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

ANSWERING BRIEF ON APPEAL OF
PLAINTIFF BELOW-APPELLEE JAMES R. ADAMS

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TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF RELATED CASES AND PROCEEDINGS 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. STANDARD OF REVIEW 8

II. ADAMS HAS STANDING TO PURSUE THIS ACTION 8

A. ADAMS SATISFIES THE REQUIREMENTS FOR ARTICLE III STANDING 8

1. Adams Has Suffered Injury-in-Fact 9

2. The Injury Is Particularized 10

3. The Political Balance Requirement is the Direct Cause of the Injury 12

4. A Decision from this Court Will Redress the Injury 12

5. Adams Has Article III Standing to Challenge the Political Restrictions on Judgeships in All Courts 13

B. ADAMS MEETS THE REQUIREMENTS FOR PRUDENTIAL STANDING 14

1. As Adams Is Claiming a Violation of His Rights Granted by the First Amendment, It Does Not Constitute a Generalized Grievance 15

2. Adams Is Asserting His Own Interests 17

III. THE POLITICAL BALANCE REQUIREMENT VIOLATES THE FIRST AMENDMENT 18

A. THE GENERAL RULE PROHIBITING CONSIDERATION OF POLITICAL AFFILIATION IN MAKING GOVERNMENT EMPLOYMENT DECISIONS 18

B. THE NARROW EXCEPTION TO THE GENERAL RULE 19

C. POLITICAL AFFILIATION IS NOT AN APPROPRIATE REQUIREMENT FOR THE EFFECTIVE PERFORMANCE OF A JUDGE 22

D. THE ROLE OF JUDGE IS NOT A "POLICYMAKING" POSITION 24

1. Judges Do Not Make Policy 25

a. Judges do not promote the policies of the appointing authority 25

b. Determining the law is not making policy 27

c. Judges do not have "discretionary" authority in the sense that word has been interpreted in policymaker cases . . 31

d. The Delaware Judiciary is not a government program 32

E. GOV. CARNEY'S AUTHORITIES ARE INAPT 34

F. GOV. CARNEY HAS NOT IDENTIFIED ANY COMPELLING GOVERNMENT INTEREST JUSTIFYING LIMITING THE ELIGIBILITY OF ANYONE SEEKING A JUDGESHIP WITHOUT REGARD TO POLITICAL AFFILIATION 39

CONCLUSION 46

TABLE OF AUTHORITIES

Cases

Adams v. Carney, 2018 WL 3105113 (D. Del. June 25, 2018) 5

Armour v. County of Beaver, PA, 271 F.3d 417 (3rd Cir. 2001) 25, 35

Assaf v. Fields, 178 F.3d 170 (3rd Cir. 1999) 22 25, 34

Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) 44

Balogh v. Charron, 855 F.2d 356 (6th Cir. 1988) 38

Bell v. Cheswick Generating Station, 734 F.3d 188 (3rd Cir. 2018) 31

Bowman v. Wilson, 672 F.2d 1145 (3rd Cir. 1982) 9

Boyle v. County o Alleghany, PA, 139 F.3d 386, 395 (3rd Cir. 1998) 22, 24

Branti v. Finkel, 445 U.S. 507 (1980) . . . . *passim*

Brazil-Breashears v. Bilandic, 1993 WL 496682 (N.D. Ill. Nov. 29, 1993) 24

Bright v. McClure, 865 F.2d 623 (4th Cir. 1989) 39

Brown v. Trench, 787 F.2d 167 (3rd Cir. 1986) 34, 35

Carroll v. City of Phoenix, 2007 WL 1140400 (D. Az. Apr. 17, 2007) 37

Ciociola v. Delaware Coca-Cola Bottling Co., 172 A.2d 252 (Del. 1962) 31

Collison v. State ex rel. Green, 2 A.2d 97 (Del. 1938) 31

Common Cause Indiana v. Individual Members of the Indiana Election Commission,
800 F.3d 913 (7th Cir. 2015) 40

Constitution Party of Pennsylvania v. Aichelle, 757 F.3d 347 (3rd Cir. 2014) . . 10

Davis v. Martin, 807 F.Supp. 385 (W.D.N.C. 1992) 37

Eisenstadt v. Baird, 405 U.S. 438 (1972) 18

Elrod v. Burns, 427 U.S. 347 (1976) . . . . *passim*

Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018) 30

Fazio v. City and County of San Francisco, 125 F.3d 1328 (9th Cir. 1997) 32

FEC v. Akins, 524 U.S. 11 (1998) 10

Federal United Corp. v. Havender, 11 A.2d 331 (Del. 1940) 31

Galli v. New Jersey Meadowlands Comm'n, 490 F.3d 265 (3rd Cir. 2007)

. . . . 19, 24, 25

Galloza v. Foy, 389 F.3d 26 (1st Cir. 2004) 25

Gannon v. Daley, 561 F.Supp. 1377 (N.D. Ill.1983) 32

Garretto v. Cooperman, 510 F.Supp. 816 (S.D.N.Y. 1981) 35

Goudy-Bachman v. U.S. Dept. of Health and Human Services, 811 F.Supp.2d 1086 (M.D. Pa. 2011) 43, 44

Hagan v. Quinn, 867 F.3d 816 (7th Cir. 2017) 31

Hassan v. City of New York, 804 F.3d 277 (3rd Cir. 2015) 9, 15

Howard v. N.J. Dept. of Civil Service, 667 F.2d 1099 (3rd Cir. 1981) 9, 10

In re Horizon Health Cares Services, Inc. Data Breach Litigation, 846 F.3d 625 (3rd Cir. 2017) 8, 9

In re Request for Opinion of Justices, 155 A.3d 371 (Del. 2017) 5

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)

. . . . 9, 11, 16

Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221 (1986) 31

Jesner v. Arab Bank, PLC, 138 S.Ct. 1386 (2018) 30

Knick v. Township of Scott, 862 F.3d 310 (3rd Cir. 2017) 18

Kurowsky v. Krajewski, 848 F.2d 767 (7th Cir. 1988) 37

Lesniak v. Budzash, 626 A.2d 1073 (N.J. 1993) 14

Levine v. McCabe, 2007 WL 4441226 (E.D.N.Y. Dec. 17, 2007), *aff'd*, 327 Fed. Appx. 315 (2nd Cir. 2009) 38

List v. Akron Mun. Court, 2006 WL 475124 (N.D. Ohio Feb. 27, 2006) 38

Loughney v. Hickey, 635 F.2d 1063 (3rd Cir. 1980) (TABLE) 21

MacGuire v. Houston, 717 P.2d 948 (Colo. 1986) (en banc) 44

Massachusetts v. EPA, 549 U.S. 497 (2007) 11

McCloud v. Testa, 97 F.3d 1536 (6th Cir. 1996) 38

National Association for the Advancement of Multijurisdiction Practice, (NAAMJP) v. Simandle, 658 Fed.Appx. 127 (3rd Cir. 2016) 11, 12, 16

Ness v. Marshall, 935 F.2d 517 (3rd Cir. 1981) 22

Newman v. Voinovich, 986 F.2d 159 (6th Cir. 1993) 24, 27, 37

Nichols v. City of Rehoboth Beach, 836 F.3d 275 (3rd Cir. 2016) 9

Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) . . . 23

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996) 19, 21

Pansy v. Borough of, Stroudsburg 23 F.3d 772 (3rd Cir. 1994) 11

Perez v. Cucci, 725 F.Supp. 209 (D. N.J. 1989), *aff'd*, 898 F.2d 139 (3rd Cir. 1990) 26

Pigford v. Veneman, 355 F.Supp.2d 148 (D. D.C. 2005) 30

Pleva v. Norquist, 35 F.Supp.2nd 839 (E.D. Wis.), *aff'd,* 195 F.3d 905 (7th Cir. 1989) 32

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 34

Rose v. Stephens, 291 F.3d 917 (6th Cir.2002) 21

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 19, 23, 26, 36

Saenz v. Roe, 526 U.S. 489 (1999) 9

Schuchardt v. President of the United States, 839 F.3d 336 (3rd Cir. 2016) . . 9, 11

