IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1045

JAMES R. ADAMS
Plaintiff-Appellee,

v.

THE HON. JOHN CARNEY
Defendant-Appellant.

On Appeal from the United States District Court for the District of Delaware
Civil Action No. 17-181-MPT

DEFENDANT-APPELLANT'S OPENING BRIEF

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INTRODUCTION

Since 1897, the Delaware Constitution has set forth certain obligations to reduce the influence of any one political party on Delaware courts by requiring a politically balanced judiciary. This political balance requirement is considered by many to be the strength of and a critical component to the Delaware judiciary, particularly the Court of Chancery, which is viewed as a nonpartisan forum for the resolution of the Nation's most significant corporate disputes.

For 120 years, this political balance was an unchallenged cornerstone of the Delaware judiciary. Recently, Plaintiff, a retired Delaware attorney, switched his voter registration from Democrat to independent and, eight days later, filed his Complaint seeking an order invalidating this longstanding political balance requirement because he alleges that it deprives him of his First Amendment rights.

As a threshold matter, Plaintiff lacked the required standing to file suit. In any event, despite his lack of standing, the District Court considered Plaintiff's challenge and then erroneously held that Article IV, Section 3 of Delaware's Constitution "violates the First Amendment by placing political affiliation restrictions on government employment by the Delaware judiciary." (JA37.) As explained below, such a conclusion was reversible error. The political balance requirement of Article IV, Section 3 of the Delaware Constitution does not violate the First Amendment because balancing judicial appointments based on political party, and pursuant to a

constitutional provision requiring a politically balanced judiciary, is permissible under the *Elrod/Branti* standard. (*See* D.I. 29 at 18–20; D.I. 34 at 5–11; D.I. 37 at 4–8.) In short, under that standard, the consideration of political affiliation as required by the Delaware Constitution does not violate the First Amendment because (a) Delaware judges are "policymakers" who make law by establishing the State's common law and equitable doctrines, exercise numerous discretionary powers, and structure and manage the third branch of the Delaware government; and (b) consideration of political affiliation is appropriate in the context of a law mandating political balance.

This Court should reverse the District Court's order and enter judgment for Defendant, the Honorable John Carney.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The District Court granted Plaintiff's motion for summary judgment and denied Defendant's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. (JA7–38.) A final judgment was entered on December 6, 2017, and revised on May 23, 2018. (JA6, 39.)

Defendant filed a timely notice of appeal on January 5, 2018 (JA1–2), and a timely revised notice of appeal on June 20, 2018. (JA3–5.) This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in granting summary judgment for Plaintiff, thereby considering the merits of Plaintiff's motion, where Plaintiff failed to meet his burden that he had standing to challenge the political balance requirement of Article IV, Section 3 of the Delaware Constitution. (*See* JA12–14, 27–32, 45–50.)

2. Whether the District Court erred in granting summary judgment for Plaintiff, and holding that the political balance requirement of Article IV, Section 3 of the Delaware Constitution violates the First Amendment, because judges satisfy the *Elrod/Branti* standard whereby political affiliation is an appropriate consideration for judicial appointments. (*See* JA14–20, 32–38.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. Defendant is not aware of any other case or proceeding related to this case.

STATEMENT OF THE CASE

I. THE POLITICAL BALANCE REQUIREMENT OF THE DELAWARE CONSTITUTION

Article IV, Section 3 of the Delaware Constitution sets forth requirements and limitations with respect to appointment to the Delaware Courts:

> Appointments to the office of the State Judiciary shall at all times be subject to all of the following limitations:
>
> First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.

> Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the members of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.
>
> Third, at any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.
>
> Fourth, at any time when the total number of Judges of the Family Court shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.
>
> Fifth, at any time when the total number of Judges of the Court of Common Pleas shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.

DEL. CONST. art. IV, § 3. These provisions are commonly referred to as the "political balance requirement." The political balance requirement contains two features. First, it prohibits any political party from constituting more than a "bare majority" of members of the Supreme Court, the Superior Court, or the collective membership of the Supreme Court, Superior Court and the Court of Chancery in combination (the "bare majority component"). Second, the members of the Supreme Court, the

Superior Court and the Court of Chancery must be members of one of the two major political parties (the "major party component").

Appointments to the Court of Common Pleas and the Family Court are restricted by a bare majority component. However, no major party component governs appointments to those two courts. Thus, an independent or minor party candidate would generally be able to apply for vacancies on these courts.

Political balance of the judiciary has been a feature of the Delaware Constitution for over 120 years.[1] In 1897, the concept of a politically balanced judiciary was added to the Delaware Constitution in response to concern regarding the need to limit political influence from the judiciary. Joseph T. Walsh & Thomas J. Fitzpatrick, Jr., *Judiciary Article IV*, in THE DELAWARE CONSTITUTION OF 1897: THE FIRST ONE HUNDRED YEARS 134 (1997); (*see also* JA135–37, 142, 146–48 (Debates and Proceedings of the Constitutional Convention of the State of Del.).) In other words, delegates at the Constitutional Convention were concerned that Delaware "ought to do something by which we would make our Bench non-partisan, or if it be a better word, bi-partisan; that is, that we should not have them all of the same political party." (JA142.) The political balance structure of the Delaware judiciary has been repeatedly reaffirmed through the amendment process. (*See*, *e.g.*, JA150–59.)

[1] The 1897 version of Article IV, Section 3 of the Delaware Constitution is attached here as Addendum 1.

The concept of political balance, in some form, is not unique to Delaware courts. Among others, the FDIC, the FTC, the SEC, the FCC, the Commission on Civil Rights, the FERC, and the FEC all have political balance requirements governing their composition. *See* 12 U.S.C. § 1812 ("[N]ot more than 3 of the members of the Board of Directors [of the FDIC] may be members of the same political party."); 15 U.S.C. § 41 ("Not more than three of the [five Federal Trade] Commissioners shall be of the same political party."); 15 U.S.C. § 78d ("Not more than three of such [five Securities Exchange] commissioners shall be members of the same political party."); 47 U.S.C. § 154 ("The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the [Federal Communications] Commission."); 42 U.S.C. § 1975 ("The Commission [on Civil Rights] shall be composed of 8 members. Not more than 4 of the members shall at any one time be of the same political party."); 42 U.S.C. § 7171 ("Not more than three [of the five] members of the [Federal Energy Regulatory] Commission shall be members of the same political party."); 52 U.S.C. § 30106 ("No more than 3 [of the 6] members of the [Federal Election] Commission . . . may be affiliated with the same political party.").

Political balance is considered by many to be the strength of and a critical component to the Delaware judiciary, particularly the Court of Chancery, which is

viewed as a nonpartisan forum for the resolution of the Nation's most significant corporate disputes. For example, according to former Justice Randy Holland, the "practice of appointing judges and maintaining a balance of power between political parties on its high court has yielded dividends in both the expertise and independence of its judiciary." Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 771–72 (2009) (hereinafter Holland, *Delaware's Business Courts*). Further, in a law review article, Superior Court President Judge Jan Jurden stated that "[i]n order to ensure that the courts are fair and impartial, the Delaware system goes one step further and requires that the courts be politically balanced." Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 243 (2009) (co-authored by President Judge Jan R. Jurden).

II. THE DISTRICT COURT PROCEEDING

The following undisputed facts demonstrate that Plaintiff filed this lawsuit as an academic challenge and not because of an interest in applying for a judicial position. Plaintiff is a member of the bar of the State of Delaware. (D.I. 10, ¶ 2.) After three years in private practice, Plaintiff went to work at the Delaware Department of Justice ("DOJ"). (*Id.*) In 2009, Plaintiff applied to be a Family Court commissioner, but was not selected. (JA61–62 at 7:18–8:17.) Other than this Family Court commissioner position, Plaintiff never applied for a judicial position before bringing this action.

(JA104.) This is so even though it is undisputed that there were a number of open judicial positions that could have been filled by a Democrat, and Plaintiff was at the time a Democrat. (JA75-79 at 21:22–25:18; JA96–98; JA103; D.I. 35 at 3.) Plaintiff then remained at DOJ, served in a number of roles, and retired on December 31, 2015. (D.I. 10, ¶ 2.)

Following his retirement, Plaintiff "went on emeritus status" with the bar and took a "sabbatical," until returning to active status in 2017. (JA59 at 5:3–8.) Plaintiff claimed to have "been a democrat [his] whole life and actually worked within the [D]emocratic party here in Delaware." (JA72 at 18:10–12.) But, Plaintiff considered himself to be "much more progressive and liberal than [D]emocrats in Delaware" and considered Delaware's Democratic Senator Tom Carper and Democratic former Governor Jack Markell to be more like Republicans than Democrats. (JA72–73 at 18:17–19:4.) Plaintiff felt "energized by Bernie Sanders" and not by the "more moderate message from [D]emocrats here locally in Delaware and sometimes nationally. So that kind of doesn't leave a lot of choices in terms of party affiliation." (JA75 at 21:13–21.)

In "January/February" of 2017, Plaintiff read a law review article by Joel Friedlander questioning the constitutionality of the political balance requirement of the Delaware Constitution. (JA67–68 at 13:16–14:12.) Plaintiff then called Mr. Friedlander and said, "I just read your Law Review article. I'd like to pursue this."

(*Id.*) Plaintiff and Mr. Friedlander talked, and Mr. Friedlander gave Plaintiff "the names of a couple of attorneys." (*Id.*).

By February 13, 2017, Plaintiff changed his registration from Democrat to independent or unaffiliated. (JA25; JA65–66 at 11:14–12:15; JA103; JA108; D.I. 1 ¶ 2; D.I. 29 at 6.) Eight days later, on February 21, 2017, Plaintiff filed his original complaint. On April 10, 2017, Plaintiff filed an amended complaint pursuant to 42 U.S.C. § 1983, claiming that "the provision of Article IV, Section 3 of the Constitution of the State of Delaware mandating political balance on the courts is unconstitutional as it violates the freedom of association guaranteed by the First Amendment to the Constitution of the United States." (D.I. 10 at 11.) As the District Court noted, this political balance requirement involves two operative terms: the major party component, requiring some members of the Delaware Courts to be members of one of the two major political parties in Delaware; and the bare majority component, prohibiting any party from having more than a one-judge "majority" on the Courts. (*See* JA28–29 and n.45.) As the District Court correctly held, the Plaintiff as an unaffiliated voter was not precluded from applying for a judicial position because of the bare majority component.

On September 29, 2017, the parties filed cross-motions for summary judgment. (D.I. 28, 31.). Plaintiff's motion, relying on Mr. Friedlander's law review article and the legal research cited therein, argued that the political balance requirement of Article

IV, Section 3 violated the First Amendment. (D.I. 32, 38.) Defendant's motion argued:

> (1) that Plaintiff had not met his burden to establish Article III or prudential standing; and
>
> (2) the political balance requirement of Article IV, Section 3 did not violate the First Amendment because balancing judicial appointments based on political party is constitutionally permissible.

(D.I. 29, 34, 37.)

On December 6, 2017, the District Court granted Plaintiff's motion for summary judgment, holding: (1) that Plaintiff had standing to challenge provisions one through three of Article IV, Section 3 (which contain major party components), but did not have standing to challenge provisions four and five (which contain only a bare majority component); (2) that, nevertheless, the political balance requirement of Article IV, Section 3 violated the First Amendment by restricting government employment based on political affiliation; and (3) that the "policymaker exception" to this general rule does not apply. (*See* JA13, 19.) The District Court entered judgment the same day. (JA6.)

On December 20, 2017, Defendant filed a Motion for Reconsideration/Clarification requesting clarification on three issues arising from the Court's initial decision: (1) whether the Court intended to adjudicate the

constitutionality of the bare majority component applicable to the Court of Common Pleas and the Family Court in light of the Court's determination that Plaintiff lacked Article III standing to challenge those components; (2) whether the Court's determination that Plaintiff lacked Article III standing to challenge the bare majority components applicable to the Court of Common Pleas and the Family Court also applied to Plaintiff's Article III standing to challenge the bare majority components applicable to the Supreme Court, Court of Chancery and Superior Court; and (3) whether the Court intended to hold that the bare majority components applicable to the Supreme Court, Court of Chancery and Superior Court were unconstitutional, in light of the fact that those provisions do *not* preclude persons who are not members of a major party from applying. (D.I. 42, 49.)

On January 5, 2018, Defendant filed a notice of appeal. (JA1.) The Clerk subsequently suspended the appeal pending the District Court's resolution of the Motion for Reconsideration/Clarification.

On May 23, 2018, the District Court denied Defendant's Motion for Reconsideration, but granted Defendant's Motion for Clarification, and issued a Memorandum Opinion Clarifying the Court's December 6, 2017 Opinion. The District Court's clarified opinion largely reiterated the December 6 opinion (*see* JA21–26, 32–38), but added more detail regarding the District Court's findings on standing. (JA27–32.). The opinion did not address the first question on which the

Governor sought clarification: whether the District Court had adjudicated the constitutionality of the provisions applicable to the Court of Common Pleas or the Family Court in any respect. The District Court's clarifying opinion did further address the standing issue. The District Court held that "Plaintiff has demonstrated constitutional standing as to the *"major political party" provisions of Article IV, § 3* of the Constitution of the State of Delaware." (JA30 (emphasis added).) The District Court did not, however, hold that Plaintiff had Article III standing to challenge the bare majority components. When addressing the provisions applicable to the Court of Common Pleas and the Family Court (provisions four and five), the District Court reiterated that Plaintiff did not have Article III standing because those provisions only had a bare majority component and did not require that an applicant be a member of a major party. (JA28–29.) The District Court correctly noted that the bare majority component would never apply to Plaintiff, an unaffiliated voter, because he is not a member of a major party whose appointment would be barred by the bare majority component. (*Id.* and n.45.) But, despite Plaintiff's lack of Article III standing to challenge the bare majority components of Article IV, Section 3, the District Court nonetheless invalidated them, finding that Plaintiff had prudential standing to challenge those provisions for which he lacked Article III standing. (JA31–32.)

On June 20, 2018, Defendant filed a timely revised notice of appeal (JA3–5) and Unopposed Motion to Expedite Appeal, which this Court granted.

STANDARD OF REVIEW

This Court "review[s] District Court decisions regarding both summary judgment and dismissal for failure to state a claim under the same de novo standard of review." *Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 826 (3d Cir. 2011). Likewise, this Court exercises de novo review over constitutional claims. *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 307–08 (3d Cir. 2015).

SUMMARY OF ARGUMENT

(1) Because the District Court held that Plaintiff did not have Article III standing to challenge the bare majority components of Article IV, Section 3, his claim as to the constitutionality of those components should have been dismissed. (*See* JA45–49; JA28–29; D.I. 29 at 9–16; D.I. 37 at 1–3.)

(2) The District Court erred in holding that Plaintiff met the requirement of prudential standing because Plaintiff's complaint challenging the constitutionality of Article IV, Section 3 was not only a generalized grievance, but merely an academic exercise, requiring the Court to decide abstract questions of wide public importance without the existence of an actual case or controversy. (*See* JA30–32; D.I. 29 at 16–18; D.I. 37 at 3–4.)

(3) The political balance requirement of Article IV, Section 3 of the Delaware Constitution does not violate the First Amendment because balancing judicial appointments based on political party, and pursuant to a constitutional

provision requiring a politically balanced judiciary, is permissible under the *Elrod/Branti* standard. (*See* JA32–38; D.I. 29 at 18–20; D.I. 34 at 5–11; D.I. 37 at 4–8.)

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF HAD STANDING TO CHALLENGE ARTICLE IV, SECTION 3 OF THE DELAWARE CONSTITUTION

A. Failure to Meet the Threshold Requirement of Article III Standing Requires Dismissal.

It is axiomatic that a claim can proceed only if the plaintiff has standing to sue. U.S. CONST. art. III, § 2 (limiting the power of the federal courts to hear only "actual cases and controversies"); *Lance* v. *Coffman*, 549 U.S. 437, 439 (2007) ("Federal courts must determine that they have jurisdiction before proceeding to the merits"); *Fair Housing Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 74 (3d Cir. 1998) ("[A] plaintiff *must* satisfy the 'case' or 'controversy' requirement of Article III. This requirement has been described as 'immutable', and as the 'irreducible constitutional minimum.'") (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (emphasis in original) (internal citation omitted)).

The question of standing is non-waivable, and the federal courts have an independent obligation to examine standing issues even if the parties fail to raise such issues. *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 340 (2006) ("We have 'an obligation to assure ourselves' of litigants' standing under Article III."); *United States*

v. Hays, 515 U.S. 737, 742 (1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'"); *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.*, 836 F.3d 261, 267 (3d Cir. 2016) (federal courts have a non-waivable obligation to police jurisdiction, even under their own initiative).

To meet the minimum requirements of Article III standing, a plaintiff must establish: (1) that he has suffered an injury in fact (i.e., "an invasion of a legally protected interest which is (a) concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical,"); (2) "a causal connection between the injury and the conduct complained of"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (internal quotations and citations omitted).

When a plaintiff lacks standing, his claims should be dismissed for lack of jurisdiction. *E.g.*, *Lance*, 549 U.S. at 442 (remanding case with instructions to dismiss Elections Clause claim for lack of standing); *DaimlerChrysler*, 547 U.S. at 354 (vacating and remanding for dismissal the plaintiffs' challenge because plaintiffs had no standing to challenge franchise tax credit and holding that "the lower courts erred by considering their claims against it on the merits"); *Hays*, 515 U.S. at 747 ("appellees have failed to show that they have suffered the injury our standing

doctrine requires . . . . Accordingly, the judgment of the District Court is vacated, and the cases are remanded with instructions to dismiss the complaint.”).

B. The District Court Erred in Finding that Plaintiff Had Standing to Challenge Provisions Four and Five of Article IV, Section 3 of the Delaware Constitution, Which Contain Only Bare Majority Components, After Concluding that Plaintiff Did Not Have Article III Standing to Challenge Those Components.

The District Court correctly held that Plaintiff *did not* have Article III standing to challenge provisions four and five of Article IV, Section 3 (as to the Family Courts or the Courts of Common of Pleas). (JA28–29.) Nonetheless, the District Court declared those provisions unconstitutional. Those provisions contain only a bare majority component, requiring that “no more than one-half” or “no more than a majority” of judges on those courts be of the same political party. Plaintiff did not have Article III standing because, as an independent, had he applied for a judicial position on those courts, his applications would not have been futile because there is no party requirement attached to either court. (*Id.*) Significantly, the District Court explained:

> In effect, this “bare majority” requirement places no limitations on unaffiliated voters and only affects judicial candidates of a major political party when the bare majority of judicial offices on those courts is filled with individuals affiliated with that major political party. In that case, only those members of that major political party would be excluded from consideration for judicial office.

(JA29 n.45.) Because Plaintiff, a registered independent, can never be adversely affected (much less have suffered an "injury-in-fact") by the bare majority component, Plaintiff lacked Article III standing to challenge such components.

