No. 19-309

In The

Supreme Court of the United States

JAMES CARNEY, GOVERNOR OF DELAWARE,

Petitioner,

v.

JAMES R. ADAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT

DAVID L. FINGER
Counsel of Record for Respondent
FINGER & SLANINA, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
dfinger@delawgroup.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Does Respondent James R. Adams, an unaffiliated voter, have Article III standing to challenge as unconstitutional provisions of the Constitution of the State of Delaware which (i) permit only Democrats and Republicans to serve as judges (the "Major Party Provision"), and (ii) require that Delaware's courts have political balance, *i.e.*, no court may have a majority of more than one member of a political party (the "Political Balance Provision")* where Adams was categorically excluded from being considered as an applicant for a judgeship, thereby denying him consideration for public employment on the merits and chilling his First Amendment right of political association?

2. Is Adams' First Amendment right of political association infringed because, as Adams is an unaffiliated voter, he is categorically excluded from candidacy for a judgeship?

3. Is Adams' First Amendment right of political association infringed by the Political Balance Provision because it grants parties a majority of the judicial seats, thereby restricting opportunities when a given party has a majority of the seats of a given court?

4. Is the Major Party Provision severable from the Political Balance Provision, where both it and the

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* The two provisions will be referred to herein collectively as the "Provisions."

QUESTIONS PRESENTED – Continued

Major Party Provision were both designed to exclude all but Republicans and Democrats, the Major Party Provision was integrated into the wording of the Political Balance Provision, and the Major Party Provision is considered, even by Delaware jurists, as necessary for the Political Balance Provision to work properly?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

All parties to the proceedings are listed on the cover. No party is a non-governmental corporation.

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INTRODUCTION

Delaware judges are rightly praised for their efficiency, expertise and wisdom, qualities which are not the exclusive province of any particular group. Adams wants to join them. However, Delaware, unique among the states, has provisions in its Constitution that restrict judgeships to only Republicans and Democrats and allocates seats based on political party.

Thus, no matter how wise, expert and efficient a lawyer is, that person may not utilize those legal skills on the bench for the benefit of the State of Delaware if that person is neither a Republican nor a Democrat.

There is no historical precedent here. This type of law did not exist at the time of the adoption of the First Amendment to the Constitution of the United States in 1791. Because of its unique nature, there is no consensus among the states regarding the Provisions. The Provisions are not "time tested" simply because they have never been challenged until now, and there is no evidence of their effectiveness.

Adams does not claim, and never has claimed, the right to a judgeship. He claims a right to be eligible for a judgeship so that his candidacy can be determined on the merits equally with all other candidates without regard to politics. Adams does not dispute that political affiliation may ultimately be taken into account by a Governor. But making it a mandatory job requirement puts Adams and those similarly situated in the position of having to choose between giving up the opportunity for a judgeship and violating their political

conscience. That choice is offensive to the First Amendment right of freedom of association and should not be allowed to stand.

OPINIONS BELOW

The Third Circuit's opinion (Cert. Pet. App. 1a–41a) is reported at 922 F.3d 166. The order denying rehearing en banc (Cert. Pet. App. 44a–45a) is unreported. The District Court's clarified and restated opinion (Cert. Pet. App. 61a–82a) is unreported but is available at 2018 WL 2411219. The District Court's order denying reconsideration (Cert. Pet. App. 46a–60a) is unreported.

JURISDICTIONAL STATEMENT

The Third Circuit entered judgment on April 10, 2019. Pet. 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 a petition for certiorari to September 4, 2019. The Governor filed his petition for certiorari on that date. This Court has statutory jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 3 of Article IV of the Delaware Constitution of 1897 (as amended) 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 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.

The First Amendment to the Constitution of the United States provides that:

> 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.

STATEMENT

Respondent James R. Adams has been a member of the Bar of the State of Delaware since 2001. JA 61. Adams went to work for the Delaware Department of Justice in 2003. There he held several posts including Deputy Division Director and Assistant State Solicitor. JA 32, 58-60.

During his tenure at the Department of Justice, Adams had considered applying for a judgeship, and did apply in 2009 for a job as a Family Court Commissioner. JA 34-35. But at the time he did not pursue a judgeship rigorously because he was content working for the Department of Justice as he was getting promotions and he greatly admired Joseph R. (Beau) Biden III, who had become Delaware's Attorney General in 2007, and wanted to continue working for him, both in Biden's position as Attorney General, and then possibly if Biden successfully ran for Governor. JA 35-36.

Things changed after Biden became ill. Two seats became available on the Delaware Supreme Court. However, Adams was ineligible for those positions as they were reserved for Republicans, and he was not a Republican. JA 35.

Beau Biden died in 2015. His death had a great effect on Adams. In addition to the personal sense of loss, Biden's death "changed direction or possibilities that professionally [Adams] would have thought about." JA 36.

On December 31, 2015, Adams retired from the Delaware Department of Justice and decided to take a one-year sabbatical from the practice of law and then return in 2017. JA 32.

Upon his return in 2017, Adams thought long and hard about what he wanted to do, and decided that he wanted to be a judge. JA 33.

In 2017, the Judicial Nominating Committee sent out a Notice of Vacancies on both the Delaware Supreme Court and the Delaware Superior Court. JA 18, 62. However, those positions were reserved for Republicans only, and so Adams was categorically excluded. JA 62.

In early 2017, Adams left the Democratic Party and changed his registration to "Unaffiliated." JA 67. His reasons were (i) frustrations he had with the Delaware Democratic Party when he worked for it as a volunteer, (ii) his view that Delaware Democrats (except for Beau Biden) were too moderate ("In most states they would be moderate republicans"), and not progressive, (iii) after Beau Biden's death, Adams did not feel that there was anyone in Delaware with whom he could align politically, and (iv) watching and admiring Bernie Sanders during the 2015 election campaign. JA 40-43.

Adams filed suit in the U.S. District Court for the District of Delaware on February 21, 2017, challenging the Provisions as being in violation of his First Amendment right to political association, and filed an Amended Complaint on April 10, 2017. JA 15-26.

Petitioner defended both on the merits and on the issue of Article III standing. Both parties moved for summary judgment and engaged in contemporaneous cross-briefing.

On December 6, 2017, the District Court issued a Memorandum Opinion entering summary judgment in favor of Adams and denying Petitioner's Motion for Summary Judgment. The District Court found that Adams had standing to challenge those sections of Article III § 4 that had both of the Provisions, as he had he met the requirements of Article III. The District Court further held that Adams had standing to challenge those sections which only had the Bare Majority Provision because he had prudential standing as to those provisions. The District Court also held that political party affiliation is not reasonably related to effective performance of the duties of a judge and so Delaware cannot limit the appointment of judges based on their political party. JA 166-72.

Petitioner filed a Notice of Appeal to the U.S. Court of Appeals on January 5, 2018. The Third Circuit reversed in part the ruling on standing, agreeing that Adams satisfied the requirements of Article III as to those courts subject to both of the Provisions, but not as to those which only had the Bare Majority Provision on the ground that prudential standing alone is insufficient to satisfy Article III. The Third Circuit also affirmed the decision of the District Court that the Major Party Provision was not severable from the Political Balance Provision.

Petitioner filed his Petition for Certiorari on September 4, 2019, and this Court accepted that Petition on December 6, 2019.