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 11, 16

State ex rel. Weinberger v. Miller, 99 N.E. 1078 (Ohio 1912) 26

Stehney v. Perry, 101 F.3d 925 (3rd Cir. 1996) 15

Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989) 21

Tomczak v. City of Chicago, 765 F.2d 633 (I7th Cir. 1985) 21

U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) 10, 11

UPS Forwarding, Inc. v. U.S. Postal Serv., 66 F.3d 621 (3rd Cir. 1995) 15

Valley Ford Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 11

Vanderklok v. United States, 868 F.3d 189 (3rd Cir. 2017) 45

Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988) 17

Warth v. Seldin, 422 U.S. 490 (1975) 10

Wellness Intern. Network, Ltd. v. Sharif, 135 S.Ct. 193 (2015) 23

Zold v. Town of Mantua, 935 F.2d 633 (3rd Cir. 1991) 22

Other authorities

U.S. Const., Article VI, Clause 2 13

Del. Constitution of 1897, Art.. III, §2 27

Del. Constitution of 1897, Art. IV, §3 . . . . 3, 4, 13, 27

11 Del. C. ch. 42 32

15 Del. C. §101(10) 13

15 Del. C. §101(15) 13

15 Del. C. §101(15)(a) 14

15 Del. C. §101(15)(b) 14

15 Del. C. §101(27) 14

Black's Law Dictionary 1041 (5th ed. 1989) 27

Delaware Judicial Branch Operating Procedures §IV(2) 42

Delaware Judges' Code of Judicial Conduct, Rule 2.4(A) 33

Delaware Judges' Code of Judicial Conduct, Rule 3.4(A) 33

Delaware Sentencing Accountability Commission Benchbook 2018 32

Delaware Supreme Court Internal Operating Procedures, §IX(2) 42

Joel Edan Friedlander, "Is Delaware's 'Other Major Political Party' Really Entitled to Half of Delaware's Judiciary" 58 *Ariz. L. Rev*. 1139 (2016) 43

Lawrence A. Hamermesh, "The Policy Foundations of Delaware Corporate Law," 106 *Columbia Law Rev.* 1749 (Nov. 2006) 46

Todd A. Purdum, "Presidents, Picking Justices, Can Have Backfires," *New York Times (*July 5, 2005) 25

JURISDICTIONAL STATEMENT

Plaintiff-below/Appellee James R. Adams agrees with the Jurisdictional Statement of Defendant-below/Appellant Gov. Carney.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly held that Adams had Article III and prudential standing to challenge a provision of the Constitution of the State of Delaware which directly and adversely affects his ability to seek a judgeship.

2. Whether the District Court properly held that political affiliation is not an appropriate requirement for employment as a judge, and so Article IV, §3 of the Constitution of the State of Delaware, which restricts judgeships to members of one of the two "major" political parties and the number of judges that can be represented by each of those parties, violates the doctrine set forth in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980).

STATEMENT OF RELATED CASES AND PROCEEDINGS

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

STATEMENT OF THE CASE

Adams is a graduate of Ursinus College and Delaware Law School. (JA 103). He is a member of the Bar of the State of Delaware. He resides in New Castle County, Delaware. (JA 104). After three years in private practice, he went to work for

the Delaware Department of Justice. There, he served as Assistant State Solicitor under Attorney General Beau Biden. He has also served as Deputy Division Director of the Family Division, which handles cases involving domestic violence, child abuse and neglect, child support orders, and juvenile delinquency and truancy. He retired from the Department of Justice on December 31, 2015. Until recently, he was registered as a Democrat, but is currently registered as an Independent. (JA100-102, 265). He changed registration after becoming frustrated with the Democratic Party in Delaware. (JA72-75, 103).

The Hon. John Carney is the Governor of the State of Delaware. Pursuant to Article IV, Section 3 of the Constitution of the State of Delaware, the Governor is responsible for appointing judges to Delaware state courts. Since 1977, Delaware governors have established by executive order a Judicial Nominating Commission to identify highly qualified candidates for judicial appointments. Ten of the eleven members of the Commission are appointed by the Governor. The president of the Delaware State Bar Association, with the Governor's consent, nominates the eleventh member, who is then appointed by the Governor. The Judicial Nominating Commission provides a list of recommended candidates to the Governor. (JA24-25).

After leaving the Department of Justice, Adams took a brief sabbatical, and now is ready to get back to work. (JA58-60). He has desired and still desires a judgeship. (JA60-61).

Several vacancies were announced. On February 14, 2017, the Judicial Nominating Committee sent out a Notice of Vacancy due to the retirement of the Honorable Robert Young from the Superior Court of the State of Delaware. On March 20, 2017, the Judicial Nominating Committee sent out a Notice of Vacancy due to the retirement of the Honorable Randy Holland of the Delaware Supreme Court. Both openings required Republican candidates. (JA 25-26).

Article IV, Section 3 of the Constitution of the State of Delaware contains a provision, unique to Delaware, which provides, in pertinent part, that:

> 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.

(The "Political Balance Requirement").

As noted above, Adams was (and remains) interested in a judicial position, but was inhibited from applying for the most recent openings because of the announced limitation that the candidate had to be a Republican. Since Adams is not and has not been a Republican, any application he would make would be immediately rejected, and so applying was futile. (JA104).

Adams filed this action against the Hon. John Carney, Governor of the State of Delaware, on February 21, 2017, challenging the constitutionality of those portions of Art. IV, §3 of the Constitution of the State of Delaware which require political balance on Delaware courts and which limit judgeships on certain courts to members of one of the two major political parties. (JA172).

On March 6, 2017, Gov. Carney sent a letter to the Supreme Court of the State of Delaware, requesting an advisory opinion as to the constitutionality of those same provisions of Article IV, §3. By letter dated March 13, 2017, the Delaware Supreme

Court declined his request as this action was already proceeding in the District Court. *In re Request for Opinion of Justices*, 155 A.3d 371 (Del. 2017).

On March 21, 2017, Gov. Carney filed a motion to dismiss the Complaint on the grounds of standing and ripeness, along with an accompanying brief. (JA173). On April 10, 2017, Adams filed a First Amended Complaint (JA 174), thereby rendering the motion to dismiss moot.

On September 29, 2017, Adams and Gov. Carney filed cross-motions for summary judgment. (JA175). On December 6, 2017, the District Court issued a Memorandum Opinion granting Adams' motion for summary judgment and denying Gov. Carney's motion for summary judgment. (JA7-20).

Gov. Carney filed a Notice of Appeal on January 6, 2018 (JA177), and an Amended Notice of Appeal on June 20, 2018. (JA179).

On May 23, 2018, upon motion by Gov. Carney (JA40-51), the District Court issued a Memorandum Opinion clarifying its prior Memorandum Opinion. (JA21-38).

On June 25, 2018, the District Court issued a Memorandum Order (i) denying Gov. Carney's second motion for reconsideration on the ground that it asserted arguments it failed to include in the briefing on the motion for summary judgment, and (ii) granting Gov. Carney's motion to stay the decision of the District Court pending resolution of this appeal. *Adams v. Carney*, 2018 WL 3105113 (D. Del. June 25, 2018).

Gov. Carney filed his opening brief on appeal on July 18, 2018. This is Adams' answering brief.

SUMMARY OF ARGUMENT

1. Adams has Article III standing. He suffers a distinct, direct and palpable injury, as the requirement that judges be chosen from a "major political party" excludes him, as an unaffiliated voted, from eligibility, and the Political Balance Requirement would limit any eligibility to only some openings. The constitutional injury is particularized to him, even if other lawyers suffer the same type of injury. The Political Balance Requirement is the direct cause of his injury, and a decision from this Court will redress the injury.

2. Adams has prudential standing. He brought his suit to correct a wrong applicable to him as an applicant for a judgeship, notwithstanding that the ruling will also affect others similarly situated. This is neither abstract nor a mere generalized grievance. The injury is specific (loss of job opportunity) and targeted. 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.

3. The First Amendment prohibits restrictions on governmental employment based on political affiliation. Article IV, Section 3 of the Delaware Constitution of 1897 mandates that there must be "political balance" in the judiciary, requiring one

major political party have only a bare majority over the other major political party, and excludes anyone who is not a member of a major political party. As this violates the requirements of the First Amendment, it is unconstitutional and must be struck down.

4. Judges do not fit into the narrow exception to the restriction on using political affiliation as a basis for hiring decisions. Political affiliation is not an appropriate requirement for the position. Political party is not essential to the effective performance of the role of a judge, even though the appointing party may find it desirable. A difference in party affiliation is highly unlikely to cause a judge to be ineffective in carrying out the duties and responsibilities of the office. Further, the performance of a judge's duties are not likely to cause serious political embarrassment.

