

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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JOHN C. CARNEY,)
GOVERNOR OF DELAWARE,)
Petitioner,)
v.) No. 19-309
JAMES R. ADAMS,)
Respondent.)
- - - - -

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3 JOHN C. CARNEY,)
4 GOVERNOR OF DELAWARE,)
5 Petitioner,)
6 v.) No. 19-309
7 JAMES R. ADAMS,)
8 Respondent.)
9 - - - - -
10 Washington, D.C.
11 Monday, October 5, 2020
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.
16
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18 APPEARANCES:
19
20 MICHAEL W. McCONNELL, ESQUIRE, Washington, D.C. ;
21 on behalf of the Petitioner.
22 DAVID L. FINGER, ESQUIRE, Wilmington, Delaware ;
23 on behalf of the Respondent.
24
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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: Our first case
4 today is Number 19-309, John Carney, Governor of
5 Delaware, versus James Adams.

6 Mr. McConnell.

7 ORAL ARGUMENT OF MICHAEL W. McCONNELL

8 ON BEHALF OF THE PETITIONER

9 MR. McCONNELL: Mr. Chief Justice, and
10 may it please the Court:

11 A fundamental feature of our system of
12 federalism, recognized most clearly in Gregory
13 versus Ashcroft, is that the states have broad
14 leeway setting qualifications for their
15 high-ranking officials, including their judges.

16 Delaware has used that freedom to
17 create a system unique among the states of
18 constitutionally-mandated political balance for
19 its judiciary, with the result that Delaware's
20 courts are widely regarded as the least partisan
21 and most professional in the nation.

22 The Third Circuit has upended that
23 system based on an implausible reading of this
24 Court's political patronage cases. Elrod and
25 Branti expressly permit using political

1 affiliation for appointments to high-level
2 discretionary positions.

3 But even if we're wrong about that,
4 the Delaware provisions serve a compelling
5 interest in creating a uniquely balanced and
6 nonpartisan judiciary.

7 Now, to make matters worse, the Third
8 Circuit invalidated the bare majority provision
9 based solely on severability, despite having
10 found that Mr. Adams has no standing to
11 challenge that requirement.

12 That analysis directly conflicts with
13 both federal and state severability doctrines.
14 There is no doubt whatsoever that the bare
15 majority requirement can stand on its own. It
16 stood on its own for more than 50 years, from
17 1897 to 1951. It stands on its own with respect
18 to two of Delaware's five constitutional courts
19 even today.

20 There is not the slightest reason to
21 believe that Delaware's constitutional drafters
22 would eliminate the bare majority requirement if
23 they knew the major party provision would be
24 struck down.

25 That said, both provisions of the

1 Delaware constitution pass muster under the
2 First Amendment. And Mr. Adams, who passed up
3 the chance to apply for a host of judgeships
4 both before and after changing party
5 affiliation, lacks standing to challenge either
6 one.

7 I look forward to your questions.

8 CHIEF JUSTICE ROBERTS: Well, Mr.
9 McConnell, I'd like to begin with the standing
10 issue.

11 Our cases, like Gratts and
12 Northeastern Florida, require that a plaintiff
13 injured by being excluded from competing for a
14 position need only establish that he's ready and
15 able to apply for it.

16 Don't you think he's ready and able?

17 MR. McCONNELL: He -- he shows by his
18 actions that he is neither -- he may be able,
19 but he isn't ready in that there were numerous
20 judgeships for which he was constitutionally
21 eligible and didn't apply.

22 It would be as if in the -- in the
23 contractor case, a -- a -- a -- a suit was
24 brought by somebody who had been offered a
25 contract and just chose not to take it.

1 CHIEF JUSTICE ROBERTS: Well, I don't
2 think that's applicable. The contractor wants
3 to enter into any contract he can to sell his
4 goods. But just because Adams passed up some
5 judgeships doesn't mean he's not interested in
6 -- in one that will become available or was
7 available when the others were.

8 MR. McCONNELL: Well, Mr. Chief
9 Justice, he -- he testified in his deposition
10 under oath that he was interested in all five
11 courts. He was specifically asked, all five of
12 the courts? And his answer was yes.

13 CHIEF JUSTICE ROBERTS: Well, he also
14 said that he would consider and apply for the
15 next available judicial position. He said that
16 under oath at the summary judgment stage.

17 What -- what more does he have to do?

18 MR. McCONNELL: Well, he did not, in
19 fact, apply for the next available position,
20 even when he was eligible for it.

21 CHIEF JUSTICE ROBERTS: Is there
22 anything else he has to do? He -- he satisfies
23 all of the qualifications. He seems adamant
24 about wanting a position.

25 MR. McCONNELL: His -- actually, even

1 his allegations have been -- have fallen very
2 short of the concrete plans that this Court
3 requires in -- in Lujan.

4 His allegations are vague in the
5 extreme. He said he has desired and still
6 desires a judgeship. That's from his amended
7 complaint.

8 He says that he would seriously
9 consider and apply for a -- a judgeship. That's
10 from his answers to interrogatories.

11 He never out and out says that if --
12 that he will apply for a -- a judgeship if the
13 -- if -- if he becomes eligible.

14 And I don't know how he could allege
15 that anyway given that there have been numerous
16 judgeships for which he is eligible and he has
17 never -- and he -- and -- and -- and he has
18 passed up most of those.

19 If -- if Mr. Adams is held to have
20 standing here, then I think anyone would have
21 standing to challenge provisions of
22 constitutions that they have academic
23 disagreements with simply by saying that they
24 might want to -- to take -- take advantage of
25 them at some point, but, in Lujan --

1 CHIEF JUSTICE ROBERTS: Thank -- thank
2 you, counsel. Thank you, counsel.

3 Justice Thomas?

4 JUSTICE THOMAS: Thank you, Chief
5 Justice.

6 Mr. McConnell, I'd like to just move
7 to the merits briefly. How -- I'd like to know
8 how far you'd go with your argument. Could
9 Delaware, for example, pass a law requiring all
10 judges to be members of one or the other of the
11 major parties?

12 MR. McCONNELL: I don't think so, Your
13 Honor. The -- the test in both Gregory versus
14 Ashcroft and in Branti and Elrod, which -- which
15 fit together very nicely, is the qualifications
16 have to be reasonably appropriate.

17 I can't see under any circumstances
18 that that requirement would be reasonably
19 appropriate.

20 JUSTICE THOMAS: Changing a little
21 here, what if you -- how would your argument be
22 different or this case be different if, for
23 example -- if the -- your judges were elected
24 and an Independent was prevented from being on
25 the -- on the ballot?

1 MR. McCONNELL: Well, Justice Thomas,
2 this Court has a whole separate line of
3 jurisprudence under the Equal Protection Clause
4 having to do with elections, and those cases
5 would apply. And I think an out -- out-and-out
6 exclusion of an Independent from being able to
7 be put on the ballot violates not only that
8 person's rights but the voters' rights.

