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* is whether this scheme violates the First Amendment.

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 three previous 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.”

Governor Carney argued that even if state judges aren’t policy makers political affiliation is still an appropriate consideration because having a politically balanced judiciary is a vital government interest. The Third Circuit didn’t disagree but concluded that “Delaware’s practice of excluding Independents and third party voters from judicial employment is not narrowly tailored to that interest.”

The Supreme Court has agreed to decide two other issues in this case. Per the Delaware Constitution only a bare majority of family court and court of common pleas judges may be from the same political party but the “major political party” rule doesn’t apply to them. The Third Circuit concluded that the “bare majority” rule isn’t severable from the unconstitutional “major political party” rule.

According to the Third Circuit the question of severability turns on legislative intent. “For nearly seventy years, the bare majority component and the major political party component have been intertwined . . . . Both components operate in tandem to dictate the bi-partisan makeup of Delaware’s courts. Operating alone, the bare majority component could be interpreted to allow a Governor to appoint a liberal member of the Green Party to a Supreme Court seat when there are
already three liberal Democrats on that bench. Only with the (unconstitutional) major political party component does the constitutional provision fulfill its purpose of preventing single party dominance while ensuring bipartisan representation."

Finally, the Supreme Court will decide whether Adams has standing to bring this case. He has not applied for any judicial position since becoming an Independent in 2017.

In most states the governor does not select judges but in almost all states interim vacancies are filled by governors. Delaware is probably unique in requiring political balance in selecting judges but governors, state legislatures, and voters take political views of candidates into consideration when selecting judges.

To the extent the Supreme Court further defines a test for when politics can be considered in government positions this case will have implications beyond selection of judges by governors. The Third Circuit has held that political affiliation is an appropriate requirement for city attorneys, assistant city attorneys, and city managers.

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