In the United States Court of Appeals
for the Sixth Circuit

No. 20-3585

LIBERTARIAN PARTY OF OHIO; et al.,

Plaintiffs - Appellants

v.

DEGEE WILHEM, et al.,

Defendants - Appellees

On Appeal from the United States District Court
For the Southern District of Ohio

APPELLANTS' PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING EN BANC

Appellants respectfully request Rehearing En Banc in the above-styled case. A copy of the Panel's opinion (hereinafter "Panel slip op.") is Attached. *See* Attachment 1.

Rule 35 Statement

Pursuant to Federal Rule of Appellate Procedure 35, Appellants respectfully state that the Panel decision conflicts with decisions of the Supreme Court, *see Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and this Court. *See Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020). Further, this proceeding involves questions of exceptional importance and the Panel's resolution of those questions conflicts with authoritative decisions of the Third and Seventh Circuits. *See Adams v. Governor of Delaware*, 922 F.3d 166 (3d Cir. 2019), *vacated on other grounds sub nom. Carney v. Adams*, 141 S. Ct. 493 (2020); *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, 800 F.3d 913 (7th Cir. 2015).

Introduction

Ohio bans members of minor political parties from serving on its Elections Commission, an adjudicatory agency that enforces election laws. Only Democrats and Republicans need apply. Contrary to the decisions of the Supreme Court, this

Court, and two Sister Circuits, a Panel of this Court, Griffin, Kethledge and White, JJ., concluded that Ohio's categorical ban is consistent with the First Amendment.

Few, if any, States have categorical bans like Ohio's. No federal agencies are restricted in this fashion. Members of minor parties are fully eligible, for example, to serve on the Federal Election Commission. *See* 52 U.S.C. § 30106(a)(1). Outside the context of ministerial positions like "election inspectors and ballot clerks," *Werme v. Merrill*, 84 F.3d 479, 481 (1st Cir. 1996), no Court has sustained against a First Amendment challenge a categorical political ban like that found in Ohio.

The reason for this dearth of authority is simple. Just as it bans religious tests, *see Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), the Constitution bars political tests. The Supreme Court has long spoke of religious and political tests in a single breath, stating, for example, that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office . . . .'" *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952) (citation omitted). Political loyalty tests, like religious tests, are plainly unconstitutional. *See Elfbrandt*, 384 U.S. 11; *Keyishian*, 385 U.S. 589.

This is even more true with judicial positions, as Justice Scalia made clear:

> If there is any category of jobs for whose performance party affiliation is not an appropriate requirement, that is the job of being a judge, where partisanship is not only unneeded but positively undesirable.

Rutan v. Republican Party of Illinois, 497 U.S. 62, 92-93 (1990) (Scalia, J., dissenting). Ohio's ensuring that its adjudicatory Elections Commission is staffed by only loyal Republicans and Democrats is unconstitutional twice over.

The Panel erred. First, it failed to follow Circuit precedent and apply the *Anderson-Burdick* analysis to Ohio's law. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992)). Second, it ignored Circuit precedent by extending a policymaker exception to categorical political bans and loyalty tests. Third, it ruled without Circuit support that present-day political exclusion is permissible because of possible (and unlikely) future events. Together, these mistakes led the Panel to create an unnecessary Circuit split. Rehearing En Banc is therefore in order.

Argument

I. The Panel's Refusal to Apply *Anderson-Burdick* Contradicts this Court's Precedents.

This Court in *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020), ruled that both the *Anderson-Burdick* test and the Supreme Court's patronage/unconstitutional conditions precedents apply to exclusive political restrictions placed on State offices:

> we believe that the eligibility criteria are constitutional under either the *Anderson-Burdick* test or the unconstitutional-conditions doctrine. Because the plaintiffs-appellants' challenge to the eligibility criteria is unlikely to succeed under either framework, however, "we need not choose between the two," ….

(Citation and footnote omitted). Because Michigan's law survived the patronage/unconstitutional conditions cases, the Court was also required to test it under *Anderson-Burdick*. Likewise, in order for Ohio's law to survive First Amendment scrutiny, it must be tested under both.

The Panel in the present case erred applying only half of the required First Amendment analysis. Finding that Ohio's law satisfied the patronage/unconstitutional condition precedents, it chose not to follow *Anderson-Burdick*. It sided with Judge Readler's minority position in *Daunt*, 956 F.3d at 422 (Readler, J., concurring), that *Anderson-Burdick* does not apply at all.

In order to reach this result, the Panel incorrectly concluded that Appellants also agreed with Judge Readler. With all due respect, nothing could be farther from the truth. Appellants here claimed that Ohio's minor party ban violates both the First Amendment's patronage/unconstitutional conditions precedents and the *Anderson-Burdick* line of authority. Eighteen pages in Appellants' Brief were devoted to explaining why *Anderson-Burdick*, like the patronage/unconstitutional conditions precedents, required application of strict scrutiny. The two lines of

authority, Appellants argued, presented different paths to the same destination -- strict scrutiny.

Appellants thus did not "agree," as the Panel stated, that the Panel should or must "forego application of *Anderson-Burdick* to plaintiffs' claim." Panel slip op. at 6. Appellants' statement that they did "not believe it necessary to apply the *Anderson-Burdick* formula here," *id*., was conditioned on the Court's applying strict scrutiny under the patronage/unconstitutional conditions cases. Assuming the Court did, then just as in *Daunt v. Benson* it would become unnecessary to apply *Anderson-Burdick*.

