No. 19-309

In the
Supreme Court of the United States

GOVERNOR OF DELAWARE,
Petitioner,
v.
JAMES R. ADAMS,
Respondent.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTERESTS OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

This case concerns a challenge to the constitutionality of Delaware's century-old judicial-balance requirements for state courts. It therefore has profound implications for the Chamber's members as well as other businesses. The Delaware courts have long been regarded as a crown jewel of the state court system. Companies of all sizes across every industry have benefited from the unparalleled quality and efficiency of the Delaware legal system and its Court of Chancery in particular. The Third Circuit's decision in this case threatens the stability of Delaware's courts by dismantling the protections that have helped insulate them from partisan influence and entrenchment. Those protections have helped earn the Delaware courts a reputation for

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

quality, consistency, and impartiality, bolstering public confidence in the judiciary.

A decision by this Court affirming the Third Circuit's decision not only would strike at the foundation of the Delaware court system, but cast doubt on the constitutionality of federal balancing provisions as well. The Chamber and its members therefore have a direct interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Twenty-five years ago, in a speech honoring the Bicentennial of the Delaware Court of Chancery, Chief Justice Rehnquist observed that "the existence of state courts that do their job promptly and well is more important today than ever before." William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351, 354 (1992). It is no less important in 2020. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 216 (2018) (discussing the vital role of state courts in our federalist system of government). And just as when Chief Justice Rehnquist made his remarks in 1992, the Delaware courts remain a model of excellence.

To this day, the Delaware courts are widely considered the gold standard of the state judicial systems.[2] Their quality, consistency, and efficiency

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[2] *See, e.g.*, U.S. Chamber Institute for Legal Reform, *2019 Lawsuit Climate Survey: Ranking the States* 1 (Sept. 2019), https://www.instituteforlegalreform.com/uploads/sites/1/2019_Lawsuit_Climate_Survey_-_Ranking_the_States.pdf (ranking the Delaware court system first among the states).

have long drawn American businesses to Delaware: more than one million companies—including two thirds of the Fortune 500—have made Delaware their legal home. The result is that "[t]he Delaware brand is to corporate law what Google is to search engines." *See* Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. Rich. L. Rev. 1129, 1129 (2008).

That is no accident. Delaware has crafted, and maintained, a system that fosters such excellence. The 120-year old judicial-balance provisions at issue in this case are a core component of that system, and thus deserve a share of the credit for the State's remarkable track record and universal acclaim. Those provisions, which date back to state constitutional amendments adopted in 1896, were originally enacted to weed out excessive political influence in the State's judiciary. Pet'r Br. 5–6. More than a century later, they have unquestionably passed the most demanding test—the test of time—instilling public confidence in the Delaware judiciary by promoting stability, moderation, and merit. The Third Circuit's holding in this case threatens to unravel all of that by dramatically extending this Court's *Elrod-Branti* line of cases[3] far beyond the narrow context in which they were intended to apply.

In *Elrod-Branti*, this Court created a framework for assessing the constitutionality of "patronage" practices that replaced lower-level employees within the executive department based on their political affiliation. Seeing only one benefit to such practices—

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[3] The lead cases in this line are *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

the need for employees to "loyally implement" the policies of the ruling party—the Court held that patronage is subject to heightened scrutiny. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (citing *Elrod v. Burns*, 427 U.S. 347, 362–63, 65–68 (1976) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507, 515–16, 518, 520 n.14 (1980)). The sole exception was for so-called "policymakers," or those for whom "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

The *Elrod-Branti* framework has been severely criticized from the outset. *See Elrod,* 427 U.S. at 375 (Burger, C.J., dissenting); *id.* at 376 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting); *Branti,* 445 U.S. at 520 (Stewart, J., dissenting); *Rutan,* 497 U.S. at 92 (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., and by O'Connor, J., in part, dissenting). But whatever its merit in addressing the sort of low-level employment practices at issue in *Elrod-Branti*, it is inapt for assessing the judicial-balance provisions at issue here. With respect to judges, the government's interest is not, as in *Elrod* and *Branti*, ensuring "loyal[] implement[ation]" of partisan policy, *see Rutan*, 497 U.S. at 74, but rather promoting public confidence in the judiciary and stability in judicial decision-making. *Elrod-Branti*'s "policymaking" exception, specifically tailored to address the very different government interest at issue in the patronage context, is a poor fit for assessing the validity of state constitutional provisions setting the qualifications for judicial office.

