No. 21-

In the Supreme Court of the United States

LIBERTARIAN PARTY OF OHIO
AND HAROLD THOMAS,
Petitioners,

v.

DON MICHAEL CRITES, OTTO BEATTY, III,
DENNIS BROMMER, CATHERINE A. CUNNINGHAM,
NATASHA KAUFMAN, A. SCOTT NORMAN,
AND CHARLETA B. TAVARES,
IN THEIR OFFICIAL CAPACITIES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK R. BROWN
Capital University
Law School
303 E. Broad St.
Columbus, OH 43215

MARK G. KAFANTARIS
625 City Park Ave.
Columbus, OH 43206

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

QUESTION PRESENTED

Whether a state violates the First Amendment by barring members of small political parties from holding a public office.

PARTIES TO THE PROCEEDING

Petitioners are the Libertarian Party of Ohio and Harold Thomas. They were appellants in the Court of Appeals.

Respondents are Don Michael Crites, Otto Beatty, III, Dennis Brommer, Catherine A. Cunningham, Natasha Kaufman, A. Scott Norman, and Charleta B. Tavares. They are the members of the Ohio Elections Commission, who are sued in their official capacities. Natasha Kaufman and Charleta B. Tavares have been substituted for Degee Wilhem and Helen E. Balcolm, who were appellees in the Court of Appeals but whose terms as Commission members have expired. The remaining respondents were appellees in the Court of Appeals.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit: *Libertarian Party of Ohio v. Wilhem*, No. 20-3685 (Feb. 10, 2021)

U.S. District Court, Southern District of Ohio: *Libertarian Party of Ohio v. Wilhem*, No. 2:19-cv-02501 (June 5, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND STATE CONSTITUTIONAL PROVISIONS

OTHER AUTHORITY

PETITION FOR A WRIT OF CERTIORARI

The Libertarian Party of Ohio and Harold Thomas respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is published at 988 F.3d 274 (6th Cir. 2021). The opinion of the District Court is published at 465 F. Supp. 3d 780 (S.D. Ohio 2020).

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 2021. The Court of Appeals denied panel rehearing and rehearing en banc on March 19, 2021. On March 19, 2020, the Court extended the deadline for filing certiorari petitions due on or after that date to 150 days from the date of the lower court judgment. Order, 589 U.S. ___ (Mar. 19, 2020). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ohio Rev. Code § 3517.152(A) provides in relevant part:

> (1) There is hereby created the Ohio elections commission consisting of seven members.
>
> Not later than forty-five days after August 24, 1995, the 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. Not later than forty-five days after August 24, 1995, the two legislative leaders in the two houses of the general assembly of the major political party of which the speaker is not a member 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. The governor shall appoint one person from each list to a term that ends on December 31, 1996, one person from each list to a term that ends on December 31, 1997, and one person from each list to a term that ends on December 31, 1998.
>
> 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. The seventh member shall be appointed to a term that ends on December 31, 2001. Terms of the initial members appointed under this division begin on January 1, 1996.

(2) If a vacancy occurs in the position of the seventh member, who is not affiliated with a political party, the six remaining members by a majority vote shall appoint, not later than forty-five days after the date of the vacancy, the seventh member of the commission, who shall not be affiliated with a political party. If these members fail to appoint the seventh member within this forty-five-day period, the chief justice of the supreme court, within fifteen days after the end of this period, shall appoint the seventh member, who shall not be affiliated with a political party. If a vacancy occurs in any of the other six positions on the commission, the legislative leaders of the political party from whose list of persons the member being replaced was appointed shall submit to the governor, not later than thirty days after the date of the vacancy, a list of three persons who are affiliated with that political party. Not later than fifteen days after receiving the list, the governor, with the advice and consent of the senate, shall appoint one person from the list to the commission.

STATEMENT

Petitioner Harold Thomas would like to be considered for appointment to the Ohio Elections Commission. Thomas, a now-retired business analyst in Co-

lumbus, has been politically active in Ohio for many years. Twice he was a Republican candidate for elective office. In 2010 he switched to the Libertarian Party and served for a time as the party's state chair. In almost any other state, he would be eligible for a position with the state agency that supervises political campaigns.

