

No. 19-309

In the
Supreme Court of the United States

JOHN C. CARNEY, 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 of *Amicus Curiae* Libertarian National
Committee in Support of Respondent**

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INTEREST OF AMICUS CURIAE¹

The Libertarian National Committee (“LNC”) is the governing body of the Libertarian Party, the third-largest political party in the United States. The Libertarian Party was founded in 1971 to promote the principles of liberty set forth in the party’s Statement of Principles.² The Libertarian Party’s interests are frequently implicated by state election laws, including those that burden candidates and voters who seek to participate in the political process without joining the Democratic Party or the Republican Party. Accordingly, the Libertarian Party and its state affiliates have repeatedly presented their views on such issues to this Court, both as a party (for example, in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), and *Clingman v. Beaver*, 544 U.S. 581 (2005)) and as an amicus (for example, in *Burdick v. Takushi*, 504 U.S. 428 (1992), *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

¹ No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of amicus briefs in this case are on file with the Clerk.

² See Libertarian Party, *Statement of Principles*, available at <https://www.lp.org/platform/> (last visited February 22, 2020).

The Libertarian Party has a direct interest in this case, in that members of the Libertarian Party reside in the State of Delaware and are registered to vote as Libertarian. See State of Delaware Department of Elections, *Voter Registration Totals By Political Party*, available at https://elections.delaware.gov/reports/e70r2601pty_20200215.shtml (last visited February 20, 2020). By operation of Article IV, Section 3 of the Delaware Constitution, these citizens are prohibited from serving as Justices of the Delaware Supreme Court, Chancellors or Vice-Chancellors of the Delaware Court of Chancery, or Judges of the Delaware Superior Court. Such prohibition harms not only the core First Amendment rights of the Libertarian voters subject to it, but also those of the Libertarian Party. The Libertarian Party cannot exercise its freedom to develop and grow as a party, and to participate in all aspects of the political and electoral processes in Delaware on an equal basis with the state's "major" parties, when its members are prohibited by virtue of their partisan affiliation from serving as members of these courts.

Further, in each election cycle, the Libertarian Party runs hundreds of candidates nationwide for local, state and federal office. There are currently no fewer than 231 Libertarian Party members who serve in public office in the United States, either because they were elected or because they were appointed to their offices. See Libertarian Party, *Elected Officials*, available at <https://my.lp.org/elected-officials/?page=CiviCRM&q=civicrm/profile&gid=38&force=1&crmRowCount=100&reset=1> (last visited

February 20, 2020). Libertarians have also been elected and appointed to state judicial offices. *See, e.g.*, Libertarian Party, *Elected Officials – Susan Bell*, available at <https://my.lp.org/elected-officials/?page=CiviCRM&q=civicrm%2Fprofile%2Fview&reset=1&id=114528&gid=38> (last visited February 21, 2020); Our Campaigns, *Buttrick, John*, available at <https://www.ourcampaigns.com/CandidateDetail.html?CandidateID=4814> (last visited February 20, 2020). If other states adopted prohibitions like the one in Article IV, Section 3 of the Delaware Constitution, or expanded upon it, the ability of these Libertarians to continue their service in public office would be jeopardized. Such a result would imperil the “basic function” of the Libertarian Party, “to select the candidates for public office to be offered to the voters at general elections.” *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973).

The Libertarian Party therefore submits this brief as *amicus curiae* in support of Respondent, because the prohibition set forth in Article IV, Section 3 of the Delaware Constitution violates the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article IV, Section 3 of the Delaware Constitution categorically excludes Libertarians, independents and members of other minor parties from serving as judicial officers of the Delaware Supreme Court, the Delaware Court of Chancery and the Delaware Superior Court. It does so pursuant to two provisions. One provision provides that no more than a “bare majority” of the judicial officers serving on these courts shall belong to

the “same major political party” (the “Bare-Majority Provision”). The other provision provides that the remainder of the judicial officers on these courts shall belong to the “other major political party” (the “Two-Party Provision”). As applied in combination, the Bare-Majority Provision and the Two-party Provision absolutely prohibit anyone who is not a member of a “major” party – *i.e.*, the Republican Party or the Democratic Party – from serving on the foregoing courts.