But the Panel did not conclude that Ohio's law was subject to strict scrutiny under the patronage/unconstitutional conditions precedents. This meant, as Appellants argued, the Court could not forego *Anderson-Burdick*, since that analysis itself requires strict scrutiny. Section II of Appellants' Brief devoted eighteen pages to this argument, leading with the heading, "Under Both *Anderson-Burdick* and the Supreme Court's Patronage/Association Cases Strict Scrutiny Must Be Applied." Appellants' Brief, Doc. No. 20, at Page 47.

Ohio and Ohio alone argued that *Anderson-Burdick* should not be applied. Appellants in their Reply Brief then devoted another Section and six pages to explain why Ohio was wrong. That Section of the Reply began, "Application of

Anderson-Burdick Leads to Strict Scrutiny," followed by sub-heading A which stated "*Anderson-Burdick* is Not Dangerous and Serves a Proper Role in this Country's Constitutional Democracy." Appellants' Reply Brief, Doc. No. 23, at Page 33.

Under this Court's precedents, including the majority's holding in *Daunt v. Benson*, *Anderson-Burdick* must be applied to political restrictions placed on appointed offices. *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), provides even more support. The Court there not only applied "the doctrine of unconstitutional conditions, which is one of the strongest forces behind the quartet of Supreme Court patronage cases," *id*. at 1550, it relied on *Anderson v. Celebrezze*, 460 U.S. 780, a case that "was referred to favorably by both the majority and concurring opinions in *Rutan* [,497 U.S. 62]." *McCloud v. Testa*, 97 F.3d at 1550.

The Panel erred. Its decision contradicts *Daunt v. Benson*, 956 F.3d 396, and *McCloud v. Testa*, 97 F.3d 1536. En Banc review is warranted.

II. Categorical Bans Cannot Be Justified by a Policymaker Exception to the First Amendment.

Daunt v. Benson, 956 F.3d 396, establishes that Ohio cannot completely exclude members of disfavored political parties from holding office. In *Daunt*, the Court sustained a Michigan conflict of interest law that "prohibit[ed] eight classes

of individuals with certain current or past political ties from serving as a commissioner." *Id.* at 401. In so holding, the Court's majority concluded that whether *Anderson-Burdick* balancing or the Supreme Court's patronage/unconstitutional conditions precedents, *see*, *e.g*., *Elrod v. Burns*, 427 U.S. 347 (1976); *Elfbrandt*, 384 U.S. 11; *Keyishian*, 385 U.S. 589, were applied, the law survived. It survived because Michigan's was a content-neutral restriction, one that did "not burden the plaintiffs-appellants based on their status as Republicans, …." *Daunt*, 956 F.3d at 408.

Of critical import is what the majority in *Daunt* did not do and did not say. Contrary to the Panel's reasoning in this case, *Daunt* did not rely on some sort of policymaker exception to insulate Michigan's law from First Amendment scrutiny. It did not cite the hypothetical in *McCloud v. Testa*, 97 F.3d 1536, nor the dicta in *Peterson v. Dean*, 777 F.3d 334 (6th Cir. 2015), both of which the Panel claimed were controlling precedent. It instead analyzed the law as it would any categorical political restriction on State office; by applying this Court's patronage/unconstitutional conditions precedents and the *Anderson-Burdick* analysis. Under either or both, categorical political exclusion violates the First Amendment.

Daunt is correct. Categorical exclusions from government employment are unconstitutional under "decades of landmark precedent." *Janus v. AFSCME*, 138

S. Ct. 2448, 2469 (2018). The Supreme Court has long maintained that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office . . . .'" *Wieman*, 344 U.S. at 191-92 (citation omitted). "[N]either a State nor the Federal Government can constitutionally force a person [seeking public employment] to profess a belief or disbelief in any religion," *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), or to forswear membership in a disfavored political organization. *See Elfbrandt*, 384 U.S. at 19; *Keyishian*, 385 U.S. at 606. States, in short, cannot categorically demand religious or political loyalty as a condition for holding office.

The Panel erred. Contrary to its conclusion that differences between ad hoc appointments and categorical political bans are "not borne out by our case law," Panel slip op. at 5, *Daunt* proves that this difference exists. Further, neither *McCloud*, 97 F.3d 1536, nor *Peterson*, 777 F.3d 334, support the weight the Panel puts upon them. Neither holds that categorical political exclusions are constitutional.

McCloud v. Testa, 97 F.3d 1536, ruled that discrimination against intraparty factions violate the First Amendment. Far from categorical exclusions, the issue in the case was whether ad hoc factional dismissals of subordinates by a recently elected County Auditor violated the First Amendment. The Court ruled they did. Because no categorical ban was at issue, the Court said nothing about the matter.

In the course of explaining its opinion, the Court in dicta in *McCloud v. Testa*, 97 F.3d at 1558, described hypothetical situations that might survive constitutional scrutiny, including:

> a gubernatorially-appointed Democratic economist placed on a revenue forecasting committee consisting by law of two economists (one Republican and one Democrat) chosen by the state legislature, two economists of similar party affiliation chosen by the governor, and one economist of any party chosen by the president of the state's most prominent university.