9 But, when a state does not subject a
10 position to elections but, rather, to
11 appointment, those cases do not apply.

12 JUSTICE THOMAS: Well, what -- what,
13 for -- would this be -- would your case be
14 better or worse if this were not a matter of
15 constitutional provision but, rather, a matter
16 of a tradition or practice that had -- of
17 long-standing?

18 MR. McCONNELL: Under this Court's
19 precedents, I think it's the same, because the
20 -- the -- the cases that the Third Circuit
21 relied on, Elrod and Branti and O'Hare and
22 Rutan, all involve the exercise of appointment
23 discretion by the appointing officer.

24 And so, if Mr. Adams is right here
25 about the state constitution, it would seem to

1 follow from those cases that he would have a
2 right even as to the executive. Now he
3 forswears that, he says that isn't his position,
4 which I can understand because it would be -- it
5 would fly in the face of -- of -- you know, of
6 long-standing and universal practice. So, of
7 course, he doesn't want to admit that that's the
8 logical implication of his position, but it is.

9 JUSTICE THOMAS: And, briefly, you've
10 studied this area. Is -- do you find any
11 historical support for preventing states from
12 imposing political qualifications?

13 MR. McCONNELL: None at all.

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Breyer?

17 JUSTICE BREYER: All right. Thank
18 you. I -- I'd like to return to Justice
19 Thomas's first question.

20 As I understand it, the Constitution
21 says, in respect to the Supreme Court, the
22 Superior Court, and a number of other courts --
23 not all -- that you have offices -- you have
24 some offices that are for the same major
25 political party, but they can't be more than a

1 bare majority. And then it says the remaining
2 members shall be of the other major political
3 party.

4 So why isn't that just the problem
5 that you said was a problem? If -- if a bare --
6 if a majority or an even number are Democrats,
7 the rest must be Republicans, and the Green
8 Party need not apply. It can't.

9 MR. McCONNELL: Well, Justice Breyer,
10 the reason for this is -- is not to exclude
11 Independents or the Green Party but, rather, as
12 a necessary backstop to the bare majority
13 requirement because, without it, it would be
14 just too easy for the governor to name a
15 political ally, you know, from an allied party.

16 I mean, take Mr. Adams as a great
17 example of this because he professes to be --
18 after having been a life-long Democrat, he
19 professes to be a Bernie Sanders Independent.

20 So, if there were already a democratic
21 majority on the Court and the governor were able
22 to name Mr. Adams, it would just fly in the face
23 and frustrate the purposes of the political
24 balance provision.

25 JUSTICE BREYER: Well, I agree there

1 might be a reason for it, but how do you get
2 around the fact that the way that it's written
3 and applied is you have to be a Republican or a
4 Democrat? And there are other parties, period.

5 MR. McCONNELL: Well --

6 JUSTICE BREYER: And so why is that
7 constitutional?

8 MR. McCONNELL: Well, it's
9 constitutional because it's -- it advances the
10 states' compelling governmental interest in
11 political balance on the courts and there -- and
12 there is no other provision that would achieve
13 that purpose in a less restrictive way, or at
14 least no one has identified it.

15 JUSTICE BREYER: I see your argument.
16 And the other question I have is it is the case
17 that the -- the Plaintiff in this case did apply
18 or did say he would apply to become a judge in
19 any court were it not for these requirements.

20 Now why isn't that good enough to give
21 him standing? I -- I mean, he's -- if he --
22 assume -- should we have a hearing to decide if
23 he's sincere? Do you think he's insincere in
24 that or what?

25 MR. McCONNELL: Actually, I think -- I

1 think that a -- first of all, this decided in
2 his favor on motion for summary judgment. So
3 the question is whether the trier of fact could,
4 on this record, conclude that Mr. Adams does not
5 have a serious interest in serving on the
6 courts.

7 And the fact that he could have
8 applied for any number of positions, both before
9 and after he changed his political affiliation,
10 casts serious doubt on his sincerity.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Alito?

14 JUSTICE ALITO: Mr. McConnell, what do
15 you think is the minimum that Mr. Adams would
16 have to allege in order to have standing?
17 Suppose he looked up when the next vacancy would
18 occur on any of the covered courts and said, I
19 plan to apply for that position. Would that be
20 sufficient?

21 MR. McCONNELL: I -- Justice Alito, I
22 -- I think so. His big problem is that his
23 actions do not line up with his words. Now it
24 is true that even his words are vague and, I
25 think, insufficient under this Court's precedent

1 in Lujan, which requires concrete plans, but
2 what you describe probably would satisfy Lujan.
3 The problem is I don't think he could swear to
4 it given that there have been so many judgeships
5 for which he's entirely eligible that go by.

6 JUSTICE ALITO: Well, couldn't he say,
7 in the past, I was equivocal about this, but now
8 I've made up my mind, I want to be a judge, and
9 a position will open up on this particular court
10 on this particular date, and I plan to apply for
11 that? Wouldn't that be enough?

12 MR. McCONNELL: Well, not without
13 taking back his sworn statement that he would be
14 interested in serving on any of the five courts,
15 because, among those five courts, two of them
16 are perfectly open to him. In fact, he has a
17 better shot on -- I mean, legally speaking, on
18 those two courts because, as an Independent, he
19 could never violate the bare majority
20 requirement.

21 But he -- despite the fact those case
22 -- those openings have been numerous, he still
23 brings the lawsuit. It seems evident that he's
24 -- he's really interested here in pursuing a
25 theory that he read about in a law review, not

1 really getting a judgeship.

2 JUSTICE ALITO: On the merits, your
3 answer to Justice Thomas about a hypothetical
4 constitutional provision requiring that all of
5 the judges on a particular court be members of a
6 particular party was that that would not be
7 reasonably appropriate, whereas the -- the
8 breakdown in the provision at issue here is
9 reasonably appropriate.

10 So, if we hypothesize a court with
11 nine members, at what point would the breakdown
12 specified in the Constitution be inappropriate?
13 If it -- nine to nothing, presumably, would not
14 be, according to your prior answer, but what
15 about eight to one, seven to two, six to three,
16 five to four? At what point would something
17 become not reasonably appropriate?

18 MR. McCONNELL: I understood Justice
19 Thomas's hypothetical to be that the Court be
20 entirely members of one party. I do not see --
21 I can't conceive what the legitimate
22 governmental interest would be for that.

23 But, here, the State is doing
24 something that's actually quite commonsensical,
25 makes a great deal of sense, if you believe in a

1 bipartisan judiciary. And that's what -- that's
2 the difference here. It isn't numbers. It's
3 whether the use of partisan affiliation is
4 reasonably appropriate for --

5 CHIEF JUSTICE ROBERTS: All right.
6 Thank you.

7 MR. McCONNELL: -- his decision.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.
10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: Counsel, I'm -- I
12 -- I just want to make sure I understand things.
13 You used the word "bipartisan," but, in your
14 briefs, you said that this provision, the
15 majority party provision, promotes partisan
16 balancing and the public's perception of an
17 independent judiciary.