The District Court's conclusion makes sense considering the bare majority components of Article IV, Section 3 do not mandate membership in one of the two major political parties. In other words, the bare majority component is not aimed at the political affiliation of nominees, but rather at the structure of the Court in its entirety. Other courts have recognized this distinction. *See McCloud v. Testa*, 97 F.3d 1536, 1557 (6th Cir. 1996) (effectively recognizing that statutes requiring political balance on governmental bodies are not prohibited by the First Amendment and citing in support *Branti v. Finkel*, 445 U.S. 507, 518 (1980)). Otherwise, existing federal statutes requiring political balance (*see supra* p.6) would also be deemed unconstitutional.

It was at this point, however, that the District Court committed plain legal error. Despite the District Court's correct finding that Plaintiff lacked Article III standing, the District Court erroneously found that Plaintiff could still challenge those sections for which Plaintiff lacked "constitutional" standing because he had "prudential" standing. (JA31–32.) The Court supported its conclusion on the basis that (1) the argument was raised by the Plaintiff and unrebutted by Defendant, and (2) the Court's

conclusion was supported by Supreme Court precedent. (*Id.* (citing D.I. 35 at 10).) The District Court erred on both counts.

First, Plaintiff raised no such argument that a party lacking Article III standing could still proceed if the party had "prudential" standing. In fact, both parties recognized the well-established requirement that Plaintiff had the burden to establish both "constitutional" and "prudential" standing. (*See, e.g.*, D.I. 29 at 11("Standing has constitutional and prudential components, both of which must be established before a plaintiff can seek redress in federal court."); D.I. 35 at 3, 9 (identifying and discussing the separate requirements of Article III and prudential standing).)

Second, if Plaintiff had raised such an argument, as the District Court did *sua sponte* in its opinion, Defendant would have responded as it does now that such a holding is contrary to the law. The District Court cited *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) in support of its erroneous holding, contending that *Munson* "recognized" that having prudential standing can be sufficient to overcome the lack of Article III standing. (JA32 and n.61.) *Munson*, however, clearly states the opposite, explaining that while there can be "a lessening of prudential limitations on standing" in First Amendment cases, a plaintiff nonetheless "must satisfy" Article III standing. 467 U.S. at 954–56 ("*In addition to* the limitations on standing imposed by Art. III's case-or-controversy requirement, there are prudential considerations that limit the challenges courts are willing to hear.") (emphasis added).

This is unsurprising considering that the law is clear that, "[N]either the counsels of prudence nor the policies implicit in the 'case or controversy' requirement should be mistaken for the rigorous Art. III requirements themselves. Satisfaction of the former cannot substitute for a demonstration of 'distinct and palpable injury . . . that is likely to be redressed if the requested relief is granted.'" *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979)) (internal quotation marks omitted); *see also Lujan*, 504 U.S. at 560 ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an *essential and unchanging* part of the case-or-controversy requirement of Article III.") (emphasis added); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) ("To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact . . . .").

Accordingly, the District Court's ruling that Plaintiff lacked Article III standing to challenge provisions four and five necessarily meant that the Court was not presented with a constitutionally required "case or controversy" as to those provisions, and therefore lacked subject matter jurisdiction to strike them down. *See Finkelman v. Nat'l Football League*, 810 F.3d 187, 192 n.31 (3d Cir. 2016) ("[O]ur conclusion that

the named plaintiffs lack Article III standing means that we do not have subject matter jurisdiction to reach the merits of plaintiffs' claims.").

C. The District Court Erred in Finding that Plaintiff Had Standing to Challenge the Bare Majority Components of Provisions One, Two, and Three of Article IV, Section 3 of the Delaware Constitution.

The District Court's conclusion that Plaintiff lacked Article III standing to challenge provisions four and five of Article IV, Section 3 (which, as discussed above, contain only the bare majority components) necessarily meant that Plaintiff also lacked Article III standing to challenge the same bare majority components of provisions one, two, and three (as applied to the Delaware Supreme Court, Court of Chancery, and Superior Courts). The District Court, however, never addressed—or even mentioned—Plaintiff's Article III standing to challenge the bare majority components of provisions one, two, and three, which operate in the same manner as the bare majority components of provisions four and five, and separately from any major party components therein. (JA28–30.) The District Court held only that, as a registered independent, Plaintiff had Article III standing to challenge provisions one through three, as to the major party components. (JA29.) But those provisions contain more than just a major party component; they also contain the same kind of bare majority component that Plaintiff lacked Article III standing to challenge in provisions four and five.

Because Plaintiff did not have Article III standing to challenge the bare majority components of provisions four and five, as the District Court's own reasoning makes plain, Plaintiff likewise did not have Article III standing to challenge the bare majority components of provisions one, two and three. The bare majority components in provisions one, two, and three would never impact Plaintiff, who is an independent and whose appointment would never contravene those provisions. Accordingly, the District Court lacked subject matter jurisdiction, which required the District Court to grant Defendant's summary judgment motion and dismiss Plaintiff's case, at least as to the bare majority components of Article IV, Section III for which Plaintiff lacked standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (condemning the practice of assuming "hypothetical jurisdiction" for the purpose of deciding the merits of an issue "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. . . . 'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'") (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (7 Wall) (1868)).

In failing to dismiss Plaintiff's claims as to the bare majority components, the District Court effectively afforded relief to a party without standing. *DaimlerChrysler*, 547 U.S. at 354 ("Because plaintiffs have no standing to challenge

that credit, the lower courts erred by considering their claims against it on the merits."); *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established"). And, in doing so, the District Court also disregarded a court's affirmative obligation to avoid invalidating more of a law than is necessary. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("[T]he normal rule, therefore, is that partial, rather than facial, invalidation is the required course, such that a statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.") (internal quotations omitted); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) ("Because '[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions,' the 'normal rule' is 'that partial, rather than facial, invalidation is the required course'").

The bare majority component is a distinct component of Article IV, Section 3—a component which Plaintiff lacked standing to challenge. In fact, the bare majority component existed for over 50 years before the major party components were added in 1951.[2] The District Court's blanket ruling that the political balance requirement of "Article IV, Section 3 of the Constitution of the State of Delaware violates the First

[2] The 1951 amendment, 48 Del. Laws, 116th, 109 (1951), is attached here as Addendum 2, and is available online at: http://delcode.delaware.gov/sessionlaws/ga116/chp109.

Amendment," even for those components for which Plaintiff lacked standing to challenge, is thus legal error. *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2173 (2014) (if the provisions are "fully operative as a law," they must be sustained "so long as it is not 'evident' from the [] text and context that [the legislature] would have preferred no [constitutional provision] at all."). *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598–99 (2007) (The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution, but may only act "when the question is raised by a party whose interests entitle him to raise it") (citations omitted).

In sum, while Defendant vigorously disagrees with and appeals from the District Court's decision finding Article IV, Section 3 unconstitutional, discussed *infra*, the District Court's decision could only extend to Article IV, Section 3 in part. In light of the fact that Plaintiff lacked Article III standing to challenge the bare majority components, the District Court's decision did not—and *could* not—disturb those components.

D. Plaintiff Lacked Prudential Standing to Challenge Article IV, Section 3.

As a threshold matter, because Plaintiff did not have Article III standing to challenge the bare majority components of Article IV, Section 3, this case should have been dismissed on that basis alone. In any event, even if Plaintiff had Article III standing, Plaintiff lacked prudential standing.

Even when the threshold requirement of Article III standing is met, a plaintiff must also satisfy prudential requirements. "Prudential standing requirements exist 'to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those best suited to assert a particular claim.'" (JA27 (*quoting Freeman v. Corzine*, 629 F.3d 146, 154 (3d Cir. 2010)).) The Third Circuit has developed a test to determine whether prudential standing is satisfied:

> 1) a plaintiff must "assert his or her own legal interests rather than those of a third party"; 2) "courts [should] refrain from adjudicating abstract questions of wide public significance amounting to generalized grievances"; and 3) "a plaintiff must demonstrate that his or her interests are arguably within the 'zone of interests' that are intended to be protected by the statute, rule, or constitutional provision on which the claim is based."

Twp. of Lyndhurst, N.J. v. Priceline.com Inc., 657 F.3d 148, 154 (3d Cir. 2011).

Here, Plaintiff asked the District Court to decide "abstract questions of wide public significance amounting to generalized grievances" and interests that are not really his own, but are rather those of third parties. Adams retired from the law at the end of 2015, without ever having applied to be a judge. (*Supra* pp.7–8.) He was a life-long Democrat who considered himself "much more progressive and liberal than democrats in Delaware" (JA72 at 18:9–19), and felt "energized by Bernie Sanders" and not by the "more moderate message from [D]emocrats here locally in Delaware and sometimes nationally." (JA75 at 21:13–19). In January/February 2017, after

speaking with a local lawyer about a law review article on the constitutionality of Article IV, Section 3, Plaintiff hired a lawyer, switched his political affiliation from Democrat to independent, and filed his complaint days later. (*Supra* pp.8–9.) In that complaint, Plaintiff sought to invalidate an entire section of Delaware's Constitution; a section replete with different requirements for different judicial positions, a section embedded in Delaware's Constitution, and developed over 120 years as way to carry out the State's legitimate interest in establishing a nonpartisan judiciary. Yet when Plaintiff filed his complaint, he had never actually submitted an application for any judgeship, whether as a Democrat or an independent. (*See supra* pp.7–8.)

In sum, Plaintiff's Complaint challenging the political balance requirement of Article IV, Section 3 of the Delaware Constitution is not only a generalized grievance and political statement, but is also merely an academic exercise, requiring the Court to decide abstract questions of wide public importance without the existence of an actual case or controversy. The facts here demonstrate that Plaintiff's claims were not particular to him because even while a life-long Democrat until eight days before filing this case, Plaintiff admittedly did not seek a judgeship, despite having the opportunities to do so. (*See supra* pp.7–9.) Plaintiff—a retired lawyer who only returned to active status around the time of filing this law suit (JA59 at 5:3–8)—filed this constitutional challenge merely to satisfy an academic and/or political interest. The requirements of prudential standing were not satisfied. *Lujan*, 504 U.S. at 576

(The proper recourse for persons who have a generalized grievance is through the political process, not the courts); *Ex parte Levitt*, 302 U.S. 633, 636 (1937) (plaintiff did not have standing, merely as a citizen and member of the bar of the Supreme Court to challenge the appointment of a Supreme Court Justice because he failed to show he sustained "a direct injury" rather than "merely a general interest common to all members of the public."). The District Court erred finding that Plaintiff had prudential standing to challenge Article IV, Section 3.

II. ARTICLE IV, SECTION 3 OF THE DELAWARE CONSTITUTION DOES NOT VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

The District Court concluded that Article IV, Section 3 of the Delaware Constitution "violates the First Amendment by placing political affiliation restrictions on government employment by the Delaware judiciary." (JA37.) When striking down Article IV, Section 3, however, the District Court did not consider the purpose of these provisions—the creation of a nonpartisan and representative judiciary that would not be subject to partisan electoral politics and, consequently, whose integrity would not be subject to political attack. (D.I. 34 at 4-17 and n.1, 3.) Rather, the District Court based its holding on two determinations: (1) that "[t]he judiciary, although a very important role, is not a policymaking position" (JA35); and (2) that "[p]olitical affiliation is not important to the effective performance of a Delaware judge's duties." (JA37.) Because these bases for the District Court's holding are

erroneous, the holding should be reversed, and judgment should be entered for Defendant.

As explained below, Delaware judges make policy by establishing the State's common law and equitable doctrines, exercising numerous discretionary powers, and structuring and managing the third branch of the Delaware government by, *inter alia*, establishing rules governing the operation of the courts. Judges are to the judicial branch what a President or Governor is to the executive branch, and senators and representatives are to the legislative branch. Neither the District Court nor the Plaintiff cited any precedent holding that judges are not policymakers, and there is a plethora of authority holding that judges are policymakers. (*Infra* pp.35–38.) Given that these policymaking functions relate to a critical function for an entire branch of government, the role of judges as policymakers is dispositive of the issue in this case. (*Infra* pp.38–39.)

The second proposition advanced by the District Court—that political affiliation is not important to the performance of a judge—is misguided in this context for two reasons. First, as noted above and explained below, the nature of the policymaking role of a judge, and the core governmental function of the judiciary, renders political affiliation a permissible qualification for a judicial position under the *Elrod/Branti* standard. No further justification or analysis is necessary. Second, if further analysis is necessary, the District Court did not consider the purpose for Section 3 when it

determined that political affiliation was not a valid qualification. The political balance that these provisions seek to create is justification for using political affiliation as a qualification under prevailing constitutional precedents and legislative practice. For these reasons, Article IV, Section 3 should be declared as not violating the First Amendment.

A. The *Elrod/Branti* Standard.

The Supreme Court's *Elrod*/*Branti*/*Rutan* trilogy of political patronage cases establishes that the First Amendment forbids government officials from making employment decisions on the basis of political affiliation unless political affiliation is an appropriate requirement for the position, which in practice has generally entailed an analysis of whether the position in question is a policymaking position. *See Elrod v. Burns*, 427 U.S. 347, 372 (1976) (establishing that patronage dismissals unconstitutionally infringe on the First Amendment freedoms of political belief and association, except dismissals of "policymaking" officials); *Branti*, 445 U.S. at 518 (refining the *Elrod* standard to include positions for which "party affiliation is an appropriate requirement for the effective performance of the public office involved"); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990) (extending the protections of *Elrod* and *Branti* to hiring, promotion, transfer, and recall).

In these cases, the judicial test that evolved turned on whether there was a reason to allow consideration of political affiliation, other than the practice of

patronage, which the plurality of the Court in *Elrod* rejected as a rationale. The legitimate reason accepted by a plurality was that a subordinate of the same party may be more effective when advancing and implementing the policies of the elected official. This rationale was initially described as limited to positions that involved "policymakers." *Elrod*, 427 U.S. at 367–68. However, the definition of "policymaker," while sometimes dispositive of the issue of whether political affiliation is an appropriate consideration, is not always dispositive. For example, in *Branti* the Court recognized that a football coach at a university may be a "policymaker," but the coach's political affiliation had nothing to do with his job performance. *Branti,* 445 U.S. at 518. Conversely, the Court recognized there are situations in which the position at issue is not a policymaker, but political affiliation could be appropriately considered. *Id.*

B. Delaware Judges Are Policymakers.

1. A Delaware Judge Has All of the Attributes of a Policymaker.

In concluding that Delaware judges do not make policy, the District Court looked at only a small aspect of the many duties of the Delaware judiciary: interpreting and applying statutes. (JA35.) Even when interpreting statutes, however, judges make policy in multiple respects, including the formulation of rules of legislative interpretation, discerning legislative intent and, most significantly, determining how a statute will be applied in factual circumstances not clearly

anticipated or addressed by the legislature. *See Krzalic v. Republic Title Co.*, 314 F.3d 875, 878 (7th Cir. 2002) ("[T]he interpretation of an ambiguous statute is an exercise in policy formulation rather than in reading."); *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997) ("When courts attempt to give meaning to a hopelessly ambiguous statute using tools of statutory interpretation, they often do engage in camouflaged policymaking.") (citing 1 Davis, *Administrative Law* § 3.6, at 130 ("It is the very indeterminacy of the 'traditional tools' that gives judges the discretion to make policy decisions through the process of statutory construction.")). Even if one were to accept that interpreting statutes is not making policy, interpreting statutes is only one part of a judge's duties, and there are ample other areas in which Delaware's judges do make policy.

One critical aspect of the policymaker determination is whether the position requires the individual to make decisions that establish policy, particularly when the policy becomes embodied in the law. *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 271 (3d Cir. 2007). Delaware judges make the decisions that shape the equitable doctrines and common law that constitute a vast body of Delaware law. *See, e.g.*, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1074 (2000) ("[T]he majority of Delaware's important legal rules are the result of judicial decisions."). These judge-made equitable doctrines establish and define the fiduciary duties applicable to officers,

directors, and managers of Delaware corporations and legal entities. These fiduciary duties are not defined by statute. E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1401 (2005) ("Delaware corporate jurisprudence is authoritatively framed, in part, by a discrete number of decisions of the Delaware Supreme Court . . . [and] a plethora of Delaware Court of Chancery decisions"); Fisch, *supra*, at 1074 ("The scope of the business judgment rule, the analysis of transactions that implicate the duty of loyalty, the legal standards governing management's response to a hostile tender offer, all are based on legal principles articulated by the Delaware courts . . . . Although the Delaware statute provides general guidelines about corporate formalities . . . , the statute does not deal with the fiduciary principles that provide the foundation of corporate law").

For example, the Supreme Court and the Court of Chancery define the fiduciary duties of care and loyalty. *See, e.g.*, *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Loft Inc. v. Guth*, 2 A.2d 225 (Del. Ch. 1938), *aff'd* 5 A.2d 503 (Del. 1939). In addition, this same body of judge-made law determines how those fiduciary duties will apply in a plethora of circumstances such as self-dealing transactions, *see e.g.*, *Sinclair Oil Co. v. Levien,* 280 A.2d 717 (Del. 1971), trading on inside information, *Brophy v. Cities Serv.*, 70 A.2d 5 (Del. Ch. 1949), the implementation of defenses to tender offers, *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), the

sale of control of a company, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), the permissibility of "poison pills," *Moran v. Household Int'l Inc.*, 500 A.2d 1346 (Del. 1985), the permissibility of "going private" transactions, *Singer v. Magnavox Co.*, 380 A.2d 969, 971 (Del. 1977) (prohibiting "going private" transactions), *overruled by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (allowing "going private" transactions subject to entire fairness scrutiny) and a host of other issues. *See, e.g.*, *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015) (determining whether and when stockholder approval of a corporate transaction eliminates claims for breach of duties against fiduciaries); *In Re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. 2013) (determining what forms of corporate process will alter the standard of judicial review); *NACEPF v. Gheewalla*, 930 A.2d 92 (Del. 2007) (fiduciary duties enforceable by creditors). This judge-made law is a critical area of law for the State of Delaware, as well as corporations, directors, and stockholders; and is debated endlessly on policy grounds by academics, lawyers, judges, and business persons. *See* Lawrence Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119, 120 (2005) (arguing that Delaware Supreme Court opinions have created uncertainty regarding the proper approach to the valuation of corporate shares); James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 326–27 (2018) (discussing how

Delaware courts have weakened judicial and shareholder oversight of directors' and officers' fiduciary duties); Mohsen Manesh, *Creatures of Contract: A Half-Truth About LLCs*, 42 DEL. J. CORP. L. 391, 453 (2018) (the Court of the Chancery may exercise its equitable powers to enforce fiduciary duties even when the LLC agreement purports to eliminate such duties).

The Delaware Supreme Court and Superior Court also fashion the common law governing tort claims, including determining when and whether potential tort liability exists. *See, e.g.*, *Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 2018 WL 3134525 (Del. Jun. 27, 2018) (overruling prior case law and holding that companies supplying asbestos products to a husband's employer could be liable to the spouse of the employee exposed to asbestos in her husband's clothes); *Sherman v. Del. Dep't of Pub. Safety*, 2018 WL 3118856 (Del. June 26, 2018) (reversing prior decisions and holding that the State may be liable for sexual assault committed by a police officer in the course of an otherwise valid arrest). The courts also determine the scope of damages recoverable in Delaware. *See Stayton v. Del. Health Corp.*, 117 A.3d 521, 533 (Del. 2015) (modifying Delaware's collateral source rule for public policy reasons).

