No. 19-309

IN THE

Supreme Court of the United States

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 THE DELAWARE STATE BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Delaware State Bar Association ("DSBA") is a voluntary association of Delaware lawyers, consisting of approximately 80% of those admitted to the bar of the Delaware Supreme Court. Virtually all those appointed to the bench in Delaware come from the DSBA's ranks and the Association regards itself as a conservator of Delaware's proud tradition of judicial impartiality – a tradition rooted in a constitutionally required selection process designed to assure the public that judicial decisions are not driven by politics.

SUMMARY OF ARGUMENT

It is no accident that media accounts of important federal judicial decisions frequently identify the respective judges with their appointing President – as in "today's decision was rendered by judge X, a Y appointee." That information is likely included in such accounts because reporters think it matters; that is, that federal judicial decisions often conform to the political leanings of the appointing President.

Not so in Delaware. The centerpiece of this dispute is a Delaware constitutional provision that requires bipartisan balance on Delaware's courts. As a result,

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[1] Pursuant to Supreme Court Rule 37, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici curiae* and their counsel made any monetary contribution toward the preparation and submission of this brief. Both Petitioner and Respondent consent to the filing of this brief. In granting consent, Respondent's counsel asked *amici* to make clear that this brief does not necessarily reflect the views of every member of the DSBA. The DSBA does not make such claim – for example, Respondent's counsel is a member of the bar association and takes a contrary view. Respondent is not a member of the association.

media accounts seldom identify judges with their appointing Governor, and political affiliation is not perceived as playing any role in judicial outcomes. Delaware believes this a good thing and no one has asserted to the contrary in this case. Indeed, the Third Circuit observed, "[p]raise for the Delaware judiciary is nearly universal and it is well deserved." *Adams v. Governor of Delaware*, 922 F.3d 166, 186 (3d Cir. 2019).

Respondent, however, challenges this time-tested provision, asserting that it violates the expressive and associative rights arising from his recent decision to register as neither Republican nor Democrat – a switch made eight days before he filed this lawsuit. But, First Amendment rights are not absolute. Indeed, while the DSBA believes that the cases most discussed in the arguments and decisions below were misapplied, those cases do serve as exemplars of this principal – *i.e.* that the First Amendment occasionally gives way to important governmental interests. The DSBA believes that a judiciary perceived as nonpartisan and free of politics is a critical governmental interest, easily justifying the minor intrusion upon whatever expressive or associative interest a person might maintain in her or his voter registration.

If one concludes that this case is controlled by cases in which the defending governmental executive asserted *freedom to be partisan* – as opposed to the case here, where Delaware seeks to *restrain partisan selections* by requiring a Governor of one party to appoint judicial officers of both major parties – then Delaware's constitutional requirement is valid, as judges fall within that class of government officials whose political affiliation can be considered. In short, all judges are policymakers and, in particular, *state*

court judges make policy, operating as they do under the common law system. Given that politics may be considered when it comes to policymaking positions, and given that First Amendment rights are never absolute, Respondent's argument that he should be considered for a judicial position in Delaware even though he is not a member of either of Delaware's two major political parties (a situation he could easily remedy simply by reversing his recent switch) fails. Delaware has the right, under the Constitution's Tenth Amendment and otherwise, to create its own system of judicial selection, and its system does not run afoul of the First Amendment.

Finally, the relief sought by the Respondent in this case cannot result in the outcome he ultimately seeks. Having been denied appointment by a Democrat Governor when he applied as a registered Democrat, it is difficult to see how the dismantling of Delaware's time-honored political balance requirement will help Respondent, now registered as "unaffiliated," secure judicial appointment.