SUMMARY OF ARGUMENT

I. Adams has Article III standing. He is categorically excluded from applying for a judgeship because he is not a Republican or a Democrat, which creates a chilling effect on the exercise of his First Amendment freedom of political association. Adams does not have to show that he would have been chosen for a judgeship, or that there was a reasonable possibility that he would have been selected, only that there is a government-imposed barrier that excludes him from a judgeship based on his political affiliation. Adams stated in his deposition that he would, in fact, apply for judgeships but for the political discrimination. As such the injury is not merely speculative.

The Provisions are the direct cause of Adams' injury. He should not be required to choose between the right to seek a judgeship and violating his political conscience by re-registering as a Democrat or a Republican in order to be considered.

A decision from this Court will redress the injury, as Delaware Governors will no longer be obligated to appoint only Democrats and Republicans, and Adams' application can be accepted and considered on its own merit.

II. State sovereignty does not affect the First Amendment analysis because states' rights are subordinate to the requirements of the Constitution of the United States.

III. Restricting appointed judgeships to Democrats and Republicans is a serious infringement of Adams' First Amendment right of political association, and so is subject to strict scrutiny.

Government employment may not be conditioned upon a party's political affiliation, except for those jobs where political affiliation is reasonably necessary to the effective performance of the job.

Political affiliation is not only not necessary for the work of a judge, it also is inconsistent with the role of a judge. Judges are required to put aside their political views and decide cases based on neutral principles. Any "policy" judges make are in furtherance of the cases before them, and not in furtherance of partisan political interests. Courtroom judges are not supposed to protect the interests of their party, like election judges do.

IV. The Provisions do not serve a compelling state interest, and there are less-restrictive ways to satisfy any state interest.

Nothing in the record shows that the Provisions have had any bearing on the quality of Delaware's judiciary. Other states without the Provisions also have high standings. The Provisions are not necessary to

preserve the integrity of Delaware's judicial system. Other states without the Provisions are deemed to have high integrity. While Delaware judges and practitioners have offered opinions about the claimed beneficial effects of the Provisions, those opinions are based on nothing more than conjecture and speculation. Indeed, there is no evidence that, prior to this lawsuit, anyone other than the Delaware bench and bar (and possibly a few non-Delaware academics and corporate lawyers) were even aware of the existence of the Provisions.

Further, there is no political balance because, as to the Delaware Supreme Court, one party always has a majority on the bench, and that majority could assert their political ideology if they so desired. Trial court judges sit solo, and so there is no counterbalance.

Political balance has little to do with impartiality. A lawyer could change her or his affiliation for the purpose of applying for a judgeship. Also, a Governor could look for members of the other political party who are moderate and/or are open to the views of the Governor's party.

The emphasis on political balance also risks a loss of confidence in Delaware's courts, as the public may perceive the Provisions as confirmation that judges come to the bench with political agendas.

There are already mechanisms in place to meet the goals of the Provisions, such as (i) the Delaware Judges' Code of Judicial Conduct, which instructs

judges to be unswayed by partisan interests, (ii) the requirement of Senate approval, (iii) the requirement that judges re-apply after twelve years, and (iv) the need for a new Governor to be reelected after four years. Most notably, the strong impact that incorporating and litigating in Delaware has on the budget and the economy creates a strong incentive to maintain judges of high quality, irrespective of political party.

There are also less-restrictive means of achieving the same goals such as (i) questioning by the Judicial Nominating Commission, the Governor and the Senate about judicial philosophy instead of political affiliation, and (ii) amending Delaware's Constitution to require a supermajority vote of the Senate to consent to the Governor's nominees.

V. Affirmance of this case will not affect independent and other commissions. Each case is decided on its own facts. The functions, constituencies and governmental interests as to those entities are different from the interests involved with judges. As such, the impact of this case on them will be marginal at best.

VI. Petitioner did not raise the issue of whether the Major Party Provision can be severed from the Political Balance Decision before either the District Court or the Court of Appeals and so has waived it.

In any event, the Major Party Provision is not severable from the Political Balance Provision. The two Provisions are textually intertwined and not written as separate provisions. The Legislative history suggests that the Legislature had only Democrats and Republicans in mind, and discounted everyone else, in adopting the Political Balance Provision. The Major Party Provision is recognized as necessary for the Political Balance Provision to achieve its goals. The Major Party Provision has no independent justification for its existence. The Provisions are not severable.

ARGUMENT

I. ADAMS HAS STANDING TO PURSUE THIS ACTION.

Standing under Article III requires (i), an "injury in fact," (ii) a causal connection between the injury and the conduct complained of, and (iii) a likelihood that the injury will be redressed by a favorable decision by this Court. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014). Adams satisfies these requirements.

A. Adams Suffers an Injury-in-Fact as He is Denied the Ability to Apply for a Judgeship Due to His Lack of Membership in a Major Political Party.[1]

"[L]oss of a job opportunity for failure to compromise one's convictions states a constitutional claim." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77 (1990). As a result of the Provisions, Adams suffers injury in two ways. First, the Major Party Provision categorically excludes him from any employment as a judge. Second, the Political Balance requirement excludes him from consideration because whenever there is a bare majority of one he will be limited in his opportunities.

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[1] Under Delaware law, "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 5 percent of the total number of voters registered in the State." 15 Del. C. § 101(15)(a). A "political party" is defined as "any political organization which elects a state committee and officers of a state committee, by a state convention composed of delegates elected from each representative district in which the party has registered members, and which nominates candidates for electors of President and Vice-President, or nominates candidates for offices to be decided at the general election." 15 Del. C. § 101(15). According to records of the Delaware Department of Elections, at the time this action was initiated in February, 2017, unaffiliated voters, although not qualifying as a political party, constituted 22% of all registered voters, with Democrats at 47% and Republicans at 30%. Minority parties made up the balance. Del. Dept. of Elections Voter Registration Totals, *available at* https://elections.delaware.gov/services/candidate/regtotals.shtml#rvtm.

1. Categorical Exclusion from Government Employment and the Chilling Effect on the Exercise of First Amendment Rights Constitute Injury-in-Fact.

Adams has experienced loss of judicial job opportunities and will continue to do so unless he changes his political affiliation to either Democrat or Republican. This is so not only due to the fact that he is not a member of a major political party, but also in those circumstances where he is ineligible because the political balance requirement would exclude him from consideration. That is an injury-in-fact. *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977).

Petitioner, citing decisions from the U.S. Court of Appeals for the District of Columbia, argues that standing requires a "realistic possibility" that Adams would get a judgeship upon application. This is not correct. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (*citing Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)). *Accord Turner v. Fouche*, 396 U.S. 346, 362 (1992) ("We may assume that the [plaintiffs] have no right to be appointed to the . . .

board of education. But [they] do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications").

In any event, Adams satisfies the "reasonable possibility" test. Under Delaware's Constitution, the requirements for a judgeship are that the judges are citizens of Delaware and are learned in law. Del. Const. Art. IV, § 2. Adams lives in Delaware. JA 33, 67. He is a graduate of Delaware Law School, JA 61, and so is deemed to be learned in the law. *In re McCaffrey*, 545 A.2d 617, 618 (Del. 1988). He is as eligible as any other Delaware lawyer. As such, it cannot be said that there is no reasonable possibility that he could be appointed a judge.

