No. 03-934

In the Supreme Court of the United States

ROGER MERLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Hatch Act, 5 U.S.C. 7323(a)(3), prohibits federal employees from "run[ning] for the nomination or as a candidate for election to a partisan political office." The questions presented are:

1. Whether the office of United States Representative is a "partisan political office."

2. Whether the application of the Hatch Act to a federal employee who wishes to run for the office of United States Representative violates the Qualifications Clause of the Constitution (Art. I, § 2, Cl. 2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 351 F.3d 92. The opinion of the district court (Pet. App. 10a-14a) is reported at 217 F. Supp. 2d 560.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2003. The petition for a writ of certiorari was filed on December 29, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Hatch Act, 5 U.S.C. 7321-7326, regulates the partisan political activities of federal employees. The Act grew out of "[t]he conviction that an actively partisan governmental personnel threatens good [public] administration." *United Pub. Workers of Am.* v. *Mitchell*, 330 U.S. 75, 97-98 (1947). Its enactment reflected Congress's concern with the "danger to the [civil] service in that political rather than official effort may earn advancement," and the related "danger * * * to the public in that governmental favor may be channeled through political connections." *Id.* at 98.

In its current form, the Act specifies particular political activities that may not be engaged in by any federal employee, together with additional activities that may not be engaged in by employees responsible for law enforcement, national security, and federal election and civil service laws. 5 U.S.C. 7323(a)(1)-(3) and (b)(1)-(4). The provision of the Act at issue in this case, 5 U.S.C. 7323(a)(3), prohibits federal employees from running for election to a "partisan political office." The Act defines "partisan political office" to include "any office for which any candidate is nominated or elected" on a partisan basis. 5 U.S.C. 7322(2).

A federal employee who violates the Hatch Act is subject to removal from his position or, in less serious cases, suspension without pay for thirty days or more. 5 U.S.C. 7326. Apart from removal or suspension, employees who violate the Act are not subject to any legal sanctions or disabilities.

On two occasions, this Court has rejected broad challenges to the constitutionality of the Hatch Act. In *Mitchell*, *supra*, the Court rejected claims that the Act violated the First, Fifth, Ninth, and Tenth

Amendments. A quarter-century later, in *United States Civil Service Commission* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court rejected claims that the Act's restrictions on partisan political activities were unconstitutionally vague and overbroad. The Court explained that the Act's restrictions serve a number of vital governmental interests, including ensuring "the impartial execution of the laws"; avoiding the public appearance of political favoritism; preventing the federal workforce from being used to build political machines; and ensuring that government employment is not dependent on political performance and that federal employees are insulated from pressure to engage in political activities to earn favor from their superiors. *Id.* at 564-567. In light of those substantial governmental interests, the Court concluded that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring * * * partisan conduct by federal employees." *Id.* at 556.

2. Petitioner Roger Merle is an employee of the United States Postal Service. As a Postal Service employee, Merle is subject to the requirements of the Hatch Act. See *Kane* v. *MSPB*, 210 F.3d 1379, 1381-1382 (Fed. Cir. 2000) (discussing applicability of Hatch Act to Postal Service employees).

In June 2002, Merle filed nominating petitions with the New Jersey Division of Elections for the purpose of qualifying as a candidate for election to the United States House of Representatives in November 2002. Pet. App. 2a. Six weeks later, Merle and petitioner Green Party State Committee filed suit against the United States in the District Court for the District of New Jersey. *Ibid*.

Petitioners sought a declaratory judgment that the office of United States Representative is not a "parti-

san political office" under the Hatch Act and that Merle therefore was free as a statutory matter to run for office without giving up his federal employment. Pet. App. 6a. Alternatively, petitioners sought a declaration that the application of the Act to Merle would violate the Qualifications Clause, which provides that "[n]o person shall be a Representative who shall not have attained the age of twenty five years, and been seven years a citizen of the United States, and who shall not * * * be an inhabitant of that state in which he shall be chosen." U.S. Const. Art. I, § 2, Cl. 2.[*] Petitioners also presented a claim that the Hatch Act violates federal employees' First Amendment rights of free speech and association. Pet. App. 13a n.1.