Much has been written on whether judges are "policymakers," and no doubt the debate will continue. But there is no reason for the Court to fill

more pages on that abstract social-science question here—either with respect to judging in the best common law tradition, as judges in Delaware still do, or any other mode of judging. *Elrod-Branti*'s "policymaking exception" is a misfit here. It was not designed with judges in mind and should not be extended to the different context at issue here.

The *Elrod-Branti* framework is particularly ill-suited to judicial-*balance* requirements, which are designed to do the very opposite of the patronage practices in *Elrod* and *Branti*—combat partisanship and promote ideological pluralism. And applying *Elrod-Branti* here also runs headlong into Tenth Amendment principles mandating a lower, not higher, level of federal constitutional scrutiny when a State exercises the core sovereign function of determining qualifications for high office. *See Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). While all state laws of course remain subject to the U.S. Constitution, this Court has always taken great care in reviewing "the authority of the people of the States to determine the qualifications of their most important government officials." *Id.* And, certainly, as *Gregory* itself recognizes, judges are among those.

While this Court need not revisit *Elrod-Branti* here, it should not extend the questionable *Elrod-Branti* framework to the fundamentally different context and set of state laws at issue in this case. Rather, an appropriate inquiry in this context would balance the interests of the government as well as the employee and be no more demanding than the test that this Court applies to every other First Amendment claim in the public-employment context. *Cf. Connick v. Myers*, 461 U.S. 138, 142, 150 (1983) (looking to whether the government's interests in

"promoting efficiency and integrity in the discharge of official duties" outweigh any inhibition of free expression (citation omitted)); *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980) ("A governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government."); *Gregory,* 501 U.S. at 463 (recognizing that the Court has lowered the standard in reviewing state qualifications for "important elective and nonelective positions").

Under such a balancing test—or any reasonable standard—this Court should uphold the Delaware provisions at issue. Experience has proven that those provisions have helped instill public confidence in the courts, which this Court has already deemed a state interest of the "highest order." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)); *see* Rehnquist, *supra,* at 354 ("'[T]ime is the best test of an institution and, over time, Delaware's law has earned respect and emulation.'" (citation omitted)). And they also promote judicial stability, predictability, and ideological pluralism. These virtues are confirmed by not only the universal acclaim the Delaware courts have received, but also the prevalence of similar balancing provisions throughout the federal government. These first-order interests in effective government outweigh any First Amendment interests on the other side of the ledger.

Courts should be extremely reluctant to invalidate state constitutional provisions that have stood, and worked, for more than a century without challenge. The Third Circuit erred in doing just that by extending *Elrod-Branti* to this new context. Its decision invalidating Delaware's time-honored

judicial-balance provisions is deeply misguided and should be reversed by this Court.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN SUBJECTING THE JUDICIAL-BALANCE REQUIREMENTS TO *ELROD-BRANTI*'S HEIGHTENED-SCRUTINY ANALYSIS

In *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court held that use of political affiliation in employment decisions impacting low-level government employees within the executive department of state and local government triggers heightened First Amendment scrutiny. Those cases stand as an exception to the deferential standard of constitutional review applicable when the government acts as an employer or sets qualifications for high-level positions in government, rather than as a lawmaker regulating private conduct.

This Court has previously applied the *Elrod-Branti* rule only to so-called "patronage practices" involving "low-level public employees" within the executive department who challenged employment decisions. *See Rutan v. Republican Party of Ill.,* 497 U.S. 62, 65 (1990). In *Elrod,* the plaintiffs were employees in the county sheriff's office ranging from a process server to a security guard, 427 U.S. at 350–51; in *Branti,* the plaintiffs were county assistant public defenders, 445 U.S. at 509; and, in *Rutan,* the plaintiffs included a rehabilitation counselor, a road equipment operator, and a prison guard who worked for the State, 497 U.S. at 66–67. The context in which those cases arose is thus far different from the one here, where respondent seeks to use *Elrod* and *Branti* to strike down judicial-qualification provisions

enacted by the State of Delaware as part of its state constitution more than 120 years ago in order to protect and balance its judiciary.