Adams further suffers an injury because the Provisions create a chilling effect on Adams' associational rights. *See Capper v. Amnesty Intern. USA*, 568 U.S. 398, 419 (2013); *Laird v. Tatum*, 408 U.S. 1, 11 (1972). By virtue of his lack of political affiliation, Adams is categorically excluded from being considered for a judgeship, and he would either have to give up any hope for government employment as a judge or else register as either a Republican or Democrat against his political conscience. This is more than merely a subjective chill. Those are real-world consequences. *Howard v. N.J. Dept. of Civil Service*, 667 F.2d 1099, 1101 (3d Cir. 1981) ("Loss of a job opportunity is unquestionably a distinct and palpable injury.").

Finally, Petitioner claims that Adams needed to provide evidence of intent to apply for a judgeship greater than "some day." Contrary to Petitioner's assertion, Adams did not state that he would merely "consider applying." He said affirmatively that he "would consider *and apply for*" any judicial position for which he feels he is qualified, which includes any judicial officer position. JA 43, 62-63 (italics added). A statement that someone would take action but for unlawful conduct impeding that action goes beyond mere "some day" intentions. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 184 (2000) (distinguishing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

2. Adams Did Not Have to Make a Futile Application for a Judgeship to Have Standing.

The law does not require the doing of a futile act. As such, Adams was not required to apply for a judgeship in order to gain standing where it is evident that such action would have been futile because the application would be denied. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S.Ct. 2652, 2663-54 (2015); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 944 n.2 (1982); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 596 n.4 (1979) (Powell, J., concurring in part and dissenting in part).

3. Petitioner Failed to Establish that Adams Acted Dishonestly in Bringing his Complaint.

Petitioner challenges Adams' credibility and suggests that the District Court should not have granted Adams' motion for summary judgment without an evidentiary hearing. Pet. Br. 23. However, the parties cross-moved for summary judgment and Petitioner did not raise the issue of a need for a trial to address Adams' credibility in the District Court. As such, it is not properly before this Court. *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977). In any event, Adams' unrefuted statements support standing.

The fact that Adams changed political affiliation knowing that there was a risk it might forever preclude him from reaching his professional goal of being a judge evidences the sincerity of his actions. Petitioner's arguments challenging his credibility are without merit.

Petitioner challenges Adams' veracity by arguing that there were a number of judicial openings he could have applied for in 2014-2016, while he was a Democrat, and consequently he is not now serious about seeking a judgeship. This is a non-sequitur, irrelevant and ignores the factual context. From 2014 through 2016, Adams placed less interest in a judgeship because he was more interested in working with then-Attorney General Beau Biden, whom he greatly admired. JA 35-36. It was not until his return from his sabbatical in 2017 that he focused on becoming a judge.

A lesser degree of interest in the past does not mean that Adams is not genuinely interested in pursuing a judgeship now.

Second, Petitioner argues that Adams' statement that he will apply for judgeships is "self-serving." A "self-serving" statement of fact is not inherently incredible, *Martin v. United States*, 889 F.3d 827, 833 (6th Cir. 2018); *Wilson v. Chicago, Milwaukee, St. Paul, and Pacific R. Co.*, 841 F.2d 1347, 1355 (7th Cir. 1988), and does not preclude summary judgment. *E.g.*, *Cadle Co. v. Hayes*, 116 F.3d 957, 961 n.5 (1st Cir. 1997) ("A party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment"); *Greer v. City of Wichita, Kansas*, 943 F.3d 1320, 1325 (10th Cir. 2019) ("virtually any party's testimony can be considered 'self-serving,' and self-serving testimony is competent to oppose summary judgment"). Petitioner does not point to anything else in the record to challenge the credibility of Adams' testimony.

Third, Petitioner says that Adams made false claims about judgeship availabilities in 2014. He did not. His Amended Complaint focused on openings in December 2017, when he finished his sabbatical and started seeking a judgeship in earnest. JA 17-18. In his deposition, Adams stated that although he applied to be a Family Court Commissioner in 2009, he did not seek further judgeships because he was enjoying working with Beau Biden. It was not until after Beau

Biden's death, Adams' retirement from the Department of Justice and completing his sabbatical that he focused on judgeships. JA 35-38. In any event, as noted above, the existence and number of judicial openings prior to 2017 is irrelevant.

Delaware, like other jurisdictions, presumes that people are honest until the contrary is shown. *Isaacs v. Messick*, 40 A. 1109, 1111 (Del. Super. 1894). As the Third Circuit stated, Petitioner "was required to do more than speculate that Adams has deceived the Court about his genuine interest in applying for a judicial position." *Adams v. Governor of Delaware*, 922 F.3d 166, 167 (3d Cir. 2019). Petitioner relies on nothing more than argumentative speculation.

B. The Provisions Are the Direct Cause of the Injury.

The second element, causation, is easily satisfied. The limitation on Adams' eligibility is directly mandated by Article IV, Section 3 of the Constitution of the State of Delaware.

Petitioner argues that the injury was self-inflicted, not the result of the Provisions but due to his decision to change from Democrat to unaffiliated shortly before filing suit. As Adams explained, his switch was a matter of political conscience. JA 41-43. There is nothing in the record to show his actions were not taken in good faith.

Petitioner's argument reflects the restrictive nature of Article IV § 3 – that Adams should have stayed

a Democrat and challenge the Political Balance Provision, despite the fact that such course would deny him the very political freedom provided by the First Amendment. *See also* Brief for the Delaware State Bar Association as *Amici Curiae* in Support of Petitioner at 3 & 10 n.4 (Adams could "remedy" his "situation simply by reversing his recent switch . . . ").

C. A Decision from this Court Will Redress the Injury.

Pursuant to Article VI, Clause 2 of the Constitution of the United States (the Supremacy Clause), a decision of this Court declaring that the challenged provision of the Delaware Constitution violates the First Amendment will immediately require that Delaware Governors halt the use of political affiliation as a mandatory qualification in determining judicial appointments, and allow unaffiliated voters to compete on the merits.

II. APPLYING THE FIRST AMENDMENT TO QUALIFICATIONS FOR STATE COURT JUDGES DOES NOT VIOLATE PRINCIPLES OF STATE SOVEREIGNTY.

Petitioner and his *amici* argue strenuously that applying the First Amendment to the appointment of state judges will offend state sovereignty and the right of states to experiment. Adams responds as a threshold matter.

State sovereignty remains subject to the requirements of the U.S. Constitution. *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991); *Bode v. Barrett*, 344 U.S. 583, 585 (1953) ("The power of a state to tax, basic to its sovereignty, is limited only if in substance and effect it is the exertion of a different and a forbidden power, as for example the taxation of a privilege protected by the First Amendment," citations omitted); *Parker v. Brown*, 317 U.S. 341, 359 (1943) ("The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution . . . "); *Ex parte Siebold*, 100 U.S. 371, 399 (1879) ("whilst the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation"). *See also Powers v. Ohio*, 499 U.S. 400, 407-08 (1991) (state may not prescribe qualifications for jurors that violate the U.S. Constitution).

The same holds true as to experimentation by the states:

> It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution. The principle is imbedded in our

> constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.

New State Ice Co. v. Liebmann, 285 U.S. 262, 279-80 (1932). *See also Parents Involved in Community Schools v. Seattle School Distr. No. 1*, 551 U.S. 701, 779 n.28 (2007) (Thomas, J., concurring) ("While this Court has permitted the States to legislate or otherwise officially act experimentally in the social and economic fields, it has always recognized and held that this power is subject to the limitations of the Constitution").