18 I just don't understand why the
19 majority party rule promotes either of those two
20 interests and does it in a better way than the
21 bare majority provision at issue in your section
22 -- in your Number 2 of Article III? There, all
23 that is required of the bare majority is that it
24 be no more than a bare majority. It doesn't
25 have to be.

1 But could you explain to me why it has
2 to be two parties only who can be judges?

3 MR. McCONNELL: Well, Justice
4 Sotomayor --

5 JUSTICE SOTOMAYOR: And to promote
6 those particular interests, because that's the
7 State's interest.

8 MR. McCONNELL: So the State's
9 interest is in -- is in balance. And what the
10 major party provision does is it prevents the
11 governor from appointing somebody from an allied
12 party, a party that's very closely associated
13 with one of the two major parties, or an
14 Independent who may have been a member of the
15 other major party, as, of course, Mr. Adams was
16 for his entire career.

17 So this is really a backstop provision
18 to make sure that the bare majority provision
19 works.

20 JUSTICE SOTOMAYOR: Well, but --

21 MR. McCONNELL: And as the --

22 JUSTICE SOTOMAYOR: -- if you'll -- if
23 you'll excuse me a moment with that, those two
24 examples. It seems to me that no rightly
25 thinking governor is going to appoint someone

1 from the other party who is completely
2 misaligned with his or her views. They could
3 pick the most -- I -- I -- I don't know if
4 there's such a word -- the softest Republican,
5 the one most closely aligned with Democratic
6 values or -- or something of that nature.

7 It just doesn't seem to me that the --
8 that the mere membership in a party connotes an
9 acceptance by a governor.

10 MR. McCONNELL: Well, Justice
11 Sotomayor, this is really a question of -- of
12 experience and reality. And political party in
13 this country is -- it's universally used by
14 political science and scientists as the proxy
15 for a philosophy and ideology, and it's
16 especially true now in the last -- in the last
17 20 or 30 years, when -- when the two parties
18 have been through, you know, what they call
19 partisan sorting, so that today the most liberal
20 Republican is -- is at least similar to but, you
21 know, probably more conservative than the most
22 conservative Democrat.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Kagan?

1 JUSTICE KAGAN: Good morning,
2 Mr. McConnell.

3 If I could go back to the standing
4 questions that you've been answering. As I
5 understood your answers, you said two things.
6 One was that Mr. Adams never out and out said he
7 was going to apply, and the second was but, in
8 fact, he didn't apply on numerous occasions.

9 So, as to the first -- I mean, this is
10 his deposition testimony. I think the -- the
11 Chief Justice referred to this. He said: I
12 would apply for any judicial position that I
13 thought I was qualified for, and I believe I'm
14 qualified for any position that would come up.

15 So isn't he -- you know, he out and
16 out says he wants a judicial position, isn't he?

17 MR. McCONNELL: He's -- that certainly
18 fall shorts of a concrete plan, as required by
19 Lujan, but I think his big problem is that --

20 JUSTICE KAGAN: If I could --

21 MR. McCONNELL: -- as to the --

22 JUSTICE KAGAN: -- just stop you
23 there. Why -- why does it fall short of a
24 concrete plan? He's basically saying: I'm -- I
25 want -- I would apply for any judicial position

1 that would come up. That's what -- that's what
2 he says. That's a concrete plan. I would apply
3 for any judicial position that would come up.

4 MR. McCONNELL: Of course, he hasn't
5 followed through on that on -- on many
6 occasions, which I think is --

7 JUSTICE KAGAN: Okay. So --

8 MR. McCONNELL: -- the problem.

9 JUSTICE KAGAN: -- that's your second
10 argument, Mr. McConnell, but, as to that, I
11 mean, isn't the answer that it would be
12 completely futile to apply? I mean, as long as
13 this constitutional provision is in effect, and
14 he's an Independent, he's not going to get a
15 position --

16 MR. McCONNELL: Oh, no, that's --

17 JUSTICE KAGAN: -- so why would we
18 insist that he have to file an application?

19 MR. McCONNELL: Justice Kagan, that's
20 just not so. Of the five constitutional courts,
21 two of them do not have a major party provision,
22 and he's eligible for every single vacancy on
23 those courts.

24 JUSTICE KAGAN: Well, if he had said,
25 what I'm -- what I'm interested in is the three

1 that have both the provisions, the -- the major
2 party as well, would he have to apply?

3 MR. McCONNELL: Well, probably not,
4 but that isn't what he said. And we have to
5 judge this case according to the case that he
6 has brought to us.

7 JUSTICE KAGAN: I -- I -- I guess it
8 seems a lot to me like the cases where we've
9 said, you know, when somebody challenges an
10 admissions policy, you know, in Gratts, in -- in
11 Bakke, things like that, we're not going to make
12 you file the application. We're certainly not
13 going to judge what the likelihood of somebody
14 thinking that the application is meritorious is.

15 As long as this policy remains in
16 effect, you can just challenge the policy.

17 MR. McCONNELL: Yeah, but the problem
18 here is that he could apply and he would be
19 eligible. And he has stated that he -- that
20 he's interested in any of the five courts. He
21 doesn't apparently care which one.

22 So it would be -- it would be as if
23 somebody said, I want to go to any public
24 university in Texas, but I can't -- but I
25 haven't applied to any of them, and one of them,

1 I think, there's a -- there's an obstacle.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Gorsuch.

5 JUSTICE GORSUCH: Thank you.

6 Mr. McConnell, I'd like to return to
7 the question of the historical pedigree of these
8 requirements. I understand your argument that
9 there are a great many bare majority
10 requirements across country and across time.

11 How -- how about with respect to the
12 major party requirement? What analogues do you
13 have for that?

14 MR. McCONNELL: Justice Gorsuch, as
15 far as I know, the -- the Delaware
16 Constitutional Convention of 1896 was an
17 innovator. I think it was the first State
18 constitutional provision or even analogue even.

19 There was a -- there was a -- there
20 were a couple of small statutes having to do
21 with elections prior to that, but I think it
22 was, in fact, an analogue.

23 But there's certainly no examples in
24 -- in history of -- of provisions of this sort
25 being regarded as unconstitutional. In fact,

1 for most under the jurisprudence --

2 JUSTICE GORSUCH: But let me -- let me
3 -- let me -- let me interrupt you there, and I'm
4 sorry for doing so, but with our limited time.
5 That -- that -- that's what I thought the answer
6 would be, and -- and -- and that raises for me
7 the following question. That's the reason for
8 the first question.

9 The major party provision prohibits
10 Independents from service, serving as -- as
11 judges. That -- that's quite a -- quite a
12 sweeping rule. And I -- as I understand you,
13 you've -- you've indicated that you'd agree that
14 that violates the Equal Protection Clause as
15 applied to elect -- elect -- elected positions.
16 But you indicate that it's somehow very
17 different with respect to appointed positions.