5. Judges are not policymakers. Judges have no input as to major governmental programs. Indeed, judicial involvement in executive and/or legislative policy decisions would (i) erode public confidence in an the idea of an independent judiciary, and (ii) possibly constitute a violation of Separation of Powers. Judges do not have significant contact with the public outside of the courtroom, and judges do not represent the State or speak on behalf of the State. Political loyalty is not only not essential to the job, it is anathema to the concept of an independent judiciary.

ARGUMENT

I. STANDARD OF REVIEW.

Adams agrees with Gov. Carney's statement of the standard of review.

II. ADAMS HAS STANDING TO PURSUE THIS ACTION.

Adams has stated under oath that after retiring from the Department of Justice he "really wanted" to become a judge; that he had applied in the past to be a Family Court Commissioner; that he has not sought other opportunities since he retired from the Delaware Department of Justice so he could focus on a judgeship; that he would apply for any judicial position for which he feels qualified, and that he feels qualified for any position. (JA60-61, JA76).

In his sworn interrogatory responses, Adams stated that he wanted to apply for judgeships in 2014 and 2017, but was inhibited from doing so because of the Political Balance Requirements (JA104), and that he would seriously consider applying for any upcoming judicial vacancy for which he feels qualified. (JA105). Notwithstanding the foregoing, Gov. Carney argues that Adams lacks standing under Article III of the Constitution of the United States.

A. ADAMS SATISFIES THE REQUIREMENTS FOR ARTICLE III STANDING.

Article III standing requires (i), an "injury in fact,"; (ii) a causal connection between the injury and the conduct complained of; and (iii) a likelihood that the injury will be redressed by a favorable decision. *In re Horizon Health Cares Services,*

Inc. Data Breach Litigation, 846 F.3d 625, 633 (3rd Cir. 2017). *Accord Schuchardt v. President of the United States*, 839 F.3d 336, 344 (3rd Cir. 2016); *Nichols v. City of Rehoboth Beach*, 836 F.3d 275, 279-80 (3rd Cir. 2016).

1. Adams Has Suffered Injury-in-Fact.

"The contours of the injury-in-fact requirement, while not precisely defined, are very generous. Once a plaintiff has alleged some specific, 'identifiable trifle' of injury, that is fairly traceable to the defendant's conduct, the requirement of a constitutionally adequate stake in the controversy is satisfied." *Bowman v. Wilson,* 672 F.2d 1145, 1150-51 (3rd Cir. 1982) (citations omitted). *Accord Hassan v. City of New York*, 804 F.3d 277, 289 (3rd Cir. 2015) ("The burden is low, requiring nothing more than 'an identifiable trifle' of harm," citations omitted).

"Threatened injury can constitute injury-in-fact where the threat is so great that it discourages the threatened party from even attempting to exercise his or her rights." *Howard v. N.J. Dept. of Civil Service*, 667 F.2d 1099, 1103 (3rd Cir. 1981) (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977)).

Adams seeks a judicial appointment, but the Political Balance Requirement denies him such opportunities, both as to recent judicial openings and as to opportunities that may arise in the future. "A discriminatory classification is itself a penalty," *Saenz v. Roe*, 526 U.S. 489, 505 (1999), and thus qualifies as an actual

injury for standing purposes. *Howard,* 667 F.2d at 1101 ("Loss of a job opportunity is unquestionably a distinct and palpable injury").

Where, as here, there is a First Amendment challenge, to establish injury it is enough for Adams to show that his plan to apply for a judicial position is directly impeded by the law being challenged. *See Constitution Party of Pennsylvania v. Aichelle*, 757 F.3d 347, 364-65 (3rd Cir. 2014). As long as the Political Balance Requirement is in effect, Adams will be denied judicial opportunities, either entirely as a result of his current registration as an Independent, or partly, if viewed through the lens of his prior registration as a Democrat (as to openings requiring a Republican). This loss of opportunity as the result of an unconstitutional law is concrete and particularized, not abstract, and is immediate as well as continuing. It affects Adams directly, as it creates barriers to his being considered for any appointment. As such, it qualifies as injury-in-fact for the purpose of standing.

2. <u>The Injury Is Particularized.</u>

Gov. Carney argues that since the injury applies to all Delaware lawyers (at least those lawyers who hope for a judgeship), it is not particular to Adams. The Supreme Court has said standing exists when there is injury-in-fact, even if the harm is widely shared. *FEC v. Akins*, 524 U.S. 11, 25 (1998); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants"); *U.S.*

v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973); *Massachusetts v. EPA*, 549 U.S. 497, 526 n.24 (2007) ("standing is not to be denied simply because many people suffer the same injury...To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody"); *Valley Ford Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 496-97 (1982). *See also Schuchardt*, 839 F.3d at 345 & n.7; *Pansy v. Borough of Stroudsburg* 23 F.3d 772, 777 (3rd Cir. 1994) ("so long as the injury in fact is a distinct and palpable injury to the plaintiff, standing should not be denied even if it is an injury shared by a large class of other possible litigants").

Finally, Adams was not required to apply for a judgeship in order to gain standing where it is evident that such action would be futile because the application would be denied. *Int'l Brotherhood of Teamsters*, 431 U.S. at 324 (non-applicant may pursue claims for discrimination on a showing that the non-applicant was deterred from applying by the employer's discriminatory practices); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 944 n. 2 (1982) (plaintiffs had standing to challenge Nebraska water laws even though they had not applied for a permit because the permit clearly would have been denied and the application would have been futile); *National Association for the Advancement of Multijurisdiction Practice (NAAMJP) v. Simandle,* 658 Fed.Appx. 127, 133 (3rd Cir. 2016) ("both Vereb and Doscher have alleged that

they would seek admission to the District Court bar if the local rules were changed. They need not actually have sought admission, as their applications would certainly have been denied").

Adams testified that he "really wants" a judgeship, he has not sought other legal employment since he retired from the Department of Justice and that he would look seriously at any judicial opening for which he felt qualified. (JA59-61). There is no case supporting the position that Adams would have to express an intent to apply for each and every opening, much less commit to doing so, irrespective of circumstances, to have standing. Nor is there any precedent indicating that Adams had to apply for a judgeship before he retired from the Department of Justice in 2015. The injury existed and continues to exist as long as Adams is barred in any respect for a judgeship.

3. The Political Balance Requirement is the Direct Cause of the Injury.

The second element, causation. is easily satisfied. The limitation on Adams' eligibility is directly mandated by the Political Balance Requirement.

4. A Decision from this Court Will Redress the Injury.

Pursuant to Article VI, Clause 2 of the Constitution of the United States (the Supremacy Clause), a decision of this Court declaring that the challenged provision of the Delaware Constitution violates the First Amendment will immediately require

that Gov. Carney (and his successors) halt the use of political affiliation as a mandatory qualification in determining judicial appointments.

5. Adams Has Article III Standing to Challenge the Political Restrictions on Judgeships in All Courts.

The Governor argues that Adams does not have standing to challenge the fourth and fifth sections of Art. IV, Section 3, relating to the Delaware Family Court and Court of Common Pleas, because those provisions do not refer to major political parties, and so unaffiliated lawyers can apply for seats on those courts. This is incorrect.

The"bare majority" provision still imposes restrictions on appointments based on political affiliation. The second, third, fourth and fifth paragraphs of Article IV, Section 3 all limit the right to a bare majority to members of a "political party." Independents, such as Adams, are by definition not members of any political party. *See* 15 Del. C. §101(10) ("Independent...means any person who at the time of registration does not choose to be affiliated with a political party as defined in this section"[1]). *See also* 15 Del. C. §101(27) (an "unaffiliated candidate" means "any

[1] "Political party" is defined as "any political organization which elects a state committee and officers of a state committee, by a state convention composed of delegates elected from each representative district in which the party has registered members, and which nominates candidates for electors of President and Vice-President, or nominates candidates for offices to be decided at the general election" 15 Del. C. §101(15). A "major political party" is "any political party which, as of December 31 of the year immediately preceding any general election year, has (continued...)

individual who files a declaration as a candidate for any office to be decided at the general election and who is not affiliated with any political party and has not been thus affiliated for at least 3 months prior to the filing of that individual's declaration"); *Lesniak v. Budzash*, 626 A.2d 1073, 1078-79 (N.J. 1993) ("an unaffiliated voter is by definition not a member of a political party...").