But not in Ohio. By statute, members of the Libertarian Party and other small political parties are prohibited from serving on the Ohio Elections Commission. Of the Commission's seven seats, three are reserved for Democrats, three for Republicans, and one for a person who is unaffiliated with any party. People who belong to a party other than the Democrats and Republicans are ineligible for a seat on the Commission. Libertarians, Greens, and members of other small parties are all excluded.

This is an infringement of the freedom of association. By joining a small political party, an Ohioan is automatically disqualified from holding a public office. If Ohio can exclude Libertarians and Greens from state office, California could do the same to Republicans or Texas to Democrats. That can't be consistent with the First Amendment.

Ohio's constitutional violation is especially troubling because the Elections Commission is the state agency that oversees the competition among Ohio's political parties. The fate of a small political party is, to a large extent, in the Commission's hands. The Ohio statute excluding members of small parties from the Commission was enacted by a legislature composed entirely of members of the two largest parties. It is hard enough for small political parties to grow, but Ohio has made it even harder by ensuring

that members of small parties cannot have a voice in the decision of campaign-related disputes.

1. The Ohio Elections Commission

The Ohio Elections Commission is responsible for investigating and adjudicating complaints of violations of the state's campaign finance laws. Ohio Rev. Code § 3517.153. The Commission is empowered by statute to issue subpoenas, § 3517.153(B), to hold hearings, § 3517.155(A)(1), to impose fines, § 3517.155(A)(1)(b), to refer cases for criminal prosecution, § 3517.155(A)(1)(c), to recommend legislation, § 3517.153(D), and to render advisory opinions, *id.* When the Commission renders an advisory opinion stating that there has been no violation of state law, "the person to whom the opinion is directed … may reasonably rely on the opinion and is immune from criminal prosecution and a civil action." *Id.*

The Elections Commission thus plays an important role in deciding disputes that arise during political campaigns. And there are many such disputes. The Commission handles between 800 and 1000 complaints each year. Ohio Elections Commission, *About Us: History*.[1]

The Elections Commission, in its current incarnation, was established in 1995. The Commission has seven members. Ohio Rev. Code § 3517.152(A)(1). The statute creating the commission specified that three of the initial members were to be affiliated with "the political party of which the speaker [of the state house of representatives] is a member." *Id.* At the time, that was the Republican Party. Three more

[1] https://elc.ohio.gov/wps/portal/gov/elc/about-us/history.

initial members were to be "affiliated with the major political party of which the speaker is not a member." *Id.* That was the Democratic Party. The Commission's seventh member, to be chosen by majority vote of the other six, "shall not be affiliated with a political party." *Id.* At its creation, the Commission thus consisted of three Republicans, three Democrats, and one person unaffiliated with any party. Members of political parties other than the Republicans and Democrats were excluded from the Commission's initial membership.

The statute requires the perpetuation of the Commission's composition whenever a vacancy arises. When a vacancy occurs in the position of the member who is not affiliated with any political party, the replacement, who is chosen by majority vote of the other six members, must likewise not be affiliated with a political party. § 3517.152(A)(2). When a vacancy occurs in one of the other six positions, "the legislative leaders of the political party from whose list of persons the member being replaced was appointed shall submit to the governor, not later than thirty days after the date of the vacancy, a list of three persons who are affiliated with that political party." *Id.* The governor must choose from this list. *Id.* That is, a Democrat who leaves the Commission must be replaced by a Democrat, and a Republican by a Republican. The statute does not contemplate the possibility that the Democrats or Republicans will be eclipsed by a third party in the future. No matter how successful a third party becomes, there are three seats on the Commission reserved for Democrats and three for Republicans. Members of

other parties are locked out of the Commission forever.[2]

When this statute was enacted, all 33 members of the Ohio Senate were Democrats or Republicans, as were all 99 members of the Ohio House of Representatives.[3]

2. The Libertarian Party of Ohio

The Libertarian Party of Ohio is the state's third-largest political party. It currently sits far behind the Republicans and Democrats, but it has more members and has attracted more voters than any of the other small parties in the state. Despite the well-known difficulties faced by third parties, the Libertarians hope that the strength of their ideas will enable them to compete with the top two parties.

To compete effectively, however, they need a level playing field, which the composition of the Elections Commission denies them. That became apparent in

---

[2] The Court of Appeals took the view that "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," on the theory that "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." App. 4a. This view is impossible to reconcile with the statute's text, which explicitly provides that a departing commissioner of one party must be replaced by a new commissioner of the same party. But the court's error is of little consequence. The statute would violate the First Amendment even if it restricted eligibility to members of the top two parties, because it would still facially discriminate against members of smaller parties.