The existence of discretionary authority is another attribute of a policymaker. *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993) (quoting *Brown v. Trench*, 787 F.2d 167, 169 (3d Cir. 1986)); *Galli*, 490 F.3d at 271. In the area of criminal law,

the Superior Court exercises considerable discretion in sentencing, parole and probation. DEL. CODE ANN. tit. 11, Chapters 39, 41, 42, and 43. Delaware judges also evidence considerable discretion in determining the remedies to be applied, the nature of damages recoverable and the amount of damages to be recovered in a case. Wolfe & Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY §12-10[b][5] (2018); *BTG Int'l, Inc. v. Wellstat Therapeutics Corp.*, 2017 WL 4151172 (Del. Ch. Sept. 19, 2017).

The *Elrod*/*Branti* standard also applies to positions that have "meaningful input into decision making concerning the nature and scope of a major [governmental] program." *Peters v. Del. River Port Auth. of Pa. & N.J.*, 16 F.3d 1346, 1353 (3d Cir. 1994) (internal quotation mark omitted). The Delaware judiciary is a "major governmental program." Judges create the rules by which the judicial branch operates, including the civil and criminal rules applicable to each court. DEL. CODE ANN. tit. 10, § 161 (Supreme Court), DEL. CODE ANN. tit. 10, § 361 (Court of Chancery), and DEL. CODE ANN. tit. 10, § 561 (Superior Court). In addition, the judges are involved in the preparation of a proposed budget for the judicial branch, which involves policy choices about the allocation of resources and new initiatives. *See* DEL. CODE ANN. tit. 10, § 6331(b), (c); *Galli*, 490 F.3d at 271 (budget preparation). And the Chancellor serves on the Board of Pardons with three elected officials and a cabinet member appointed by the Governor. DEL. CONST. art. VII, § 2.

Finally, the policymaking function of Delaware judges, and the appropriateness of their political affiliation, is evidenced by the process by which judges are chosen. Specifically, these are positions subject to the approval of the Delaware Senate. DEL. CONST., art. IV, § 3. The fact that judicial positions are subject to Senate confirmation evidences the public perception that these are positions involving policy choices sufficiently important to require Senate approval. *Galli*, 490 F.3d at 271 (public perception a factor in defining policymakers); *Carroll v. City of Phoenix*, 2007 WL 1140400, at *8–11 (D. Ariz. Apr. 17, 2007) (appointment by elected officials evidences policymaking role). This policy role and these powers of the judiciary are so substantial that many states allow for the election of some or all of their judges. Brennan Center for Justice, *Judicial Selection: Significant Figures* (May 8, 2015), https://www.brennancenter.org/rethinking-judicial-selection/significant-figures (39 states use some form of election at some level of court).

In summary, the District Court's determination that members of the Delaware judiciary are not "policymakers" is contradicted by the fact that judges make law, exercise important and considerable discretion, and largely shape the branch of government in which they serve.

2. Existing Precedents Establish that Judges Are Policymakers.

The District Court's determination that judges are not policymakers is unprecedented. Neither the District Court nor the Plaintiff could cite to a single case

holding judges are not policymakers. By contrast, there is substantial precedent holding that judges and/or quasi-judicial officers are policymakers. *Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993) (holding judges are policymakers "because their political beliefs influence and dictate their decisions on important jurisprudential matters"); *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988) (noting that judges are policymakers when holding that a judge *pro tempore* is a policymaking position); *Garretto v. Cooperman*, 510 F. Supp. 816, 818–20 (S.D.N.Y. 1981) *aff'd*, 794 F.2d 676 (2d Cir. 1984) ("the position of Compensation Law Judge does fall broadly within the 'policy-maker' exception discussed in Elrod" and criticizing *Branti* "when a case is considered which involves true policymakers."); *Carroll*, 2007 WL 1140400, at *8–11 (holding judge on Municipal Court a policymaker); *List v. Akron Mun. Court*, 2006 WL 475124, at *7 (N.D. Ohio Feb. 27, 2006) (holding judges are policymakers); *Davis v. Martin*, 807 F. Supp. 385, 387 (W.D.N.C. 1992) (finding *Rutan* inapplicable, noting that judges do not fall within the category of "low-level public" positions for which party affiliation is not an appropriate requirement). Moreover, courts have held that a judicial hearing officer and a judge's law clerk, secretary, and bailiff also fall within the *Elrod/Branti* standard. *See McCloud*, 97 F.3d at 1557 (judge's law clerk or secretary); *Balogh v.*

Charron, 855 F.2d 356, 356–57 (6th Cir. 1988) (bailiff); *Levine v. McCabe*, 2007 WL 4441226, at *6–7 (E.D.N.Y. Dec. 17, 2007) (judicial hearing officers).[3]

The District Court did not meaningfully address any of this persuasive precedent, but instead purported to distinguish certain of these cases on the basis that they "addressed situations in which political affiliation could be considered, but was not constitutionally mandated." (JA35–36.) This distinction did not turn on any difference between the roles of judges as described in those cases compared to the role of judges in this case. Rather, the distinction turned upon how political affiliation was being used. However, that distinction logically has nothing to do with whether a judge is or is not a policymaker and neither the District Court nor Plaintiff cited any authority suggesting that this distinction is relevant to the definition of a policymaker.[4] Rather than engaging in this persuasive precedent, the District Court discarded it on a

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[3] *Cf Lucia v. S.E.C.*, 138 S. Ct. 2044, 2052–54 (2018) (an SEC administrative law judge exercises authority comparable to that of a federal district judge conducting a bench trial, and as such is considered an "Officer of the United States" subject to the Appointments Clause and not a "mere employee," because, *inter alia*, an ALJ "exercis[es] significant authority pursuant to the laws of the United States" and exercises "significant discretion" similar to a special trial judge in the tax court).

[4] This distinction is further undermined by the position taken by the Plaintiff. By making this distinction, the District Court suggested that judges may be policymakers who come within the exception when appointed by a Governor exercising discretion. However, Plaintiff has repeatedly taken the position that the District Court's ruling in this case means that the Governor may not take political affiliation into consideration in his discretionary review of judicial candidates, thus rejecting as irrelevant the very distinction the District Court relied upon for not following this precedent. (*See* D.I. 43 at 2; D.I. 53 at 3 n.2; D.I. 57 at 3; D.I. 59 at 2-3.)

flawed basis. When properly recognized, however, this precedent demonstrates that judges are necessarily policymakers and fall under the *Elrod*/*Branti* standard.

3. Political Affiliation Is an Appropriate Qualification for Policymakers Who Perform Core Governmental Functions.

The nature of the policymaking role of a judge, and the core governmental function of the judiciary, renders political affiliation a permissible qualification for a judge under the *Elrod/Branti* standard. In *Branti*, the Supreme Court stated that whether a person is a policymaker may not always be dispositive of when political affiliation may be a constitutionally permissible qualification for a position. However, in this case, a judge is the type of policymaker for which political affiliation is an appropriate consideration. First, in *Branti*, the example given of when political affiliation would not be an appropriate qualification involved a government employee—a state university's football coach—who "formulates policy," but does not administer a governmental function, and party affiliation had no bearing on job performance as a coach. *Branti*, 445 U.S. at 518. In this case, judges do perform a core and vital government function. Policymakers involved in critical government functions are uniformly held to occupy positions for which political affiliation may be required. *See, e.g.*, *Jimenez Fuentes v. Torres Gaztambide,* 807 F.2d 236, 241–42 (1st Cir. 1986) (en banc) (political affiliation is an appropriate consideration when the position involves "decisionmaking on issues where there is room for political disagreement on goals or their implementation."); *Savage v. Gorski,* 850 F.2d 64, 68

(2d Cir. 1988) (consideration of political affiliation appropriate when "there is a rational connection between shared ideology and job performance"). Moreover, the Sixth Circuit established categories for determining positions falling within *Branti*. *McCloud*, 97 F.3d at 1557. The first category included positions "to which discretionary authority with respect to the enforcement of [the] law or carrying out of some other policy of political concern is granted." *Id.* By every measure, a judge is the type of policymaker for which the *Elrod* standard was created in the first place.

Second, in every case that held judges to be policymakers, the status of the judge as policymaker resolved the First Amendment issue without further analysis. *See, e.g.*, *Newman*, 986 F.2d at 162–63; *Garretto*, 510 F. Supp. at 818–29; *Carroll*, 2007 WL 1140400, at *8-11; *List*, 2006 WL 475124, at *7; *Davis*, 807 F. Supp. at 386–88; *Levine*, 2007 WL 4441226, at *6–7. Thus, while political affiliation is not necessarily an appropriate qualification for all policymaking positions, it is an appropriate qualification for policymakers involved in a core governmental function, like judges. However, if further analysis is necessary as to the appropriateness of political affiliation being used in this case, the next section demonstrates that the purposes of Article IV, Section 3 supply ample justification.

C. Political Affiliation Is an Appropriate Consideration for Achieving a Balanced and Representative Court.

The District Court concluded that political affiliation was not an appropriate consideration because "[p]olitical affiliation is not important to the effective

performance of a Delaware judge's duties." (JA37.) In reaching this conclusion, the District Court relied primarily upon provisions of the Delaware Judges' Code of Judicial Conduct that a judge's decision making should not be swayed by partisan interest and judges should refrain from political activity. (JA36.)

It is axiomatic that, in resolving cases, judges should not be swayed by politics.[5] However, Section 3 was not adopted because persons of a particular political party were deemed better judges or because politics should sway a judge's decision. Rather, the political balance requirement of Article IV, Section 3 is directed to the structure of the courts and was adopted so that Delaware courts would be nonpartisan, representative of the electorate, and balanced in views. (*See supra* pp.3–7.) Indeed, the fundamental objective of this requirement is to minimize the effect of partisan politics in the selection of judges and protect the integrity of the courts from partisan political attack.

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[5] *Cf. Newman*, 986 F.2d at 165 ("[I]t would ignore reality to suggest that a judge is not influenced by an infinite number of factors . . . . Moreover, as a direct result of those factors, a judge does create a particular brand of governmental policy."); Hon. Theodore A. McKee, *Judges As Umpires*, 35 HOFSTRA L. REV. 1709, 1724 (2007) ("I am troubled by the fact that our jurisprudence is shaped by personal beliefs, but I am more troubled by pretending that judges can somehow become perfect objective adjudicators at the flip of a switch, or the wearing of a robe.").

1. Applying the *Elrod/Branti* Standard in the Context of a Political Balance Requirement.

In *Branti*, 445 U.S. at 518, the Supreme Court recognized the permissibility of using political affiliation to achieve political balance. The Court posed this hypothetical involving a statute requiring political balance:

> Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee's governmental responsibilities.

Branti, 445 U.S. at 518.

In this passage, the Supreme Court recognized that the political affiliation required by a statute mandating political balance is permissible under the First Amendment, even when the position at issue is not necessarily a policymaking position. The use of political affiliation to achieve a statutorily mandated balance was permissible because being of a particular political affiliation was necessary to accomplish the statutory objective of balance. The justification derived not from the fact that political affiliation was necessary to the performance of election judges, but that it was necessary to accomplish the statutory objective of balance. Party

membership was thus "essential to the discharge of the employee's governmental functions" in this context. The same is true in this case.

This case concerns the structure of a governmental institution. For that reason, as evidenced by the *Branti* hypothetical referenced above, the District Court erred by failing to consider the purposes for which these constitutional provisions were adopted and how political affiliation served those purposes. When a statute requires political balance for an institution, as the Court in *Branti* stated, "party membership [is] essential to the discharge of the employee's governmental responsibilities" in order to meet the legitimate objectives of the statute. *Branti*, 445 U.S. at 518.

2. Political Balance Is an Appropriate Objective.

As noted above, the United States Supreme Court has recognized that maintaining a politically balanced decision-making body is an appropriate objective, and that political affiliation is a permissible qualification when used to achieve that objective. *Id.* When the positions for which balance is sought are policymaking positions, the importance of political balance is even greater and the justification even more reasonable.

For example, the Sixth Circuit's categories mentioned above included a category four: "positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies." *McCloud*, 97 F.3d at 1557–58 (giving as an example of a position falling

within category four, "a gubernatorially-appointed Democratic economist placed on a revenue forecasting committee consisting by law" of persons of specified political affiliations). The Sixth Circuit applied this category recently in *Peterson v. Dean*, 777 F.3d 334, 339 (6th Cir. 2015).

In *Peterson*, the Sixth Circuit addressed terminations on the grounds of political affiliation in the context of election commissions required by law to be politically balanced. The plaintiffs were county administrators of elections who had been terminated because of their political affiliation following a shift in the controlling political party in the state assembly. *Id.* The Tennessee statute prescribed that the state election commission and the county election commissions (appointed by the state election commission) must have a majority of commissioners who are members of the "majority party" and a minority of commissioners who are members of the "minority party." *Id.* at 337–38. The county election commissions in turn appointed a county election administrator to assist in running the elections, but the statute did not specify a political affiliation for the administrator. *Id.* at 339. Utilizing the categories identified in *McCloud*, the Sixth Circuit concluded termination of the administrators on the basis of political affiliation was constitutionally permissible. *Id.* at 350. The opinion largely turned on the relationship between the administrators and the statutorily "balanced" commissions that appointed them. *Id.* at 344–350. In that regard, both the majority and dissenting opinions accepted that the election

commissioners themselves could properly be determined by political affiliation in accordance with the balance required by the relevant statutes. *Id*. at 344, 352; *see also MacGuire v. Houston*, 717 P.2d 948, 953 (Colo. 1986) (upholding statute requiring election judges be members of major parties in order to assure the integrity of the election process).

Article IV, Section 3 is intended to preserve the integrity of the judicial system in Delaware. The United States Supreme Court has recognized the permissibility of laws that restrict First Amendment rights for the purpose of protecting both the integrity and the perception of integrity of the judiciary and other government agencies. *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 108, 121 (1947) (upholding the constitutionality of Section 9(a) of the Hatch Act prohibiting federal employees in the executive branch from "taking an active part in political management or in political campaigns" in order to maintain the "integrity of the civil service"); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973) (reaffirming the constitutionality of the same statute based upon the government's substantial interest in preserving both the integrity of the civil service and the perception of integrity so that "confidence in the system of representative Government is not to be eroded to a disastrous extent.").

For example, in *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666–68 (2015), the Supreme Court upheld a state rule prohibiting judicial candidates from personally

soliciting campaign funds, stating: "[t]he importance of public confidence in the integrity of judges stems from the place of the judiciary in the government" and "public perception of judicial integrity is 'a state interest of the highest order.'" *Id.* at 1666; *see also Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 338–39 (6th Cir. 2016) (Ohio's stated interest of minimizing partisanship in judicial elections "is an important one" and "can be a compelling state interest").

The efficacy of provisions mandating political balance has also been recognized by Congress when creating federal agencies that are to be independent of the executive branch; much like a court is to be independent. Joshua Kershner, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process Is Constitutional*, 32 CARDOZO L. REV. 615, 634–36 (2010) (Congress established autonomy of independent agencies by three means: "(1) the decision-making commission is a multi-member body; (2) the commissioners are insulated from Presidential removal power; and (3) *the commissioners are divided fairly evenly along partisan lines.*") (emphasis added).

Such provisions have been recognized as serving other salutary purposes as well. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 798 (2013) ("Partisan balance requirements limit politically motivated decision making within an agency. They ensure that different viewpoints will be expressed—an institutional feature that

Professor Sunstein argues lowers the risk that decisions will be made on a strictly partisan basis."). With respect to courts in particular, political balance dampens the risk of extreme positions prevailing. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103–04 (2000) (noting that "group polarization" may occur on multimember courts and that mixed panels are far less likely to "go in an extreme direction.").

3. Party Affiliation Is an Appropriate Consideration for Maintaining Balance.

As previously discussed, the bare majority components of Article IV, Section 3 prevent members of any political party from constituting more than a "bare majority" of members of (1) the Delaware Supreme Court, (2) the Delaware Superior Court, (3) the combined Supreme Court, Court of Chancery, and Superior Court , (4) the Family Court and (5) the Court of Common Pleas. The major party components, on the other hand, require that the members of the Supreme Court, Superior Court, and Court of Chancery be members of one of the "major political parties."

These provisions are intended to preserve the integrity of the judicial system in Delaware, and they accomplish this goal by several means. By assuring that the major political parties are represented on the courts, they assure that the results reached by the courts reflect a bipartisan viewpoint. By limiting any political party to a bare majority, they assure that no party can dominate the courts, either with members of that party or with the judicial attitudes that may be associated with any one party.

Further, by assuring that both major parties will be represented and that no party may dominate, these provisions largely eliminate representation on the courts from becoming a partisan, election issue. When the composition of a court becomes a partisan political issue, the perception that the court is even-handed and fair to all points of view is damaged. *See* Scott et al., *supra*, at 239.

a. The Bare Majority Components

The bare majority components were first adopted through the Delaware Constitutional Convention of 1897. (*See* D.I. 29 at 5; *supra* p.5); *see also* Randy J. Holland, THE DELAWARE STATE CONSTITUTION 162 (G. Alan Tarr ed., Oxford Univ. Press 2d ed.) (2017). These components do not require any political affiliation for any member or any court. They do not preclude the appointment of an independent or a member of a minor party. Indeed, under these components the entire judiciary could consist of persons not members of any political party. Rather, these components only preclude a major political party from having its members constitute more than a bare majority of the affected courts. These components are directed to the structure of the courts and only indirectly affect the requirements for a nominee. A potential nominee only is affected when that person is a member of a party that already has members who constitute a majority of the court in question, and that disqualification would cease as soon as the other party obtains a majority or the court is evenly divided. This component prevents the domination of the judiciary by one party, and it substantially

reduces the possibility that an appointment to a judicial position will become a partisan, election issue by limiting the potential gains to any party. Preventing a party from dominating a branch of government is an important governmental interest allowing restrictions on First Amendment rights. *See, e.g.*, *United Pub. Workers of Am. (C.I.O.)*, 330 U.S. at 100 ("Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system.").

b. The Major Party Components

The major party components were not adopted until 1951. (*See supra* p.22 and Addendum 2.) These are the only components that could affect the Plaintiff in connection with an application to become a judge on the Delaware Superior Court. (JA28–30.) As an independent, he was not a member of either major party. These components are complementary to the bare majority components and the purposes served by those components. For example, with respect to the lessening of partisan election contests over judicial appointments, the bare majority components limit the number of appointments that the party prevailing in the election might obtain, but it does not assure representation to the party not prevailing in the election. The major party components assure the largest political parties in Delaware that they will have members of their party serving on the courts and have largely prevented partisan election contests over judicial appointments.