18 And I guess I'm not clear why, given
19 the absence of any historically-rooted tradition
20 along these lines with respect to the major
21 party requirement.

22 I understand your argument that it
23 serves as a backstop for the bare majority rule,
24 which does have historical antecedents, plenty
25 of them, but, near as I can tell, none of those

1 has ever included this backstop before. This is
2 a novel thing. And it does -- does prohibit a
3 great percentage of the population from
4 participating in the process.

5 MR. McCONNELL: Just, Justice Gorsuch,
6 may I make two points about this? First,
7 although I can't point to a specific use of this
8 particular matter, this Court has approved any
9 number of limitations on First Amendment rights
10 as a condition to public service.

11 The Hatch Act cases, for example, are
12 a much more severe limitation on free speech
13 rights, applying to lots more people for lots
14 more positions, and the Court has -- has
15 consistently upheld them.

16 But, secondly, as to the uniqueness
17 here, this actually, I think, points in
18 Delaware's favor. It is true that Delaware is
19 the only state that does this. But it is also
20 the only state that has created a judiciary of a
21 particular sort that -- that is fair. It's like
22 --

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MR. McCONNELL: -- the Delaware

1 judiciary is a jewel.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Thank you, Mr.
5 Chief Justice.

6 And good morning, Mr. McConnell.

7 I will pick up on standing from the
8 comments and questions of the Chief Justice and
9 Justice Kagan.

10 You keep saying he hasn't applied. Of
11 course, he hasn't applied. He's not eligible.
12 And that's the point.

13 He says, once I'm eligible, I will
14 apply. And I took your answer to Justice Kagan
15 then to be, well, he's applying to too many
16 courts. And I -- I guess I don't understand
17 why, if he says, I'm interested in any of three
18 or four different courts, that defeats his
19 intent to apply for standing purposes.

20 MR. McCONNELL: Well, Justice
21 Kavanaugh, when he says he's interested in any
22 of the five courts, and there are positions for
23 which he is eligible, constitutionally eligible
24 on some of those courts, it indicates that --
25 that his actions at least do not conform to his

1 words.

2 JUSTICE KAVANAUGH: Well, he's not
3 eligible because he's not a Republican or
4 Democrat.

5 MR. McCONNELL: He is eligible for two
6 of the five courts, including the one for which
7 his qualifications would seem to be the best
8 match, namely, the family court.

9 JUSTICE KAVANAUGH: On the merits
10 question, could a state exclude Republicans and
11 Democrats from being judges and allow only
12 Independents to be judges?

13 MR. McCONNELL: Justice Kavanaugh, I
14 thought about that, and I think it's a difficult
15 question. I don't -- I can't answer that a
16 definite no.

17 I think it is not impossible that --
18 not a -- that a state has the constitutional
19 authority under Gregory versus Ashcroft and
20 other cases to say that judges simply may not be
21 registered members of any party.

22 JUSTICE KAVANAUGH: Why can't -- to
23 pick up on Justice Sotomayor's question, why
24 can't Independents even better serve the goal of
25 a balanced judiciary nonpartisan/bipartisan

1 judiciary?

2 MR. McCONNELL: This provision is not
3 really about whether Independents can do a good
4 job as judges. It's about governors and -- and
5 whom they can apply.

6 And the limitation applies to the
7 governor. It's a separation of powers type
8 provision. If a -- if a governor simply used
9 his discretion to balance the courts, nobody
10 would even bat an eyelash. Obviously
11 constitutional.

12 It's very odd to say that the
13 constitution cannot direct the governor in his
14 exercise of discretion. But it's the governor
15 who might very well name an -- a supposed
16 independent who is, in fact, an ally of his
17 party, and that's what this provision is -- is
18 parting against.

19 JUSTICE KAVANAUGH: Well, I guess
20 there's a mismatch, arguably, between the
21 State's interest and excluding Independents
22 altogether from being judges because
23 Independents could certainly -- wouldn't you
24 agree that Independents could serve the purpose
25 of achieving a balanced nonpartisan or

1 bipartisan judiciary?

2 MR. McCONNELL: Absolutely. But
3 giving governors the discretion to name
4 Independents or allied parties would frustrate
5 the purpose of the provision. It doesn't make
6 it impossible. I don't -- I don't -- I'm not
7 saying it's an -- an essential backstop, just
8 that it is a valuable backstop.

9 JUSTICE KAVANAUGH: Thank -- thank
10 you, Mr. McConnell.

11 CHIEF JUSTICE ROBERTS: Mr. McConnell,
12 why don't you take a minute to wrap up.

13 MR. McCONNELL: Thank you.

14 The framers of the Delaware
15 constitution had lived through domination of the
16 courts by one party and then by the other. On
17 the basis of that experience, they resolved that
18 a bipartisan bench would bring about, and I
19 quote, "a fuller and freer discussion of the
20 matters that come before them and lead to fair
21 and impartial decisions."

22 In other words, they wanted the
23 judiciary to remain stable, balanced, and
24 nonpartisan, even when elections go all for one
25 party for a period of time.

1 Now their decision has survived the
2 test of fire. For the last 27 years, one party
3 has held both the governorship and the Senate in
4 Delaware, but the courts have remained balanced
5 and nonpartisan. That is a remarkable
6 achievement.

7 We may not be able to prove with
8 scientific precision that Article IV, Section 3
9 is the cause, but we don't want to risk it.
10 States all over the country use partisan
11 affiliation as part of judicial selection with
12 partisan elections and partisan appointments.

13 Delaware should be able to use
14 partisan affiliation to bring political balance.
15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Finger.

19 ORAL ARGUMENT OF DAVID L. FINGER ON
20 BEHALF OF THE RESPONDENT

21 MR. FINGER: Mr. Chief Justice, and
22 may it please the Court:

23 Delaware's constitution denies Mr.
24 Adams the opportunity to apply for a judgeship
25 because he does not belong to a major political

1 party. The language "political party" excludes
2 unaffiliated voters.

3 The Delaware code provides that
4 unaffiliated and independent voters are voters
5 without a political party. And if one severs
6 the phrase "political party" from the
7 provisions, then the text becomes incoherent and
8 does not achieve its desired goal.

9 Petitioner is really asking this Court
10 to rewrite the provisions under the guise of
11 severance, and that should be left to the
12 Delaware legislature.

13 This phrase of "political party"
14 affects all the issues before the Court. A
15 party who suffers unequal treatment has standing
16 to challenge a discriminatory exception that
17 favors others.

18 As long as judicial seats are
19 allocated exclusively to political parties,
20 unaffiliated lawyers are categorically excluded.

21 The Petitioner's arguments, at least
22 in their brief, are based on the assumption that
23 a judge's political affiliation is determinative
24 of how that judge will vote in a case. And this
25 Court can look to its own history as a

1 refutation of that premise. If this Court
2 accepts the premise, it's the end of the idea of
3 an independent judiciary. And if this Court
4 rejects the premise, then, irrespective of the
5 standard of review, the challenged provisions
6 must fall.

