Delaware’s Constitution requires that three state courts be balanced between the two major political parties. The main question before the Supreme Court in *Carney v. Adams* [2] is whether this scheme violates the First Amendment. In an *amicus brief* [3] the State and Local Legal Center (SLLC) argues it does not.

Per Delaware’s Constitution no more than half of the members of the Delaware Supreme Court, Superior Court, or Chancery Court may be of the same major political party.

Delaware attorney James Adams wants to be a judge in Delaware but he is an Independent. Adams claims that the First Amendment prohibits the governor from making judicial appointments based on political party.

In the three previous “patronage” cases the Supreme Court has explained “the limits on a government employer’s ability to consider a job candidate's political allegiance.” Based on those cases the Third Circuit focused on whether judges are policymakers as First Amendment protections do not apply to them.

The Third Circuit concluded judges aren’t policymakers. According to the lower court the “purpose of the policymaking exception is to ensure that elected officials may put in place loyal employees who will not undercut or obstruct the new administration.”

The Third Circuit reasoned “[j]udges simply do not fit this description. The American Bar Association’s Model Code of Judicial Conduct instructs judges to promote ‘independence’ and ‘impartiality,’ not loyalty.” “The Delaware Supreme Court has stated that Delaware judges ‘must take the law as they find it, and their personal predilections as to what the law should be have no place in efforts to override properly stated legislative will.’ Independence, not political allegiance, is required of Delaware judges.”

The SLLC *amicus brief* [3] argues that state and local governments should be able to “insulate certain decision-making bodies from the rough-and-tumble of partisan politics.” The brief argues that the patronage cases don’t apply to this case because “the person making a hiring decision—here, the Governor—has no say in whether to take partisan affiliation into account; patronage plays no part in this picture. Instead, the relevance of partisan affiliation is baked into the structure of government ahead of time, when no one can predict who will be making a given appointment at a given point in the future.”

The brief next argues if the Court applies the policymaking exception in this case it should construe it more broadly than the Third Circuit.

Finally, the brief points out that “[h]undreds of state and local governments have made a thoughtful choice to use bipartisan decision-making processes, based on their conclusion that these processes will produce the best outcomes for their communities. They have reached this conclusion in myriad
settings: from judicial selection, to elections administration, to ethics enforcement, and more. A test which deems these reasonable choices per se unconstitutional would upend state and local governments and would defy common sense.

Kirti Datla and Kristina Alekseyeva, Hogan Lovells, wrote the SLLC amicus brief in this case which the following organizations joined: National Conference of State Legislatures, National Association of Counties, National League of Cities, U.S. Conference of Mayors, International City/County Management Association, and International Municipal Lawyers Association.

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