

# SUPREME COURT OF THE UNITED STATES

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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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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 states have broad  
14 leeway in 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 -- the  
16 qualifications have to be reasonably  
17 appropriate.

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

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

1 the -- on the ballot?

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

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

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

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

25 And so, if Mr. Adams is right here

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

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

14 MR. McCONNELL: None at all.

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Breyer?

18 JUSTICE BREYER: All right. Thank  
19 you.

20 I -- I'd like to return to Justice  
21 Thomas's first question. As I understand it,  
22 the Constitution says, in respect to the Supreme  
23 Court, the Superior Court, and a number of other  
24 courts -- not all -- that you have offices --  
25 you have some offices that are for the same

1 major political party, but they can't be more  
2 than a bare majority. And then it says the  
3 remaining members shall be of the other major  
4 political party.

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

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

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

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

1 balance provision.

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

7 MR. McCONNELL: Well --

8 JUSTICE BREYER: And so why is that  
9 constitutional?

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

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

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

1 that or what?

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

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

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Justice Alito?

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

23 MR. McCONNELL: I -- Justice Alito, I  
24 -- I think so. His big problem is that his  
25 actions do not line up with his words. Now it

1 is true that even his words are vague and, I  
2 think, insufficient under this Court's precedent  
3 in Lujan, which requires concrete plans, but  
4 what you describe probably would satisfy Lujan.  
5 The problem is I don't think he could swear to  
6 it given that there have been so many judgeships  
7 for which he's entirely eligible that go by.

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

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

23 But he -- despite the fact that those  
24 case -- those openings have been numerous, he  
25 still brings the lawsuit. It seems evident that

1 he's -- he's really interested here in pursuing  
2 a theory that he read about in a law review, not  
3 really getting a judgeship.

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

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

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

25 But, here, the State is doing



1 something that's actually quite commonsensical,  
2 makes a great deal of sense, if you believe in a  
3 bipartisan judiciary. And that's what -- that's  
4 the difference here. It isn't numbers. It's  
5 whether the use of partisan affiliation is  
6 reasonably appropriate for --

7 CHIEF JUSTICE ROBERTS: All right.  
8 Thank you.

9 MR. McCONNELL: -- his decision.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Justice Sotomayor?

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

20 I just don't understand why the  
21 majority party rule promotes either of those two  
22 interests and does it in a better way than the  
23 bare majority provision at issue in your section  
24 -- in your Number 2 of Article III? There, all  
25 that is required of the bare majority is that it

1 be no more than a bare majority. It doesn't  
2 have to be.

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

5 MR. McCONNELL: Well, Justice  
6 Sotomayor --

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

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

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

22 JUSTICE SOTOMAYOR: Well, but --

23 MR. McCONNELL: And as the --

24 JUSTICE SOTOMAYOR: -- if you'll -- if  
25 you'll excuse me a moment with that, those two

1 examples. It seems to me that no rightly  
2 thinking governor is going to appoint someone  
3 from the other party who is completely  
4 misaligned with his or her views. They could  
5 pick the most -- I -- I -- I don't know if  
6 there's such a word -- the softest Republican,  
7 the one most closely aligned with Democratic  
8 values or -- or something of that nature.

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Kagan?

3 JUSTICE KAGAN: Good morning,  
4 Mr. McConnell.

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

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

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

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

22 JUSTICE KAGAN: If I could --

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

24 JUSTICE KAGAN: -- just stop you  
25 there. Why -- why does it fall short of a

1 concrete plan? He's basically saying, I'm -- I  
2 want -- I would apply for any judicial position  
3 that would come up. That's what -- that's what  
4 he says. That's a concrete plan: I would apply  
5 for any judicial position that would come up.

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

9 JUSTICE KAGAN: Okay. So --

10 MR. McCONNELL: -- the problem.

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

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

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

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

1 JUSTICE KAGAN: Well, if he had said,  
2 what I'm -- what I'm interested in is the three  
3 that have both the provisions, the -- the major  
4 party as well, would he have to apply?

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

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

17 As long as this policy remains in  
18 effect, you can just challenge the policy.

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

24 So it would be -- it would be as if  
25 somebody said, I want to go to any public

1 university in Texas, but I can't -- but I  
2 haven't applied to any of them, and one of them,  
3 I think, there's a -- there's an obstacle.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Gorsuch.