7 Judicial engineering to avoid
8 extremism in judging is not an interest that
9 overcomes the First Amendment, and there's no
10 evidence that political discrimination has had
11 any beneficial effect on the quality of justice
12 in Delaware. Merely repeating that it has
13 doesn't make it so. For these reasons, this
14 Court should affirm the decision of the Third
15 Circuit.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Counsel, your
18 client said that he would apply -- was
19 interested in serving as a judge on -- on any
20 court, and yet there were several opportunities
21 for him to apply to judgeships for which he was
22 qualified and he didn't do it.

23 So why shouldn't we not take his
24 standing assertions as serious?

25 MR. FINGER: Well, again, his -- his

1 statements are judged to have been made in good
2 faith. He -- he didn't want to apply and he
3 didn't feel that he could not at the time. He
4 may have been in error as to these two minor
5 courts. But we shouldn't ghetto-ise it and say
6 he -- he has to apply only to these lower courts
7 when there's these other courts that he wants to
8 be on as well.

9 CHIEF JUSTICE ROBERTS: Well, but he
10 did say --

11 MR. FINGER: And under --

12 CHIEF JUSTICE ROBERTS: -- he did say
13 that he wanted to be -- he would be interested
14 in a judgeship on any of the courts.

15 MR. FINGER: He did say that, Justice
16 -- Chief Justice, but he also -- there are a
17 number of factors which are outside the record
18 that I can't tell you I know them which affected
19 the decision at one time. He does want to.
20 There may have been intervening factors that
21 prevented him from doing that.

22 But, nonetheless, the -- the law -- or
23 the jurisprudence of this Court has been that
24 there's not a concrete step point that -- that
25 flows from Lujan but the fact that it's unlawful

1 conduct that impedes the ability to undertake
2 the action that determines the standing.

3 CHIEF JUSTICE ROBERTS: Well, the
4 strongest statement he has is that he would
5 consider and apply for the job. Now, if -- if I
6 got an application for a clerkship from someone
7 who said she would consider and apply for the
8 job, I really wouldn't know what to make of
9 that.

10 MR. FINGER: Well, it -- it might be
11 in the context where there -- there's no
12 restriction on -- on your decision-making in
13 terms of whether to accept or decline or to
14 follow up with an interview. He can't -- for at
15 least three of the five courts, he can't even
16 apply, or he can apply, but what's the point?

17 CHIEF JUSTICE ROBERTS: Counsel, in
18 their opening brief, Mr. McConnell emphasized
19 our decision in Williams-Yulee and in his reply
20 brief as well. You don't cite that case at all
21 in your brief, if I'm remembering correctly, and
22 I wondered what your response was to their
23 reliance on it?

24 MR. FINGER: The Williams case --
25 again, the Court in that case did apply the --

1 the heightened standard of judicial review.
2 Again, this is not -- the problem with that case
3 and the Hatch Act-type cases is those are cases
4 involving conduct, not merely thought,
5 restrictions on the ability of -- of -- of a
6 judge to do something or a political employee to
7 do something which reflects a political
8 judgment.

9 In this case, it is a question of
10 political thought. No one expects a judge, no
11 matter what their political persuasion, to come
12 out and advocate for -- in the role of a judge
13 for a particular political party.

14 So those cases are distinguished from
15 -- from this case.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 JUSTICE THOMAS: Thank you, Mr. Chief
20 Justice.

21 Mr. Finger, in Lujan, we said that a
22 petitioner's -- or "someday" intentions really
23 were not sufficiently concrete to amount to an
24 injury. This looks -- and his intentions of
25 someday doing something did not amount to an

1 injury.

2 This looks much like that. And would
3 you tell me how this differs from the problem
4 that we had in Lujan?

5 MR. FINGER: Certainly, Justice
6 Thomas. The -- I -- I point to the Friends of
7 the Earth versus Laidlaw decision of this Court
8 in 2000, in which it distinguished the Lujan
9 case, saying that a statement that someone would
10 take action but for unlawful conduct goes beyond
11 mere someday intention. And that --

12 JUSTICE THOMAS: So how does --

13 MR. FINGER: -- and that statement --

14 JUSTICE THOMAS: -- unlawful -- I
15 mean, I thought that in Laidlaw there was at
16 least some sanctions involved. What would be
17 the sanction against Petitioner -- Respondent
18 here?

19 MR. FINGER: The sanction would be the
20 denial of the opportunity.

21 JUSTICE THOMAS: And what was it in
22 Laidlaw?

23 MR. FINGER: In Laidlaw? I don't
24 recall that off the top of my head, Your Honor
25 -- Justice Thomas.

1 JUSTICE THOMAS: Normally, I think,
2 when we think of a sanction, it's a penalty of
3 some sort or a criminal sanction.

4 The -- let me ask you this: If you
5 don't need anything more concrete than his
6 indication that he would have applied, how
7 formal would this have -- would that have to be,
8 that his intention -- the announcement of his
9 intention? Could he just say to a couple of
10 friends at a cocktail party, oh, I think I'm --
11 I would have applied for this job but for the
12 fact that I'm not a Republican or a Democrat?
13 Or does it have to be in writing? What does it
14 have to be?

15 MR. FINGER: That's a good -- a very
16 good question. The question then becomes --
17 going back to the Lujan case, the Court uses the
18 phrase "concrete plan," but there's no
19 interpretation of what constitutes a concrete
20 plan.

21 A statement under oath, as it is in
22 this case, that that was what -- what was on his
23 mind, absent some evidence that he is
24 deliberately misleading or lying, should be
25 accepted.

1 JUSTICE THOMAS: What if he has a long
2 history of saying, I'm going to do this and I'm
3 going to do that, and never really gets around
4 to doing it?

5 MR. FINGER: Well, again -- again, it
6 would depend on the circumstances. As I said,
7 there may be things that come up in one's life
8 that interfere with a given opportunity.
9 Nonetheless, if -- if someone has a constant
10 record of saying, I'm going to do this, and
11 doesn't, then that is some evidence cutting
12 against that person.

13 JUSTICE THOMAS: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer?

16 JUSTICE BREYER: As I understand it,
17 and correct me if I'm wrong, two of the five
18 courts, he's perfectly eligible and always has
19 been to apply for, because you can be an
20 Independent. That's the Family Court and the
21 Court of Common Pleas.

22 So we're only thinking about the other
23 three. Now, as to the other three --

24 MR. FINGER: That's correct.

25 JUSTICE BREYER: Is that right?

1 MR. FINGER: That's correct.

2 JUSTICE BREYER: Okay. So, as to the
3 other three, what should we do? He -- in --
4 there was a summary judgment motion. He said he
5 wanted to apply to any court. Before he changed
6 his party registration, he could have, since he
7 was a Democrat -- my clerk counted 16 openings
8 that were on the other three courts he could
9 have applied to.