[3] Wikipedia, *121st Ohio General Assembly*, https://en.wikipedia.org/wiki/121st_Ohio_General_Assembly.

Ohio's 2018 gubernatorial campaign, when the two main parties shut the smaller parties out of the debates among the candidates.

One debate was hosted by the University of Dayton, which planned the debate in cooperation with the campaigns for the Democratic and Republican candidates. Only those two candidates were allowed to participate. The university did not even notify the candidates of other parties that a debate would take place. The Libertarian Party filed a complaint with the Elections Commission alleging that the university's staging of the debate for the exclusive benefit of the Democratic and Republican candidates constituted an impermissible in-kind contribution to their campaigns, in violation of state law prohibiting nonprofit corporations like the university from making contributions to candidates for office. App. 4a-5a.

The second and third debates were hosted by Marietta College and the City Club of Cleveland. These debates were also planned in cooperation with the campaigns of the Democratic and Republican candidates, again without even informing candidates of other parties. The Libertarian Party filed a complaint with the Elections Commission alleging that the staging of these debates for the exclusive benefit of the Democratic and Republican candidates likewise constituted unlawful in-kind contributions to their campaigns. *Id.*

The Elections Commission dismissed both complaints. *Id.* at 5a. In accordance with its customary practice, it provided no explanation for its decisions.

Whether or not the Elections Commission accurately interpreted state law, it seemed unfair to the Libertarians that such decisions should be made by

an agency from which members of smaller parties are excluded. After all, the gist of the Libertarians' complaints was that the debate organizers had improperly favored the two largest political parties at the expense of the smaller ones. A Commission stacked in favor of the two largest parties hardly seemed like a neutral decisionmaker.

3. Proceedings below

Petitioners, the Libertarian Party of Ohio and Harold Thomas, filed this suit against respondents, the members of the Elections Commission in their official capacities. *Id.* They alleged that the Ohio statute infringes their freedom of association, in violation of the First and Fourteenth Amendments, by making members of smaller political parties ineligible for service on the Elections Commission. *Id.*

The District Court granted respondents' motion for summary judgment. *Id.* at 19a-37a. The court assessed the Ohio statute under two lines of this Court's cases and found it constitutional under both.

First, the District Court applied "the *Anderson-Burdick* test." *Id.* at 27a (referring to *Anderson v. Celebreeze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992)). The court found that the Ohio statute "does not impose a severe burden on rights guaranteed by the First Amendment, as the statute is content neutral and does not limit political participation by an identifiable political group." App. 30a. The court determined that "Ohio has important regulatory interests sufficient to justify" the statute, particularly "an interest in ensuring that political balance on its Elections Commission protects the fairness of the deliberative process." *Id.* at 31a. For

these reasons, the District Court concluded that the statute "survives scrutiny under the *Anderson-Burdick* test." *Id.* at 32a.

Second, the District Court analyzed the Ohio statute under two of this Court's cases involving political patronage—*Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). App. 33a. The District Court reasoned that "the Elections Commission, like judges, acts in a quasi-judicial capacity." *Id.* at 35a. The court noted that under Sixth Circuit precedent, "judges are policy-makers within the meaning of *Elrod* and *Branti*, and thus, can be appointed based on political considerations." *Id.* The District Court concluded that the Ohio statute "withstands scrutiny under" the political patronage cases. *Id.* at 36a.

The Court of Appeals affirmed. *Id.* at 1a-18a.

After rejecting Ohio's assertion that Harold Thomas lacks standing, *id.* at 5a-8a, the Court of Appeals assessed the constitutionality of the statute under *Elrod* and *Branti*.[4] The court determined that

[4] The Court of Appeals declined to assess the statute's constitutionality under *Anderson* and *Burdick* because the court erroneously concluded that "the parties agree that we should forego application of *Anderson-Burdick* to plaintiffs' claim." App. 8a. In fact, both parties devoted substantial portions of their briefs to *Anderson* and *Burdick*. The Court of Appeals quoted a sentence from petitioners' brief stating that it was unnecessary to apply *Anderson* and *Burdick*, *id.* at 9a, but the court wrenched this sentence out of context. Petitioners had already argued that they should win under a different set of this Court's cases, and in this sentence petitioners' brief merely explained that attention to *Anderson* and *Burdick* would be unnecessary if the Court of Appeals agreed with the brief's first argument. Petrs.

a restriction based on political party affiliation satisfies the First Amendment where the restriction's purpose is "balancing out political party representation." *Id.* at 13a (citation and internal quotation marks omitted). The court concluded that "Ohio may thus condition employment on the OEC on party affiliation." *Id.* at 15a.