The major party components also serve the purpose of ensuring that the courts reflect the differing judicial views of the major parties. This representation helps to dampen any tendency toward extreme results, as noted above, and ensures that the courts reflect the views of the political mainstream. This representation also lowers the risk that the judiciary may become detached or isolated from the electorate and promotes political stability. Promoting political stability is an interest that the United States Supreme Court has recognized as allowing limitations on First Amendment rights. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 352–53 (1997) ("The State's strong interest in the stability of its political systems . . . . does permit the State to enact reasonable election regulations that may, in practice, favor the traditional two-party system."); *Clingman v. Beaver*, 544 U.S. 581, 582 (2005) ("Oklahoma's primary advances a number of regulatory interests this Court recognizes as important: It 'preserv[es] [political] parties as viable and identifiable interest groups[.]'"); *Elrod*, 427 U.S. at 383 ("We also have recognized the strong government interests in encouraging stable political parties and avoiding excessive political fragmentation." (citing *Storer v. Brown*, 415 U.S. 724, 735 (1974))).

c. Membership in Political Parties Correlates with Different Judicial Philosophies

The final justification for the Delaware Constitution's political balance requirement is the fact that membership in political parties correlates with different judicial philosophies. Studies demonstrate a correlation between political affiliation

and decision making. Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 689 (2009); Robert Barnes, *Justices Tend to Agree with Presidents That Pick Them — but Stray Later*, WASH. POST (Dec. 20, 2015) ("Judicial independence is a mainstay of American democracy, but politics plays a vital role in how a justice gets his or her job. Presidents look for those with similar views and values."); Lee Epstein et al., THE BEHAVIOR OF FEDERAL JUDGES 8 (2013) ("Justices appointed by Republican Presidents vote more conservatively on average than justices appointed by Democratic ones, with the difference being most pronounced in civil rights cases[.]"); Cass R. Sunstein et al., ARE JUDGES POLITICAL? 24 (2006) (finding "striking evidence of ideological voting" and that Republican appointees only upheld affirmative action programs 47 percent of the time, whereas Democratic appointees upheld affirmative action programs 75 percent of the time); Bradley W. Joondeph, *The Many Meanings of "Politics" in Judicial Decision Making*, 77 UMKC L. REV. 347, 352 (2008) ("Republican judges more frequently vote for conservative results, while Democratic judges more frequently vote for liberal results"); Fitzpatrick, *supra*.

Empirical evidence also shows that sentencing decisions have differed based on partisan affiliation. Adam Liptak, *Black Defendants Get Longer Sentences From Republican-Appointed Judges, Study Finds*, N.Y. TIMES (May 28, 2018) (". . . Republican appointees are tougher on crime over all, imposing sentences an average of 2.4 months longer than Democratic appointees.") (citing Alma Cohen & Crystal

Yang, *Judicial Politics and Sentencing Decisions*, NBER Working Paper No. 24615, NAT'L BUREAU OF ECON. RESEARCH (May 2018)); Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the United States Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24 (2007) ("The conclusion we draw from this analysis of prison term length is that the political orientation of the judge matters with respect to street crimes . . . .") (comparing Republican and Democratic federal judicial appointees).

The political balance requirement of Section 3 prevents any particular judicial philosophy from dominating the Delaware courts, requires the judiciary to reflect differing judicial philosophies, and ensures that the courts reflect the judicial philosophies associated with the parties that constitute the majority of the electorate.

d. The Effectiveness of the Delaware Structure

Members of the Delaware judiciary have publicly stated that the constitutionally-mandated balance requirement has served Delaware and its courts well. Former Delaware Supreme Court Justice Randy Holland, for example, has written about the history of the Delaware judiciary and the provisions at issue:

> The delegates wanted to eliminate political influence from the judiciary to the fullest extent possible. To achieve that result, they placed a limitation on the number of judges appointed from a single political party.
>
> * * * *
>
> Delaware's court system provides a model that largely addresses modern corporate worries about courtroom litigation. . . . Delaware's independent judiciary is essential to securing these values, and its

> practice of appointing judges and maintaining a balance of power between political parties on its high court has yielded dividends in both the expertise and independence of its judiciary.

Holland, *Delaware's Business Courts*, *supra* at 771, 777 (2009).

President Judge Jan R. Jurden of the Delaware Superior Court has written:

> In order to ensure that the courts are fair and impartial, the Delaware system goes one step further and requires that the courts be politically balanced. . . . The Delaware judicial nominating process goes to great pains to ensure a balanced and independent judiciary, and, therefore, it is no surprise that the public perceives Delaware courts as fair arbiters of justice.

Scott et al., *supra*, at 243–44.

Former Chief Justice Veasey of the Delaware Supreme Court has written:

> The constitutional requirement of a bipartisan judiciary is unique to Delaware. . . . This system has served well to provide Delaware with an independent and depoliticized judiciary and has led, in my opinion, to Delaware's international attractiveness as the incorporation domicile of choice.

Veasey, *supra*, at 1402; *see also* Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 683 (2005) ("the Delaware judiciary is, by the state's Constitution, evenly balanced between the major political parties, resulting in a centrist group of jurists committed to the sound and faithful application of the law.").

In sum, the political balance requirement of Article IV, Section 3 is an appropriate means to ensure that major political parties are represented on the courts and to assure that the results reached by the courts reflect a bipartisan viewpoint.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this Court reverse the District Court's finding of summary judgment in favor of Plaintiff and enter judgment in favor of Defendant. Specifically, Defendant requests a judgment that Plaintiff lacked standing to challenge the political balance requirement of Article IV, Section 3, and that Article IV, Section 3 does not violate the First Amendment because judges are exempted under the *Elrod/Branti* standard.

Respectfully submitted,

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Dated: July 18, 2018

Attorneys for Defendant-Appellant

COMBINED CERTIFICATIONS

Pursuant to the Federal Rules of Appellate Procedure and the Local Rules of the United States Court of Appeals for the Third Circuit, Pilar G. Kraman, Esquire, hereby certifies the following:

1. I am a member in good standing of the Bar of this Court.

2. This Brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B), because this Brief contains 12,957 words.

3. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point font using Times New Roman style.

4. The text of the electronic Brief is identical to the text in the paper copies.

5. The electronic file containing the Brief was scanned for viruses and no virus was detected. The virus detection program used was Sophos Protection AntiVirus Software.

6. On this day, I caused to be filed seven paper copies of the Appellant's Opening Brief, by Federal Express to the Clerk of the Court for the Third Circuit and electronically filed the brief through the Court's CM/ECF filing system, which will send notice to all counsel of record. I also hand delivered a paper copy of the brief to the following counsel of record for the Appellee:

David L. Finger, Esquire
Finger & Slanina, LLC
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1201 N. Orange St., 7th Floor
Wilmington, DE 19801

7. I certify the foregoing is true and correct to my personal knowledge and belief.

/s/ Pilar G. Kraman
Pilar G. Kraman (DE Bar No. 5199)

Counsel for Defendant-Appellant

Dated: July 18, 2018

ADDENDUM

Constitution

OF THE

State of Delaware

Adopted in Convention,

June 4th, A. D. 1897.

Published by the Secretary of State, by Authority of a Resolution of the Constitutional Convention.

Republished by Order of the State Senate.
1903.

THE UNION REPUBLICAN,
GEORGETOWN, DEL.

SECTION 2. There shall be six State Judges who shall be learned in the law. One of them shall be Chancellor, one of them Chief Justice and the other four of them Associate Judges. Judges.

The Chancellor, Chief Justice and one of the Associate Judges may be appointed from and reside in any part of the State. The other three Associate Judges may be appointed from any part of the State. They shall be resident Associate Judges, and one of them shall reside in each county. Appointment. Residence.

In case the commissions of two or more of the Associate Judges shall be of the same date, they shall, as soon as conveniently may be after their appointment, determine their seniority by lot, and certify the result to the Governor. Seniority.

SECTION 3. The Chancellor, Chief Justice and Associate Judges shall be appointed by the Governor, by and with the consent of a majority of all the members elected to the Senate, for the term of twelve years: Provided, however, that the Chancellor, Chief Justice and Associate Judges first to be appointed under this amended Constitution, shall be appointed by the Governor without the consent of the Senate, for the term of twelve years; and the persons so appointed shall enter upon the discharge of the duties of their respective offices upon taking the oath of office prescribed by this amended Constitution. If a vacancy shall occur, by expiration of term or otherwise, at a time when the Senate shall not be in session, the Governor shall within thirty days after the happening of any such vacancy convene the Senate for the purpose of confirming his appointment to fill said vacancy, and the transaction of such other executive business as may come before it. Such vacancy shall be filled as aforesaid for the full term. The said appointment shall be such that no more than three of the said five law judges, in office at the same time, shall have been appointed from the same political party. Appointment. Consent of Senate. Term. First appointment. Oath. Vacancies. Senate convened. Not more than three from same political party.

SECTION 4. The Chancellor, Chief Justice and Associate Judges shall respectively receive from the State for their services a compensation which shall be fixed by law and paid quarterly, and shall not be less than the annual sum of three thousand dollars, and they shall not receive any fees or perquisites in addition Compensation. Not to hold

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CHAPTER 109

CONSTITUTIONAL AMENDMENT - RELATING TO JUDICIARY AND SUPREME COURT

AN ACT AGREEING TO THE PROPOSED AMENDMENTS TO ARTICLE IV OF THE CONSTITUTION OF THE STATE OF DELAWARE, RELATING TO THE JUDICIARY.

WHEREAS, Amendments to the Constitution of the State of Delaware were proposed to the Senate in the One Hundred and Fifteenth Session of the General Assembly as follows:

"AN ACT PROPOSING CERTAIN AMENDMENTS TO ARTICLE IV OF THE CONSTITUTION OF THE STATE OF DELAWARE, RELATING TO THE JUDICIARY.

"Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met (two-thirds of all the Members elected to each House agreeing thereto):

"Section 1. That Article W of the Constitution of the State of Delaware be amended so as to read as follows:

"ARTICLE IV

"Judiciary

"Section 1. The judicial power of this State shall be vested in a Supreme Court, a Superior Court, a Court of Chancery, an Orphans' Court, a Register's Court, Justices of the Peace, and such other courts as the General Assembly, with the concurrence of two-thirds of all the Members elected to each House, shall have by law established prior to the time this amended Article W of this Constitution becomes effective or shall from time to time by law establish after such time.

"Section 2. There shall be three Justices of the Supreme Court who shall be citizens of the State and learned in the law. One of them shall be the Chief Justice who shall be designated as such by his appointment and who when present shall preside at all sittings of the Court. In the absence of the Chief Justice the Justice present who is senior in length of service shall preside. If it is otherwise impossible to determine seniority among the Justices, they shall determine it by lot and certify accordingly to the Governor.

"There shall be six other State Judges who shall be citizens of the State and learned in the law. One of them shall be Chancellor, one of them President Judge of the Superior Court and of the Orphans' Court and the other four of them Associate Judges of the Superior Court and of the Orphans' Court. Three of the said Associate Judges shall be resident Associate Judges and one of them shall after appointment reside in each County of the State. If it is otherwise impossible to determine seniority of service among the said Associate Judges, they shall determine it by lot and certify accordingly to the Governor.

ADDENDUM 2

"There shall also be such number of other State Judges to be known as Vice-Chancellors as shall have been provided for by the Constitution or by Act of the General Assembly prior to the time this amended Article IV of this Constitution becomes effective and as may be provided for by Act of the General Assembly after such time. Each of such Vice-Chancellors shall be citizens of the State and learned in the law.

"Section 3. The Justices of the Supreme Court, the Chancellor and the Vice-Chancellor or Vice-Chancellors, and the President Judge and Associate Judges of the Superior Court and of the Orphans' Court shall be appointed by the Governor, by and with the consent of a majority of all the Members elected to the Senate, for the term of twelve years each, and the persons so appointed shall enter upon the discharge of the duties of their respective offices upon taking the oath of office prescribed by this Constitution. If a vacancy shall occur, by expiration of term or otherwise, at a time when the Senate shall not be in session, the Governor shall within thirty (30) days after the happening of any such vacancy convene the Senate for the purpose of confirming his appointment to fill said vacancy and the transaction of such other executive business as may come before it. Such vacancy shall be filled as aforesaid for the full term.

"Appointments to the offices of the State Judiciary shall at all times be subject to all of the following limitations:

"First, no more than two of the three Justices of the Supreme Court in office at the same time, shall be of the same major political party, at least one of said Justices shall be of the other major political party;

"Second, no more than three of the five Judges of the Superior Court and Orphans' Court, in office at the same time, shall be of the same major political party, at least two of the five Judges shall be of the other major political party;

"Third, at any time when the total number of the offices of the three Justices of the Supreme Court, the five Judges of. the Superior Court and Orphans' Court, the Chancellor and all Vice-Chancellors, shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of the Courts above enumerated shall be of the other major political party.

"Section 4. The Justices of the Supreme Court, the Chancellor and the Vice-Chancellor or Vice-Chancellors, and the President Judge and Associate Judges of the Superior Court and of the Orphans' Court shall respectively receive from the State for their services compensations which shall be fixed by law and paid monthly and they shall not receive any fees or perquisites in addition to their salaries for business done by them except as provided by law. They shall hold no other office of profit.

"Section 5. The President Judge of the Superior Court and of the Orphans' Court and the four Associate Judges thereof shall compose the Superior Court and the Orphans' Court, as hereinafter prescribed. The said five Judges shall designate those of their number who shall

hold the said courts in the several counties. No more than three of them shall sit together in either of the said courts. In each of the said courts the President Judge when present shall preside and in his absence the senior Associate Judge present shall preside.

"One Judge shall constitute a quorum of the said Courts, respectively, except in the Superior Court sitting to try a criminal case involving a charge of capital felony, when three Judges shall constitute a quorum, and except in the Superior Court sitting to try cases of prosecution under Section 8 of Article V of this Constitution, when two Judges shall constitute a quorum, and except in the Orphans' Court sitting to hear appeals from a Register's Court, when two Judges shall constitute a quorum. One Judge may open and adjourn any of said Courts.

"Section 6. Subject to the provisions of Section 5 of this Article, two or more sessions of the Superior Court and of the Orphans' Court may at the same time be held in the same county or in different counties, and the business in the several counties may be distributed and apportioned in such manner as shall be provided by the rules of the said Courts, respectively.

"Section 7. The Superior Court shall have jurisdiction of all causes of a civil nature, real, personal and mixed, at common law and all other the jurisdiction and powers vested by the laws of this State in the formerly existing Superior Court; and also shall have all the jurisdiction and powers vested by the laws of this State in the formerly existing Court of General Sessions of the Peace and Jail Delivery; and also shall have all the jurisdiction and powers vested by the laws of this State in the formerly existing Court of General Sessions; and also shall have all the jurisdiction and powers vested by the laws of this State in the formerly existing Court of Oyer and Terminer.

"Section 8. The phrase 'Supreme Court' as used in Section 4 of Article V of this Constitution and the phrases 'Superior Court,' Court of General Sessions of the Peace and Jail Delivery,' 'Court of Oyer and Terminer' and 'Court of General Sessions' whenever found in the law of this State, elsewhere than in this amended Article IV of this Constitution, shall be read as and taken to mean, and hereafter printed as, the Superior Court provided for in this amended Article IV of this Constitution; and the phrase 'Chief Justice' wherever found in the law of this State existing at the time this amended Article IV of this Constitution becomes effective, elsewhere than in this amended Article IV of this Constitution, shall be read as and taken to mean, and hereafter printed as President Judge of the Superior Court and of the Orphans' Court, as provided for in this amended Article IV of this Constitution.

"Section 9. The Orphans' Court shall have all the jurisdiction and powers vested by the laws of this State in the Orphans' Court.

"Section 10. The Chancellor and the Vice-Chancellor or Vice-Chancellors shall hold the Court of Chancery. One of them, respectively, shall sit alone in that court. This court shall have all the jurisdiction and powers vested by the laws of this State in the Court of Chancery. The business of the court shall be distributed by the Chancellor and the Vice-Chancellor or Vice-Chancellors between or among themselves in such manner as to expedite it. The rules of the Court of Chancery shall be made by the Chancellor and he may make general rules providing for the distribution of the business of the court between or among the Chancellor and the Vice-Chancellor or Vice-Chancellors. In any cause or matter in the Court of Chancery that is

initiated by an application to a Judge of that Court, the application may be made directly to the Chancellor or a Vice-Chancellor. Causes or proceedings in the Court of Chancery shall be decided, and orders or decrees therein shall be made, by the Chancellor or Vice-Chancellor who hears them, respectively.

"In cases of temporary emergency, upon written request made by the Chancellor to the President Judge of the Superior Court and of the Orphans' Court, or to the Senior Associate Judge of said Courts if the said President Judge should be incapacitated or absent from the State, such President Judge or senior Associate Judge, as the case may be, shall be authorized and it shall be his duty to designate one or more of the five Judges of the Superior Court and of the Orphans' Court to sit separately as Acting Vice-Chancellor, or Acting Vice-Chancellors, and hear and decide such causes in the Court of Chancery as the Chancellor may indicate prior to such designation that he desires to be so heard and decided. It shall be the duty of the Judges so designated to serve accordingly as Acting Vice-Chancellors. The Judges hearing and deciding such causes as such Acting Vice-Chancellors shall make all appropriate orders and decrees therein, in their own names as Acting Vice-Chancellors, and, for the purpose of said causes, shall be Judges of the Court of Chancery.

"(1) To issue writs of error in civil causes to the Superior Court and to determine finally all matters in error in the judgments and proceedings of said Superior Court in civil causes.

"(2) To issue upon application of the accused,' after conviction and sentence, writs of error in criminal causes to the Superior Court in all cases in which the sentence shall be death, imprisonment exceeding one month, or fine exceeding One Hundred Dollars ($100.00), and in such other cases as shall be provided by law; and to determine finally all matters in error in the judgments and proceedings of said Superior Court in such criminal causes; provided, however, that there shall be no writ of error to the Superior Court in cases of prosecution under Section 8 of Article V of this Constitution.

"(3) To receive appeals from the Superior Court in cases of prosecution under Section 8 of Article V of this Constitution and to determine finally all matters of appeal in such cases.

"(4) To receive appeals from the Court of Chancery and to determine finally all matters of appeal in the interlocutory or final decrees and other proceedings in chancery.

"(5) To receive appeals from the Orphans' Court and to determine finally all matters of appeal in the interlocutory or final decrees and judgments and other proceedings in the Orphans' Court.

"(6) To issue writs of prohibition, quo warranto, certiorari and mandamus to the Superior Court, the Court of Chancery and the Orphans' Court, or any of the Judges of the said courts and also to any inferior court or courts established or to be established.by law and to any of the Judges thereof and to issue all orders, rules and processes proper to give effect to the same. The General Assembly shall have power to provide by law in what manner the jurisdiction and power hereby conferred may be exercised in vacation and whether by one or more Justices of the Supreme Court.

ADDENDUM 2

"(7) To issue such temporary writs or orders in causes pending on appeal, or on writ of error, as may be necessary to protect the rights of parties and any Justice of the Supreme Court may exercise this power when the court is not in session.

"(8) To exercise such other jurisdiction by way of appeal, writ of error or of certiorari as the General Assembly may from time to time confer upon it.

"(9) To hear and determine questions of law certified to it by the Court of Chancery, Superior Court or Orphans' Court where it appears to the Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it. The Supreme Court may by rules define generally the conditions under which questions may be certified to it and prescribe methods of certification.

"Section 12. The Supreme Court shall always consist of the three Justices composing it except in case of a vacancy or vacancies in their number or in case any one or two of them shall be incapacitated or disqualified to sit by reason of interest, in any of which cases the Chief Justice of the Supreme Court, or if he be disqualified or incapacitated or if there be a vacancy in that office, the Justice who by seniority is next in rank to the Chief Justice, shall have the power to designate from among the Chancellor, the Vice-Chancellor or Vice-Chancellors, and the Judges of the Superior Court, one or more persons to sit in the Supreme Court temporarily to fill up the number of that court to three Justices and it shall be the duty of the person or persons so designated to sit accordingly; provided, however, that no one shall be so designated to sit in the Supreme Court to hear any cause in which he sat below. Three Justices shall constitute a quorum in the Supreme Court. Any one of the Justices of the Supreme Court may open and adjourn court.

