THE BARE-MAJORITY REQUIREMENT OF THE DELAWARE JUDICIARY AND ITS UNFORTUNATE VIOLATION OF THE FIRST AMENDMENT

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> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.
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> —Justice Robert H. Jackson[1]

INTRODUCTION

The State of Delaware operates a system of judicial nomination that violates the First Amendment, despite its worst efforts to reconcile the competing provisions. It is well established that the government cannot discriminate based on political ideology, unless the position is one that constitutes policymaking.[2] The clarity of the

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[1] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[2] *See* Elrod v. Burns, 427 U.S. 347, 372–73 (1976); Branti v. Finkel, 445 U.S. 507, 518

principle does not carry over into the clarity of its application.[3] The First Amendment has developed a long way since Justice Jackson's opinion in *Barnette*, but the Supreme Court of the United States has yet to address a fundamental question that will impact the very seats the justices sit in: whether judges are policymakers and therefore do not have First Amendment protections.[4]

This Note will attempt to remedy the circuit split on the issue of whether judges are policymakers for purposes of the First Amendment, and if they are not—as this Note concludes—whether the Delaware Constitution is in violation of the First Amendment through its major-party and bare-majority requirement.

First, this Note will analyze the development of the only challenge to article IV, section 3 of the Delaware Constitution as it proceeded from the U.S. District Court for the District of Delaware to the U.S. Supreme Court where it was thrown out on standing.[5] Second, this Note will argue that judges are not policymakers under *Elrod* and *Branti*, and therefore, deserving of First Amendment protections.[6] The major-party provision is unconstitutional because it places a one of two party requirement on judicial seats.[7] Further, the bare-majority requirement is not severable since in order to keep a bare majority, some seats will become subject to the requirement to be of one political party.[8]

Third, this Note will argue that given the sophistication of the bar in Delaware, specifically the corporate bar, and the recognized need by the legislature and the governor to keep business in the state as a source of revenue and power, judicial nominees will remain non-partisan even after removing the provisions.[9]

The text of the Delaware State Constitution article IV, section 3 is as follows:

> Appointments to the office of the State Judiciary shall at all times be subject to all of the following limitations:
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> 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.

(1980); Rutan v. Republican Party of Ill., 497 U.S. 62, 79 (1990); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 726 (1996).

[3] *See Elrod*, 427 U.S. at 372–73; *Branti*, 445 U.S. at 518; *Rutan*, 497 U.S. at 79; *O'Hare Truck Serv.*, 518 U.S. at 726.

[4] *See generally* Carney v. Adams (*Adams IV*), 592 U.S. 53 (2020).

[5] *See infra* discussion Part I. *See generally* Adams v. Carney (*Adams I*), C.A. No. 17-181-MPT, 2017 WL 6033650 (D. Del. Dec. 6, 2017); Adams v. Governor of Delaware (*Adams III*), 922 F.3d 166 (3d Cir. 2019); *Adams IV*, 592 U.S. at 53.

[6] *See infra* discussion Part II.

[7] *Id.*

[8] *Id.*

[9] *See infra* discussion Part III.

> Second, . . . 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.[10]

There are two provisions from the text at issue: the major-party requirement and the bare-majority requirement.[11] In order to ensure that the judiciary would be non-partisan, the Delaware Constitution was amended in 1897.[12] This amendment, along with Delaware's favorable corporate tax, may have contributed to the state's attractiveness for business incorporation.[13] These provisions went unchallenged until 2017.[14] For more than 100 years, through development of the First Amendment in the Supreme Court, Delaware provided an explicit party membership requirement for the judiciary in the First State.[15]

I. *CARNEY V. ADAMS*

A. District Court

In 2017, James Adams sued Governor John Carney for declaratory judgment and injunctive relief under 42 U.S.C. § 1983.[16] Adams, until 2017, was a registered Democrat.[17] He then changed his registration to Independent.[18] Adams worked for the Department of Justice in Delaware until 2015.[19] Delaware selects judges through gubernatorial nomination and senate confirmation, not unlike the process for nomination of Article III judges.[20] Delaware, however, has a screening process prior to the governor's nomination.[21] This process involves a Judicial Nominating Commission,

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[10] DEL. CONST. art. IV, § 3. For a full reprint of the current statute, see Appendix A.

[11] Note that the two provisions are not explicitly separate in the Delaware Constitution but have been read as two separate requirements. *See Adams I*, C.A. No. 17-181-MPT, 2017 WL 6033650, at *2 (D. Del. Dec. 6, 2017); *Adams III*, 922 F.3d 166, 171 (3d Cir. 2019).

[12] *Adams I*, 2017 WL 6033650, at *1; *see also* Steven D. Schwinn, *Does the First Amendment Permit a State to Specify and Define the Composition of State Courts by Reference to the Political Party of the Judges?*, 47 PREVIEW U.S. SUP. CT. CASES 23 (2020).

[13] Chauncey Crail et al., *Why Incorporate in Delaware? Benefits & Considerations*, FORBES (Feb. 15, 2024, 7:51 PM), https://www.forbes.com/advisor/business/incorporating-in-delaware/ [https://perma.cc/W3Z9-N9ML].

[14] *See generally Adams I*, 2017 WL 6033650.

[15] *See id.*

[16] *Id.* at *1.

[17] *Id.* at *2.

[18] *Id.*

[19] *Id.*

[20] *Compare* DEL. CONST. art. IV, § 3, *with* U.S. CONST. art. III, § 1, *and id.* art. II, § 2.

[21] *Adams I*, 2017 WL 6033650, at *2.

created by executive order, to give the governor a preselected group of individuals with high qualifications to choose from.[22] The Commission will notify potential candidates when a position becomes available.[23] This function was used twice in relation to Adams's suit.[24] Adams received his first vacancy notice on February 14, 2017, after the retirement of the Honorable Robert Young, and a second on March 20, 2017, after the retirement of Justice Randy J. Holland for the Supreme Court.[25] Both positions, due to the makeup of the courts and the political party of the judges creating the vacancy, would require a Republican to fill the seat under the then-existing version of article IV, section 3.[26] This commission process is similar to the informal process used by some Republican presidents in nominating judges.[27] Specifically, President Trump relied on the Federalist Society to help select his judicial nominees and even ran on this campaign promise in 2016.[28] While the process used by presidents does not carry the neutrality that the Judicial Nomination Commission appears to have, this vetting process adds another layer of similarity between the federal and Delaware models for judicial selection.[29] Both commissions in effect become partisan, with the Delaware Commission needing to conform to article IV, section 3, limiting the pool of potential judges to a specific political party.

The Commission barred Adams from applying to both the vacant Family Court judgeship and the Supreme Court justice position.[30] Before Adams was a registered Independent voter, he had applied to be the Family Court Commissioner, but he did

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See* Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017, 10:12 AM), https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html [https://perma.cc/MXZ7-H9FT] (commenting on President Trump's claim during his 2016 election campaign he would select only Justices recommended by the Federalist Society, and how he coordinated with the Federalist Society to choose his first pick: Neil Gorsuch); *see also* Sheldon Whitehouse, *The Third Federalist Society*, SHELDON WHITEHOUSE (Mar. 28, 2019), https://www.whitehouse.senate.gov/news/speeches/the-third-federalist-society [https://perma.cc/2594-TSQJ] ("What's a little weird about this is that nearly 90% of Trump's appellate judges, and both his Supreme Court justices, are members of the so-called Federalist Society. On the Supreme Court, Kavanaugh, Gorsuch, Alito, Thomas . . . all are members . . . . What's really weird is that through this Federalist Society vehicle, big special interests are picking federal judges."); *The Conservative Club That Came to Dominate the Supreme Court*, HARV. GAZETTE (Mar. 4, 2021), https://news.harvard.edu/gazette/story/2021/03/in-audiobook-takeover-noah-feldman-lidia-jean-kott-explore-how-federalist-society-captured-supreme-court/ [https://perma.cc/N6ET-2M3E] (discussing Noah Feldman's audiobook on the Supreme Court Justices' membership in the Federalist Society).

[28] *See* Baum & Devins, *supra* note 27.

[29] *Adams I*, 2017 WL 6033650, at *2.

