No. __-____

In the Supreme Court of the United States

GOVERNOR OF DELAWARE, PETITIONER

v.

JAMES R. ADAMS, RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment invalidate a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a "bare majority" on the State's three highest courts, with the other seats reserved for judges affiliated with the "other major political party"?

2. Did the Third Circuit err in holding that a provision of the Delaware Constitution requiring that no more than a "bare majority" of three of the state courts may be made up of judges affiliated with any one political party is not severable from a provision that judges who are not members of the majority party on those courts must be members of the other "major political party," when the former requirement existed for more than fifty years without the latter, and the former requirement, without the latter, continues to govern appointments to two other courts?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings include all those listed on the cover. No party is a nongovernmental corporation.

LIST OF ALL PROCEEDINGS DIRECTLY RELATED

- *Adams* v. *Carney*, No. 1:17-cv-00181-MPT, U.S. District Court for the District of Delaware. Judgment entered May 23, 2018.
- *Adams* v. *Governor of Delaware*, No. 18-1045, U.S. Court of Appeals for the Third Circuit. Judgment entered Apr. 10, 2019.

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INTRODUCTION

The Delaware courts play a dominant role in American—and indeed global—corporate governance. Sixty percent of the Fortune 500 and more than half of the corporations listed on the New York Stock Exchange are incorporated in Delaware, in no small part due to the reputation—and reality—of the Delaware courts as objective, stable, and nonpartisan.

These qualities have not come about by accident. For more than 120 years, Delaware's Constitution has required a politically balanced judiciary. Under current law, no more than 50 percent, or a "bare majority," of the judges on the Supreme Court, Superior Court, or those courts together with the Court of Chancery, may be affiliated with one political party (the "bare majority provision"); the other seats are reserved to members of the "other major political party" (the "major party provision"). Del. Const. art. IV, § 3. Thus, party affiliation renders some people ineligible to fill certain judicial vacancies.

The Third Circuit acknowledged that "[p]raise for the Delaware judiciary" is both "nearly universal" and "well deserved." App. 38a–39a (concurring opinion joined by all three judges). It also accepted that Delaware's "exemplary" judicial system "has resulted from Delaware's political balance requirements." App. 39a; accord App. 38a. Nevertheless, it held that those political balance provisions violate the First Amendment as interpreted by *Elrod* v. *Burns*, 427 U.S. 347 (1976), and *Branti* v. *Finkel*, 445 U.S. 507 (1980). Those decisions prohibit the government from considering party affiliation in making employment decisions involving employees who lack policymaking au-

thority. The Third Circuit rejected the Governor's argument that state court judges fall within this "policymaking" exception to *Elrod* and *Branti*—a conclusion that conflicts with every other decision on the issue, including reported Sixth and Seventh Circuit decisions and a summary Second Circuit decision.

More fundamentally, the decision below violates the States' sovereign right "to determine the qualifications of their most important government officials" —including "those who sit as their judges"—"an authority that lies at the heart of representative government." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460, 463 (1991). Indeed, in *Gregory* this Court affirmed a decision holding that a state constitutional retirement age for judges did not violate the Age Discrimination in Employment Act (ADEA), based on "[the] power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States guarantee[s] to every State in this Union a Republican Form of Government." *Id.* at 463 (cleaned up). The same principles apply with equal force here.

Although the Third Circuit applied its First Amendment logic only to the major party provision, it also invalidated the bare majority provision, finding it not severable from the major party provision. That conclusion is untenable for three reasons. First, the bare majority provision continues to function even in the absence of the major party provision. Second, Article IV, § 3, imposes only a bare majority requirement on Delaware's Family Court and Court of Common Pleas, showing conclusively that that the state constitution's framers believe that the bare majority provision has value independent of the major party provi-

sion. Finally, for over 50 years, the Delaware Constitution contained only a bare majority rule, without a major party rule. It makes no sense to say that a provision that existed on its own for over 50 years, and still does for two courts, is "not severable."

OPINIONS BELOW

The Third Circuit's opinion (App. 1a–41a) is reported at 922 F.3d 166 (3d Cir. 2019). The order denying reconsideration (App. 44a–45a) is unpublished. The clarified and restated opinion of the district court (App. 61a–82a) is unpublished.

JURISDICTION

The Third Circuit entered its judgment on April 10, 2019. App. 42a–43a. The court denied a timely rehearing petition on May 7, 2019. On July 16, 2019, Justice Alito extended the time for filing this petition to September 4, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 3 of Article IV of the Delaware Constitution states in relevant part:

> 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.
> >
> > Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the mem-

bers of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.

Third, at any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.

Fourth, at any time when the total number of Judges of the Family Court shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.

Fifth, at any time when the total number of Judges of the Court of Common Pleas shall be an even number, not more than one-half of the Judges shall be of the same political party;

> and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.

The First Amendment to the United States Constitution 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.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT

A. The history of Delaware's political balance requirements

In 1897, when Delaware adopted its current constitution, the framers rejected popular elections for judges, concluding that politics had no place in the judiciary. Joseph T. Walsh & Thomas J. Fitzpatrick, Jr., Judiciary: Article IV, *in The Delaware Constitution of 1897: The First One Hundred Years* 131–135 (1997); C.A. App. 116–117. Instead, the governor would appoint judges with the state senate's consent, subject to the requirement that persons "from the same political party" could hold no more than three of the five law judgeships.

Today, persons from the same party cannot hold more than half or a bare majority of the seats on each of the statewide law courts or on the three highest courts combined. The Delaware courts thus have a partisan balance requirement that protects them from becoming political spoils. As a result, some otherwise-eligible aspirants may not be considered for judicial positions, due to their affiliation with the party already holding a majority. See Walsh & Fitzpatrick, *supra*, at 134–135.

In 1951, when Delaware created an independent Supreme Court, the framers added the "major party" provision, further restricting the governor's discretion to make appointments that would disturb the courts' political balance.[1] Applicable to the Supreme Court, the Superior Court, and the Court of Chancery, this provision reserves the minority seats to members of the "other major political party."

The major party provision prevents governors from appointing political allies whose views align with the party already commanding a majority, but who register as independents or with a minor party, to seats intended for the party opposed to the majority. One effect, however, is to exclude persons who are not members of one of the two major parties from appointment to the Delaware Supreme Court, Superior Court, or Court of Chancery.

In 2005, the Delaware Constitution was further amended to refer specifically to what had been two statutory courts: the Family Court and the Court of

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[1] Prior to 1951, appeals were heard by ad hoc panels made up of Superior Court judges and the Chancellor.

Common Pleas. The bare majority provision—but not the major party provision—applies to those courts.

In practice, by executive order, the Governor nominates individuals to all five constitutional courts from a list created by the Judicial Nominating Commission. See, *e.g.*, Del. Exec. Order 7 (Mar. 9, 2019).[2] The twelve-member commission has its own bare majority provision: "No more than seven members of the Commission shall be registered members of the same political party at the time of their appointment." *Id.* ¶ 4.

Delaware's political balance provisions have well served the needs of the people of the State, creating a well-respected judiciary that is the envy of the Nation. In part because of Article IV, § 3, the Delaware judiciary is unusually apolitical and harmonious, with a high rate of unanimous Supreme Court opinions.

B. The parties to this dispute

Petitioner John Carney became Governor of Delaware in January 2017. He is litigating this case in his official capacity as the officer charged with enforcing Article IV, § 3.

Respondent James R. Adams, a retired lawyer, was a registered Democrat until 2016. C.A. App. 103. In 2009, he applied for a position on the Family Court, but was not selected for reasons unrelated to his party affiliation. C.A. App. 62. In 2017, Adams changed his registration to Independent. Eight days later, without applying for any judicial position, he filed this lawsuit, alleging that Delaware's political balance provi-

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[2] Available at:

https://governor.delaware.gov/executive-orders/eo07/.

sions violate his First Amendment right to be considered for public office without regard to his political affiliation.

C. The *Elrod-Branti* line of decisions

In *Elrod* v. *Burns*, this Court held that the Democratic Cook County Sheriff could not discharge certain employees, including a process server and a security guard, solely because they were Republicans. 427 U.S. 347. Justice Brennan's plurality noted that "patronage dismissals" would be allowed for "policymaking positions." *Id.* at 367. The opinion acknowledged that "[n]o clear line can be drawn between policymaking and nonpolicymaking positions," but noted that "[a]n employee with responsibilities that * * * are of broad scope more likely functions in a policymaking position." *Id.* at 367–368.

Four years later, in *Branti* v. *Finkel*, the Court held that two assistant public defenders could not be replaced merely because they were Republicans. The "ultimate inquiry," the Court held, "is not whether the label 'policymaker' or 'confidential' fits a particular position," but "whether the hiring authority can demonstrate that party affiliation is *an appropriate requirement* for the effective performance of the public office involved." 445 U.S. at 518 (emphasis added).

The Court's opinion in *Branti* specifically approved of a partisan balance provision for judges, calling it "obvious" that such a provision would be valid:

> As one obvious example, if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately dis-

> charged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee's governmental responsibilities.

Ibid.

This Court has not further defined the scope of employees to whom *Elrod* and *Branti* apply. In *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62 (1990)—which involved a rehabilitation counselor, a road equipment operator, an applicant to be a prison guard, a state garage worker, and a dietary manager—the Court expanded the anti-patronage rule to other employment decisions. But the defendants there conceded that those positions fell within the scope of the *Elrod-Branti* principle. *Id.* at 71 n.5.

Finally, in *O'Hare Truck Service, Inc.* v. *City of Northlake*, 518 U.S. 712 (1996), the Court held that the *Elrod-Branti* restrictions on patronage applied to independent contractors. The Court did not address the scope of the "policymaking exception," likely because it was plainly inapplicable to the tow-truck operators involved.

D. The decisions below

On cross-motions for summary judgment and the Governor's motion for reconsideration/clarification, the district court granted judgment to Adams. The court held that judges are not policymaking officials, and thus that both the bare majority provision and the

major party provision violate Adams' First Amendment right to be considered for government employment without consideration of his party affiliation. App. 75a–81a. The court later stayed its decision pending appeal. *Adams* v. *Carney*, 2018 U.S. Dist. LEXIS 105529, *8–15 (D. Del. June 25, 2018).

The Third Circuit largely affirmed, applying circuit precedent not involving the judiciary that confined "the policymaking exception to only the class of employees whose jobs 'cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority].'" App. 28a, quoting *Brown* v. *Trench*, 787 F.2d 167, 170 (3d Cir. 1986). By definition, that excludes the use of political affiliation for purposes of maintaining political balance—*even for offices that are indisputably policymaking and of the utmost importance to the State*. In sum, the court reasoned, "while judges clearly play a significant role in Delaware, that does not make the judicial position a political role tied to the will of the Governor and his political preferences." App. 26a–27a.

In so holding, the Third Circuit expressly acknowledged that it created a circuit split on the application of *Elrod* and *Branti* to judicial appointments: "We are aware that two of our sister Circuits have concluded otherwise." App. 27a, citing *Kurowski* v. *Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988) ("A judge both makes and implements governmental policy."), and *Newman* v. *Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993) ("We agree with the holding in *Kurowski* that judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters.").

Having concluded that *Elrod* and *Branti* apply, the Third Circuit turned to the State's justifications. Although the court did not question the State's "vital" interest in political balance on the courts, it faulted the Governor for failing to explain why the major party provision, which effectively "bars candidates who do not belong to either the Democratic or Republican parties" from serving as judges, is "the least restrictive means of achieving political balance." App. 32a–33a. The court did not suggest what "le[ss] restrictive alternative" the State could have used to prevent the bare majority provision from being circumvented. Indeed, the court elsewhere explained why the political balance provision is essential to achieving the State's interest:

> Operating alone, the bare majority component could be interpreted to allow a Governor to appoint a liberal member of the Green Party to a Supreme Court seat when there are already three liberal Democrats on that bench. Only with the (unconstitutional) major political party component does the constitutional provision fulfil its purpose of preventing single party dominance while ensuring bipartisan representation.

App. 34a.

The court acknowledged an explicit circuit split on this point too: "The Sixth Circuit, following *Branti*, has categorically held that employment decisions conditioned on political party affiliation are permissible where the position is one of several 'filled by balancing out political party representation, or that are filled by

balancing out selections made by different government agents or bodies.'" App. 30a n.78, quoting *McCloud* v. *Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996).

Although the court purported not to address the constitutionality of the "bare majority" provision, it struck down this provision on the theory that it could not be severed from the major party provision. While acknowledging "that we should refrain from invalidating more of a statute than necessary," the court nonetheless held that "the two substantive components of Article IV, Section 3 are interdependent and equally integral to the political balance scheme Delaware envisioned for the Supreme Court, Superior Court, and Chancery Court." App. 35a (footnote omitted).[3]

A concurrence written by Judge McKee, joined by all three judges, recognized that the invalidated political balance provisions contributed to the high quality of Delaware's judiciary:

> Praise for the Delaware judiciary is nearly universal, and it is well deserved. Scholars and academics routinely refer to Delaware's courts as the preeminent forum for litigation involving business disputes. * * * Members of the Delaware bench credit the political balancing requirement for at least part of this success.

App. 38a–39a. The judges expressed their hope that "the constitutional provisions which we today invalidate have resulted in a political and legal culture * * *

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[3] The court reversed the district court's judgment that the bare majority requirement was unconstitutional as applied to the Family Court and Court of Common Pleas, holding that Adams lacks standing to challenge the requirement on those courts. App. 36a.

so firmly woven into the fabric of Delaware's legal tradition that it will almost certainly endure in the absence of the political affiliation requirements." App. 41a.

The Third Circuit denied rehearing or rehearing en banc.

REASONS FOR GRANTING THE PETITION

This Court should address the express circuit split over whether judges are policymakers under the First Amendment and resolve that question in favor of sovereign States' Tenth Amendment right to structure their judiciaries in light of their vital interests, such as Delaware's commitment to a nonpartisan judiciary. Further, even if this Court agrees with the court below that the major party provision of Article IV, § 3, violates the First Amendment, the Court should review and reverse the Third Circuit's severability ruling and allow the bare majority provision to remain in effect.

I. The Court should resolve the circuit split over whether judges are policymakers under *Elrod* and *Branti*.

The Third Circuit's holding that judges are "non-policymaking" officials covered by *Elrod* and *Branti* expressly conflicts with reported Sixth and Seventh Circuit decisions, a summary Second Circuit decision and the ruling of every other court to address the issue.

Moreover, the logic of the decision below extends far beyond judges. According to the Third Circuit, the "policymaking" exception to *Elrod* and *Branti* extends only to positions that "cannot be performed effectively except by someone who *shares* the political beliefs of [the appointing authority]." App. 26a (emphasis added; citation and internal quotation marks omitted).

If that reasoning were correct, it would mean that the exception could not be used to preserve political balance on a board or commission or to limit the appointing official's ability to pack the entity with political cronies—thus endangering the constitutionality of hundreds of federal, state, and local good-government reform provisions. Certiorari is warranted.

A. Every other court to address the issue has held that judges are policymakers who fall outside the scope of *Elrod* and *Branti*.

The Third Circuit's holding conflicts with that of every other court to consider the issue, including reported decisions of the Sixth and Seventh Circuits. This Court should resolve that conflict, which involves a matter of great national importance.

1. In *Kurowski* v. *Krajewski*, the Seventh Circuit concluded that judges are policymakers under *Elrod* and *Branti*. 848 F.2d 767 (7th Cir. 1988). There, a Republican state court judge (Krajewski) fired two Democrats could serve as public defenders, a role in which they sometimes served as judges pro tempore. The district court held for the plaintiffs, reasoning that judges pro tempore were not "policymakers" because they did not implement Krajewski's policies. *Id.* at 769.

The Seventh Circuit rejected that reasoning, stating: "Neither *Elrod* nor *Branti* makes anything turn on the relation between the job in question and the implementation of the appointing officer's policies." *Id.* at 770. Moreover, the court explained, "A judge both makes and implements governmental policy. A judge may be suspicious of the police or sympathetic to them, stern or lenient in sentencing, and political debates rage about such questions." *Ibid.*

The court thus determined that persons selecting judges could consider the politics of judicial aspirants, adding: "The Governor of Indiana was entitled to consider * * * [the judge's] political affiliation—when making the appointment, just as the voters may consider these factors without violating the first amendment when deciding whether to retain Judge Krajewski in office." *Ibid*. As that court has since explained, "judges and hearing officers typically occupy policymaking roles for First Amendment purposes." *Hagan* v. *Quinn*, 867 F.3d 816, 828 (7th Cir. 2017).

The Sixth Circuit has expressly followed *Kurowski*. In *Newman* v. *Voinovich*, 986 F.2d 159 (6th Cir. 1993), a Democratic judicial aspirant argued that a Republican governor's practice of naming judges based solely on the recommendations of Republican county chairpersons violated the First Amendment. The Sixth Circuit disagreed, stating: "We agree with the holding in *Kurowski* that judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters." *Id.* at 163.

2. The court below acknowledged that its decision conflicts with *Kurowski* and *Newman*. Nevertheless, citing its narrow definition of policymaker, it rejected those decisions as "unpersuasive." App. 27a–29a.

The Third Circuit did not, however, acknowledge the many other decisions, before and after *Kurowski* and *Newman*, that have uniformly reached the same conclusion. In *Garretto* v. *Cooperman*, 510 F. Supp. 816, 817–818 (S.D.N.Y. 1981), for example, the court held that a terminated worker's-compensation judge did not show a likelihood of success on the merits of

her claim that firing her based on her political affiliation violated the First Amendment. The judge was deemed a policymaker because, among other things, "judges who approach the task of adjudication from different points on the political spectrum will produce markedly different results in the functioning of the compensation system." *Id.* at 819. The Second Circuit affirmed in a one-word order. 794 F.2d 676 (2d Cir. 1984); see also *Hawkins* v. *Steingut*, 829 F.2d 317 (2d Cir. 1987) (holding that defendants were entitled to qualified immunity when a workers'-compensation judge claimed he was not reappointed because of his partisan affiliation).