"Section 13. In matters of chancery jurisdiction in which the Chancellor and all the Vice-Chancellors are interested or otherwise disqualified, the President Judge of the Superior Court and of the Orphans' Court shall have jurisdiction, or, if the said President Judge is interested or otherwise disqualified, the senior Associate Judge not interested or otherwise disqualified shall have jurisdiction.

"Section 14. The President Judge of the Superior Court and of the Orphans' Court or any Associate Judge shall have power, in the absence of the Chancellor and all the Vice-Chancellors from the county where any suit in equity may be instituted or during the temporary disability of the Chancellor and all the Vice-Chancellors, to grant restraining orders, and the said President Judge or any Associate Judge shall have power, during the absence of the Chancellor and all the Vice-Chancellors from the State or his and their temporary disability, to grant preliminary injunctions pursuant to the rules and practice of the Court of Chancery; provided that nothing herein contained shall be construed to confer general jurisdiction over the case.

"Section 15. The Governor shall have power to commission a Judge or Judges ad litem to sit in any cause in any of said Courts when by reason of legal exception to the Judges authorized to sit therein, or for other cause, there are not a sufficient number of Judges available to hold such Court. The commission in such case shall confine the office to the cause and it shall expire on the determination of the cause. The Judge so appointed shall receive reasonable

compensation to be fixed by the General Assembly. A Member of Congress, or any person holding or exercising an office under the United States, shall not be disqualified from being appointed a Judge ad litem.

"Section 16. The jurisdiction of each of the aforesaid courts shall be co-extensive with the State. Process may be issued out of each court, in any county, into every county. No costs shall be awarded against any party to a cause by reason of the fact that suit is brought in a county other than that in which the defendant or defendants may reside at the time of bringing suit.

"Section 17. The General Assembly, notwithstanding anything contained in this Article, shall have power to repeal or alter any Act of the General Assembly giving jurisdiction to the former Court of Oyer and Terminer, the former Superior Court, the former Court of General Sessions of the Peace and Jail Delivery, the former Court of General Sessions, the Superior Court hereby established, the Orphans' Court or the Court of Chancery, in any matter, or giving any power to either of the said courts. The General Assembly shall also have power to confer upon the Superior Court, the Orphans' Court and the Court of Chancery jurisdiction and powers in addition to those herein-before mentioned. Until the General Assembly shall otherwise direct, there shall be an appeal to the Supreme Court in all cases in which there is an appeal, according to any Act of the General Assembly, to the former Court of Errors and Appeals or to the former Supreme Court of this State.

"Section 18. Until the General Assembly shall otherwise provide, the Chancellor and the Vice-Chancellor or Vice-Chancellors, respectively, shall exercise all the powers which any law of this State vests in the Chancellor, besides the general powers of the Court of Chancery, and the President Judge of the Superior Court and of the Orphans' Court and the Associate Judges of said Courts shall each singly exercise all the powers which any law of this State vests in the Judges singly of the former Superior Court, whether as members of the Court or otherwise.

"Section 19. Judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law.

"Section 20. In civil causes where matters of fact are at issue, if the parties agree, such matters of fact shall be tried by the court, and judgment rendered upon their decision thereon as upon a verdict by a jury.

"Section 21. In civil causes, when pending, the Superior Court shall have the power, before judgment, of directing, upon such terms as it shall deem reasonable, amendments in pleadings and legal proceedings, so that by error in any of them, the determination of causes, according to their real merits, shall not be hindered; and also of directing the examination of witnesses and parties litigant.

"Section 22. At any time pending an action for debt or damages, the defendant may bring into court a sum of money for discharging the same, together with the costs then accrued and the plaintiff not accepting the same, if upon the final decision of the cause, he shall not recover a greater sum than that so paid into court for him, he shall not recover any costs accruing after such payment, except where the plaintiff is an executor or administrator.

"Section 23. By the death of any party, no suit in chancery or at law, where the cause of action survives, shall abate, but, until the General Assembly shall otherwise provide, suggestion of such death being entered of record, the executor or administrator of a deceased petitioner or plaintiff may prosecute the said suit; and if a respondent or defendant dies, the executor or administrator being duly serviced with a scire facias thirty (30) days before the return thereof shall be considered as a party to the suit, in the same manner as if he had voluntarily made himself a party; and in any of those cases, the court shall pass a decree, or render judgment for or against executors or administrators as to right appertains. But where an executor or administrator of a deceased respondent or defendant becomes a party, the court upon motion shall grant such a continuance of the cause as to the judges shall appear proper.

"Section 24. Whenever a person, not being an executor or administrator, appeals or applies to the Supreme Court for a writ of error, such appeal or writ shall be no stay of proceedings in the court below unless the appellant or plaintiff in error shall give sufficient security to be approved by the court below or by a judge of the Supreme Court that the appellant or plaintiff in error shall prosecute respectively his appeal or writ to effect, and pay the condemnation money and all costs, or otherwise abide the decree in appeal or the judgment in error, if he fail to make his plea good.

"Section 25. No writ of error shall be brought upon any judgment heretofore confessed, entered or rendered, or upon any judgment hereafter to be confessed, entered or rendered, but within six (6) months after the confessing, entering or rendering thereof; unless the person entitled to such writ be an infant, non compos mentis, or a prisoner, and then within six months exclusive of the time of such disability.

"Section 26. The Prothonotary of each County shall be the Clerk of the Superior Court in and for the County in which he holds office. He may issue process, take recognizance of bail and enter judgments, according to law and the practice of the court. No judgment in one county shall bind lands or tenements in another until a testatum fieri facias being issued shall be entered of record in the office of the Prothonotary of the County wherein the lands or tenements are situated. Such Prothonotary shall perform all duties heretofore performed by the Clerk of the Peace as Clerk of the former Court of General Sessions and the former Court of Oyer and Terminer.

"Section 27. The Supreme Court shall have the power to appoint a Clerk to hold office at the pleasure of the said Court. He shall receive from the State for his services a compensation which shall be fixed from time to time by the said Court and paid monthly.

"Section 28. The General Assembly may by law give to any inferior courts by it established or to be established, or to one or more justices of the peace, jurisdiction of the criminal matters following, that is to say--assaults and batteries, carrying concealed a deadly weapon, disturbing meetings held for the purpose of religious worship, nuisances, and such other misdemeanors as the General Assembly may from time to time, with the concurrence of two-thirds of all the Members elected to each House, prescribe.

ADDENDUM 2

"The General Assembly may by law regulate this jurisdiction, and provide that the proceedings shall be with or without indictment by grand jury, or trial by petit jury, and may grant or deny the privilege of appeal to the Superior Colift; provided, however, that there shall be an appeal to the Superior Court in all cases in which the sentence shall be imprisonment exceeding one (1) month, or a fine exceeding One Hundred Dollars ($100.00).

"Section 29. There shall be appointed, as hereinafter provided, such number of persons to the office of Justice of the Peace as shall be directed by law, who shall be commissioned for four (4) years.

"Section 30. Justices of the Peace and the judges of such courts as the General Assembly may establish, or shall have established prior to the time this amended Article IV of this Constitution becomes effective, pursuant to the provisions of Section 1 or Section 28 of this Article, shall be appointed by the Governor, by and with the consent of a majority of all the Members elected to the Senate, for such terms as shall be fixed by this Constitution or by law.

"Section 31. The Registers of Wills of the several counties shall respectively hold the Register's Court in each County. Upon the litigation of a cause the depositions of the witnesses examined shall be taken at large in writing and made part of the proceedings in the cause. This court may issue process throughout the State. Appeals may be taken from a Register's Court to the Orphans' Court. In cases where a Register of Wills is interested in questions concerning the probate of wills, the granting of letters of administration, or executors' or administrators' accounts, the cognizance thereof shall belong to the Orphans' Court.

"Section 32. An executor or administrator shall file every account with the Register of Wills for the County, who shall, as soon as conveniently may be, carefully examine the particulars with the proofs thereof, in the presence of such executor or administrator, and shall adjust and settle the same accordingly to the right of the matter and the law of the land; which account so settled shall remain in his office for inspection; and the executor, or administrator, shall within three (3) months after such settlement give notice in writing to all persons entitled to shares of the estate, or to their guardians, respectively, if residing within the State, that the account is lodged in the said office for inspection.

"Exceptions may be made by persons concerned to both sides of every such account, either denying the justice of the allowances made to the accountant or alleging further charges against him; and the exceptions shall be heard in the Orphans' Court for the County; and thereupon the account shall be adjusted and settled according to the right of the matter and the law of the land.

"The General Assembly shall have the power to transfer to the Orphans' Court all or a part of the jurisdiction by this Constitution vested in the Register of Wills and to vest in the Orphans' Court all or a part of such jurisdiction and to provide for appeals from that Court exercising such jurisdiction.

"Section 33. The style in all process and public acts shall be THE STATE OF DELAWARE. Prosecutions shall be carried on in the name of the State.

ADDENDUM 2

"Section 34. The Chancellor, Chief Justice and Associate Judges in office at and immediately before the time this amended Article IV of this Constitution becomes effective shall hold their respective offices until the expiration of their terms respectively and shall receive the compensation provided by law. They shall, however, be hereafter designated as follows:

"The Chancellor shall continue to be designated as Chancellor;

"The Chief Justice shall hereafter be designated as President Judge of the Superior Court and of the Orphans' Court;

"The Associate Judges shall hereafter be designated as Associate Judges of the Superior Court and of the Orphans' Court.

"The Vice-Chancellor in office at and immediately before the time this amended Article IV of this Constitution becomes effective shall hold his office until the expiration of the period of twelve years from the date of the commission for the office of Vice-Chancellor held by him at the time this amended Article IV of this Constitution becomes effective and shall receive the compensation provided by law. He shall continue to be designated as Vice-Chancellor.

"Section 35. All writs of error and appeals and proceedings pending, at the time this amended Article IV of this Constitution becomes effective, in the Supreme Court as heretofore constituted shall be proceeded within the Supreme Court hereby established, and all the books, records and papers of the said Supreme Court as heretofore constituted shall be the books, records and papers of the Supreme Court hereby established.

"All suits, proceedings and matters pending, at the time this amended Article IV of this Constitution becomes effective, in the Superior Court as heretofore constituted shall be proceeded within the Superior Court hereby established and all the books, records and papers of the said Superior Court as heretofore constituted shall be the books, records and papers of the said Superior Court as heretofore constituted shall be the books, records and papers of the Superior Court hereby established.

"All indictments, proceedings and matters of a criminal nature pending in the former Court of General Sessions and in the former Court of Oyer and Terminer, at the time this amended Article IV of this Constitution becomes effective, and all books, records and papers of said former Court of General Sessions and former Court of Oyer and Terminer shall be transferred to the Superior Court hereby established, and the said indictments, proceedings and matters pending shall be proceeded with to final judgment and determination in the said Superior Court hereby established.

"The Court of Chancery is not affected by this amended Article IV of this Constitution otherwise than by the provisions with respect to a Vice-Chancellor or Vice-Chancellors."

AND WHEREAS, the said proposed amendment was agreed to by two-thirds of all the members elected to each House in the said One Hundred and Fifteenth Session of the General Assembly; and

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WHEREAS, the said proposed amendment was published by the Secretary of State three months before the then next general election, to wit: the general election of 1950, in three newspapers in each County in the State of Delaware, NOW, THEREFORE,

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met (two-thirds of all the Members elected to each House of the General Assembly agreeing thereto):

Section 1. That the said proposed amendment be and it is hereby agreed to and adopted and that the same shall forthwith become and be a part of the Constitution.

Approved May 14, 1951.

ADDENDUM 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1045

JAMES R. ADAMS
Plaintiff-Appellee,
v.
THE HON. JOHN CARNEY
Defendant-Appellant.

On Appeal from the United States District Court for the District of Delaware
Civil Action No. 17-181-MPT

JOINT APPENDIX - VOLUME I OF II

(Pages JA1 to JA51)

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Dated: July 18, 2018

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES R. ADAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 17-181 MPT
	)	
THE HON. JOHN CARNEY, Governor of the State of Delaware,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that the Honorable John Carney, Defendant in the above-captioned action, hereby appeals to the United States Court of Appeals for the Third Circuit from the Judgment entered in this action on December 6, 2017 (D.I. 39), granting Plaintiff's Motion for Summary Judgment and denying Defendant's Motion for Summary Judgment for the reasons set forth in the Memorandum Opinion entered that same date (D.I. 40).

Dated: January 5, 2018

YOUNG CONAWAY STARGATT & TAYLOR, LLP

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Attorneys for Defendant, The Hon. John Carney

CERTIFICATE OF SERVICE

I, Pilar G. Kraman, hereby certify that on January 5, 2018, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

David L. Finger, Esquire
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Attorneys for Plaintiff

I further certify that on January 5, 2018**,** I caused the foregoing document to be served via electronic mail upon the above-listed counsel.

Dated: January 5, 2018

YOUNG CONAWAY STARGATT & TAYLOR, LLP

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Attorneys for Defendant, The Hon. John Carney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES R. ADAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 17-181 MPT
	)	
THE HON. JOHN CARNEY,	)	
Governor of the State of Delaware,	)	
	)	
Defendant.	)	

AMENDED NOTICE OF APPEAL

Notice is hereby given that the Honorable John Carney, Defendant in the above-captioned action, hereby appeals to the United States Court of Appeals for the Third Circuit from the:

1. Judgment entered in this action on December 6, 2017 (D.I. 39), granting Plaintiff's Motion for Summary Judgment and denying Defendant's Motion for Summary Judgment for the reasons set forth in the Memorandum Opinion entered that same date (D.I. 40);
2. Revised Judgment entered in this action on May 23, 2018, granting Plaintiff's Motion for Summary Judgment and denying Defendant's Motion for Summary Judgment for the reasons set forth in the Memorandum Opinion Clarifying the Court's Opinion Issued December 6, 2017 (D.I. 61, 62); and
3. Memorandum Order denying Defendant's Motion for Reconsideration/Clarification (D.I. 60).

Dated: June 20, 2018

YOUNG CONAWAY STARGATT & TAYLOR, LLP

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Attorneys for the Hon. John Carney

CERTIFICATE OF SERVICE

I, Pilar G. Kraman, hereby certify that on June 20, 2018, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

David L. Finger, Esquire
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Attorneys for Plaintiff

I further certify that on June 20, 2018, I caused the foregoing document to be served via electronic mail upon the above-listed counsel.

Dated: June 20, 2018

YOUNG CONAWAY STARGATT & TAYLOR, LLP

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Attorneys for Defendant, The Hon. John Carney

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JAMES R. ADAMS,	:	
Plaintiff,	:	
v.	:	C. A. No. 17-181-MPT
THE HON. JOHN CARNEY Governor of the State of Delaware,	:	
Defendant.	:	

JUDGMENT ORDER

Consistent with the reasoning contained in the Memorandum Opinion of December 6, 2017, IT IS ORDERED and ADJUDGED that plaintiff's motion for summary judgment (D.I. 31) is GRANTED, and defendant's motion for summary judgment (D.I. 28) is DENIED.

Dated: December 6, 2017

/s/ Mary Pat Thynge
Chief U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JAMES R. ADAMS, Plaintiff,	:	
v.	:	C. A. No. 17-181-MPT
THE HON. JOHN CARNEY Governor of the State of Delaware, Defendant.	:	

MEMORANDUM OPINION

David L. Finger, Esq., Finger & Slanina, LLC, One Commerce Center, 1201 North Orange Street, 7th Floor, Wilmington, DE 19801.
Attorney for Plaintiff James R. Adams.

Christian D. Wright, Department of Justice Civil Division, 820 North French Street, 8th Floor, Wilmington, DE 19801.
Attorney for Defendant the Honorable John Carney, Governor of the State of Delaware.

Ryan Patrick Connell, Department of Justice State of Delaware, Carvel Office Building, 820 North French Street, 8th Floor, Wilmington, DE 19801.
Attorney for Defendant the Honorable John Carney, Governor of the State of Delaware.

I. INTRODUCTION

Plaintiff, James R. Adams, filed this Declaratory Judgment and Injunctive Relief action under 42 U.S.C. § 1983, in relation to Article IV, § 3 of the Constitution of the State of Delaware, against the Governor of the State of Delaware, John Carney on February 21, 2017.[1] Plaintiff seeks review of the constitutionality of the provision, commonly referred to as the "Political Balance Requirement," which prohibits any political party to comprise more than a "bare majority" of the seats in the Supreme Court

[1] D.I. 1; *see also* D.I. 10 (amended compliant filed on March 10, 2017).

or Superior Court, or in the Supreme Court, Superior Court, and Court of Chancery combined.[2] The provision also requires that the remaining seats be comprised of members of the "other major political party."[3]

Presently before the court are the parties' cross-motions for summary judgment, filed on September 29, 2017.[4] Plaintiff, in his motion, contends Article IV, § 3 of the Constitution of the State of Delaware's "Political Balance Requirement" restricts governmental employment based on political affiliation, which violates the First Amendment of the Constitution of the United States.[5] Defendant claims that plaintiff failed to establish standing under Article III, § 2 of the Constitution of the United States,[6] and/or contends the position of judge is a "policymaking position," which falls under the well established exception to the restriction of governmental employment based on political affiliation.[7] For the reasons stated herein, the court grants plaintiff's motion for summary judgment, and denies defendant's motion for summary judgment.

II. BACKGROUND

Article IV, § 3 of the Constitution of the State of Delaware was amended to its present language in 1897 to provide the requirements and limitations associated with judicial appointment.[8] The pertinent section reads:

> Appointments to the office of the State Judiciary shall at all times be subject to all of the following limitations:

[2] Del. Const. Art. IV, § 3.
[3] *Id.*
[4] *See* D.I. 28; D.I. 31.
[5] D.I. 32 at 2.
[6] U.S. const. Art. III, § 2.
[7] D.I. 29 at 3.
[8] D.I. 30 at A-80-84.

First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.

Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the members of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.

Third, at any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.

Fourth, at any time when the total number of Judges of the Family Court shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.

Fifth, at any time when the total number of Judges of the Court of Common Pleas shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.[9]

This provision effectively creates a few limitations: first, it demands three of the Delaware Supreme Court Justices be from "one major political party,"[10] and the other

[9] Del. Const. Art. IV, § 3.