III. POLITICAL AFFILIATION IS NOT REASONABLY RELATED TO EFFECTIVE PERFORMANCE AS A JUDGE.

The First Amendment's protection of freedom of association prohibits a State from excluding a person from a profession or punishing that person solely because he or she is a member of a particular political organization or because he or she holds certain beliefs. *Baird v. State Bar of Ariz.*, 401 U.S. 1, 7 (1971). As this Court has stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a

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

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citation omitted).

Elrod v. Burns, 427 U.S. 347 (1976), recognized that government employment is a type of public benefit subjecting certain employees to protection from termination based on political affiliation. This principle was subsequently reaffirmed and expanded to include hiring, demotion, transfer and other employment decisions. *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). The rule was further extended outside the employment context to those who do business with the government. *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996).

As freedom of association presupposes a freedom not to associate, *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), lower courts have added that the First Amendment protects politically neutral or apolitical people from political discrimination. *Wrobel v. County of Erie*, 692 F.3d 22, 28 (2d Cir. 2012); *Galli v.*

New Jersey Meadowlands Comm'n, 490 F.3d 265, 276 (3d Cir. 2007).

There is no rule limiting the *Branti* exception to "low level" and "nondiscretionary" employees. *See Rutan*, 497 U.S. at 74 (a "government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing *certain* high-level employees on the basis of their political views," italics added). *See also Horton v. Taylor*, 767 F.2d 471, 478 n.7 (8th Cir. 1985) ("if political affiliation is not an appropriate requirement for effective conduct of a public office, be it low-level or high-level, then *Elrod* and *Branti*, which we are bound to follow, dictate this result"); *Assaf v. Fields*, 178 F.3d 170, 179 (3d Cir. 1999) ("to label someone a middle manager says nothing about whether or not that person has significant policy-making responsibilities that make adherence to the incumbent party's political philosophy a necessary job requirement"). It is the function, and not the level, of the job that is the issue.

The fact that judges are not in the Executive branch of government makes the argument that they are immune from political qualifications in their hiring even stronger, as judges do not work closely with and are not accountable to the appointing authority. Michael E. Solimine, "Constitutional Restrictions on the Partisan Appointment of Federal and State Judges," 61 *U. Cin. Law Rev*. 955, 961 (1993) (hereinafter "Solimine"). Judges must be loyal to the law, not to the person who appointed them or their political party.

A. Judges Are Not "Policymakers" in the *Elrod/Branti* Sense.

Although *Branti* reformulated the test away from a "policymaker" analysis, Petitioner and the *amici* address it in detail, and so Adams responds.

The meaning of a word depends on the context in which it is used. *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25 (1988). The context of the "policymaker" exception is that political loyalty of certain employees is necessary to ensure that representative government will not be undercut by tactics obstructing the implementation of policies of the new administration. *Elrod*, 427 U.S. at 367.

In *Branti*, this Court emphasized the limited scope of "policy" involved in the analysis. In holding that assistant public defenders could not be discharged based on political affiliation, this Court rejected a claim that the assistant public defenders were "policymakers" for purposes of the exception: "whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests." 445 U.S. at 519.

The Third Circuit simply applied this same standard to judges: "the question before us is not whether judges make policy, it is whether they make policies that necessarily reflect the political will and partisan goals of the party in power." *Adams*, 922 F.3d at 179. Although Petitioner and *amici* complain that the Third Circuit formulation is too strict, it comes directly from *Branti*, 445 U.S. at 518 ("the Governor of a State

may appropriately believe that the official duties . . . cannot be performed effectively unless those persons share his political beliefs and party commitments").[2]

Judges are not supposed to represent any special constituency. Their loyalty is to the law and their duty is to interpret and apply the law to the facts of the cases before them using precedents and neutral principles, "unswayed by partisan interest. . . ." Delaware Judges' Code of Judicial Conduct R. 2.4(A). Their loyalty is to the case and the law, and not to the desires of their party or whoever appointed them.

Notwithstanding this, Petitioner and the *amici* argue that judges make "policy," citing *Gregory v. Ashcroft*, 405 U.S. 452 (1991). In that decision, which did not involve the application of the First Amendment, this Court interpreted a statute that referred to "employees at the policymaking level."

This Court in *Gregory* did not determine that judges were policymakers under the statute, much less in the *Elrod/Branti* sense. Instead, it based its holding on statutory language: "Where it is unambiguous that an employee does not fall within one of the exceptions,

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[2] Other Courts of Appeals have similarly interpreted *Elrod* and *Branti* as referring to positions requiring political loyalty to the Executive for effective performance of the job. *E.g.*, *Bogart v. Vermilion County, Illinois*, 909 F.3d 210, 213 (7th Cir. 2018); *Rodriguez-Ramos v. Hernandez-Gregorat*, 685 F.3d 34, 40 (1st Cir. 2012); *Shockency v. Ramsey County*, 493 F.3d 941, 951 (8th Cir. 2007); *Knight v. Vernon*, 214 F.3d 544, 551 (4th Cir. 2000); *Dickeson v. Quarberg*, 844 F.2d 1435, 1442 (10th Cir. 1988).

the Act states plainly and unequivocally that the employee is included. It is at least ambiguous whether a state judge is an 'appointee on the policymaking level.'" *Id.* at 467.

Gregory does not hold that judges make or implement partisan policy, and for good and obvious reasons this Court should not do so here either.

Petitioner argues that judges fit within the exception in part because they exercise discretion in interpreting legal texts and developing the common law.

This Court did not discuss the concept of "discretion" in *Elrod* or its progeny. Lower courts however have created this factor as part of their analysis as to whether a position is a policymaking one. However, in that context, the Seventh Circuit has distinguished political discretion from professional discretion. *Hagan v. Quinn*, 867 F.3d 816, 823 (7th Cir. 2017). Lower courts have adopted the view that the reference to "discretion" means the type of discretion that can be exercised to promote or thwart the policies of the incumbent administration. *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1333 (9th Cir. 1997); *Pleva v. Norquist*, 35 F.Supp.2d 839, 844-45 (E.D. Wis.), *aff'd*, 195 F.3d 905 (7th Cir. 1989).

Judges do not have the discretion to thwart partisan goals. Decisions on the constitutional and statutory issues are limited by rules of construction and legal precedents. Any "discretion" judges have is limited to deciding the cases before them based on the facts presented and applying principles of judicial

methodology. David J. Tatel, "Judicial Methodology, Southern School Desegregation, and the Rule of Law," 79 *N.Y.U. Law Rev*. 1071, 1074 (2004) (describing the principles of judicial methodology that distinguish judging from policymaking).

The fact that Delaware judges administer the state judiciary system, oversee court staff and license and discipline Delaware lawyers is also irrelevant because those responsibilities are incidental to the judicial role and do not relate to partisan goals. Neither does the development of Delaware corporate law.

Petitioner claims that the statement by the Third Circuit that the exception applies to those positions that "cannot be performed effectively except by one who shares the political beliefs of [the appointing authority]," *Adams*, 922 F.3d at 180, interprets *Branti* too strictly. However, this language comes directly from *Branti*: "the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments." 445 U.S. at 518.