The district court dismissed petitioners' complaint for failure to state a claim for relief. Pet. App. 10a-14a. The district court concluded that the Hatch Act does not violate the Qualifications Clause, because it does not disqualify federal employees from running for federal office. *Id.* at 11a-13a. The district court further noted that the constitutionality of the Hatch Act under the First Amendment is settled by *Mitchell* and *Letter Carriers*, *supra*. Pet. App. 13a n.1.

3. On appeal, petitioners raised their statutory and Qualifications Clause claims but did not renew their First Amendment claim. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-9a.

The court of appeals held that "the office of United States Representative is a 'partisan political office' as

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[*] In addition to the clause governing the qualifications of Representatives, Article I contains a separate clause governing the qualifications of Senators. See U.S. Const. Art. I, § 3, Cl. 3. References in this brief to the Qualifications Clause refer to the former of these two clauses.

that term is defined in the Hatch Act." Pet. App. 7a. The court pointed out that the office of Representative fits squarely within the statutory definition of "partisan political office" in 5 U.S.C. 7322(2). Pet. App. 6a-7a. The court added that because the statutory definition does not refer specifically to any office, relying instead on a general definition, "the office of United States Representative need not be specifically enumerated in the statute for it to be included within it." *Id.* at 7a.

Turning to petitioners' Qualifications Clause claim, the court pointed out that the Hatch Act "does not disqualify any individual from running for public office." Pet. App. 8a. Instead, it simply functions as a resign-to-run law, requiring federal employees to give up their federal employment if they wish to run for a partisan political office. *Ibid.* The court concluded that the difference between laws that bar potential candidates from running for office and resign-to-run laws "is a key distinction for the purposes of the Qualifications Clause," because while laws of the first sort impose additional qualifications for officeholding, resign-to-run laws merely disallow potential candidates from continuing to work for the government, leaving them free to run for office if they wish to do so. *Ibid.* The court added that while "a 'resign to run' law may force Merle to choose between remaining as an employee of the federal government and running for elected office, * * * forcing Merle to make that decision does not constitute an additional qualification for the office of United States Representative." *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this

Court or any other court of appeals. The petition for certiorari therefore should be denied.

1. a. The court of appeals correctly rejected petitioners' claim that the application of the Hatch Act to federal employees who wish to run for election to the House of Representatives violates the Qualifications Clause. It is well settled that Congress may not seek to override the preferences of the electorate by adding to the qualifications set forth in the Qualifications Clause itself. See *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 787-798 (1995); *Powell* v. *McCormack*, 395 U.S. 486 (1969). But nothing in the Hatch Act runs afoul of that principle.

Simply stated, the Hatch Act does not impose any qualifications on membership in the House of Representatives. The Act does not regulate the partisan office to which Merle aspires, but rather the federal government positions that he and other federal employees already hold. Congress's goal is not one of limiting who is qualified to serve in the national legislature, but instead the constitutionally legitimate goal of regulating partisan activities by persons employed by the federal government and thereby furthering "th[e] great end of Government—the impartial execution of the laws." *Letter Carriers*, 413 U.S. at 565.

The Hatch Act does not seek to prevent federal employees from becoming members of Congress or from holding any other partisan political office. Contrary to petitioners' claim (Pet. 9), the Act does not "debar[] millions of American citizens from seeking election to the national legislature." If Merle wishes to run for election to the House of Representatives, he is free to do so, and if the voters of his district wish for him to represent them, they are free to choose him. As

the court of appeals pointed out, the Hatch Act simply requires him to choose between the federal government position that he currently holds and the partisan one that he wishes to seek. Pet. app. 8a. Moreover, the Act does not prohibit him from having his name placed on the ballot, nor does it prohibit him from taking office if he is elected. See 39 Op. Att. Gen. 423, 424 (1940) (holding elective office does not violate Hatch Act because "the statute [is] directed at political activity rather than [at] the holding of public office"); U.S. Office of Special Counsel, *Political Activity and the Federal Employee* 5 (2000) ("while the Hatch Act prohibits candidacy for public office in partisan elections, it does not prohibit a federal employee from being appointed to or holding public office"). If he voluntarily resigns to run, then his actions do not violate the Hatch Act at all, and if he runs without resigning, he risks his public employment, but the available remedies do not affect the ballot or the seating of elected officials.