The Panel placed great weight on this hypothetical, claiming it proved that categorical political exclusions are just like ad hoc appointments and dismissals. Panel slip op. at 9. The problem with the Panel's syllogism is not only that this hypothetical was pure dicta, but more importantly that it did not describe a categorical political exclusion. The presumed forecasting committee included an economist "of <u>any party</u> chosen by the president of the state's most prominent university." It was not limited to the two major parties.

In *Peterson v. Dean*, 777 F.3d 334, the Court ruled that ad hoc dismissals of several election administrators were not unconstitutional. No categorical political exclusions applied to the dismissed election administrators, and no constitutional challenges were directed at any other categorical political bans. Contrary to the Panel's description of *Peterson*, the Court did not rule, nor could it have, that categorical political bans are constitutional.

To be sure, the Court in *Peterson*, 777 F.3d at 338, did describe the chain of command responsible for the challenged ad hoc dismissals:

> the state legislature has established a system wherein the majority party has control of the state and county election commissions. Membership on these commissions is based explicitly on political party affiliation. The county commissions in turn appoint a county election administrator to assist in running the elections.

The county commissions themselves thus included categorical party requirements, a structure the parties "agreed" was constitutional. *Id*. at 343 (emphasis added).

Concessions like this, however, are not binding precedent. Whether the county commissioners fell into a First Amendment exception was not relevant to the plaintiffs' case. The question in the case was not whether county commissioners were policymakers, but instead whether the dismissed county administrators were. *Id*. at 344. No categorical restriction applied to the administrators; rather, they worked at the pleasure of the commission. Their dismissals were ad hoc.

Concluding, as the Panel did here, that the Court in *Peterson* created binding precedent through this stipulation is a far stretch indeed. “Parties, after all, “may not stipulate to the legal conclusions to be reached by the Court.” *Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir. 2002). As explained by Judge Clay in his dissenting opinion in *Peterson*, 777 F.3d at 351 (Clay, J., dissenting), the majority in that case itself erred by “uncritically relying on the parties’ stipulation on this point of law.”

No precedent from this Court or the Supreme Court supports the Panel's position. Indeed, this Court's decisions point in the opposite direction. In *Newman v. Voinovich*, 986 F.2d 159, 161 (6th Cir. 1993), for example, where the Sixth Circuit sustained a Governor's discretionary use of patronage as one factor in making ad hoc, interim judicial appointments, it expressed reservations over wholesale, categorical applications:

> we are troubled by the Governor's practice of considering only members of his party in making appointments to fill interim judicial vacancies. While this practice may be constitutional, we believe it is unwise.

Id. at 163.

Judge Jones reinforced the majority's concern: "I absolutely agree … that political affiliation may be *an appropriate factor* to consider when making interim judicial appointments." *Id*. at 165 (Jones, J., concurring) (emphasis original). But "[u]sing political affiliation as a *factor* in filling appointments is drastically different from using political affiliation as *an exclusive means* of appointing judges." *Id*. (emphasis original).

Neither the Sixth Circuit nor the Supreme Court has ever extended the First Amendment's policymaker exception to categorical political bans and loyalty requirements. This Court in *Daunt* rejected the notion out of hand. *Newman* cautioned against it. The Panel's decision to the contrary is not supported by precedent, contradicts existing case law, and should be reexamined En Banc.

III. Sister Circuits Have Ruled that Categorical Political Restrictions on Judicial Positions Violate the First Amendment.

The Panel's conclusion contradicts decisions from the Third and Seventh Circuits. Those Circuits have ruled that because adjudication is expected to be fair, neutral and impartial, patronage restrictions of any sort placed on judicial positions necessarily violate the First Amendment.

In *Adams v. Governor of Delaware*, 922 F.3d 166 (3d Cir. 2019), *vacated on other grounds sub nom. Carney v. Adams*, 141 S. Ct. 493 (2020),[1] the Third Circuit invalidated a Delaware law that restricted judicial appointments to members of the two major political parties. Like Ohio, Delaware used "major" political party -- as opposed to "Democratic" and "Republican" -- to define its categorical restriction. Still, even this language was found to violate the First Amendment.

Delaware, like Ohio here, argued that its law was justified by the policymaker exception sometimes used to justify politically based, ad hoc hiring decisions. *See*, *e.g.*, *Branti v. Finkel*, 445 U.S. 507 (1980). Although it recognized this exception, the Third Circuit distinguished it, applied Supreme Court precedent mandating strict scrutiny, and struck down Delaware's law. *Adams*, 922 F.3d at 183. *See* Joel Edan Friedlander, *Is Delaware's 'Other Major Political Party'*

[1] The Supreme Court vacated the Third Circuit's decision for lack of Article III standing.

Really Entitled to Half of Delaware's Judiciary, 58 ARIZ. L. REV. 1139, 1147 (2016) ("the Two-Party Feature of the Political Balance Requirement [in Delaware] is at odds with U.S. Supreme Court precedent").