B. People of All Political Viewpoints Can Serve Effectively as Judges.

There is no rational connection between political ideology and effective performance as a judge, and none has ever been shown. Political affiliation is not

only not essential to the performance of the job, it is inappropriate. Moreover, the Provisions restrict employment based only on party, not on judicial philosophy. While political party has been said to be a barometer of judicial philosophy, that is not the case *per se*. Although cynics may call them an endangered species, there are still political moderates. Solimine, 61 *Cinn. L. Rev*. at 965 n.52.

In any event, "if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable." *Rutan*, 497 U.S. at 92-93 (Scalia, J., dissenting). *See also Newman v. Voinovich*, 986 F.2d 159, 164 (7th 1993) (Jones, J., concurring) ("it cannot be seriously contended that being a member of a certain party . . . should be a requirement for the *effective performance* of being a judge," italics in original). This is evident by the fact that rules of judicial conduct discourage judges from being influenced by politics.

1. Election Judges are Not Comparable to Courtroom Judges.

Petitioner points to a statement in *Branti* that consideration of political party is appropriate in selecting election judges. But that is a different situation because election judges are typically chosen to represent the partisan interests of their respective parties in a very partisan environment, the act of voting and being

counted. *See*, *e.g.*, *Vintson v. Anton*, 786 F.2d 1023, 1025-28 (11th Cir. 1986); *Lehner v. O'Rourke*, 339 F.Supp. 309, 314-15 (S.D.N.Y. 1971); *MacGuire v. Houston*, 717 P.2d 948, 953 (Colo. 1986). Moreover, election judges work only a couple of days every two years. This minimal burden weakens the strength of a First Amendment claim. Thus, party membership can, consistent with the First Amendment, be a valid prerequisite to employment as an election judge. *Id.* at 952-53.

Courtroom judges, by contrast, are not expected to represent the interests of their political parties, and should not be seen that way. Judges are not supposed to be professionally antagonistic toward each other or any party, and political balance does nothing to prevent corruption or the appearance of corruption. To the contrary, using political affiliation as a criterion (in this case the only mandatory criterion) reinforces the perception that Delaware judges come to the bench with a political agenda, thereby eroding public confidence in the system.

2. The Decisions of the Sixth and Seventh Circuits Do Not Conflict with the Third Circuit.

In *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993), the Sixth Circuit was faced with circumstances where elected judges vacated their seats mid-term. The Governor made a voluntary choice to appoint judges on an interim basis until the next election of the same political party as the vacating judge, after which

it would be up to the voters to decide whether to retain the judge. The District Court stated:

> This is not to suggest, however, that there is not an element of political patronage to the selection of judges, both at the state and federal level. This certainly was recognized by Justice Scalia. However, to suggest that among the ranks of state and federal judges there is a corps of incompetence due to this political patronage factor, grossly overstates the minimalistic effect of granting some consideration to an individual's political affiliation prior to appointment. To the contrary, I would suggest that there is no shortage of lawyers, nor lawyers qualified to be judges, nor qualified lawyers of a variety of political affiliations; Republicans, Democrats, and Independents alike.
>
> The other matter which distinguishes this case and the appointment process from *Elrod* and its progeny is the fact that within a matter of months the appointee is called upon to face the electorate to determine whether he or she is suitable to retain the position to which he or she has been appointed. The specific employment decisions in *Elrod*, *Branti* and *Rutan* are never subject to approval by the people of the state. While I am certain the title of incumbent is a benefit, it should be noted that the incumbent is not identified on the ballot, and the title of incumbent is no guarantee of success at the ballot box. Therefore, if the Governor has not selected an appointee wisely, that fateful decision is subject to

> rejection by the people of the county. At that time, the individual thwarted by the appointment process may wage a campaign against the appointed judge.

Newman v. Voinovich, 789 F.Supp. 1410, 1419-20 (S.D. Ohio 1992), *aff'd*, 986 F.2d 159 (6th Cir. 1993) (footnote omitted).

By contrast, the present action involves appointed judges who serve for 12-year terms and whose appointment is subject to mandatory political restrictions. As the Third Circuit noted, *Newman* does not involve a legal obligation to base the hiring decision on 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." The former does not run afoul of the First Amendment; but in our view, the latter does.

Adams, 922 F.3d at 181.

In *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988), a judge fired two assistant district attorneys, who may also serve as judges *pro tempore* when the judge is away, of a different party. The Court stated that judges are policymakers under *Branti* even if whatever policy they make is not tied to and may be

independent of the policy goals of the appointing Governor. *Id.* at 770.

As shown above, this conclusion is inconsistent with *Branti*. *See also Rutan*, 497 U.S. at 74 (reaffirming *Elrod/Branti* rule and stating that the "government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views") as well as lower Courts of Appeals which have interpreted the *Branti* exception as tying job performance and function to the policies of the appointing administration.[3] Indeed, *Branti* made clear that "policy" not tied to partisan political interests is not the type of policy that allows political discrimination. *Branti*, 455 U.S. at 519.

Both *Kurowski* and *Newman* stated that nothing in either *Elrod* or *Branti* required a relation between the job in question and the appointing officer's policies. *Kurowski*, 848 F.2d at 770; *Newman*, 986 F.2d at 163. In so doing, those courts ignored *Elrod*'s express rationale for the "policymaker" exception – so that "representative government not be undercut by tactics obstructing the implementation of policies of the new

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[3] *E.g.*, *Powers v. Richards*, 549 F.3d 505, 510 (7th Cir. 2008); *Camacho v. Brandon*, 317 F.3d 153, 165-66 (2d Cir. 2003); *Acevedo-Delgado v. Rivera*, 292 F.3d 37, 42 (1st Cir. 2002) (*Elrod* and progeny "allow politically motivated discharges of policy-related employees when reasonably necessary for an administration to effectuate its mandates").

administration." 427 U.S. at 367; *Rutan*, 497 U.S. at 74.

The Sixth and Seventh Circuits came to recognize as much in subsequent decisions. *See Powers v. Richards*, 549 F.3d 505, 509 (7th Cir. 2008) ("Some jobs, however, can be performed satisfactorily only when the employee supports the administration's ideas about policy and governing"); *Faughender v. City of North Olmsted, Ohio*, 927 F.2d 909, 915 (6th Cir. 1991) ("The only reason that governments may consider any political factor when making employment decisions is that failure to permit such consideration would, with respect to some positions, disturb the ability of the people's representatives to implement policies").

In passing, Petitioner cites two cases this Court affirmed pre-*Elrod*, *LoFrisco v. Schaffer*, 341 F.Supp. 743 (D. Conn.), *aff'd mem.*, 409 U.S. 972 (1972) and *Hechinger v. Martin*, 411 F.Supp. 650 (D.D.C. 1976), *aff'd mem.*, 429 U.S. 1030 (1977), to support his argument that this Court has affirmed political balance decisions. Pet. Brf. 37. Those cases addressed protecting minority party representation in the context of multimember or legislative bodies. As those cases pre-date *Branti*, they offer no insight on the issue currently before the Court.

In sum, there is no logical reason to exclude judges from the *Elrod*/*Branti* rule. The test is not the seriousness or importance of the job, but whether the job requires performance consistent with the goals of the

appointing party. It is clear that the job of judging should not and does not.