Because the object of the Act is to regulate the conduct of government employees rather than the composition of Congress, and because the Act does not prohibit anyone who wishes to run for Congress from doing so, the Act's provision regarding candidacy for partisan political office is entirely consistent with the principles underlying the Qualifications Clause. The Qualifications Clause embodies "the fundamental principle of our representative democracy that the people should choose whom they please to govern them." *Thornton*, 514 U.S. at 783 (internal quotation marks omitted). It reflects the conviction that "[t]he people are the best judges [of] who ought to represent them," and that "[t]o dictate and control them, to tell them whom they shall not elect, is to abridge their natural

rights." *Id.* at 794-795 (internal quotation marks omitted). Thus, for example, a State may not adopt a term limit law, like the one in *Thornton*, that seeks to exclude incumbent members of Congress from re-election by denying them access to the ballot. Such laws embody a legislative judgment about who should serve in Congress and who should not, and they seek to enforce that judgment by impermissibly overriding the preferences of the public about who ought to represent them.

In contrast, the Hatch Act makes no attempt whatsoever to "dictate and control" the electorate by "tell[ing] them whom they shall not elect" to Congress. It is a matter of indifference under the Hatch Act whether Merle or anyone else currently employed by the federal government is elected to serve in Congress. The Act's sole goal is to protect the efficiency and impartiality of the civil service by regulating the terms and conditions of federal employment. The Act does not reflect a legislative judgment that federal employees are unsuited to serve in Congress, and it does not disqualify them from doing so.

b. Petitioners acknowledge (Pet. 4) that the Hatch Act does not actually prohibit anyone from running for Congress. Nevertheless, petitioners argue that the Act effectively disables federal employees from running for Congress because the loss of federal employment will allegedly create an insurmountable economic barrier. *Ibid.*

As a factual matter, petitioners' claims of prohibitive economic coercion are significantly overstated: federal employees do voluntarily leave their federal employment in order to run for partisan political offices, including Congressional offices. See, *e.g.*, *Letter Carriers*, 413 U.S. at 551 n.3 (federal employee "re-

signed his position in the Department of Health, Education, and Welfare * * * to run as a Republican candidate for the Maryland State Senate"); *Holloway* v. *Department of the Interior*, 82 M.S.P.R. 435, 437 para. 3 (1999) (employee of Department of the Interior "resigned in order to run as a Republican candidate for the U.S. Senate"). But even if it were assumed that the Hatch Act imposes significant economic burdens on federal employees who wish to run for partisan political office, an indirect economic burden alone does not violate the Qualifications Clause. This Court's decision in *Thornton* suggests that while a law that seriously burdens the ability of individuals to run for Congress may run afoul of the Qualifications Clause, it does so only when "the avowed purpose" of the law is to "handicap[] a class of candidates." 514 U.S. at 831. In contrast, when the object of the law is not to "evad[e] the requirements of the Qualifications Clauses," *ibid.*, but instead to protect the independence and efficiency of government employees, the "indirect burden on potential candidates for Congress * * * is not sufficient * * * to constitute an impermissible qualification for federal office." *Joyner* v. *Mofford*, 706 F.2d 1523, 1531 (9th Cir.), cert. denied, 464 U.S. 1002 (1983).

c. Although this is the first case in which the Hatch Act has been challenged on the basis of the Qualifications Clause, similar constitutional challenges have been pursued against state resign-to-run statutes that, like the Hatch Act, require a government employee to give up his government position if he wishes to run for Congress. Those challenges have been uniformly rejected. See *Joyner*, *supra*; *Signorelli* v. *Evans*, 637 F.2d 853 (2d Cir. 1980); *Adams* v. *Supreme Court of Pa.*, 502 F. Supp. 1282, 1290-1291 (M.D. Pa. 1980);

Oklahoma State Election Bd. v. *Coats*, 610 P.2d 776 (Okla. 1980); *Alex* v. *County of Los Angeles*, 111 Cal. Rptr. 285 (Ct. App. 1973).