ARGUMENT

For nearly 70 years, Delaware's Constitution has required that members of its Supreme Court, Superior Court, and Court of Chancery belong to one of the two major political parties and that there be no more than a bare majority of either party on any court or on the three courts overall. Del. Const. Art. IV, § 3. This requirement, ensuring a balanced judiciary not perceived as partisan, has worked well – Delaware's judiciary is highly regarded throughout the nation and the world. Respondent, who was an unsuccessful applicant for a judicial position as a Democrat (during a Democratic gubernatorial administration), and did not apply for several other positions while a registered

Democrat, switched his registration to "unaffiliated"[2] in early 2017 and then promptly sued to challenge Delaware's judicial selection regime on First Amendment grounds. The District Court ruled in his favor and the Third Circuit affirmed. Both courts were incorrect.

Both lower courts examined Respondent's challenge through the paradigm fashioned by this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). In other words, both lower courts considered whether judges were "policymakers," and decided (wrongly) they were not. The District Court stated that "the role of the judiciary is to interpret statutory intent and not enact or amend it." *Adams v. Carney*, 2018 WL 2411219, at *8 (D. Del. May 23, 2108), *aff'd in part, rev'd in part*, 922 F.3d 166 (3d Cir. 2019). The Third Circuit agreed, holding that "a judicial officer, whether appointed or elected, is not a policymaker," but then went on to say that the policymaking exception created by this Court did not apply in any event:

> [T]he 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. . . . To the extent that Delaware judges create policy, they do so by deciding individual cases and controversies before them, not by creating

[2] Under Delaware's voter registration system, a person not identifying with any political party is registered as "unaffiliated." Such voters, though, are typically referred to as "independents." *See* State of Delaware, Dept. of Elections: New Castle County Office, Voter Registration, https://electionsncc.delaware.gov/votreg.shtml ("If you do not pick a political party, you will be registered as unaffiliated.") (last visited January 27, 2020).

> partisan agendas that reflect the interest of the parties to which they belong. . . . Put simply, 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. As such, the policy making exception does not apply to members of the judicial branch.

922 F.3d at 178-80 (footnotes omitted).

In so holding, the lower courts failed to appreciate the significant policymaking role of state common law judges. Because judges are policymakers, and because Delaware has a keen interest in ensuring a balanced bench that is perceived as nonpartisan and does not tilt too far in one political direction or the other, the Third Circuit decision should be reversed.

I. Judges are policymakers; their political affiliation may be considered.

American voters frequently measure a presidential candidate by the extent to which that candidate's appointees are likely to apply our laws and Constitution in one particular way or another. This phenomena, so common that it requires no particular proof, contradicts the Third Circuit's notion that judges, if selected on a partisan basis, will not play "a political role tied to the will of the Governor." *Id.* at 180. Indeed, a President's legacy includes his or her judicial appointments and the party out of power often fights a vigorous delaying action so that open seats might be filled by the winner of the next election (hopefully a President of their party). None of this would occur, of course, if judges were not policymakers – if their decisions and judicial philosophies were unconnected to their political beliefs.

Justice Holmes and Justice Cardozo both recognized that judges make policy.

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every 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; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis.

O. Holmes, *The Common Law* 35–36 (1881). Similarly, Justice Cardozo observed:

> Each [common-law judge] indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. . . [W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made.

B. Cardozo, *The Nature of the Judicial Process* 113–115 (1921). These views are in accord with decisions of the Sixth and Seventh Circuits, both of which candidly recognize that judges do have a policymaking role. *See Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993) ("[J]udges are policymakers because their

political beliefs influence and dictate their decisions on important jurisprudential matters"); *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988) ("A judge both makes and implements governmental policy."). Indeed, in *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991), this Court recognized that, for purposes of the Age Discrimination in Employment Act of 1967, a state judge is an "appointee on the policymaking level" and therefore the act did not apply.

Even if one questions whether federal judges are, indeed, policymakers, state court judges surely are because they continue the development of the common law. *Compare* Del. Const. Art. IV, § 7 ("The Superior Court shall have jurisdiction of all causes . . . at common law"), *and* 10 Del. C. § 341 ("The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity"), *with Erie v. Tompkins*, 304 U.S. 64, 78 (1938) ("there is no federal general common law").