Thus, as Article IV, Section 3 restricts, the judicial opportunities of Adams who are not affiliated with a political party, at least to some degree, Adams has standing to challenge the entire scheme.

Even if this Court were to hold otherwise, that does not mean the entire case should be dismissed, as the Governor argues, Rather, the suit remains as to the first three paragraph of Article IV, Section 3, which go to the political party issue, and not the bare majority issue.

B. ADAMS MEETS THE REQUIREMENTS FOR PRUDENTIAL STANDING.

Gov. Carney argues that the requirements of prudential standing were not met because (1) Adams brought this suit as an academic exercise propounding an abstract question of public significance amounting to a generalized grievance, and (2) Adams

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[1](...continued)
registered in the name of that party voters equal to at least 5 percent of the total number of voters registered in the State." 15 Del. C. §101(15)(a). A "minor political party is "any political party which does not qualify as a major political party." 15 Del. C. §101(15)(b).

was asserting interests that were not truly his own, but of third parties. These arguments lack factual and legal support and are without merit.

1. As Adams Is Claiming a Violation of His Rights Granted by the First Amendment, It Does Not Constitute a Generalized Grievance.

To satisfy the requirements of prudential standing, Adams has to be seeking more than an abstract question of wide public significance, *i.e.*, a generalized grievance. *UPS Forwarding, Inc. v. U.S. Postal Serv.*, 66 F.3d 621, 626 (3rd Cir. 1995). This Court has said:

> It is true that "only ... a complainant [who] possesses something more than a general interest in the proper execution of the laws ... is in a position to secure judicial intervention." But where a plaintiff is "asserting [his or her] own [equality] right," a claim of discrimination, even where it affects a broad class, "is not an abstract concern or 'generalized grievance.'"

Hassan, 804 F.2d at 291 (citations omitted).

This Court has also said that the "[v]iolation of constitutional and regulatory rights is not an 'abstract' or 'generalized grievance.'" *Stehney v. Perry*, 101 F.3d 925, 931 (3rd Cir. 1996). The Political Balance Requirement directly interferes with Adams' constitutional right to obtain public employment free from political discrimination and so violates the First Amendment.

The undisputed evidence is that Adams had (and continues to have) a genuine desire to be a judge and has found his desires thwarted by the Political Balance Requirement. Gov. Carney attempts to distract from this by arguing that Adams has

not applied for every judgeship from the time of his first application in 2009. Adams testified that the reason he did not do so was that he was happy with his job as a Deputy Attorney General, and greatly admired and respected then-Attorney General Joseph "Beau" Biden, and he wanted to stay at the Department as long as Beau Biden was Attorney General, and then hopefully find a spot to work with him when Biden became Governor (as Delawareans expected him to do). When Biden died, it was a personal and professional blow to Adams. (JA62-64).

It was not until Adams retired from the Delaware Department of Justice in 2015 that he started considering applying for judgeships. But the ones that became available were designated as being Republican seats, so he felt it would be futile for him to apply. (JA64). As noted above, when application would be futile, it is not necessary to go through the motions. *Int'l Brotherhood of Teamsters*, 431 U.S. at 324; *Sporhase*, 458 U.S. at 944 n. 2; *National Association for the Advancement of Multijurisdiction Practice (NAAMJP),* 658 Fed.Appx. at 133.

Thus, Adams has explained why he did not apply sooner and why he did not apply for all openings (party affiliation). Gov. Carney has no evidence to refute this testimony, and so he relies on innuendo. He suggests that Adams switched his political affiliation only a few days before the Complaint was filed. Adams testified to his legitimate motive for switching parties. (JA74-75). Gov. Carney offered nothing to refute that.

The change in political affiliation is of no consequence in any event. As an unaffiliated voter, Adams suffers exclusion from any judicial position, at least in the Supreme Court, the Court of Chancery and the Superior Court. As a Democrat, he would be eliminated from at least 50% of the openings in those courts. Half a loaf is not adequate where constitutional rights are being transgressed.

As the District Court held, "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." (JA31).

Gov. Carney also argues that Adams did not bring this suit sooner, even though he had considered the unconstitutionality of the Political Balance Requirement for the past 15-20 years. This fact shows that it is not mere intellectual interest, as he chose to bring the suit when he was ready, willing and able to serve as a judge.

Adams' complaint is not a generalized grievance, but states a concrete injury to his personal interests. As such, he satisfies this prudential requirement.

2. <u>Adams Is Asserting His Own Interests.</u>

Adams has established that he has a personal interest in becoming a judge. In any event, the prudential rule that a party must represent his own interests, not those of third parties, is relaxed as to facial challenges raised under the First Amendment. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988). *See also*

Eisenstadt v. Baird, 405 U.S. 438, 445 n.5 (1972); *Knick v. Township of Scott*, 862 F.3d 310, 320 (3rd Cir. 2017).

Adams brought this action to correct a wrong applicable to him as an individual desiring a judgeship, notwithstanding that the ruling will also affect others similarly situated. The injury is specific (loss of job opportunity) and targeted. It is undisputed that 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 generally based on his or her political affiliation.

Thus, Adams fully satisfies the requirements of prudential standing.

III. THE POLITICAL BALANCE REQUIREMENT VIOLATES THE FIRST AMENDMENT.

A. THE GENERAL RULE PROHIBITING CONSIDERATION OF POLITICAL AFFILIATION IN MAKING GOVERNMENT EMPLOYMENT DECISIONS.

In *Elrod v. Burns*, 427 U.S. 347 (1976), a plurality decision, the Supreme Court held that the practice of firing employees based on their political affiliation was presumptively unconstitutional, as such action struck at the core of First Amendment freedoms of speech and of association.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the Supreme Court, in a 6-3 decision, reaffirmed the principle that termination of employment based on political belief is repugnant to the First Amendment. *Id.* at 512-18.

Ten years later, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Supreme Court extended the *Elrod/Branti* rule to promotion, transfer, recall and (most relevant here) hiring decisions. *Id.* at 64, 75-80.

Six years after that, in *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), the Supreme Court, in a 7-2 decision, reaffirmed the principle and extended it to outside government contractors.

This Court has added that "the First Amendment protects politically neutral or apolitical government employees from political patronage discrimination." *Galli v. New Jersey Meadowlands Comm'n*. 490 F.3d 265, 276 (3rd Cir. 2007). Adams is an unaffiliated voter.

B. THE NARROW EXCEPTION TO THE GENERAL RULE.

In *Elrod*, the Supreme Court recognized an exception to the general rule:

> A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. Nonpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party.
>
> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have

> many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration would also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals. Thus, the political loyalty "justification is a matter of proof, or at least argument, directed at particular kinds of jobs." Since, as we have noted, it is the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular respondent will rest on the [government] on remand, cases of doubt being resolved in favor of the particular respondent.

Elrod, 427 U.S. at 366-67.

In *Branti*, the Supreme Court concluded that *Elrod's* "policymaker" test could not be easily applied, and so changed the test:

> 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*.
>
> It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government. On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, *the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a*

> *particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.*

445 U.S. at 518 (italics added).[2] *Accord O'Hare Service, Inc.*, 518 U.S. at 719.

This Court has recognized the change in the test for determining whether or not the exception applies. *Loughney v. Hickey*, 635 F.2d 1063 (3rd Cir. 1980) (remanding decision under *Elrod* because pending the appeal the *Branti* decision was released, establishing a "new test"); *Boyle v. County of Alleghany, PA*, 139 F.3d 386, 395 (3rd Cir. 1998) (noting that *Branti* "reformulated the *Elrod* test").

This Court has recognized that under the *Branti* rule "[t]he exception for 'policymaking' jobs exists because political loyalty is *essential* to the position itself." *Galli*, 490 F.3d at 270 (italics added).[3] It has also stated that:

> An employee may be terminated for political reasons *only if* "a difference in party affiliation [is] highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office," *and only if* an employee's duties make it possible to cause "serious political embarrassment," will the position meet the narrow *Branti-Elrod* exception.

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[2] Although *Branti* did away with the "policymaker" test and found the term "policymaker" inapt, courts and litigants have continued to use that term, some as shorthand for the *Branti* rule. Others have referred to it as the "*Branti* rule" or the *Elrod/Branti* rule." Adams uses herein the phrase the *Branti* rule."