In *Signorelli*, the Second Circuit was presented with a state law that required a state judge to resign his judicial office before campaigning for political office, including the office of United States Representative. The Second Circuit held that the statute did not violate the Qualifications Clause because "New York's purpose is to regulate the judicial office that [the plaintiff] holds, not the Congressional office that he seeks," and because "he is free to run [for Congress] and the people are free to choose him." 637 F.2d at 858-859. While the Second Circuit suggested that the Qualifications Clause might limit New York's ability to make resign-to-run statutes applicable to employees in the private sector, such as lawyers or business executives, *id.* at 859, the court concluded that the Clause did not invalidate a law whose "purpose * * * is to protect the integrity of a branch of state government." *Id.* at 863.

In *Joyner*, the Ninth Circuit rejected a similar constitutional challenge to a provision of the Arizona constitution that prohibited any holder of an elective state office from "offer[ing] himself for nomination or election to any salaried local, state or federal office." 706 F.2d at 1526. Like the Second Circuit, the Ninth Circuit distinguished between statutes that "bar a potential candidate from running for federal office" and those that "merely bar[] state officeholders from remaining in their positions should they choose to run for federal office." *Id.* at 1528. The Ninth Circuit noted that "[t]he burden on candidacy, imposed by laws of the latter category, is indirect and attributable to a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress." *Ibid.*

In *Thornton*, this Court cited *Signorelli* and *Joyner* favorably and distinguished the statutes in those cases from the term limit law struck down in *Thornton* itself. See 514 U.S. at 835 n.48. The Court quoted with approval the Ninth Circuit's reasoning that "the burden on candidacy" from resign-to-run laws "is indirect and attributable to a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress." *Id.* at 835 (quoting *Joyner*, 706 F.2d at 1528). The Court also repeated the Second Circuit's observation that resign-to-run laws leave a candidate "free to run" and the electorate "free to choose him." *Ibid.* (quoting *Signorelli*, 637 F.2d at 858).

The provision of the Hatch Act at issue in this case is constitutionally indistinguishable from the statutory provisions sustained in *Signorelli* and *Joyner*. Like state resign-to-run laws, the Hatch Act "places no obstacle between [a government employee] and the ballot or his nomination or his election[;] he remains free to run and the people are free to choose him." *Signorelli*, 637 F.2d at 858; *Joyner*, 706 F.2d at 1531. Like those laws, the Act is aimed solely at regulating the conduct of government employees in the government offices that they now hold, not the partisan offices to which they aspire. *Signorelli*, 637 F.2d at 859. To the extent that it may place an incidental burden on federal employees who wish to run for Congress, the burden "is indirect and attributable to a desire to regulate * * * officeholders and not to impose additional qualifications to serving in Congress." *Joyner*, 706 F.2d at 1528. Just as resign-to-run laws find their justification in a state's "fundamental interests" in "protecting the integrity of a branch of state government," *Signorelli*, 637 F.2d at 861, 863, so is the Hatch Act justified by the fundamental interests of the United

States in protecting the integrity of a branch of the federal government—interests that this Court has recognized to be compelling in rejecting other constitutional challenges to the Act. See *Letter Carriers*, 413 U.S. at 564 ("[T]he balance [Congress] has struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act."); *id.* at 564-567 (enumerating legitimate governmental interests served by restrictions on partisan political activities).

Petitioners argue (Pet. 16-17) that *Signorelli* and *Joyner* conflict with the decision below because they draw a distinction between laws that impose resign-to-run obligations on a small number of individuals and laws such as the Hatch Act that affect a large number of government employees. The distinction actually drawn by the Second Circuit and Ninth Circuit is a very different one: a distinction between laws that regulate government employees and laws that extend beyond the confines of government service to regulate the private sector. The Second Circuit explained that it was permissible for New York to impose a resign-to-run requirement on state judges, while it could not impose the same requirement on lawyers or business executives, because "[t]he[] fundamental interests in the structure of government far transcend the interests involved when a state exercises general regulatory authority over *non-governmental occupations*." 637 F.2d at 859, 861 (emphasis added). When the Ninth Circuit upheld Arizona's resign- to-run provision, it drew the same distinction, explaining that "state office-holders," in contrast to lawyers and business executives, are "engaged in pursuits '*peculiarly* within the essential regulatory authority of the states.'" 706 F.2d at 1530 n.6 (quoting *Signorelli*, 637 F.2d at 859)

(emphasis added by Ninth Circuit). Moreover, the Ninth Circuit made clear that the Hatch Act itself falls on the permissible side of this divide, explaining that "like the civil servants affected by the Hatch Act cases, the elected salaried state officials covered by the Arizona provision are within the State's 'essential regulatory authority.'" *Id.* at 1530. Accordingly, petitioners' claims that the Third Circuit's reasoning conflicts with *Signorelli* and *Joyner*, or that *Signorelli* and *Joyner* are in conflict with each other (see Pet. 18-20) are mistaken.

