Securities Regulation Daily Wrap Up, TOP STORY—U.S.: SCOTUS reinstates Delaware bar on third-party judges, (Dec. 10, 2020)

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By Anne Sherry, J.D.

The U.S. Supreme Court overturned a Third Circuit holding that Delaware's judicial-selection requirements violated the First Amendment. The decision does not reach the merits, instead holding that the respondent lacked Article III standing to challenge the provisions.

In an 8-0 decision, the Supreme Court overturned a holding that Delaware's political-party restrictions for certain judicial appointments violate the U.S. Constitution. Calling this a "highly fact-specific case" that "begins and ends with standing," Justice Breyer wrote that the lawyer challenging the restrictions did not suffer an injury in fact in part because he lacked a concrete intention to apply for judicial vacancies. Justice Sotomayor wrote a short concurring opinion suggesting the Delaware Supreme Court be offered a chance to weigh in should another plaintiff take up the challenge (*Carney v. Adams*, December 10, 2020, Breyer, S.).

The Court perhaps telegraphed its holding when it granted certiorari and added a question asking whether the respondent had Article III standing. Much of the oral argument held in October focused on the standing question.

Background and posture. Delaware's constitution restricts appointments to several of its courts in two interconnected ways. The bare majority provision limits the number of judges that are of the same "major political party." The major party provision requires that the other judicial positions be filled with members of the "other major political party." In effect, this means that most of Delaware's courts must be filled with Republicans and Democrats only, and roughly balanced between those two parties.

The respondent before the Supreme Court, James Adams, is a registered Independent who said that he wanted to apply to Delaware judgeships, but knew that application would be futile because of the political-party restrictions on appointments. Adams won summary judgment in the District of Delaware, and the Third Circuit affirmed. In doing so, the appeals court invalidated both the bare-majority and major-party provisions because they work in tandem to achieve political balance and cannot be severed. The court also found that while Adams had standing to challenge the constitution's provisions dealing with the Supreme Court, Superior Court, and combined balance of those courts along with the Court of Chancery, he lacked standing with respect to the Family Court and Court of Common Pleas. Adams could have applied, but did not apply, to judgeships on those latter two courts, which are not subject to a major-party restriction.

No standing. Justice Breyer explained that standing requires an injury in fact that must be "concrete and particularized" as well as "actual and imminent." Furthermore, "a grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law" does not constitute an injury in fact and thus does not confer standing. The Court concluded that Adams suffered just such a generalized grievance and not an injury that is personal or particular to him. Specifically, Adams failed to carry his burden of showing that he was "able and ready" to apply for a judicial position.

While two statements in the summary judgment record indicated Adams's intention to apply, the record overall showed that he was not "able and ready." Adams did not apply for vacancies for which he was eligible between 2012 and 2016 as a then-registered Democrat, and he retired as a lawyer at the end of 2015. In January 2017, however, he reactivated his bar membership and reached out to the author of a law review article about the constitutionality of Delaware's political-party requirements. The author suggested attorneys who could handle such a challenge, and in February Adams changed his political affiliation to unaffiliated independent. "Leaving the party made it less likely that he would become a judge," Justice Breyer noted, "But doing so made it possible

for him to vindicate his view of the law as set forth in the article." Adams sued shortly after changing his political affiliation, but he did not explore what judicial positions were available or otherwise take actions suggesting he was "able and ready" to apply.

Rather, Justice Breyer wrote, Adams's statement that he "would apply" stood alone without an actual past injury, past applications, past conversations, a timeframe for applying, research into likely openings, or any other supporting evidence. The context of the record suggested an abstract, generalized grievance rather than an actual desire to become a judge. And if the Court were to hold that the few words of general intent sufficed to show an injury in fact, it would weaken longstanding doctrine against the Court's issuing advisory opinions at the request of an individual who believes the government is not following the law.

The majority cited precedent in which organizations without concrete plans to visit species-impoverished habitats lacked an "actual or imminent injury." Conversely, cases in which the Court has found standing contained more evidence that the plaintiff was "able and ready" to apply for a contract or admission to a university. Justice Breyer also said that the Court's decision in this fact-specific case does not disturb precedents holding that a plaintiff does not need to make a formal application that would be a "futile gesture." Rather, the holding here follows from applying precedent to a summary judgment record that lacks evidence that Adams suffered a personal, concrete, and imminent injury.

State should opine. Concurring in the decision, Justice Sotomayor wrote separately to address some of the merits arguments that could arise again in future litigation over the judicial-selection provisions. First, she highlighted the distinction between the bare-majority requirement and the major-party requirement. Major-party requirements are much rarer and arguably impose a greater burden on First Amendment rights of association.

In turn, the possibility that the two types of provisions require distinct constitutional analysis raises the question whether Delaware's two provisions are severable from one another. If one is unconstitutional, can the other remain? This is a "sensitive issue of state constitutional law," and federal courts might consider certifying the issue to the state's highest court, Justice Sotomayor suggested. "Certification may be especially warranted in a case such as this, where invalidating a state constitutional provision would affect the structure of one of the state's three major branches of government."

The case is No. 19-309.

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