[30] *Id.*

not get the position.[31] The initial suit, filed on February 21, 2017, was amended on April 10, 2017.[32]

Governor Carney then filed a motion for summary judgment.[33] The court, in an order written by Chief Magistrate Judge Mary Pat Thynge on December 6, 2017, determined that there was an "actual and immediate threat of future injury," which was "concrete and particularized."[34] The district court found that Adams was barred as a matter of political affiliation from applying to a position, and therefore, he had suffered an injury.[35] The discussion of standing in Judge Thynge's opinion is marginal at best compared to the discussion of the policymaking exception to the First Amendment.[36] Standing is almost assumed, which is important to the final disposition of the case because the Supreme Court—in a unanimous opinion by Justice Breyer, eleven pages in length—decided that there is no standing.[37]

The district court determined:

> The United States Supreme Court has established that political belief and association are at the core of First Amendment protections. Governmental employees can not be terminated or asked to relinquish their "right to political association at the price of holding a job." "Patronage . . . to the extent that it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment." This right of political affiliation has been expanded to government employees regarding their promotion, transfer, and hiring.[38]

The court applied the Supreme Court's formulation in *Elrod* and *Branti*, which allows policymaking positions to be conditioned based on political party without offending the First Amendment.[39] Judge Thynge further noted that "[a] difference in political affiliation is only a proper factor in making employee decisions if it is highly likely 'to cause an official to be ineffective in carrying out the duties and responsibilities of the office.'"[40] The court held judges were not subject to the exception.[41]

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[31] *Id.*

[32] *Id.* at *1.

[33] *Id.* at *1, *3.

[34] *Id.* at *3.

[35] *Id.* at *4.

[36] Only one page is utilized for standing, yet three are on the merits. *See id.* at *3–6.

[37] *See generally Adams IV*, 592 U.S. 53 (2020).

[38] *Adams I*, 2017 WL 6033650, at *4 (quoting Elrod v. Burns, 427 U.S. 347, 356–57 (1976)).

[39] *Id.*

[40] *Id.* (quoting Waskovich v. Morgano, 2 F.3d 1292, 1297 (3d Cir. 1993)).

[41] *Id.* at *6.

The analysis of the District of Delaware is important. It could be assumed that this decision would be uniform across the country because the role of judges would be the same. But this is not the case. Judges' roles differ from state to state. The Delaware Judges' Code of Judicial Conduct indicates that judges should not let political opinions or affiliation dictate decisions, nor should they be involved in political organizations.[42] The district court found that this was evidence that Delaware intended for judges to be nonpolitical.[43] The conduct code fulfills a state constitutional requirement from article IV, section 3.[44] This section requires the Delaware Supreme Court to adopt Canons of Judicial Ethics which may be used to remove judicial officers after repeated violations.[45] The district court found this to be a clear indication that Delaware judges are intended to be nonpolitical.[46]

This ignores that the Delaware constitutional provisions at issue here, the bare-majority and the major-party requirements, were also enacted as indicators of the opinion of Delawareans on the role of the judiciary. If the legislature found it necessary to politically balance the courts, it could then be argued this indicates that the legislature thought judges *do* have policymaking authority. Additionally, the Code of Judicial Conduct was adopted by the supreme court, whereas the state constitution was adopted through the legislature.[47] This is an incorrect interpretation of the Delaware Constitution. The provisions are not indications of the desire for judges to engage in policymaking. In fact, it is an extra guard *against* judges engaging in policymaking. It becomes difficult to square the argument of the district court since, essentially, in trying to remove the politicization of judges, the legislature has indicated that they are not policymakers; therefore, eliminating the *Elrod*/*Branti* exception to First Amendment protections.[48]

The district court distinguished the Delaware codification of neutral judges from the Sixth Circuit's opinion in *Newman v. Voinovich*, and the Seventh Circuit's opinion in *Kurowski v. Krajewski* on their facts.[49] Again, this points to the need to consider the intent of the office. Specifically, the court cited Canon 4 of the Judges' Code of Judicial Conduct, which notes that the judiciary must not engage in political

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[42] *Id.* (citing DEL. JUDGES' CODE JUD. CONDUCT R. 2.4(A)–(B) Canon 4).

[43] *Id.*

[44] DEL. JUDGES' CODE JUD. CONDUCT pmbl. 7 (2008).

[45] *Id.*

[46] *Adams I*, 2017 WL 6033650, at *6.

[47] *Adams III*, 922 F.3d 166, 169–70 (3d Cir. 2019).

[48] *See* Elrod v. Burns, 427 U.S. 347, 357 (1976) (holding "patronage dismissals" unconstitutional under the First and Fourteenth Amendments); Branti v. Finkel, 445 U.S. 507, 518–20 (1980) (holding the test "is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved").

[49] *Adams I*, 2017 WL 6033650, at *5–6 (first citing Newman v. Voinovich, 986 F.2d 159, 160 (6th Cir. 1993); and then citing Kurowski v. Krajewski, 848 F.2d 767, 768–69 (7th Cir. 1988)).

activity.[50] The policymaking exception under *Branti* and *Elrod* does not apply to judges because they interpret law, they do not create or amend it.[51]

B. Third Circuit

Governor Carney appealed the decision of the district court to the Third Circuit.[52] In an opinion written by Judge Julio Fuentes, the court affirmed in part and reversed in part.[53] Unlike *Adams I*, the Third Circuit found that Adams did not have standing to challenge the provisions of article IV, section 3, of the Delaware Constitution that only contain a bare-majority requirement.[54] The party requirement provisions do not apply to the Family Court and the Court of Common Pleas.[55] Since the bare-majority requirement does not explicitly exclude independents and other third-party applicants from a seat on the judiciary, Adams did not suffer any harm under the *Lujan* test for Article III standing.[56] As will be addressed later, this rationale fails to consider that the effect of a bare-majority requirement will be to politicize the minority seats on the bench, making it a major-party requirement in application. Additionally, Judge Fuentes reversed on the prudential standing grounds articulated by the district court.[57] Prudential standing is a restriction on a court's ability to hear a case; it does not grant standing when there otherwise is no subject matter jurisdiction.[58]

On the merits, the Third Circuit determined that judges did not fall under the policymaking exception.[59] The Third Circuit interpreted the Supreme Court's decision in *Branti* as deviating from the policymaking formality of *Elrod*.[60] The test is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[61] Judges are not appointed to carry out the political programs of the hiring authority: the Governor.[62] The Third Circuit referred to two codifications of the principle of judicial independence, the first being from the American Bar Association's Model Code of Judicial Conduct, and the second from the Delaware Code of Judicial

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[50] *Adams I*, 2017 WL 6033650, at *6.

[51] *See id.*

[52] *See generally* Adams v. Governor of Del. (*Adams II*), 914 F.3d 827 (3d Cir. 2019), *reh'g granted, vacated*, *Adams III*, 922 F.3d 166 (3d Cir. 2019).

[53] *Adams III*, 922 F.3d 166, 184–85 (3d Cir. 2019).

[54] *Id.* at 174–75.

[55] *Id.* at 174.

[56] *Id.* at 173–75.

[57] *Id.* at 175.

[58] *Id.*

[59] *Id.* at 181 (finding both elected and nominated judges do not fall under the exception).

[60] *Id.* at 177.

[61] *Id.* (quoting Branti v. Finkel, 445 U.S. 507, 518 (1980)).

[62] *See id.* at 178–79.

Conduct.[63] In addition, the Third Circuit noted that the Delaware Supreme Court has stated judges "must take the law as they find it, and their personal predilections . . . have no place in efforts to override properly stated legislative [agenda]."[64]

The court reasoned that judges are not appointed based on a political agenda either because the governor, under both provisions, will be required to appoint judges from opposing political parties.[65] This argument is circular. The only reason the Governor appoints from both parties is because of the provisions of the act which the court finds unconstitutional. The unconstitutional provision created the nonpolitical history required to find the provision unconstitutional. Finally, the Third Circuit noted when judges are nominated, they exercise their independent judgment, and therefore, cannot be considered policymakers under *Branti*.[66]

Even after finding judges are not policymakers under *Elrod/Branti*, Governor Carney could still prevail if it was found that the state of Delaware satisfied strict scrutiny under the First Amendment.[67] Governor Carney argued that the state had a compelling interest in achieving a politically balanced judiciary.[68] Although political balancing may be permissible in the context of the federal administrative state, the Third Circuit found that the judiciary was different.[69] In the context of the judiciary it does not make the judgment of individual members impartial.[70] The Third Circuit ultimately did not rest its decision on whether it was a vital state interest, but instead found that the major-party provision was not narrowly tailored because political balance can still be achieved by allowing minority parties such as independents.[71]

Judge Fuentes determined that the major-party provision was not severable from the bare-majority provision.[72] While Adams did not have standing to challenge the bare-majority provision, because it was not severable from the major-party provision, both provisions were invalidated for the supreme, chancery, and superior courts.[73] The court found that the bare-majority provision could stand on its own, but only if it was originally enacted on its own.[74] This was the case for the Delaware Court of Common Pleas and Family Court.[75] Recall that the language is tied together

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[63] *Id.* at 179.