10 So -- so here's a person who says any
11 court, he could have applied before to any, he
12 can apply now to two. Should we have a hearing
13 on that as to whether -- or should we what?

14 MR. FINGER: Just, Your Honor, let me
15 respond first by saying --

16 JUSTICE BREYER: Yeah.

17 MR. FINGER: -- one has to look at the
18 timing of those openings. Mr. -- Mr. Adams
19 testified that while he was working at the
20 Department of Justice, while he was interested
21 in a someday, at that point, he was very happy
22 working with the attorney general, Beau Biden,
23 and wasn't seeking actively a judgeship.

24 It was only after he went into
25 temporary retirement to rethink his position and

1 when he came back a year later in 2017 that he
2 decided that a judgeship was his -- his -- his
3 leading goal.

4 And of those 16, most of them
5 happened -- predated that point in time.

6 JUSTICE BREYER: Good. I knew you
7 would have an answer to my argument, and that's
8 why I was asking, should we have a hearing on
9 it?

10 MR. FINGER: Again --

11 JUSTICE BREYER: Should we send it
12 back for a hearing so that the judges can listen
13 and decide whether he was serious about this or
14 not?

15 MR. FINGER: I think --

16 JUSTICE BREYER: Or just write it in a
17 law review article?

18 MR. FINGER: I -- I think not, Your
19 Honor, for this reason. Both the district court
20 and the Third Circuit did not find a reason to
21 infer that he was not sincere.

22 Now that goes to the question of
23 whether it's a question of fact or question of
24 law. Whether the testimony and the evidence
25 gives rise to any inference is a question of

1 law.

2 And lower courts have found that --
3 that the -- the evidence presented -- and both
4 parties moved for summary judgment, so the -- so
5 the State seemed to feel it was prepared, but
6 the evidence submitted, they found, did not rise
7 to the ebb -- to the level of creating an
8 inference of insincerity.

9 JUSTICE BREYER: No, I know that, but
10 sincerity is not the same thing as having a
11 chance. And he could have had any chance he
12 wanted to, and then there's the argument about
13 the other three.

14 That's -- that's one of the things I'm
15 not certain about, but -- whether sincerity is
16 the answer to this. What do you think?

17 MR. FINGER: Well, if it's not
18 sincerity, then -- then there -- very often in a
19 case where someone says, I want to do something,
20 but I can't, I --

21 JUSTICE BREYER: Doesn't mean, sorry,
22 if I sincerely want to go to the North Pole,
23 nonetheless I can't go?

24 MR. FINGER: Yes. If -- if -- if --
25 if there was -- if there is a government-imposed

1 impediment to that, and there's nothing that
2 really rises to the level of a -- a challenging
3 the legitimacy of his intentions, then there's
4 not -- then you -- we have -- we have achieved
5 the -- the standing requirement.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Alito?

9 JUSTICE ALITO: Because this issue of
10 standing was decided at summary judgment, we are
11 required to look at the record in the light most
12 favorable to your adversary, isn't that so?

13 MR. FINGER: That's correct.

14 JUSTICE ALITO: And as was previously
15 mentioned, Mr. Adams' best statement about his
16 plans appears to have been the statement that he
17 would "consider and apply for a future vacancy."
18 Isn't that right?

19 MR. FINGER: That's correct, Justice
20 Alito.

21 JUSTICE ALITO: And if we view that in
22 the light most favorable to the other side, can
23 we say that means that he would actually apply?
24 He said he would consider and apply.

25 MR. FINGER: Yes. If -- if -- if the

1 word "apply" was not there, it would be pure
2 consideration of -- "consider and apply"
3 indicates a positive, affirmative action.

4 JUSTICE ALITO: Well, if you're going
5 to apply, you're done considering. And if
6 you're going to consider, you haven't made up
7 your mind whether you're going to apply. Isn't
8 that right?

9 MR. FINGER: That certainly would be
10 true -- is true even in -- in isolation, but
11 when someone says, I will consider and apply,
12 one can reasonably decide -- see that the person
13 does have a goal in mind.

14 JUSTICE ALITO: If we say that the
15 record does not support summary judgment on
16 this, is there any reason for us to go on to the
17 merits of the case? Wouldn't that be deciding a
18 hypothetical case at that point?

19 MR. FINGER: That was -- well, that
20 would require the Court to make a determination
21 that he was not -- that his testimony was not --
22 was not sincere, not truthful, in which case you
23 would have to go --

24 JUSTICE ALITO: You applied for -- let
25 me turn to another matter -- you applied for an

1 injunction, and there was no ruling on that, was
2 there?

3 MR. FINGER: That's correct. I'm not
4 sure that we looked -- yeah, we may have
5 included a request for an injunction in the
6 complaint, but we were basically seeking
7 declaratory judgment, which we received.

8 JUSTICE ALITO: Well, had you
9 withdrawn the -- the -- the request for an
10 injunction?

11 MR. FINGER: No, we've taken no action
12 on the injunction issue.

13 JUSTICE ALITO: Well, is it still
14 pending?

15 MR. FINGER: No, it is not because the
16 declaratory judgment action essential -- has the
17 essential effect of an injunction in that it
18 creates a rule of law that the -- that the State
19 has to abide by.

20 JUSTICE ALITO: Well, why is that so?
21 If the governor refuses to comply with the Third
22 Circuit's decision, can he be held in contempt?

23 MR. FINGER: I believe so.

24 JUSTICE ALITO: Consent to the
25 declaratory --

1 MR. FINGER: It is -- it is a -- I'm
2 sorry.

3 JUSTICE ALITO: Consent to the
4 declaratory judgment?

5 MR. FINGER: Yes, and point to the
6 Court's order instructing what must be done. It
7 is not --

8 JUSTICE ALITO: On the merits, in just
9 -- in just the couple seconds that are left,
10 suppose the governor -- suppose there's no
11 provision like this one, but a governor says,
12 under no circumstances will I ever appoint to
13 any judgeship a member -- a person registered as
14 a member of the other party.

15 From the standpoint of somebody who
16 wants to apply for a judgeship, is there any
17 difference between that situation and the
18 situation here?

19 MR. FINGER: No, because it becomes an
20 effective unconstitutional policy of the
21 governor.

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor? Justice Sotomayor?

25 JUSTICE SOTOMAYOR: Counsel, your last

1 answer troubles me because there are three
2 rights at issue here that I see, at least three.

3 It's your right, your client's right
4 as an Independent to seek judicial appointment,
5 and that right is being limited by this majority
6 party rule. Then there's the governor's right
7 under Elrod and Branti to decide who he wants to
8 appoint to a certain position, and he could,
9 maybe not this governor, but another governor
10 might want an Independent or another third-party
11 applicant, but the constitution stops him from
12 doing that. And that's where I think Elrod and
13 Branti would have quite a -- a lot to say about
14 whether or not your political affiliations have
15 much to do with your decision-making.

16 And -- and that, I think, would be
17 what we would have to face given Justice Alito's
18 question, a governor who says, I won't appoint
19 somebody from another party under any
20 circumstance.