In sum, it defies common experience to conclude that judges are not policymakers or that their decisions are not connected with the appointing Governor's "political preferences." If the *Elrod* and *Branti* cases provide the correct framework for analysis, then the observation that judges make policy ends this case and requires reversal.

II. First Amendment rights are not absolute and a state's interest in a non-partisan judiciary is sufficiently compelling to overcome the expressive right associated with a lawyer's voter registration.

As shown above, if this case is controlled by *Elrod* and *Branti*, it should be reversed, and the DSBA asserts that the same result will follow even if

the analytical framework offered by those cases is not appropriate. The Third Circuit stated that the policymaking exception in *Elrod* and *Branti* is limited to those employees whose jobs "cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority]." *Adams*, 922 F.3d at 181 (alteration in original) (citation omitted). The Circuit Court thus concluded that "[w]hile states have nearly unfettered discretion to select state judges, states cannot condition judicial positions on partisan political affiliation alone." *Id.* No authority is provided for this last statement; and, ironically, by stripping the Delaware Constitution of its political balance requirements entirely, the Third Circuit leaves the Governor (and future Governors) free to do exactly what the Circuit Court claims cannot be done – going forward, the Governor (like the President) would have unfettered discretion and be free to appoint only members of his or her own party.[3]

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[3] Some might read the Third Circuit's statement that "states cannot condition judicial positions on partisan political affiliation alone" as applying only to a specific state constitutional or statutory requirement, and not to a Governor (or other appointing authority), who, in the absence of a political balance requirement, would have unfettered discretion in selecting judges and could, in the exercise of such discretion, limit appointees to those of the Governor's same political party. Or, put another way, while the Third Circuit might concede that an executive has discretion in appointing judges, and could, if he or she so desired, limit appointments to those of her or his own party, the State itself may not by statute or, as here, by constitutional requirement, limit judicial appointments due to political affiliation. However, if one concedes that a Governor, like the President, may limit his or her judicial appointments to persons of only their own party, then there is nothing inappropriate about the State requiring, in advance, and not knowing who future Governors might be, that Governors appoint members of both major political parties,

The problem with the Third Circuit's reading of *Elrod* and *Branti* is that it fails to appreciate the distinction between the issue in those cases and the issue here. *Elrod* and *Branti* dealt with limitations on an *administration's desire to be partisan* in hiring; but, here, the issue is a *state's desire to be bipartisan* with respect to judicial appointments.

In *Elrod* and *Branti*, this Court held that political affiliation could be considered with respect to policymaking positions, so as to ensure that an executive could have confidence that his or her policy views would be implemented. For non-policymaking positions, political affiliation could not be considered, because in non-policymaking positions, political affiliation does not, in theory, matter. In other words, *Elrod* and *Branti* hold that the First Amendment limits the partisanship in which an executive might otherwise engage with respect to non-policymaking positions.

Elrod and *Branti* would allow political affiliation to be considered with respect to judicial offices (because they are policymaking positions), but the Delaware Constitution seeks to limit the partisanship in which a Governor might otherwise engage with respect to such offices by requiring bipartisanship on its judicial bench. Put another way, *Elrod* and *Branti* deal with situations where an executive wanted to engage in partisanship; this case is a situation where the State of Delaware seeks to restrain partisanship in furtherance of a bipartisan judiciary perceived as free of politics. Delaware's interest in such a judicial branch, unconnected to partisan politics, and the confidence such a system inspires in its citizens is easily as com-

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rather than just members of their own. This is what Delaware has done, and it has worked well.

pelling a governmental interest as any state's interest in an executive branch free to engage in partisan hiring for policymaking positions.

As Justice Brennan wrote in *Elrod*, "the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons." *Elrod*, 427 U.S. at 360. In particular, lawyers – each a potential candidate for judicial appointment – are subject to a host of First Amendment restrictions not applicable to the general public.