The Court of Appeals disagreed with petitioners' argument that the Ohio statute denies equal treatment to members of smaller parties. *Id.* at 16a-17a. The statute "does not single out any ideology, viewpoint, or protected class" the court held. *Id.* at 16a. "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." *Id.*

The Court of Appeals denied rehearing en banc. *Id.* at 38a.

REASONS FOR GRANTING THE WRIT

In *Carney v. Adams*, 141 S. Ct. 493 (2020), the Court granted certiorari to decide whether the First Amendment allows a state to restrict eligibility for a public office to members of the two largest political parties. The Court could not reach the question, however, because the person challenging the restriction lacked standing. *Id.* at 501-03.

In this case, the Court can finally decide this question. Indeed, this case is a better vehicle than *Carney* was, even apart from *Carney*'s standing prob-

---

Ct. App. Br. at 49. The brief went on to devote fourteen pages to an argument based on *Anderson* and *Burdick*. *Id.* at 54-68.

lem.[5] In *Carney*, the lower court invalidated two distinct provisions of state law—a "bare majority" requirement preventing any single party from having more than half of the seats, and a "major party" requirement barring members of smaller parties from holding office. In this Court, *Carney* involved an additional question as to whether one of these requirements was severable from the other.

This case challenges only a major party requirement, not a bare majority requirement. The Ohio statute also has a bare majority requirement, which petitioners do not challenge. It provides: "At no time shall more than six members of the commission be affiliated with a political party, and, of these six members, not more than three shall be affiliated with the same political party." Ohio Rev. Code § 3517.152(A)(3). Petitioners have no quarrel with this provision, because it does not prevent anyone from serving on the Elections Commission. Their only complaint concerns the major party requirement, because it excludes members of small parties.

The distinction between bare majority requirements and major party requirements is important. As Justice Sotomayor observed in *Carney*, bare majority requirements

---

[5] As the Court of Appeals found, in this case Harold Thomas clearly has standing, because he introduced uncontradicted "evidence that he would like to be on the Ohio Elections Commission but his membership in the Libertarian Party prevents him from being considered." App. 7a (punctuation omitted). The Libertarian Party also has standing, both in its own right and on behalf of its more than 10,000 members, who are all ineligible to serve on the Commission for the same reason.

> have existed in various forums for roughly 150 years, currently feature in a large number of public bodies, and have been shown to help achieve ideological diversity. Major party requirements like Delaware's, by contrast, preclude anyone who is not a member of the two major political parties from serving in a public body. They are far rarer than their bare majority cousins, and they arguably impose a greater burden on First Amendment associational rights. These differences may require distinct constitutional analyses.

Id. at 503 (Sotomayor, J. concurring). This case will allow the Court to assess the constitutionality of a major party requirement by itself, without *Carney*'s confounding variable of whether a major party requirement is severable from a bare majority requirement.

Ohio's statute is unconstitutional whether it is read literally, to exclude members of small parties forever, or whether it is read as the Sixth Circuit read it, as an implicit "top two" rule allowing members of small parties to join the Commission if their parties rise into second place. Either way, the statute excludes members of certain political parties from holding public office. Such discrimination is unconstitutional full stop, without regard to the strength of the government's asserted interests. But even if the government's interests were relevant, they could not support *this* statute, which bears no relationship to any permissible state interest.

I. Ohio is violating the First Amendment by barring members of small parties from holding a public office.

The First Amendment guarantees the right to join a political party of one's choosing. "The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). For this reason, the First Amendment "prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization." *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971).

This is what Ohio is doing. It is excluding Harold Thomas from serving on the Elections Commission solely because is a member of the Libertarian Party. If Thomas were a Democrat or a Republican, or if he belonged to no party at all, he would be eligible. A state can no more exclude members of the Libertarian Party from holding a government position than it can exclude members of the Communist Party. *Cf. Keyishian v. Board of Regents*, 385 U.S. 589, 607-08 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966).