21 But that's not the case here. The
22 case here involves the State, and it's the
23 State's choice for its own interests balancing
24 partisanship and promoting an independent
25 judiciary who says, I want to prohibit both your

1 client and the State and the governor from
2 acting in a particular way, i.e. from selecting
3 you merely because you're an Independent.

4 And it seems to me that the bare
5 majority rule, that or prohibition in this case,
6 is more than adequate to take care of those two
7 interests, but the majority party rule doesn't
8 -- isn't. But you're arguing against both.

9 Can you tell me why you're saying we
10 can't have severance?

11 MR. FINGER: Certainly. As I
12 indicated in my opening, Justice Sotomayor, the
13 language of -- of the -- of the provisions
14 cannot be -- you can't point to a phrase term
15 that'll take out and -- and remain coherent.
16 And I'll just give the first example regarding
17 the Delaware Supreme Court.

18 The language says: Three of the five
19 Justices of the Supreme Court in office at the
20 same time shall be --

21 JUSTICE SOTOMAYOR: Counsel, I don't
22 mean -- I don't mean to stop you because I'm
23 mostly interested in the second one. Take a
24 look. All you have to do is take out the last
25 proposition, "the remaining members of such

1 office shall be of the other major political
2 party."

3 MR. FINGER: Yes.

4 JUSTICE SOTOMAYOR: And take out the
5 word "mayor." That's just excising a portion.

6 MR. FINGER: But it still relegates
7 independence and minor parties to -- to the --
8 to the minority. It precludes -- it neuters the
9 influence of unaffiliated judges by diminishing
10 the importance of their vote by -- numerically.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Kagan?

14 JUSTICE KAGAN: Good morning, Mr.
15 Finger.

16 I just want to make sure I understood
17 your answer to Justice Alito. He said a
18 governor comes in and he says, you know, I'm a
19 Democrat and I'm committed to appointing only
20 Democrats to the bench. They share my judicial
21 philosophy. That's what I'm doing.

22 You think that that would be
23 unconstitutional?

24 MR. FINGER: I think that would be --
25 certainly, governors have the right to include a

1 political affiliation amongst the factors they
2 consider. But, if they are making a
3 determination based on a classification without
4 regard to individual merit, and a classification
5 that is -- is protected by the constitution --

6 JUSTICE KAGAN: Well, I'm sure that
7 they're making decisions with regards to merit.
8 There are lots of meritorious Democrats. But
9 they're -- they're just saying, I'm not going to
10 consider Republicans, I'm only going to consider
11 Democrats.

12 Or, alternatively, let's take another
13 hypothetical. Suppose a -- a -- a governor
14 comes in and says, I'm going to do -- I -- I
15 like this Delaware scheme. We don't have one in
16 my state. But I'm going to do exactly this.
17 I'm going to make sure that there's only a bare
18 majority and make sure that it's evenly divided
19 between Democrats and Republicans.

20 A governor couldn't do that either.
21 There's no constitutional provision. There's no
22 law. This is just a governor's view of good
23 judicial appointment-making.

24 MR. FINGER: Again, these go back to
25 the communist cases and the question of

1 communists need not apply, which we find --
2 which is not acceptable under the First
3 Amendment. It is -- it is simply a form it's
4 taking -- as opposed to a written law, it is a
5 -- a decision of a government authority.

6 And in those cases, if you're doing it
7 just because you like it or just because you
8 don't like someone of another political party,
9 that is no different than -- than having a law
10 that says you can -- you cannot apply.

11 JUSTICE KAGAN: So you -- you don't
12 think that there's any difference between the
13 two, having a -- a law from somebody else,
14 whether it's the constitution or the legislature
15 passes it, on the one hand, and just it being a
16 decision of the appointing authority?

17 MR. FINGER: No, I believe that
18 unwritten policy, which violate constitutional
19 language, are just as subject to -- to judicial
20 attack as written ones.

21 JUSTICE KAGAN: Okay. Let's assume
22 that we do what you ask us to do and -- and
23 apply strict scrutiny or some form of heightened
24 scrutiny. Why does this fail? I understood
25 your principal argument to be that this was not

1 the least restrictive alternative.

2 So I guess my question is, what --
3 what would be a less restrictive alternative?

4 MR. FINGER: The less restrictive
5 alternative is already -- exists. It is in the
6 Delaware Code of Judicial Conduct, which says
7 that judges shall not consider political
8 concerns in making their decisions.

9 Of course, Mr. --

10 JUSTICE KAGAN: Well, I -- I --
11 doesn't that go to something very different? I
12 mean, sure that code of conduct is very
13 important and it makes sure that judges are
14 ethical, but it doesn't do what this law tries
15 to do, which is to say we want to create
16 balanced courts, we want to do that both for the
17 appearance of justice, that those courts won't
18 look political, and we also want to do it
19 because we think that those courts will make
20 better decisions. They won't go to the
21 extremes. They'll move to the center. There
22 won't be polarization. There'll be compromise.

23 MR. FINGER: Yes, so and I -- I -- I
24 believe, for the second point, political -- the
25 question whether -- whether it is partisan,

1 bipartisan, that is challengeable from the
2 perspective of the public, who could also say
3 that by creating this -- this political
4 compromise, you -- we are agreeing that judges
5 are making political decisions.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. Justice Gorsuch?

8 JUSTICE GORSUCH: Counsel, we've
9 already discussed standing an awful lot, but I
10 just wanted to clear up one small thing that we
11 didn't discuss, and that concerns the bare
12 majority requirement. The Third Circuit held
13 that your client had no standing to contest that
14 because as an Independent it doesn't preclude
15 him from taking office in any judicial capacity.

16 I did not see a cross-petition from
17 you on that. I did see one or two stray
18 sentences in your brief suggesting you contest
19 that. I -- I -- I'd just like clarity now. Are
20 you expecting us to -- to rule on that, or do
21 you concede that that issue is not before us?

22 MR. FINGER: I believe that issue is
23 not before the Court. The Third Circuit did not
24 pass on it but merely relied on -- on severable
25 -- severance for the lack of severability. Can

1 I ask --

2 JUSTICE GORSUCH: Counsel -- counsel,
3 thank -- thank you. If you agree it's not
4 before us, that's great. That's all I needed to
5 hear.

6 With respect to the merits, on Elrod
7 and Branti, I want you to react to this: The
8 notion that they might be an odd fit here.
9 They've been applied to protect the affiliation
10 rights of what the Court has called low-level
11 employees in the executive branch. And here we
12 have -- and -- and they've also been there to
13 ensure that patronage doesn't go too far.

14 Here we have a requirement that
15 doesn't concern the rights of affiliation,
16 necessarily, and actually mitigates the problem
17 of patronage by ensuring as it has for the last,
18 I guess, 27 years that a -- a governor has to
19 pick a candidate from the opposite party.