The Seventh Circuit in *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, 800 F.3d 913, 923 (7th Cir. 2015), reached this same result with an Indiana law that apportioned judicial positions between the two "major" political parties. The Seventh Circuit concluded that the political restrictions violated the First Amendment. "Although the State's goal of partisan balance on the Marion Superior Court conjures up notions of fairness, it is an odd concept of fairness in the judicial context." *Id.* at 923. "Partisan balance amongst the judges who comprise the court, alone, has little bearing on impartiality." *Id.* The Court thus rejected the notion that true political balance served a compelling State interest: "The emphasis on partisan balance could just as easily damage public confidence in the impartiality of the court." *Id.* at 925.

Ohio's Elections Commission is an adjudicatory agency that resolves disputes between Democrats, Republicans, and their minor party challengers. Its judges, meanwhile, can only be Democrats and Republicans. It is by design biased, unfair and partial. As made clear by the Third and Seventh Circuits, it cannot be constitutional.

IV. The Panel's Conclusion that Political Majorities May Exclude Political Minorities Contradicts Constitutional Decisions in Sister Circuits.

> *If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution ….*

-- Abraham Lincoln, First Inaugural Address, March 4, 1861

The Panel concluded that because Ohio grants preferences to the two "major" parties, as opposed to the "Democratic" and "Republican" parties, it is not really discriminating. It "does not single out any ideology, viewpoint, or protected class," Panel slip op. at 11, but "instead operates such that whichever parties are the two most represented factions in the Ohio legislature—for now the Republicans and the Democrats, but subject to change should another party achieve greater electoral success—receive three seats each on the OEC …." *Id*. The hypothetical possibility of future political popularity, the Panel concluded, justifies Ohio's political (and governmental) majorities' denial of First Amendment rights (and representation) to minority ideologies.

Although the Panel's logic arguably finds support in *Werme v. Merrill*, 84 F.3d 479, 487 (1st Cir. 1996) ("the Libertarian Party has the same opportunity as its better-known competitors to attract voters to its standard, finish in one of the top

two spots in a gubernatorial election, and thereafter play a more active role in the mechanics of the electoral process"), it contradicts rulings in the Third, *see Adams*, 922 F.3d 166, and Seventh Circuits. *See Common Cause Indiana*, 800 F.3d 913. Both those Courts invalidated "major" party limitations and preferences placed on judges, whether they were elected (as in Indiana) or appointed (as in Delaware).

In *Adams*, 922 F.3d 166, the Third Circuit invalidated a Delaware law that, like Ohio, restricted judicial appointments to members of the two prevailing "major" political parties. Like Ohio, Delaware's law did not identify the preferred Democratic and Republican parties by name, nor identify the disfavored political parties. For instance, Delaware's Constitution stated that appointments

> to the office of the State Judiciary shall at all times be subject to all of the following limitations: First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.

Id.

Still, notwithstanding that minor parties could obviously someday become "major" parties and qualify their members for office, and notwithstanding that unaffiliated voters could always join a major party, the Third Circuit ruled that the restriction still violated the First Amendment.

Under Indiana's "Partisan Ballot Statute," which was invalidated by the Seventh Circuit in *Common Cause Indiana*, 800 F.3d 913, members of the two

"major" parties, defined as those that "received at least ten percent (10%) of the votes cast in the last general election," were each insured up to half of the available judicial vacancies. *Id.* at 915. "Minor political parties," meanwhile, were essentially foreclosed from winning any of the available seats. *Id.* at 915-16. Nowhere did the statute identify by name which political parties were to benefit from the restrictions; rather, the law used the same ostensibly neutral language employed by Ohio.

In stark contrast to the Panel's approach here, the Seventh Circuit employed the *Anderson-Burdick* analysis, *id.* at 917, to strike down the Partisan Balance Statute. That the minor parties might someday win enough support to become the dominant "major" parties was irrelevant.

The Third and Seventh Circuits both sensibly concluded that whether a "minor" party might someday achieve majority status is irrelevant to present-day discrimination and exclusion. Present-day exclusion, like any loyalty demand, must instead be judged on its own terms. It cannot be excused based on what might hypothetically emerge in the future. If it were any other way then virtually every discriminatory practice would be permitted. All minority races and religions, after all, might hypothetically one day form majorities.

In *Wieman*, 344 U.S. at 191-92, the Supreme Court made clear that neither Jews nor Republicans may be banned from office. Whether religion or politics, ideological status is constitutionally protected. But according to the Panel here, a loophole exists. Ohio can limit governmental positions to members of the two "major" parties. It cannot name them, but can achieve the exact same result by using the terms "majority" and "minority."

Under the Panel's rationale, of course, Ohio logically must then be able to do the same thing with religion. Rather than ban Jews by name, which would clearly be unconstitutional under *Wieman*, Ohio can limit its offices to members of the two "major" religions. The effect is the same, of course, but because Judaism might one day become one of the two "major" religions it is constitutionally acceptable.

This cannot be correct. It is not right with religion and is just as wrong with political ideology. Present-day discrimination framed in terms of "small, new or unpopular denominations," *Larson v. Valente*, 456 U.S. 228, 245 (1982), is just as unconstitutional as discrimination against Judaism by name. The same is necessarily true of loyalty requirements and political exclusions. It cannot be form over substance.

Echoing President Lincoln, Justice Gorsuch said in *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring), that if States may use their laws "to silence those who voice unpopular ideas, little would be left of our First

Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age." He's right. And the Panel is wrong.