Similarly, *Davis* v. *Martin*, 807 F. Supp. 385 (W.D.N.C. 1992), upheld a statute requiring a governor to appoint an interim judge from the same political party as the vacating judge, who had been popularly elected. As the court recognized, the *Elrod* line of cases applies only to "low-level executive branch employees." *Id*. at 387.

In *Walsh* v. *Heilman*, 2006 U.S. Dist. LEXIS 26299 (N.D. Ill. Apr. 19, 2006), the district court held that an administrative hearing officer was a policymaker because his duties were "very similar to, if not exactly the same as, the duties [of] state or federal judges." *Id.* at *14. The Seventh Circuit affirmed, explaining such the hearing officers were like judges in that, although the laws "hedge[]" their independence, "the remaining discretion is enough" to make them policymakers. 472 F.3d 504, 506 (7th Cir. 2006).

In *Carroll* v. *City of Phoenix*, 2007 U.S. Dist. LEXIS 28749 (D. Ariz. Apr. 17, 2007), the court held that a Phoenix municipal judge was a policymaker.

As the court noted, "in light of our common law tradition, the public tends to perceive judges of all kinds as policymakers who shape the law by creating precedent," and "the position confers authority to make discretionary decisions that shape the content and implementation of state and local law on a variety of issues." *Id.* at *35, *37.

In *Levine* v. *McCabe*, 2007 U.S. Dist. LEXIS 92381 (E.D.N.Y. Dec. 17, 2007), the district court held that a New York state judicial hearing officer (not unlike a federal magistrate judge) was a policymaker. *Id.* at *22–26. Here again, the Second Circuit affirmed "for substantially the reasons" stated by the district court. 327 F. App'x 315, 316 (2d Cir. 2009).

Finally, in *Durham* v. *Haslam*, 2014 Tenn. Cir. LEXIS 241 (Tenn. Cir. Ct. Oct. 8, 2014), the Tennessee Court of Appeals held that it was "clear" that governors "may base their appointment[s] on political considerations" without violating the federal constitution. *Id.* at *7–8.

In sum, we are aware of no federal or state decision that resolves the question presented as did the court below, and many come out the other way.

3. In addition to bringing the Third Circuit into line with other courts as to whether judges are policymakers, this case provides an opportunity for the Court to clarify the scope of the *Elrod-Branti* doctrine. Currently, courts' tests for when *Elrod* prohibits employment decisions based on political affiliation vary greatly. See, *e.g.*, *Jimenez Fuentes* v. *Torres Gaztambide*, 807 F.2d 236, 241–242 (1st Cir. 1986) (en banc) (applying a two-step inquiry); *Morin* v. *Tormey*, 626 F.3d 40, 45 (2d Cir. 2010) (relying on eight non-exclusive factors); *McCloud*, 97 F.3d at 1557 (identifying

four exemplary categories of policymakers); *Hagan*, 867 F.3d at 824–825 (relying on whether the office's inherent powers include "meaningful input" or "room for principled disagreement"); *Walker* v. *City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001). Review is needed.

B. Common law judging has a significant policymaking element.

The Third Circuit might have thought that labeling state court judges "policymakers" would sound pejorative. In reality, however, judges are among the most important decisionmakers in our legal-political system. As judges and Justices across the jurisprudential spectrum have long recognized, jurists stand at the opposite pole from the process servers, road construction workers, and rehabilitation counselors who are subject to the *Elrod-Branti* rule. *E.g.*, *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law."); Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 Yale L.J. 218, 221 (1961) (referring to "the unfeasability, under our legal system, of divorcing the deciding from the law-making functions of the judge"); Oliver Wendell Holmes, Jr., *The Common Law* 35–36 (1881) ("[e]very important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy"); see also Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. Rev. 685, 714–722 (2009) (collecting statements from judges).

If any judges make law, state common law judges certainly do. As this Court explained in *Republican*

Party of Minnesota v. *White*, 536 U.S. 765, 784 (2002): "Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well." Not surprisingly, Delaware judges themselves have recognized that they make policy. In one study, two of three Delaware Supreme Court justices saw their role as somewhere between a "Law Interpreter" and a "Lawmaker." John T. Wold, *Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges*, 27 W. Pol. Q. 239, 241 (1974).

For instance, Delaware fiduciary-duty law, often cited by courts in other jurisdictions, is judge-made. See Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. Pa. J. Bus. L. 675, 700 (2009). Similarly, Delaware's nationally and internationally emulated business-judgment rule—which "creates a presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith"—is a product of judge-made common law. *Cede & Co.* v. *Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) (cleaned up); see also Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U. J.L. & Bus. 27 (2017).

Every area of the common law includes policymaking. See, *e.g.*, *E.I. DuPont de Nemours & Co.* v. *Pressman*, 679 A.2d 436, 440–442 (Del. 1996) (recognizing that a "public policy exception" to at-will employment is created by the common law covenant of good faith and fair dealing); *Beattie* v. *Beattie*, 630 A.2d 1096, 1098–1101 (Del. 1993) (abrogating the common law doctrine of interspousal immunity for torts because it "is no longer based on sound public policy grounds"); *Dalton* v. *Clanton*, 559 A.2d 1197 (Del. 1989) (holding

that the common law child support formula is consistent with public policy).

Statutory questions likewise have a public-policy component. For instance, Delaware courts look to policy in determining how to interpret ambiguous statutes. As the Delaware Supreme Court explained in *Kelly* v. *State Farm Mutual Automobile Insurance Co.*, "If we determine that a statute is ambiguous, we 'will resort to other sources, including relevant public policy,' to determine the statute's purpose." 73 A.3d 926, 929 (Del. 2013), quoting *Progressive N. Ins. Co.* v. *Mohr*, 47 A.3d 492, 496 (Del. 2012).

C. Judges exercise other policymaking authority.

Even if Delaware judges did not make policy in their judicial opinions, they would still be policymakers when administering the courts and regulating the legal profession. See *Gregory*, 501 U.S. at 466; *Peters* v. *Del. River Port Auth.*, 16 F.3d 1346, 1353 (3d Cir. 1994) (determining whether an employee is a policymaker based on "whether the employee has 'meaningful input into decision making concerning the nature and scope of a major [government] program'").

Delaware judges administer the judicial system, a major governmental program that was recently projected to be 2.3% of Delaware's budget. See Office of John Carney, *Financial Overview for Fiscal Year 2019*, at 10 (2018).[4] The Chief Justice, with the approval of a majority of the justices, is charged "to adopt rules

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[4] Available at:

https://budget.delaware.gov/budget/fy2019/documents/budget-presentation.pdf.

for the administration of justice." Del. Const. art. IV, § 13. Delaware judges thus create the rules by which the courts operate, and those rules supersede all conflicting statutory provisions. *E.g.*, Del. Code tit. 10, § 161 (Supreme Court); Del. Code tit. 10, § 361 (Court of Chancery). Since 2007, the Chancellor has had the authority to appoint full-time Masters in Chancery (akin to federal magistrate judges). Del. Ch. Ct. R. 143. Likewise, the State Court Administrator is appointed by, and serves at the pleasure of, Delaware's Chief Justice. Del. Code tit. 10, § 128.

Delaware judges also directly regulate judges. Article IV, § 37, of the Delaware Constitution provides for the regulation of the judiciary by a Court on the Judiciary composed of the Supreme Court justices and the presiding judges of the other constitutional courts. As Section 37 explains, the Court on the Judiciary can remove or retire sitting judges.

Finally, Delaware judges regulate lawyers. Under the Delaware Constitution, the Delaware Supreme Court has exclusive authority for licensing and disciplining persons admitted to practice law in Delaware. See *In re McCann*, 894 A.2d 1087, 1088 (Del. 2005). The Delaware Supreme Court discharges these responsibilities through the Board of Bar Examiners, the Board of Professional Responsibility, and the Commission on Continuing Legal Education. It both adopts rules for each of these boards and promulgates the Delaware Lawyers' Rules of Professional Conduct.

In these and many other ways, Delaware judges make policy regulating the entire legal profession.

D. Balance in partisan affiliation is not irrelevant to judicial decisionmaking.

Although courts typically speak of a "policymaking exception" to *Elrod* and *Branti*, this is something of a misnomer. As the Court said in *Branti*, "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." 445 U.S. at 518. Certiorari is warranted to confirm that States may consider balance in partisan affiliation in attempting to ensure the effective functioning of their judiciaries.

Elrod and its progeny apply only to positions for which political views and affiliations are irrelevant. No one can honestly say that of judges—or the States are at least entitled to conclude otherwise. In many States, judges are chosen in partisan elections; in others they are appointed by governors using political affiliation as a proxy for judicial philosophy.

As Judge Easterbrook notes, "[p]olitical platforms, and candidates, take strong positions on * * * contentious issues" that come before courts. *Bauer* v. *Shepard*, 620 F.3d 704, 712 (7th Cir. 2010). A large body of political science evidence confirms the commonsense observation "that Democratic judges are indeed more liberal than are Republican judges." Jeffrey A. Segal, Ideology and Partisanship, *in The Oxford Handbook of U.S. Judicial Behavior* 306 (2017) (summarizing meta-analysis of 140 studies).

More relevant to Delaware's political balance provisions is extensive scholarship by Harvard Law Pro-

fessor Cass Sunstein and others, showing that ideologically homogeneous judicial panels (three Republicans or three Democrats) are more extreme in their voting patterns than the same judges sitting on ideologically mixed panels. As Sunstein explains: "Apparently a large disciplining effect comes from the presence of a single panelist from another party. Hence all-Republican panels show far more conservative patterns than majority Republican panels, and all-Democratic panels show far more liberal patterns than majority Democratic panels." Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 306 (2004). Indeed, Dean Thomas Miles of the University of Chicago Law School has written that "[t]he presence of 'peer effects', that an ideologically homogenous panel decides a case in a more characteristically partisan way than an ideologically mixed panel, is now a standard finding in studies of appellate decision-making." Thomas J. Miles, *The Law's Delay: A Test of the Mechanisms of Judicial Peer Effects*, 4 J. Legal Analysis 301, 302 (2012).[5]

Delaware's political balance provisions prevent this "panel effect" by sharply reducing ideologically homogeneous courts. That is an "appropriate" use of partisan affiliation in light of the policymaking role of courts in our society. *Branti*, 445 U.S. at 518.

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[5] The phenomenon of "panel effects" has been replicated or analyzed in numerous studies. See, *e.g.*, Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. Pa. L. Rev. 1319, 1323–1324 (2009) (summarizing research).

This does not mean that judicial partisanship is a good thing—just that party affiliation is a convenient and widely recognized proxy for beliefs that undoubtedly are relevant to the job. The Delaware Constitution pays attention to party affiliation precisely because of the dangers of unchecked partisanship. By mandating a balance, the State has created a judicial branch that is "nearly universal[ly]" admired for its objectivity, stability, and degree of consensus. App. 38a. It makes no difference whether road crews, prison guards, or process servers are balanced politically. The same cannot be said of courts.

E. The Third Circuit's reasoning would doom many other statutory schemes and conflicts with *Elrod* and *Branti*.

The Third Circuit held that partisan affiliation is relevant *only* when the appointing authority exercises control over the appointee's decisions: "We have always more narrowly applied the policymaking exception to only the class of employees whose jobs 'cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority].'" App. 28a, quoting *Brown*, 787 F.2d at 170. By definition, that excludes every use of partisan affiliation to *insulate* decisionmaking from political control —even in unquestionably policymaking roles such as regulatory commissions. That view cannot be reconciled with *Elrod* and *Branti*.

The Third Circuit's error was to assume that the only purpose of the policymaking exception is "to ensure that elected officials may put in place loyal employees who will not undercut or obstruct the new administration." App. 23a. But political affiliation can be used to accomplish the *opposite* end: to ensure that

elected officials do *not* put in place only loyal employees who will subordinate the public interest to the official's politics. There is no good reason for such provisions to fall categorically outside of the *Elrod-Branti* policymaking exception. The Third Circuit's rationale for reaching a contrary conclusion is unconvincing:

> Article IV, Section 3 itself illustrates that political loyalty is not an appropriate job requirement for Delaware judges. Delaware has chosen to considerably limit the Governor's ability to nominate judges on the basis of political expediency. Instead, the Governor must ensure that there are sufficient Democratic and Republican judges on the bench. Far from nominating only judges who will be loyal to his party, the Governor may be required by Delaware's constitution to nominate judges who belong to a different political party.

App. 24a. The desire to ensure representation of multiple viewpoints is no reason to hold the provision to higher First Amendment scrutiny.

In *Branti* itself, this Court stated that election judges could be politically balanced: "[I]f 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." 445 U.S. at 518. Indeed, the Court called this "obvious." *Ibid.* The Third Circuit's test nonetheless requires the opposite conclusion.

Likewise, in *Davis* v. *Martin*, the court upheld a statute requiring a governor to appoint interim judges from the same party as vacating judges they replaced, even if that meant appointing someone whose political beliefs were *the opposite of the governor's*. 807 F. Supp.

at 387. The obvious purpose of that provision was to force the governor to honor the will of the electorate that elected the vacating judge. See also, *e.g.*, Ariz. Rev. Stat. § 16-222(C). The Third Circuit's interpretation of *Elrod* and *Branti* makes even that commonsensical use of partisan affiliation constitutionally suspect.

Other methods designed to take politics out of judicial selection would be suspect under the decision below. Delaware and other States have merit-based judicial selection commissions that winnow the contenders for a judicial vacancy. These commissions frequently require partisan balance among members. *E.g.*, Del. Exec. Order 7 ¶ 4;[6] Douglas Keith, *Judicial Nominating Commissions* 6, Brennan Ctr. for Justice (May 29, 2019) (describing political balance provisions).[7] Under the decision below, such reform schemes fall within the scope of *Elrod-Branti*.

Moreover, the Third Circuit's interpretation would extend to the many federal and state regulatory commissions that have political balance provisions. The fact that such commissions unquestionably make policy is irrelevant under the Third Circuit's rule, as that rule asks only whether the job "cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority]." App. 26a.

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[6] Available at:

https://governor.delaware.gov/executive-orders/eo07/.

[7] Available at:

https://www.brennancenter.org/sites/default/files/publications/2019_05_29_JudicialNominationCommissions_Final.pdf.

Dozens of federal agencies are run by multi-member, partisan-balanced commissions. See, *e.g.*, *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (noting that the FEC "is inherently bipartisan in that no more than three of its six voting members may be of the same political party"); see also Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 51 (noting that, "[a]most uniformly," "no more than a majority" of members of independent federal agencies may "come from one party"). Indeed, "dozens of agencies" have "some form of partisan-balance requirement," and "the courts have never held that they are unconstitutional." Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 Yale L.J. (forthcoming 2019) (footnote omitted).

Under the Third Circuit's "narrow[] appli[cation of] the policymaking exception" (App. 28a), the First Amendment bars States and the federal government from ensuring minority-party representation on any of these bodies, as such appointees would not be "loyal" to the "new administration." App. 23a. That test would upend decades of federal and state appointment practice and conflicts with *Elrod* and *Branti*. This Court should intervene.

II. Certiorari should be granted to protect the States' sovereign authority to structure their own governing institutions and to protect Delaware's "vital interest" in a balanced judiciary.

Certiorari is also warranted to reaffirm that federal courts are obligated to respect the States' sovereign authority to structure their own governments, including by setting qualifications for state judges. The Third Circuit should not have dismissed Delaware's

strong interest in a politically balanced judiciary based on a "least restrictive means" analysis.

A. *Gregory* requires applying a "less exacting" standard to state constitutional provisions setting judicial qualifications.

In *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), one of this Court's leading federalism decisions, the Court affirmed a decision holding that a state constitutional mandatory retirement age for state court judges did not violate the Age Discrimination in Employment Act. Citing a century of precedent, the Court reaffirmed that "each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Id.* at 462, quoting *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973), quoting *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892).

The Court in *Gregory* extensively quoted earlier cases involving constitutional challenges to state qualifications for government office, noting: "We have lowered our standard of review when evaluating the validity of [state qualifications for] important elective and nonelective positions whose operations 'go to the heart of representative government.'" *Id.* at 463, quoting *Bernal* v. *Fainter*, 467 U.S. 216, 220 (1984); see also *id.* at 462 ("[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."), quoting *Sugarman*, 413 U.S. at 648; *id.* at 463–464 (where "[o]ther constitutional provisions * * * proscribe certain qualifications," the Court's review "is less exacting, but it is not absent").

The Court recently reaffirmed *Gregory*'s holding requiring deference to state sovereignty in *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1671 (2015). As

the Court there explained, "how to select those who 'sit as [state] judges'" involves "sensitive choices by States in an area central to their own governance." *Ibid.*; see also *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm.*, 135 S. Ct. 2652, 2673 (2015).

The Third Circuit's self-described "narrow[]" definition of the policymaking exception (App. 28a) puts the *Elrod-Branti* principle on a collision course with *Gregory* and the venerable line of authorities on which it rests. Reading *Elrod* and *Branti* in light of *Gregory*, the policymaking exception must apply at a minimum "to persons holding state elective and important nonelective executive, legislative, *and judicial positions*." *Gregory*, 501 U.S. at 462 (emphasis added). Those are the "officers who participate directly in the formulation, execution, or review of broad public policy [and] perform functions that go to the heart of representative government." *Ibid.* And as *Gregory* plainly holds, the category includes state court judges.