20 So, the -- first of all, they seem
21 kind of an odd fit. And then -- then there's
22 the overlay of the Tenth Amendment, which grants
23 states considerable power to organize their own
24 governments, so long as they're republican forms
25 of government, and this Court has repeatedly

1 emphasized the importance of that right in
2 Gregory versus Ashcroft.

3 So can you just react to -- to those
4 thoughts?

5 MR. FINGER: Yes, Justice Gorsuch.
6 Branti is relevant at least in that it -- it
7 creates a limited exception to what I'm calling
8 the communist rule, that is, the absolute bar on
9 the -- using political affiliation.

10 And the -- although I don't believe
11 that those -- those cases refer to it as
12 limiting it to low-level employees, that's a
13 characterization that was put in -- in -- in my
14 opponent's brief.

15 As for the Tenth Amendment, this Court
16 has also recognized that states' rights are
17 still bounded by the -- the -- the Constitution
18 of the United States.

19 JUSTICE GORSUCH: Thank you, counsel.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: Thank you,
23 Mr. Chief Justice. Good morning, Mr. Finger.

24 Picking up on a question earlier from
25 Justice Gorsuch, there is a long tradition of

1 governors considering political affiliation when
2 selecting judges. Delaware seems to just make
3 explicit what has been implicit in many states
4 that leave it to the governor.

5 Why, then -- given that traditional
6 practice matters in First Amendment analysis,
7 why is that different in kind than governors
8 considering political affiliation?

9 MR. FINGER: Because, Justice
10 Kavanaugh, it's not an exclusive fact. Taking
11 the federal bench for -- just for example, since
12 President Roosevelt, there has been
13 approximately 5 to 10 percent of -- of
14 appointees coming from the other party. And I
15 take this from a law review article that
16 appeared in the amicus brief of the former
17 justices of the Delaware Supreme Court.

18 That same law review article also
19 shows that, since President Carter, there has
20 been an increase to about 5 percent of -- of
21 candidates -- of appointments.

22 JUSTICE KAVANAUGH: So --

23 MR. FINGER: But roughly --

24 JUSTICE KAVANAUGH: I'm sorry to
25 interrupt. So the problem is the categorical

1 nature of Delaware's rule. I think I understand
2 that.

3 Mr. McConnell also identifies, I
4 guess, what I would describe as the "leave well
5 enough alone" principle, that the results in
6 Delaware have been superb with Judges, you know,
7 Collins Seitz and Bill Allen and Leo Strine and
8 Norm Veasey and leading lights of the judiciary.
9 What's your response to that argument, that it's
10 produced an excellent, widely respected
11 judiciary?

12 MR. FINGER: Again, there is no
13 evidence that this highly respected and -- and
14 properly recognized judiciary actually results
15 from this provision. That's a -- that's a case
16 of a sort of illusory truth effect where a
17 statement is made over and over and people tend
18 to believe it more. But there's nothing
19 concrete to -- to support that.

20 It's not really even intuitive.

21 JUSTICE KAVANAUGH: Okay. Next
22 question is, if you were to win here, what would
23 happen to partisan balance requirements for
24 federal independent agencies, state
25 redistricting commissions, state judicial

1 nominating commissions, and the like?

2 MR. FINGER: Well, nothing should
3 directly follow from that. These -- these
4 various agencies and commissions, they all have
5 different interests involved. So a decision by
6 this Court will not per se do away with those
7 requirements.

8 JUSTICE KAVANAUGH: Thank you,
9 Mr. Finger.

10 MR. FINGER: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Finger,
12 why don't you take a minute to wrap up.

13 MR. FINGER: Thank you, Your Honor I
14 thank the Court for the opportunity.

15 In conclusion, I just want to say the
16 State's interest in the stability of its
17 judicial system should -- this should not permit
18 it to insulate the judiciary from Independents
19 or unaffiliateds or members of the minor --
20 major political parties. The goals are not met
21 by the provisions, and the assumptions
22 underlying them, as set forth in the brief,
23 indicate that they are not achieving that goal
24 solely on that basis.

25 There are other factors in Delaware

1 which create an excellent judiciary and will
2 continue to do so without these limitations on
3 the rights of people other than Democrats and
4 Republicans.

5 I thank the Court.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. McConnell, three minutes for
9 rebuttal.

10

11

12 REBUTTAL ARGUMENT OF MICHAEL W. McCONNELL

13 ON BEHALF OF THE PETITIONER

14 MR. McCONNELL: Thank you very much,
15 Mr. Chief Justice.

16 The -- I want to address a couple of
17 small points and then -- and then the major one.

18 In Justice Breyer's discussions, both
19 with me and with Mr. Finger, we talked about
20 sincerity. But -- and I even used the word
21 "sincerity," but I want to emphasize that the
22 ultimate test here isn't whether Mr. Adams was
23 sincere. The question is whether applying would
24 be futile. And that's a question of fact. It's
25 not a question of -- of sincerity.

1 And then, ultimately, the question is
2 whether a trier of fact, reasonable trier of
3 fact, could have -- have found on this record
4 against Mr. Finger -- Mr. Adams on the summary
5 judgment motion.

6 Now, the second small point that --
7 that I would like to emphasize here is that
8 severability is a -- which we didn't discuss a
9 great deal today -- is of enormous practical
10 importance because even if the major party
11 provision were struck down, there is no
12 justification for striking down the bare
13 majority provision.

14 It -- it's especially clear because
15 Mr. Adams does not even have standing to
16 challenge that. And it does -- we know that it
17 could stand on its own because it does -- it has
18 for so many years and it's of -- you know, of
19 grave importance to the state that even if we
20 were to lose on the major party provision, that
21 the -- that the bare majority provision still
22 stand.

23 But, finally, I want to turn to the
24 merits, which is really what matters here. And
25 the -- the -- we believe that under Gregory

1 versus Ashcroft, as well as Branti and -- and
2 Elrod, that strict scrutiny is not appropriate.
3 That the language used by the courts in -- in
4 the patronage cases all involve reasonableness.
5 Is there a reasonable relation between the
6 requirement? And this is because it's basically
7 an unconstitutional conditions case.

8 What Mr. Adams is alleging is that
9 he's being denied an available public benefit
10 because of his exercise of a constitutional
11 right. But that kind of an argument doesn't
12 work if the restriction is germane to the
13 purpose for which the benefit was -- was
14 created.

15 So strict scrutiny should not apply.
16 But even if it did apply, the question is
17 whether the challenged provision confers a
18 compelling governmental interest in the least
19 restrictive way. And here no one doubts that
20 the State has a compelling interest in promoting
21 public confidence in the judiciary.

22 Now, the bare majority requirement may
23 be sufficient to achieve that interest under
24 normal circumstances, where political parties
25 seesaw back and forth, but the major party

1 provision makes the bare majority provision more
2 effective, especially under the actual
3 circumstances here of long --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 MR. McCONNELL: -- party domination.
7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel. The case is submitted.

10 (Whereupon, at 11:05 a.m., the case
11 was submitted.)

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