans, regardless of how these parties fare in future elections. Pet. 5-7. We interpreted the statute this way in the Court of Appeals. 6th Cir. Br. for Appellants at 3 ("OEC's membership must (and did at the time of its debate decision here) consist of three Democrats, three Republicans, and one person who is not associated with any political party."). It was *respondents* who urged the Court of Appeals to adopt an interpretation at variance with the statute's text. 6th Cir. Br. of Appellees at 6 ("[T]hough the statute does not say so expressly, it is implicit in the statute's party-neutral design that a political party, upon losing its major-party status, loses to the new major party its ability to nominate members to fill seats for which the term has expired.").

But this disagreement makes no difference. Either way, the statute is unconstitutional because it categorically excludes members of the Libertarian Party and other small parties from serving on the Elections Commission. The Court will have no occasion in this case to interpret state law. Whether the statute means what it says or what respondents claim it

means, it bars members of certain political parties from holding a public office. A state just cannot do that.

2. Below, we argued that this case is distinguishable from the Court's political patronage precedents, because this case involves a categorical statutory exclusion from government service, not the exercise of patronage in discretionary hiring decisions. 6th Cir. Br. for Appellants at 33-34 ("Ohio's law cannot be defended under the Court's patronage exceptions noted in cases like *Elrod* …. *Elrod* and its progeny govern discretionary hiring and firing decisions, not statutory categorical disqualifications."). It was *respondents* who argued that the patronage cases should govern. 6th Cir. Br. of Appellees at 26-33. Our argument in this Court is not a "late-raised theory" (BIO 19) but one that we raised early and have renewed at every opportunity.

III. This case would have come out differently in other circuits.

Respondents err again in contending (BIO 19-22) that other circuits agree with the decision below. In fact, the Third and Seventh Circuits have held that a state's interest in political balance cannot justify barring members of small parties from serving in a public office, and the First Circuit would almost certainly hold likewise if the opportunity arose.

In *Adams v. Governor of Delaware*, 922 F.3d 166, 182 (3d Cir. 2019), *vacated on other grounds sub nom. Carney v. Adams*, 141 S. Ct. 493 (2020), the Third Circuit held: "We need not dwell long on whether Delaware possesses a 'vital state interest' in

a politically balanced judiciary, because Delaware's practice of excluding Independents and third party voters from judicial employment is not narrowly tailored to that interest." The Seventh Circuit reached the same conclusion in *Common Cause Indiana v. Individual Members of the Indiana Election Comm'n*, 800 F.3d 913, 927 (7th Cir. 2015), when it held that a state's interest in "partisan balance" provides "little justification for the severe burden imposed upon the right to vote" by a system that ensured that only Democrats and Republicans were ever chosen. And the First Circuit upheld a state limitation on eligibility for office only because the restriction was "nondiscriminatory, that is, it does not differentiate among Republicans, Democrats, and Libertarians." *Werme v. Merrill*, 84 F.3d 479, 484 (1st Cir. 1996). The plain implication of the First Circuit's holding is that a state may not restrict eligibility for public office in a way that *is* discriminatory and that *does* differentiate among Republicans, Democrats, and Libertarians.

Respondents attempt to distinguish the cases from the Third and Seventh Circuits on the basis that these cases involved judges, not members of an elections commission. But the rationales in these cases did not rest on anything unique about judges. It is hardly plausible to suppose that the Third or Seventh Circuits would uphold a state statute barring Libertarians from serving as governor, or as a state legislator, or as an election commissioner. Rather, the rationale of these cases is that a state may not penalize people for choosing to join one political party rather than another.

The Sixth Circuit, by contrast, has allowed Ohio to penalize people who choose to join the Libertarian Party, the Green Party, and every other small party.

IV. The First Amendment does not allow the states to bar members of small political parties from holding a public office.

Respondents rely (BIO 22-32) on the Court's patronage cases to defend the decision below, but respondents fail to perceive two crucial differences between the patronage cases and this case.

The first difference is that our case does not involve any patronage. Respondents claim that the statute advances the goal of maintaining a "balance between the major parties" (BIO 27). That is not patronage. It is the opposite of patronage.

The second difference is that the patronage cases allow officials to *consider* a potential appointee's political affiliation. The patronage cases do not allow the government to *prohibit* members of certain political parties from being appointed. Perhaps a Republican mayor could favor Republicans for chief of police, but a city could not enact an ordinance barring Democrats from serving as chief of police. A Democratic president may prefer an attorney general of his own party, but Congress could not enact a statute prohibiting Republicans from serving as attorney general.

The Ohio statute challenged here categorically prohibits Libertarians, Greens, and members of other small parties from holding a public office. The Court's patronage cases are not the ones that govern this situation. Indeed, even if all patronage were permissible, as it may have been in the nineteenth

century, a state still could not exclude members of a political party from holding public office. In the nineteenth century, Whig governors may have appointed Whigs to state positions, but no one thought the legislature could enact a statute barring Democrats from serving in government.

Rather, the relevant cases are those in which the Court has made clear that categorical exclusions from public office based on political party violate the First Amendment. *See, e.g.*, *United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 100 (1947) ("Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.") (internal quotation marks omitted); *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) ("The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization.").

The First Amendment requires Ohio to allow members of all political parties, not merely Democrats and Republicans, to serve on the Elections Commission. The state need not *choose* a Libertarian as a commissioner, but Libertarians must be eligible. The state can reserve *some* of the seats on the Commission for members of the major parties. But the state cannot reserve all of them.

Respondents are mistaken in claiming (BIO 22) that this well-established principle will "upend innumerable laws." Indeed, because it has been so clear, for so long, that a state may not bar members of a political party from holding public office, statutes like the one challenged here are quite rare. As we showed in the certiorari petition, Pet. 16-18, al-

most every other state with a comparable agency allows members of small parties to hold positions in it, and members of small parties are eligible to serve on the Federal Election Commission.

Respondents claim (BIO 28) to have found three states with statutes like Ohio's, but respondents are wrong about one of them. Kentucky allows members of small political parties to serve on its Registry of Election Finance. Six of the seven members must be from the top two political parties, but the seventh seat is open to anyone, "without regard to political affiliation." Ky. Rev. Stat. § 121.110(2)(f). That leaves only two states, Tennessee and Maryland, that categorically exclude members of small parties like Ohio does.

These exclusions have nothing to do with patronage. They serve only to insulate the two largest parties from competition. But "protecting the Republican and Democratic parties from external competition cannot justify the virtual exclusion of other political aspirants." *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1980). "There is, of course, no reason why two parties should retain a permanent monopoly." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). If, in the early Republic, the states had been allowed to suppress the emergence of new parties, there would be no Republican Party today. The decisions we make today will likewise shape the political landscape of the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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