[64] *Id.* (quoting Leatherbury v. Greenspun, 939 A.2d 1284, 1292 (Del. 2007)).

[65] *Id.*

[66] *Id.* at 179–80.

[67] *Id.* at 181–82 (quoting Rutan v. Republican Party of Ill., 497 U.S. 62, 74 (1990)).

[68] *Id.*

[69] *Id.* at 182 ("[U]nlike elected officials and agency representatives who explicitly make policy, judges perform purely judicial functions.").

[70] *Id.*

[71] *Id.* at 183.

[72] *Id.* at 183–84.

[73] *Id.*

[74] *Id.* at 183.

[75] *Id.*

for the higher courts, with no distinct separation.[76] The Third Circuit took a drastic step. Adams did not have standing to challenge the bare-majority provision, and it is allowed to stand on its own,[77] but the court determined legislative intent for the provisions to be construed together with little evidence.[78] However, for reasons that will be argued in Part II, the bare-majority requirement is not severable, nor can it stand on its own because functionally it would politicize minority seats.

C. Supreme Court

The Supreme Court of the United States granted Governor Carney's petition for writ of certiorari on December 6, 2019.[79] The Court, on December 10, 2020, decided that Adams did not have standing to challenge any provision of article IV, section 3, and therefore reversed in part and affirmed in part the Third Circuit's decision.[80] Writing for a unanimous Court, Justice Breyer found that because Adams could not demonstrate that he would have applied without the provision, beyond his own personal statements of intent, he had not suffered an injury-in-fact required under Supreme Court precedent for Article III standing.[81]

If Adams does not have standing, who does? This Note has refrained from questioning the rationale of the Third Circuit in determining that Adams did not have standing to challenge the bare-majority requirement on its own to consider the consequences of the Supreme Court finding Adams does not have standing to challenge *any* provision of article IV, section 3. It appears, given the timeline, that Adams changed party membership from Democrat to Independent in order to challenge the provisions because of a law review article that he read.[82] He changed party affiliation just weeks before filing the complaint and was inactive in the bar until one year before filing the complaint.[83] What timeline would be sufficient for demonstrating the intent to be a judge?

Justice Breyer notes that Adams not knowing what judicial positions may become open in the next year was negative evidence.[84] However, Adams could not know when there may be a judicial availability, as seats can suddenly become open.

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[76] *See* Appendix A.

[77] *See Adams III*, 922 F.3d at 175 ("[The bare-majority] component, however, creates a ceiling for members of the same political party; it does not create a floor entitling them to a certain number of judicial seats.").

[78] *Id.* at 184. The court cites to *Matter v. Oberly*, which the court describes in a footnote as "explaining that severance is only possible if the residual component has 'separate purpose and independent legislative significance.'" *Id.* at 184 n.87 (citing Matter v. Oberly, 524 A.2d 1176, 1182 (Del. 1987)).

[79] *See* Carney v. Adams, 140 S. Ct. 602 (2019) (granting petition for writ of certiorari).

[80] *Adams IV*, 592 U.S. 53, 55 (2020).

[81] *Id.* at 63.

[82] *Id.* at 62.

[83] *Id.*

[84] *Id.*

Adams could not offer any evidence to rebut the "negative evidence" other than his own statements that he wanted to be a judge.[85]

Much of what Adams would have to prove is impossible because of the very law that Adams is challenging. He cannot formally apply because the law says he must be a Democrat or a Republican. The Court also ventures down a dangerous path in questioning Adams's political convictions, suggesting that he does not truly align with the Independent Party as he was a lifelong Democrat.[86] By this rationale, in order to challenge a potential violation of the First Amendment, you must have been aligned with your political party for a long time.

The Court also seems to ignore its own precedent. It notes that in *Gratz v. Bollinger*, a plaintiff had standing to challenge a college's admission program when they applied in the past and planned on doing so again.[87] Adams did apply to judicial positions in the past.[88] Yes, it was when he was a Democrat, but his change in political party membership should not affect his desire for the position.[89] The Supreme Court vacated the decision of the Third Circuit.[90]

D. The Agreement and Subsequent Remedial Measures

On the day that the Supreme Court issued its opinion, Adams filed a new lawsuit in the District Court for the District of Delaware.[91] The Supreme Court stated that Adams would have to show more readiness to apply for the judgeship beyond his mere personal statements of intention to do so.[92] Adams's amended complaint addressed these requirements.[93] Adams stated he now had a plan for seeking a judgeship, focusing on the Delaware Superior Court and Court of Common Pleas where judges would not be seeking re-election.[94] He also regionally restricted his applications to New Castle County.[95] By this time, Adams amassed evidence of numerous occasions where he applied and had been rejected for nominations.[96] In his complaint, Adams contended he applied for the Superior Court in 2017, and the Court of Common Pleas in 2018, 2020, and 2021.[97] Judge Maryellen Noreika found that this

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[85] *Id.*

[86] *See id.* at 63.

[87] *Id.* at 65 (citing Gratz v. Bollinger, 539 U.S. 244 (2003)).

[88] *Adams III*, 922 F.3d 166, 172 (3d Cir. 2019).

[89] *See id.*

[90] *Adams IV*, 592 U.S. at 66.

[91] Adams v. Carney (*Adams V*), C.A. No. 20-1680 (MN), 2022 WL 4448196, at *3 (D. Del. Sept. 23, 2022).

[92] *Adams IV*, 592 U.S. at 64–66.

[93] *Adams V*, 2022 WL 4448196, at *9.

[94] *Id.* at *3.

[95] *Id.*

[96] *Id.*

[97] *Id.*

was enough to satisfy the intent that the Supreme Court was looking for to satisfy standing.[98] Judge Noreika did not reach the merits in this memorandum opinion.[99]

On January 30, 2023, Governor Carney agreed that the major-party requirement was unconstitutional.[100] The District Court for the District of Delaware certified the consent agreement between Adams and Carney.[101] The agreement, signed by Judge Noreika, left the bare-majority requirement in place.[102] Essentially the agreement severed the major-party requirement from the bare-majority requirement. This seems to be impossible, and indeed the Third Circuit noted so explicitly in its opinion from the first litigation; however, it is no longer binding authority because that opinion was rendered moot by the Supreme Court's finding that Adams previously did not have standing to challenge either provision of article VI, section 3.[103]

Following the consent agreement, the Delaware House of Representatives introduced a bill to amend article IV, section 3.[104] The bill, however, does not focus on eliminating the major-party provision, nor does it in any effect eliminate the bare-majority requirement.[105] The bill attempts to remedy the lack of Southern representation on the Delaware Supreme Court.[106] The original intent of the 1897 provision was to create balance so that the judiciary would remain nonpolitical and foster growth in the corporate economy of the state.[107] This helped with surface level differences but regional differences may have a similar, if not greater, effect on Delawareans' lives. The Northern versus Southern divide mirrors greatly the original divide in this country between Southern agrarian states and Northern merchant or

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[98] *Id.* at *6 ("[T]he record evidence demonstrates that Plaintiff has applied to multiple judgeships and has developed a plan to apply to future judgeships. Accordingly, the Court's inquiry requires analysis of material facts that were missing from *Adams I*, and the parties will not be relitigating the identical issue previously decided.").

[99] *Id.* at *10.