[3] The Third Circuit is not an outlier on this point. The term "essential" appears in *Branti.* 445 U.S. at 518. Other federal appellate courts similarly follow *Branti* and require that political loyalty be "essential" to the position. *E.g., Rose v. Stephens*, 291 F.3d 917, 923 (6th Cir.2002); *Thomas v. Carpenter*, 881 F.2d 828, 832 (9th Cir. 1989); *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir. 1985).

Assaf v. Fields, 178 F.3d 170, 177 (3rd Cir. 1999) (citations omitted, italics added). *Accord Zold v. Town of Mantua*, 935 F.2d 633, 635 (3rd Cir. 1991) (citing *Ness v. Marshall*, 935 F.2d 517, 521 (3rd Cir. 1981)).

C. POLITICAL AFFILIATION IS NOT AN APPROPRIATE REQUIREMENT FOR THE EFFECTIVE PERFORMANCE OF A JUDGE.

Based on the authorities cited above, to exclude judges based on political affiliation under the *Branti* rule, Gov. Carney must prove that:

(1) political affiliation is essential to the performance of the job;

(2) the difference in party affiliation is highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office; and

(3) the difference in political will cause serious political embarrassment.

First, is political affiliation essential to the performance of the job? The answer is solidly no. In addressing performance of the job, one looks at the primary responsibility of the office. *Branti*, 445 U.S. at 519 (Supreme Court strongly considered the plaintiffs' "primary" responsibilities, rather than relying on snippets of evidence which might imply further policy-related duties).

The primary responsibility of any judge is to decide the cases presented by the parties for resolution. "If there is any category of jobs for whose performance party affiliation is not an appropriate requirement, that is the job of being a judge, where

partisanship is not only unneeded but positively undesirable." *Rutan*, 497 U.S. at 92-93 (Scalia, J, dissenting).[4]

There is no rational connection between political ideology and job performance. Political affiliation is not only not essential to the performance of the job, it is inappropriate, even though the appointing party might find it desirable. The absence of political bias and influence from the Executive and Legislative branches, and the appearance of a lack of political influence, is essential to public confidence in our judicial institutions. *E.g., Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*,458 U.S. 50, 59 n.10 (1982) ("independence from political forces...helps to promote public confidence in judicial determinations"), *abrogated on other grounds by statute as stated in Wellness Intern. Network, Ltd. v. Sharif*, 135 S.Ct. 193 (2015).

The perception that a judge is expected to follow the political agenda of the appointing party also diminishes public respect for the judiciary.

The second question is does a difference in party affiliation make it highly likely to cause a judge to be ineffective in carrying out the duties and responsibilities of the office. Of course not. *See Newman v. Voinovich*, 986 F.2d 159, 164 (7th 1993) (Jones, J., concurring) ("it cannot be seriously contended that being a member of a certain party, in this case the Republican party, should be a requirement for the

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[4] Justice Scalia's statement was not the holding of the case, and so it is *dicta*. The fact that it is *dicta*, however, does not detract from the force or correctness of Justice Scalia's conclusion.

effective performance of being a judge," italics in original). Political preference not is a necessary ingredient to the effective performance of a judge. Indeed, it is anathema to effective performance as a judge.

Even though some contend that some or all judicial decisions are, consciously or not, mere masks for the political preferences of the judge, few if any argue that such decision-making is a normative ideal that we should strive to attain.

Third, will the difference in political affiliation will cause serious political embarrassment? There is no history showing that. Gov. Carney has not demonstrated that it will. There is no reason why it would. Indeed, when a judge rules contrary to the desires of the appointing authority (which happens[5]), it may anger or disappoint the appointing authority, but has never politically damaged the appointing authority, and it reinforces the public's perception of that judge's independence.

D. THE ROLE OF JUDGE IS NOT A "POLICYMAKING" POSITION.

The "substantial" burden is on Gov. Carney to prove the exception applies. *Boyle,* 139 F.3d at 401. *See also Branti*, 445 U.S. at 518; *Galli*, 490 F.3d at 270-271 (citing *Rutan*). In determining whether the exception applies, the Court should view

[5] Judges have, on occasion, disappointing those who appointed them. *See* Todd A. Purdum, " Presidents, Picking Justices, Can Have Backfires," *New York Times* (July 5, 2005) (available at https://www.nytimes.com/2005/07/05/politics/politicsspecial1/presidents-picking-justices-can-have-backfires.html).

the exception narrowly. *Armour v. County of Beaver, PA*, 271 F.3d 417, 428 (3rd Cir. 2001) (describing the exception as "narrowly drawn"); *Assaf*, 178 F.3d at 177.

1. Judges Do Not Make Policy.

Gov. Carney focuses on the outdated *Elrod* "policymaker" test. Even under that formulation, his argument fails.

Initially, it should be noted that Gov. Carney's arguments cut against him. If judges are policymakers within the meaning of *Elrod*, then the political balance requirement is unconstitutional because it places restrictions on his ability to select judges based on his political agenda. Also, it prevents him from hiring judges he may prefer because they are not members of a "major political party."

a. Judges do not promote the policies of the appointing authority.

An important initial question is what type of "policy" implicates the "policymaker" rule? The answer is that the policy must relate to partisan political interests of the winning party of the elective branches. *See Elrod*, 427 U.S. at 367 (government has interest in preventing employees from "obstructing the implementation of policies of the new administration"); *Rutan*, 497 U.S. at 74 (administration has an interest in "securing employees who will loyally implement its policies"); *Branti*, 445 U.S. at 520-21; *Galli*, 490 F.3d at 282. *See also Galloza v. Foy,* 389 F.3d 26, 28 (1st Cir. 2004) (reason for the *Branti* rule is that "[p]olicies espoused by a new administration, presumably desired by the citizens whose votes

elected that administration, must be given a fair opportunity to flourish"); *Perez v. Cucci*, 725 F.Supp. 209, 238 n.27 (D. N.J. 1989), *aff'd*, 898 F.2d 139, 141, 142 (3rd Cir. 1990) ("if the principle duty of an individual who holds the position at issue is to promote the *policies of the administration*, then the holder of that position could be dismissed based solely upon his political affiliation, without violating the first amendment," italics added).

As has been stated:

> a judge is not a "policymaker" for the appointing governor. Rather, the judiciary is an independent arm of the government, unconnected by oath or duty to the governor's office or political party. Once appointed, a judge does not and should not answer to a governor's directives or opinions. Therefore, the link between an appointee judge and the appointing governor is fundamentally different from the link between a governor and other gubernatorial appointees who are appointed to fulfill the political or policy objectives of a governor.

Newman, 986 F.2d at 165. Similarly, the Ohio Supreme Court stated:

> Legislative and executive officers are selected for the avowed purpose of promulgating definite principles and methods of government advanced by [their] respective parties.... No partisan political platform can be written for the judge. He is charged with the interpretation and the administration of the law as he finds it. He has no voice in framing it. He must not depart from the plain provisions thereof, no matter how much he may be opposed to the principles or purposes of it. In the discharge of his duty, a judge is not concerned with party platforms or party expediency. In his official capacity he can serve no party, promulgate no partisan theories of government, encourage no partisan economic measures.

State ex rel. Weinberger v. Miller, 99 N.E. 1078, 1085 (Ohio 1912).

Judges do not implement the policies of the elected branches, nor are they accountable to the elected branches or the electorate. It cannot be said, without corrupting of the entire idea of an independent judiciary, that the purpose of a judge is to assist the appointing authority in an elected branch of government in promoting the policies of that administration. When judges announce legal doctrine, they are not (or are not expected to be) concerned with the political desires of members of the executive or legislative branch.[6]

None of the arguments Gov. Carney puts forward about policymakers relates to promotion of the policies of an elected administration. This alone justifies affirmance of the District Court's ruling.

b. <u>Determining the law is not making policy.</u>

Gov. Carney first asserts that judges make policy because they formulate legal principles and interpret statutes. But this not a partisan issue which is tied to policies of an administration. In any event, the argument is wrong because it confuses policy with legal doctrine. "Policy" refers to "general principles by which a government is guided in its management of public affairs, or the legislature in its measures." *Black's Law Dictionary* 1041 (5th ed. 1989).