It would be a dramatic extension of the *Elrod-Branti* rule to apply it in this novel context. Indeed, to strike down the judicial-balance provisions here would run counter to the very principles that animated *Elrod* and *Branti* in the first place. There is no reason for the Court to take that dramatic step.

A. *Elrod-Branti* Should Not Be Extended To State Constitutional Requirements For Judicial Appointments

1. This Court has long held that the government may hire or fire public employees based on their speech—even their core political speech—so long as the government has "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *see also United Public Workers (C.I.O.) v. Mitchell*, 330 U.S. 75, 101 (1947) (applying a similarly lenient standard for government regulation of its employees' political activity). This framework balances "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State" in "promot[ing] efficiency and integrity in the discharge of official duties." *Connick v. Myers*, 461 U.S. 138, 142, 150–51 (1983) (alterations in original) (citations omitted); *see also Pickering v. Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

Accordingly, in "government employment cases," the government is not "required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest." *Board of Cty. Comm'rs v.*

Umbehr, 518 U.S. 668, 678 (1996). Rather, a court must engage in a balancing of interests that is "deferential [to] the government's legitimate interests" both "as a public service provider" and "in being free from intensive judicial supervision of its [core] functions." *Id.* at 677–78; *see Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980) ("A governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government.").

In *Elrod* and *Branti*, this Court devised a new rule for the dismissal of certain employees based solely on political affiliation, or "patronage." "Under this line of analysis," instead of subjecting the dismissal decision to the balancing framework applicable in the speech context, the employment decision must survive a more exacting scrutiny, where an employee may be discharged only based on "an overriding interest" "of vital importance," *Branti*, 445 U.S. at 515–16 (citations omitted). *See also Rutan*, 497 U.S. at 74 (holding that "patronage practices" violate the First Amendment unless they "are narrowly tailored to further vital government interests").

But even *Elrod* and *Branti* recognized that the consideration of political affiliation could not be prohibited as to *all* employees. Recognizing the need for some employees to "loyally implement" the policies crafted by each administration, the Court carved out an exception from this stringent standard for so-called "policymaking" positions. *See Rutan*, 497 U.S. at 74, 70 (citing *Elrod*, 427 U.S. at 365–68). In *Branti*, this Court elaborated that the test for whether this exception applied was not whether a particular position "involved participation in policy decisions," but whether "party affiliation is an appropriate

requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

2. The *Elrod-Branti* analysis has been sharply criticized by members of this Court. In *Rutan,* Justice Scalia explained that *Elrod-Branti*'s "strict-scrutiny standard" for employee political affiliation "finds no support in [this Court's] cases." *Rutan*, 497 U.S. at 98 (Scalia, J., dissenting). If "the government may dismiss an employee for political *speech* 'reasonably deemed by Congress to interfere with the efficiency of the public service,' it follows, *a fortiori*, that the government may dismiss an employee for political *affiliation* if 'reasonably necessary to promote effective government.'" *Id.* at 100 (citation omitted).

Indeed, as Justice Scalia further explained, outside the patronage context, the Court's cases have "consistently applied a lower level of scrutiny" when the government action at issue is not regulation of private conduct but "'manage[ment of] [its] [own] internal operatio[ns].'" *Id.* at 98 (second and fourth alterations in original) (citation omitted); *see also Janus v. American Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2484 (2018) (describing the heightened scrutiny for employee political affiliation called for by *Elrod-Branti* as an "odd feature of [the Court's] First Amendment cases," but noting that *Janus* presented "no occasion here to reconsider our political patronage decisions").

Justice Scalia likewise criticized the amorphous nature of the "policymaking exception." In the time since *Branti* had been decided, Justice Scalia explained, "interpretations" in the courts of appeals regarding the scope of the exception had "not only [been] significantly at variance with each other [but] so general that for most positions it is impossible to

know whether party affiliation is a permissible requirement until a court renders its decision." *Rutan*, 497 U.S. at 111 (Scalia, J., dissenting).

In light of these criticisms, four Justices in *Rutan*—Chief Justice Rehnquist, Justice Kennedy, and Justice O'Connor, in addition to Justice Scalia himself—would have gone so far as to overrule *Elrod* and *Branti*. In their view, *Elrod* and *Branti* were "not only wrong, not only recent, not only contradicted by a long prior tradition, but also ha[d] proved unworkable in practice." *Id.* at 110–11.