[100] Debra Cassens Weiss, *Delaware's Major-Party Requirement for Judges on Top State Courts Won't Be Enforced Under Consent Decree*, ABA J. (Feb. 1, 2023, 9:23 AM), https://www.abajournal.com/news/article/delawares-major-party-requirement-for-judges-on-top-state-courts-wont-be-enforced-under-consent-decree [https://perma.cc/4VT8-4F3L].

[101] Stipulated Consent Judgment and Order at 5–7, Adams v. Carney (D. Del. Jan. 30, 2023) (C.A. No. 20-1680-MN) [hereinafter Consent Agreement]; *see also* Tom Hals, *Delaware to Allow Judges from Minor Parties or Independents*, REUTERS (Jan. 30, 2023, 5:48 PM), https://www.reuters.com/world/us/delaware-allow-judges-minor-parties-or-independents-2023-01-30/ [https://perma.cc/R68T-LHB2]; Ellen Bardash, *Carney Agrees to Settle Lawsuit Over Party on Delaware Courts*, LAW.COM (Jan. 30, 2023, 3:25 PM), https://www.law.com/delawarelawweekly/2023/01/30/carney-agrees-to-settle-lawsuit-over-party-balance-on-delaware-courts/ [https://perma.cc/CF52-LEHD]; Weiss, *supra* note 100.

[102] Consent Agreement, *supra* note 101, at 5–6.

[103] *See Adams III*, 922 F.3d 166, 184 (3d Cir. 2019); *Adams IV*, 592 U.S. 53, 66 (2020).

[104] H.B. 237, 152d Gen. Assemb. (Del. 2023).

[105] *Id.* § 3(b)(1)–(2); *see* Appendix B.

[106] *See* Del. H.B. 237.

[107] *Adams III*, 922 F.3d at 169–71.

business states.[108] The interests of the two are very different. The current supreme court has four justices from New Castle County, the northern county where Wilmington is located.[109] There is only one justice from Sussex County, the most agrarian and where most of the chicken farms are located.[110] There are no justices from Kent County, the middle county where the capital Dover is located.[111]

While differences in political party were accounted for, there is a great divide in cultural differences between the counties in the states. Once Governor Carney replaced the last remaining Kent County justice, Justice James T. Vaughn, with Justice N. Christopher Griffiths, there were no Kent County justices, leaving a hole in representation on the court.[112] The proposed bill, sponsored by Representative Lynn and Senator Buckson, can be found in full in Appendix B.[113]

This bill would remedy the major-party provision, as it removes any language referring to party membership requirements.[114] That is the easy fix. It does not remove the *effect* of the bare-majority provision. The original language relevant to the bare-majority provision for the Supreme Court was "[f]irst, 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."[115] The revised language says "not more than 4 of 7" can be of the same major political party.[116] This is a bare majority. While the language changed to reflect the removal of the major-party requirements and to reflect the updated number of seats for the new supreme court, the practical effect remains the same where seats will be subject to political party analysis.[117] Therefore, any analysis provided in this Note on the current unconstitutionality of the bare-majority requirement will apply to this bill if passed without amendment.

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[108] *See* Richard L. Gaw, *The (Not So) Great Divide*, DEL. TODAY (Oct. 12, 2009), https://delawaretoday.com/uncategorized/the-not-so-great-divide/ [https://perma.cc/X8FU-VUMW].

[109] Del. H.B. 237, at *4; *see also Judicial Officers*, DEL. CTS., https://courts.delaware.gov/supreme/justices.aspx [https://perma.cc/62Q4-P75H] (last visited Apr. 17, 2025).

[110] Justice Gray F. Traynor is the only justice from Sussex County. He took the bench in 2017. *See id.*; *Success Story: Perdue Farms*, DEL. PROSPERITY P'SHIP, https://www.choosedelaware.com/success-stories/perdue-farms/ [https://perma.cc/G6VH-38AU] (last visited Apr. 17, 2025).

[111] The last justice from Kent County was Justice James T. Vaughn, Jr., who retired from the bench in May of 2023. His seat was filled by Justice Abigail M. LeGrow, to fulfill the bare-majority provision by nominating a Democrat to replace a Democrat. Charlie Megginson, *Longtime Delaware Supreme Court Justice to Retire*, DEL. LIVE (Nov. 29, 2022), https://delawarelive.com/supreme-court-vaughn-retirement/ [https://perma.cc/8NMR-BHX8].

[112] *See supra* note 109.

[113] *See* Del. H.B. 237; *see also* Appendix B.

[114] *See* Del. H.B. 237 § 3(b)(1)–(2); *see also* Appendix B.

[115] DEL. CONST. art. 4, § 3.

[116] Del. H.B. 237 § 3(b)(1); *see also* Appendix B.

[117] Del. H.B. 237 § 3(b)(1).

II. THE VIOLATION OF THE FIRST AMENDMENT

A. Is There a Violation of the First Amendment with the Major-Party Requirement? The Circuit Split

The Third Circuit created a split over the determination of whether judges are policymakers under *Elrod/Branti*. In effect, the split does not stand after the Supreme Court reversed the Third Circuit and ruled that Adams had no standing.[118] As we have seen, however, the Governor and the district court followed the determination by the Third Circuit in committing to the agreement with Adams that the major-party provision was unconstitutional and severable.[119] There is, at least in theory, still a split among the circuits; one that has yet to be resolved by the Supreme Court.

To date, only three circuits have addressed the issue of whether judges are policymakers.[120] This means that while the Third Circuit did stand alone in its decision, the majority, which holds that judges are policymakers, is a "bare majority."[121] There are two other relevant cases discussing whether judges are policymakers under *Elrod*/*Branti*. First, the District Court for the District of Arizona, in *Carroll v. City of Phoenix*, followed the *Newman* and *Kurowski* decisions and found that city municipal court judges were policymakers because of the large jurisdiction, technical expertise, substantial power, and the public perception of judges making policy.[122] None of these factors are relevant to the ultimate inquiry under *Branti* of whether conditioning employment on political affiliation is essential to the execution of the office, and therefore this Note will not discuss this case in any great depth.[123] Additionally, the case was decided in 2007, over a decade before the Third Circuit's decision in *Adams III* which created a circuit split.[124] The District Court for the District of Arizona's decision came at a time when the circuits who had spoken on the issue were unanimous.[125]

The other relevant decision worth mentioning before discussing *Kurowski* and *Newman* is *Haddock v. Tarrant County*.[126] In *Haddock*, the Fifth Circuit initially

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[118] Zach Hullinger, *Are Judges Policymakers?: A Constitutional Rebuff to Judicial Reform*, 89 U. CIN. L. REV. 157, 163–65 (2020).

[119] *See* Consent Agreement, *supra* note 101.

[120] Newman v. Voinovich, 986 F.2d 159, 161–63 (6th Cir. 1993); Kurowski v. Krajewski, 848 F.2d 767, 769–71 (7th Cir. 1988) (dismissing the case on judicial immunity grounds, as the suit was commenced pursuant to 28 U.S.C. § 1983); *Adams III*, 922 F.3d 166, 178–81 (3d Cir. 2019).

[121] *See Newman*, 986 F.2d at 163; *Kurowski*, 848 F.2d at 770.

[122] No. CV-07-00148-PHX-NVW, 2007 WL 1140400, at *11 (D. Ariz. Apr. 17, 2007).

[123] *See* Branti v. Finkel, 445 U.S. 507, 519–20 (1980); *see also supra* note 51 and accompanying text.

[124] *See generally Adams III*, 922 F.3d 166.

[125] *See generally Carroll*, 2007 WL 1140400.