The Third Circuit misapprehended the role of the policymaking exception, assuming that "[its] purpose * * * is to ensure that elected officials may put in place loyal employees who will not undercut or obstruct the new administration." App. 23a. *Branti* and *Elrod* say no such thing. The policymaking exception has the more fundamental constitutional purpose of preserving the sovereign right of the States "to prescribe the qualifications of its officers and the manner in which they shall be chosen," which "inheres in the State by virtue of its obligation * * * to preserve the basic conception of a political community." *Gregory*, 501 U.S. at 462, quoting *Sugarman*, 413 U.S. at 647.

Based on this misapprehension, the decision below subjected "a decision of the most fundamental sort for

a sovereign entity" (*id.* at 460) to federal court review not under the "less exacting" standard prescribed by *Gregory*, but under unforgiving, heightened scrutiny. According to the Third Circuit: "To justify a rule that impinges an employee's First Amendment association rights, the state must show both that the rule promotes 'a vital state interest' and that the rule is 'narrowly tailored' to that interest," meaning that it employs "the least restrictive means" to attain its purpose. App. 32a–33a. The court derived that test from *Rutan*, App. 29a–30a, which involved low-level government employees such as road equipment operators and prison guards—not, as in *Gregory*, "important elective and nonelective positions whose operations 'go to the heart of representative government.'" 501 U.S. at 463, quoting *Bernal*, 467 U.S. at 221. The latter positions are governed by more deferential rules.

Even apart from *Gregory*, the Third Circuit improperly read a "least restrictive means" requirement into the *Elrod-Branti* policymaking exception. *Branti* and *Elrod* do not require that the State's particular use of party affiliation be the "least restrictive means"—only that party affiliation at a general level be "appropriate" to the job. *Branti*, 445 U.S. at 518. That is not a demanding requirement; and as *Gregory* confirms, and it is clearly met with respect to state court judges.

Because party affiliation is an "appropriate" requirement, the restriction falls within the policymaking exception, and no further scrutiny is required. The Third Circuit's "least restrictive means" analysis thus conflicts with this Court's precedents and calls for review.

B. In any event, the political balance requirements would pass strict scrutiny.

In all events, under any standard of review—"vital," "appropriate," or something else—Delaware's political balance provisions easily surmount the constitutional bar, as they are narrowly tailored to meet a compelling need. Indeed, this Court has twice summarily affirmed lower court decisions upholding political balance requirements. See *LoFrisco* v. *Schaffer*, 341 F. Supp. 743, 750 (D. Conn.), aff'd, 409 U.S. 972 (1972); *Hechinger* v. *Martin*, 411 F. Supp. 650, 653 (D.D.C. 1976), aff'd, 429 U.S. 1030 (1977).

The Third Circuit did not reflect on the importance of Delaware's interest in political balance on its courts, reasoning that the challenged provisions are not the "least restrictive means" of achieving this interest: "[T]his cannot suffice as a justification to bar candidates who do not belong to either the Democratic or Republican parties from seeking judicial appointment, because the Governor fails to explain why this is the least restrictive means of achieving political balance." App. 32a–33a.

Yet few values are more important to States—and especially Delaware—than the fairness, consistency, balance, and objectivity of their courts. The Delaware judiciary's reputation, particularly in matters of corporate law, has made this small State a beacon for business and business litigation all over the country.

Indeed, in the concurrence, all three members of the court below explained that "[p]raise for the Delaware judiciary is nearly universal" and "well deserved." App. 38a. In a similar vein, the late Chief Justice William Rehnquist remarked that "[c]orporate

lawyers across the United States have praised the expertise of the Court of Chancery * * * . [T]he process of decision in the litigated cases has so refined the law that business planners may usually order their affairs to avoid law suits." William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351, 354 (1993), quoting Rodman Ward, Jr. & Erin Kelly, *Why Delaware Leads in the United States as a Corporate Domicile*, 9 Del. Law. 15 (1991) (internal quotation mark omitted). As he recognized, the Delaware bench is worthy of "one of the highest forms of praise the judiciary can receive." *Ibid.*

One of the fruits of partisan balance has been Delaware judges' ability to reach consensus. From 1960 to 1996, an average of 97 percent of the Delaware Supreme Court's reported decisions have been unanimous. David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 Va. L. Rev. 127, 132, 174–175 App. A (1997); Randy J. Holland & David A. Skeel, Jr., Deciding Cases Without Controversy, *in Delaware Supreme Court Golden Anniversary 1951-2001* at 41 (Randy J. Holland & Helen L. Winslow ed.) (2001). That trend continues today. And many, including Justices of this Court, have observed that unanimous decisionmaking is desirable. *E.g.*, Ruth Bader Ginsberg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 1, 3 (2010) ("[A]s Chief Justice Roberts suggested, the U.S. Supreme Court may attract greater deference, and provide clearer guidance, when it speaks with one voice."). In short, greater consensus leads to greater doctrinal stability.

Delaware's well-earned reputation for impartiality and expertise is one reason that companies choose to charter there. Delaware "is the state of incorporation

for more than 60% of the Fortune 500 companies and for more than half of all companies whose stock is traded on the New York Stock Exchange and NASDAQ." Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. Corp. L. 771, 772 (2009). Being incorporated in Delaware may even increase a company's value. See Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. Fin. Econ. 525, 555 (2001); Roberta Romano, *The Genius of American Corporate Law* 18 (1993) (noting that "several [studies] have found significant positive stock price effects on firms' reincorporation to Delaware").

Delaware judges have concluded that the greater objectivity and consensus within the Delaware judiciary is due at least in part to its political balance provisions. As one former Delaware Chief Justice has explained, "[t]his system has served well to provide Delaware with an independent and depoliticized judiciary and has led, in my opinion, to Delaware's international attractiveness as the incorporation domicile of choice." E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004?*, 153 U. Pa. L. Rev. 1399, 1402 (2005). Likewise, the current Delaware Chief Justice has observed that "the Delaware judiciary is, by the state's Constitution, evenly balanced between the major political parties, resulting in a centrist group of jurists committed to the sound and faithful application of the law." Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673, 683 (2005); see also Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 Penn. St. L. Rev. 217, 239 (2009).

Scholars agree. The research on "panel effects" discussed above persuasively shows that bipartisan judicial panels are less likely to reach extreme results than an unmixed panel would. The Delaware Constitution generates mixed panels.

Regarding tailoring, the Third Circuit insisted that the Governor "show that the goals of political balance could not be realized without the" political balance provisions and "explain why this is the least restrictive means of achieving political balance." App. 32a–33a. But the court did not suggest any less-restrictive alternative. In his three-judge concurrence, Judge McKee was content to hope that the virtue of the political balance provisions is now "so firmly woven into the fabric of Delaware's legal tradition that it will almost certainly endure in the absence of the political affiliation requirements." App. 41a. That is a hope, not a plan.

The court's casual dismissal of the State's well-considered choices about its own structure of government is wrong on not only the facts, but the law. As this Court recently explained, "[t]he First Amendment requires that [the challenged restriction] be narrowly tailored, not that it be 'perfectly tailored.'" *Williams-Yulee*, 135 S. Ct. at 1671. Moreover, "[t]he impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary." *Ibid.*

The rationale for the major party provision is plain. In fact, the court below itself explained why it is practically the only means of securing political balance:

> Operating alone, the bare majority component could be interpreted to allow a Governor to appoint a liberal member of the Green Party to a

> Supreme Court seat when there are already three liberal Democrats on that bench. *Only with the (unconstitutional) major political party component does the constitutional provision fulfil its purpose of preventing single party dominance while ensuring bipartisan representation*.

App. 34a (emphasis added).

Again, empirical research supports the conclusion. A recent study explored whether political balance requirements for regulatory commissions have worked in practice, concluding that, due largely to the increased ideological coherence of the two parties, party affiliation is a more reliable metric than ever before. See Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Colum. L. Rev. 9, 12 (2018). Thus, scholars favoring political balance requirements typically use partisan affiliation as their means for identifying political balance. *E.g.*, Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 Pepp. L. Rev. 547, 550 (2018) (arguing that "Congress should have enacted laws and procedures to make permanent an even-numbered Supreme Court with four Republicans and four Democrats"); Epps & Sitaraman, *supra* ("First, the Supreme Court would start with ten justices. Five would be affiliated with the Democratic Party, and five would be affiliated with the Republican Party. These ten justices would then choose five additional justices * * * .").

* * * * *

The proper question here is whether, under *Gregory*'s deferential standard, partisan affiliation is an "appropriate" consideration in selecting judges.

Branti, 445 U.S. at 518. The Delaware Constitution's framers concluded that an even mix of judges affiliated with the two major parties would produce a more concordant judiciary. The wisdom of that conclusion is evidenced by the Delaware Supreme Court's 97 percent unanimity rate in reported opinions, providing legal stability. Under the proper standard, it was error to invalidate the political balance provisions of Article IV, § 3.

Even under strict scrutiny, however, the provisions pass muster. The court below did not question the vital nature of the State's interest or offer any alternative means that could effectively serve the same end. Review is needed to confirm that the Third Circuit's approach fails to give proper consideration to the States' interest as sovereigns, in conflict with this Court's precedent.

III. The court's severability ruling is plainly incorrect and should be reversed.

The Third Circuit applied its First Amendment analysis only to the major party provision, but it invalidated that provision *and* the bare majority provision as they apply to the Supreme Court, Superior Court, and the Court of Chancery on the ground that the bare majority provision is "not severable" from the major party provision. App. 33a. That conclusion is untenable. A provision is severable if (1) it can stand alone, and (2) it is not clear that the legislature intended the entire statute to be displaced. See *Exec. Benefits Ins. Agency* v. *Arkison*, 573 U.S. 25, 37 (2014); accord *Farmers for Fairness* v. *Kent County*, 940 A.2d 947, 962 (Del. Ch. 2008). Both are true here.

First, the bare majority provision serves a valid function even without the major party provision. This

Court "ordinarily give[s] effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law." *Arkison*, 573 U.S. at 37 (cleaned up). As the Third Circuit acknowledged, "there is no question that the bare majority component is capable of standing alone." App. 34a. To be sure, without the major party provision, the bare majority provision could be circumvented by naming a judge affiliated with a small party whose views align with the governor's. Nonetheless, the bare majority provision would itself impose significant constraint, as confirmed by the fact that *most* political balance requirements nationwide impose a bare majority rule without the equivalent of a major party backstop. Feinstein & Hemel, *supra*, at 41.

Second, the valid portion of a law remains operative "so long as it is not 'evident' from the statutory text and context that [the drafters] would have preferred no statute at all." *Arkison*, 573 U.S. at 37. The burden is on the party opposing severability.

Here, the history shows conclusively that the Delaware Constitution's framers were willing to impose a bare majority provision even without a major party provision. From 1897 until 1951—54 years—that was the case. Del. Const. art. IV, § 3 (1897). More recently, in 2005, two statutory courts—the Family Court and Court of Common Pleas—were given constitutional status with a bare majority provision but no major party provision. Del. Const. Art. IV, § 3; App. 34a (recognizing that the bare majority provision "stand[s] alone" as to those two courts). There is no reason to think that Delaware's framers would prefer no limitation rather than just one.

It makes no sense to say that a provision that existed alone for over 50 years, still exists on its own for two courts, and is a common device for regulatory bodies nationwide, is not severable. If this Court were to affirm the Third Circuit's First Amendment analysis of the major party provision, it should correct this flagrant error in its severability analysis. It is of great practical importance to the Delaware judicial system and Delaware's sovereign rights that at least part of the political balance requirements survive.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 2019

APPENDIX

Appendix A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1045

JAMES R. ADAMS

v.

GOVERNOR OF DELAWARE,

Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-17-cv-00181)
Honorable Mary Pat Thynge, U.S. Magistrate Judge

Argued September 25, 2018

Before: MCKEE, RESTREPO, and FUENTES,
Circuit Judges.

(Filed: April 10, 2019)

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OPINION OF THE COURT

FUENTES, *Circuit Judge.*

James R. Adams is a resident and member of the State Bar of Delaware. For some time, he has expressed a desire to be considered for a judicial position in that state. Following the announcement of several judicial vacancies, Adams considered applying but ultimately chose not to because the announcement required that the candidate be a Republican. Because Adams was neither a Republican nor a Democrat, he concluded that any application he submitted would be futile.

Adams brings this suit against the Governor of the State of Delaware to challenge the provision of the Delaware Constitution that effectively limits service on state courts to members of the Democratic and Republican parties. Adams claims that under the Supreme Court's precedent in *Elrod v. Burns*[1] and *Branti v. Finkel*,[2] a provision that limits a judicial candidate's freedom to associate (or not to associate) with the political party of his or her choice is unconstitutional. The Governor argues that because judges are policymakers, there are no constitutional restraints on his hiring decisions and he should be free to choose candidates based on whether they belong to one of the two major political parties in Delaware—that is, whether they are Democrats or Republicans. We disagree and conclude that judges are not policymakers because whatever decisions judges make in any given case relates to the case under review and not to partisan political interests. We therefore conclude that the portions of Delaware's constitution that limit Adams's ability to apply for a judicial position while associating with the political party of his choice violate his First Amendment rights, and we will accordingly affirm in part and reverse in part the District Court's grant of summary judgment in favor of Adams.

I. Background

A. Article IV, Section 3 of the Delaware Constitution

In 1897, Delaware was unique in its method of judicial selection—it was the only state in the

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1 427 U.S. 347 (1976).

2 445 U.S. 507 (1980).

country in which the governor appointed judges without legislative involvement.[3] Judicial selection became an important and contentious topic during Delaware's constitutional convention that year. Debating whether or not to move to a system of judicial election, delegates to the convention expressed their deep concern over the politicization of the judiciary. John Biggs, Sr., the president of the convention, explained his position that the appointment of judges would enable judges to remain free from political cronyism and partisanship:

> I think it would be very unwise that our Judges should be mixed up, I will say, in politics. We can obtain good men in this way, by the confirmation by the Senate, without those men being under political obligations, such as are engendered at primaries and at general elections.
>
> And there are reasons, it occurs to me, why the Judges should not be elected that perhaps do not apply to any other officers. For after all, Judges are but human. Whoever sits upon the Bench to pass upon the rights of yours as to your liberty and your property ought certainly to be as free from all influence and bias, political and otherwise, as it is possible to throw around that man.[4]

The delegates ultimately recommended amending the Delaware Constitution to provide for

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[3] Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 128 (2002).

[4] J.A. 117–18.

gubernatorial nomination of judges, with confirmation by the Senate. They did not stop there, however, and debated a novel approach designed to make the judiciary "non-partisan, or if it be a better word, bi-partisan"—a limitation on the number of judges from one party that could sit on the bench at any given time.[5]

Some delegates voiced their support for the provision, stating that minority representation on the judicial bench would "bring about a fuller and freer discussion of these matters that come before them and that they may make fair and impartial decisions on those questions."[6] Some, however, expressed concern that the provision would bring about the opposite result. As delegate Andrew Johnson explained:

> It is well known that [judges serving on Delaware's] Judiciary at the present time have been appointed from one political party. That probably is not the best course to pursue, and I would be very glad to see the Governor of this State appoint well equipped men from another party. I would hail the day when it was done and would be glad to have it; but to vote to compel a Governor to appoint a man on account of his political affiliation, you are simply saying, "You are put upon the Bench to look out for our party interests whenever they come up." There is no other construction that you can put upon it. There can be no other, in my own mind,

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[5] J.A. 130.

[6] J.A. 133.

> established, and that man is expected, whenever a political question arises, before that Court to take care of his own party rights or privileges.[7]

Ultimately, the provision prevailed, and Delaware's constitution has included some form of a political balance requirement ever since. In 1951, as part of a wider series of structural changes to the Delaware judiciary, the provision was modified to exclude third party and unaffiliated voters from applying to serve as judges on the Supreme Court, Superior Court, and Chancery Court in Delaware. The system thus created is binary, excluding all candidates from consideration except those of the Republican or Democratic parties. The provision has been reaffirmed during the amendment process several times, including in 2005. Article IV, Section 3 of the Delaware Constitution now reads in relevant part:

> 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.
>
> Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the members of all such offices shall be of the same political party; and at any time when

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[7] J.A. 134.

the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.

Third, at any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.

Fourth, at any time when the total number of Judges of the Family Court shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.

Fifth, at any time when the total number of Judges of the Court of Common Pleas shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number,

> then not more than a majority of one Judge shall be of the same political party.[8]

Thus, the provision is made up of five sections—one addressing the Supreme Court, one addressing the Superior Court, one addressing combined membership of those courts and the Chancery Court, one addressing the Family Court, and, finally, one addressing the Court of Common Pleas. Significantly, there are also two separate, but connected, substantive components: the bare majority component (which limits the number of judicial positions that can be occupied by members of a single political party)[9] and the major political party component (which mandates that the other judicial positions must be filled with members of the other major political party in Delaware). In practice, then, most courts must be filled with Democrats and Republicans exclusively.

B. Judicial Nominations in Delaware

Since 1978, Delaware governors have relied on judicial nominating commissions to identify qualified candidates for judicial appointments.[10] Eleven of the twelve commission members are appointment by the Governor, and the twelfth is appointed by the president of the Delaware State Bar Association with

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[8] Del. Const. art. IV, § 3.

[9] When there are an even number of judges on a given court, no more than half of the judicial seats may be held by members of a single political party. When there is an odd number of judicial positions, no more than a bare majority (that is, one seat above half) may be held by members of a party. *Id.*

[10] Holland, *supra* note 3, at 129.

the consent of the Governor.[11] The commission provides a list of three recommended candidates to the Governor. The Governor is not free to ignore the commission's recommendations; if he is not satisfied with the list, the commission generates another list of candidates.[12] The nominating commission is politically balanced and comprised of both lawyers and non-lawyers.[13]

When a judicial position becomes available, the nominating commission gives public notice of the positions available, the salary, and the job requirements, including the party membership required for nomination. For example, in August 2012, the commission gave notice of five open judicial positions, of which three were open only to candidates who were members of the Democratic Party and two were open to members of either political party.