[10] Major political party is defined as "any political party which, as of December 31, of the year immediately preceding any general election year, has registered in the name of that party voters equal to at least five percent of the total number of voters registered in the State." 15 Del. C. § 101(15).

two be from the "other major political party;"[11] second, at no time may the Delaware Superior Court or the Delaware Supreme Court, Superior Court, and Court of Chancery combined, have more than a "bare majority" be comprised of the same "major political party," and the remainder positions must be of the "other major political party;"[12] and third, in the Family Courts and the Courts of Common Pleas, one political party may never possess more than a one judge majority.[13]

Defendant, as Governor of the State of Delaware, is responsible for appointing judges in compliance with Article IV, § 3 of the Constitution of the State of Delaware.[14] In 1977, a Judicial Nominating Commission was created by executive order to identify highly qualified candidates.[15] To fulfill this role, the Commission provides notice for existing judicial vacancies.[16] The required party affiliation is listed within the notice, as "must be a member of the [Democratic or Republican] party," when necessary because of Delaware's constitutional limitations.[17] The Committee then provides a list of qualified candidates to defendant for selection.[18]

Plaintiff is a graduate of Ursinus College and Delaware Law School.[19] He is a resident of New Castle County and a member of the Delaware bar.[20] Plaintiff worked in multiple positions before retiring from the Department of Justice on December 31,

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[11] *Id.*
[12] Del. Const. Art. IV, § 3.
[13] *Id.*
[14] Del. Const. Art. IV, § 3.
[15] D.I. 32 at 3.
[16] D.I. 30 at A-107-17.
[17] *Id.*
[18] *Id.*
[19] D.I. 10 at 1.
[20] *Id.*

2015.[21] After retirement, he remained on emeritus status from the bar before returning to active status in 2017.[22] Until February 13, 2017, plaintiff was registered as affiliated with the Democratic party.[23] Plaintiff, during that time, applied for one position, Family Court Commissioner.[24] Now plaintiff is registered as an independent voter.[25] On February 14, 2017, the Judicial Nominating Commission released a Notice of Vacancy calling for a Republican candidate in the Superior Court of Kent County, following the retirement of the Honorable Robert Young.[26] On March 20, 2017, the Judicial Nominating Commission also sent a Notice of Vacancy following the retirement of the Honorable Randy Holland, which required a qualified Republican candidate for the Delaware Supreme Court.[27] Plaintiff, as an unaffiliated voter, was barred from applying to either position. Plaintiff's amended complaint was filed shortly thereafter on April 10, 2017, to which defendant responded on April 24, 2017.[28]

III. STANDARD OF REVIEW

A motion for summary judgment should be granted where the court finds no genuine issues of material fact from its examination of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, and that

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[21] *Id.* at 1-2.
[22] *Id.* at 4.
[23] D.I. 30 at A-55.
[24] Plaintiff was not selected for the Commissioner position, but such positions are not subjected to the "Political Balancing Requirement" under the Delaware Constitution. D.I. 37 at 1.
[25] D.I. 30 at A-55.
[26] D.I. 1 at Ex. A.
[27] D.I. 10 at 4.
[28] *See id.*; D.I. 13.

the moving party is entitled to judgment as a matter of law.[29] A party is entitled to summary judgment where "the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party or where the facts are not disputed and there is no genuine issue for trial."[30]

This standard does not change merely because there are cross-motions for summary judgment.[31] Cross-motions for summary judgment

> are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist.[32]

Moreover, "[t]he filing of cross-motions for summary judgment does not require the court to grant summary judgment for either party."[33]

IV. ANALYSIS

A. Defendant's Motion for Summary Judgment Based on Plaintiff's Lack of Standing for Failure to Show Injury in Fact.

For plaintiff to demonstrate standing, there must be a showing of: (1) an injury in fact, (2) with a traceable connection to the challenged action, and (3) the requested relief will redress the alleged injury.[34] Three principals that must be considered in a standing analysis are that a party must litigate his own rights and not those of a third-party, the issue must not be an abstract or generalized grievance, and the harm must

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[29] *Ford v. Unum Life Ins. Co. of Am.*, 465 F. Supp. 2d 324, 330 (D. Del. 2006).
[30] *Delande v. ING Emp. Benefits*, 112 F. App'x 199, 200 (3d Cir. 2004).
[31] *Appleman's v. City of Philadelphia*, 826 F.2d 214, 216 (3d Cir. 1987).
[32] *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968).
[33] *Krups v. New Castle County*, 732 F. Supp. 497, 505 (D. Del. 1990).
[34] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

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be in the zone of interest protected by the statute or constitutional provision at issue.[35] Plaintiff must show he is likely to experience actual future injury.[36] In addition, plaintiff is not required to engage in futile gestures to establish standing.[37]

In the standing analysis, there are two parts of Article IV, § 3 of the Constitution of the State of Delaware involved: provisions one through three, which contain the term "other political party," and provisions four and five, which only include a bare minimum requirement.[38] Defendant alleges that plaintiff has no standing because he fails to demonstrate an "actual and immediate threat of future injury" and/or a "concrete and particularized threat of future injury."[39]

Plaintiff does not have standing under provisions four and five. He has not applied for a judicial position in any of Family Courts or the Courts of Common Pleas.[40] In addition, plaintiff's applications for these positions would not have been futile, because there is no party requirement constitutionally attached to either court.[41] The only constitutional restriction on these courts is that "not more than a majority of one Judge shall be of the same political party."[42]

As for provisions one through three, which contain the "other political party"

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[35] *Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State*, 454 U.S. 464, 474-75 (1982).

[36] *Voneida v. Pennsylvania*, 508 F. App'x 152, 156 (3d Cir. 2012).

[37] *Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639 (3d Cir. 1995).

[38] Del. Const. Art. IV, § 3.

[39] D.I. 29 at 12, 15.

[40] Although plaintiff applied for Family Court Commissioner in 2009 and was not selected, he does not contend this occurred due to the reasons asserted in his compliant. D.I. 30 at A-08-09.

[41] *See* Del. Const. Art. IV, § 3; D.I. 30 at A-110-16.

[42] Del. Const. Art. IV, § 3.

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requirement, defendant fails to demonstrate that plaintiff does not have the requisite standing. Plaintiff alleged that if he were permitted to apply as an independent, he would apply for a position on either the Delaware Superior Courts or the Delaware Supreme Court.[43] As an unaffiliated voter, he is barred from applying and any such application would be futile.[44] As a result, an actual, concrete, and particularized threat of present and future injury to plaintiff is demonstrated.[45]

B. Whether a Judge is a Policymaking Position, That is an Exception to the Right of Political Affiliation in Employment Decisions.

The United States Supreme Court has established that political belief and association are at the core of First Amendment protections.[46] Governmental employees can not be terminated or asked to relinquish their "right to political association at the price of holding a job."[47] "Patronage . . . to the extent that it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First

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[43] D.I. 10 at 4; *see Nat'l Ass'n for the Advancement of Multijurisdiction Practice, (NAAMJP) v. Simandle*, 658 Fed. Appx. 127, 133 (3d Cir. 2016) (The plaintiffs "alleged that they would seek admission to the District Court bar if the rules were changed to permit their admission. Since denial of their application was assured, the rules inflict the alleged injury regardless of whether [the plaintiffs] actually undertook the futile application.").

[44] Del. Const. Art. IV, § 3 (provision one, concerning the Delaware Supreme Court, requires "two of said Justices shall be of the other major political party," and provision two, regarding the Delaware Superior Courts, requires "the remaining members of such offices shall be of the other major political party").

[45] *Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State*, 454 U.S. 464, 474-75 (1982).

[46] *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion).

[47] *Id.* at 356-57.

Amendment."[48] This right of political affiliation has been expanded to government employees regarding their promotion, transfer, and hiring.[49]

The "prohibition on encroachment of First Amendment protections is not absolute," and an exception is recognized, which limits patronage dismissals to "policymaking positions," and requires an analysis of the nature of the employee's responsibilities.[50] The United States Court of Appeals for the Third Circuit has found "a question relevant in all cases is whether the employee has meaningful input into decision making concerning the nature and scope of a major government program."[51] A "policymaking position" is a narrow exception applied when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[52]

The Court has recognized that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered."[53] In *Branti v. Finkel*, the United States Supreme Court held that the position of Assistant Public Defender was not entitled to the "policymaker" exception.[54] It found that the factors to be considered in determining whether a position is a policymaking position are

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[48] *Id.* at 357; *see also Branti v. Finkel*, 445 U.S. 507, 512-18 (1980) (the majority of the court reaffirming the opinion established in *Elrod*).

[49] *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64, 75-80 (1990).

[50] *Elrod*, 427 U.S. at 360, 367.

[51] *Peters v. Del. River Port Auth. of Pa. and N.J.*, 16 F.3d 1346, 1353 (3d Cir. 1994) (internal citations omitted).

[52] *Branti*, 445 U.S. at 518.

[53] *Id.*

[54] "His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation." *Id.* at 519 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)).

whether the position is simply clerical, nondiscretionary or technical in nature, whether the employee "participates in Council discussions, or other meetings, whether the employee prepares budgets, or has authority to hire or fire employees, the salary of the employee, and the employee's power to control others and to speak in the name of policymakers."[55] A difference in political affiliation is only a proper factor in making employee decisions if it is highly likely "to cause an official to be ineffective in carrying out the duties and responsibilities of the office."[56] Whether a position involves policy-making is a question of law.[57]

Defendant contends that the role of the judiciary falls within the policymaker exception under the precedent of *Elrod* and *Branti*.[58] Defendant's argument rests heavily upon the holdings by other circuit courts outside the Third Circuit,[59] and the United States Supreme Court's holding in *Gregory v. Ashcroft*.[60] Plaintiff contends that the role of the judiciary is not a policymaking position and rests his argument upon a separation of powers, the role of the judiciary, and the Delaware Judges' Code of Judicial Conduct.[61]

The judiciary, although a very important role, is not a policymaking position. A

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[55] *Brown v. Trench*, 787 F.2d 167, 169 (3d Cir. 1986).

[56] *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993).

[57] *St. Louis v. Proprotnik*, 485 U.S. 112, 126 (1988).

[58] *See* D.I. 29 at 20.

[59] *See Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993) (Judges are "policymakers," whose political affiliations may be considered during the appointment process); *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988) (Governor was entitled to consider judge's political affiliation in making a temporary appointment).

[60] *See* D.I. 29 at 20; *Gregory v. Ashcroft*, 501 U.S. 452, 466 (1991) (finding that legislative intent was not clear as to whether the language "appointee on the policymaking level," included the judiciary).

[61] D.I. 32 at 8-19.

judge does not provide "meaningful input into decision making concerning the nature and scope of a major government program."[62] To the contrary a judge's role is "to apply, not amend, the work of the People's representatives."[63] The court may not speak on policymakers behalf, sit in on Congressional discussions, or participate in policymaking meetings.[64] The role of the judiciary is not to "hypothesize independently" legislative decision and intent.[65] "Matters of practical judgment and empirical calculation are for Congress" and the judiciary has "no basis to question their detail beyond the evident consistency and substantiality."[66] Statutory interpretation, not statutory creation, is the responsibility of the judiciary and therefore, the position of judge is not a policymaking position.

Cases from other circuits, on which defendant relies, are distinguishable.[67] Both *Newman* and *Kurowski* addressed situations which political affiliation could be considered, but was not constitutionally mandated.[68] Neither case dealt with a constitutional provision requiring a political affiliation evaluation, nor a complete bar on hiring individuals with minority political party beliefs. In addition, the Court in *Gregory* addressed the issue of interpreting legislative intent of an exception as it applied to the

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[62] *Peters v. Del. River Port Auth. of Pa. and N.J.*, 16 F.3d 1346, 1353 (3d Cir. 1994) (internal citations omitted).

[63] *Hayes v. Harvey*, 874 F.3d 98, 111 (3d Cir. 2017) (citing *Henson v. Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017)).

[64] *Brown*, 787 F.2d at 169.

[65] *Matthew v. Lucas*, 427 U.S. 495, 515 (1976).

[66] *Id.* at 515-16.

[67] D.I. 29 at 20.

[68] *See Newman*, 986 F.2d at 159-60 (in the appointment of interim judges, Governor considered candidates based on recommendations from Republican Chairpersons); *Kurowski*, 848 F.2d at 769 (political affiliation could be considered by court when assigning judges *pro tempore*).

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Age Discrimination in Employment Act for positions "on the policymaking level."[69] The Court addressed whether Congress intended the judiciary be included in the exception, and whether a Missouri law mandating that members of the judiciary retire at the age seventy was permissible under the Age Discrimination in Employment Act.[70] The Court specifically did not decide the issue of whether the judiciary was a policymaker, and based its holding on the rationale that "people . . . have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. The people may therefore wish to replace some older judges."[71] Thus, the phrase "on the policymaking level" is not the equivalent of a "policymaking" position, on which employment decisions based on political affiliation may be made.

Delaware requirements are clear, that "[a] judge should be unswayed by partisan interest" and "family, social, or other relationships" should not influence their conduct or judgment."[72] In particular, Canon Four of the Delaware Judges' Code of Judicial Conduct specifically addresses that the judiciary must refrain from political activity.[73] A judge may not act as a "leader or hold any office in a political organization," make speeches for political organizations or candidates, or "engage in any other political

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[69] *Gregory*, 501 U.S. at 455-57.
[70] *Id.* at 455-64.
[71] *Id.* at 472.
[72] Del. Judges' Code Judicial Conduct Rule 2.4 (A)-(B).
[73] *See* Del. Judges' Code Judicial Conduct Canon 4.

activity."[74] The Delaware Judicial Code clearly pronounces that political affiliation should not affect the position.[75]

Political affiliation is not important to the effective performance of a Delaware judge's duties.[76] A Delaware judge may not participate in political activities, hold any office in a political organization, or allow political affiliation to influence his judgment on the bench.[77] Since political affiliation in Delaware cannot "cause an official to be ineffective in carrying out the duties and responsibilities of the office," it does not meet the standard for a "policymaking position."[78]

Article IV, § 3 of the Constitution of the State of Delaware violates the First Amendment by placing a restriction on governmental employment based on political affiliation in the Delaware judiciary. The narrow exception of political affiliation does not apply because the role of the judiciary is to interpret statutory intent and not to enact or amend it.[79] Precedent relied upon by defendant is highly distinguishable and not applicable to the current situation.[80] Further, the Delaware Judges' Code of Judicial Conduct clearly indicates that political affiliation is not a valued trait of an effective

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[74] *Id.* at Rule 4.1 (A), (C) (with an exception for activities "on behalf of measures to improve the law, the legal system or the administration of justice").

[75] *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1292 (Del. 2007) ("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."); *Ewing v. Beck*, 1986 WL 5143, at *2 (Del. Ch. 1986) ("It is a settled principle that courts will not engage in 'judicial legislation' where the statute in question is clear and unambiguous.").

[76] *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

[77] Del. Judges' Code Judicial Conduct Rule 2.4 (B); 4.1 (A)(1), (C).

[78] *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993).

[79] *Hayes v. Harvey*, 874 F.3d 98, 111 (3d Cir. 2017) (citing *Henson v. Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017)).

[80] *See Newman v. Voinovich*, 986 F.2d 159, 159-60 (6th Cir. 1993); *Kurowski v. Krajewski*, 848 F.2d 767, 769 (7th Cir. 1988); *Gregory*, 501 U.S. at 455-64.

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judiciary.[81]

As a result of the findings herein, plaintiff's motion for summary judgment (D.I. 31) is granted, and defendant's motion for summary judgment (D.I. 28) is denied. An appropriate Order shall follow.

Dated: December 6, 2017

/s/ Mary Pat Thynge
Chief U.S. Magistrate Judge

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[81] *See* Del. Judges' Code Judicial Conduct Canon 4.

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MEMORANDUM OPINION CLARIFYING THE COURT'S OPINION ISSUED DECEMBER 6, 2017

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[1] D.I. 1; *see also* D.I. 10 (amended compliant filed on March 10, 2017).

commonly referred to as the "Political Balance Requirement," which prohibits any political party to comprise more than a "bare majority" of the seats in the Supreme Court or Superior Court, or in the Supreme Court, Superior Court, and Court of Chancery combined.[2] The provision also requires that the remaining seats be comprised of members of the "other major political party."[3]

Under consideration in this clarification opinion are the parties' cross-motions for summary judgment, filed on September 29, 2017.[4] Plaintiff, in his motion, contends Article IV, § 3 of the Constitution of the State of Delaware's "Political Balance Requirement" restricts governmental employment based on political affiliation, which violates the First Amendment of the Constitution of the United States.[5] Defendant claims that plaintiff failed to establish standing under Article III, § 2 of the Constitution of the United States,[6] and/or contends the position of judge is a "policymaking position," which falls under the well established exception to the restriction of governmental employment based on political affiliation.[7] For the reasons stated herein, the court grants plaintiff's motion for summary judgment, and denies defendant's motion for summary judgment.

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II. BACKGROUND

Article IV, § 3 of the Constitution of the State of Delaware was amended to its present language in 1897 to provide the requirements and limitations associated with judicial appointment.[8] The pertinent section reads:

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> First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.
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> Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the members of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.
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> Third, at any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.
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> Fourth, at any time when the total number of Judges of the Family Court shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.
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> Fifth, at any time when the total number of Judges of the Court of Common Pleas shall be an even number, not more than one-half of the Judges shall be of the same political party; and at any time when the total

[8] D.I. 30 at A-80-84.

number of Judges shall be an odd number, then not more than a majority of one Judge shall be of the same political party.[9]

This provision effectively creates a few limitations: first, it demands three of the Delaware Supreme Court Justices be from "one major political party,"[10] and the other two be from the "other major political party;"[11] second, at no time may the Delaware Superior Court or the Delaware Supreme Court, Superior Court, and Court of Chancery combined, have more than a "bare majority" be comprised of the same "major political party," and the remainder positions must be of the "other major political party;"[12] and third, in the Family Courts and the Courts of Common Pleas, one political party may never possess more than a one judge majority.[13]

Defendant, as Governor of the State of Delaware, is responsible for appointing judges in compliance with Article IV, § 3 of the Constitution of the State of Delaware.[14] In 1977, a Judicial Nominating Commission was created by executive order to identify highly qualified candidates.[15] To fulfill this role, the Commission provides notice for existing judicial vacancies.[16] The required party affiliation is listed within the notice, as "must be a member of the [Democratic or Republican] party," when necessary because

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[10] Major political party is defined as "any political party which, as of December 31, of the year immediately preceding any general election year, has registered in the name of that party voters equal to at least five percent of the total number of voters registered in the State." 15 Del. C. § 101(15).

[11] *Id.*

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[13] *Id.*

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[16] D.I. 30 at A-107-17.

of Delaware's constitutional limitations.[17] The Committee then provides a list of qualified candidates to defendant for selection.[18]

Plaintiff is a graduate of Ursinus College and Delaware Law School.[19] He is a resident of New Castle County and a member of the Delaware bar.[20] Plaintiff worked in multiple positions before retiring from the Department of Justice on December 31, 2015.[21] After retirement, he remained on emeritus status from the bar before returning to active status in 2017.[22] Until February 13, 2017, plaintiff was registered as affiliated with the Democratic party.[23] Plaintiff, during that time, applied for one position, Family Court Commissioner.[24] Now plaintiff is registered as an independent voter.[25] On February 14, 2017, the Judicial Nominating Commission released a Notice of Vacancy calling for a Republican candidate in the Superior Court of Kent County, following the retirement of the Honorable Robert Young.[26] On March 20, 2017, the Judicial Nominating Commission also sent a Notice of Vacancy following the retirement of the

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[17] *Id.*
[18] *Id.*
[19] D.I. 10 at 1.
[20] *Id.*
[21] *Id.* at 1-2.
[22] *Id.* at 4.
[23] D.I. 30 at A-55.
[24] Plaintiff was not selected for the Commissioner position, but such positions are not subjected to the "Political Balancing Requirement" under the Delaware Constitution. D.I. 37 at 1.
[25] D.I. 30 at A-55.
[26] D.I. 1 at Ex. A.