[126] 852 F. App'x 826 (5th Cir. 2021).

determined that an associate judge of the family court was a policymaker under *Elrod*/*Branti*.[127] This opinion was withdrawn and the court narrowed its holding such that Haddock was a confidential employee and did not discuss whether she was a policymaker.[128] The original disposition dismissed *Adams III* as an exception given Delaware's statutory mandate.[129]

The Seventh Circuit in *Kurowski v. Krajewski* upheld the removal of two Democrat state public defenders by a Republican judge, appointed by a Republican Governor.[130] The positions were filled by Republicans.[131] While under *Branti* public defenders are not policymakers because they are advocates for their clients, public defenders in Indiana have the ability to serve as "judge *pro tempore*."[132]

In an opinion by Judge Frank Easterbrook, the court determined that "[a] judge both makes and implements governmental policy."[133] In a singular paragraph, Judge Easterbrook applied the *Elrod*/*Branti* formulation to the role of judge *pro tempore* in Indiana.[134] Judges *pro tempore* are selected from existing members of the bar, by a sitting judge.[135] Judge Easterbrook concluded it was correct to allow judges to choose judges *pro tempore* who would execute their intended policy.[136] Judge Easterbrook seems to argue that the actions of the judge in the case are constitutional because they are a good exercise of power.[137] He also based much of his conclusion on the mere fact that in many states judges are elected.[138]

If Judge Easterbrook's contention is that judges are policymakers solely because he finds that they make and implement policy—without any citations to cases, statutes, dictionaries, law review articles, nor *any* citation for that matter—and that they have the ability to hire people that agree with them, the Seventh Circuit alone would seem to lose the split to the Third Circuit's detailed analysis on the role of judges.[139] Importantly, as in *Adams III*, much of the decision rests on either the role of judges in the respective states, or the manner of appointment, suggesting this question may not be one with a uniform answer.[140]

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[127] Haddock v. Tarrant Cnty., 986 F.3d 893, 898, 900 (5th Cir. 2021), *withdrawn and superseded*, 852 F. App'x 826 (5th Cir. 2021).

[128] *Haddock*, 852 F. App'x at 832.

[129] *Haddock*, 986 F.3d at 899.

[130] *See* 848 F.2d 767, 768–71 (7th Cir. 1988).

[131] *Id.* at 769.

[132] *Id.* (citing Branti v. Finkel, 445 U.S. 507, 519–20 (1980)).

[133] *Id.* at 770.

[134] *Id.*

[135] *Id.* at 770–71.

[136] *Id.* at 771.

[137] *See id.* at 770–71.

[138] *Id.* at 770.

[139] *See id.*

[140] *Compare Adams III*, 922 F.3d 166, 171–72, 179 (3d Cir. 2019), *with Kurowski*, 848 F.2d at 700.

Five years after *Kurowski*, the Sixth Circuit agreed with Judge Easterbrook in *Newman v. Voinovich*.[141] The Sixth Circuit was more diligent in its analysis, but it misunderstood the intention of *Elrod*/*Branti*.[142] *Newman* suggests that the test is whether "political beliefs influence and dictate their decisions," which is a Frankenstein analysis of the Supreme Court's precedent.[143] The test is "not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[144] The court in *Newman* does cite this language but constricts most of its analysis to the *Elrod* formulation.[145] The two concepts are related. If the hiring authority can demonstrate that party affiliation is an appropriate requirement, then the political beliefs would likely influence and dictate their decisions once in office. However, the focus on which official to put much of the constitutional analysis is misplaced.

The Sixth Circuit held that consideration of political party membership in the process of interim judicial appointments in Ohio was permissible.[146] The plaintiff was an attorney who had written to the Governor to replace a resigning judge, but the Governor noted that he would only seriously consider those names submitted by Republican Chairpersons to the Governor's Special Assistant for Boards, Commissions and Judges.[147] Ohio judges, per the state's constitution article IV, section 13, are elected.[148] Appointment only happens to temporarily fill vacancies before an election may be held.[149]

The court's rationale, correctly, turned largely on the role of the Governor when making selections.[150] However, the rationale seems to be at odds with the question that the court correctly frames.[151] "[J]udges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters."[152] The court reasoned that politics are relevant to the decisions judges make, and therefore consideration of their politics is permissible in hiring.[153] Political beliefs may influence their decisions but that does not mean it is important for the execution of duties.

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[141] 986 F.2d 159, 163 (6th Cir. 1993) ("We agree with the holding in *Kurowski* that judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters.").

[142] *Compare Kurowski*, 848 F.2d at 770–71, *with Newman*, 986 F.2d at 161–63.

[143] 986 F.2d at 163.

[144] O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 719 (1996) (quoting Branti v. Finkel, 445 U.S. 507, 518 (1980)).

[145] *See* 986 F.2d at 161.

[146] *Id.* at 160.

[147] *Id.*

[148] *Id.* at 161.

[149] *Id.*

[150] *Id.* at 163.

[151] *See id.* at 161, 163.

[152] *Id.* at 163 (citing Gregory v. Ashcroft, 501 U.S. 452 (1991)).

[153] *Id.*

There is an underlying policy concern that separates the Third Circuit from the Sixth Circuit. In Ohio, gubernatorial appointments, for however brief a time, supplanted the will of the electorate. Typically, under the Ohio Constitution, the people were free to choose the best candidates.[154] In Delaware, while the governor is the one who ultimately appoints, he or she is not the one who is in violation of the Constitution. That would be the legislature.[155] Delaware's provision precludes the governor from making a constitutional choice by placing restrictions on the parties from which he may choose judicial candidates.[156]

The Third Circuit currently stands alone in correctly holding judges are not policymakers under the *Elrod*/*Branti* formation.[157]

B. The Circuit Split Should Be Resolved in Favor of the Third Circuit

> To the victor belong only those spoils that may be constitutionally obtained.[158]

Judges are not policymakers.[159] The question is aptly phrased in the Delaware Bar Association's brief of amicus curae before the Supreme Court:

> 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 . . . .[160]

Article III vests the federal judiciary with judicial power, not policymaking.[161]

What did the Court mean when it said policymaking? The issues mirror the considerations of what constitutes an "officer of the United States" under Article II, Section 2 of the U.S. Constitution.[162] The Supreme Court has stated that government officials are "officers" when they exercise "significant authority."[163] The constitutional

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[154] *Id.* at 161.

[155] *See* DEL. CONST. art. 4, § 3.

[156] *See id.*

[157] *See Adams III*, 922 F.3d 166, 180–81 (3d Cir. 2019).

[158] Rutan v. Republican Party of Ill., 497 U.S. 62, 64 (1990).

[159] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to [s]ay what the law is.").

[160] Brief for the Del. State Bar Ass'n as Amici Curiae Supporting Petitioner at 2, *Adams IV*, 592 U.S. 53 (2020) (No. 19-309) [hereinafter Brief for the Del. State Bar Ass'n].

[161] U.S. CONST. art. III, § 1.

[162] *See* Buckley v. Valeo, 424 U.S. 1, 122–24 (1976).

[163] *Id.* at 126.

principles which underlaid this distinction were that, if Congress had the ability to appoint those who would enact its laws, then it would upend the balance of separation of powers so acutely designed in our founding document.[164] Present, in the case of whether to apply the policymaking exception, is the fear of who controls the government actor. Who do we want to control the governmental actor? This is why the Court in *Branti* made sure to emphasize the importance of the role of the hiring authority.[165] The independence of the office may be of crucial importance.[166]

The Sixth Circuit's use of *Gregory v. Ashcroft* is misplaced.[167] The Sixth Circuit looked to the Supreme Court's holding in *Gregory*, where the Court determined state judges are "at the policymaking level."[168] The relevant statute was the Age Discrimination Employment Act.[169] Statutory definitions are sometimes different than constitutional ones.[170] Textually, the language is different than *Elrod*/*Branti*. Congress included all those "on the policymaking level," meaning equivalent positions that do not explicitly make policy are on the same level.[171] Justice O'Connor, writing for the majority, rested the decision on statutory interpretation and found that because there were exceptions from the words "all," it must be clear and unambiguous that Congress wanted to exclude judges.[172] Congress was not clear, so this definition included judges.[173]

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[164] *See id.* at 123.

[165] *See* Branti v. Finkel, 445 U.S. 507, 519–20 (1980); *see also supra* note 51 and accompanying text.

[166] *Compare* Brian T. Fitzpatrick, *The Case for Political Appointment of Judges*, FEDERALIST SOC'Y (Apr. 30, 2018), https://fedsoc.org/commentary/publications/the-case-for-political-appointment-of-judges [https://perma.cc/7MB7-JM9U], *with* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1541 (2010).

[167] *See* Newman v. Voinovich, 986 F.2d 159, 163 (6th Cir. 1993) (citing Gregory v. Ashcroft, 501 U.S. 452, 469 (1991)).

[168] *Id.*

[169] 29 U.S.C. § 630(f) ("The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office . . . or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.").