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[6] In Delaware, judges sit for a twelve-year term, subject to reappointment. Del. Const. Art. IV, §3. Governors can only sit for two 4-year terms (which are usually contiguous). Del. Const. III, §2. This protects judges from not being reappointed by the Governor who appointed them as a means of political retaliation.

Policy is a general statement of the way governing authorities want laws to be. Affirmative action, for example, is a policy. There's nothing that says we must give minorities an advantage; this is something that the people's elected representatives decided would be the most effective way to reach true equality.

Another example is waiting periods before someone can get an abortion. Certainly, the policy points to an anti-abortion agenda, but it does not speak to whether people can get abortions, nor is it the only possible way to limit the prevalence of abortions. It is simply one way that administrations have decided will further their goals. Policy can be very generic, like affirmative action, or be very specific, like 24-hour waiting periods.

Legal doctrine, on the other hand, deals with how policy is applied to facts. For example, it is constitutional policy in the United States that people should be free from unreasonable search and seizure. But how is that applied? The Constitution does not say. So the Supreme Court established the doctrine of the exclusionary rule – if someone's guilt is proven only through unlawful search or seizure, they are set free. That is not written anywhere in the Constitution, but if the courts don't enforce the Fourth Amendment somehow, then it means nothing.

Moreover, in fashioning common law and interpreting statutes, there are strictures in place to prevent judges from having the latitude actual policymakers have:

Judges are not legislators or policymakers. Their job is to interpret and apply the laws as written by Congress, the rules of procedure adopted by the Supreme Court, and the law and legal precedents announced by the Supreme Court and the courts of appeals. The federal judiciary was intended by the Founders to be the least active branch of the federal government and, correspondingly, it operates under significant constraints not the least of which are the statutes enacted by Congress, the rules of procedure and legal precedents. Principles of judicial restraint that govern the judicial branch turn on what Professor Wechsler called the application of "neutral principles," Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14, 16 (1959), and what, more recently, Judge Tatel has referred to as "those principles of judicial methodology that distinguish judging from policymaking" - principles that include stare decisis (following precedent), "faithful[ness] to constitutional and statutory text and to the intent of the drafters," and appropriate deference to "the policy judgments of Congress and administrative agencies." David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L.R. 1071,1074 (2004). Although faithfulness to these principles sometimes can be frustrating, they also can, as Judge Tatel explained, be "immensely reassuring.... Although [judges] have personal views about such questions, we have neither the expertise to resolve them nor the accountability to the electorate for doing so." *Id*. at 1075.

> These methodological constraints ... mean that we judges sometimes sustain actions we think make little sense, invalidate programs we like, or apply precedents we believe were wrongly decided.... In all these cases, though we may have been troubled by the outcomes, we knew that vindicating the rule of law was far more important to our constitutional system than the issues at stake in any particular case.

Pigford v. Veneman, 355 F.Supp.2d 148, 169-70 (D. D.C. 2005) (citation omitted).[7] *See also Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018) (noting that the role of judges is to be "expounders of what the law is," and not "policymakers choosing what the law should be"); *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1413 (2018) (Thomas, J., concurring) ("In our democracy the people's elected representatives make the laws that govern them. Judges do not. The Constitution's provisions insulating judges from political accountability may promote our ability to render impartial judgments in disputes between the people, but they do nothing to recommend us as policymakers for a large nation").

It is also important to note that the Delaware judiciary has, by its own pronouncements, removed itself from the role of policymakers:

> it is the province of the legislature and not of the courts to pass upon matters of policy. The legislative hand is free except as the constitution restrains; and courts are bound by a most solemn sense of responsibility to sustain the legislative will in the appropriate field of its exercise, even though in the opinion of the judges as individuals the legislature had acted in an unwise manner.

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[7] Gov. Carney points to Delaware corporate law as an example of judge-made "policy." Of course, much of Delaware's corporate law comes from interpretation of Delaware's corporate code. The rest in common law, derived from precedents. However, Gov. Carney has not pointed to any instance where the political affiliation of a judge had any effect, or could have any effect, on Delaware's corporate law, tort law, or any other area of law.

Collison v. State ex rel. Green, 2 A.2d 97, 108 (Del. 1938). *Accord Federal United Corp. v. Havender,* 11 A.2d 331, 338 (Del. 1940) ("It is for the Legislature not for the court, to declare the public policy of the state...").

Perhaps the clearest proof that judges are not policymakers is the political question doctrine, which "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (*quoted in Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3rd Cir. 2018)).

c. Judges do not have "discretionary" authority in the sense that word has been interpreted in policymaker cases.

Gov. Carney next argues that another indicator of a policymaker is that a person has discretionary authority, and adds that judges have discretion setting remedies in civil case and penalties in criminal cases. However, Gov. Carney does not explain how those discretionary acts relate to partisan activities.

The Supreme Court did not discuss the concept of "discretion" in either *Elrod* or *Branti*. The Seventh Circuit has distinguished political discretion from professional discretion. *Hagan v. Quinn*, 867 F.3d 816, 823 (7th Cir. 2017). Additionally, courts have adopted the view that the reference to "discretion" means the type of discretion that can be exercised to promote or thwart the policies of the incumbent

administration. *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1333 (9th Cir. 1997); *Pleva v. Norquist*, 35 F.Supp.2nd 839, 844-45 (E.D. Wis.), *aff'd,* 195 F.3d 905 (7th Cir. 1989); *Gannon v. Daley*, 561 F.Supp. 1377, 1383 (N.D. Ill.1983).

The decisions as to what criminal punishments to hand out (with discretion limited by statutes[8] and administrative guidelines[9]), and the discretion in forming remedies (subject to review for abuse of discretion) are examples of a judge's professional discretion. It certainly has nothing to do with an administration's political goals (at least Gov. Carney has not shown it to be). Further, judges do not have the discretion to thwart partisan goals. Their decisions on the constitutionality or acceptability of government programs and policies are limited by rules of statutory construction and constitutional precedents.

d. The Delaware Judiciary is not a government program.

Gov. Carney next argues that policymakers provide input into the nature and scope of major governmental programs, and identifies the Delaware judiciary as a major governmental program. This may be the first time an independent branch of government has been referred to or reduced to the status of a "major governmental program." Gov. Carney has not offered anything to show that an independent branch

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[8] 11 Del. C. ch. 42.

[9] Delaware Sentencing Accountability Commission Benchbook 2018. https://cjc.delaware.gov/wp-content/uploads/sites/61/2018/01/Benchbook-2018v2.pdf.

of government was intended to be included in the term "major governmental program."

Judges do not provide (and properly should not provide) input into government policies and programs. Indeed, to hold otherwise would erode public confidence in their objectivity. *Delaware Judges' Code of Judicial Conduct,* Rule 2.4(A) ("A judge should be unswayed by partisan interests, public clamor, or fear of criticism"). Political affiliation politicizes the judiciary in they eyes of the citizenry, causing a loss of respect for the institution. *See id.*; Rule 3.4(A) ("A judge should not accept appointment to a governmental committee, commission, board, agency or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice").[10]

Finally, Gov. Carney argues that the fact that Delaware judges, after being appointed by the Governor, then have to be voted upon by the Senate shows that the public's perception is that judges are policymakers. This is a non-sequitur. First, there is no study, precedent or other authority that shows that people even pay attention to Senate confirmations, much less that they ascribe any significance to it. Second, any

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[10] Gov. Carney states that judges are involved in the preparation of budget "which involve policy choices about the allocation of resources and new initiatives." Gov. Carney did not introduce as evidence budgets proposed by the judiciary. The Court cannot determine whether there is anything in a proposed budget that could constitute an actual policy. Staffing and infrastructure requests certainly do not constitute policy.

such impression is corrected by decisions of the Delaware Supreme Court stating that judges are not policymakers (and no doubt the general public pays at least as much attention to decisions from the Delaware Supreme Court as it does to Senate confirmations).[11]

Additionally, Judges do not have "significant contact with the public" outside of the courtroom, and judges do not represent or speak on behalf of the administration. *Assaf*, 178 F.3d at 178.