Honorable Randy Holland, which required a qualified Republican candidate for the Delaware Supreme Court.[27] Plaintiff, as an unaffiliated voter, was barred from applying to either position. Plaintiff's amended complaint was filed shortly thereafter on April 10, 2017, to which defendant responded on April 24, 2017.[28]

III. STANDARD OF REVIEW

A. Summary Judgment

A motion for summary judgment should be granted where the court finds no genuine issues of material fact from its examination of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, and that the moving party is entitled to judgment as a matter of law.[29] A party is entitled to summary judgment where "the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party or where the facts are not disputed and there is no genuine issue for trial."[30]

This standard does not change merely because there are cross-motions for summary judgment.[31] Cross-motions for summary judgment

> are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist.[32]

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[27] D.I. 10 at 4.
[28] *See id.*; D.I. 13.
[29] *Ford v. Unum Life Ins. Co. of Am.*, 465 F. Supp. 2d 324, 330 (D. Del. 2006).
[30] *Delande v. ING Emp. Benefits*, 112 F. App'x 199, 200 (3d Cir. 2004).
[31] *Appleman's v. City of Philadelphia*, 826 F.2d 214, 216 (3d Cir. 1987).
[32] *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968).

Moreover, "[t]he filing of cross-motions for summary judgment does not require the court to grant summary judgment for either party."[33]

B. Standing

"Standing implicates both constitutional requirements and prudential concerns."[34] For plaintiff to demonstrate "the irreducible constitutional minimum of standing" under Article III, § 2 of the United States Constitution ("Article III standing"), there must be a showing of: (1) an injury in fact, (2) with a traceable connection to the challenged action, and (3) the requested relief will redress the alleged injury.[35] Plaintiff must show he is likely to experience actual future injury.[36] In addition, plaintiff is not required to engage in futile gestures to establish Article III standing.[37]

Prudential standing requirements exist "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those best suited to assert a particular claim."[38] According to the United States Court of Appeals for the Third Circuit, prudential limits require that:

> (1) a litigant assert his or her own legal interests rather than those of third parties, (2) courts refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances, and (3) a litigant demonstrate that [his or] her interests are arguably within the zone of interests intended to be protected

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[33] *Krups v. New Castle County*, 732 F. Supp. 497, 505 (D. Del. 1990).

[34] *Common Cause of Pennsylvania v. Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009) (citation omitted).

[35] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (internal quotation marks and citations omitted).

[36] *Voneida v. Pennsylvania*, 508 F. App'x 152, 156 (3d Cir. 2012).

[37] *Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639 (3d Cir. 1995).

[38] *Freeman v. Corzine*, 629 F.3d 146, 154 (3d Cir. 2010) (citations and internal quotation marks omitted).

> by the statute, rule or constitutional provision on which the claim is based.[39][40]

"Thus, the limits of prudential standing are used to ensure that those parties who can best pursue a particular claim will gain access to the courts."[41]

IV. ANALYSIS

A. Defendant's Motion for Summary Judgment Based on Plaintiff's Lack of Standing for Failure to Show Injury in Fact.

1. Article III standing

With respect to constitutional standing, there are effectively two different parts of Article IV, § 3 of the Constitution of the State of Delaware: provisions one through three, which contain "major political party" and "bare majority" requirements, and provisions four and five, which only include a "bare majority" requirement.[42] Defendant alleges that plaintiff has no standing because he fails to demonstrate an "actual and immediate threat of future injury" and/or a "concrete and particularized threat of future injury."[43]

Plaintiff does not have constitutional standing under provisions four and five. He has not applied for a judicial position in any of the Family Courts or the Courts of Common Pleas.[44] In addition, plaintiff's applications for these positions would not have

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[39] *Oxford Assocs. v. Waste Sys. Auth. of E. Montgomery Cty.*, 271 F.3d 140, [40] -46 (3d Cir. 2001) (alteration and citations omitted); *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (articulating a similar standard).

[41] *Mariana v. Fisher*, 338 F.3d 189, 204 (3d Cir. 2003).

[42] Del. Const. Art. IV, § 3.

[43] D.I. 29 at 12, 15.

[44] Although plaintiff applied for Family Court Commissioner in 2009 and was not selected, he does not contend this occurred due to the reasons asserted in his compliant. D.I. 30 at A-08-09.

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been futile, because there is no party requirement constitutionally attached to either court.[45] The only constitutional restriction on these courts is that "not more than a majority of one Judge shall be of the same political party."[46]

As for provisions one through three, which contain the "major political party" requirement, defendant fails to demonstrate that plaintiff does not have the requisite standing. Plaintiff alleges that if he were permitted to apply as an independent, he would apply for a position on either the Delaware Superior Courts or the Delaware Supreme Court.[47] As an unaffiliated voter, he is barred from applying and any such application would be futile.[48] As a result plaintiff has demonstrated an actual, concrete, and particularized threat of present and future injury.[49]

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[45] Del. Const. Art. IV, § 3; *see also* D.I. 30 at A-110-16 (documenting vacancies for judicial office in the Family Courts and Courts of Common Pleas in which political affiliation is not a requirement). In effect, this "bare majority" requirement places no limitations on unaffiliated voters and only affects judicial candidates of a major political party when the bare majority of judicial offices on those courts is filled with individuals affiliated with that major political party. In that case, only those members of that major political party would be excluded from consideration for judicial office.

[46] Del. Const. Art. IV, § 3 (the "bare majority" requirement).

[47] D.I. 10 at 4; *see Nat'l Ass'n for the Advancement of Multijurisdiction Practice, (NAAMJP) v. Simandle*, 658 Fed. Appx. 127, 133 (3d Cir. 2016) (The plaintiffs "alleged that they would seek admission to the District Court bar if the rules were changed to permit their admission. Since denial of their application was assured, the rules inflict the alleged injury regardless of whether [the plaintiffs] actually undertook the futile application.").

[48] Del. Const. art. IV, § 3 (provision one, concerning the Delaware Supreme Court, requires "two of said Justices shall be of the other major political party," and provision two, regarding the Delaware Superior Courts, requires "the remaining members of such offices shall be of the other major political party").

[49] *Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State*, 454 U.S. 464, 474-75 (1982).

2. Prudential standing

Plaintiff has demonstrated constitutional standing as to the "major political party" provisions of Article IV, § 3 of the Constitution of the State of Delaware. Defendant argues that summary judgment is, nonetheless, appropriate, because plaintiff fails to satisfy the second limit of prudential standing, specifically that the constitutionality of Article IV, § 3 of the Delaware Constitution is an "abstract question[] of wide public significance."[50] Defendant challenges whether plaintiff actually intends to become a judge in the State of Delaware and whether judicial intervention is "necessary to protect his rights[.]"[51]

Plaintiff responds by addressing each limit of prudential standing:

> Adams easily satisfies prudential standing requirements. First, he brought his suit to correct a wrong applicable to him as an anticipated applicant for a judgeship, notwithstanding that the ruling will also affect others similarly situated. Second, this is neither abstract nor a mere generalized grievance. The injury is specific (loss of job opportunity) and targeted (applicable to members of the Delaware Bar seeking judicial appointment, such as Adams). Third, Adams' interests are within the "zone of interests" protected by the First Amendment freedom of political association, as an individual may not be refused government employment based on his or her political affiliation.[52]

In addition, plaintiff argues that the requirements of prudential standing are relaxed in First Amendment cases.[53] Plaintiff contends that the reason for this is that "'[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the

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[50] D.I. 29 at 17.

[51] *Id.* at 17-18.

[52] D.I. 35 at 11.

[53] *Id.* at 10 (citing *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988)) ("Where a party raises a facial challenge to a law pursuant to the First Amendment, general prudential standing requirements are relaxed.").

litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court.'"[54] In its reply brief, defendant does not address any of plaintiff's arguments or the case law cited by plaintiff.[55] Instead, defendant repeats its argument and expands on its theory that "[p]laintiff is litigating more of an academic interest[.]"[56]

The court addresses the three prudential limitations in order. First, although defendant questions plaintiff's motivations in bringing suit, these questions do not overcome plaintiff's unrebutted argument that the political affiliation requirements of judicial offices in Delaware directly harm him as an unaffiliated voter. Second, defendant argues that plaintiff asks the court "to decide abstract questions of wide public significance[,]"[57] but this conclusory argument fails to consider that this specific question—whether political affiliation can be a requirement of government employment—is an issue previously addressed by the United States Supreme Court on numerous occasions.[58][59] Third, plaintiff argues, and defendant does not discuss, that plaintiff's rights to political affiliation are within the "zone of interests" protected by the First Amendment.[60] Moreover, plaintiff's argument, that the Supreme Court has

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[54] *Id.* (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984)).

[55] D.I. 37 at 3-4.

[56] *Id.*

[57] D.I. 29 at 17.

[58] *E.g.*, *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, [59] U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976)

[60] *Compare* D.I. 35 at 11, *with* D.I. 37 at 3-4. Plaintiff's grievance about the "major political party" affiliation requirements of Article IV, § 3, is substantially similar to the First Amendment rights of members of major political parties, who are impacted by the "bare majority" requirements, so that the rights of those individuals are within the same zone of interests protected by the First Amendment.

recognized that Article III standing is not a requirement for prudential standing in First Amendment cases,[61] is unrebutted.[62] Rather, the prudential standing question is "whether [a plaintiff] can be expected satisfactorily to frame the issues in the case."[63]

In light of the unrebutted prudential standing arguments, under either standard discussed by plaintiff, the court concludes that plaintiff can satisfactorily frame the issues in this case.[64] Therefore, plaintiff has prudential standing to challenge, on First Amendment grounds, the entirety of Article IV, § 3 of the Constitution of the State of Delaware.

B. Whether a Judge is a Policymaking Position, that is an Exception to the Right of Political Affiliation in Employment Decisions. The United States Supreme Court has established that political belief and association are at the core of First Amendment protections.[63] Governmental employees can not be terminated or asked to relinquish their "right to political association at the price of holding a job."[65] "Patronage . . . to the extent that it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment."[66] This right of

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[61] *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984).

[62] *Compare* D.I. 35 at 10, *with* D.I. 37 at 3-4.

[63] *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. at 958.

[64] In fact, as a retired attorney on a state pension and for whom filing suit is not likely to affect his prospect of future earnings and employment (other than to limit his aspirations to the bench), plaintiff, is in a *far better* position than other Delaware attorneys to challenge these political affiliation requirements. *See* D.I. 30 at A-15-16.

[63] *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion).

[65] *Id.* at 356-57.

[66] *Id.* at 357; *see also Branti v. Finkel*, 445 U.S. 507, 512-18 (1980) (the majority of the court reaffirming the opinion established in *Elrod*).

political affiliation has been expanded to government employees regarding their promotion, transfer, and hiring.[67]

The "prohibition on encroachment of First Amendment protections is not absolute," and an exception is recognized, which limits patronage dismissals to "policymaking positions," and requires an analysis of the nature of the employee's responsibilities.[68] The United States Court of Appeals for the Third Circuit has found "a question relevant in all cases is whether the employee has meaningful input into decision making concerning the nature and scope of a major government program."[69][70] A "policymaking position" is a narrow exception applied when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[71]

The Court has recognized that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered."[72] In *Branti v. Finkel*, the United States Supreme Court held that the position of Assistant Public Defender was not entitled to the "policymaker" exception.[73] It found that the factors to be considered in determining whether a position is a policymaking position are whether the position is simply clerical, nondiscretionary or technical in nature, whether

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[67] *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64, 75-80 (1990).

[68] *Elrod*, 427 U.S. at 360, 367.

[69] *Peters v. Del. River Port Auth. of Pa. and N.J.*, 16 F.3d 1346, 1353 (3d Cir.

[70]) (internal citations omitted).

[71] *Branti*, 445 U.S. at 518.

[72] *Id.*

[73] "His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation." *Id.* at 519 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)).

the employee "participates in Council discussions, or other meetings, whether the employee prepares budgets, or has authority to hire or fire employees, the salary of the employee, and the employee's power to control others and to speak in the name of policymakers."[74] A difference in political affiliation is only a proper factor in making employee decisions if it is highly likely "to cause an official to be ineffective in carrying out the duties and responsibilities of the office."[75] Whether a position involves policymaking is a question of law.[76]

Defendant contends that the role of the judiciary falls within the policymaker exception under the precedent of *Elrod* and *Branti*.[77] Defendant's argument rests heavily upon the holdings by other circuit courts outside the Third Circuit,[78] and the United States Supreme Court's holding in *Gregory v. Ashcroft*.[79] Plaintiff contends that the role of the judiciary is not a policymaking position and directs his argument upon separation of powers, the role of the judiciary, and the Delaware Judges' Code of Judicial Conduct.[80]

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[74] *Brown v. Trench*, 787 F.2d 167, 169 (3d Cir. 1986).

[75] *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993).

[76] *St. Louis v. Proprotnik*, 485 U.S. 112, 126 (1988).

[77] *See* D.I. 29 at 20.

[78] *See Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993) (Judges are "policymakers," whose political affiliations may be considered during the appointment process); *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988) (Governor was entitled to consider judge's political affiliation in making a temporary appointment).

[79] *See* D.I. 29 at 20; *Gregory v. Ashcroft*, 501 U.S. 452, 466 (1991) (finding that legislative intent was not clear as to whether the language "appointee on the policymaking level," included the judiciary).

[80] D.I. 32 at 8-19.

The judiciary, although a very important role, is not a policymaking position. A judge does not provide "meaningful input into decision making concerning the nature and scope of a major government program."[81][82] To the contrary a judge's role is "to apply, not amend, the work of the People's representatives."[83] The court may not speak on policymakers behalf, sit in on Congressional discussions, or participate in policymaking meetings.[84] The role of the judiciary is not to "hypothesize independently" legislative decision and intent.[85] "Matters of practical judgment and empirical calculation are for Congress" and the judiciary has "no basis to question their detail beyond the evident consistency and substantiality."[86] Statutory interpretation, not statutory creation, is the responsibility of the judiciary and therefore, the position of judge is not a policymaking position.

Cases from other circuits, on which defendant relies, are distinguishable.[87] Both *Newman* and *Kurowski* addressed situations which political affiliation could be considered, but was not constitutionally mandated.[88] Neither case dealt with a constitutional provision requiring a political affiliation evaluation, nor a complete bar on

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[81] *Peters v. Del. River Port Auth. of Pa. and N.J.*, 16 F.3d 1346, 1353 (3d Cir. [82]) (internal citations omitted).

[83] *Hayes v. Harvey*, 874 F.3d 98, 111 (3d Cir. 2017) (citing *Henson v. Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017)).

[84] *Brown*, 787 F.2d at 169.

[85] *Matthew v. Lucas*, 427 U.S. 495, 515 (1976).

[86] *Id.* at 515-16.

[87] D.I. 29 at 20.

[88] *See Newman*, 986 F.2d at 159-60 (in the appointment of interim judges, Governor considered candidates based on recommendations from Republican Chairpersons); *Kurowski*, 848 F.2d at 769 (political affiliation could be considered by court when assigning judges *pro tempore*).

hiring individuals with minority political party beliefs. In addition, the Court in *Gregory* analyzed the issue of interpreting legislative intent of an exception as it applied to the Age Discrimination in Employment Act for positions "on the policymaking level."[89] The Court addressed whether Congress intended the judiciary be included in the exception, and whether a Missouri law mandating that members of the judiciary retire at the age seventy was permissible under the Age Discrimination in Employment Act.[90] The Court specifically did not decide the issue of whether the judiciary was a policymaker, and based its holding on the rationale that "people . . . have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. The people may therefore wish to replace some older judges."[91] Thus, the phrase "on the policymaking level" is not the equivalent of a "policymaking" position, on which employment decisions based on political affiliation may be made.

Delaware requirements are clear, that "[a] judge should be unswayed by partisan interest" and "family, social, or other relationships" should not influence their conduct or judgment."[92] In particular, Canon Four of the Delaware Judges' Code of Judicial Conduct specifically addresses that the judiciary must refrain from political activity.[93] A judge may not act as a "leader or hold any office in a political organization," make

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[89] *Gregory*, 501 U.S. at 455-57.
[90] *Id.* at 455-64.
[91] *Id.* at 472.
[92] Del. Judges' Code Judicial Conduct Rule 2.4 (A)-(B).
[93] *See* Del. Judges' Code Judicial Conduct Canon 4.

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speeches for political organizations or candidates, or "engage in any other political activity."[94] The Delaware Judicial Code clearly pronounces that political affiliation should not affect the position.[95]

Political affiliation is not important to the effective performance of a Delaware judge's duties.[96] A Delaware judge may not participate in political activities, hold any office in a political organization, or allow political affiliation to influence his judgment on the bench.[97] Since political affiliation in Delaware cannot "cause an official to be ineffective in carrying out the duties and responsibilities of the office," it does not meet the standard for a "policymaking position."[98]

V. CONCLUSION

Article IV, § 3 of the Constitution of the State of Delaware violates the First Amendment by placing political affiliation restrictions on governmental employment by the Delaware judiciary.[99] The narrow political affiliation exception does not apply, because the role of the judiciary is to interpret statutory intent and not to enact or

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[94] *Id.* at Rule 4.1 (A), (C) (with an exception for activities "on behalf of measures to improve the law, the legal system or the administration of justice").

[95] *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1292 (Del. 2007) ("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."); *Ewing v. Beck*, 1986 WL 5143, at *2 (Del. Ch. 1986) ("It is a settled principle that courts will not engage in 'judicial legislation' where the statute in question is clear and unambiguous.").

[96] *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

[97] Del. Judges' Code Judicial Conduct Rule 2.4 (B); 4.1 (A)(1), (C).

[98] *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993).

[99] These restrictions include the "major political party" and "bare majority" requirements discussed herein.

amend it.[100] Precedent relied upon by defendant is highly distinguishable and not applicable to the current situation.[101] Further, the Delaware Judges' Code of Judicial Conduct clearly indicates that political affiliation is not a valued trait of an effective judiciary.[102]

As a result of the findings herein, plaintiff's motion for summary judgment (D.I. 31) is granted, and defendant's motion for summary judgment (D.I. 28) is denied. An appropriate Order shall follow.

Dated: May 23, 2018

/s/ Mary Pat Thynge
Chief U.S. Magistrate Judge

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[100] *Hayes v. Harvey*, 874 F.3d 98, 111 (3d Cir. 2017) (citing *Henson v. Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017)).

[101] *See Newman v. Voinovich*, 986 F.2d 159, 159-60 (6th Cir. 1993); *Kurowski v. Krajewski*, 848 F.2d 767, 769 (7th Cir. 1988); *Gregory*, 501 U.S. at 455-64.