[170] *Compare* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding that part of the test for whether a process is a Fourteenth Amendment adjudication, therefore requiring due process, is whether the proposed rule would affect few or great amounts of people), *with* 5 U.S.C. § 551(6)–(7) (finding the Administrative Procedure Act determines an "adjudication" is an "agency process for the formulation of an order" and "order" is defined as "the whole or a part of a final disposition . . . of an agency in a matter other than rule making"). Additionally, rules must have "future effect" under the APA. 5 U.S.C. § 551(4); *see also* Energy Consumers & Producers Ass'n v. Dep't of Energy, 632 F.2d 129, 139 (1980), *cert. denied*, 449 U.S. 832 (1980).

[171] *Ashcroft*, 501 U.S. at 483 (White, J., concurring).

[172] *Id.* at 467 (majority opinion).

[173] *See id.*

Justice O'Connor discussed the arguments of whether judges make policy, including the fact that in a common law state, judges develop the law, and they create rules for their bar associations.[174] The Third Circuit correctly notes this was not central to the holding, as it rested on the fact that Congress had not explicitly excluded judges.[175] The Supreme Court itself has indicated that judges do not make policy in the same way Congress does.[176]

This argument appears to align itself with textualists and originalists. Justice Antonin Scalia wrote that judges are to impute words with their meaning at the time they were adopted and are restrained specifically to the text.[177] As such, the mechanical application of canons of textual construction will not always lead to a desired political result.[178] In fact, it should lead to the political result of those who adopted the statute. Additionally, Justice Ketanji Brown Jackson does not think that judges are policymakers and testified as such during her confirmation hearings.[179]

The Federalist Papers are helpful to this analysis.[180] Alexander Hamilton envisioned the Constitution based on the very principle that judges are not policymakers, citing to their authority to interpret laws.[181] Hamilton, in *Federalist* No. 78, notes that "it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done,"[182] this brings into question the meaning of "interpret."

The issue turns on whether interpretation is a function of making law. The Delaware Bar Association cites both Justices Holmes and Cardozo in their brief in

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[174] *Id.* at 465.

[175] *See id.* at 466 ("The statute refers to appointees 'on the policymaking level,' not to appointees 'who make policy.'"); *Adams III*, 922 F.3d 166, 179 n.64 (3d Cir. 2019).

[176] Mathews v. Lucas, 427 U.S. 495, 515 (1976) ("Nor, in ratifying these statutory classifications, is our role to hypothesize independently on the desirability or feasibility of any possible alternative basis for presumption. These matters of practical judgment and empirical calculation are for Congress.").

[177] ANTONIN SCALIA & BRYAN GARNER, READING LAW 16 (2012).

[178] *See id.* ("A textualist reading will sometimes produce 'conservative outcomes,' sometimes 'liberal' ones.").

[179] Molly Christian, *'Judges Are Not Policymakers,' Supreme Court Nominee Brown Jackson Says*, S&P GLOB. (Mar. 24, 2022), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/judges-are-not-policymakers-supreme-court-nominee-brown-jackson-says-69478378 [https://perma.cc/N7ZQ-UYEN] ("I believe that judges are not policymakers, . . . [t]hat we have a constitutional duty to decide only cases and controversies that are presented before us and that within that framework, judges exercise their authority to interpret the law, not make the law.").

[180] Fitzpatrick, *supra* note 166, at 4.

[181] THE FEDERALIST NO. 78 (Alexander Hamilton) ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

[182] *Id.*

support of Governor Carney.[183] Holmes noted that decisions will implicitly carry with them the judges' views on policy, and Cardozo noted that judges will necessarily have to fill legislative gaps.[184] Both of these, however, are to be restrained by legislative commands, and while judges may accidentally carry bias, that is true of every public position. Delaware judges are *required* to not be political by the judicial code of conduct.[185]

However, whether this is policymaking is not the only question. In fact, it may not even be the one the Court would be concerned with. At oral argument, not one Justice asked a question using the phrase "policymaker."[186]

Even if judges make policy, it may be that their authority is independent, and not tied to a program of the hiring authority.[187] Making law is not necessarily policy and implicates an important constitutional question that underlays this discussion. The policymaking exception seems to have its greatest impact in determining the difference between executive actors. Indeed, the Supreme Court has only ever decided these cases with regards to executive actors.[188] The judiciary is a separate branch. It is not part of the legislature or executive where policy is clearly made and seems to be what the Court was considering when it adopted the test in *Elrod*/*Branti*. As Chief Justice John Roberts aptly said, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges, . . . [w]hat we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them . . . . That independent judiciary is something we should all be thankful for."[189]

The Supreme Court has only applied the *Elrod*/*Branti* test on four occasions.[190] Beginning with *Elrod* in 1976, the Court held a sheriff could not fire employees that were not in policymaking positions due to political affiliation.[191] In 1980, the Court in *Branti* held public defenders did not fall under the policymaking exception.[192] Ten years later in *Rutan*, the Court applied the formulation to a hiring freeze on government

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[183] *See* Brief for the Del. State Bar Ass'n, *supra* note 160, at 6.

[184] *Id.*

[185] DEL. JUDGES' CODE JUD. CONDUCT pmbl. 7 (2008).

[186] *See generally* Transcript of Oral Argument, *Adams IV*, 592 U.S. 53 (2020) (No. 19-309).

[187] *See* Branti v. Finkel, 445 U.S. 507, 518 (1979) ("[T]he question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.").

[188] *See* Elrod v. Burns, 427 U.S. 347, 360–73 (1976); *Branti*, 445 U.S. at 517–20; Rutan v. Republican Party of Ill., 497 U.S. 62, 68–71 (1990); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 718–19 (1996).

[189] William Cummings, *U.S. Does Have 'Obama Judges': Trump Responds to Supreme Court Justice John Roberts' Rebuke*, USA TODAY (Nov. 21, 2018, 6:37 PM), https://www.usatoday.com/story/news/politics/2018/11/21/john-roberts-trump-statement/2080266002/ [https://perma.cc/35YR-EHP2].

[190] *See* THE FEDERALIST NO. 78, *supra* note 181.

[191] *See* 427 U.S. at 372–73.

[192] 445 U.S. at 519.

employees in Illinois, constituting multiple levels of government.[193] Finally, in 1996, the Court held in *O'Hare*, that independent contractors do not fall under *Elrod*/*Branti* and therefore get First Amendment protections.[194]

All the above instances are employees of the executive branch, whether state or federal. They are subject to executive authority. It may be concluded that what this means is that the judicial branch is fair game for patronage dismissals or hirings. However, the object of the rule is to constrain political firings while giving latitude to important democratic institutions.[195] There is accountability within the executive, allowing the Chief Executive to institute their programs they were presumably elected on. The Court in *Elrod* even cites to this principle articulated by the Court in *Myers v. United States*.[196] "[O]ur determination of the limits on state executive power contained in the Constitution is in proper keeping with our primary responsibility of interpreting that document."[197]

In Delaware, the legislature has constrained the executive to be political in its hirings. Instead of allowing opportunities for democratic choice and accountability, while preserving the First Amendment rights of employees, Delaware has violated both competing interests. Delaware has instituted a provision that limits the exercise of First Amendment rights by judicial officers and removed the opportunity to hire whomever the Governor sees fit. Instead, it has enshrined in its constitution for all time the codification of political party requirements for seats on its bench.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[198] It is true that in interpreting laws, policy is often affected. However, it does not mean that policy is made, nor does it mean that the political affiliations of a judge are a relevant inquiry to be codified by the legislature. Judges, in interpreting, do not express their own policy (at least that is what we envision), they express the policy of the people who enacted the law.[199] Judges swear an oath upon the Constitution, to faithfully and *impartially* discharge their duties, not to the governor, nor to the electorate's whims, but to the people's representatives and the laws which they have passed.[200]

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[193] 497 U.S. at 65, 66 (noting the governor was using the freeze "to operate a political patronage system to limit state employment . . . to those who are supported by the Republican party").

[194] O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 720–22 (1996).

[195] *See Elrod*, 427 U.S. at 374–75 (Stewart, J., concurring).

[196] *Id.* at 352–53 (majority opinion).

[197] *Id.*

[198] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[199] *See* McCulloch v. Maryland, 17 U.S. 316, 407 (1819) ("[W]e must never forget that it is *a constitution* we are expounding.").