III. THE PROVISIONS DO NOT SERVE A COMPELLING STATE INTEREST AND ARE NOT NARROWLY TAILORED TO SERVE SUCH INTEREST.

Independent of an *Elrod/Branti* analysis, Petitioner undertakes a traditional First Amendment analysis, *i.e*., whether the restriction on appointment of judges based on political affiliation "serve[s] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S.Ct. 2448, 2468 (2018) (*quoting Knox v. Service Employees Intern. Union, Local 1000*, 567 U.S. 298, 310 (2012)). *Accord Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015).

Petitioner faces a "heavy burden . . . to show that the inquiry is *necessary* to protect a legitimate state interest." *Baird*, 401 U.S. at 7 (italics added). "The State must specifically identify an 'actual problem' in need of solving . . . and the curtailment of free speech must be actually necessary to the solution . . . That is a demanding standard"). *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 800 (2011).

A. Strict Scrutiny is the Proper Standard of Review as the Provisions Cause a Severe Infringement of Adams' Associational Rights Under the First Amendment.

Petitioner tries to avoid strict scrutiny by relying on *Gregory v. Ashcroft* for the proposition that a "less exacting" standard of review applies when addressing the right of a state to set qualifications for its officers. 501 U.S. at 463. *Gregory*, however, did not suggest that federalism concerns can override the strictures of the First Amendment. *See Chandler v. Miller*, 520 U.S. 305, 317 (1997) ("States, *Gregory* reaffirmed, enjoy wide latitude to establish conditions of candidacy for state office, but in setting such conditions, they may not disregard basic constitutional protections").

It is true that a less exacting standard of review may be utilized when the impact on First Amendment associational rights is not severe. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997). However, Petitioner has not argued that the infringement of Adams' right of political association, by absolutely excluding him from obtaining employment as a judge, is not severe. *See Elfbrandt v. Russell*, 384 U.S. 11 (1966) (may not condition government employment on a loyalty oath); *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971) (may not *per se* reject an applicant to a state bar who declines to answer question about membership in the Communist Party); *United States v. Robel*, 389 U.S. 258 (1967) (may not *per se* deny employment to member of Communist Party); *Keyishian v. Board of*

Regents of University of State of N. Y., 385 U.S. 589 (1967).

The Provisions do more than tangentially burden the right of political association for a short period of time. They require either registration with a party whose political views they may not share, or else be forever denied the right to be considered for a judgeship on the merits. As such, strict scrutiny should apply.

B. The Challenged Provisions Do Not Support a State Interest.

A desire to maintain the quality and independence of the judiciary, and to promote public confidence in the judiciary, is indeed a valid state interest. However, identifying a state interest is not enough. The proposed restriction must be *necessary* to further that state interest. Neither the "Major Party Provision" nor the "Political Balance Provision" serves that interest and they are not narrowly tailored to serve that interest.

First, although Petitioner and some *amici* credit the Provisions for Delaware's judicial reputation, there is nothing in the record to substantiate that claim[4],

[4] Contrary to statements made by Petitioner and certain of the *amici*, the Third Circuit did not state or acknowledge that the Provisions have played any role in the excellence of Delaware's judiciary. The concurrence merely noted that "*[m]embers of the Delaware bench* credit the political balancing requirement for at least part of this success." 922 F.3d at 186 (italics added). Thus, while acknowledging that members of Delaware's legal and

much less the claim that the Provisions are necessary to serve Delaware's interests.

There are other states that do not have these political restrictions and yet rank highly. Steven J. Choi, *et al.*, "Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges," 58 *Duke Law Journal* 1312, 1333-58 (2009) (hereinafter "Choi"). Although Delaware usually ranks at the top of the annual U.S. Chamber of Commerce survey[5], in another survey, Delaware was ranked 44th in independence, measured by the number of opposing opinions written by a judge of one party against a judge of the opposite party divided by the number of opposing opinions written against a judge of either party. *Id.* at 1323, 1342-44.

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political community have favorable (albeit factually unsupported) opinions about the effect of the challenged Provisions, the Third Circuit did not state its agreement with that conclusion.

[5] Delaware fell to 11th overall in the Chamber of Commerce's 2017 survey, ranking 18th in the nation as to judicial fairness and seventh in the nation in quality of judicial review. *Ranking the States*, U.S. Chamber Institute for Legal Reform (Sept. 2017), https://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf. The Chamber of Commerce surveys only senior lawyers at corporations that earn more than $100 million per year in revenues, who might have different attitudes toward judicial decisionmaking than other lawyers. Choi, 58 *Duke Law Journal* at 1326, 1341, 1354. *See also* Theodore Eisenberg, "U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business," 6 *Journal of Empirical Legal Studies* 969 (2009) (identifying significant flaws in the methodology of the surveys of the U.S. Chamber of Commerce, with an emphasis on Delaware). A survey of business lawyers cannot constitute the views of lawyers as a whole or the public generally.

Political balance also is not necessary to preserve the integrity of the judicial system. Other state courts have judges who are appointed without restrictions on political affiliation. There is no evidence that this practice has damaged the standing or integrity of other states' judicial systems or that the Provisions render Delaware's judiciary of superior integrity.

Petitioner and *amici* cite articles in which Delaware judges and practitioners have offered their personal opinions as to the effect of the Provisions. Pet. Brf. 39-40. None of those articles offers any studies or surveys of non-Delaware lawyers, bankers, venture capitalists, Delaware citizens or other relevant constituencies, or indeed anyone, about what effect the Provisions have had, if any, on either their view of Delaware's judges or what guides their advice in suggesting incorporating or litigating in Delaware, or if they were even aware of the existence of the Provisions.

There is no support for the conclusion that the Provisions had any effect. Mere conjecture and supposition are inadequate to carry a First Amendment burden. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508 (1996). This is so whether the conjecture comes from the Petitioner or his *amici*. *Watchtower Bible and Tract Society of New York, Inc. v.*

Village of Stratton, 536 U.S. 150, 170 (2002) (Breyer, J., concurring).[6]

Thus, it cannot be said that the Provisions played any role as to the quality or independence of judges, or any effect on the public's perception of Delaware's judiciary.

There are additional reasons political balance does not serve its claimed purpose. First, the phrase "political balance" is a misnomer, as the Provisions create a majority of one. The Delaware Supreme Court hears cases in panels of three or five. Delaware Supreme Court Internal Operating Procedures § IX(2). In panels of five there will always be three members of the same political party, and panels of three will have either all members of the same party or a 2-1 majority, in which case it will be heard *en banc*. *Id.* at § X. In each case the majority would be able to exert its will over the minority if it so chose.

The Provisions do not require political balance in the Court of Chancery alone (only in combination with the Supreme and Superior Courts). As for the Superior Court, cases are heard by a single judge, Delaware Judicial Branch Operating Procedures § IV(2), so balance serves no purpose. If a judge were inclined to rule

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[6] The State of Delaware itself does not mention the Provisions in literature promoting incorporating in Delaware. *See* Lewis S. Black, Jr., "Why Corporations Choose Delaware" (Delaware Dept. of State, Div. of Corporations 2007), *available at* https://corpfiles.delaware.gov/pdfs/whycorporations_english.pdf; "Why Businesses Choose Delaware," https://corplaw.delaware.gov/why-businesses-choose-delaware/.

based on his or her political views, there would be no counterbalance. And it would be cold comfort to a losing litigant to hear that there are almost the same number of judges of the other major political party hearing other cases.