C. James Adams's Search for a Judicial Position

James Adams, a member of the Delaware State Bar, is an Independent who desires a judicial position but has not applied for one due to his current political affiliation.

Throughout his career, Adams was a registered Democrat and participated with the Democratic Party. In early 2017, that changed, as Adams became

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[11] *See* Executive Order 16, *available at*: https://governor.delaware.gov/executive-orders/eo16/.

[12] Holland, *supra* note 3, at 129.

[13] *Id.*

an Independent voter for the first time.[14] Adams explained that he changed his affiliation because he is progressive and grew frustrated with the centrism of the Democratic Party in Delaware. He now describes himself as "more of a [Vermont Senator] Bernie [Sanders] independent."[15]

Around the same time, Adams read an essay questioning the constitutionality of Article IV, Section 3. The essay focused in large part on the portion of the provision that requires judicial applicants to be members of one of Delaware's two major political parties, and posed the question: "May Delaware enforce a state law providing that no Independent or member of a minor party shall be appointed to a judgeship?"[16] After reading the article, Adams decided to challenge the provision. He filed the instant lawsuit against John Carney, the Governor of the State of Delaware, in February 2017. At the time he filed the lawsuit, he pointed to two judicial vacancies that both required Republican candidates.

Although Adams did not apply for either of those judicial positions, he has applied to similar positions in the past. In 2009, Adams applied to be a Family Court Commissioner, but was not selected. In 2014, Adams considered applying for judicial positions on

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[14] Adams's new voter registration card, indicating that he is unaffiliated with a political party, is dated February 13, 2017 and was mailed to him on February 14, 2017. Adams cannot remember the exact day that he switched his party affiliation.

[15] J.A. 74.

[16] *See* Joel Edan Friedlander, *Is Delaware's 'Other Major Political Party' Really Entitled to Half of Delaware's Judiciary?*, 58 Ariz. L. Rev. 1139, 1154 (2016).

the Supreme Court and the Superior Court; however, at the time he was registered as a Democrat and the positions were open only to Republican candidates. Shortly thereafter, in 2015, Adams retired and assumed emeritus status with the Delaware State Bar. By 2017 he felt ready to resume searching for a judicial position, and believed he was a qualified applicant. He therefore returned to active status in 2017. Notwithstanding his interest, Adams has refrained from submitting an application based on his belief that he would not be considered for a judicial position because of Artice IV, Section 3 and his new affiliation as an Independent voter.

D. The District Court Proceedings[17]

Both parties filed cross-motions for summary judgment. The Governor argued primarily that Adams lacks both Article III and prudential standing to bring his claims, and Adams argued that the political balance requirement violates the First Amendment because it conditions appointment on a judicial candidate's political affiliation.

The District Court determined that Adams had Article III standing to challenge some, but not all, of the sections of the provision. Chief Magistrate Judge Thynge considered the first three sections because they contain both a bare majority component and a major political party component. She concluded that although Adams did not apply for an open judicial position on one of those courts, his application would have been futile because the openings available

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[17] Both parties consented to the entry of final judgment by a Magistrate Judge. *See Adams v. Hon. John Carney*, Dkt. 2, No. 17 Civ. 181 (MPT) (D. Del. 2017).

around the time he filed his complaint were not available to Independents like himself.

Sections four and five, however, contain only the bare majority component, and Magistrate Judge Thynge concluded that Adams did not have standing to challenge those sections because his status as an Independent would not have prevented his application from being considered. She nevertheless concluded that he had prudential standing to challenge those sections and found that sufficient to confer jurisdiction.

Turning to the merits, Magistrate Judge Thynge determined that Article IV, Section 3 restricted access to a government position (here, a judgeship) based on political affiliation. She found that the narrow policymaking exception laid out in *Elrod* and *Branti*, which allows a government employer to make employment decisions based on political allegiance for policymakers, did not apply. In reaching that conclusion, the District Court drew on Third Circuit and Supreme Court cases emphasizing that a judge's job is to apply, rather than create, the law. The District Court also cited the Delaware Judges' Code of Judicial Conduct, which mandates that judges refrain from political activity and instructs judges not to be swayed by personal opinion. Because political affiliation could not be seen as a necessary trait for effective judicial decisionmaking, and because the District Court concluded that judges do not meet the policymaking exception established in *Elrod* and *Branti*, she found the provision unconstitutional in its entirety. This appeal followed.[18]

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[18] The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the District Court's grant of summary judgment. *Curley v. Klem*, 298 F.3d 271, 276 (3d Cir. 2002).

II. Discussion

A. Standing

1. Article III Standing

We begin by addressing Adams's constitutional standing. Constitutional standing, also referred to as Article III standing, is "a threshold issue that must be addressed before considering issues of prudential standing."[19] Because it is an essential component of subject matter jurisdiction, if Article III standing is lacking, our inquiry must end and Adams's claim must be dismissed.[20]

To satisfy the "irreducible conditional minimum" of standing, a plaintiff must show that he has: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[21] Of standing's three elements, "injury in fact, [is] the 'first and foremost.'"[22] "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[23]

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[19] *Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 269 (3d Cir. 2016) (quoting *Miller v. Nissan Motor Acceptance Corp.*, 362 F.3d 209, 221 n.16 (3d Cir. 2004)).

[20] *See Lance v. Coffman*, 549 U.S. 437, 439 (2007).

[21] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

[22] *Id.* (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998)).

[23] *Id.* (quoting *Lujan*, 504 U.S. at 560).

However, a plaintiff need not make futile gestures to establish that injury is actual and not conjectural.[24]

It is black letter that standing may not be "dispensed in gross."[25] Our cases demonstrate that we must ask not only whether Adams has standing to sue at all, but whether he has standing to challenge part or all of Article IV, Section 3.[26] Accordingly, we do not ask only whether Adams has been injured by Article IV, Section 3 of the Delaware Constitution. We must identify how, if at all, he has been injured, and whether that injury stems from all or part of the provision.

Adams desires a judgeship, and he has applied for, or considered applying for, judicial positions since at least 2009. If he felt his application would be reviewed, he would consider applying for a judicial seat on any of Delaware's five constitutional courts. But because Adams is an Independent, he has refrained from submitting an application in light of the restrictions of Article IV, Section 3.

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[24] *Sammon v. New Jersey Bd. of Medical Examiners*, 66 F.3d 639, 643 (3d Cir. 1995).

[25] *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)).

[26] *See Contractors Ass'n of E. Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 995 (3d Cir. 1993) ("Our standing inquiry has two parts: whether the Contractors have standing to challenge the Ordinance at all, and if so, whether they have standing to challenge all or just part of the Ordinance."); *see also Service Employee's Int'l Union, Local 3 v. Municipality of Mt. Lebanon*, 446 F.3d 419, 422 (3d Cir. 2006) (separately considering a union's standing to challenge each section of an allegedly unconstitutional municipality ordinance).

The District Court agreed with Adams that it would have been futile to apply for a judicial position on the Supreme Court, Superior Court, or Chancery Court, because under Delaware's constitution, judges on those courts must be members of one of Delaware's two major political parties, and Adams is not. The Governor does not contest that Adams has constitutional standing to challenge these provisions, and we agree that Adams has clearly been injured by the major political party component and therefore has standing to challenge it.

But the District Court also concluded that Adams's application to either the Family Court or the Court of Common Pleas "would not have been futile, because there is no party requirement constitutionally attached to either Court."[27] Adams argues that the bare majority component injures him independently of the major political party component because it "limit[s] the right to a bare majority to members of a 'political party.'"[28] In his view, the bare majority component mandates that one of the two major political parties control a bare majority of judicial seats on the relevant court, thereby limiting an Independent's ability to successfully apply for a position. The component, however, creates a ceiling for members of the same political party; it does not create a floor entitling them to a certain number of judicial seats.[29]

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[27] J.A. 13. The last two sections of the provision, which cover the Family Court and the Court of Common Pleas, contain only the bare majority component.

[28] Appellee's Br. at 13–14.

[29] As the District Court explained, the bare majority component "places no limitations on unaffiliated voters and only affects judicial candidates of a major political party when the bare majority of judicial offices on those courts is filled with individuals affiliated with that major political party." J.A. 29.

Therefore, we agree with the District Court's reading of Article IV, Section 3 and conclude that Adams does not have standing to challenge the sections of the provision that contain only the bare majority component. Nevertheless, the District Court went on to conclude that Adams did not need to establish constitutional standing because he established prudential standing. The District Court's conclusion that prudential standing can serve as "substitute" standing for a plaintiff who cannot demonstrate constitutional standing is incorrect. While Article III standing is a threshold issue that implicates subject matter jurisdiction, prudential standing is not. Instead, it is a "judicially self-imposed limit[] on the exercise of federal jurisdiction."[30] Prudential standing cannot vest a court with subject matter jurisdiction; therefore, it cannot replace or substitute for constitutional standing, as without the latter, the case must be dismissed.[31] Therefore, because Adams does not have Article III standing with respect to the Family Court and the Court of Common Pleas, we may not consider the merits of his argument with respect to those courts.[32]

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[30] *Davis v. City of Philadelphia*, 821 F.3d 484, 487 (3d Cir. 2016) (quoting *United States v. Windsor*, 570 U.S. 744, 757 (2013)).

[31] *See Lance*, 549 U.S. at 439.

[32] The Governor argues that because Adams lacked standing to challenge the sections of Article IV, Section 3 that contain only the bare majority component, he also cannot challenge the bare majority component even where it appears in the sections of Article IV, Section 3 governing the makeup of the Supreme Court, Superior Court, and Chancery Court, where the bare majority requirement is tied to the major political party component. The Governor's argument confuses the standing

2. Prudential Standing

We next address whether the doctrine of prudential standing should give us pause before reaching the merits of the dispute over the first three sections of the political balance requirement. Even when Article III standing is present, we look to prudential considerations "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."[33] Prudential standing requires

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doctrine with the severability doctrine. When we consider standing, we ask whether the plaintiff before us has actually been injured by the statute or constitutional provision she challenges. *See Spokeo*, 136 S. Ct. at 1547 (citing *Lujan*, 504 U.S. at 560–61). When we consider severability, we ask whether all or only part of a constitutionally infirm statute must be stricken. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006). The Governor's argument puts the cart before the horse by asking us to consider whether Adams would have standing to challenge the bare majority component if the major political party component were stricken from those sections. But that is not what is before us, and we have never held that standing must be established independently for each clause of a challenged provision. Once a plaintiff has met the Article III requirements for a particular constitutional or statutory provision, we have jurisdiction to turn to the merits of her case. If we determine on the merits that part of the statute that has injured her is unconstitutional, we then ask whether part of the statute can remain intact while the unconstitutional part falls. The Governor, recognizing as much, relies on our severability jurisprudence to argue that we should leave the bare majority provision intact without explicitly referencing the doctrine. Recognizing his argument for what it is, we will address the severability of the two components after addressing the constitutionality of Article IV, Section 3.

[33] *Joint Stock Society v. UDV N. Am., Inc.*, 266 F.3d 164, 179 (3d Cir. 2001) (quoting *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998)).

"(1) that a litigant assert his or her own legal interests rather than those of a third party; (2) that the grievance not be so abstract as to amount to a generalized grievance; (3) and that the [plaintiff's] interests are arguably within the 'zone of interests' protected by the statute, rule, or constitutional provision on which the claim is based."[34]

We see no reason to ignore Adams's challenge to Article IV, Section 3 on prudential grounds. Although the question is surely one of broad social import in Delaware, Adams has established that aside from his political affiliation, he feels qualified for a judicial position and intends to apply for a judicial position if he is able. The provision may be of interest to many residents of Delaware, but Adams has shown that he has a particular legal interest in the constitutionality of Article IV, Section 3 because of his desire to apply for a judicial position while refraining from associating with either the Democratic or Republican parties.

The Governor's arguments to the contrary are unavailing. He states that Adams's interest in this case is "merely an academic exercise" because Adams switched his political affiliation in the days before filing this Complaint, and had not applied for a judicial position since 2009 although, as a registered Democrat until 2017, he could have.[35] Essentially, the Governor's argument asks us to discredit the portions of Adams's deposition in which he explained why he decided to leave the Democratic Party (he was frustrated by the lack of progressive Democrats in Delaware) and why he did not apply for a judicial

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34 *Lewis v. Alexander*, 685 F.3d 325, 340 (3d Cir. 2012).

35 Appellant's Br. at 24–25.

position after 2009 (he found working for the late Beau Biden rewarding and therefore did not consider other career opportunities until after Biden's death in 2015). But in opposing a motion for summary judgment, the Governor was required to do more than speculate that Adams has deceived the Court about his genuine interest in applying for a judicial position.[36] The short time period in which Adams changed his party affiliation, read the law review article, and filed suit, without more, is insufficient to raise a genuine issue of material fact about Adams's prudential standing.

B. The *Elrod*/*Branti* Inquiry

We now turn to the heart of this appeal: whether the sections of Article IV, Section 3 of the Delaware Constitution that govern the Supreme Court, the Superior Court, and the Chancery Court run afoul of the First Amendment's guarantee of freedom of association. A trio of seminal United States Supreme Court cases explain the limits on a government employer's ability to consider a job candidate's political allegiance and govern our analysis here: *Elrod*,[37] *Branti*,[38] and *Rutan*.[39] We discuss each case in turn.

In *Elrod v. Burns*, Justice Brennan, writing for the plurality, recognized that the practice of patronage dismissals—dismissing a civil servant because his

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[36] *Ramara, Inc. v. Westfield Ins. Co.*, 814 F.3d 660, 666 (3d Cir. 2016) (a movant may not rely on "speculation and conjecture in opposing a motion for summary judgment").

[37] 427 U.S. 347 (1976).

[38] 445 U.S. 507 (1980).

[39] *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).

political affiliation differed from the political party in power—is "inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment."[40] He explained that to justify terminating a public employee based on political allegiance, the government must show that the practice "further[s] some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."[41] The plurality suggested that the government's interest in employee loyalty would allow it to discharge employees in policymaking positions based on political allegiance.[42] Although "no clear line can be drawn between policymaking and nonpolicymaking positions," the plurality instructed factfinders to consider the nature of the employee's responsibilities to determine whether or not he or she is in a policymaking position.[43]

The Court next examined the First Amendment implications of politically-motivated employment decisions in *Branti v. Finkel*. Summarizing *Elrod*, the Court stated that "if an employee's private political beliefs would interfere with the discharge of his

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[40] 427 U.S. at 357 (internal quotations marks omitted (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (1972))). In a concise concurrence, Justice Stewart, joined by Justice Blackmun, stated that a "nonpolicymaking, nonconfidential government employee" may not be discharged or threatened with discharge on the sole ground of his or her political beliefs. *Id.* at 375 (Stewart, J., concurring).

[41] *Id.* at 363.

[42] *Id.* at 367.

[43] *Id.* at 367–68.

public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency."[44] The Court, however, moved away from *Elrod*'s policymaking distinction and held 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."[45] The Court explained that some positions, like that of an election judge, might be political without being a policymaking role, and some, like that of a state university football coach, might involve setting policy without being political.[46]

In *Rutan*, the Court confirmed that the general prohibition on politically-motivated discharge also applies to decisions to promote, transfer, or hire an employee.[47] "Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms."[48]

The Governor of Delaware sets forth two arguments to justify his practice of requiring applicants for judicial positions to be Democrats or Republicans: first, the Governor argues that because judges are policymakers, they can be hired or fired

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44 *Branti*, 445 U.S. at 517.

45 *Id.* at 518.

46 *Id.*

47 *Rutan*, 497 U.S. at 74.

48 *Id.* at 74.

based on their political affiliation without restraint, and second, the Governor argues that even if they are not policymakers, Delaware has an interest in political balance that justifies the restrictions set forth in Article IV, Section 3.

1. The Policymaking Exception[49]

In our cases applying *Branti*, *Elrod*, and *Rutan*, we have set forth criteria to aid us in determining whether an employee's job responsibilities would make political party allegiance an appropriate condition of employment. We consider "whether the employee has duties that are non-discretionary or non-technical, participates in discussions or other meetings, prepares budgets, possesses the authority to hire or fire other employees, has a high salary, retains power over others, and can speak in the name of policymakers."[50] The "key factor" is whether an employee in that position "has meaningful input into decisionmaking concerning the nature and scope of a major program."[51] Using this analysis, we have concluded that political affiliation is an appropriate requirement for a director of a veterans'

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[49] Adams argues that after *Branti*, the question of whether a government position involves policymaking is irrelevant. We disagree. As we have explained before, after *Branti*, "the fact that an employee is in a policymaking or confidential position is relevant to the question of whether political affiliation is a necessary job requirement but this fact is no longer dispositive . . . ." *Brown v. Trench*, 787 F.2d 167, 168–69 (3d Cir. 1986); *see also Galli v. New Jersey Meadowlands Comm'n*, 490 F.3d 265, 270 (3d Cir. 2007) ("The exception for 'policymaking' jobs exists because political loyalty is essential to the position itself.").

[50] *Galli*, 490 F.3d at 271 (citing *Brown*, 787 F.2d at 169).

[51] *Id.* (quoting *Armour v. County of Beaver, PA*, 271 F.3d 417, 429 (3d Cir. 2001)).

administrative services department,[52] an assistant director of public information,[53] assistant district attorneys,[54] city solicitors and assistant city solicitors,[55] a solicitor for the Northeast Pennsylvania Hospital and Education Authority,[56] and a city manager,[57] among others. We have never before considered the role of a state judge. We now conclude that a judicial officer, whether appointed or elected, is not a policymaker.