For example, under Delaware's Rule of Professional Conduct ("RPC") 3.5, lawyers are not to engage in discourteous conduct "degrading to the tribunal." Under RPC 4.1, lawyers are not to make false statements of material fact in representing a client. Under RPC 7.3, lawyers are limited in the solicitation of clients. Under RPC 7.4, lawyers may not state or imply they are certified as a specialist in a field of law, unless the lawyer has been certified by an identified organization certified by the American Bar Association. There is a fairly lengthy list of restrictions on statements and conduct applicable to lawyers but not members of the general public. In sum, Delaware's lawyers, as is the case in every state, accept limits to their First Amendment rights in return for the privilege of practicing before Delaware's Courts. The additional limitation on their expressive or associational freedom imposed by the requirement that they register as members of one of the two major parties in order to be considered for judicial appointment, is slight. Indeed, one's voter registration says very little.[4]

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[4] All that is required in order for Respondent to be considered in the future would be a change in his voter registration back to

In sum, in *Elrod* and *Branti*, this Court sought to restrain use of political affiliation in an effort to restrain partisanship in the selection of employees for non-policymaking positions. Here, though, the State of Delaware wants to use political affiliation in an effort to restrain partisanship through the creation of a politically-balanced judiciary and the many advantages such a balanced judiciary brings. First Amendment rights are never absolute, and, as they gave way in *Elrod* and *Branti*, they should also give way here to the State's goal of creating a first-class judiciary free from the perception that politics plays a role in the judicial decision-making process.

Democrat (or to Republican). One can argue that there are many who register with a party not because they identify with the party, but for other purposes, including, for example, so they may vote in that party's primary. In 2016, approximately 1,250 voters changed their voter registration to Democrat so they could vote in that year's democratic mayoral primary. *See* Xerxes Wilson, *Republicans, independents seek voice in Wilmington mayor race*, The News Journal (July 3, 2016 6:50 p.m.), *available at* https://www.delawareonline.com/story/news/2016/07/03/republicans-independents-seek-voice-wilmington-mayor-race/86591780/ (last visited January 27, 2020). Similarly, in 2008, an estimated 3,000 Republicans changed their registration to Democrat in order to vote in that year's democratic gubernatorial primary. *See* Bob Yearick, Former Delaware Congressman Mike Castle: Life Out of Office, DelawareToday, https://delawaretoday.com/dt-reads/former-delaware-congressman-mike-castle-life-out-of-office/ (last visited January 27, 2020). The fact that a person may change their voter registration, in and of itself, does not necessarily preclude their associational rights with other parties. Senator Bernie Sanders, with whom Respondent identifies, *Adams*, 922 F.3d at 172, is not a registered Democrat, but says he is a Socialist, and yet the Senator is currently seeking the Democratic presidential nomination.

III. The "bare majority" requirement is severable.

The Third Circuit erroneously rejected the "bare majority" requirement as non-severable, even though it had existed for some 60 years prior to the addition of the "major party" requirement. *Adams*, 922 F.3d at 183-84. As the Circuit Court's opinion recounts, in 1897, when Delaware's Constitution was first being debated and then adopted, the original requirement for membership on the Superior Court was no more than a bare majority from any political party.[5] This requirement remained in place until 1951, when the Delaware Supreme Court was first created as a separate court.[6] At that time, the bipartisan requirement regarding the two major political parties was added to the Delaware Constitution.

Nonetheless, the Third Circuit struck down the bare majority requirement as well, "because we do not think the two components were intended to operate separately, we find that the major political party component is not severable." *Adams*, 922 F.3d at 183. Certainly it is fair to say that the drafters and adopters of the 1951 revisions to Delaware's Constitution intended for both provisions to apply; but, beyond

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[5] At the time of the Delaware Constitution's adoption, the Court of Chancery consisted solely of the Chancellor, and so the bare majority requirement applied only to the Superior Court.