3. This Court need not revisit whether *Elrod* and *Branti* were correctly decided here. Because whatever the shortcomings of the *Elrod-Branti* rule as a matter of first principles, this Court has only applied the rule to the narrow context of adverse employment decisions "involving low-level public employees" within the executive branch of government. *Rutan*, 497 U.S. at 65; *see supra* at 7–8. The Court has never applied these decisions to invalidate a state constitutional provision governing the qualifications for high office, much less in the context of state laws mandating political balance on the courts. And it should not open that can of worms here. Such a dramatic extension would be inappropriate for three fundamental reasons.

First, the *Elrod-Branti* framework presupposes that the relevant employees are low-level staff whose function is to carry out the policy preferences of their superiors. In *Elrod*, for example, the Court stressed the subordinate role a public employee has with respect to his employer and explained how the employee's "belief and association" could thus be "inhibit[ed]" by the "threat of dismissal for failure to . . . support" a particular political party. 427 U.S. at

359; *see also id.* at 355–56 (stressing that the "average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties"); *Rutan*, 497 U.S. at 77 (noting that there are many "occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards," and thus that "denial of a state job is a serious privation").

Political-affiliation requirements were also impractical, the *Elrod* Court reasoned, because of the "inefficiency [of] the wholesale replacement of large numbers of public employees" when an administration changes and the way in which "the prospect of dismissal after . . . the incumbent party has lost [may be] a disincentive to good work." 427 U.S. at 364. These reasons obviously do not apply at all to the context of state-wide judicial appointments.

The "policymaking" exception, likewise, was fashioned to address the concern that subordinate employees may not "loyally implement" the policies of an administration with which they disagree. *Rutan*, 497 U.S. at 74. That exception thus turns on whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. But that exception is a poor fit for assessing the constitutionality of judicial appointments; judges are not subordinate employees whose role is to "implement" executive policies, nor are they political functionaries. To the contrary, judges belong to a co-equal branch of government, are duty bound to apply the law neutrally (without regard to party affiliation), and, in fact, *check* the power of those who appointed them. *See, e.g.*, Del. Judges' Code of Judicial Conduct Rule

2.4(A) (2008), https://courts.delaware.gov/rules/ ("A judge should be unswayed by partisan interests . . . .").

Second, even if the *Elrod-Branti* framework could be coherently applied to judicial appointments, it is plainly inappropriate for assessing the sort of *balance* provisions at issue here. The premise of the *Elrod-Branti* framework is that patronage "impairs the elective process by discouraging free political expression by public employees." *Rutan*, 497 U.S. at 75. But the opposite is true of judicial-balance provisions. Because such provisions frequently result in a governor having to appoint a judge from the *opposing* party, they counteract any compulsion a judicial candidate might feel to sublimate his or her true political beliefs in order to curry favor with the party in power. Indeed, the very purpose of such provisions is to combat the *de facto* "patronage" that can often attend ordinary judicial appointments.

Thus, while ordinary patronage practices may inhibit lower-level employees' freedom to express their political beliefs by threatening punishment or even loss of one's livelihood for supporting the "wrong" party, balance provisions *encourage* free expression by severing the connection between political power and judicial appointment. A mechanical application of the *Elrod-Branti* framework to strike down judicial-balance provisions would lead to more, not less, patronage and would thus be contrary to the very principles animating *Elrod* and *Branti*.

Third, extending *Elrod-Branti* to state laws governing the constitutional qualifications for state judicial office is particularly inappropriate because it would squarely conflict with this Court's Tenth Amendment precedent. As this Court has explained,

establishing "who [may] sit as . . . judges . . . is a decision of the most fundamental sort for a sovereign entity." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Taylor v. Beckham*, 178 U.S. 548, 570–71 (1900).

Accordingly, whatever the baseline rule, this Court has "'*lowered* [its] standard of review when evaluating the validity of exclusions that entrust only to citizens important elective and nonelective positions whose operations "go to the heart of representative government."'" *Gregory*, 501 U.S. at 463 (emphasis added) (citation omitted); *see also Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) ("[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives," which include "the qualifications of an appropriately designated class of public office holders."). And time and again, this Court has recognized in particular that "how to select those who 'sit as [state] judges'" unquestionably involves "sensitive choices by States in an area central to their own governance." *Williams-Yulee*, 575 U.S. at 454 (quoting *Gregory*, 501 U.S. at 460); *see also Arizona State Legislature v. Arizona Indep. Redistricting Comm.*, 135 S. Ct. 2652, 2673 (2015).