The Panel's reasoning, moreover, is especially pernicious as applied to an Elections Commission charged with policing political fairness. As this case makes clear, this includes fairness in debates but also goes much farther. The Commission renders judgment on a whole host of electoral matters facing all candidates and every political party. Stacking the Commission in favor of the reigning political/governmental duopoly makes it virtually impossible for challengers to succeed. This protection from market forces is both unconstitutional and undeserved. *See* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect Democrats and Republicans from Political Competition*, 1997 S. CT. REV. 331, 332 ("none of the reasons that might be put forth to justify Supreme Court protection of the two-party system are persuasive").

The Panel's reasoning needs to be reexamined En Banc.

Conclusion

Appellants respectfully request Rehearing En Banc.

Respectfully submitted,

s/ Mark R. Brown

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CERTIFICATE OF TYPE-SIZE AND WORD COUNT

Appellants certify that they have prepared this document in 14-point Times New Roman font and that excluding the Caption, Signature Blocks and Certificates, the document includes 3861 words.

s/*Mark R. Brown*
Mark R. Brown

CERTIFICATE OF SERVICE

I certify that this Petition was filed using the Court's electronic filing system and thereby will be served on all parties to this proceeding.

s/*Mark R. Brown*
Mark R. Brown

In the United States Court of Appeals
for the Sixth Circuit

No. 20-3585

LIBERTARIAN PARTY OF OHIO; et al.,

Plaintiffs - Appellants

v.

DEGEE WILHEM, et al.,

Defendants - Appellees

Attachment 1

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0030p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LIBERTARIAN PARTY OF OHIO and HAROLD THOMAS,
Plaintiffs-Appellants,

v.

DEGEE WILHEM, HELEN E. BALCOLM, OTTO BEATTY, III, DENNIS BROMMER, DON MICHAEL CRITES, CATHERINE A. CUNNINGHAM, and A. SCOTT NORMAN, in their official capacities,
Defendants-Appellees.

No. 20-3585

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:19-cv-02501—Algenon L. Marbley, District Judge.

Argued: August 24, 2020

Decided and Filed: February 10, 2021

Before: GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Mark R. Brown, Columbus, Ohio, for Appellants. Michael J. Hendershot, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellees. **ON BRIEF:** Mark R. Brown, Columbus, Ohio, for Appellants. Michael J. Hendershot, Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellees.

OPINION

GRIFFIN, Circuit Judge.

Ohio law mandates that the Ohio Elections Commission (OEC) be composed of three members from each of the top two political parties in the state, and an additional seventh member who cannot have any political affiliation. *See* Ohio Rev. Code § 3517.152(A)(1). The Libertarian Party of Ohio (LPO) and its former chairman, Harold Thomas, contend this law violates their First Amendment right to associate for political purposes. The district court disagreed, and we affirm.

I.

A.

Plaintiff Harold Thomas is the former chairman of the Libertarian Party of Ohio and a current member of the LPO.[1] During the 2020 election season, the LPO was a minor political party recognized in Ohio, but it lost its status by not receiving a sufficient share of the vote in the 2020 general election. Defendants are the appointed members of the Ohio Elections Commission (OEC or the Commission) and have been sued in their official capacities.

"[T]he Commission is an independent agency consisting of seven members, six of whom are appointed by the governor on the recommendation of the combined state House and Senate caucuses of the major political parties. Three members are appointed from each of the two major political parties and the seventh is an unaffiliated elector appointed by the other six members." *Project Veritas v. Ohio Election Comm'n*, 418 F. Supp. 3d 232, 236–37 (S.D. Ohio 2019). All members of the OEC serve five-year terms. The OEC enforces Ohio's campaigning and election laws. It may investigate complaints, issue fines, and publish advisory opinions on matters of Ohio election law. *See id.* It is also empowered to refer criminal violations of Ohio's election law to county prosecutors. *See* Ohio Admin. Code § 3517-1-14-(B)(3) and (C).

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[1]Thomas resigned his executive position while this appeal was pending.

The procedure for selecting OEC Commissioners is set forth in Ohio Revised Code § 3517.152(A)(1):

> There is hereby created the Ohio elections commission consisting of seven members.
>
> . . . [T]he speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member shall jointly submit to the governor a list of five persons who are affiliated with that political party. . . . [T]he two legislative leaders in the two houses of the general assembly of the major political party of which the speaker is not a member shall jointly submit to the governor a list of five persons who are affiliated with the major political party of which the speaker is not a member. Not later than fifteen days after receiving each list, the governor shall appoint three persons from each list to the commission.
>
> * * *
>
> Not later than thirty days after the governor appoints these six members, they shall, by a majority vote, appoint to the commission a seventh member, who shall not be affiliated with a political party. If the six members fail to appoint the seventh member within this thirty-day period, the chief justice of the supreme court, not later than thirty days after the end of the period during which the six members were required to appoint a member, shall appoint the seventh member, who shall not be affiliated with a political party.

As defendants observe, § 3517.152(A)(1) does not restrict the partisan seats to any specific party. Instead,

> three members will be selected from *any* party that wins enough seats in the legislature to qualify as one of the State's two major parties. Thus, the parties to this appeal do not dispute that, if "a minor party" builds "its base and become[s] one of the two major parties in the state," it would secure "an avenue for its members to serve on the Elections Commission." Rightly so: though 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.

Record citations omitted. Based on this procedure and Ohio's election results, there are presently three Republican commissioners, three Democrat commissioners, and one commissioner with no party affiliation. *See* Ohio Elections Commission, Members/Staff, *available at* https://elc.ohio.gov/wps/portal/gov/elc/about-us/membership-staff (last visited Feb. 4, 2021).

B.

In the lead-up to Ohio's 2018 gubernatorial election, three organizations hosted televised debates between the nominees chosen by the Democratic Party and the Republican Party, to the exclusion of other candidates, including the ballot-qualified nominee of the LPO. In September 2018, the LPO filed administrative complaints with the OEC, alleging that each of the organizations hosting those debates had violated Ohio's campaign-finance laws because the exclusive debates between major-party candidates were illegal, in-kind campaign contributions. *See* Ohio Rev. Code § 3599.03. But in December 2018, the OEC found no violation and dismissed the administrative complaints.

The LPO and Thomas then sued the individual commissioners of the OEC in their official capacities, alleging violations of their First and Fourteenth Amendment rights. As relevant here, plaintiffs alleged that § 3517.152(A)(1) violated their First Amendment associational rights because it rendered LPO members ineligible for service on the OEC.[2] The district court entered summary judgment in defendants' favor, reasoning § 3517.152(A)(1) withstood constitutional scrutiny under either of two potential frameworks. This timely appeal followed.

II.

We review the district court's summary judgment determination de novo. *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 526 (6th Cir. 2014). Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III.

Initially, we must address defendants' assertion, first raised on appeal, that plaintiffs lack standing. The "irreducible constitutional minimum" of standing consists of three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the

[2]Plaintiffs also alleged selective enforcement of Ohio's campaign finance laws. The district court dismissed those claims for lack of standing, and plaintiffs do not challenge that ruling on appeal.

defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Id.* at 560–561. Absent these three elements, a plaintiff has failed to show a present "case or controversy" that we are authorized to adjudicate under Article III of the Constitution. *Id.* at 560 ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). Therefore, even though the failure to raise an issue before the district court usually renders it forfeited on appeal, *see, e.g.*, *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 630 (6th Cir. 2014), we must consider plaintiffs' standing because it implicates our subject-matter jurisdiction, *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), and such defects cannot be forfeited, *see United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[D]efects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.").

The OEC offers several reasons why plaintiffs have not demonstrated their standing to challenge § 3517.152(a). First, it says that Thomas, as LPO chairman, was not eligible for membership on the Commission at the time the lawsuit was filed under a separate provision of § 3517.152. Specifically, defendants point out that Ohio law prohibits political party officers from serving on the OEC. *See* Ohio Rev. Code § 3517.152(F)(1)(c) ("No member of the Ohio elections commission shall . . . [b]e an officer of the state central committee, a county central committee, or a district, city, township, or other committee of a political party or an officer of the executive committee of the state central committee, a county central committee, or a district, city, township, or other committee of a political party[.]"). While Thomas is no longer the chairman of the LPO, standing must exist from the outset of the suit, so if Thomas lacked Article III standing at the time the complaint was filed, his resignation of the chairmanship cannot cure the defect. *See Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 206 (6th Cir. 2011).

But Thomas had standing at the outset of the suit. As the OEC 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. Under 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." *Carney v. Adams*, 141 S. Ct. 493, 503 (2020) (internal quotation marks, brackets, and citation

omitted).[3] Further, the separate provision § 3517.152 poses no obstacle to Thomas's eligibility because it prohibits a person only from *simultaneously* holding public office as an OEC commissioner and a leadership position in a political party. *See* § 3517.152(F)(1)(c). Accordingly, if Thomas had been selected for a seat on the OEC, he could have resigned his party leadership role (and has now done so while this appeal was pending). Thus, the record demonstrates that Thomas has standing to challenge § 3517.152(A)(1), and further discussion of plaintiffs' standing is unnecessary to our resolution of the suit. *See Mays v. LaRose*, 951 F.3d 775, 782 (6th Cir. 2020).

IV.

Moving now to the merits, we recognize that there are arguably two frameworks that plaintiffs may invoke to establish a violation of their First Amendment rights—*Anderson-Burdick* and the unconstitutional-conditions doctrine. However, we limit our holding to the latter because the parties agree that we should forego application of *Anderson-Burdick* to plaintiffs' claim.[4] *See* Appellant's Opening Br. at 48 ("LPO does not believe it necessary to apply the *Anderson-Burdick* formula here. . . ."); Reply at 28 ("LPO does not believe *Anderson-Burdick* needs [to] be used in this case."); Appellee's Br. at 49 ("[T]he Court should refuse to apply *Anderson-Burdick*.").

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[3]In *Carney*, the Supreme Court concluded that a Democrat-turned-independent did not have standing to challenge Delaware's "major party" requirement, which mandated the state's judges be a member of either of the two most popular political parties. *Carney*, 141 S. Ct. at 498–503. The Court reached this conclusion by observing in part that the plaintiff had not applied to any of 14 judicial openings for which he would have been eligible as a Democrat between 2012 and 2016, and that his decision to switch his political affiliation from Democrat to unaffiliated independent "made it less likely that he would become a judge[,]" but more likely that he could "vindicate his view" that Delaware's major party requirement was unconstitutional. *Id.* at 501.

[4]In a recent case, we declined to decide which of these frameworks applied to First and Fourteenth Amendment challenges brought against the criteria for government service on Michigan's Independent Citizens Redistricting Commission. *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020). While some may harbor doubts over the applicability of *Anderson-Burdick* to such cases because the challenged law neither regulates the administration of elections nor burdens voting rights, *see id.* at 422–24, 429–31 (Readler, J. concurring), we leave that matter for another day when it is properly before the court.

A.

The unconstitutional-conditions doctrine prevents the government from denying a benefit on the basis of a person's constitutionally protected speech or associations. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In *Perry*, the Court explained that the government

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible.

Perry, 408 U.S. at 597 (alteration and internal citation omitted). In a trio of cases, the Supreme Court has employed the unconstitutional conditions doctrine to examine the tension between governmental patronage practices—hiring and firing based on political affiliation—and the First Amendment rights of individuals. Those cases warrant further discussion.

First, in *Elrod v. Burns*, Justice Brennan wrote for a plurality of the Court and held that patronage dismissals violated the First and Fourteenth Amendments because they amounted to the government conditioning employment on particular political affiliations, and thus "severely restrict[ed]" the employees' right to "political belief and association." 427 U.S. 347, 372 (1976). However, the plurality also acknowledged that First Amendment protections were "not . . . absolute[,]" and that patronage dismissals did not violate the First Amendment in "policymaking positions." *Id.* at 360–61, 367–68. Concurring in the judgment, Justices Stewart and Blackmun would have decided the case on narrower grounds: "[A] nonpolicymaking, nonconfidential government employee" could not be discharged solely because of his political beliefs under *Perry*. *Id.* at 375 (Stewart, J., concurring in the judgment).

The Court then built upon *Elrod* in *Branti v. Finkel*, 445 U.S. 507 (1980). There, the issue was whether the dismissal of two assistant public defenders for their political affiliation violated the First Amendment, or whether the plaintiffs fit within *Elrod*'s policymaking exception. *Id.* at 510–11. The Court clarified that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring

authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. "As one obvious example," the Court explained, "if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration." *Id.* With this understanding, the Court held that the patronage dismissals of the plaintiffs violated the First Amendment because "[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State." *Id.* at 519.

Finally, in *Rutan v. Republican Party of Illinois*, the Court considered "whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support." 497 U.S. 62, 65 (1990). The case arose out of a system of patronage instituted by the Governor of Illinois by imposing a state-wide hiring freeze and then requiring that any exception to the freeze receive his "express permission." *Id.* When determining whether permission should be granted, the governor's office looked at whether the applicant voted in his party's primaries, provided financial or other support to his party, had joined or promised to work for the party in the future, and whether the applicant was supported by local party officials. *Id.* at 66. Moreover, state officials also allegedly used party affiliation to make decisions about recalling laid-off employees and when selecting employees for promotions. *Id.* at 67. The Supreme Court held "that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation." *Id.* at 79.

B.

As discussed above, the touchstone of our inquiry is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. However, we do not write on a blank slate; our precedent fills in many of the gaps for determining whether or not party affiliation is an appropriate criterion for government employment. Most significantly, we elaborated in *McCloud v. Testa* on the types of positions for which it would not violate the First Amendment to consider party affiliation and set forth four categories of public employment that fall "with reasonable certainty" within the *Elrod-Branti* exception:

> **Category One**: positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;
>
> **Category Two**: positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;
>
> **Category Three**: confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors;
>
> **Category Four**: positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

97 F.3d 1536, 1557 (6th Cir. 1996) (footnotes omitted). Further, the *McCloud* court instructed that where there is "any ambiguity" in determining whether a particular position falls within one of the categories, "it is to be construed in favor of the governmental defendants" at least when the position is "unclassified or non-merit under state law." *Id.* It also provided examples of positions in each category. Relevant here, we explained that "a gubernatorially-appointed Democratic economist placed on a revenue forecasting committee consisting by law of two economists (one Republican and one Democrat) chosen by the state legislature, two economists of similar party affiliation chosen by the governor, and one economist of any party chosen by the president of the state's most prominent university" would fall within Category Four. *Id.*

More recently, in *Peterson v. Dean*, we considered whether Tennessee's county election administrators were subject to patronage dismissals under the *Elrod-Branti* exception. 777 F.3d 334, 336 (6th Cir. 2015). Tennessee law requires the State Election Commission to appoint five election commissioners for each county, with three members being of the majority party and two members of the minority party. *Id.* at 338. The county commissioners, in turn, were required to "appoint an administrator of elections" to serve as the "chief administrative officer of the commission." *Id.* Eight of these county administrators were ousted from their positions allegedly because of their actual or perceived political affiliation. They then filed suit under

42 U.S.C. § 1983, claiming that their patronage dismissals violated their First and Fourteenth Amendment rights. *Id.* at 340. On appeal, the parties agreed that "the common and controlling issue was whether the statutory position of county administrator of elections in Tennessee [was] lawfully subject to patronage dismissal" under *Elrod* and *Branti*. *Id.* at 337.

