

No. 19-309

IN THE
Supreme Court of the United States

GOVERNOR OF DELAWARE,

Petitioner,

v.

JAMES R. ADAMS,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit*

**BRIEF *AMICUS CURIAE* OF
JOEL EDAN FRIEDLANDER
IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

1. Does the First Amendment invalidate a unique state constitutional provision that categorically disqualifies Independents and members of minor parties from serving on any of the State's three highest courts?

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INTEREST OF *AMICUS CURIAE*¹

Amicus is the author of the sole law review article analyzing the constitutionality under the First Amendment of the Delaware constitutional provision at issue. Joel Edan Friedlander, *Is Delaware's "Other Major Political Party" Really Entitled To Half of Delaware's Judiciary?*, 58 Ariz. L. Rev. 1139 (2016) [hereinafter Essay]. Respondent James Adams read the Essay before filing suit, and the Third Circuit prominently cited the Essay. App. 10a. *Amicus* has been appointed Lecturer on Law at Harvard Law School and Intermittent Lecturer at University of Michigan Law School and has lectured on Delaware corporate law at numerous law schools. *Amicus* is a Delaware lawyer who regularly practices in the Delaware Supreme Court, the Delaware Court of Chancery, and the Delaware Superior Court. *Amicus* submits this brief out of concern that the judicial appointment process in Delaware violates the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The provision of the Delaware Constitution that the Third Circuit adjudged unconstitutional is unique in American law. It categorically disqualifies

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* or its counsel, contributed monetarily to the preparation or submission of this brief. *Amicus* is filing this brief with the consent of the parties. The written consent of petitioner is on file with the Clerk. Both parties received timely notice of intention to file this brief.

Independents and members of minor parties from serving on the Delaware Supreme Court, the Delaware Court of Chancery, or the Delaware Superior Court.

Two provisions interact to categorically disqualify Independents and members of minor parties. One provision limits the number of judges belonging to the same political party to a “bare majority” of the total judgeships (the “bare majority provision”); another provision sets aside the remaining judgeships for members of the “other major political party” (the “major party provision”). Del. Const. art. IV, § 3. The Essay refers to the two provisions as the “Bare-Majority Feature” and the “Two-Party Feature” of Delaware’s political balance requirement. Essay, 58 Ariz. L. Rev. at 1142. The Essay discusses how the “Two-Party Feature” (*i.e.*, the major party provision) is of dubious constitutionality.

The bare majority provision and the major party provision have different histories. The original version of the bare majority provision dates to 1897, when the Delaware Constitution was significantly rewritten in a spirit of reform following a period of one-party dominance, unilateral appointment power of the governor over the judiciary, and rampant electoral fraud. *See id.* at 1147-49. The wording of the bare majority provision is consistent with similar provisions in certain multi-member federal independent agencies, which do not disqualify Independents. *See id.* at 1144.

The original version of the major party provision was part of a political bargain struck in 1951, when a proposed constitutional amendment to create a separate Delaware Supreme Court ran into opposition. *See id.* at 1149-51. The addition of the major party provision guaranteed that Republicans would be appointed to just less than half of the newly created vacancies, despite the then-Governor being a Democrat. *Id.* at 1150. In the presidential election of 1948, 49.5% of Delaware votes had been cast for Democrat Harry Truman, 45.1% for Republican Thomas Dewey, 2.4% for Progressive Henry Wallace, 2.4% for Dixiecrat Strom Thurmond, and 0.6% for Socialist Norman Thomas. *Id.* at 1150 n.53.

The bare majority provision and the major party provision have endured, even as the partisan affiliation of Delaware voters has shifted. In the second half of the twentieth century, Delaware was known as a bellwether state with a strong tradition of ticket-splitting. *Id.* at 1151. As of November 1, 2016, 47.5% of Delaware's registered voters were Democrats, 27.1% were Republicans, and 22.7% were unaffiliated with any party. *Id.* at 1140.

The Third Circuit held that the major party provision violates the First Amendment, rejecting the Governor's arguments for "requiring applicants for judicial positions to be Democrats or Republicans." App. 21a. The Third Circuit also ruled as a matter of state law that the bare majority provision is not severable from the major party provision. App. 34a.

The major party provision is uniquely infirm under the First Amendment. Petitioner does not cite an equivalent major party provision respecting any other governmental body or judiciary in the United States. Lines of cases supporting invalidation of the major party provision include those involving (i) unconstitutional conditions to government employment, (ii) protection of minor political parties from partisan lockups, and (iii) freedom of speech in judicial elections. Essay, 58 Ariz. L. Rev. at 1153-63.

Because the categorical exclusion of Independents and members of minor parties from service in the Delaware judiciary is uniquely infirm under multiple lines of First Amendment cases, the supposed circuit split respecting the scope of the policymaker exception under *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), is illusory. This case is not an appropriate vehicle to clarify the reach of *Elrod* and *Branti*. The federalism concerns of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), do not lessen Petitioner's burden of establishing that the major party provision is "narrowly tailored to serve a compelling government interest." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1672 (2015).

Whether the bare majority provision is severable from the major party provision is a question of Delaware law that is not certworthy. The Third Circuit's ruling does not prevent amendment of the Delaware Constitution to retain only the bare majority provision.

REASONS FOR DENYING THE PETITION

1. Petitioner argues that the Third Circuit’s ruling creates a circuit split on the reach of the *Elrod-Branti* restrictions on patronage. As a general principle, the Third Circuit disagreed with the Sixth Circuit and the Seventh Circuit and “conclude[d] that state judges do not fall within the policymaking exception” to patronage restrictions. App. 29a. This case is not an appropriate vehicle to resolve that disagreement.