Extending the *Elrod-Branti* rule to state judicial-balancing laws would turn these settled principles on their head. Instead of "lowering" the applicable standard of review as required by *Gregory*, the result would be to jack *up* the standard on the State's

judicial appointments compared to less sensitive employment-related actions. As discussed above, a State's decision to terminate an employee for his purely private political speech is subject to the *Connick-Pickering* balancing framework. *Supra*, at 8–9. It makes no sense to defer to a State's legitimate interest in addressing ordinary speech retaliation claims while subjecting the appointment of judges—a "decision of the most fundamental sort for a sovereign entity"—to the strictest scrutiny.

Accordingly, this Court should decline to extend *Elrod-Branti*'s strict-scrutiny analysis to the judicial-balance provisions at issue here.

B. At Most, The Court Should Review Delaware's Judicial-Balance Provisions Under An Intermediate Standard That Appropriately Balances The State's Interests In Self-Government Against The Interest In Individual Expression

The standard here should more fully account for the State's interest in effective government and be no more searching than the inquiry this Court applies in the public employment context generally. In the routine public-employment context, the Court generally engages in a balancing of interests. As discussed above, the ordinary test applicable to First Amendment speech or activity claims by public employees is whether the government has "an adequate justification" for making its decision based on a candidate's expression. *Garcetti*, 547 U.S. at 418.

Rather than inquiring whether the challenged action is narrowly tailored to a compelling state interest, a court simply must ask whether the government's interests in "promot[ing] efficiency and

integrity in the discharge of official duties" outweighs any inhibition of free expression. *Connick*, 461 U.S. at 150–51 (alteration in original) (citation omitted); *see also Rutan*, 497 U.S. at 102 (Scalia, J., dissenting) (framing inquiry as whether "the governmental advantages of [the challenged] practice [can] reasonably be deemed to outweigh its coercive effects"); *United Pub. Workers of Am.*, 330 U.S. at 101 (in regulating employees' "political activity," "it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service").

This test appropriately requires "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. If anything, challenges to laws that set the qualifications for positions that "go to the heart of representative-government," *Gregory,* 501 U.S. at 463 (citation omitted), like the provisions at issue here, warrant a more deferential inquiry. But at a minimum, the inquiry should be no more demanding than the *Connick-Pickering* test applied to ordinary First Amendment claims by public employees. Such an inquiry would permit meaningful consideration of the government's interests as well as the First Amendment interests implicated by conditioning judicial appointments on party affiliation.

Indeed, in some respects, the *Elrod-Branti* inquiry may itself be best understood as a species of this same balancing test—albeit one ill-suited for the government interests at stake here. Unlike other First Amendment exceptions—which typically turn on the type or context of the speech involved, *see, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–

68 (2009) (government speech); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (speech on public property); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–64 (1980) (commercial speech)—the "policymaking" exception turns on the nature of the government's *interest* as a sovereign and employer, i.e., the need for "loyal[] implement[ation]" of its policies. *See Rutan*, 497 U.S. at 74. Therefore, even *Elrod* and *Branti* did not apply pure strict scrutiny but instead recognized a form of relaxed scrutiny tied to the government's interests in regulating its own structure. And even *Elrod-Branti* recognized, when it carved out an exception for "policymaking" positions, that not all positions, and not all First Amendment claims based on political affiliation, are the same.

As discussed above, the "policymaking" exception was designed with an eye toward executive branch employees, the context in which the *Elrod-Branti* cases arose. Whether or not state judges may be viewed as "policymakers" in the *Elrod-Branti* sense, applying the "policymaking" exception here makes little sense because the government interests at stake are very different. But the core principle remains the same: when the government is addressing its own internal operation or constitution, individual First Amendment rights must be balanced against the relevant government interests rather than subjected to strict scrutiny. The primary difference here is thus not the overall framework but the nature of the interests; instead of "loyal implementation," an individual's rights must be balanced against the government's interest in stable decision-making and public confidence in the judiciary. *See infra* at 18–24.