[6] Until Delaware's Supreme Court was created by constitutional amendment in 1951 as a separate court, Delaware used the "leftover judge" system, whereby judges from the Superior Court (and the Chancellor) who had not been involved in the lower court decision under appeal would review the lower court decision. *See generally* Maurice A. Hartnett, III, Delaware Courts' Progression, in *Delaware Supreme Court Golden Anniversary* at 12-21 (Randy J. Holland & Helen L. Winslow ed. 2001).

mere speculation, there is nothing to suggest that the bare majority limitation, standing alone, should not survive – after all, it stood alone for nearly 60 years. Accordingly, if the major political party requirement were unconstitutional (it is not), it nevertheless should have been severed from the bare majority requirement. *State v. Dickerson*, 298 A.2d 761, 766 n. 11 (Del. 1973) ("Any doubt, as to . . . 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") *abrogated on other grounds by Woodson v. North Carolina*, 428 U.S. 280 (1976).

The major political party affiliation requirement is constitutional as argued above, but, if not, there is no reason to throw out the baby with the bathwater. The bare majority provision, while not as effective as the combination of the two components together, as the Third Circuit correctly recognized,[7] nevertheless

[7] As the Third Circuit explained in rejecting the bare majority requirement without the limitation to the two major political parties:

> Both components operate in tandem to dictate the bipartisan 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.

would provide at least some balance to the judiciary. The bare majority requirement, alone, does apply to the Family Court and Court of Common Pleas,[8] and there is no reason to think that the adopters of the 1951 constitutional amendments would not, at a minimum, want the bare majority requirement to apply to Delaware's Supreme Court, Superior Court and Court of Chancery as well.

CONCLUSION

Delaware, with its unique judicial balance requirement, has created a judicial branch second-to-none, free from claims of partisanship and political bias. This is no accident. By taking politics into account in selecting its judiciary, Delaware has removed politics from the perception and operation of its judiciary. By taking political affiliation into account, Delaware has ensured that its judiciary never strays too far in one direction or the other, and, as a result, Delaware's judiciary enjoys a sterling reputation. Justice Brandeis once said that "a single courageous State may, if its citizens choose, serve as a laboratory," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), and here Delaware has done just that. "Praise for the Delaware judiciary is nearly universal, and it is well deserved." *Adams*, 922 F.3d at 186.

Adams, 922 F.3d at 184. This is no doubt why, when the Supreme Court was created as a new, separate court, the two major party requirement was also added to the Delaware Constitution.

[8] The Delaware Constitution was amended in 2005 to require that no more than a bare majority of judges on the Family Court and the Court of Common Pleas be of the same political party. For reasons unexplained, the requirement for an appointee to be a member of a major political party was not included. 75 Del. Laws ch. 53 (2005).

Respondent's First Amendment claims, to the extent that a lawyer and potential judge has such claims, must and do give way to Delaware's desire to ensure a bipartisan bench. Judges, particularly state court judges acting in the common law tradition, are policymakers. As such, the exception for policymakers articulated in *Elrod* and *Branti,* and as followed by the Sixth and Seventh Circuits in *Newman v. Voinovich* and *Kurowski v. Krajewski*, controls, and the Delaware constitutional provisions should be upheld.

To the extent the Third Circuit believed *Elrod* and *Branti* inapplicable here, because those cases deal with executive branch employees and whether such employees' political affiliation matters for policymaking positions in the executive branch, the Third Circuit should nevertheless still be reversed. Here, the question is not one of limiting partisan behavior in a state's hiring of executive branch employees, rather it is ensuring bipartisan membership in the staffing of a state's judicial branch, and removing the perception of politics, as much as possible, from judicial decisions. As First Amendment rights are never absolute, they must give way to Delaware's desire for a bipartisan bench, and this is particularly true for common law state court judiciaries.

Respectfully submitted,

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