7 JUSTICE GORSUCH: Thank you.

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

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

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

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

25 But there's certainly no examples in

1 the -- in history of -- of provisions of this  
2 sort being regarded as unconstitutional. In  
3 fact, for most under the jurisprudence --

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

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

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

24 I understand your argument that it  
25 serves as a backstop for the bare majority rule,



1 which does have historical antecedents, plenty  
2 of them, but, near as I can tell, none of those  
3 has ever included this backstop before. This is  
4 a novel thing. And it does -- does prohibit a  
5 great percentage of the population from  
6 participating in the process.

7 MR. McCONNELL: Just, Justice Gorsuch,  
8 may I make two points about this?

9 First, although I can't point to a  
10 specific use of this particular matter, this  
11 Court has approved any number of limitations on  
12 First Amendment rights as a condition to public  
13 service. The Hatch Act cases, for example, are  
14 a much more severe limitation on free speech  
15 rights, applying to lots more people for lots  
16 more positions, and the Court has -- has  
17 consistently upheld them.

18 But, secondly, as to the uniqueness  
19 here, this actually, I think, points in  
20 Delaware's favor. It is true that Delaware is  
21 the only state that does this. But it is also  
22 the only state that has created a judiciary of a  
23 particular sort that -- that is fair. It's like  
24 --

25 JUSTICE GORSUCH: Thank you, counsel.

1                   MR. McCONNELL:  -- the Delaware  
2                   judiciary is a jewel.

3                   CHIEF JUSTICE ROBERTS:  Justice  
4                   Kavanaugh?

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

7                   And good morning, Mr. McConnell.

8                   To pick up on standing from the  
9                   comments and questions of the Chief Justice and  
10                  Justice Kagan, you keep saying he hasn't  
11                  applied.  Of course, he hasn't applied.  He's  
12                  not eligible.  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 -- the  
8 best 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 -- 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 -- 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. Thank you.

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

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

24           MR. FINGER: Well, again, his -- his  
25 statements are judged to have been made in good



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

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

10 MR. FINGER: And under --

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

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

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

1 undertake the action that determines the  
2 standing.

3 CHIEF JUSTICE ROBERTS: Well, the  
4 strongest statement he has is that he would  
5 consider and apply for the job.

6 Now, if -- if I got an application for  
7 a clerkship from someone who said she would  
8 consider and apply for the job, I really  
9 wouldn't know what to make of 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. So we're only thinking  
22 about the other three.

23 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 is a -- if there is a

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

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Justice Alito?

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

14 MR. FINGER: That's correct.

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

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

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

1           MR. FINGER: Yes. If -- if -- if the  
2 word "apply" was not there, it would be pure  
3 consideration of -- "consider and apply"  
4 indicates a positive, affirmative action.

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

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

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

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

25          JUSTICE ALITO: You applied for -- let

1 me turn to another matter -- you applied for an  
2 injunction, and there was no ruling on that, was  
3 there?

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

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

12 MR. FINGER: We've taken no action on  
13 the injunction issue.

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

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

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

24 MR. FINGER: I believe so.

25 JUSTICE ALITO: Contempt of the

1 declaratory --

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

4 JUSTICE ALITO: Contempt of the  
5 declaratory judgment?

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

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

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

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

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor? Justice Sotomayor?

2 JUSTICE SOTOMAYOR: Counsel, your last  
3 answer troubles me because there are three  
4 rights at issue here that I see, at least three.

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

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

23 But that's not the case here. The  
24 case here involves the State, and it's the  
25 State's choice for its own interests balancing

1 partisanship and promoting an independent  
2 judiciary who says, I want to prohibit both your  
3 client and the State and the governor from  
4 acting in a particular way, i.e. from selecting  
5 you merely because you're an Independent.

6           And it seems to me that the bare  
7 majority rule, that, or proposition in this  
8 case, is more than adequate to take care of  
9 those two interests, but the majority party rule  
10 doesn't -- isn't. But you're arguing against  
11 both. Can you tell me why you're saying we  
12 can't have severance?

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

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

23           JUSTICE SOTOMAYOR: Counsel, I don't  
24 mean -- I don't mean to stop you because I'm  
25 mostly interested in the second one. Take a

1 look. All you have to do is take out the last  
2 proposition, "the remaining members of such  
3 office shall be of the other major political  
4 party."

5 MR. FINGER: Yes.

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

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

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Justice Kagan?