The Court has observed several times that it would be unconstitutional for a state to enact a statute barring Republicans from holding a public office. *See, e.g.*, *Rutan v. Republican Party*, 497 U.S. 62, 77 (1990); *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952); *United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 100 (1947). The same is true of a statute excluding members of smaller parties.

The lower courts mistakenly applied the standard established in this Court's political patronage cases—*Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). But these cases are inapplicable here, because the Ohio statute is not an instance of political patronage. Indeed, it is the very opposite of patronage. Ohio is trying to ensure that the Elections Commission is *not* loyal to the party in power, but rather that the Commission has a politically diverse membership.

The cases involving political patronage thus have no bearing on a statute that disqualifies members of certain political parties from holding public office. Unlike political patronage, this statute would not be constitutional if it were applied only to "policymakers." Ohio's governor is the leading policymaker in the state, but it would be absurd to claim that the state could therefore ban members of certain political parties from serving as governor.

The lower courts also erred in assessing the strength of Ohio's asserted interests. No state interest can support a statute that disqualifies members of a political party from holding public office. A statute barring Republicans or Libertarians from government service is unconstitutional even if the state claims to have a good reason for the discrimination.

But even if Ohio's asserted interests had some bearing on the statute's constitutionality, the two interests that Ohio has offered do not come close to justifying this statute, under any standard of review.

First, Ohio claims an abstract interest in "structuring its government." Ohio Ct. App. Br. 53. This assertion begs the question in this case, which is whether the state's particular *choice* of structure sat-

isfies the Constitution. California also has an interest in structuring its government, but that would hardly permit California to bar Republicans from holding public office. So too with Ohio and Libertarians.

Second, Ohio asserts an interest in "using partisan balance to avoid conflicts of interest among those who judge disputes about fair election conduct." *Id.* Partisan balance is no doubt a desirable feature in an Elections Commission. But excluding members of small political parties has no relation to partisan balance. The proof can be found in the experience of other states.

Many states have an agency like Ohio's Elections Commission. They all seek to attain partisan balance, for the same reason Ohio does. But they achieve partisan balance without barring members of small parties.

Several of these states use a bare majority rule, under which no more than a certain number of seats can be held by members of the same party. These states do not reserve seats for members of particular parties or exclude members of particular parties from holding office. They merely prohibit a party from holding more than a bare majority (or more than half) of the seats.

This is true, for example, of the Arizona Citizens Clean Elections Commission, Ariz. Rev. Stat. § 16-955; the California Fair Political Practices Commission, Cal. Gov't Code § 83100; the Connecticut State Elections Enforcement Commission, Conn. Gen. Stat. § 9-7a; the Georgia Government Transparency and Campaign Finance Commission, Ga. Code § 21-5-4; the Iowa Ethics and Campaign Disclosure

Board, Iowa Code §§ 68B.32, 69.16; the Kansas Governmental Ethics Commission, Kan. Stat. § 25-4119a; the Maine Commission on Governmental Ethics and Election Practices, Me. Stat. tit. 1, § 1002; the Minnesota Campaign Finance and Public Disclosure Board, Minn. Stat. § 10A.02; the Nebraska Accountability and Disclosure Commission, Neb. Rev. Stat. § 49-14,106; the New Jersey Election Law Enforcement Commission, N.J. Stat. § 19:44A-5; the New Mexico State Ethics Commission, N.M. Const. art. V, § 17; the Oklahoma Ethics Commission, Okla. Const. art. XXIX, § 1; the Washington Public Disclosure Commission, Wash. Rev. Code § 42.17A.100; and the West Virginia State Election Commission, W.V. Code § 3-1A-2.

The Ohio Elections Commission also has a bare majority rule, separate from the ban on service by members of smaller parties. Ohio Rev. Code § §3517.152(A)(3). This provision alone would ensure partisan balance on the Commission.[6]

Other states, like Ohio, reserve some seats for members of the two largest parties, but, unlike Ohio, these states make the remaining seats available to anyone, including members of smaller parties.

Such is the composition, for example, of the Alaska Public Offices Commission, Alaska Stat.

---

[6] The Federal Election Commission likewise has a bare majority rule, 52 U.S.C. § 30106, as do many other federal agencies. Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Colum. L. Rev. 9, 11 (2018) (reporting that "more than half of all multimember agencies within the federal government are now subject" to a bare majority rule). By contrast, we are unaware of any federal agencies from which members of small parties are excluded.