This outcome is clear from the principles animating *Elrod* and *Branti*. The purpose of the policymaking exception is to ensure that elected officials may put in place loyal employees who will not undercut or obstruct the new administration.[58] If a job "cannot properly be conditioned upon allegiance to the political party in control," the policymaking

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[52] *Waskovich v. Morgano*, 2 F.3d 1292, 1298–1303 (3d Cir. 1993).

[53] *Brown*, 787 F.2d at 169–70.

[54] *Mummau v. Ranck*, 687 F.2d 9, 10 (3d Cir. 1982).

[55] *Ness v. Marshall*, 660 F.2d 517, 520–22 (3d Cir. 1981).

[56] *Wetzel v. Tucker*, 139 F.3d 380, 384–86 (3d Cir. 1998).

[57] *Curinga v. City of Clairton*, 357 F.3d 305, 313 (3d Cir. 2004).

[58] *Elrod*, 427 U.S. at 367 ("A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end.").

exception is inappropriate.[59] Judges simply do not fit this description. The American Bar Association's Model Code of Judicial Conduct instructs judges to promote "independence" and "impartiality," not loyalty.[60] It also asks judges to refrain from political or campaign activity.[61] The Delaware Code of Judicial Conduct similarly makes clear that judges must be "unswayed by partisan interests" and avoid partisan political activity.[62] The Delaware Supreme Court has stated that Delaware judges "must take the law as they find it, and their personal predilections as to what the law should be have no place in efforts to override properly stated legislative will."[63] Independence, not political allegiance, is required of Delaware judges.

Article IV, Section 3 itself illustrates that political loyalty is not an appropriate job requirement for Delaware judges. Delaware has chosen to considerably limit the Governor's ability to nominate judges on the basis of political expediency. Instead, the Governor must ensure that there are sufficient Democratic and Republican judges on the bench. Far from nominating only judges who will be loyal to his party, the Governor may be required by Delaware's constitution to nominate judges who belong to a different political party. The Governor, therefore, cannot credibly argue that he must be free to follow a rule excluding those who do not belong to the two major parties in Delaware because allegiance to his

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59 *Branti*, 445 U.S. at 519.

60 Am. Bar Ass'n Model Code of Judicial Conduct Canon 1.

61 *Id.* Canon 4.

62 Del. Judges' Code Judicial Conduct Rules 2.4(A), 4.1.

63 *Leatherbury v. Greenspun*, 939 A.2d 1284, 1292 (Del. 2007) (quoting *Ewing v. Beck*, 520 A. 2d 653, 660 (1987)).

party is an appropriate condition for judicial employment.

Nor are we swayed by his argument that the important role judges play in Delaware transforms them into political actors. The Governor argues that by interpreting statutes, sentencing criminal defendants, and crafting the common law, judges in Delaware make policy and exercise significant discretion. But the question before us is not whether judges make policy,[64] it is whether they make policies that necessarily reflect the political will and partisan goals of the party in power. That is why, as the Court explained in *Branti*, a football coach for a state university cannot be discharged because of her political affiliation even though she may formulate policy for the athletic department.[65] And why public defenders, who made some policy decisions in fulfilling their public office, still could not be fired on the basis of their political allegiance—because their policymaking activity did not relate to "any partisan political interest."[66]

To the extent that Delaware judges create policy, they do so by deciding individual cases and controversies before them, not by creating partisan

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64 *Compare Matthews v. Lucas*, 427 U.S. 495, 515 (1976) ("Nor, in ratifying these statutory classifications, is our role to hypothesize independently . . . . These matters of practical judgment and empirical calculation are for Congress."), *with Wetzel*, 139 F.3d at 386 ("Tough legal questions are not answered mechanically, but rather by the exercise of seasoned judgment. Judgment is informed by experience and perspective . . . ."); *see generally Gregory v. Ashcroft*, 501 U.S. 452, 465–67 (1991) (explaining, without resolving, the debate over whether judges make policy).

65 *Branti*, 445 U.S. at 518.

66 *Id.* at 519.

agendas that reflect the interests of the parties to which they belong.[67] Similarly, although the Governor contends that Delaware judges have meaningful input into a major government program because they set the judiciary's budget and create rules of civil and criminal procedure, the operation of the judicial branch is not "so intimately related to [Delaware] policy" that the Governor would have "the right to receive the complete cooperation and loyalty of a trusted advisor [in that position]."[68]

The policymaking inquiry is designed to test whether the position in question "is one which cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority]."[69] Put simply, while judges clearly play a

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[67] *See Branti*, 445 U.S. at 519–20 ("[W]hatever policymaking occurs in the public defender's officer must relate to the needs of individual clients and not to any partisan political interests. . . . Under these circumstances, it would undermine, rather than promote, the effective performance of an assistant public defender's office to make his tenure dependent on his allegiance to the dominant political party.").

[68] *Ness*, 660 F.2d at 522 ("[W]e agree with the district court that, as a matter of law, the duties imposed on city solicitors by the York Administrative Code and the undisputed functions entailed by these duties e.g., rendering legal opinions, drafting ordinances, [and] negotiating contracts define a position for which party affiliation is an appropriate requirement. In relying on an attorney to perform these functions so intimately related to city policy, the mayor has the right to receive the complete cooperation and loyalty of a trusted adviser, and should not be expected to settle for less.").

[69] *Brown*, 787 F.2d at 170. *See also Branti*, 445 U.S. at 517 ("[I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.").

significant role in Delaware, that does not make the judicial position a political role tied to the will of the Governor and his political preferences. As such, the policymaking exception does not apply to members of the judicial branch.

We are aware that two of our sister Circuits have concluded otherwise. In *Kurowski v. Krajewski*, the Seventh Circuit determined that the guiding question in political affiliation cases was "whether there may be genuine debate about how best to carry out the duties of the office in question, and a corresponding need for an employee committed to the objectives of the reigning faction," and answered that question in the affirmative with respect to judges and judges pro tempore.[70] In *Newman v. Voinovich*, the Sixth Circuit similarly concluded that judges were policymakers who could be appointed on the basis of their partisan affiliation.[71] We find these cases unpersuasive for two reasons.

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[70] *Kurowksi*, 848 F.2d 767, 770 (7th Cir. 1988) ("A judge both makes and implements governmental policy. A judge may be suspicious of the police or sympathetic to them, stern or lenient in sentencing, and political debates rage about such questions. In most states judges are elected, implying that the office has a political component. Holders of the appointing authority may seek to ensure that judges agree with them on important jurisprudential questions.").

[71] *Newman*, 986 F.2d 159, 163 (6th Cir. 1993) ("We agree with the holding in *Kurowski* that judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters. . . . Therefore, we believe that Governor Voinovich's appointment of judges based on political considerations is consistent with *Elrod*, *Branti*, and *Rutan*.").

First, we do not believe, as the Seventh Circuit does, that the policymaking exception described in *Elrod* and *Branti* is merely "shorthand for a broad category of public employees whose work is politically sensitive and who exercise significant discretion in the performance of their duties."[72] Under the Seventh Circuit's view, so long as employees make decisions involving issues about which "political debates rage," they may be hired or fired for their party affiliation.[73] We have always more narrowly applied the policymaking exception to only the class of employees whose jobs "cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority]."[74] There can be no serious question that judicial candidates of different political parties can effectively serve as state judges. Thus, while "political debates rage" about issues that judges must decide in the course of their state employment, we do not believe that this leaves judges entirely at the whim of state governors and the patronage of the ruling party. While states have nearly unfettered discretion to select state judges, states cannot condition judicial positions on partisan political affiliation alone.

Second, the opinions in *Kurowski* and *Newman* conflate an appointing authority's ability to consider the political beliefs and ideologies of state employees with that authority's ability to condition employment on party loyalty. Under our case law, discrimination

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[72] *Hagan v. Quinn*, 867 F.3d 816, 824 (7th Cir. 2017) (finding that arbitrators on the Illinois Workers' Compensation Commission are policymakers).

[73] *Kurowski*, 848 F.2d at 770.

[74] *Brown*, 787 F.2d at 170.

based on political patronage is only actionable where the employee's political affiliation was a "substantial or motivating factor in the government's employment decision."[75] *Elrod* and *Branti* protect affiliation—and decisions not to affiliate—with a political party. We have never read them to prohibit an appointing official from considering a job candidate's views on questions and issues related to the job itself. There is a wide gulf between a governor asking a judicial candidate about his philosophy on sentencing, for example, and a governor posting a sign that says "Communists need not apply."[76] The former does not run afoul of the First Amendment; but in our view, the latter does. Because the approach of the Sixth and Seventh Circuits would allow governors both to weigh an individual candidate's political beliefs *and* to condition judicial positions on party allegiance, we must disagree.

We therefore conclude that state judges do not fall within the policymaking exception because affiliation with a particular political party is not a requirement for the effective performance of the judicial role.

2. Delaware's Interest in Political Balance

We next consider the Governor's second argument, that even if state judges are not policymakers, their political affiliation is still an appropriate condition of state employment. The Court in *Rutan* emphasized that politically motivated employment practices

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[75] *Galli*, 490 F.3d at 271.

[76] *See Keyishian v. Bd. Of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605–10 (1967).

could be constitutional if they are "narrowly tailored to further vital government interests."[77] While most cases following *Branti* have focused on the policymaking exception, which relates to a state's interest in the loyalty and efficiency of key state employees, the Governor argues that Article IV, Section 3 can be justified by a different interest—the interest in political balance. We need not dwell long on whether Delaware possesses a "vital state interest" in a politically balanced judiciary, because Delaware's practice of excluding Independents and third party voters from judicial employment is not narrowly tailored to that interest.

The Governor posits that the Supreme Court has always recognized the permissibility of conditioning appointments on political affiliation when the goal is to ensure political balance. In *Branti*, the Court stated that "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."[78] Similarly, in *LoFrisco v. Schaffer* and *Hechinger v. Martin*, the Supreme Court affirmed two district court decisions approving political balance statutes governing elections for a state's boards of education and the District of Columbia's

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[77] *Rutan*, 497 U.S. at 74.

[78] *Branti*, 445 U.S. at 518. The Sixth Circuit, following *Branti*, has categorically held that employment decisions conditioned on political party affiliation are permissible where the position is one of several "filled by balancing out political party representation, or that are filled by balancing out selections made by different government agents or bodies." *McCloud v. Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996).

city council, respectively.[79] The Governor also points to several federal administrative agencies that use some form of political balance requirement for decisionmaking bodies, including the Federal Deposit Insurance Corporation, the Federal Trade Commission, the Securities and Exchange Commission, the Federal Communications Commission, the Commission on Civil Rights, the Federal Energy Regulatory Commission, and the Federal Election Commission. These examples show some support for the Governor's argument, but unlike elected officials and agency representatives who explicitly make policy, judges perform purely judicial functions. Further, it is difficult to see how the logic of political balance and minority representation extends from multimember deliberative bodies, like a school board, to Delaware's judiciary, most of whom sit alone.[80]

The Seventh Circuit has also addressed the political balance interest in the judicial context. In *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, the court considered a municipal ordinance prohibiting political parties from nominating candidates for more than half of the

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[79] *See LoFrisco v. Schaffer*, 341 F. Supp. 743, 744–45, 750 (D. Conn. 1972), *aff'd* 409 U.S. 972 (1972); *Hechinger v. Martin*, 411 F. Supp. 650, 653 (D.D.C. 1976), *aff'd* 429 U.S. 1030 (1977).

[80] The Delaware Supreme Court is the only judicial body in which a panel of judges regularly hears cases as a collective. Even then, panels are usually comprised of three of the five judges on the court. The political balance on a panel, therefore, does not necessarily mirror the political balance of the Supreme Court as a whole. *See* Randy J. Holland and David A. Skeel, Jr., *Deciding Cases Without Controversy*, 5 DEL. L. REV. 115, 121 (2002).

eligible seats on its superior court.[81] The Seventh Circuit found that partisan balance concerns are less compelling with respect to judges, who are "not elected [or appointed] to represent a particular viewpoint" and instead are required to "exercise [their] own independent authority to make decisions that uphold and apply the law fairly and impartially."[82] The court also emphasized that "partisan balance amongst the judges who comprise the court, alone, has little bearing on impartiality" because while it can "serve as a check against contrary partisan interests," it does not affect "the impartiality of individual members."[83]

While we share many of the Seventh Circuit's concerns about conflating party balance with judicial impartiality, we need not resolve the issue today. To justify a rule that impinges an employee's First Amendment association rights, the state must show both that the rule promotes "a vital state interest" and that the rule is "narrowly tailored" to that interest. Even assuming judicial political balance is a vital Delaware interest, the Governor must also show that the goals of political balance could not be realized without the restrictive nature of Article IV, Section 3, and this he has failed to do.

The Governor describes the benefits of balance and details the popularity Article IV, Section 3 has among Delaware judges and former judges. But this cannot suffice as a justification to bar candidates who do not belong to either the Democratic or Republican

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81 *Common Cause*, 800 F.3d 913, 915 (7th Cir. 2015).

82 *Id.* at 922–23.

83 *Id.*

parties from seeking judicial appointment, because the Governor fails to explain why this is the least restrictive means of achieving political balance. Because the Governor has not shown that Article IV, Section 3 is narrowly tailored to further a vital state interest, the infringement on judicial candidates' association rights is unconstitutional.

C. Severability

We need not determine whether the bare majority component, operating alone, would be unconstitutional, because we conclude that the unconstitutional major political party requirement is not severable from the sections of Article IV, Section 3 relating to the Supreme Court, Superior Court, and Chancery Court.

Severability of a state statute or constitutional provision is a question of state law.[84] The Chancery Court has explained that severability analysis under Delaware law proceeds in two steps: first, courts consider whether the "unobjectionable" part of the provision, standing alone, would be capable of enforcement; and second, courts consider whether the legislature intended for the unobjectionable part to stand "in case the other part should fall."[85] In determining whether one portion of a statute or constitutional provision is severable from another, the "touchstone" must always be legislative intent.[86]

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[84] *See Contractors Ass'n of E. Pennsylvania*, 6 F.3d at 997 (quoting *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988)).

[85] *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 669 n. 68 (Del. 2014) (quoting *Farmers of Fairness v. Kent Cty.*, 940 A.2d 947, 962 (Del. Ch. 2008)).

[86] *Ayotte*, 546 U.S. at 330; *see also Doe*, 88 A.3d at 669 n. 68.

Here, there is no question that the bare majority component is capable of standing alone, as it does in the provisions of Article IV, Section 3 involving the Family Court and the Court of Common Pleas. But because we do not think the two components were intended to operate separately, we find that the major political party component is not severable.

For nearly seventy years, the bare majority component and the major political party component have been intertwined in the sections of Article IV, Section 3 pertaining to the Supreme Court, Chancery Court, and Superior Court. Both components operate in tandem to dictate the bi-partisan makeup of Delaware's courts. Operating alone, the bare majority component could be interpreted to allow a Governor to appoint a liberal member of the Green Party to a Supreme Court seat when there are already three liberal Democrats on that bench. Only with the (unconstitutional) major political party component does the constitutional provision fulfil its purpose of preventing single party dominance while ensuring bipartisan representation.[87]

Against this backdrop, the Governor has offered no evidence suggesting that the Delaware General Assembly, which authorizes constitutional amendments, intended for the bare majority component to stand even if the major political party component fell. The Governor points to no applicable

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[87] *Cf. id.* (finding that two provisions of a housing policy were not severable when they were "enacted[] together" and one provision was designed to "enforce compliance" with the other); *Matter of Oberly*, 524 A.2d 1176, 1182 (Del. 1987) (explaining that severance is only possible if the residual component has "separate purpose and independent legislative significance").

severability legislation passed by the General Assembly, nor has he shown that in the history of this specific constitutional provision, the General Assembly conceived of the components as independent and separable.[88]

While we are mindful that we should refrain from invalidating more of a statute than necessary,[89] here, the two substantive components of Article IV, Section 3 are interdependent and equally integral to the political balance scheme Delaware envisioned for the Supreme Court, Superior Court, and Chancery Court. It is not our place to rewrite the balance the General Assembly struck in crafting Article IV, Section 3 ourselves.[90] Finding that the major political party component cannot be severed, we conclude that the sections of Article IV, Section 3 containing the major political party component are unconstitutional and must be stricken.

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[88] This case, then, is a far cry from cases like *Ayotte* and *Executive Benefits Insurance Agency v. Arkinson*, upon which the Governor relies. In both cases, the laws at issue contained severability clauses that are not present here. *See Ayotte*, 546 U.S. at 331; *Exec. Benefits Ins. Agency*, 573 U.S. 25, 36 (2014); *see also State v. Dickerson*, 298 A.2d 761, 766 (Del. 1972), *abrogated on other grounds by Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding statutory provisions severable because of Delaware's general severability statute).

[89] *Cf. Dickerson*, 298 A.2d at 766 n. 11 ("Any doubt, as to the correctness of our conclusion on severability, is resolved by the maxims that a statute must be held valid if it is possible for the court to do so; that every presumption must be resolved in favor of its validity; and that it should not be declared unconstitutional unless the court is convinced of that status beyond a reasonable doubt.").

[90] *See Ayotte*, 546 U.S. at 329 ("[W]e restrain ourselves from rewriting state law . . . even as we strive to salvage it." (internal punctuation marks and citation omitted)).

III. Conclusion

For the foregoing reasons, we find that Adams has shown that his freedom of association rights were violated by the political balance requirement that prevented his application to the Supreme Court, Superior Court, and Chancery Court. Therefore, we conclude that the first three sections of Article IV, Section 3 violate the First Amendment. We affirm the District of Delaware's order granting summary judgment to Adams on those sections. Because Adams had no standing to challenge the sections of Article IV, Section 3 dealing with the Family Court and the Court of Common Pleas, however, we reverse the District of Delaware's order as it pertained to those sections.