E. <u>GOV. CARNEY'S AUTHORITIES ARE INAPT.</u>

Gov. Carney cites several cases to support his arguments. Those cases, however, are unavailing. As shown below, the cases cited by Gov. Carney appear to rely on *Elrod's* "policymaker" analysis exclusively, ignoring the fact that the test was changed in *Branti.* "The fact that an employee is in a policymaking or confidential position is relevant to the question of whether political affiliation is a necessary job requirement but this fact is no longer dispositive after *Branti." Brown v. Trench*, 787

[11] Gov. Carney also suggests that the fact that judges are elected in other jurisdictions is because of public recognition of the "substantial" role judges play in making policy. Gov. Carney cites no case law, no treatise, no law review article or any other secondary source to support this interpretation of history. It has been said that movement to election of judges was the result of the "Jacksonian movement toward greater popular control of public office...." *Republican Party of Minnesota v. White*, 536 U.S. 765, 791 (2002) (O'Connor, J., concurring). "By the beginning of the 20th century, however, elected judiciaries increasingly came to be viewed as incompetent and corrupt, and criticism of partisan judicial elections mounted." *Id.*

F.2d 167, 167-68 (3rd Cir. 1986). Failure to analyze under the *Branti* rule renders Gov. Carney's cases of little precedential weight.

Moreover, none of the cases cited by Gov. Carney utilize the analytical methodology applied by this Court. As noted above, this Court requires that: (i) political loyalty must be *essential* to the position itself,; (ii) the difference in party affiliation be highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office; and (ii) the difference in political views will cause serious political embarrassment.

Additionally, in discussing policymaking, the judges in the cases cited by Gov. Carney failed to tie the work of the judges to furthering the policies of the appointing authority, as opposed to a general sense of "policy." The failure to connect the factors used under the *Elrod* test to its purpose renders those analyses incorrect.

Even those courts that refer to the *Branti* rule do not explain how political affiliation is necessary to the "effective performance" as a judge.

- *Garretto v. Cooperman*, 510 F.Supp. 816 (S.D.N.Y. 1981). In determining whether a workers compensation judge is a policymaker, the Court noted that "[i]f *Branti* is to be read literally, however, the policymaking responsibilities of the job are of no consequence. The only issue that matters is whether membership in a particular party is a requirement for the effective performance of the duties of the office. *It is absolutely clear that party affiliation is not a requirement for the effective.*

performance of the duties of the office of Compensation Judge." *Id*. at 819 (italics added).

Notwithstanding this, the District Court rejected the holding of *Branti,* concluding that the Supreme Court would not adhere to it, and so found the judge a policymaker under a pre-*Branti* analysis. *Id*. at 820. Nine years later, however, the Supreme Court disproved the judge by reaffirming the *Branti* rule. *Rutan,* 497 U.S. at 64. Thus, *Garretto* supports the conclusion that, under *Branti*, political affiliation is not an appropriate requirement for the position of a judge.

- *Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993). In *Newman*, state laws required the election of judges, but allowed the Governor to appoint interim judges if a judge left the bench before the end of the term. The suit claimed that the Governor impermissibly considered political affiliation in exercising his discretion in appointing interim judges. The Sixth Circuit held that judges hold policymaking positions such that the Governor could consider political affiliations in his appointment decisions.

The issue in *Newman* was whether the governor could voluntarily choose to take political affiliation into consideration as a factor amongst others in selecting judges. The issue in the present case is whether there the Governor can be *compelled* to choose based on political affiliation, to the detriment of other applicants.

Although the *Newman* court concluded that judges are policymakers, it failed to analyze whether or not political affiliation is an objectively necessary requirement for effective performance as a judge under *Branti*, and failed to apply the factors this Court has repeatedly used, as described above.

- *Kurowsky v. Krajewski*, 848 F.2d 767 (7th Cir. 1988). The Seventh Circuit relied simply on policymaker, did not assess whether political affiliation is appropriate for effective performance (as opposed to the appointer's political desires), and, indeed, made no reference to performance.

- *Carroll v. City of Phoenix*, 2007 WL 1140400 (D. Az. Apr. 17, 2007). Like the other cases cited by Gov. Carney, the District Court limited its analysis to policymaker, without applying *Branti* or the test formulated by this Court.

- *Davis v. Martin*, 807 F.Supp. 385 (W.D.N.C. 1992). North Carolina law provided that when a elected judge does not finish his or her term, members of the Bar of the district where the seat is vacant submitted nominees of the same political party as the judge who left the bench. That nominee, however, would ultimately have to face reelection by the voters. The Court reasoned that maintaining same political party "preserves the voters' political party choice for that particular office." *Id*. at 387. The Court went on to note that the statute only applies where the vacating judge is elected, and did not apply where the judge was appointed or where the vacating judge was elected as an independent. *Id*. Indeed, the Court noted that the plaintiffs

in *Elrod* and *Branti* "were not subject to approval by the people of the state through elections." *Id*. This is a very different case. And again, that court did not apply the *Branti* rule or this Court's method of analyses.

• *Levine v. McCabe*, 2007 WL 4441226 (E.D.N.Y. Dec. 17, 2007), *aff'd*, 327 Fed. Appx. 315 (2nd Cir. 2009). The court went through a list of policymaker factors but did not apply the *Branti* rule or this Court's method of analysis. There was no discussion on how political affiliation is necessary for effective performance as a judge.

* *List v. Akron Mun. Court*, 2006 WL 475124 (N.D. Ohio Feb. 27, 2006). The Court mis-stated the *Branti* rule, saying that political discrimination may take place where political affiliation is "relevant" to the job. *Id.* at *7. That is a lower standard than essential (or even appropriate) "to the effective performance of the job." Instead, it went through a rote analysis of categories set by the Sixth Circuit (which no other Court of Appeals has adopted). There was no discussion on how political affiliation is necessary for effective performance as a judge.

* In *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), and *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988), the Sixth Circuit applied its own test, one which has not been adopted by any other Court of Appeal. *McCloud* did not explain how a law clerk's politics are essential to the performance of his job. *Balogh* justified finding a bailiff to be subject to the *Branti* rule because the bailiff had access to a

judge's confidential information, which has nothing to do with his effectiveness as a bailiff.

On the other hand, in *Bright v. McClure*, 865 F.2d 623 (4th Cir. 1989), a case not cited by Gov. Carney, plaintiffs sued a court clerk for failing to include them in the clerk's list of nominees for magistrate judge positions because of the plaintiffs' affiliation with the Democratic Party. The Fourth Circuit affirmed the lower court's dismissal of the case because the damages claim was barred by the 11th Amendment, and the claim for equitable relief was brought too late as the magistrate positions had been filled before suit was filed. However, the Fourth Circuit stated at the end that "This opinion should serve the office of a declaratory judgment and inform the parties that state magisterial positions are not food for political patronage." *Id.* at 626.

F. GOV. CARNEY HAS NOT IDENTIFIED ANY COMPELLING GOVERNMENT INTEREST JUSTIFYING LIMITING THE ELIGIBILITY OF ANYONE SEEKING A JUDGESHIP WITHOUT REGARD TO POLITICAL AFFILIATION.

Laws infringing on First Amendment rights, including the right to political association, are subject to strict scrutiny, and, to satisfy strict scrutiny, Gov. Carney must show not merely a legitimate government interest, but an interest that is "paramount, of vital importance," and the law must be narrowly tailored to use the least restrictive method to achieve the government interest. *Elrod*, 427 U.S. at 362-63.

Gov. Carney's first justification for overriding the First Amendment is the desire for political balance to promote public confidence. The interest in public

confidence in the judiciary, however, is not met by political balance. In *Common Cause Indiana v. Individual Members of the Indiana Election Commission*, 800 F.3d 913 (7th Cir. 2015), the Seventh Circuit struck down on First Amendment grounds an Indiana statute that established a system for the election of judges to the Marion Superior Court. Pursuant to the statute, a political party could nominate candidates for no more than half of the eligible seats on the Marion Superior Court. Even though minor parties and write-in candidates had access to the general election ballot, the Republican and Democratic parties typically each nominated candidates for half of the open seats, and those nominees were all elected, thereby maintaining the Superior Court as half Republicans and half Democrats. The Seventh Circuit, in striking down the law, rejected the State's argument that partisan balance promotes compelling interest in promoting public confidence in the impartiality of the bench:

> Partisan balance amongst the judges who comprise the court, alone, has little bearing on impartiality. For instance, let's assume that the court included two equally ultra-partisan, biased judges who allowed their political affiliation to influence their conduct and decisions. One judge is partial for Republican interests; the other for Democratic interests. Once the public became aware of the two problem judges, their confidence in the impartiality of the court would not be restored by the fact that the court still has overall partisan balance. Rather, calls would be made for the removal of both judges and their replacement with judges who would fairly and impartially decide cases, regardless of any political affiliation. If the ratio of ultra-partisan, biased judges was extended to 2 to 2, 3 to 3, or even 18 to 18 (comprising the entire court), the public would become increasingly less confident in the impartiality of the court, notwithstanding that the court still enjoys partisan balance between the major political parties. Simply stated, partisan balance can

serve as a check against contrary partisan interests, but it says little about the impartiality of individual members.