Moreover, any claimed need for political balance on the Superior Court is undercut by the right to a jury trial in a Superior Court action, in addition to the absence of collective decisionmaking.

Additionally, the system can currently be "gamed." For example, if there are three Republicans and two Democrats on the bench, and one Democrat retires, a Republican Governor could seek out a Democrat who is moderate or even sympathetic in some degree to Republican ideology. Further, a potential applicant could change his or her registration to satisfy the requirement. *See* Brief for the Delaware State Bar Association as *Amici Curiae* in Support of Petitioner at 10-11 n.4 (noting that thousands of Delawareans change their party registration for partisan political purposes).

Partisan balance amongst the judges who comprise the court has little bearing on impartiality. For example, if the court included two equally ultra-partisan, biased judges of different parties who allowed their political views to influence their conduct and decisions, public confidence in the impartiality of the court would not be restored by the fact that the court still has overall partisan balance. *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, 800 F.3d 913, 924 (7th Cir. 2015).

The emphasis on partisan balance could just as easily damage public confidence in the impartiality of the courts, as the public may perceive the requirement as confirmation that judges have to be appointed from different parties because they all have strong political agendas, and so are not truly impartial. *Id.* at 924-25.

"Even though some contend that some or all judicial decisions are, consciously or not, mere masks for the political preferences of the judge, few if any argue that such decision-making is a normative ideal which we should strive to attain." Solimine, 61 *U. Cin. Law Rev*. at 963.

Not only are the claimed state interests not preserved by the Provisions, but there is no evidence that the absence of the Provisions will endanger any of those interests.

A concern has been raised that the loss of the Provisions may result in fewer corporate cases being litigated in Delaware. *Amicus* Brief for the Former Governors of the State of Delaware at 9. The desire to be the preferred venue for a class of litigation, however, is not a compelling interest strong enough to subordinate Adams' First Amendment interests. Moreover, according to the Court of Chancery, from 2014 through 2018 there was a decline of approximately one-third in the number of case filings in its court. 2018 Report of the Delaware Judiciary, *available at* https://courts.delaware.gov/aoc/AnnualReports/FY18/doc/Chancery2018.pdf. Yet at the same time, the number of entity formations in Delaware, and the amount of revenue

those formations have generated, has continued to grow. Delaware Division of Corporations Annual Report Statistics, *available at* https://corp.delaware.gov/stats. Delaware is and will be just fine.

C. Petitioner Has Not Shown That There Are No Less Restrictive Alternatives.

Petitioner claims that the Third Circuit failed to identify less-restrictive alternatives. The burden, however, was not on the Third Circuit. Where there is an infringement of First Amendment rights, the burden is on the government (or its representative) to prove that there are no less-restrictive options. *See Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 669 (2005); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718 (1981).

Delaware does not need the Provisions to ensure political impartiality as it has less restrictive alternatives already in place. The Delaware Judges' Code of Judicial Conduct states that "[a] judge should be unswayed by partisan interests, public clamor, or fear of criticism." *Id*. at Rule 2.4(A). The Code also instructs judges to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and should avoid impropriety and the appearance of impropriety in all activities." *Id*. at Rule 1.1.

These directives, by which we must assume judges will abide, coupled with Delaware's Court on the Judiciary which enforces the Code of Judicial Conduct,

Del. Const. Art. I, § 37, effectively negates any concern about a judge's ability or impartiality.

Additionally, there is the requirement of confirmation by the State Senate, Del. Const. Art. IV, § 3, during which process state senators can question applicants about their judicial philosophies. Also, judges have to be concerned about reappointment after twelve years, or advancement if an opening arises on a higher court. Further, a Governor who is concerned about re-election has to be aware of his or her constituencies.

Indeed, if judges put aside their political biases upon joining the bench and are understood by the public as doing so, as we must assume they do, then what need do the Provisions truly serve?

There is another important structural protection. Delaware already has strong motivation for avoiding politically biased judges. Corporate franchise taxes and related revenues represent a significant portion of the state's budget, rising to 29% in 2019.[7] Delaware has a great incentive to maintain its status as the preferred venue for incorporation, not only for tax revenue but for the ancillary economic effects of lawyers (local and out-of-state) litigating cases there, including employment, investment, and revenue from industries serving Delaware's legal sector, plus *pro hac vice* fees from approximately 4,500 non-Delaware lawyers each

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[7] State of Del., Office of the Governor, Fiscal Year Operating and Capital Budget Summary (2019), *available at* http://budget.delaware.gov/budget/fy2019/documents/operating/financial-summary.pdf (29%).

year, "back-office" industries, couriers, and process servers, as well as general service providers, such as the food, beverage, lodging, hospitality, and real estate industries. Paul Larson, *et al.*, *The Contributions of the Legal Industry to the Delaware Economy* (Delaware State Bar Association June 2019), *available at* http://media.dsba.org/publications/LegalIndustryEconomicImpactStudy.PDF.

An important part of keeping that economic engine running is maintaining an excellent judiciary, especially in the Court of Chancery. *See*, *e.g.*, Lynn M. LoPucki, "Corporate Charter Competition," 102 *Minn. Law Rev.* 2101, 2166 (2018). This economic component alone is enough to ensure that appointed judges of any party will not upset the proverbial applecart.

As the state's interest in ensuring public confidence in the judiciary is already served by existing means, the claimed state interest is not strong enough to deny Adams' right of political association.

Apart from that, there are less-restrictive reforms that could be adopted which would gain comparable results without infringing Adams' rights.

First, applications for judgeships, instead of asking about political affiliation, could include a question about judicial philosophy without identifying political party. Follow-up interviews or questions during the confirmation process could delve deeper. This would assure an ideologically balanced court, or an ideologically compatible judiciary, if either of those are Delaware's goals.

Second, Delaware could amend Article IV § 3 of its Constitution to change from majority Senate approval of a judicial candidate to a supermajority. This would require Governors to choose more centrist candidates, if consensus, moderation and avoidance of unpredictable outcomes are Delaware's goals[8], although there is no evidence that these goals cannot be reached or maintained absent political balance.

Finally, if Delaware has an interest in avoiding "court packing," and assuming that such is a compelling state interest (a questionable proposition), there are already mechanisms in place to prevent it. Judges are appointed to 12-year terms, Del. Const. Art. IV, § 3, and Governors are elected for up to two four-year terms, *id.* at Art. III, § 2, resulting in a staggered judiciary. There is no evidence that there will be a rush of openings any time soon. As such, the danger (if it be a danger) of court packing is minimized.

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[8] While the Delaware's Supreme Court has had dissents in less than 1% of its cases from 1951-2001, there has been a debate amongst members of the Delaware Bar whether substantive compromises made in order to achieve unanimity have an adverse impact on the clarity of the Court's precedents. Joint Study of the Delaware Courts Conducted by the Delaware State Bar Association and the Delaware Chapter of the American College of Trial Lawyers at 17-18 (May 2016), *available at* https://courts.delaware.gov/aoc/docs/ACTL-DSBA-Full-Report.pdf.

IV. AFFIRMANCE WILL NOT IMPERIL INDEPENDENT AND OTHER COMMISSIONS.

Petitioner and his *amici* suggest that if this Court affirms the Third Circuit's ruling it will undercut political balance requirements for commissioners of certain regulatory agencies. This is mere speculation.