[200] *See Marbury*, 5 U.S. at 180.

The role of judges may differ from state to state. In the original *Adams* litigation, both the Third Circuit and the District of Delaware addressed Delaware's special provisions relating to judges which distinguished them in part from Illinois and Indiana.[201]

The Sixth Circuit claims that because governors must be able to consider political opinions of the candidates they are considering for judicial appointments, that this makes judges policymakers under the *Elrod*/*Branti* inquiry.[202] The Third Circuit claims that the requirement of party membership in Delaware's Constitution is unconstitutional.[203] This initially may seem squarable, and the Third Circuit certainly thinks that these two decisions are.[204] The Third Circuit believes that there is something different for the purposes of First Amendment protections from required party considerations than considerations made by the appointer outside of mandates.[205] The Third Circuit does not suggest anywhere in *Adams III* that Governor Carney cannot consider the political opinions of the candidate when selecting judges for nomination.[206]

The court in *Newman* concluded "Governor Voinovich is free to make judicial appointments based on political considerations," which is a step away from concluding that explicitly restricting third party or independent candidates from obtaining the seat is permissive.[207] Political considerations are not the same as a prohibition or even a requirement, as the bare-majority provision would force certain seats to be reserved for one political party.

Both *Newman* and *Adams III* can be compatible with *Branti*. In the end, this is a distinction between the "freedom to choose," and the lack of freedom to choose in Delaware.[208] It does not provide the choice to consider political party affiliation. It requires certain positions to be filled by certain parties. In fact, Governor Carney *cannot* consider political affiliation because he is forced to appoint from a particular political party. There is no *Branti* hiring exercised.

It is worth noting that the Court in *Branti* seemed to imply in dicta that states may condition specific judicial seats on party affiliation.[209] The Court noted that it may be permissible for a state to condition the judges who oversee election laws to be individualized by party.[210] This was rightly dismissed by the Third Circuit, noting that state judges often act alone.[211] The court did write in a footnote, however, that

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[201] *See Adams I*, C.A. No. 17-181-MPT, 2017 WL 6033650, at *5–6 (D. Del. Dec. 6, 2017); *Adams III*, 922 F.3d 166, 179–80 (3d Cir. 2019).

[202] Newman v. Voinovich, 986 F.2d 159, 163 (6th Cir 1993).

[203] *Adams III*, 922 F.3d at 184–85.

[204] *Id.* at 180.

[205] *Id.* at 181.

[206] *See generally id.*

[207] *Newman*, 986 F.2d at 163.

[208] *See id.* at 165 (Jones, J., concurring).

[209] *See* Branti v. Finkel, 445 U.S. 507, 518 (1980).

[210] *See id.* at 518.

[211] *See Adams III*, 922 F.3d at 182.

the Delaware Supreme Court is unique in that it hears cases as a panel.[212] However those panels are not predetermined and could therefore be politically unbalanced.[213] "Further, it is difficult to see how the logic of political balance and minority representation extends from multimember deliberative bodies, like a school board, to Delaware's judiciary, most of whom sit alone."[214] This argument does somewhat avoid the problem, as judges do often act together. An alternative argument—and the one that most easily resolves the dicta—is that likely under a strict scrutiny analysis, the government does have a compelling interest to ensure that elections are not dominated by one political party, and there are no less restrictive means of accomplishing this when judges are overseeing the adjudication of election claims.

C. Severability

The bare-majority requirement is not severable from the major-party requirement.[215] The Third Circuit was correct when it determined that the provisions were enacted to further one singular goal of a non-partisan judiciary and the legislature intended them to be read together.[216] The bare-majority provision has no force without the major-party provision.[217] Different parties can be aligned politically, as the Green Party is aligned left with the Democrat, and the Republican is right with the Tea Party. Libertarians may fall towards either side. A bench could be entirely on one side of the political spectrum while one party merely held a bare majority.

The language is tied together.[218] Recall there are not two separate provisions, but one sentence that has been read as two separate requirements.[219] As a result, it may be impossible to severe just from a mere practicality standpoint in that both provisions share some of the same words in order to be effective.[220] Justice Sotomayor at oral argument in *Adams IV* asked if severability was still a bar considering the provision could theoretically remove "the remaining members of such office shall be of the other major political party."[221] However this move would not give any effect to the initial provision. It could be that a majority of the court would be three Democrats, but the others could be one Republican and one Independent. No longer is this even a bare majority, and therefore removing the major-party provision as to the minority party renders the entire bare-majority language useless.

Justice Sotomayor wrote a brief concurrence in *Adams IV*, addressing two questions that may arise when, in her view, the issue would inevitably be litigated by a

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[212] *Id.* at 182 n.80.
[213] *Id.* at 182.
[214] *Id.*
[215] *See supra* note 2 and accompanying text.
[216] *See Adams III*, 922 F.3d at 169–70.
[217] *See id.* at 184.
[218] *See id.*
[219] *See* Appendix A.
[220] *See id.*
[221] Transcript of Oral Argument at 46–47, *Adams IV*, 592 U.S. 53 (2020) (No. 19-309).

plaintiff with standing and consideration of the merits would be necessary.[222] She noted the bare-majority provision does not impose as great a burden on freedom of association as does the major-party provision.[223] Justice Sotomayor also addressed severability and noted that, historically, the Supreme Court has deferred to state courts on the severability of state laws.[224] In *Leavitt v. Jane L.*, the Court explained "[s]everability is of course a matter of state law."[225] If the issue were to be brought in federal court again, it would then be necessary to certify the severability question to the Delaware Supreme Court.

Therefore, it is important to look to Delaware's process of determining severability.[226] There must be a way to parse the statute so as to remove the unconstitutional pieces from the apparent constitutional ones.[227] There is no such way. As Justice Sotomayor pointed out in oral argument, there does appear to be language that could be taken out.[228] However, by removing "other major political party," it gives the major political party that would be made of three justices a possibility at a supermajority if the other remaining seats were of opposing parties.[229] "Other" also explicitly refers to the prior statement of "major political party."[230] Since the language is intertwined, there is no way to parse the statute so as to remove the unconstitutional pieces and therefore is inseverable.

If there must be a bare majority, it will have the effect of making seats political. The current split is three Democrats to two Republicans on the Delaware Supreme Court. If one of the Republicans were to not seek another term, the seat would have to be filled by a Republican to satisfy the bare-majority provision. Under the current agreement between Adams and the Governor, Adams would not be able to seek this position.[231] Plainly, Adams would be restricted from a judicial nomination because of his political affiliation. The major-party provision was found to be unconstitutional because of this same reason.[232]

There would be seats that would not implicate the unconstitutionality of the bare-majority provision. If a Democrat were to leave the bench, that would mean it

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[222] *Adams IV*, 592 U.S. 53, 66 (2020) (Sotomayor, J., concurring).

[223] *Id.* at 67.

[224] *Id.*

[225] 518 U.S. 137, 139 (1996) (per curiam); *see also* Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 613 (1985); *Adams IV*, 592 U.S. at 67.

[226] *See* Zebroski v. State, 179 A.3d 855, 858 (Del. 2018); State v. Spence, 367 A.2d 983, 988 (Del. 1976); *see also* Evans v. State, 872 A.2d 539, 552–53 (Del. 2005) (discussing the enforceability of severability clauses within statutes).

[227] *See* Rauf v. State, 145 A.3d 430, 433–34 (Del. 2016) (finding that the state death penalty statute not providing for determination of aggravating factors by a jury was not severable, and therefore the entire sentencing scheme was unconstitutional).

[228] *See* Transcript of Oral Argument at 47, *Adams IV*, 592 U.S. 53 (2020) (No. 19-309).

[229] *Id.*

[230] *See* Appendix A.

[231] *See* Consent Agreement, *supra* note 101, ¶ 3.

[232] *See Adams III*, 922 F.3d 166, 178–81 (3d Cir. 2019).

would be equal two Democrats and two Republicans. If Adams were to apply as an Independent, it would satisfy the bare-majority requirement.