In short, it is fully consistent with the principles espoused in this Court's government-employer cases, and even in *Elrod* and *Branti* themselves, for this Court to apply a balancing test that appropriately weighs the government's interests with individual rights of expression. Whatever precise standard the Court adopts, it should be no more restrictive than the balancing framework applied for ordinary First Amendment claims by public employees.

II. DELAWARE'S JUDICIAL-BALANCE PROVISIONS SERVE GOVERNMENT INTERESTS OF THE FIRST ORDER

A. Judicial-Balance Provisions Promote Public Confidence In The Judiciary

This Court has long "recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the [judiciary].'" *Williams-Yulee*, 575 U.S. at 445 (citation omitted). "The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government." *Id.* "Unlike the executive or the legislature . . . [t]he judiciary's authority . . . depends in large measure on the public's willingness to respect and follow its decisions." *Id.* at 445–46. Thus, "[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). And this perception of fairness, in turn, "generat[es] the feeling, so important to a popular government, that justice has been done." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation omitted). "It follows that public perception of judicial integrity is 'a state interest of the highest order.'"

Williams-Yulee, 575 U.S. at 446 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

A judicial bench exclusively appointed by members of one party may be less likely to enjoy the full confidence of the public. As this Court has explained, the validity of the State's interest in this regard does not turn on whether any judge is *in fact* influenced to vote a particular way based on his or her political affiliation. Instead, "the mere possibility that judges' decisions may be motivated by the desire to repay" the patronage of those who placed them on the bench may "undermine the public's confidence in the judiciary." *Id.* at 447 (citation omitted). "In the eyes of the public, a judge's" political affiliation "could result (even unknowingly) in 'a possible temptation . . . which might lead him not to hold the balance nice, clear and true.'" *Id.* (alteration in original) (citation omitted); *see also* Del. Judges' Code of Judicial Conduct Rule 1.2(A) ("A judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary . . . .").

Public confidence in the Delaware courts is exemplary. Indeed, as all three judges on the Third Circuit acknowledged below, the Delaware court system has long been regarded as a model of excellence. Pet. App. 38a (concurring) ("Praise for the Delaware judiciary is nearly universal . . . ."). Likewise, opinion polls show that the Delaware judiciary, and Delaware judges, consistently rank as the Nation's best.[4] While it is not possible to say

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[4] *See* The Harris Poll, *2019 Lawsuit Climate Survey: Ranking the States* 19-20, 22–32 (Sept. 18, 2019), https://www.instituteforlegalreform.com/uploads/pdfs/2019_Harris_Poll_State_Lawsuit_Climate_Ranking_the_States_Full_Re

exactly what share of the credit for that success belongs to the judicial-balance provisions, the stability, consistency, and merit fostered by those provisions has unquestionably contributed to the success of the Delaware courts. And striking those provisions would deal a major blow to a judicial system in which the public has great confidence.

It is a state interest of "the highest order" to guard against the erosion of public trust in one of its branches of government—especially one whose vitality fundamentally depends on that trust. And under the Tenth Amendment principles espoused in *Gregory*, a State should not be disabled from taking reasonable measures designed to protect public confidence in its judicial branch. *See* 501 U.S. at 463. Under any reasonable framework for assessing the First Amendment question at stake, Delaware's balance provisions should be upheld.

B. Judicial-Balance Provisions Encourage Moderation And Stability In Decisionmaking

Delaware's compelling interest in ensuring public confidence in its judiciary is alone a sufficient state interest to justify upholding the State's judicial-balance provisions. But those provisions also serve other important state interests, all of which no doubt help explain the public confidence in the court system.

First, Delaware's judicial-balance provisions help foster stability and predictability in judicial decision-making. Studies indicate that deliberation among a diversity of viewpoints can lead to more stable and

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predictable outcomes. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 40 (2010) ("As a wealth of empirical research demonstrates, a group composed solely of ideologically like-minded people tends toward extreme decision making."); David Schkade et al., *What Happened on Deliberation Day?*, 95 Calif. L. Rev. 915, 917 (2007) (finding that deliberation among like-minded people leads to greater ideological extremism); Cass R. Sunstein, Essay, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L.J. 71, 103–04 (2000) (noting that a "requirement of bipartisan membership can operate as a check against" polarized decisionmaking by agencies and courts).