2. In addition to challenging the constitutionality of the Hatch Act under the Qualifications Clause, petitioners also argue (Pet. 20-24) that the Hatch Act should be construed not to apply to candidacy for election to the House of Representatives. That argument cannot be squared with the language of the Act. The Act's text is clear and unqualified: "'partisan political office' means *any* office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected." 5 U.S.C. 7322(2) (emphasis added). As the court of appeals recognized, the office of Representative fits squarely within that statutory definition, since candidates for the office are routinely nominated and elected as representatives of political parties whose Presidential candidates received votes in the preceding election. Pet. App. 6a-7a.

Petitioners argue (Pet. 21-23) that the Act should be construed to exclude the office of Representative in order to avoid the constitutional problems that supposedly would arise under the Qualifications Clause if the Act were applied to federal elective offices. As shown above, however, applying the Hatch Act to

federal employees who wish to run for Congress does not present any substantial constitutional problem, and hence the doctrine of constitutional avoidance does not come into play. See pp. 6-10, *supra*. Moreover, even if the application of the Hatch Act in this case did present a substantial constitutional question, the statutory text does not leave room for the kind of judicial interpolation proposed by petitioners. As this Court has emphasized, "[t]he canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is not a license for the judiciary to rewrite language enacted by the legislature." *Chapman* v. *United States*, 500 U.S. 453, 464 (1991) (internal quotation marks omitted); *United States* v. *Locke*, 471 U.S. 84, 96 (1985) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.").

3. Finally, petitioners contend (Pet. 25-27) that the Hatch Act's prohibition on running for partisan political offices violates the First Amendment. Although petitioners raised First Amendment claims in the district court, they did not pursue those claims on appeal, and the court of appeals therefore did not address them. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); see *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 527 (1994). In any event, this Court squarely rejected First Amendment challenges to the Hatch Act in *Mitchell* and *Letter Carriers*, and petitioners provide no reason why those constitutional holdings should be revisited.

Petitioners argue (Pet. 26) that this Court's subsequent decision in *Connick* v. *Myers*, 461 U.S. 138 (1983), undermines the constitutional reasoning of *Mitchell* and *Letter Carriers*. In *Connick*, the Court rejected a First Amendment claim by a state employee who was fired for making statements that were critical of her supervisor. The Court held that the First Amendment does not protect government employees from being disciplined for work-related speech that does not involve "matters of public concern." 461 U.S. at 143-147. The court further held that, even when speech by a government employee does involve matters of public concern, the employee's constitutional interests must be balanced against "the government's legitimate purpose in promot[ing] efficiency and integrity in the discharge of official duties." *Id.* at 150-151 (internal quotation marks omitted). Nothing about that reasoning is even remotely at odds with the Court's First Amendment reasoning in *Mitchell* and *Letter Carriers*. To the contrary, *Connick* and the line of public-employee speech cases on which it builds are all consistent with the notion that the government may impose burdens on government employees that it could not impose on the public at large. Cf. *Joyner*, 706 F.2d at 1530 n.6 (distinguishing limits on public employees' candidacy from similar restrictions on private-sector employees); *Signorelli*, 637 F.2d at 859, 861 (same).

Petitioners also suggest (Pet. 26) that reconsideration of *Mitchell* and *Letter Carriers* is warranted by *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002). In *White*, the Court held that a state law prohibiting candidates for judicial office from announcing their views on "disputed legal or political issues" violated the First Amendment. 536 U.S. at 788. The Court subjected the law to strict scrutiny because

it prohibited speech based on its content and burdened political speech at the core of the First Amendment. *Id.* at 774. In contrast to the law at issue in *White*, the Hatch Act does not prohibit federal employees from expressing their views on any political subject, nor (as explained above) does it prevent them from pursuing their political beliefs by seeking elective office. Nothing in *White* suggests that the Hatch Act is subject to strict scrutiny or that its regulation of political activity by federal employees is constitutionally suspect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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