§ 15.13.020; the Arkansas State Board of Election Commissioners, Ark. Code § 7-4-101; the Delaware State Board of Elections, Del. Code tit. 15, § 202; the Kentucky Registry of Election Finance, Ky. Rev. Stat. § 121.110; the South Carolina State Election Commission, S.C. Code § 7-3-10; and the Virginia State Board of Elections, Va. Code § 24.2-102.

Ohio itself formerly had a similar rule. Between 1974 and 1995, the Commission was a five-member body consisting of two Democrats, two Republicans, and a fifth commissioner chosen by the other four. Ohio Rev. Code § 3517.14.[7] There were no restrictions on the party membership of the fifth commissioner. *Id.* § 3517.14(B). It was only in 1995 that Ohio barred Libertarians, Greens, and members of other small parties from serving on the Elections Commission.

The experience of all these other states demonstrates that partisan balance is easily achievable without excluding members of small parties from the Elections Commission. So does Ohio's own experience before 1995.

Below, Ohio claimed that barring members of small parties was necessary because "minor-party adherents tend to lean (no matter how slightly) toward one of the major parties." Ohio Ct. App. Br. 55-56. But even if some members of small parties do lean slightly toward one of the major parties, the same is just as true of people unaffiliated with any party. Pew Research Center, *Political Independents:*

---

[7] This statute remains on the books, but the agency it created was abolished in 1995, when the Commission was reorganized. *See* Ohio Rev. Code § 3517.151(C).

Who They Are, What They Think (2019) (reporting that 81% of independents lean toward the Democrats or the Republicans).[8] Independents are nevertheless eligible to serve on the Elections Commission. It is hard to understand why Libertarians are not.

In any event, the seventh member of the Commission is chosen by majority vote of the other six members, three of whom must be Democrats and three Republicans, so a person who leans toward one major party or the other would not be chosen. The seventh member of the Commission must be someone who is acceptable to adherents of both major parties. A Libertarian is just as capable of satisfying this criterion as a member of no party.

The exclusion of members of small parties thus has nothing to do with partisan balance, which would be equally attainable if members of small parties were allowed to serve on the Elections Commission. Rather, the effect of the statute is to entrench a two-party duopoly by suppressing competition from third parties.

Suppressing third parties is not a permissible state interest. "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson v. Celebreeze*, 460 U.S. 780, 793 (1980). For this reason, "protecting the Republican and Democratic parties from external competition cannot justify the virtual exclusion of other political aspirants." *Id.* at 802. As the Court once explained, in words that ap-

---

[8] https://www.pewresearch.org/politics/2019/03/14/political-independents-who-they-are-what-they-think/.

ply equally to this case, "the Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

II. Other jurisdictions would decide this case differently.

This case would come out the other way if it arose in the Third or Seventh Circuits, and probably in the First Circuit as well. By contrast, the Colorado Supreme Court would decide this case the same way the Sixth Circuit did.

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), the Third Circuit held that it is unconstitutional to restrict eligibility for state judgeships to members of the two main parties.[9] "We need not dwell long on whether Delaware possesses a 'vital state interest' in a politically balanced judiciary," the Third Circuit reasoned, "because Delaware's practice of excluding Independents and third party voters from judicial employment is not narrowly tailored to that interest." *Id.* at 182. The Third Circuit concluded that partisan balance "cannot suffice as a justification to bar candidates who do not belong to either the Democratic or

[9] This Court expressed no view on the merits when it vacated the Third Circuit's judgment on standing grounds, so although *Adams* no longer serves as precedent in the Third Circuit, it still indicates how the Third Circuit would have decided this case.

Republican parties from seeking judicial appointment." *Id.* at 183.

The Third Circuit's reasoning applies equally to the Ohio Elections Commission. Here, the state likewise claims that its interest in political balance justifies excluding members of third parties from holding a public office. The Third Circuit would reject this argument for the same reason it rejected Delaware's claim that its interest in partisan balance justified excluding members of third parties.