Elrod/Branti cases are fact-specific and decided on a case-by-case basis. *See O'Hare Truck Service, Inc.*, 518 U.S. at 719-20. In a First Amendment analysis, a court must "weigh the character and magnitude of the burden the State's rule imposes on [Plaintiffs' First Amendment] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 358 (1997).

Political issues may qualify as compelling interests. For example, federal independent agencies are created by Congress and are responsible for creating and implementing policy as authorized by Congress. *E.g.*, *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 91 (1994); *United States v. Booker*, 543 U.S. 220, 243 (2005) (Federal Sentencing Commission); *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1991); *Moog Indust. v. Federal Trade Comm'n*, 355 U.S. 411, 413 (1950).

Similarly, independent state agencies are created by state legislatures with members appointed by the Governor, and create or implement policy within the limits set by those legislatures. *E.g.*, *Roche v. Lincoln Property Co.*, 175 Fed.Appx. 597, 601 (4th Cir. 2006).

Although Congress and legislatures create independent agencies and determine the scope of the agencies' power to make policy, the President and Governors appoint the commissioners (which appointments, by statute, may require the consent of the legislature and which may include restrictions on who the Governor may appoint). *E.g.*, Neb. Rev. Stat. § 49-14,106 (Nebraska Accountability and Disclosure Commission, allocates seats among Democrats, Republicans and Independents); *State ex rel. New Mexico Judicial Standards Comm'n v. Espinosa*, 73 P.3d 197, 201 (N.M. 2003) (independent Judicial Standards Commission).

The Executive branch, however, may have an agenda separate from that of the co-equal Legislative branch, and may seek to appoint people who will be supportive of that agenda. *See* Anderson P. Heston, "The Flip Side of Removal: Bringing Appointment into the Removal Conversation," 68 *N.Y.U. Ann. Surv. Am. L.* 85 (2012). The tension between the goals of the Legislative and Executive branches, particularly when Congress is controlled by a different party than the President, may justify political balance. Further, in such circumstance there may be no less restrictive alternative to a politically balanced commission.

By contrast, judges are wholly independent of the will of both the Executive and Legislative branches and there is no need to be concerned with policy goals of either branch.

State redistricting commissions and other commissions, having a direct responsibility to and direct impact upon the electorate and the voting process, may also give rise to other compelling state interests. A state may want the political demographics of the Commission to match the political demographics of the state to instill confidence that the electorate is being fairly represented. A state may want political balance to avoid efforts by one group or another to skew the map in their favor. Ensuring the fairness of an election map or an election itself, both relating to the rights of the voters, could be a strong state interest which would justify some form of political allocation.

Judicial nominating commissions have been established in a variety of designs. According to the Brennan Center for Justice, sixteen states require some form of partisan balance on their commissions. In all but two of those states, however, one party can have a significant majority, ranging from 55.6% to 81.8%, which is hardly balanced. Some of the commissions are designed to represent the state's political demographics. Douglas Keith, *Judicial Nominating Commissions* at 6 (Brennan Center for Justice), *available at* https://www.brennancenter.org/our-work/research-reports/judicial-nominating-commissions.

However, twelve of those states choose judges by popular election, and two of them have retention elections after the original appointment. *Judicial Election Methods by State*, *available at* https://ballotpedia.org/Judicial_election_methods_by_state. The interests involved when a judicial nominating commission selects

judges for election may be very different from those that arise when judges are appointed.

The functions of judges do not include serving as a vehicle to preserve the balance of power between Executive and Legislative branches in setting policy, or to determine electoral maps or who sits on the bench. Additionally, none of those entities is subject to a code of conduct which explicitly requires them to eschew their own personal political beliefs in making their decisions.

As such, this case will not affect the weighing of interests and the determination of less-restrictive alternatives in other cases, which will have to be decided on their own merits.

V. THE POLITICAL BALANCE PROVISION CANNOT BE SEVERED FROM THE MAJOR PARTY PROVISION.

The parties did not raise or brief the issue of severability in either the District Court or the Third Circuit. The Third Circuit addressed the issue *sua sponte.* Thereafter, on April 23, 2019, Petitioner filed a Petition for Rehearing *En Banc*, asserting as one of its grounds that the Third Circuit found the Provisions unseverable. This Court does not consider matters raised for the first time on a motion for reargument in the Court of Appeals. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.4 (1984). As such, it should be deemed waived. *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002).

The fact that the Third Circuit addressed it *sua sponte* should not change this outcome. *Tom v. First American Credit Union*, 151 F.3d 1289, 1994 (10th Cir. 1998). The argument was knowable from the outset and the Third Circuit's decision on severability has the same effect as if it never raised it – there would be no severability and the Provisions would be struck down together.

In any event, the Provisions are not severable. The Political Balance Provision does not stand independent of the Major Party Provision. The original language in Delaware's Constitution of 1897 stated that "no more than three of the said five law judges, in office at the same time, shall have been appointed from the same political party." Harvey B. Rubenstein, *et al.*, *The Delaware Constitution of 1897* at 352 (1997) (hereinafter "Rubenstein"). As such, political affiliation and balance have been intertwined requirements from the beginning. The Delaware Constitution was subsequently amended to extend political affiliation and balance applicable to all courts. *Id.* at 396.

The Political Balance Provision ties seats to party. The legislative history shows that the framers contemplated only Democrats or Republicans. JA 109 ("three of the five must come from one party or the other . . . "), 110 ("I think it is desirable to have the minority party represented on our bench . . . "). This evidences the fact that, in adopting the Political Balance Provision, the framers intended to exclude candidates who were not Democrats or Republicans, such as the Single Taxers and the Prohibitionists. JA 110. This conclusion

is strengthened by the fact that the Constitution of 1897, until subsequently amended, provided for a total of 5 Superior Court judges who decided cases in panels of two or more. Del. Const. Art. IV, § 5 (prior to amendment); *Rubenstein* at 127-28. That is no longer the case. Now, Superior Court judges hear cases by themselves. Del. Const. Art. IV, § 5 (as amended).

Amici point out that the Major Party Provision was a "necessary" addition to the law to prevent a Governor from gaming the Political Balance Provision. Brief of the Brennan Center for Justice at NYU School of Law as *Amicus Curiae* in Support of Petitioner at 26-29; Brief of Former Justices of the Delaware Supreme Court as *Amici Curiae* in Support of Petitioner at 14 n.8; Brief of State and Local Government Associations as *Amici Curiae* in Support of Petitioner at 17 (the Bare Majority Provision "works only with its major-party requirement").

This conclusion is justified given that the amendment was incorporated into the wording of the Political Balance Provision, and not stated independently or as a stand-alone paragraph. This fact also justifies the conclusion that the Legislature would not have added the Major Party Provision if it did not deem the amendment necessary and integral to the proper functioning of the Political Balance Provision. Otherwise, why would it have been added?

Petitioner argues that Adams lacks standing to raise severability. "The severability doctrine comes into play only after the court has resolved that issue –

typically the only live controversy between the parties." *Murphy v. National Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1487 (2018) (Thomas, J., concurring). Adams has proven Article III standing.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the judgment below.

Respectfully submitted,

DAVID L. FINGER
Counsel of Record for Respondent
FINGER & SLANINA, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525
dfinger@delawgroup.com

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