The LNC takes no position with respect to the constitutionality of the Bare-Majority Provision. The Two-Party Provision, however, is unconstitutional. It prohibits Libertarians and anyone else who does not belong to the Republican Party or Democratic Party from serving in certain judicial offices based solely on their political affiliation. As such, the Two-Party Provision violates this Court’s long-settled precedent invalidating statutes that condition public service on “patently arbitrary or discriminatory” grounds. *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952).

If the Two-Party Provision were applied to impose a prohibition against Republicans or Democrats from serving on Delaware’s state courts, there would be little doubt as to its unconstitutionality. *See id.* at 191-92. Time and again, this Court has held that the Constitution does not permit the federal or state government from conditioning public service – either as an elected official, an appointed official, or an employee – solely upon the official’s or employee’s political affiliation. *See, e.g., Quinn v. Millsap*, 491 U.S. 95 (1989); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v.*

Burns, 427 U.S. 347 (1976). But Republicans and Democrats enjoy no special protection under the Constitution. Indeed, the Constitution makes no mention of political parties, much less does it afford a higher degree of protection to any two particular parties. Consequently, just as Delaware may not bar Republicans or Democrats from serving on its state courts based on their political affiliation, it may not impose such a prohibition against Libertarians, or any other citizens, based on their political affiliation.

This Court's ballot access jurisprudence is instructive. In 1968, when the Court first ruled on the constitutionality of a state ballot access law, it concluded that the state cannot restrict access to the ballot in a manner that "in effect, tends to give" Republicans and Democrats a "monopoly on the right to have people vote for or against them." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Here, the Two-Party Provision does not merely "tend" to give Republicans and Democrats a monopoly on the right to serve in certain judicial offices: it imposes an absolute, categorical prohibition against all others from serving in those offices. That Delaware accomplishes this impermissible purpose by restricting eligibility for appointment to public office rather than by restricting access to the ballot is of no moment, because constitutional protection extends to those who seek appointed office. *See Quinn*, 491 U.S. 95.

The "good government" justifications for the Two-Party Provision asserted by Respondent and the *amici* supporting Respondent should therefore be treated with skepticism. The Two-Party Provision does not

further Delaware's asserted interest in a politically balanced judiciary, Pet. App. 30a, but rather a judiciary narrowly confined to members of two – and only two – political parties. And there is ample reason to conclude that those two parties, who jointly imposed the Two-Party Provision upon their fellow citizens, did so to further their own partisan interests rather than any legitimate state interest. Indeed, the academic scholarship overwhelmingly suggests that the Two-Party Provision is precisely the sort of partisan interference that led the Framers to view “factions” with such disdain. This Court should not permit Republicans and Democrats to seize for themselves a permanent monopoly on serving as officers of Delaware's state courts. The judgment of the Third Circuit Court of Appeals should be affirmed.

ARGUMENT

I. THE TWO-PARTY PROVISION VIOLATES LIBERTARIAN PARTY MEMBERS' CONSTITUTIONAL RIGHTS.

Does the Constitution of the United States of America permit the State of Delaware to prohibit members of the Republican Party or the Democratic Party from serving as judicial officers of the Delaware state courts? It does not. “[C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.” *Wieman*, 344 U.S. at 192. Thus, while this Court has held that the federal government may “properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service,” it found it necessary to “cast this holding

into perspective by emphasizing that Congress could not ‘enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.’” *Id.* at 191-92 (quoting *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947)). The same constitutional protection extends to public servants who serve in state offices, including offices filled by appointment. *See Quinn*, 491 U.S. 95 (holding that property ownership requirement as qualification for appointment to local office violated the Equal Protection Clause).

But if the Constitution does not permit Delaware to prohibit Republicans or Democrats from serving as judicial officers of its state courts, on what basis could the Constitution permit Delaware to impose that same prohibition on other citizens, solely by virtue of their partisan affiliation? There is none. Yet, that is what the Two-Party Provision does, as applied in combination with the Bare-Majority Provision. Thus, while the LNC takes no position on the constitutionality of the Bare-Majority Provision, the Two-Party Provision as applied in combination with that provision is unconstitutional under this Court’s long-settled precedent. The Two-Party Provision categorically excludes Libertarian voters, and all other voters who are not registered as Republicans or Democrats, including voters registered as independent or as members of another minor party, from serving as judicial officers of Delaware state courts (albeit not all such courts). The categorical exclusion of voters from appointment to such offices, based solely on their political affiliation, is no less invidious as applied to

Libertarians, independents or other minor party members than it is as applied to Republicans and Democrats. *See Wieman*, 344 U.S. at 191-92.

This Court has consistently held that citizens who choose not to associate with the Republican Party or Democratic Party have the “freedom to associate as a political party, a right we have recognized as fundamental.” *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (citing *Williams*, 393 U.S. at 30-31). This entails that non-major political parties have a constitutional right to run candidates for elective office. *See Illinois Bd. of Elections*, 440 U.S. at 184 (right to form a party “has diminished practical value if the party can be kept off the ballot”); *Williams*, 393 U.S. at 31 (right to form a party “means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes”); *see also Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) (holding that burdens on new or small parties and independent candidates impinge on First Amendment associational choices). As the Court observed in *Williams*, there is “no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them.” *Williams*, 393 U.S. at 32.

These same principles apply equally to “the right to be considered for public service” by appointment to public office. *See Quinn*, 491 U.S. at 105. Just as “there is no reason why two parties should retain a permanent monopoly on” elected offices, there is no reason why two parties should retain a permanent monopoly on appointed offices. Both kinds of offices,

after all, represent the people. And this Court's cases make clear that exclusion because of political affiliation can be no less pernicious in the workplace than it is at the polling place. *See, e.g., Branti*, 445 U.S. at 516 (First Amendment protects public employees from discharge based on speech and private belief); *Elrod*, 427 U.S. at 355-58 (requirement that public employees pledge allegiance to Democratic Party violates First Amendment).

This is not to say that a state's use or consideration of political affiliation is always impermissible. On the contrary, the political affiliation of candidates is often printed on ballots, and it is not only known but used by voters to aid in their selections at the polls. Similarly, political affiliation can be considered by governors in making appointments to public offices – arguably including some or all of the judicial offices at issue here. But the ability to use information such as political affiliation to make appointments for public office is a far cry from the categorical exclusion from appointment to such offices based on political affiliation. Just as a law that prohibits citizens from voting for a minor party or independent candidate is unconstitutional, *see Anderson*, 460 U.S. at 793; *Williams*, 393 U.S. at 32, a law like Delaware's Two-Party Provision, which prohibits the appointment of minor party members and independents, is unconstitutional.

II. THE TWO-PARTY PROVISION FURTHERS THE PARTISAN INTERESTS OF DELAWARE'S PREDOMINANT POLITICAL PARTIES, NOT LEGITIMATE OR COMPELLING STATE INTERESTS.

This Court's decisions in cases like *Anderson* and *Williams* are consistent with the Framers' conception of the role of political parties in regulating the nation's political and electoral processes. The original Constitution expressly recognized the likelihood that multiple presidential candidates would receive votes in the Electoral College. Should no single candidate win a majority of Electoral College votes, Article II stated, the House of Representatives would pick the President "from the five highest on the List." *See* U.S. Const., art. II, § 1. And when the Twelfth Amendment was ratified in 1804, it provided that the candidates who received "the highest numbers not exceeding three on the list of those voted for as President" would proceed for selection by the House. Thus, both the Framers of 1787 and those a half a generation later expected that more than two political parties would exist and play an active role in the nation's political process.

The Framers feared the damage that two competing factions could do to the republican form of government they sought to establish. As Professors Issacharoff and Pildes explain, "the constitutional structure was specifically intended to preclude the rise of political parties, which were considered the quintessential form of 'faction.'" Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643, 713 (1998) (footnote

omitted). “[W]hen the Constitution was formed and early elections held, the very idea of political parties was anathema to the reigning conception of democracy ...” *Id.* at 677.

For the nation’s first 150 years, the American political system hewed more closely to the Framers’ intent. “In the nineteenth century,” Professors Issacharoff and Pildes explain, “American partisan and ideological competition was far more robust. Third parties were a consistent and enduring presence, including the Liberty, Free Soil, Know-Nothing, Constitutional Union, Southern Democrat, Greenback, People’s, and Prohibition Parties.” *Id.* at 644 (footnote omitted). The resulting robust field of candidates translated into electoral interest: “[v]oter turnout dwarfed that in the present era.” *Id.* (footnote omitted). Meanwhile, because they “generated more intense and pervasive personal ties,” *id.*, pluralistic political parties thrived.

The dawn of the Twentieth Century and the advent of official state ballots supplied the two dominant political parties of the day, the Republicans and Democrats, with the ability to begin unraveling the Framers’ intent. See Mark R. Brown, *Ballot Fees as Impermissible Qualifications for Federal Office*, 54 Am. U. L. Rev. 1283, 1288 (2005) (“By 1916, the Australian pre-printed paper ballot had become the universal norm throughout the United States. ... The development of pre-printed paper ballots ... supplied government its first real opportunity to limit the number of candidates running for office”). By 1950, in the midst of the Second Red Scare, states across the

country began categorically excluding minor parties and independent candidates from their official ballots. *See, e.g.*, Richard Winger, *Ballot Format: Must Candidates Be Treated Equally?*, 45 *Cleve. St. L. Rev.* 87, 90-92 (1997) (describing experience in Ohio and the Democrats' and Republicans' fear of Socialist and Progressive candidates for party restrictions on ballot access). Such categorical exclusions continued until at least 1968, when this Court in *Williams* ordered Ohio to place George Wallace and his American Independent Party on Ohio's presidential ballot. *See Williams*, 393 U.S. 23.

Professor Joel Friedlander places Delaware's categorical exclusion of independents and minor party members from serving as officers of its state courts in this historical context. Such exclusion is not, he concludes, "a reasonable election regulation that just happens to favor the two major parties. It is a product of partisan self-dealing between Democrats and Republicans in 1951 by which they continue to share control over the state judiciary to the exclusion of Independents or members of minor parties." Joel Edan Friedlander, *Is Delaware's "Other Major Party" Really Entitled to Half of Delaware's Judiciary?*, 58 *Ariz. L. Rev.* 1139, 1160 (2016). The exclusion has been perpetuated because it "ensures some level of institutional support for both incumbent major parties, because lawyers know that membership and participation in either major party is a path to the judiciary." *Id.*

Similarly, Professors Issacharoff and Pildes have observed that “state regulations that purportedly reflect state interests in ‘stability’ or the ‘avoidance of factionalism’ can be seen as tools by which existing parties seek to raise the cost of defection and entrench existing partisan forces more deeply into office.” Issacharoff & Pildes, *supra*, at 643. Far from serving a legitimate state interest, history teaches that duopolistic restrictions serve only the interests of the nation’s two predominant political parties. This result is not surprising. *See id.* at 682-83 (“we should expect the two dominant parties to seek to close off avenues of third-party challenge. ... Such efforts to close off third-party challenges should be a shared objective of both of the major parties, regardless of their immediate position as the majority or opposition party”).

Consequently, “good government” claims, like that made by the Republican National Committee, should be met with a measure of skepticism. *See, e.g., Carney v. Adams*, No. 19-309 (U.S.), Corrected Amicus Curiae Brief of the Republican National Committee in Support of Petitioner, 15-16 (claiming that the two dominant political parties “serve the more fundamental purpose of facilitating an organized and coherent politics—in the broadest, Aristotelian sense,” and that they provide “a helpful indicator of what a candidate is likely to view as conducive to the good of the whole”). Such claims must be tested against the evidence. It cannot be enough that those who are responsible for excluding their competitors cloak their actions in the garb of ‘Aristotelian’ justice. The same goes for claims, like that made by the Republican National Committee, that “[t]he Delaware Constitution cannot plausibly reduce

a better proxy into law.” *Id.* at 19. The truth of this bold proposition is hardly self-evident.

Not only does history cast a large shadow of doubt over the “good government” claim, *see, e.g.*, Issascharoff & Pildes, *supra*, at 682-83, but also, common sense and logic refute it outright. Rather than seeking Aristotelian justice, it is far more likely that the Republicans and Democrats joined to legislate a categorical ban on their competitors from serving in appointed office for the same reason they seek to exclude outsiders from elected office – to maintain power for themselves. *See* Gregory P. Magarian, *Regulating Political Parties Under a “Public Rights” First Amendment*, 44 Wm. & Mary L. Rev. 1939, 1993 (2003) (“partisan lockups’ are easiest to identify when a single political party controls a jurisdiction, but they may also result from the two major parties’ collective efforts to bar minor parties from the political stage”) (footnotes omitted).

The position the Republican National Committee advances in this case is not new. For some time, “responsible party government scholars [] have argued that the two-party system promotes political stability, combats factionalism, and provides a valuable voting cue.” Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition*, 1997 S. Ct. Rev. 331, 342. “[T]hese scholars,” however, “have not proven that the two-party system, especially the modern system since the advent of capital-intensive, candidate-centered campaigns, actually has these effects.” *Id.* Professor Hasen thus

offers “at least three good reasons the Court should be skeptical of speculative empirical claims made in support of legislation favoring the two-party system:

First, there is a severe agency problem here: virtually all of the legislators who will make these decisions are members of one of the two major political parties, and the choice may be less the product of reason than of self-interest. ... Second, there are informational losses associated with restrictions on third parties. ... Favoring the two-party system ultimately provides voters with less information about the choices available to them in terms of candidates, parties, and issues. ... Finally, the lack of a competitive political market may have other costs as well. ... A strong duopoly could make it less likely that the Democrats and Republicans will feel pressure to become the encompassing parties that responsible party government theorists hope they will become.

Id. at 343-44, 358, 360. For these reasons, “the unproven conjecture that the [two-party] system maintains political stability” cannot be sustained. *Id.* at 358. Instead, “circumstantial evidence and underlying theory point in the opposite direction. In short, neither political stability nor antifactionalism justifies the Supreme Court’s decision to favor the two-party system.” *Id.* at 360 (discussing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (concluding that “the States’ interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two party system”).

Many scholars have echoed this view. Professor Magarian, for example, has observed that “[t]he theory of responsible party government reflects a pessimistic and elitist view of politics.” Magarian, *supra*, at 1991. “The trouble with this vision is that its fixation on stability exacts a heavy price in political vitality. Members of the political community, especially but not exclusively those who are uncomfortable in the major party coalitions, have little reason to participate in the political process.” *Id.* Consequently, “[i]n recent years, the legal literature has revealed an increasing level of concern about the judiciary’s embrace of the responsible party government theory. A diverse group of academic commentators has questioned the major party duopoly’s representative character and effectiveness and, accordingly, the Court’s role in sustaining the duopoly.” *Id.* at 1992; *see, e.g.*, Joel Rogers, *Two-Party Systems: Pull the Plug*, 52 Admin. L. Rev. 743 (2000) (arguing that the modern duopoly has not achieved good government and charging the major parties with two central shortcomings: failure to develop and implement coherent programs, and insufficient representation of partisan and ideological minorities); Mark R. Brown, *Policing Ballot Access: Lessons From Nader’s 2004 Run for President*, 35 Cap. U. L. Rev. 163, 169 (2006) (“Far from facilitating a robust marketplace of ideas, America’s two-party system often suppresses meaningful discussion” (footnote omitted)).

The reality is that Delaware’s Two-Party Provision does not foster good government within any understandable sense of those words. It is not necessary for Aristotelian justice. It does not promote

nonpartisanship. It does not in a meaningful way proxy for people's preferences. It does not foster principled developments in the law. It does not obviate the possibility of political gamesmanship. It has nothing to do, in short, with achieving constitutionally acceptable political balance. Far from it. The Two-Party Provision is designed to achieve an unconstitutional imbalance in the State's court system, and it achieves that purpose. It is therefore unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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