The Seventh Circuit would reach the same conclusion. In *Common Cause Indiana v. Individual Members of the Indiana Election Comm'n*, 800 F.3d 913, 915-16 (7th Cir. 2015), the Seventh Circuit considered a complex method of selecting judges that ensured that only Democrats or Republicans were ever chosen. The Seventh Circuit concluded that the state's interest in partisan balance could not justify excluding members of smaller parties. *Id.* at 927-28.

The Seventh Circuit's reasoning applies with equal force here. Ohio's method of choosing the members of its Elections Commission likewise ensures that members of small parties can never serve. If this case arose in the Seventh Circuit, the court would hold that the state's interest in political balance on the Commission cannot justify the exclusion of members of small parties.

The First Circuit would probably agree with the Third and Seventh Circuits that Ohio's statute is unconstitutional. In *Werme v. Merrill*, 84 F.3d 479 (1st Cir. 1996), the First Circuit upheld a New Hampshire statute that barred members of small parties from serving as election inspectors and ballot clerks. But the court's decision rested on the fact

that the statute at issue was a "top two" rule, which allowed members of any party to serve, so long as their party was one of the top two. "New Hampshire's regulation is nondiscriminatory, that is, it does not differentiate among Republicans, Democrats, and Libertarians," the First Circuit observed. *Id.* at 484. "Instead, the regulation conditions the right to appoint election inspectors and ballot clerks on a certain degree of success at the polls." *Id.* The court concluded that "the 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." *Id.* at 484-85. Ohio's statute, which denies equality of opportunity to members of parties other than the Democrats and Republicans, would not satisfy this standard.

By contrast, the Colorado Supreme Court would decide this case the same way the Sixth Circuit did. In *MacGuire v. Houston*, 717 P.2d 948 (Colo. 1986), the court upheld statutory restrictions barring members of small parties from serving as election judges. The Colorado Supreme Court held that the restrictions' effect on First Amendment rights were very small, because they "do not interfere with MacGuire's ability to express her political views and MacGuire is not being denied full-time public employment." *Id.* at 952. The court concluded that the exclusion of members of small parties was constitutional, because "the classification based on political affiliation does not inhibit MacGuire's ability to join her chosen political party, to vote for that party's

candidate, or to freely advocate that party's platform." *Id.* at 954.

Petitioners would thus win this case in the Third or Seventh Circuits, and probably the First Circuit as well. They would lose it in the Colorado Supreme Court. This conflict provides another reason to grant certiorari.

III. This case is a good vehicle for resolving this question.

As this case and *Carney v. Adams* demonstrate, the Court will eventually have to decide whether states can exclude members of third parties from holding public office. The issue is unlikely to disappear. Third parties will always try to compete with the top two. The two main parties will always have an incentive to stifle the emergence of competitors. Katherine M. Gehl and Michael E. Porter, *Fixing U.S. Politics*, 98(4) Harv. Bus. Rev. 114 (July/Aug. 2020). This issue promises to return repeatedly until the Court puts it to rest.

Our current political configuration is not set in stone. One day, perhaps, the Democrats or the Republicans will go the way of the Whigs and the Federalists, to be replaced by a new party that started small and grew, just as the Republican Party itself did after its formation in the 1850s. Third-party candidates have often done well in presidential elections, including Theodore Roosevelt in 1912 (who gained 27% of the popular vote), Robert La Follette in 1924 (17%), George Wallace in 1968 (14%), and Ross Perot in 1992 (19%). There have been many members of Congress elected as third-party candidates, and many more members of state legislatures.

The future is likely to see third parties competing to take voters away from the two main parties, just like they always have throughout American history.

As the Court has often recognized, this constant competition between established parties and rising upstarts is a wholesome feature of our politics, because the ideal party system is the one that most accurately reflects the preferences of the voters, preferences that never stand still. "Historically," the Court has noted, "political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream." *Anderson*, 460 U.S. at 794. As the Court put it on another occasion, "[a]ll political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted." *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957).

This case is an excellent vehicle for resolving this question, because it is narrowly targeted at a state law that explicitly excludes members of smaller parties from holding a public office. Petitioners are *not* challenging the "bare majority" requirements that are common in state and federal agencies. Bare majority requirements ensure partisan balance while allowing members of small parties to serve in government. Ohio's statute, by contrast, shuts them out entirely.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK R. BROWN
Capital University
Law School
303 E. Broad St.
Columbus, OH 43215

MARK G. KAFANTARIS
625 City Park Ave.
Columbus, OH 43206

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu