

Securities Regulation Daily Wrap Up, CORPORATE GOVERNANCE— U.S.: Delaware says would-be judge lacked standing to contest state constitutional judge selection process, (Jan. 23, 2020)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

Governor Carney asked the Supreme Court to reverse a Third Circuit decision finding Delaware's judge selection process violated the First Amendment.

Delaware Governor John Carney filed his merits brief in a case in which he seeks to overturn a Third Circuit decision finding that three of five state constitutional judge selection provisions are unconstitutional under the federal constitution. Although the governor reiterates arguments about the policymaking nature of judges' work, a key focus for Carney's and respondent James Adams's merit stage briefs will be the Article III standing question added by the justices when they agreed to hear the case. Oral argument has yet to be scheduled ([Governor of Delaware v. Adams](#), January 21, 2020).

James Adams, who switched his political affiliation from Democrat to Independent, had [sued](#) Delaware arguing that the major political party and bare majority requirements that are part of Delaware's constitutional judge selection process violated the First Amendment of the U.S. Constitution. Adams, however, refrained from applying for judgeships after changing his political affiliation on the theory that he was then precluded from doing so because of the state's constitution. The Third Circuit held that Adams could challenge Delaware's constitutional judge selection process and further concluded that process, at least regarding three of the state's five courts, was unconstitutional.

Added standing question. Constitutional standing in this case was addressed, at times, in somewhat unusual ways by the lower courts. The district court, for example, sometimes focused on prudential standing, an emphasis the Third Circuit sought to correct because prudential standing is not a substitute for Article III standing. The Third Circuit affirmed that Adams had Article III standing to challenge Delaware's constitutional selection process for the Delaware Supreme Court, the Superior Court, and the Chancery Court, all of which have a majority political party requirement. The Third Circuit also said prudential standing existed for these provisions "because of his [Adams's] desire to apply for a judicial position while refraining from associating with either the Democratic or Republican parties." The Third Circuit further concluded that Adams lacked Article III standing regarding the Family Court and Court of Common Pleas, which have a bare majority requirement, but not a major political party requirement.

None of the certiorari-stage briefs addressed Article III standing in a significant manner. As a result, the U.S. Supreme Court, upon granting certiorari, added this question for the parties to address. At the merits stage, Delaware emphasizes Adams's lack of a constitutionally recognizable injury.

Generally, Article III standing exists where a party has suffered an injury in fact, that is fairly traceable to the challenged conduct of the defendant (as compared to the independent action of a nonparty), and it is likely the injury will be redressed by a favorable court decision. The Supreme Court also has explained that an injury must address a protected interest that is concrete and particularized and actual or imminent, and not conjectural or hypothetical. Likewise, the redress of an injury must be likely and not speculative (See [Lujan](#) and [Spokeo](#)).

Delaware's merits brief also cited the gerrymandering case of [Gill v. Whitford](#) multiple times for the proposition that Article III standing is personal to the plaintiff. The court in *Gill* had observed: "We caution, however, that 'standing is not dispensed in gross': A plaintiff's remedy must be tailored to redress the plaintiff's particular injury" (citation omitted). The court in *Gill* gave the plaintiff a second chance at demonstrating Article III standing

by not directing the lower courts to dismiss the case, but a majority of the justices in a later case would hold that gerrymandering claims like those raised in *Gill* were nonjusticiable.

Overall, Delaware argued that Adams's claim regarding Delaware's constitutional judge selection provisions was nothing more than "an abstract interest" that falls short of the requirements for Article III standing under the federal constitution. Delaware also complained that the district court shortchanged Delaware's arguments based on the record by not holding an evidentiary hearing. Similarly, Delaware criticized the Third Circuit's apparent reliance on Adams's assertion that he could not have applied for certain judgeships in 2014. Delaware's standing argument can be broken down into two components: (1) the state's major party requirement; and (2) the state's bare majority requirement.

Major party requirement. Delaware argued that the Third Circuit's conclusion that Adams had Article III standing to challenge the major political party requirement applicable to three of the state's courts should be reversed. Specifically, Delaware said Adams failed to show in the courts below that: (1) he has genuine and concrete plans to become a judge; (2) that he was not evaluated equally for such judgeships because of Delaware's constitutional judge selection requirements; and (3) in the absence of state constitutional roadblocks, Adams had a reasonable probability of becoming a judge.

With respect to open judgeships in 2014, Delaware argued that Adams's protestations that he desired to be a judge but for the state constitutional limit was false because multiple openings existed for Democrats during the relevant period of time and Adams never applied for any of them. Delaware also argued that Adams's future plans to be a judge were too vague (i.e., his desire was not actual or imminent or more than conjectural or hypothetical). Here, Delaware likened Adams to the plaintiffs in the Supreme Court's seminal Article III standing case of *Lujan* where standing was found to be lacking because the plaintiffs desired to return to Sri Lanka to observe endangered animal species but had no immediate plans for such travel.

Delaware also emphasized two additional items that it said should influence the Article III standing question. First, Delaware reiterated that two of Delaware's constitutional courts have no political majority requirement. Second, Delaware noted that Adams filed his law suit just seven days after he switched his political alliance from Democrat to Independent.

Bare majority requirement. Delaware's merits brief emphasized the Third Circuit's conclusion that Adams lacked Article III standing to challenge the bare majority requirement. According to Delaware, Adams is an Independent and there is no possibility that his presence on a Delaware court with only a bare majority requirement could result in a supermajority that would run afoul of Delaware's constitution. As a result, Delaware argued that the bare majority requirement for the five constitutional courts was not amenable to litigation.

Delaware also challenged the Third Circuit's finding that the bare majority requirement regarding the state's Supreme Court, Superior Court, and Chancery Court was not severable from the major political party requirement. According to Delaware, Adams lacked standing on this point and, even if he did have standing, the appeals court erred in finding the provision was not severable.

Policymaker exception. Delaware also reiterated its view that state judges, especially when they act regarding common law, fall within the Supreme Court's trio of antipatronage cases, which carve out an exception for the political hiring and firing of policymakers. For example, Delaware noted that its version of the business judgment rule is part of the state judge-made common law. Moreover, Delaware argued that its mode of judge selection, while focused on party affiliation, ultimately counters "unchecked partisanship" and that it has a constitutional right to structure its own government.

Delaware concedes that persons may be "squeamish" about relying on the Supreme Court's patronage precedents in the context of state judges. For Delaware, however, the dividing line is not between "law" and "policy," but rather between "nondiscretionary functions" and functions touching "representative government." The bulk of Delaware's merits brief goes on to dispute the Third Circuit's interpretation of the Supreme Court's anti-patronage cases, which Delaware argues runs counter to the view of all other federal courts of appeals to have addressed the issue.

The case is [No. 19-309](#).

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