Not only could the bare-majority requirement be unconstitutional to third parties, but unlike the major-party provision, it could be unconstitutionally applied to Democrats and Republicans. In the scenario where a Republican leaves the bench, a Democrat would be prohibited from nomination because it would create a four-to-one political imbalance. This is certainly the objective the drafters had in mind when they tied the bare-majority provision to the major-party provision. The two provisions are inextricably tied together as one program. The legislature may pass the amendment removing the major-party provision and creating a new bare-majority provision. In that case it would be unconstitutional in application, not on its face as is the major-party provision. However, the current state of the provisions is that they are part of one, inseverable program. The bare-majority provision should be found equally as unconstitutional as the major-party provision.

III. THE EFFECT ON DELAWARE'S JUDICIARY

A. If Article IV, Section 3 Is Ruled Unconstitutional in Its Entirety, the Judiciary Will Not Suffer[233]

Article IV, section 3 of the Delaware Constitution is in violation of the First Amendment, and the state must eliminate all of its political party requirements in selection of its jurists. The legislature hoped to improve the quality of the judiciary.[234] Whether because of this provision or not, the legislature got its wish, with Delaware becoming the home of 68% of the Fortune 500.[235] Amazon, Google, Walmart, Disney and American Express are all too large to ignore and losing them would be a massive hit to the state.[236] The Delaware bar is unique, and those in Delaware know how important neutral and non-polarized courts are to the success of the state.[237] The

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[233] Catherine Morris, Note, *Dealing with the Elephant in the Robe: How to Limit the Rising Role of Political Affiliation in the Judiciary Using the First Amendment*, 73 RUTGERS U. L. REV. 751, 775–76 (2021) (analyzing the circuit split and advocating for eliminating the political affiliations of judges prior to the 2023 agreement with no mention of the bare-majority requirement, using Delaware as an example for the federal judiciary).

[234] *See Adams III*, 922 F.3d at 169–70.

[235] Crail et al., *supra* note 13 ("[Ninety-three percent] of all U.S.-based initial public offerings . . . [are] all registered in Delaware.").

[236] *See id.*

[237] Chris Coons, *Carper, Coons' Judicial Candidates Nominated for U.S. District Court Bench*, CHRIS COONS (Dec. 21, 2017), https://www.coons.senate.gov/news/press-releases/carper-coons-judicial-candidates-nominated-for-us-district-court-bench [https://perma.cc/TQ2C-H2AE] (explaining Senator Chris Coons and Senator Tom Carper recommended the appointment of Judge Maryellen Noreika and Chief Judge Colm Connolly to the United States District Court for the District of Delaware; a bipartisan commission was used, and the members were of the Delaware legal community).

late Justice Randy J. Holland of the Delaware Supreme Court has discussed this practice.[238]

As a result, the governor and legislature will continue to appoint justices to the bench in a uniform way and likely stick to the major-party formula that has led to the development of Delaware corporate law since the turn of the twentieth century.[239] The appointment commission will continue to carry out the purpose of the major-party and bare-majority requirement without the requirement of political appointments that is antithetical to the original goal of the provision: to keep the courts nonpolitical.[240]

Delaware has long recognized the importance of impartiality. The legislature and the courts know the nation's business eye is trained on its every movement.[241] One need look no further than the seminal decision of *Smith v. Van Gorkom* and the ensuing reaction by the Delaware legislature.[242] Or consider the development of the duty of good faith after *Disney*.[243] In an effort to save the *Caremark* duties of oversight, the court subsumed them under the duty of good faith, and subsequently

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[238] Randy J. Holland & David A. Skeel, Jr., *Deciding Cases Without Controversy*, 5 DEL. L. REV. 115, 118 (2002) ("The Delaware Supreme Court, which has long been recognized as the definitive authority on corporate law, rarely issues separate opinions. Even on deeply controversial issues, Delaware's justices almost invariably speak with a single voice.").

[239] Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 144 PENN ST. L. REV. 217, 241–42 (2009) (noting "The Delaware Way" encourages intrabranch participation and emphasizes keeping Delaware in high regard with respect to its Judiciary, allowing it to continue to bear a badge of honor for a corporation which chooses to incorporate there).

[240] *Id.* at 243 ("[The Governor selects nominees from a list from the Judicial Nominating Commission, whose] stated purpose . . . is to select 'men and women of the highest caliber, who by intellect, work ethic, temperament, integrity and ability demonstrate the capacity and commitment to sensibly, intelligibly, promptly, impartially, and independently interpret the laws and administer justice. The Commission shall seek the best qualified persons available at the time for the particular vacancy at issue.' The Commission itself is a testament to the Delaware's 'commitment to a bipartisan judiciary composed of judges of high integrity, independence and excellent legal abilities.'"). For a response to claims that the Delaware Court of Chancery is becoming corrupt and driving away business by the co-chairs of the Delaware State Bar Association's Committee on Response to Public Comment, see Mary F. Dugan & Richard D. Kirk, *The Delaware Court of Chancery Is Essential to the First State. Here's Why*, DEL. ONLINE (June 9, 2023), https://www.delawareonline.com/story/opinion/columnists/2023/06/09/delaware-court-of-chancery-remains-essential-to-delaware/70281796007/ [https://perma.cc/7VMR-8NRN] ("Delaware is simply not losing 'major corporations' or 'major revenue.' Delaware is deservedly proud of the integrity, competence and national stature of its Court of Chancery. Delawareans may also be reassured that the prestige of this Court continues to attract corporations and other businesses, in ever-increasing numbers annually, to form under Delaware law.").

[241] *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2024).

[242] *See id.*; Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

[243] *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006).

the duty of loyalty so that it removed them from the business judgment rule.[244] These cases are not recent.[245] The long history of recognizing the importance of impartiality, and the effect these decisions have on the state, will continue without the major-party and the bare-majority requirements.[246]

CONCLUSION

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[247] There is no doubt that article IV, section 3 of the Delaware Constitution was enacted with benevolent purposes. The state has an important role in shaping the business law of the country. It is a role that cannot be taken lightly. If left on its own without safeguards, it may have ceased to hold this high admiration. However, these purposes do not allow Delaware to continue to violate the First Amendment rights of potential jurists. The provisions are not necessary to achieve the compelling interest of a politically balanced independent judiciary.

The major-party provision is inseverable from the bare-majority provision, both because the legislature intended for them to operate as a single check on partisan judges, and because the effect of the bare-majority requirement standing alone would have the near same effect as the major-party provision.

Delaware, and the nation, should not fear. While the Third Circuit should prevail over the Sixth and Seventh, the makeup of the state judiciary will not change. Delaware has now long recognized a history of distinguished, accomplished, brilliant, and dedicated jurists. They have preserved the status of the state and become so integral to its success that no governor will let this idly decay. The Delaware judiciary will continue to be made up of the finest lawyers, not just the state, but the country has to offer.

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[244] *See id.*; Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 685–88 (2010) ("*Caremark* held that directors could only be liable for failing to set up an adequate monitoring system if they were found to have acted in bad faith.").

[245] Almost twenty years has passed since the *Disney* case, and forty years since the duty of good faith was debated by the Supreme Court and the legislature.

[246] All five of the justices on the Delaware Supreme Court possess a background in business law. *Judicial Officers*, *supra* note 109.

[247] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

APPENDIX A

Delaware Constitution: Article VI, Section 3 Full Text

> 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.[248]

[248] DEL. CONST. art. 4, § 3.

APPENDIX B

Proposed Amendment to Article VI, Sections 2(a) and 3(b)

> Section 2.(a)(1) There shall be ~~five~~ 7 Justices of the Supreme Court who shall be citizens of the State and learned in the law. In addition to the qualifications for appointment to the Supreme Court under this paragraph (a)(1), an individual must, for at least 1 year immediately before the submission of an application for consideration to appointment to the Supreme Court, be a resident of the county for which the individual is required to be appointed under paragraph (a)(2) of this Section.
>
> (2) At least 2 Justices must be residents of New Castle County, at least 2 Justices must be residents of Kent County, and at least 2 Justices must be residents of Sussex County. The seventh Justice may be from any county.
>
> . . . .
>
> [Section 3] (b) Appointments to the office of the State Judiciary shall at all times be subject to all of the following limitations:
>
> (1) First, not more than ~~three of the five~~ 4 of the 7 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.~~ time shall be of the same political party.
>
> (2) 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.~~ political party.
>
> (3) 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.~~ political party.[249]

[249] Del. H.B. 237 §§ 2(a)(1)–(2), 3(b)(1)–(3).