McKEE, *Circuit Judge*, concurring. Judges Restrepo and Fuentes join.

I join my colleagues' thoughtful opinion in its entirety. I write separately merely to add the perspective of someone who has served as a state court judge in a jurisdiction that selects judges in general elections preceded by partisan political campaigning and the fundraising that is endemic to political campaigns. In doing so, I certainly do not mean to in anyway cast aspersions upon the many dedicated, intelligent and hardworking men and women whom the electorate in such jurisdictions ultimately select to serve as judges. I only wish to note the potential damage to the image of the judiciary in such jurisdictions and the extent to which it can undermine the public's faith in the judges who are elected.[1]

All of us have a keen understanding of, and appreciation for, the fact that the provisions we strike down today were enacted to ensure selection of

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[1] The criticism of systems where judges are elected has stressed the importance of such irrelevant factors as campaign contributions and the importance of ballot position. *See* The Inquirer Editorial Board, Editorial, *Close Down the Circus: Replace Judicial Elections with Merit Selection*, PHILA. INQUIRER, (July 13, 2018) (http://www.philly.com/philly/opinion/editorials/judicial-election-merit-selection-pennsylvania-election-reform-20180713.html) ("In Pennsylvania we elect judges in partisan elections . . . The corrosive effects of money work over time until it is impossible for people to trust the court system."); Ryan Briggs, *Does Ballot Position Matter? Science Says 'Yes,'* CITY AND STATE PENNSYLVANIA (Dec. 20, 2016), https://www.cityandstatepa.com/content/does-ballot-position-matter-science-says-%E2%80%98yes%E2%80%99 (last visited Jan. 17, 2019) ("Sheer luck has more to do with becoming [a] judge in the city [of Philadelphia] than experience or endorsements.").

a judiciary whose political balance would serve notice that judicial decisions were devoid of politics and political motivations. Paradoxically, by elevating one's political affiliation to a condition precedent to eligibility for appointment to the bench by the Governor, Delaware has institutionalized the role of political affiliation rather than negated it. As we explain, the resulting system of judicial selection is in conflict with the First Amendment right of association even though it has historically produced an excellent judiciary; accordingly, it cannot survive this First Amendment challenge. Although this is as paradoxical as it is ironic, it is really not surprising that the judicial system that has resulted from Delaware's political balance requirements is as exemplary as the judges who comprise it.

In 2011, then-Delaware Supreme Court Justice Randy J. Holland presciently observed that the "political balance provisions appear to prevent the appointment of persons belonging to a third political party or having no party affiliation. To date, however, there has been no court challenge to this requirement under the United States Constitution."[2] Justice Holland's observation about the absence of challenges to the 122 year-old constitutional framework that plainly implicates the First Amendment is understandable given the well-earned excellent reputation of the state courts it has produced.

Praise for the Delaware judiciary is nearly universal, and it is well deserved. Scholars and academics routinely refer to Delaware's courts as the

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[2] Randy J. Holland, THE DELAWARE STATE CONSTITUTION 149 (2011).

preeminent forum for litigation, particularly for cases involving business disputes.[3] On the bicentennial anniversary of the establishment of the Court of Chancery, then-Chief Justice Rehnquist observed that the "Delaware state court system has established its national preeminence in the field of corporation law" and identified such hallmarks of the Court of Chancery as its "[j]udicial efficiency and expertise, a well-paid and well-respected judiciary, innovative judicial administration [and] courageous leadership."[4] Members of the Delaware bench credit the political balancing requirement for at least part of this success.[5] With that national reputation so

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[3] *See, e.g.*, Omari Scott Simmons, *Delaware's Global Threat*, 41 J. OF CORP. L. 217, 224 (2016) (referring to the "preeminence of Delaware's courts in resolving corporate disputes"); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUMBIA L. REV. 1908, 1926 (1998) ("Delaware courts have earned a unique reputation for quality adjudication").

[4] William H. Rehnquist, Chief Justice of the United States, Address at the Bicentennial of the Delaware Court of Chancery (Sep. 18, 1992) *in The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 THE BUSINESS LAWYER 1 (1992).

[5] *See, e.g.*, Devera B. Scott, et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 243 (2009) (quoting President Judge Jan R. Jurden as saying the "Delaware judicial nominating process goes to great pains to ensure a balanced and independent judiciary, and, therefore, it is no surprise that the public perceives Delaware courts as fair arbiters of justice."); E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1401 (2005) (former Chief Justice of the Delaware Supreme Court stating that Delaware's judicial "system has

firmly established, it is perhaps not surprising that attorneys contemplating judicial candidacy have not previously challenged this constitutional framework.[6]

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served well to provide Delaware with an independent and depoliticized judiciary and has led . . . to Delaware's international attractiveness as the incorporation domicile of choice."); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 683 (2005) (Chief Justice of the Delaware Supreme Court noting that its judicial selection process has resulted "in a centrist group of jurists committed to the sound and faithful application of the law.").

[6] Indeed, one of this court's two courtrooms is named for Collins J. Seitz; a legendary judge of national prominence who served with great distinction as a judge on the Delaware Court of Chancery before being appointed to this court by President Johnson in 1966.

While sitting on the Delaware Court of Chancery, Judge Seitz decided *Belton v. Gebhart,* 87 A.2d 862 (1952) in which he courageously ordered the desegregation of the Delaware public schools two years before the United States Supreme Court struck down the doctrine of "separate but equal" in *Brown v. Bd. Of Educ.* 347 U.S. 483 (1954). The appeal from his decision there was one of the four consolidated cases before the Court in *Brown* where the Supreme Court affirmed the view Judge Seitz had expressed in ordering the desegregation of the Delaware's schools rather than ordering Delaware to make its "Negro" schools equal to those serving White students. In *Belton,* Judge Seitz based his ruling on his factual conclusion that the Negro schools were inferior to White schools and therefore not equal; the approach that was then required under *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Nevertheless, in reaching his decision, Judge Seitz clearly stated that the doctrine of *Plessy* was itself an anathema to the United States Constitution because segregated schools were, by definition, unequal. Foreshadowing *Brown,* he wrote: "I believe that the 'separate but equal' doctrine in education should be rejected, but I also believe its rejection must come from [the Supreme Court.]." *Belton*, 87 A.2d at 865. His decision was later aptly described as a demonstration of Judge Seitz's

But that excellence cannot justify the constitutional transgression that is baked into the selection process. As we explain,[7] despite the state's interest in achieving a judicial system that is as fair in fact as it is in appearance, the provisions of the Delaware Constitution restricting who can apply for judicial appointment are not narrowly tailored to achieve their laudatory objectives. Accordingly, we need not decide whether Delaware has a "vital state interest" that justifies the limitations on political affiliation. That question may be decided in a future case. Moreover, Delaware may choose to amend its Constitution in a manner that achieves the goals of the problematic political affiliation requirements without their attendant constitutional infirmities.

No matter what ensues, I have little doubt that the constitutional provisions which we today invalidate have resulted in a political and legal culture that will ensure the continuation of the bipartisan excellence of Delaware's judiciary. That culture appears to be so firmly woven into the fabric of Delaware's legal tradition that it will almost certainly endure in the absence of the political affiliation requirements that run afoul of the First Amendment.

"courage and moral clarity." William T. Allen, *The Honorable Collins J. Seitz: Greatness in a Corporate Law Judge*, 16 FALL DEL. LAW 5, 3. (1998).

It is particularly appropriate to mention Judge Collins Seitz here because he is such a dramatic example of the judicial excellence I am referring to in extolling Delaware's judiciary.

[7] Maj. Op, at 24–25.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1045

JAMES R. ADAMS,

v.

GOVERNOR OF DELAWARE,

Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-17-cv-00181-MPT)
Honorable Mary Pat Thynge, U.S. Magistrate Judge

Argued September 25, 2018

Before: MCKEE, RESTREPO, and FUENTES,
Circuit Judges.

JUDGMENT

This cause came to be considered from the United States District Court for the Delaware and was argued on September 25, 2018. On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** by this Court that the revised judgment of the District Court entered on May 23, 2018 granting the Appellee's motion for summary judgment and denying the Appellant's motion for summary judgment and the order entered May 23, 2018 denying the Appellant's motion for reconsideration are **AFFIRMED in part** and **REVERSED in part**. Each party to bear its own costs. All of the above in accordance with the Opinion of this Court.

Attest:

s/ Patricia S. Dodszuweit
Clerk

DATED: April 10, 2019

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1045

JAMES R. ADAMS

v.

GOVERNOR OF DELAWARE,

Appellant

(D. Del. No. 1-17-cv-00181)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN**, HARDIMAN**, GREENAWAY, JR., SHWARTZ, KRAUSE**, RESTREPO, BIBAS**, PORTER, MATEY, and FUENTES,* Circuit Judges

The petition for rehearing filed by appellant, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Julio M. Fuentes
Circuit Judge

Dated: May 7, 2019
Lmr/cc: David L. Finger
Pilar G. Kraman
Martin S. Lessner
David C. McBride

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* Pursuant to Third Circuit I.O.P. 9.5.3., Judge Fuentes's vote is limited to panel rehearing.

** Judges Jordan, Hardiman, Krause, and Bibas voted to grant rehearing.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C. A. No. 17-181-MPT

JAMES R. ADAMS,

Plaintiff,

v.

HONORABLE JOHN CARNEY,
Governor of the State of Delaware

Defendant.

MEMORANDUM ORDER

I. INTRODUCTION

On February 21, 2017, Plaintiff, James R. Adams ("plaintiff"), filed this action, pursuant to 42 U.S.C. § 1983, seeking Declaratory Judgment and Injunctive Relief against the Governor of the State of Delaware, John Carney ("defendant").[1] Plaintiff seeks review of the constitutionality of provisions found in Article IV, § 3 of the Constitution of the State of Delaware known as the "Political Balance Requirement."[2] The

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1 D.I. 1; *see also* D.I. 10.

2 D.I. 10; *see also* D.I. 29 at 4; Del. Const. art. IV, § 3.

Political Balance Requirement subjects all appointments to the office of the State Judiciary to a series of limitations relating to the political affiliation of judicial appointees.[3] These limitations consist broadly of requirements that: (1) not more than a "bare majority"[4] of the offices in the Supreme Court or Superior Court "shall be of the same political party;" (2) collectively, not more than a "bare majority" of "the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be . . . of the same major political party[;]"[5] and (3) "the remaining members of such [judicial] offices shall be of the other major political party."[6] Similarly, the Family Court and the Court of Common Pleas are subject to limitations in which, in the case of an even number of judges on the court, "not more than one-half of the Judges shall be of the same political party[,]" and in the case of an odd number of judges, "not more than a majority of one Judge shall be of the same political party."[7]

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[3] Del. Const. art. IV, § 3; *see also* D.I. 40 at 2-4.

[4] Section 3 distinguishes between courts with an even number of seats, in which "not more than one-half of the members of all such offices shall be of the same political party[,]" and courts with an odd number of seats, in which "not more than a bare majority of the members of all such offices shall be of the same major political party[.]" Del. Const. Art. IV, § 3. Defendant refers to these two requirements collectively as the "Bare Majority Component." D.I. 29 at 4-5 & n.1.

[5] Major political party is defined as "any political party which, as of December 31,of the year immediately preceding any general election year, has registered in the name of that party voters equal to at least five percent of the total number of voters registered in the State." 15 Del. C. § 101(15).

[6] Del. Const. art. IV, § 3.

[7] Id.

Plaintiff filed an amended complaint on April 10, 2017.[8] In the amended complaint, Plaintiff asked the court to:

> [E]nter an Order (i) holding that the provision of Article IV, Section 3 of the Constitution of the State of Delaware mandating political balance on the courts is unconstitutional as it violates the freedom of association guaranteed by the First Amendment to the Constitution of the United States, (ii) permanently enjoining the use of political affiliation as a criterion for the appointment of judges to the Courts of Delaware, and (iii) awarding Mr. Adams his costs and reasonable attorneys' fees pursuant to 42 U.S.C. §1988.[9]

On September 29, 2017, the parties filed cross-motions for summary judgment.[10] In his motion, Plaintiff argued that Article IV, § 3 restricts Delaware state government employment based on political affiliation in violation of the First Amendment of the Constitution of the United States.[11] Meanwhile, in defendant's motion for summary judgment, defendant contended that plaintiff had failed to establish standing under Article III, § 2 of the Constitution of the United States.[12] Defendant argued in the alternative that that the position of judge is a "policymaking

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8 D.I. 10.

9 *Id.* at 11.

10 D.I. 17; D.I. 31.

11 D.I. 32 at 2.

12 U.S. Const. art. III, § 2.

position," which defendant contends falls under the well-established exception to the restriction of governmental employment based on political affiliation.[13] On December 6, 2017, the court issued a memorandum opinion and order ("Memorandum Opinion" and "Order") granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment.[14]

On December 19, 2018, plaintiff moved for an award of attorney's fees and costs under 42 U.S.C. § 1988.[15] The following day, defendant moved for the court to reconsider or clarify its Memorandum Opinion and Order pursuant to Federal Rule of Civil Procedure 60 and D. Del. LR 7.1.5.[16] On January 5, 2018, defendant appealed to the United States Court of Appeals for the Third Circuit.[17] Defendant then moved for the court to defer ruling on the award of attorney's fees and costs pending the appeal.[18] Thereafter, on February 21, 2018, plaintiff moved for issuance of an order for defendant to show cause as to why defendant should not be held in contempt for violating the court's December 6, 2017 Order.[19] These motions are presently before the court.

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13 D.I. 29 at 3.

14 D.I. 40; D.I. 39.

15 D.I. 41.

16 D.I. 42.

17 D.I. 50.

18 D.I. 51.

19 D.I. 57.

II. STANDARD OF REVIEW

A. Motion for Reconsideration

Motions for reconsideration are the "functional equivalent" of a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e).[20] Meeting the standard for relief under Rule 59(e) is difficult. The purpose of a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence."[21] A court should exercise its discretion to alter or amend its judgment only if the movant demonstrate one of the following: (1) a change in the controlling law; (2) a need to correct a clear error of law or fact or to prevent manifest injustice; or (3) availability of new evidence not available when the judgment was granted.[22]

A motion for reconsideration is not properly grounded on a request that a court rethink a decision already made.[23] Nor may motions for reargument or reconsideration be used "as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided."[24] Reargument, however, may be appropriate where a court "has patently misunderstood a party, or has made a decision outside the adversarial issues

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[20] *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1352 (3d Cir. 1990) (citing *Fed. Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348 (3d Cir. 1986)).

[21] *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 699, 677 (3d Cir. 1999).

[22] *Id.*

[23] *Glendon Energy Co v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993).

[24] *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990).

presented to the [c]ourt by the parties, or has made an error not of reasoning but of apprehension."[25]

The "Court should not hesitate to grant the motion when compelled to prevent manifest injustice or correct clear error."[26] This court has granted motions to clarify ambiguities in its opinions and orders.[27]

B. Motion for Fees and Costs

The right to reasonable attorney's fees is provided under 42 U.S.C. § 1988: "[i]n any action or proceeding to enforce a provision of [42 U.S.C.] section[] . . . 1983, ... the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs[.]"[28] In order to qualify, a plaintiff must be designated as "prevailing party,"[29] a term which has been defined as any party who "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[30] A key factor is that the plaintiff "must be able to point to a resolution of the dispute which changes the legal relationship between itself and the

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[25] *Id.* at 1241 (citations omitted); *see also* D. Del. LR 7.1.5.

[26] *Brambles USA*, 735 F.Supp. at 1241 (citations omitted).

[27] *Helios Software, LLC v. SpectorSoft Corp.*, No. CV 12-81-LPS, 2015 WL 3622399, at *1 (D. Del. June 5, 2015); *Organizational Strategies, Inc. v. Feldman Law Firm LLP*, No. CV 13-764-RGA, 2014 WL 2446441, at *1-2 (D. Del. May 29, 2014); *Neomagic Corp. v. Trident Microsystems*, No. 1:98CV-00699-KAJ, 2003 WL 25258274, at *3 (D. Del. July 30, 2003)

[28] 42 U.S.C. § 1988.

[29] *Farrar v. Hobby,* 506 U.S. 103, 109 (1992).

[30] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (internal quotation marks omitted) (citing *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978) (overruled on other grounds).

defendant."[31] This is usually accomplished through a judgment on the merits.[32] Under Rule 54(d)(2), "if an appeal on the merits of a case is pending, a court 'may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing . . . a new period for filing after the appeal has been resolved.'"[33]

C. Motion for an Order to Show Cause

"The Court has wide discretion in determining sanctions in a civil contempt matter."[34] "Sanctions for civil contempt serve two purposes: to coerce the defendant into compliance with the court's order and to compensate for losses sustained by the disobedience."[35]

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[31] *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (citing *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987)).

[32] *Farrar*, 506 U.S. at 111 (citations omitted) ("The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement.").

[33] *Walker Digital, LLC v. Expedia, Inc.*, No. CV 11-313-SLR, 2013 WL 5662145, at *2 (D. Del. Oct. 16, 2013) (quoting Fed. R. Civ. P. 54, Advisory Committee Note, 1993 Amendment, Subdivision (d), Paragraph (2), Subparagraph (B)).

[34] *Virium BV v. Lithium Tech. Corp.*, No. CV 13-500-LPS, 2016 WL 4182742, at *2 (D. Del. Aug. 5, 2016) (citing *Elkin v. Fauver*, 969 F.2d 48, 52 (3d Cir. 1992)).