16 JUSTICE KAGAN: Good morning, Mr.  
17 Finger.

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

24 You think that that would be  
25 unconstitutional?



1           MR. FINGER: I think that would be --  
2           certainly, governors have the right to include  
3           political affiliation amongst the factors they  
4           consider. But, if they are making a  
5           determination based on a classification without  
6           regard to individual merit and a classification  
7           that is -- is protected by the constitution --

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

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

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

1           MR. FINGER: Again, these go back to  
2 the communist cases and the question of  
3 communists need not apply, which we find --  
4 which is not acceptable under the First  
5 Amendment. It is -- it is simply a form it's  
6 taking -- as opposed to a written law, it is a  
7 -- a decision of a government authority.

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

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

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

23           JUSTICE KAGAN: Okay. Let's assume  
24 that we do what you ask us to do and -- and  
25 apply strict scrutiny or some form of heightened

1 scrutiny. Why does this fail? I understood  
2 your principal argument to be that this was not  
3 the least restrictive alternative.

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

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

11 Of course, Mr. --

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

25 MR. FINGER: Yes, so -- and I -- I --

1 I believe, for the second point, political --  
2 the question whether -- whether it is partisan,  
3 bipartisan, that is challengeable from the  
4 perspective of the public, who could also say  
5 that by creating this -- this political  
6 compromise, you -- we are agreeing that judges  
7 are making political decisions.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Justice Gorsuch?

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

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

25 MR. FINGER: I believe that issue is

1 not before the Court. The Third Circuit did not  
2 pass on it but merely relied on -- on severable  
3 -- severance or the lack of severability. And  
4 that's what I meant.

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

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

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

22 So the -- first of all, they seem kind  
23 of an odd fit. And then -- then there's the  
24 overlay of the Tenth Amendment, which grants  
25 states considerable power to organize their own

1 governments, so long as they're republican forms  
2 of government, and this Court has repeatedly  
3 emphasized the importance of that right in  
4 Gregory versus Ashcroft.

5 So can you just react to -- to those  
6 thoughts?

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

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

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

21 JUSTICE GORSUCH: Thank you, counsel.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Kavanaugh?

24 JUSTICE KAVANAUGH: Thank you,  
25 Mr. Chief Justice.

1           Good morning, Mr. Finger. Picking up  
2           on a question earlier from Justice Gorsuch,  
3           there is a long tradition of governors  
4           considering political affiliation when selecting  
5           judges. Delaware seems to just make explicit  
6           what has been implicit in many states that leave  
7           it to the governor.

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

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

21          That same law review article also  
22          shows that, since President Carter, there's been  
23          an increase too of about 5 percent of -- of  
24          candidates -- of appointments.

25          JUSTICE KAVANAUGH: So --

1 MR. FINGER: But roughly --

2 JUSTICE KAVANAUGH: -- I'm sorry to  
3 interrupt. So the problem is the categorical  
4 nature of Delaware's rule. I think I understand  
5 that.

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

15 MR. FINGER: Again, there's no  
16 evidence that this highly respected and -- and  
17 properly recognized judiciary actually results  
18 from this provision. That's a -- that's a case  
19 of a sort of illusory truth effect where a  
20 statement is made over and over and people tend  
21 to believe it more. But there's nothing  
22 concrete to -- to -- to support that. It's not  
23 really even intuitive.

24 JUSTICE KAVANAUGH: Okay. Next  
25 question is, if you were to win here, what would



1 happen to partisan balance requirements for  
2 federal independent agencies, state  
3 redistricting commissions, state judicial  
4 nominating commissions, and the like?

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

11 JUSTICE KAVANAUGH: Thank you,  
12 Mr. Finger.

13 MR. FINGER: Thank you.

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

16 MR. FINGER: Thank you, Your Honor. I  
17 thank the Court for the opportunity.

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

1 are not achieving that goal solely on that  
2 basis.

3 There are other factors in Delaware  
4 which create an excellent judiciary and will  
5 continue to do so without these limitations on  
6 the rights of people other than Democrats and  
7 Republicans.

8 I thank the Court.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Mr. McConnell, three minutes for  
12 rebuttal.

13 REBUTTAL ARGUMENT OF MICHAEL W. McCONNELL

14 ON BEHALF OF THE PETITIONER

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

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

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

1 not a question of -- of sincerity.

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

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

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

24           But, finally, I want to turn to the  
25 merits, which is really what matters here. And

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

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

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

23           Now the bare majority requirement may  
24 be sufficient to achieve that interest under  
25 normal circumstances, where political parties

1 seesaw back and forth, but the major party  
2 provision makes the bare majority provision more  
3 effective, especially under the actual  
4 circumstances here of long --

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

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

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

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

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