In concluding the administrators fell within the exception, we started from the premise that county election commissioners in Tennessee were Category One employees under *McCloud* because their positions were statutorily established and vested with discretionary authority to carry out functions of political concern. *See id.* at 345. From there, we observed that "[c]ategory two is constructed to recognize that it may be necessary to deny First Amendment protection not just to positions at the very top of any state administrative hierarchy, but in some cases to those occupying levels a bit farther down the hierarchy." *Id.* at 345 (quoting *McCloud*, 97 F.3d at 1557 n.31). Thus election administrators "neatly fit[]" into Category Two because "the position [was] one to which a significant amount of the total discretionary authority available to category-one employees ha[d] been delegated." *Id.* at 346 (quoting *Summe v. Kenton Cty. Clerk's Office*, 604 F.3d 257, 266 (6th Cir. 2010)).

Writing in dissent, Judge Clay disagreed. In his view, the county election commissioners were not Category One employees because they did not "exercise meaningful discretion on issues where there is room for principled disagreement on the goals or their implementations." 777 F.3d at 352 (Clay, J., dissenting) (internal quotation marks omitted). Judge Clay instead concluded that they were subject to patronage dismissals because their positions fell within Category Four, given that they were "filled by balancing out political party representation." *Id.* (quoting *McCloud*, 97 F.3d at 1557). Accordingly, while he concluded that county administrators could not be discharged for their political affiliation, all three members of the panel agreed that the county election commissioners were subject to patronage dismissals. *Id.*

C.

Applying the foregoing precedent to the plaintiffs' claim, the district court properly granted summary judgment in favor of defendants because OEC Commissioners fall within Category Four of the *McCloud* framework, and Ohio may thus condition employment on the

OEC on party affiliation. They are akin to the supervisory judges discussed in *Branti*, 445 U.S at 518, the economists appointed to maintain partisan balance in *McCloud*, 97 F.3d at 1557, and the county election commissioners in *Peterson*, 777 F.3d at 346; *id.* at 352 (Clay, J., dissenting). Accordingly, § 3517.152(A)(1) is not an unconstitutional condition on government employment because it is "appropriate" for Ohio to consider political affiliation to serve its stated interest in maintaining partisan balance among the members of the OEC. For this reason, § 3517.152(A)(1) does not violate plaintiffs' First Amendment rights.

Plaintiffs' arguments to the contrary are not persuasive. First, they compare § 3517.152(A)(1) to laws prohibiting persons from government service based on immutable characteristics or laws that require a person seeking public employment to profess a certain belief or disbelief in religion, or laws requiring a person to forswear membership in a "disfavored political organization" for government employment. The challenged law is similar, in their view, because it "condition[s] one's full participation in Ohio's political community and electoral machinery on forfeiting her freedom of association." Therefore, the argument goes, "[b]anning members of minor parties from office is no more constitutional than banning Jews or Republicans from office."

We disagree. Section 3517.152(A)(1) does not single out any ideology, viewpoint, or protected class. It instead operates such that whichever parties are the two most represented factions in the Ohio legislature—for now the Republicans and the Democrats, but subject to change should another party achieve greater electoral success—receive three seats each on the OEC with one additional seat to a person with no political affiliation. There is no comparison to be drawn from laws which afford equality of opportunity to all political parties, and those that expressly prohibit a person from government employment because of a protected characteristic. *Cf. American Party of Texas v. White*, 415 U.S. 767, 781 (1974) (holding that it is not invidious discrimination for a state to grant minor parties official recognition, but deny them the right to hold primaries even though the main political parties are so entitled); *Jenness v. Fortson*, 403 U.S. 431, 440 (1971) (holding that Georgia did not violate the First or Fourteenth Amendment rights of independent candidates or unrecognized political parties by requiring that they petition for access to the ballot, while recognized parties—who attained twenty percent of

the vote in a prior election—obtained ballot access by holding a primary election); *see also Werme v. Merrill*, 84 F.3d 479, 484–85 (1st Cir. 1996) ("[T]he Libertarian Party has exactly the same opportunity to qualify as a source of election inspectors and ballot clerks under New Hampshire law as does any other party. Equality of opportunity exists, and equality of opportunity—not equality of outcomes—is the linchpin of what the Constitution requires in this type of situation.").

Second, the LPO attempts to draw a distinction between "discretionary hiring and firing decisions" and "statutory categorical disqualifications" because *Elrod* and the cases that follow govern only the former and do not bear on the latter. This distinction is not borne out by our caselaw. Look no further than *McCloud* or *Peterson*. In each of those cases, our court clearly contemplated statutory schemes that would result in "categorical" exclusions to maintain partisan balance. The touchstone under *Elrod* and *Branti* is whether the State of Ohio can demonstrate that party affiliation is an "appropriate" requirement for the effective performance of the public office involved. *See Branti*, 445 U.S. at 518. That remains the standard whether Ohio is justifying hiring criteria as in *Rutan* or the discharge of an existing employee like *Branti*. We thus reject plaintiffs' attempt to recast decades of precedent.[5]

V.

For these reasons, we affirm the judgment of the district court.

[5]Plaintiffs also contend that we should follow the Third Circuit's reasoning from *Adams* and conclude that commissioners are not policymakers. Defendants respond that *Adams* is contrary to our precedent, citing *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993). We need not address this purported conflict because the Supreme Court vacated our sister court's opinion and remanded with instructions to dismiss the case for lack of jurisdiction. *Carney*, 141 S. Ct. at 503.