[35] *Robin Woods Inc. v. Woods*, 28 F.3d 396, 400 (3d Cir. 1994) (internal quotation marks omitted) (citing *McDonald's Corp. v. Victory Investments,* 727 F.2d 82, 87 (3d Cir.1984)); *see also McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949); *In re Linerboard Antitrust Litig.,* 361 F. App'x 392, 398-99 (3d Cir. 2010).

III. DISCUSSION

A. Motion for Reconsideration or Clarification

Defendant argues that there are three reasons why the court's Memorandum Opinion and Order requires either reconsideration or clarification.[36] First, defendant questions whether the court's Order "reaches the provisions of Article IV, Section 3 concerning the Family Court and the Court of Common Pleas."[37] Second, defendant asks whether the court's Order "invalidates only the provisions of Article IV, Section 3 that arguably require that judicial nominees be members of one political party or also invalidates the provisions that limit any political party to a 'bare majority' of the members of the Court."[38] Third, defendant seeks clarification as to whether the court's determination, that plaintiff lacked Article III standing to challenge the "bare majority" provision as it applies to the Court of Common Pleas and Family Court,[39] "also applies to 'bare majority' provisions that pertain to all of the courts."[40]

In response, plaintiff disputes the court's finding as to Article III standing with respect to the Court of Common Pleas and the Family Court.[41] And plaintiff contends that, regardless of whether he "had standing to challenge the political restrictions as to

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36 D.I. 42 at 2-4.

37 *Id.* at 2.

38 *Id.* at 3.

39 D.I. 40 at 7.

40 D.I. 42 at 4.

41 D.I. 43 at 1 n.1.

. . . [the Family Court and Court of Common Pleas], the reasoning of this [c]ourt is applicable to all Delaware State courts."[42]

During the briefing on defendant's motion for summary judgment for lack of standing, defendant characterized the Political Balance Requirement as consisting of two types of provisions limiting appointments to judicial office: (1) "Bare Majority" provisions and (2) Major Party provisions.[43] In moving for reconsideration or clarification, defendant points to the court's discussion of plaintiff's lack of Article III standing with respect to the Court of Common Pleas and the Family Court, which are judicial offices limited exclusively by Bare Majority provisions.[44] Defendant essentially argues that the court's ruling cannot extend beyond the Major Party provisions of Article IV, § 3, because these are the only provisions that give rise to plaintiff's Article III standing.[45] Therefore, defendant avers, in reconsidering or clarifying the court's December 6, 2017 Memorandum Opinion and Order, the court should revise its Memorandum Opinion and Order to effectively "redline" Article IV, § 3 to eliminate the Major Party provisions as to the Supreme Court, the Superior Court, and the Court of Chancery, while

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42 *Id.* at 2.

43 D.I. 29 at 5 nn.1-2. In note 2, defendant actually uses the term "Majority Political Party Component"—the court finds the use of the term "majority" in both nomenclatures to be confusing and, therefore, refers to this aspect of Article IV, § 3 as the "Major Party provisions."

44 D.I. 42 at 2.

45 *Id.* at 2-4.

preserving the Bare Majority provisions as to all judicial offices.[46]

Defendant's position on reconsideration or clarification is that the court can (and must have intended to) only issue judgment on the constitutionality of the specific, Major Party, provisions of Article IV, § 3 of the Constitution of the State of Delaware that give rise to plaintiff's Article III standing.[47] This is an argument about prudential standing. Without using the term "prudential standing" anywhere in its briefs on reconsideration or clarification, defendant contends that plaintiff does not have prudential standing to challenge the Bare Majority provisions, because the court only found that plaintiff has Article III standing to challenge the Major Party provisions.[48]

1. Reconsideration

Defendant directs the court's attention to pages 7-8 of D.I. 40, the court's December 6, 2017 Memorandum Opinion[49] as the basis for defendant's motion for reconsideration or clarification.[50] In this portion of the its Memorandum Opinion, the court addressed the question of plaintiff's Article III standing.[51] With respect to the Family Courts and the Courts of

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46 D.I. 49 at 3.

47 D.I. 42 at 4 ("In reading pages 7-8 of the Memorandum Opinion, it appears that this Court intended to invalidate only the 'major party' feature of Article IV.").

48 *Id*.

49 D.I. 40 at 7-8.

50 D.I. 42 at 4.

51 D.I. 40 at 7-8.

Common Pleas, which are limited by Bare Majority provisions, the court stated:

> Plaintiff does not have standing under provisions four and five [of Article IV, § 3 of the Constitution of the State of Delaware]. He has not applied for a judicial position in any of Family Courts or the Courts of Common Pleas. In addition, plaintiff's applications for these positions would not have been futile, because there is no party requirement constitutionally attached to either court. The only constitutional restriction on these courts is that "not more than a majority of one Judge shall be of the same political party."[52]

However, this determination was not fatal to plaintiff's standing, as the court found that plaintiff had established Article III standing with respect to provisions one through three of Article IV, § 3 of the Constitution of the State of Delaware.[53]

Prudential standing was a minor factor in defendant's summary judgment briefing, with defendant spending a little more than one page of its opening brief on the subject.[54] In moving for reconsideration, defendant does not argue that: (1) the court misunderstood defendant's prudential standing arguments; (2) the court made a decision about prudential standing outside the adversarial issues presented to the court by the parties; or (3) the

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52 D.I. 40 at 7 (footnotes omitted).

53 *Id.* at 7-8.

54 D.I. 29 at 16-18.

court has made an error not of reasoning but of apprehension.[55]

From the record, it is apparent that defendant is presently making an argument that it did not make in its briefing on summary judgment.[56] At that time, defendant argued that plaintiff had failed to satisfy the limitations on prudential standing, because plaintiff was asking the court to adjudicate an abstract question of wide public significance which amounts to a generalized grievance.[57] Defendant, however, did not argue, for example, that—were the court to find that plaintiff has Article III standing as to some provisions of Article IV, § 3—plaintiff's prudential standing would be explicitly limited to *only those specific provisions* for which he has Article III standing.[58]

Moreover, in his briefing, defendant failed to rebut plaintiff's argument to the contrary.[59] Plaintiff opposed defendant's motion for summary judgment and averred that plaintiff has prudential standing to

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55 D.I. 42 at 2-4; *see also Tinney v. Geneseo Commc'ns, Inc.*, 502 F. Supp. 2d 409, 415 (D. Del. 2007).

56 D.I. 29 at 16-18; D.I. 37 at 3-4.

57 *See* D.I. 29 at 17 ("Here, Plaintiff is asking this Court to decide abstract questions of wide public significance."); D.I. 37 at 3 ("Plaintiff is asking this Court to decide abstract questions of wide public significance that establish the bedrock of Delaware's judicial branch.").

58 *Id.* at 16-18.

59 *Compare* D.I. 35 at 9-11 (plaintiff's prudential standing argument in plaintiff's brief opposing defendant's motion for summary judgment), *with* D.I. 37 at 3-4 (defendant's prudential standing argument in defendant's reply brief in support of defendant's motion for summary judgment).

challenge the entirety of Article IV, § 3, regardless of the scope of his Article III standing.[60] For example, plaintiff cited *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988),[61] which states:

> Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights. However, in the First Amendment context, "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[62]

Plaintiff contended that this case stands for the proposition that "[w]here a party raises a facial challenge to a law pursuant to the First Amendment, general prudential standing requirements are relaxed."[63] Yet defendant did not acknowledge this argument, discuss it, or address any of the prudential standing case law cited by plaintiff.[64] Moreover, aside from the briefing discussed herein,[65] defendant did not make any other prudential standing arguments

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60 D.I. 35 at 9-10.

61 *Id.* at 10.

62 *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392–93 (1988) (alteration in original) (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956- 57 (1984).

63 D.I. 35 at 10.

64 D.I. 37 at 3-4.

65 D.I. 29 at 16-18; D.I. 37 at 3-4.

elsewhere in the briefing on the cross motions for summary judgment.[66]

In the briefing on summary judgment, defendant failed to rebut plaintiff's arguments on prudential standing. Defendant presently seeks reconsideration and an opportunity to make arguments that he did not make in the briefing. This is beyond the scope of the remedy requested or allowed.[67] Therefore, defendant's motion for reconsideration (D.I. 42) is DENIED.

2. Clarification

Upon review of the briefs and the record, it is apparent that the court did not fully explain the question of prudential standing in its December 6, 2017 Memorandum Opinion.[68] The court agrees that clarification will simplify the record for appeal and GRANTS defendant's motion for clarification (D.I. 42). Therefore, the court will issue a separate, clarified version of its December 6, 2017 Memorandum Opinion.

B. Fees

Plaintiff's motion for fees and costs lacks the statement, required by Local Rule 7.1.1, that plaintiff had made a reasonable effort to reach agreement with defendant on fees and costs.[69] Moreover, an appeal on the merits is pending. Therefore, the court

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66 *See* D.I. 34 (defendant's brief opposing plaintiff's motion for summary judgment).

67 *Max's Seafood Café*, 176 F.3d at 677.

68 D.I. 40 at 6-7 (citing the test for prudential standing but not discussing the subject further).

69 D.I. 41; *see also* D. Del. LR 7.1.1.

DENIES plaintiff's motion for fees and costs (D.I. 41) without prejudice to renew.[70] As a result, defendant's motion to defer ruling on fees and costs pending appeal (D.I. 51) is granted.

C. Show Cause

Plaintiff's motion to show cause also lacks the Local Rule 7.1.1 statement.[71] Defendant contends that it has sought to work, in good faith, within the bounds of what it contends is the court's holding.[72] Given the court's grant of defendant's motion to clarify, a hearing on contempt is inappropriate at this time. Thus, the court DENIES plaintiff's motion for an order to show cause (D.I. 57) without prejudice to renew.

IV. CONCLUSION

For the reasons discussed herein, plaintiff's motion for reconsideration (D.I. 42) is denied; plaintiff's motion for clarification (D.I. 42) is granted; plaintiff's motion for fees and costs (D.I. 41) is denied without prejudice; defendant's motion to defer ruling on fees and costs pending appeal is granted (D.I. 51) and plaintiff's motion for an order to show cause (D.I. 57) is denied without prejudice. As a result of the motion for clarification, the court will issue a clarified version of its December 6, 2017 Memorandum Opinion.

Dated: May 23, 2018 /s/ Mary Pat Thynge
Chief U.S. Magistrate Judge

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70 *See supra* note 33.

71 D.I. 57.

72 D.I. 58 at 4-5 & n.4.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C. A. No. 17-181-MPT

JAMES R. ADAMS,

Plaintiff,

v.

THE HON. JOHN CARNEY : Governor of the State of Delaware, :

Defendant.

MEMORANDUM OPINION CLARIFYING THE COURT'S OPINION ISSUED DECEMBER 6, 2017

David L. Finger, Esq., Finger & Slanina, LLC, One Commerce Center, 1201 North Orange Street, 7th Floor, Wilmington, DE 19801. Attorney for Plaintiff James R. Adams.

Christian D. Wright, Department of Justice Civil Division, 820 North French Street, 8th Floor, Wilmington, DE 19801.

Attorney for Defendant the Honorable John Carney, Governor of the State of Delaware.

Ryan Patrick Connell, Department of Justice State of Delaware, Carvel Office Building, 820 North French Street, 8th Floor, Wilmington, DE 19801.

Attorney for Defendant the Honorable John Carney, Governor of the State of Delaware.

I. INTRODUCTION/PROCEDURAL POSTURE

Plaintiff, James R. Adams, filed this Declaratory Judgment and Injunctive Relief action under 42 U.S.C. § 1983, in relation to Article IV, § 3 of the Constitution of the State of Delaware, against the Governor of the State of Delaware, John Carney on February 21, 2017.[1] Plaintiff seeks review of the constitutionality of the provision, commonly referred to as the "Political Balance Requirement," which prohibits any political party to comprise more than a "bare majority" of the seats in the Supreme Court or Superior Court, or in the Supreme Court, Superior Court, and Court of Chancery combined.[2] The provision also requires that the remaining seats be comprised of members of the "other major political party."[3]

Under consideration in this clarification opinion are the parties' cross-motions for summary judgment, filed on September 29, 2017.[4] Plaintiff, in his motion, contends Article IV, § 3 of the Constitution of the State of Delaware's "Political Balance Requirement" restricts governmental employment based on political

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1 D.I. 1; *see also* D.I. 10 (amended compliant filed on March 10, 2017).

2 Del. Const. Art. IV, § 3.

3 *Id.*

4 *See* D.I. 28; D.I. 31.

affiliation, which violates the First Amendment of the Constitution of the United States.[5] Defendant claims that plaintiff failed to establish standing under Article III, § 2 of the Constitution of the United States,[6] and/or contends the position of judge is a "policymaking position," which falls under the well established exception to the restriction of governmental employment based on political affiliation.[7] For the reasons stated herein, the court grants plaintiff's motion for summary judgment, and denies defendant's motion for summary judgment.

II. BACKGROUND

Article IV, § 3 of the Constitution of the State of Delaware was amended to its present language in 1897 to provide the requirements and limitations associated with judicial appointment.[8] The pertinent section reads:

> 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.
>
> Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the

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5 D.I. 32 at 2.

6 U.S. const. Art. III, § 2.

7 D.I. 29 at 3.

8 D.I. 30 at A-80-84.

members of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.

Third, at any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.

Fourth, at any time when the total number of Judges of the Family Court shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.

Fifth, at any time when the total number of Judges of the Court of Common Pleas shall be an even number, not more than one-half of the Judges shall be of the same political

> party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.[9]

This provision effectively creates a few limitations: first, it demands three of the Delaware Supreme Court Justices be from "one major political party,"[10] and the other two be from the "other major political party;"[11] second, at no time may the Delaware Superior Court or the Delaware Supreme Court, Superior Court, and Court of Chancery combined, have more than a "bare majority" be comprised of the same "major political party," and the remainder positions must be of the "other major political party;"[12] and third, in the Family Courts and the Courts of Common Pleas, one political party may never possess more than a one judge majority.[13]

Defendant, as Governor of the State of Delaware, is responsible for appointing judges in compliance with Article IV, § 3 of the Constitution of the State of Delaware.[14] In 1977, a Judicial Nominating Commission was created by executive order to identify highly qualified candidates.[15] To fulfill this

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9 Del. Const. Art. IV, § 3.

10 Major political party is defined as "any political party which, as of December 31, of the year immediately preceding any general election year, has registered in the name of that party voters equal to at least five percent of the total number of voters registered in the State." 15 Del. C. § 101(15).

11 *Id.*

12 Del. Const. Art. IV, § 3.

13 *Id.*

14 Del. Const. Art. IV, § 3.

15 D.I. 32 at 3.

role, the Commission provides notice for existing judicial vacancies.[16] The required party affiliation is listed within the notice, as "must be a member of the [Democratic or Republican] party," when necessary because of Delaware's constitutional limitations.[17] The Committee then provides a list of qualified candidates to defendant for selection.[18]

Plaintiff is a graduate of Ursinus College and Delaware Law School.[19] He is a resident of New Castle County and a member of the Delaware bar.[20] Plaintiff worked in multiple positions before retiring from the Department of Justice on December 31, 2015.[21] After retirement, he remained on emeritus status from the bar before returning to active status in 2017.[22] Until February 13, 2017, plaintiff was registered as affiliated with the Democratic party.[23] Plaintiff, during that time, applied for one position, Family Court Commissioner.[24] Now plaintiff is registered as an independent voter.[25] On February 14, 2017, the Judicial Nominating Commission released a Notice of Vacancy calling for a Republican

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16 D.I. 30 at A-107-17.

17 *Id.*

18 *Id.*

19 D.I. 10 at 1.

20 *Id.*

21 *Id.* at 1-2.

22 *Id.* at 4.

23 D.I. 30 at A-55.

24 Plaintiff was not selected for the Commissioner position, but such positions are not subjected to the "Political Balancing Requirement" under the Delaware Constitution. D.I. 37 at 1.

25 D.I. 30 at A-55.

candidate in the Superior Court of Kent County, following the retirement of the Honorable Robert Young.[26] On March 20, 2017, the Judicial Nominating Commission also sent a Notice of Vacancy following the retirement of the Honorable Randy Holland, which required a qualified Republican candidate for the Delaware Supreme Court.[27] Plaintiff, as an unaffiliated voter, was barred from applying to either position. Plaintiff's amended complaint was filed shortly thereafter on April 10, 2017, to which defendant responded on April 24, 2017.[28]

III. STANDARD OF REVIEW

A. Summary Judgment

A motion for summary judgment should be granted where the court finds no genuine issues of material fact from its examination of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, and that the moving party is entitled to judgment as a matter of law.[29] A party is entitled to summary judgment where "the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party or where the facts are not disputed and there is no genuine issue for trial."[30]

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[26] D.I. 1 at Ex. A.

[27] D.I. 10 at 4.

[28] *See id.*; D.I. 13.

[29] *Ford v. Unum Life Ins. Co. of Am.*, 465 F. Supp. 2d 324, 330 (D. Del. 2006).

[30] *Delande v. ING Emp. Benefits*, 112 F. App'x 199, 200 (3d Cir. 2004).

This standard does not change merely because there are cross-motions for summary judgment.[31] Cross-motions for summary judgment

> are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist.[32]

Moreover, "[t]he filing of cross-motions for summary judgment does not require the court to grant summary judgment for either party."[33]

B. Standing

"Standing implicates both constitutional requirements and prudential concerns."[34] For plaintiff to demonstrate "the irreducible constitutional minimum of standing" under Article III, § 2 of the United States Constitution ("Article III standing"), there must be a showing of: (1) an injury in fact, (2) with a traceable connection to the challenged action, and (3) the requested relief will redress the alleged

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[31] *Appleman's v. City of Philadelphia*, 826 F.2d 214, 216 (3d Cir. 1987).

[32] *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968).

[33] *Krups v. New Castle County*, 732 F. Supp. 497, 505 (D. Del. 1990).