The policymaker exception under *Elrod* and *Branti* is not a safe harbor for the major party provision. If state judges are deemed policymakers, then a governor may take political party affiliation into account when nominating judges. Such a rule would not justify a state constitutional provision that categorically prevents *any* governor from nominating *any* Independent or *any* third party member to the judiciary. Essay, 58 Ariz. L. Rev. at 1155-58.

The critical holding of the Third Circuit is that regardless of Delaware’s professed interest in a politically balanced judiciary, “Delaware’s practice of excluding Independents and third party voters from judicial employment is not narrowly tailored to that interest.” App. 30a. No circuit split exists on that question, given the uniqueness of Delaware’s categorical exclusion of Independents and third party members from judicial office.

2. Delaware’s unique categorical exclusion of Independents and third party members cannot withstand any scrutiny.

The major party provision is an unconstitutional condition on employment under the settled law that “Congress could not ‘enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.’” *Wieman v. Updegraff*, 344 U.S. 183, 191–192 (1952) (internal quotation omitted). This Court’s loyalty oath cases, including *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), which was cited by the Third Circuit (App. 29a), protect members of the Communist Party from categorical disqualification for state employment or bar admission. “If Communist Party membership is not itself a permissible disqualification for public employment or admittance to the bar, how can a lawyer who registers as an Independent or with any minority party (whether the Libertarian Party or the Socialist Workers Party) be categorically disqualified for appointment as a Delaware judge?” Essay, 58 *Ariz. L. Rev.* at 1155.

The major party provision operates as a bipartisan lockup of Delaware’s judiciary. A small party cannot hope to get any of its members appointed to the judiciary, even if the small party is allied with a major party. This is a severe burden on associational rights, warranting strict judicial scrutiny under *Clingman v. Beaver*, 544 U.S. 581, 592 (2005). See Essay, 58 *Ariz. L. Rev.* at 1158-61. The bare majority provision is not a reasonable regulation that “may, in practice, favor the traditional two party system.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). It

is part of a legislative bargain struck in 1951 that ensured the permanent equal allocation of judgeships between the two major parties.

This Court applies strict scrutiny when reviewing state codes of judicial conduct regulating the speech of judicial candidates. *Williams-Yulee*, 135 S. Ct. 1656; *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). In *Williams-Yulee*, the Court cited *Gregory v. Ashcroft*, 501 U.S. 452, with approval, 135 S. Ct. at 1671, but nonetheless held that a “State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.” *Id.* at 1665. These precedents apply by analogy to the major party provision, given that it restricts associational freedoms protected by the First Amendment in connection with the appointment of judicial candidates. *See* Essay, 58 Ariz. L. Rev. at 1161-63.

Petitioner’s arguments in favor of narrow tailoring are weak. There is not even a rational link between maintaining a judiciary known for impartiality and expertise and categorically disqualifying Independents and members of minor parties from judicial service. The Delaware judiciary’s well-earned reputation can be attributed to numerous other factors, such as the role of the Judicial Nominating Commission, the gravity and prestige of judicial appointments in light of the importance to Delaware’s economy of adjudicating corporate and commercial disputes and attracting firms to incorporate in Delaware, and the operation of the bare majority provision. *See id.* at 1151-52. New Jersey maintained a 150-year tradition to a

bipartisan supreme court without a major party provision (or a bare majority provision). *See id.* at 1145.

The major party provision cannot ensure balance or consensus. The Delaware Supreme Court is a five-member body, and it can divide sharply on issues of public law or corporate law. *See, e.g., Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 688 n.159 (Del. 2017) (“As to our dissenting colleagues, we ignore many of their comments suggesting that any law, constitutional provision, or decision announcing or upholding the rights to keep and bear arms—including Section 20, *Doe*, and *Heller*—must be discounted as the product of a politically motivated, NRA-driven agenda.”); *Omnicare, Inv. v. NCS Healthcare, Inc.*, 818 A.2d 914, 946 (Del. 2003) (“It is regrettable that the Court is split in this important case.”) (Veasey, C.J., dissenting).

The major party provision cannot ensure true political balance for the judiciary as a whole. Judges and applicants for judicial office may mask their political beliefs by adopting or maintaining a public partisan affiliation that maximizes the likelihood of appointment or reappointment. A commentator’s description of how to circumvent the bare majority provision respecting the United States Court of Appeals for the Armed Forces applies as well to Delaware’s major party provision: “a candidate ... may be a merely nominal member of one party but enjoy strong political support from legislators of the other party.” Eugene R. Fidell, *The Next Judge*, 5 J. Nat’l Security L & Pol’y 303, 308 (2011), *quoted in*

Essay, 58 Ariz. L. Rev. at 1145. Judges or judicial applicants may feel incentivized to make strategic, publicly reported donations to political parties or political candidates that do not reflect their actual voting preferences. That effect builds permanent institutional support for both major parties, because membership in either major party is a path to the judiciary. *See* Essay, 58 Ariz. L. Rev. at 1160.

For those, like respondent Adams, who do not hide their political views, “loss of a job opportunity for failure to compromise one’s convictions states a constitutional claim.” *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77 (1990). Delaware’s unique major party provision cannot bear the scrutiny it requires.

3. Petitioner cites no case in which this Court has deemed it worthy to review a ruling under state law respecting severability for plain error.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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