Further, we note that the policy reasons offered by the State in support of the Statute—namely, to promote public confidence in the impartiality of the court by preventing one party from sweeping all of the seats—are not supported by the record. The State contends that if one party were to have majority control of the seats on the court, litigants of other political affiliations would feel as though the odds were stacked against them. However, there is nothing in the record to substantiate a claim that partisan balance on the court is necessary to serve that interest, or that such a concern has ever been raised. Even during the 1970 and 1974 elections in which each major party swept all of the seats, we are not presented with any evidence that a litigant complained of bias or prejudice on the part of a judge based upon party affiliation, or that all the judges on the court had the same party affiliation. It is asserted that the Statute, and its accompanying burden on the right to vote, is necessary to protect and promote public confidence in the impartiality of the bench, but this presumes that nothing protected these interests before the Statute. The Indiana Code of Judicial Conduct contains numerous rules and provisions designed to ensure the independence, integrity, and impartiality of the court, including detailed restrictions on political activity by judges and judicial candidates. Ind. Code of Judicial Conduct Canon 4 ("A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.") Although the Code of Judicial Conduct has gone through revisions over the years, requirements that judges refrain from certain political activities and decide cases impartially, without personal bias or prejudice, predate the Statute. *See, e.g.,* Indiana Code of Judicial Conduct (effective January 1, 1975). Furthermore, complaints about judicial misconduct for violations of the Code may be filed with the Indiana Commission on Judicial Qualifications, which investigates and recommends discipline, where appropriate, to the Indiana Supreme Court.

We disagree that partisan balance in the context of judicial elections improves the public's confidence in an impartial judiciary. The emphasis on partisan balance could just as easily damage public confidence in the impartiality of the court.

Id. at 924-25.

There are numerous other states whose laws do not require political balance, and yet there is no evidence that this has resulted in a loss of public confidence.

For the same reason, political balance is not necessary to preserve the integrity of the judicial system. For over 200 years state courts have had judgeships which are appointed without regard to political affiliation. There is no evidence that this practice has damaged the integrity of the judicial system. The real damage to the judicial system is from restrictions on judgeships based on political affiliation, which promote the idea that a judge has a bias by virtue of his or her political affiliation.

Political balance also does not serve the purpose of preventing one party from dominating a court. First, Delaware trial courts are single-judge courts and assignment of cases is by the President Judge, who is of a single political party. Delaware Judicial Branch Operating Procedures §IV(2). https://courts.delaware.gov/aoc/operating-procedures/op-casemgmnt.aspx#judges. Delaware Supreme Court cases are heard in either panels of three, the composition of which are assigned randomly, Delaware Supreme Court Internal Operating Procedures, §IX(2), or *en banc* in panels of five. In either case judges of one political party dominate the panel. Thus, the law currently allows political domination, and does not remove it. As one scholar has noted:

> Of those three courts, only the Delaware Supreme Court is a collective body. The adjudication of civil and criminal appeals is categorically

> different than functioning as a partisan representative for promulgating election-related regulations or resolving real-time disputes at a polling place. The appellate process is not designed to reflect the partisan views of the appellate judges. Otherwise, a three–two partisan majority would have license to rule routinely in a partisan fashion.
>
> On the Court of Chancery, each member of the court acts individually to find the facts, determine the law, and select a remedy. Given that individualized approach to case disposition, it is difficult to conceive how the partisan makeup of the remainder of the court renders the partisan affiliation of a particular candidate for a particular vacancy a "reasonably appropriate requirement" for the job.
>
> Any claimed importance for the partisan makeup of the Superior Court is undercut by the right to a jury trial in a Superior Court action, as well as by the absence of collective decision-making. The Superior Court is a court of general jurisdiction, and neither civil plaintiffs nor criminal defendants have a right to a near-50% probability of drawing a Democrat or Republican judge in a given case.

Joel Edan Friedlander, "Is Delaware's 'Other Major Political Party' Really Entitled to Half of Delaware's Judiciary" 58 *Ariz. L. Rev*. 1139, 1157-58 (2016).

Another justification proffered by Gov. Carney is that limiting appointment to the two major political parties ensures that those parties get representation on the courts. Protecting the partisan interests of political parties as to the judiciary is not only not a compelling interest, it also flies in the face of an independent judiciary.

Assuming that the challenged provision of Delaware's Constitution aims at a desirable end, its desirability does not render it constitutional. "Even a law passed with the highest and most noble intentions must be rendered void if constitutionally infirm...." *Goudy-Bachman v. U.S. Dept. of Health and Human Services*, 811

F.Supp.2d 1086, 1108 n.17 (M.D. Pa. 2011). As the Supreme Court has said, "The Good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislatures of good purpose to promote it without thought of the serious break it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922).

Gov. Carney makes the broad proposition that in *Branti* the Supreme Court recognized that political balance is permissible. In so arguing, he points to language noting that election judges could be subject to dismissal if there is a change in party registration, because "party membership was essential to the discharge of the employer's governmental responsibilities." *Branti*, 445 U.S. at 518.

Gov. Carney confuses the function of election judges with those of courtroom judges. Where laws require political balance as to election judges, it is because election judges are expected to represent the interests of their party in reviewing challenges to voters or votes. *See MacGuire v. Houston*, 717 P.2d 948, 953 (Colo. 1986) (en banc) ("We agree with the district court that the system in which one Democrat and one Republican are assigned to work in pairs as election judges gives the appearance of propriety to the voters and the antagonism between the two parties results in a system of monitoring").

Courtroom judges, by contrast, are not expected to represent the interests of their political party, and should not be seen that way. Judges are not supposed to be professionally antagonistic toward each other, and political balance does nothing to prevent corruption or the appearance of corruption. To the contrary, by using political affiliation as a criterion (in this case the only mandatory criterion), it reinforces the perception that those judges come to the bench with a political agenda, thereby eroding public confidence in the system.[12]

Finally, even if this Court were to accept one or more of Gov. Carney's proffered justifications, Gov. Carney does not explain why excluding those who are not Republicans or Democrats is necessary to achieve those goals. Indeed, allowing

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[12] Gov. Carney's citation to cases and law review articles regarding administrative agencies are wide of the mark, as those agencies are not expected to be independent from their employer the way that the judiciary is supposed to be independent of the other branches of government.

Gov. Carney also identifies a number of federal agencies, the FDIC, the FTC, the SEC, the FERC and the FEC, which have political balance requirements, Those entities are policymaking entities, https://www.fdic.gov/regulations/laws/rules/5000-100.html (FDIC); www.ftc.gov/policy/policy-statements (FTC); https://www.sec.gov/rules/policy.shtml (SEC); https://ferc.gov/legal/maj-ord-reg/policy-statements.asp (FERC);https://classic.fec.gov/law/policy.shtml#policy (FEC), and so could take political affiliation into asccount. The Court may take judicial notice of the contents of federal government websites. *Vanderklok v. United States*, 868 F.3d 189, 205 n.16 (3rd Cir. 2017).

lawyers of all parties, and those unaffiliated with any party, increases the chance that no one party will dominate.

It is important to remember that the reputation of Delaware's courts plays a significant role in attracting corporations to Delaware, thereby resulting in significant tax and other revenue to the State. *E.g.,* Lawrence A. Hamermesh, "The Policy Foundations of Delaware Corporate Law," 106 *Columbia Law Rev.* 1749 (Nov. 2006). As such, Delaware has built-in incentives to ensure that its judges are of the highest caliber and are seen as objective. To further that goal, political background should be irrelevant.

CONCLUSION

WHEREFORE, for the foregoing reasons, plaintiff James R. Adams respectfully requests that the Court affirm the decision of the District Court in its entirety.

Respectfully submitted,

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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, David L. Finger 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 11,961 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 2016 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 Malware Bytes Premium 3.5.1.

6. On this day, I caused to be filed ten 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:

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

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