Studies also suggest that a panel of judges from different political parties is more likely to reflect a diversity of viewpoints and achieve beneficial deliberative and moderating effects. *See* Thomas J. Miles, *The Law's Delay: A Test of the Mechanisms of Judicial Peer Effects*, 4 J. Legal Analysis 301, 324 (2012) (concluding that peer effects—the tendency of ideologically homogenous panels to decide cases in more characteristically partisan ways than ideologically mixed panels—"are one of the most persistent regularities of judicial behavior"); Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Colum. L. Rev. 9, 76 (2018) (discussing the theory that "while individuals surrounded by others with like-minded views will grow more extreme, individuals exposed to a diversity of viewpoints may become more moderate").

Certainly, the Constitution does not require the States to adopt balancing provisions, and some might disagree about the extent to which such diversity

impacts (or improves) judicial decision-making. But at a minimum, the Constitution leaves States leeway to structure their own judiciaries in a manner that seeks to accomplish these ends, if they so choose. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997) ("States . . . have a strong interest in the stability of their political systems." (citation omitted)); *see also* Sutton, *supra*, at 203–16.[5]

Second, judicial-balance provisions promote moderation. As Justice Scalia observed, it is rare that "one party will appoint a judge from another party. And it has always been rare." *Rutan*, 497 U.S. at 93 (Scalia, J., dissenting). But judicial-balance provisions have the consequence of ensuring that at least some cross-party appointments are made. Studies indicate that cross-party appointments are generally more likely to be jurists whose views are more moderate and closer to their parties' ideological center. *See* Feinstein & Hemel, *supra*, at 42–45 (showing that over the last half century Democrats appointed by Republican presidents have been on

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[5] Judge Sutton focuses his thoughtful analysis on the critical role of state courts in protecting individual rights. But many of his observations about the role of state courts, including offering an opportunity to experiment with "what works and what doesn't," apply to other areas of law as well. Sutton, *supra*, at 212. Moreover, as Judge McKee recognized in his concurring opinion below, while perhaps best known for their development of corporate law, the Delaware courts have played a historic role in protecting individual rights. *See* Pet. App. 40a n.6 (discussing the Delaware Court of Chancery's decision in *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952), ordering the desegregation of Delaware public schools two years before *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954)).

average less liberal than Democrats appointed by Democratic presidents and vice versa).

Balance provisions thus can act as an important bulwark against polarization on a court, which can hamper both the quality of decision-making and public confidence in the judicial branch. Moderation also can reduce the likelihood that a court will reach a splintered decision, promotes compromise, and encourages unanimity—important virtues in an effective judicial branch. *See* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133, 150 (1990) (advocating for fewer separate judicial opinions in order to increase the clarity and certainty of judicial pronouncements); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717, 1768 (1997) (concluding from an empirical study of D.C. Circuit decisions that "to a surprisingly strong extent, a judge's vote is affected by the identity of her colleagues on the panel"); David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 Va. L. Rev. 127, 133–34 (1997) (attributing the Delaware Supreme Court's extreme tendency to issue unanimous decisions in part to the judicial selection process).

Notably, these advantages are not offset by the compromises of the patronage practices at issue in *Elrod*, *Branti*, and *Rutan*. Those decisions evidenced concern that patronage may "impair[] the elective process by discouraging free political expression by public employees" without providing any benefits that could not be effectively obtained through alternative means. *See Rutan*, 497 U.S. at 75. Judicial-balance provisions are just such an alternative. They promote vital government interests, and, far from eroding free expression, they can in fact *encourage* free expression

by promoting cross-party appointments and ideological plurality in the judiciary.

C. Experience Proves That Delaware's Judicial-Balance Provisions Promote Effective Government

Pursuit of these interests alone would justify Delaware's judicial-balance provisions. But here, experience shows that Delaware's experiment is working. Thanks to the State's balancing scheme, "Delaware's judiciary is nonpoliticized" "compared both to judges in other states and to federal judges." Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 Vand. L. Rev. 1573, 1603 (2005). One major result has been deliberative moderation. The Delaware Supreme Court has a remarkable record of unanimity; in the last fifty-five years, the justices have written separately in less than one percent of cases. Randy J. Holland & David A. Skeel, Jr., *Deciding Cases Without Controversy*, *in Delaware Supreme Court Golden Anniversary 1951-2001*, 39, 41 (Randy J. Holland & Helen L. Winslow eds., 2001).