[102] *See* Del. Judges' Code Judicial Conduct Canon 4.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JAMES R. ADAMS, :
:
Plaintiff, :
:
v. : C. A. No. 17-181-MPT
:
THE HON. JOHN CARNEY : Governor of the State of Delaware, :
:
Defendant. :

JUDGMENT ORDER

Consistent with the reasoning contained in the Memorandum Opinion of December 6, 2017 and Clarified in the Reissued Opinion dated May 23, 2018, IT IS ORDERED and ADJUDGED that plaintiff's motion for summary judgment (D.I. 31) is GRANTED, and defendant's motion for summary judgment (D.I. 28) is DENIED.

Dated: May 23, 2018

/s/ Mary Pat Thynge
Chief U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JAMES R. ADAMS,	:	
Plaintiff,	:	
v.	:	C. A. No. 17-181-MPT
HONORABLE JOHN CARNEY, Governor of the State of Delaware	:	
Defendant.	:	

MEMORANDUM ORDER

I. INTRODUCTION

On February 21, 2017, Plaintiff, James R. Adams ("plaintiff"), filed this action, pursuant to 42 U.S.C. § 1983, seeking Declaratory Judgment and Injunctive Relief against the Governor of the State of Delaware, John Carney ("defendant").[1] Plaintiff seeks review of the constitutionality of provisions found in Article IV, § 3 of the Constitution of the State of Delaware known as the "Political Balance Requirement."[2] The Political Balance Requirement subjects all appointments to the office of the State Judiciary to a series of limitations relating to the political affiliation of judicial appointees.[3] These limitations consist broadly of requirements that: (1) not more than a "bare majority"[4] of the offices in the Supreme Court or Superior Court "shall be of the same political party;" (2) collectively, not more than a "bare majority" of "the Justices of

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[1] D.I. 1; *see also* D.I. 10.

[2] D.I. 10; *see also* D.I. 29 at 4; Del. Const. art. IV, § 3.

[3] Del. Const. art. IV, § 3; *see also* D.I. 40 at 2-4.

[4] Section 3 distinguishes between courts with an even number of seats, in which "not more than one-half of the members of all such offices shall be of the same political party[,]" and courts with an odd number of seats, in which "not more than a bare majority of the members of all such offices shall be of the same major political party[.]" Del. Const. Art. IV, § 3. Defendant refers to these two requirements collectively as the "Bare Majority Component." D.I. 29 at 4-5 & n.1.

the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be . . . of the same major political party[;]"[5] and (3) "the remaining members of such [judicial] offices shall be of the other major political party."[6] Similarly, the Family Court and the Court of Common Pleas are subject to limitations in which, in the case of an even number of judges on the court, "not more than one-half of the Judges shall be of the same political party[,]" and in the case of an odd number of judges, "not more than a majority of one Judge shall be of the same political party."[7]

Plaintiff filed an amended complaint on April 10, 2017.[8] In the amended complaint, Plaintiff asked the court to:

> [E]nter an Order (i) holding that the provision of Article IV, Section 3 of the Constitution of the State of Delaware mandating political balance on the courts is unconstitutional as it violates the freedom of association guaranteed by the First Amendment to the Constitution of the United States, (ii) permanently enjoining the use of political affiliation as a criterion for the appointment of judges to the Courts of Delaware, and (iii) awarding Mr. Adams his costs and reasonable attorneys' fees pursuant to 42 U.S.C. §1988.[9]

On September 29, 2017, the parties filed cross-motions for summary judgment.[10] In his motion, Plaintiff argued that Article IV, § 3 restricts Delaware state government employment based on political affiliation in violation of the First Amendment of the Constitution of the United States.[11] Meanwhile, in defendant's motion for summary judgment, defendant contended that plaintiff had failed to establish standing under

[5] Major political party is defined as "any political party which, as of December 31,of the year immediately preceding any general election year, has registered in the name of that party voters equal to at least five percent of the total number of voters registered in the State." 15 Del. C. § 101(15).
[6] Del. Const. art. IV, § 3.
[7] Id.
[8] D.I. 10.
[9] *Id.* at 11.
[10] D.I. 17; D.I. 31.
[11] D.I. 32 at 2.

Article III, § 2 of the Constitution of the United States.[12] Defendant argued in the alternative that that the position of judge is a "policymaking position," which defendant contends falls under the well-established exception to the restriction of governmental employment based on political affiliation.[13] On December 6, 2017, the court issued a memorandum opinion and order ("Memorandum Opinion" and "Order") granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment.[14]

On December 19, 2018, plaintiff moved for an award of attorney's fees and costs under 42 U.S.C. § 1988.[15] The following day, defendant moved for the court to reconsider or clarify its Memorandum Opinion and Order pursuant to Federal Rule of Civil Procedure 60 and D. Del. LR 7.1.5.[16] On January 5, 2018, defendant appealed to the United States Court of Appeals for the Third Circuit.[17] Defendant then moved for the court to defer ruling on the award of attorney's fees and costs pending the appeal.[18] Thereafter, on February 21, 2018, plaintiff moved for issuance of an order for defendant to show cause as to why defendant should not be held in contempt for violating the court's December 6, 2017 Order.[19] These motions are presently before the court.

II. STANDARD OF REVIEW

A. Motion for Reconsideration

Motions for reconsideration are the "functional equivalent" of a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e).[20] Meeting the standard

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[12] U.S. Const. art. III, § 2.
[13] D.I. 29 at 3.
[14] D.I. 40; D.I. 39.
[15] D.I. 41.
[16] D.I. 42.
[17] D.I. 50.
[18] D.I. 51.
[19] D.I. 57.
[20] *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1352 (3d Cir. 1990) (citing *Fed. Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348 (3d Cir. 1986)).

for relief under Rule 59(e) is difficult. The purpose of a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence."[21] A court should exercise its discretion to alter or amend its judgment only if the movant demonstrate one of the following: (1) a change in the controlling law; (2) a need to correct a clear error of law or fact or to prevent manifest injustice; or (3) availability of new evidence not available when the judgment was granted.[22]

A motion for reconsideration is not properly grounded on a request that a court rethink a decision already made.[23] Nor may motions for reargument or reconsideration be used "as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided."[24] Reargument, however, may be appropriate where a court "has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the [c]ourt by the parties, or has made an error not of reasoning but of apprehension."[25]

The "Court should not hesitate to grant the motion when compelled to prevent manifest injustice or correct clear error."[26] This court has granted motions to clarify ambiguities in its opinions and orders.[27]

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[21] *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 699, 677 (3d Cir. 1999).

[22] *Id.*

[23] *Glendon Energy Co v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993).

[24] *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990).

[25] *Id.* at 1241 (citations omitted); *see also* D. Del. LR 7.1.5.

[26] *Brambles USA*, 735 F.Supp. at 1241 (citations omitted).

[27] *Helios Software, LLC v. SpectorSoft Corp.*, No. CV 12-81-LPS, 2015 WL 3622399, at *1 (D. Del. June 5, 2015); *Organizational Strategies, Inc. v. Feldman Law Firm LLP*, No. CV 13-764-RGA, 2014 WL 2446441, at *1-2 (D. Del. May 29, 2014); *Neomagic Corp. v. Trident Microsystems*, No. 1:98CV-00699-KAJ, 2003 WL 25258274, at *3 (D. Del. July 30, 2003)

B. Motion for Fees and Costs

The right to reasonable attorney's fees is provided under 42 U.S.C. § 1988: "[i]n any action or proceeding to enforce a provision of [42 U.S.C.] section[] . . . 1983, ... the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs[.]"[28] In order to qualify, a plaintiff must be designated as "prevailing party,"[29] a term which has been defined as any party who "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[30] A key factor is that the plaintiff "must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."[31] This is usually accomplished through a judgment on the merits.[32] Under Rule 54(d)(2), "if an appeal on the merits of a case is pending, a court 'may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing . . . a new period for filing after the appeal has been resolved.'"[33]

C. Motion for an Order to Show Cause

"The Court has wide discretion in determining sanctions in a civil contempt matter."[34] "Sanctions for civil contempt serve two purposes: to coerce the defendant

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[28] 42 U.S.C. § 1988.

[29] *Farrar v. Hobby,* 506 U.S. 103, 109 (1992).

[30] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (internal quotation marks omitted) (citing *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978) (overruled on other grounds).

[31] *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (citing *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987)).

[32] *Farrar*, 506 U.S. at 111 (citations omitted) ("The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement.").

[33] *Walker Digital, LLC v. Expedia, Inc.*, No. CV 11-313-SLR, 2013 WL 5662145, at *2 (D. Del. Oct. 16, 2013) (quoting Fed. R. Civ. P. 54, Advisory Committee Note, 1993 Amendment, Subdivision (d), Paragraph (2), Subparagraph (B)).

[34] *Virium BV v. Lithium Tech. Corp.*, No. CV 13-500-LPS, 2016 WL 4182742, at *2 (D. Del. Aug. 5, 2016) (citing *Elkin v. Fauver*, 969 F.2d 48, 52 (3d Cir. 1992)).

into compliance with the court's order and to compensate for losses sustained by the disobedience."[35]

III. DISCUSSION

A. Motion for Reconsideration or Clarification

Defendant argues that there are three reasons why the court's Memorandum Opinion and Order requires either reconsideration or clarification.[36] First, defendant questions whether the court's Order "reaches the provisions of Article IV, Section 3 concerning the Family Court and the Court of Common Pleas."[37] Second, defendant asks whether the court's Order "invalidates only the provisions of Article IV, Section 3 that arguably require that judicial nominees be members of one political party or also invalidates the provisions that limit any political party to a 'bare majority' of the members of the Court."[38] Third, defendant seeks clarification as to whether the court's determination, that plaintiff lacked Article III standing to challenge the "bare majority" provision as it applies to the Court of Common Pleas and Family Court,[39] "also applies to 'bare majority' provisions that pertain to all of the courts."[40]

In response, plaintiff disputes the court's finding as to Article III standing with respect to the Court of Common Pleas and the Family Court.[41] And plaintiff contends that, regardless of whether he "had standing to challenge the political restrictions as to . . . [the Family Court and Court of Common Pleas], the reasoning of this [c]ourt is

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[35] *Robin Woods Inc. v. Woods*, 28 F.3d 396, 400 (3d Cir. 1994) (internal quotation marks omitted) (citing *McDonald's Corp. v. Victory Investments,* 727 F.2d 82, 87 (3d Cir.1984)); *see also McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949); *In re Linerboard Antitrust Litig.,* 361 F. App'x 392, 398-99 (3d Cir.2010).
[36] D.I. 42 at 2-4.
[37] *Id.* at 2.
[38] *Id.* at 3.
[39] D.I. 40 at 7.
[40] D.I. 42 at 4.
[41] D.I. 43 at 1 n.1.

applicable to all Delaware State courts."[42]

During the briefing on defendant's motion for summary judgment for lack of standing, defendant characterized the Political Balance Requirement as consisting of two types of provisions limiting appointments to judicial office: (1) "Bare Majority" provisions and (2) Major Party provisions.[43] In moving for reconsideration or clarification, defendant points to the court's discussion of plaintiff's lack of Article III standing with respect to the Court of Common Pleas and the Family Court, which are judicial offices limited exclusively by Bare Majority provisions.[44] Defendant essentially argues that the court's ruling cannot extend beyond the Major Party provisions of Article IV, § 3, because these are the only provisions that give rise to plaintiff's Article III standing.[45] Therefore, defendant avers, in reconsidering or clarifying the court's December 6, 2017 Memorandum Opinion and Order, the court should revise its Memorandum Opinion and Order to effectively "redline" Article IV, § 3 to eliminate the Major Party provisions as to the Supreme Court, the Superior Court, and the Court of Chancery, while preserving the Bare Majority provisions as to all judicial offices.[46]

Defendant's position on reconsideration or clarification is that the court can (and must have intended to) only issue judgment on the constitutionality of the specific, Major Party, provisions of Article IV, § 3 of the Constitution of the State of Delaware that give rise to plaintiff's Article III standing.[47] This is an argument about prudential standing. Without using the term "prudential standing" anywhere in its briefs on reconsideration or

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[42] *Id.* at 2.

[43] D.I. 29 at 5 nn.1-2. In note 2, defendant actually uses the term "Majority Political Party Component"—the court finds the use of the term "majority" in both nomenclatures to be confusing and, therefore, refers to this aspect of Article IV, § 3 as the "Major Party provisions."

[44] D.I. 42 at 2.

[45] *Id.* at 2-4.

[46] D.I. 49 at 3.

[47] D.I. 42 at 4 ("In reading pages 7-8 of the Memorandum Opinion, it appears that this Court intended to invalidate only the 'major party' feature of Article IV.").

clarification, defendant contends that plaintiff does not have prudential standing to challenge the Bare Majority provisions, because the court only found that plaintiff has Article III standing to challenge the Major Party provisions.[48]

1. Reconsideration

Defendant directs the court's attention to pages 7-8 of D.I. 40, the court's December 6, 2017 Memorandum Opinion[49] as the basis for defendant's motion for reconsideration or clarification.[50] In this portion of the its Memorandum Opinion, the court addressed the question of plaintiff's Article III standing.[51] With respect to the Family Courts and the Courts of Common Pleas, which are limited by Bare Majority provisions, the court stated:

> Plaintiff does not have standing under provisions four and five [of Article IV, § 3 of the Constitution of the State of Delaware]. He has not applied for a judicial position in any of Family Courts or the Courts of Common Pleas. In addition, plaintiff's applications for these positions would not have been futile, because there is no party requirement constitutionally attached to either court. The only constitutional restriction on these courts is that "not more than a majority of one Judge shall be of the same political party."[52]

However, this determination was not fatal to plaintiff's standing, as the court found that plaintiff had established Article III standing with respect to provisions one through three of Article IV, § 3 of the Constitution of the State of Delaware.[53]

Prudential standing was a minor factor in defendant's summary judgment briefing, with defendant spending a little more than one page of its opening brief on the

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[48] *Id.*
[49] D.I. 40 at 7-8.
[50] D.I. 42 at 4.
[51] D.I. 40 at 7-8.
[52] D.I. 40 at 7 (footnotes omitted).
[53] *Id.* at 7-8.

subject.[54] In moving for reconsideration, defendant does not argue that: (1) the court misunderstood defendant's prudential standing arguments; (2) the court made a decision about prudential standing outside the adversarial issues presented to the court by the parties; or (3) the court has made an error not of reasoning but of apprehension.[55]

From the record, it is apparent that defendant is presently making an argument that it did not make in its briefing on summary judgment.[56] At that time, defendant argued that plaintiff had failed to satisfy the limitations on prudential standing, because plaintiff was asking the court to adjudicate an abstract question of wide public significance which amounts to a generalized grievance.[57] Defendant, however, did not argue, for example, that—were the court to find that plaintiff has Article III standing as to some provisions of Article IV, § 3—plaintiff's prudential standing would be explicitly limited to *only those specific provisions* for which he has Article III standing.[58]

Moreover, in his briefing, defendant failed to rebut plaintiff's argument to the contrary.[59] Plaintiff opposed defendant's motion for summary judgment and averred that plaintiff has prudential standing to challenge the entirety of Article IV, § 3,

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[54] D.I. 29 at 16-18.

[55] D.I. 42 at 2-4; *see also Tinney v. Geneseo Commc'ns, Inc.*, 502 F. Supp. 2d 409, 415 (D. Del. 2007).

[56] D.I. 29 at 16-18; D.I. 37 at 3-4.

[57] *See* D.I. 29 at 17 ("Here, Plaintiff is asking this Court to decide abstract questions of wide public significance."); D.I. 37 at 3 ("Plaintiff is asking this Court to decide abstract questions of wide public significance that establish the bedrock of Delaware's judicial branch.").

[58] *Id.* at 16-18.

[59] *Compare* D.I. 35 at 9-11 (plaintiff's prudential standing argument in plaintiff's brief opposing defendant's motion for summary judgment), *with* D.I. 37 at 3-4 (defendant's prudential standing argument in defendant's reply brief in support of defendant's motion for summary judgment).

regardless of the scope of his Article III standing.[60] For example, plaintiff cited *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988),[61] which states:

> Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights. However, in the First Amendment context, "[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[62]

Plaintiff contended that this case stands for the proposition that "[w]here a party raises a facial challenge to a law pursuant to the First Amendment, general prudential standing requirements are relaxed."[63] Yet defendant did not acknowledge this argument, discuss it, or address any of the prudential standing case law cited by plaintiff.[64] Moreover, aside from the briefing discussed herein,[65] defendant did not make any other prudential standing arguments elsewhere in the briefing on the cross motions for summary judgment.[66]

In the briefing on summary judgment, defendant failed to rebut plaintiff's arguments on prudential standing. Defendant presently seeks reconsideration and an opportunity to make arguments that he did not make in the briefing. This is beyond the scope of the remedy requested or allowed.[67] Therefore, defendant's motion for reconsideration (D.I. 42) is DENIED.

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[60] D.I. 35 at 9-10.

[61] *Id.* at 10.

[62] *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392–93 (1988) (alteration in original) (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984).

[63] D.I. 35 at 10.

[64] D.I. 37 at 3-4.

[65] D.I. 29 at 16-18; D.I. 37 at 3-4.

[66] *See* D.I. 34 (defendant's brief opposing plaintiff's motion for summary judgment).

[67] *Max's Seafood Café*, 176 F.3d at 677.

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2. **Clarification**

Upon review of the briefs and the record, it is apparent that the court did not fully explain the question of prudential standing in its December 6, 2017 Memorandum Opinion.[68] The court agrees that clarification will simplify the record for appeal and GRANTS defendant's motion for clarification (D.I. 42). Therefore, the court will issue a separate, clarified version of its December 6, 2017 Memorandum Opinion.

B. Fees

Plaintiff's motion for fees and costs lacks the statement, required by Local Rule 7.1.1, that plaintiff had made a reasonable effort to reach agreement with defendant on fees and costs.[69] Moreover, an appeal on the merits is pending. Therefore, the court DENIES plaintiff's motion for fees and costs (D.I. 41) without prejudice to renew.[70] As a result, defendant's motion to defer ruling on fees and costs pending appeal (D.I. 51) is granted.

C. Show Cause

Plaintiff's motion to show cause also lacks the Local Rule 7.1.1 statement.[71] Defendant contends that it has sought to work, in good faith, within the bounds of what it contends is the court's holding.[72] Given the court's grant of defendant's motion to clarify, a hearing on contempt is inappropriate at this time. Thus, the court DENIES plaintiff's motion for an order to show cause (D.I. 57) without prejudice to renew.

IV. CONCLUSION

For the reasons discussed herein, plaintiff's motion for reconsideration (D.I. 42) is denied; plaintiff's motion for clarification (D.I. 42) is granted; plaintiff's motion for fees

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[68] D.I. 40 at 6-7 (citing the test for prudential standing but not discussing the subject further).
[69] D.I. 41; *see also* D. Del. LR 7.1.1.
[70] *See supra* note 33.
[71] D.I. 57.
[72] D.I. 58 at 4-5 & n.4.

and costs (D.I. 41) is denied without prejudice; defendant’s motion to defer ruling on fees and costs pending appeal is granted (D.I. 51) and plaintiff’s motion for an order to show cause (D.I. 57) is denied without prejudice. As a result of the motion for clarification, the court will issue a clarified version of its December 6, 2017 Memorandum Opinion.

Dated: May 23, 2018

/s/ Mary Pat Thynge
Chief U.S. Magistrate Judge