[34] *Common Cause of Pennsylvania v. Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009) (citation omitted).

injury.[35] Plaintiff must show he is likely to experience actual future injury.[36] In addition, plaintiff is not required to engage in futile gestures to establish Article III standing.[37]

Prudential standing requirements exist "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those best suited to assert a particular claim."[38] According to the United States Court of Appeals for the Third Circuit, prudential limits require that:

> (1) a litigant assert his or her own legal interests rather than those of third parties, (2) courts refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances, and (3) a litigant demonstrate that [his or] her interests are arguably within the zone of interests intended to be protected by the statute, rule or constitutional provision on which the claim is based.[39] [40]

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[35] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (internal quotation marks and citations omitted).

[36] *Voneida v. Pennsylvania*, 508 F. App'x 152, 156 (3d Cir. 2012).

[37] *Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639 (3d Cir. 1995).

[38] *Freeman v. Corzine*, 629 F.3d 146, 154 (3d Cir. 2010) (citations and internal quotation marks omitted).

[39] *Oxford Assocs. v. Waste Sys. Auth. of E. Montgomery Cty.*, 271 F.3d 140, [40]-46 (3d Cir. 2001) (alteration and citations omitted); *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (articulating a similar standard).

"Thus, the limits of prudential standing are used to ensure that those parties who can best pursue a particular claim will gain access to the courts."[41]

IV. ANALYSIS

A. Defendant's Motion for Summary Judgment Based on Plaintiff's Lack of Standing for Failure to Show Injury in Fact.

1. Article III standing

With respect to constitutional standing, there are effectively two different parts of Article IV, § 3 of the Constitution of the State of Delaware: provisions one through three, which contain "major political party" and "bare majority" requirements, and provisions four and five, which only include a "bare majority" requirement.[42] Defendant alleges that plaintiff has no standing because he fails to demonstrate an "actual and immediate threat of future injury" and/or a "concrete and particularized threat of future injury."[43]

Plaintiff does not have constitutional standing under provisions four and five. He has not applied for a judicial position in any of the Family Courts or the Courts of Common Pleas.[44] In addition, plaintiff's applications for these positions would not have been futile, because there is no party requirement

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41 *Mariana v. Fisher*, 338 F.3d 189, 204 (3d Cir. 2003).

42 Del. Const. Art. IV, § 3.

43 D.I. 29 at 12, 15.

44 Although plaintiff applied for Family Court Commissioner in 2009 and was not selected, he does not contend this occurred due to the reasons asserted in his compliant. D.I. 30 at A-08-09.

constitutionally attached to either court.[45] The only constitutional restriction on these courts is that "not more than a majority of one Judge shall be of the same political party."[46]

As for provisions one through three, which contain the "major political party" requirement, defendant fails to demonstrate that plaintiff does not have the requisite standing. Plaintiff alleges that if he were permitted to apply as an independent, he would apply for a position on either the Delaware Superior Courts or the Delaware Supreme Court.[47] As an unaffiliated voter, he is barred from applying and any such application would be futile.[48] As a result

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[45] Del. Const. Art. IV, § 3; *see also* D.I. 30 at A-110-16 (documenting vacancies for judicial office in the Family Courts and Courts of Common Pleas in which political affiliation is not a requirement). In effect, this "bare majority" requirement places no limitations on unaffiliated voters and only affects judicial candidates of a major political party when the bare majority of judicial offices on those courts is filled with individuals affiliated with that major political party. In that case, only those members of that major political party would be excluded from consideration for judicial office.

[46] Del. Const. Art. IV, § 3 (the "bare majority" requirement).

[47] D.I. 10 at 4; *see Nat'l Ass'n for the Advancement of Multijurisdiction Practice, (NAAMJP) v. Simandle*, 658 Fed. Appx. 127, 133 (3d Cir. 2016) (The plaintiffs "alleged that they would seek admission to the District Court bar if the rules were changed to permit their admission. Since denial of their application was assured, the rules inflict the alleged injury regardless of whether [the plaintiffs] actually undertook the futile application.").

[48] Del. Const. art. IV, § 3 (provision one, concerning the Delaware Supreme Court, requires "two of said Justices shall be of the other major political party," and provision two, regarding the Delaware Superior Courts, requires "the remaining members of such offices shall be of the other major political party").

plaintiff has demonstrated an actual, concrete, and particularized threat of present and future injury.[49]

2. Prudential standing

Plaintiff has demonstrated constitutional standing as to the "major political party" provisions of Article IV, § 3 of the Constitution of the State of Delaware. Defendant argues that summary judgment is, nonetheless, appropriate, because plaintiff fails to satisfy the second limit of prudential standing, specifically that the constitutionality of Article IV, § 3 of the Delaware Constitution is an "abstract question[] of wide public significance."[50] Defendant challenges whether plaintiff actually intends to become a judge in the State of Delaware and whether judicial intervention is "necessary to protect his rights[.]"[51]

Plaintiff responds by addressing each limit of prudential standing:

> Adams easily satisfies prudential standing requirements. First, he brought his suit to correct a wrong applicable to him as an anticipated applicant for a judgeship, notwithstanding that the ruling will also affect others similarly situated. Second, this is neither abstract nor a mere generalized grievance. The injury is specific (loss of job opportunity) and targeted (applicable to members of the Delaware Bar seeking judicial appointment, such as Adams).

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49 *Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State*, 454 U.S. 464, 474-75 (1982).

50 D.I. 29 at 17.

51 *Id.* at 17-18.

> Third, Adams' interests are within the "zone of interests" protected by the First Amendment freedom of political association, as an individual may not be refused government employment based on his or her political affiliation.[52]

In addition, plaintiff argues that the requirements of prudential standing are relaxed in First Amendment cases.[53] Plaintiff contends that the reason for this is that "'[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court.'"[54] In its reply brief, defendant does not address any of plaintiff's arguments or the case law cited by plaintiff.[55] Instead, defendant repeats its argument and expands on its theory that "[p]laintiff is litigating more of an academic interest[.]"[56]

The court addresses the three prudential limitations in order. First, although defendant questions plaintiff's motivations in bringing suit, these questions do not overcome plaintiff's unrebutted argument that the political affiliation requirements of judicial offices in Delaware directly

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52 D.I. 35 at 11.

53 *Id.* at 10 (citing *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988)) ("Where a party raises a facial challenge to a law pursuant to the First Amendment, general prudential standing requirements are relaxed.").

54 *Id.* (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984)).

55 D.I. 37 at 3-4.

56 *Id.*

harm him as an unaffiliated voter. Second, defendant argues that plaintiff asks the court "to decide abstract questions of wide public significance[,]"[57] but this conclusory argument fails to consider that this specific question—whether political affiliation can be a requirement of government employment—is an issue previously addressed by the United States Supreme Court on numerous occasions.[58] [59] Third, plaintiff argues, and defendant does not discuss, that plaintiff's rights to political affiliation are within the "zone of interests" protected by the First Amendment.[60] Moreover, plaintiff's argument, that the Supreme Court has recognized that Article III standing is not a requirement for prudential standing in First Amendment cases,[61] is unrebutted.[62] Rather, the prudential standing question is "whether [a plaintiff] can be expected satisfactorily to frame the issues in the case."[63]

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[57] D.I. 29 at 17.

[58] *E.g.*, *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, [59] U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976)

[60] *Compare* D.I. 35 at 11, *with* D.I. 37 at 3-4. Plaintiff's grievance about the "major political party" affiliation requirements of Article IV, § 3, is substantially similar to the First Amendment rights of members of major political parties, who are impacted by the "bare majority" requirements, so that the rights of those individuals are within the same zone of interests protected by the First Amendment.

[61] *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984).

[62] *Compare* D.I. 35 at 10, *with* D.I. 37 at 3-4.

[63] *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. at 958.

In light of the unrebutted prudential standing arguments, under either standard discussed by plaintiff, the court concludes that plaintiff can satisfactorily frame the issues in this case.[64] Therefore, plaintiff has prudential standing to challenge, on First Amendment grounds, the entirety of Article IV, § 3 of the Constitution of the State of Delaware.

B. Whether a Judge is a Policymaking Position, that is an Exception to the Right of Political Affiliation in Employment Decisions. The United States Supreme Court has established that political belief and association are at the core of First Amendment protections.[63] Governmental employees can not be terminated or asked to relinquish their "right to political association at the price of holding a job."[65] "Patronage . . . to the extent that it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment."[66] This right of political affiliation has

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[64] In fact, as a retired attorney on a state pension and for whom filing suit is not likely to affect his prospect of future earnings and employment (other than to limit his aspirations to the bench), plaintiff, is in a *far better* position than other Delaware attorneys to challenge these political affiliation requirements. *See* D.I. 30 at A-15-16.

[63] *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion).

[65] *Id.* at 356-57.

[66] *Id.* at 357; *see also Branti v. Finkel*, 445 U.S. 507, 512-18 (1980) (the majority of the court reaffirming the opinion established in *Elrod*).

been expanded to government employees regarding their promotion, transfer, and hiring.[67]

The "prohibition on encroachment of First Amendment protections is not absolute," and an exception is recognized, which limits patronage dismissals to "policymaking positions," and requires an analysis of the nature of the employee's responsibilities.[68] The United States Court of Appeals for the Third Circuit has found "a question relevant in all cases is whether the employee has meaningful input into decision making concerning the nature and scope of a major government program."[69] [70] A "policymaking position" is a narrow exception applied when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[71]

The Court has recognized that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered."[72] In *Branti v. Finkel*, the United States Supreme Court held that the position of Assistant Public Defender was not entitled to the "policymaker" exception.[73] It found that the factors to be considered

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67 *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64, 75-80 (1990).

68 *Elrod*, 427 U.S. at 360, 367.

69 *Peters v. Del. River Port Auth. of Pa. and N.J.*, 16 F.3d 1346, 1353 (3d Cir. [70]) (internal citations omitted).

71 *Branti*, 445 U.S. at 518.

72 *Id.*

73 "His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act

in determining whether a position is a policymaking position are whether the position is simply clerical, nondiscretionary or technical in nature, whether the employee "participates in Council discussions, or other meetings, whether the employee prepares budgets, or has authority to hire or fire employees, the salary of the employee, and the employee's power to control others and to speak in the name of policymakers."[74] A difference in political affiliation is only a proper factor in making employee decisions if it is highly likely "to cause an official to be ineffective in carrying out the duties and responsibilities of the office."[75] Whether a position involves policymaking is a question of law.[76]

Defendant contends that the role of the judiciary falls within the policymaker exception under the precedent of *Elrod* and *Branti*.[77] Defendant's argument rests heavily upon the holdings by other circuit courts outside the Third Circuit,[78] and the United States Supreme Court's holding in *Gregory v.*

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independently of the government and to oppose it in adversary litigation." *Id.* at 519 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)).

74 *Brown v. Trench*, 787 F.2d 167, 169 (3d Cir. 1986).

75 *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993).

76 *St. Louis v. Proprotnik*, 485 U.S. 112, 126 (1988).

77 *See* D.I. 29 at 20.

78 *See Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993) (Judges are "policymakers," whose political affiliations may be considered during the appointment process); *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988) (Governor was entitled to consider judge's political affiliation in making a temporary appointment).

Ashcroft.[79] Plaintiff contends that the role of the judiciary is not a policymaking position and directs his argument upon separation of powers, the role of the judiciary, and the Delaware Judges' Code of Judicial Conduct.[80]

The judiciary, although a very important role, is not a policymaking position. A judge does not provide "meaningful input into decision making concerning the nature and scope of a major government program."[81] [82] To the contrary a judge's role is "to apply, not amend, the work of the People's representatives."[83] The court may not speak on policymakers behalf, sit in on Congressional discussions, or participate in policymaking meetings.[84] The role of the judiciary is not to "hypothesize independently" legislative decision and intent.[85] "Matters of practical judgment and empirical calculation are for Congress" and the judiciary has "no basis to question their detail beyond the evident consistency and substantiality."[86] Statutory interpretation, not statutory creation, is

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79 *See* D.I. 29 at 20; *Gregory v. Ashcroft*, 501 U.S. 452, 466 (1991) (finding that legislative intent was not clear as to whether the language "appointee on the policymaking level," included the judiciary).

80 D.I. 32 at 8-19.

81 *Peters v. Del. River Port Auth. of Pa. and N.J.*, 16 F.3d 1346, 1353 (3d Cir. [82]) (internal citations omitted).

83 *Hayes v. Harvey*, 874 F.3d 98, 111 (3d Cir. 2017) (citing *Henson v. Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017)).

84 *Brown*, 787 F.2d at 169.

85 *Matthew v. Lucas*, 427 U.S. 495, 515 (1976).

86 *Id.* at 515-16.

the responsibility of the judiciary and therefore, the position of judge is not a policymaking position.

Cases from other circuits, on which defendant relies, are distinguishable.[87] Both *Newman* and *Kurowski* addressed situations which political affiliation could be considered, but was not constitutionally mandated.[88] Neither case dealt with a constitutional provision requiring a political affiliation evaluation, nor a complete bar on hiring individuals with minority political party beliefs. In addition, the Court in *Gregory* analyzed the issue of interpreting legislative intent of an exception as it applied to the Age Discrimination in Employment Act for positions "on the policymaking level."[89] The Court addressed whether Congress intended the judiciary be included in the exception, and whether a Missouri law mandating that members of the judiciary retire at the age seventy was permissible under the Age Discrimination in Employment Act.[90] The Court specifically did not decide the issue of whether the judiciary was a policymaker, and based its holding on the rationale that "people . . . have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental

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87 D.I. 29 at 20.

88 *See Newman*, 986 F.2d at 159-60 (in the appointment of interim judges, Governor considered candidates based on recommendations from Republican Chairpersons); *Kurowski*, 848 F.2d at 769 (political affiliation could be considered by court when assigning judges *pro tempore*).

89 *Gregory*, 501 U.S. at 455-57.

90 *Id.* at 455-64.

capacity sometimes diminish with age. The people may therefore wish to replace some older judges."[91] Thus, the phrase "on the policymaking level" is not the equivalent of a "policymaking" position, on which employment decisions based on political affiliation may be made.

Delaware requirements are clear, that "[a] judge should be unswayed by partisan interest" and "family, social, or other relationships" should not influence their conduct or judgment."[92] In particular, Canon Four of the Delaware Judges' Code of Judicial Conduct specifically addresses that the judiciary must refrain from political activity.[93] A judge may not act as a "leader or hold any office in a political organization," make speeches for political organizations or candidates, or "engage in any other political activity."[94] The Delaware Judicial Code clearly pronounces that political affiliation should not affect the position.[95]

Political affiliation is not important to the effective performance of a Delaware judge's duties.[96] A

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91 *Id.* at 472.

92 Del. Judges' Code Judicial Conduct Rule 2.4 (A)-(B).

93 *See* Del. Judges' Code Judicial Conduct Canon 4.

94 *Id.* at Rule 4.1 (A), (C) (with an exception for activities "on behalf of measures to improve the law, the legal system or the administration of justice").

95 *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1292 (Del. 2007) ("Judges must take the law as they find it, and their personal predilections as to what the law should be have no place in efforts to override properly stated legislative will."); *Ewing v. Beck*, 1986 WL 5143, at *2 (Del. Ch. 1986) ("It is a settled principle that courts will not engage in 'judicial legislation' where the statute in question is clear and unambiguous.").

96 *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

Delaware judge may not participate in political activities, hold any office in a political organization, or allow political affiliation to influence his judgment on the bench.[97] Since political affiliation in Delaware cannot "cause an official to be ineffective in carrying out the duties and responsibilities of the office," it does not meet the standard for a "policymaking position."[98]

V. CONCLUSION

Article IV, § 3 of the Constitution of the State of Delaware violates the First Amendment by placing political affiliation restrictions on governmental employment by the Delaware judiciary.[99] The narrow political affiliation exception does not apply, because the role of the judiciary is to interpret statutory intent and not to enact or amend it.[100] Precedent relied upon by defendant is highly distinguishable and not applicable to the current situation.[101] Further, the Delaware Judges' Code of Judicial Conduct clearly indicates that political affiliation is not a valued trait of an effective judiciary.[102]

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97 Del. Judges' Code Judicial Conduct Rule 2.4 (B); 4.1 (A)(1), (C).

98 *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993).

99 These restrictions include the "major political party" and "bare majority" requirements discussed herein.

100 *Hayes v. Harvey*, 874 F.3d 98, 111 (3d Cir. 2017) (citing *Henson v. Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017)).

101 *See Newman v. Voinovich*, 986 F.2d 159, 159-60 (6th Cir. 1993); *Kurowski v. Krajewski*, 848 F.2d 767, 769 (7th Cir. 1988); *Gregory*, 501 U.S. at 455-64.

102 *See* Del. Judges' Code Judicial Conduct Canon 4.

As a result of the findings herein, plaintiff's motion for summary judgment (D.I. 31) is granted, and defendant's motion for summary judgment (D.I. 28) is denied. An appropriate Order shall follow.

Dated: May 23, 2018 /s/ Mary Pat Thynge
Chief U.S. Magistrate Judge

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C. A. No. 17-181-MPT

JAMES R. ADAMS,

Plaintiff,

v.

THE HON. JOHN CARNEY : Governor of the State of Delaware, :

Defendant.

JUDGMENT ORDER

Consistent with the reasoning contained in the Memorandum Opinion of December 6, 2017 and Clarified in the Reissued Opinion dated May 23, 2018, IT IS ORDERED and ADJUDGED that plaintiff's motion for summary judgment (D.I. 31) is GRANTED, and defendant's motion for summary judgment (D.I. 28) is DENIED.

Dated: May 23, 2018 /s/ Mary Pat Thynge
Chief U.S. Magistrate Judge