Moderation has resulted in stability. Particularly in the realm of business law, Delaware's jurisprudence is consistent enough and its decisions are clear enough that parties can often simply "order their affairs to avoid law suits." *See* Rehnquist, *supra,* at 354 (citation omitted). This is—in the words of former Chief Justice Rehnquist—"one of the highest forms of praise [a] judiciary can receive." *Id.*

These qualities have inspired public confidence in the Delaware legal system. Recognizing the benefits of predictability and expediency in adjudication, a persistent majority of publicly traded U.S.

corporations has rushed to incorporate in Delaware, "result[ing] in a convergence on the Delaware General Corporation Law as a de facto national corporate law." Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 Am. J. Comp. L. 329, 350 (2001). In the nearly twenty years that The Harris Poll has surveyed perceptions of the fairness of state liability systems, Delaware has placed first every time but one.[6]

The longstanding success of Delaware's judicial-balance provisions is itself cause for restraint. As Chief Justice Rehnquist observed in reference to the Delaware state court system's "national preeminence," "[t]ime is the best test of an institution." Rehnquist, *supra*, at 354 (alteration in original) (citation omitted). Not only have the judicial-balance provisions helped develop Delaware's courts into bastions of legal clarity and consistency over their more than a century on the books, they also have stood without challenge until this recent controversy. This lengthy and "unbroken practice . . . is not something to be lightly cast aside." *See Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 678 (1970); *see also Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (explaining that "if a thing has been practiced for two hundred years by common consent, it will need a strong case" to find it suddenly unconstitutional).

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[6] *See* U.S. Chamber Institute for Legal Reform, *Delaware*, http://www.instituteforlegalreform.com/states/delaware (last visited Jan. 24, 2020).

D. Congress's Widespread Use Of Political Balancing Underscores Its Value In Promoting Effective Government

The structural benefits of Delaware's political-balance provisions are underscored by the prevalence of similar provisions at the federal level. For more than a century, Congress has designed particular agencies to be politically balanced in order to protect them from "the violent vicissitudes of party politics" and "the bias and prejudice of partisan controversy." *See* S. Doc. No. 64-243, at 5 (1916) (discussing the design advantages of the predecessor to the International Trade Commission). Congress's authority to use provisions like these has rarely been questioned—and never before on First Amendment grounds. *See* Ronald J. Krotoszynski, Jr. et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 Notre Dame L. Rev. 941, 968 (2015). The prevalence and pedigree of these analogous federal provisions is further evidence of the advantages offered by political balancing.

Yet, the Third Circuit's reasoning in this case would cast doubt on the constitutionality of each of these independent federal bodies. By excluding from the policymaking exception any role that requires "[i]ndependence, not political allegiance," Pet. App. 24a, the logic of the decision below could imperil politically balanced courts like the United States Court of International Trade, 28 U.S.C. § 251, and the Court of Appeals for Veterans Claims, 38 U.S.C. § 7253(b). Many prominent regulatory agencies are likewise both independent and politically balanced—including the Federal Election Commission, *see* 52 U.S.C. § 30106(a)(1), the Nuclear Regulatory

Commission, *see* 42 U.S.C. § 5841(b)(2), and the Securities and Exchange Commission, *see* 15 U.S.C. § 78d(a). Each could face challenge if the Third Circuit's reasoning were allowed to stand.

That result would be hard to square with the near-universal approval that political-balance requirements for independent agencies have received over the past century and a half. The possibility that the decision below would be invoked to dismantle these time-honored structural protections for stable and consistent decision-making is reason to reject its extension of *Elrod-Branti* to this novel context.

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Other States are of course free to eschew Delaware's judicial-balance provisions and design their own court systems as they see fit. And there are certainly other state judiciaries that serve as models of excellence. One of the geniuses of Our Federalism is that States may experiment with different approaches, even in seeking to achieve the same worthy objectives. But nothing in the Constitution prohibited Delaware from adopting the system it did. And the universally acclaimed success of that system over the past century should give the Court great pause about unleashing the wrecking ball that the Third Circuit has created here.

CONCLUSION

The Third Circuit's decision should be reversed.

Respectfully submitted,

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