

## Delaware law hangs in balance with Ginsburg-less SCOTUS

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The news of the passing of Supreme Court Justice Ruth Bader Ginsburg on the evening of Sept. 18 closed the story of one of America's most prominent jurists, who spent a lifetime fighting discrimination of all kinds. As the nation mourns the loss of the "Notorious R.B.G.," however, her empty seat on the nine-member Supreme Court of the United States will take on an out-sized role in the 2020 presidential election, the upcoming October slate of court cases, and even the future of Delaware's legal system.

On Oct. 5, the first day of the high court's next session, attorneys will phone in to argue *Carney v. Adams*, a case that will decide whether partisanship can continue to play a role in Delaware's judicial selection.

The case will be closely **watched** by corporate America, as it impacts both Delaware's Supreme Court and Chancery Court, where litigation is heard for more than a million incorporated businesses. Delaware's status as a national corporate nexus has been an integral part to the case's arguments as well.

Delaware has required that the state's courts have a balance of Democrats and Republicans since 1897, with the majority party holding one more seat on the bench than the minority party in cases of an odd number of seats. In 1951, as part of a wider series of structural changes to the Delaware judiciary, the provision was modified to exclude third party and unaffiliated voters from applying to serve as judges on the state's Supreme Court, Superior Court, and Chancery Court.

The plaintiff in the case is James Adams, a former Delaware Department of Justice lawyer who wanted to seek a judicial appointee but is currently a registered Independent, disqualifying him from the bench under the state's Constitution. While Adams was a registered Democrat, he changed his party affiliation in 2017 because of his frustration "with the centrism of the Democratic Party in Delaware" and now describes himself as an independent in the mold of Vermont Sen. Bernie Sanders.

He is arguing under First Amendment grounds that the state's requirement is unconstitutional due to previous Supreme Court rulings that found a judicial candidate should be free to associate, or not to associate, with the political party of his or her choice.

In his defense, Gov. John Carney argues that because judges are policymakers, there are no constitutional restraints on his hiring decisions, and he should be free to choose candidates based on whether they belong to one of the two major political parties.

The case was last heard by a panel of the U.S. Court of Appeals for the Third Circuit, which struck down the law as unconstitutional, writing, “judges are not policymakers because whatever decisions judges make in any given case relates to the case under review and not to partisan political interests.” Two other cases, one each in the Sixth and Seventh Circuits, have concluded otherwise on the question of “policymaking” for state judges though, creating a “circuit split” in decisions and raised the stakes for a ruling by the U.S. Supreme Court.

Those stakes got a little higher with Ginsburg’s passing, as an eight-member court is now likely to hear arguments barring a record-breaking expedited confirmation hearing, presenting the risk of a 4-4 tie where the court declines to rule and the lower court’s ruling is upheld. In this case, that would mean ruling Delaware’s judicial process unconstitutional and forcing a rewrite of its provisions, risking the state’s pro-business reputation.

When reached by Delaware Business Times, the lead attorneys for both Carney and Adams expressed their sadness for the passing of Ginsburg, but neither said they believed the case hinged on her vote.

“I believe all of the Justices will recognize and support the principle that judges decide cases independent of their personal political beliefs, and that creating political quotas and excluding those who are not a Democrat or a Republican is discriminatory and unconstitutional,” Adams’ attorney David L. Finger, of Finger & Slanina LLC, said.

“We do not regard our case as raising the kind of divisive issue on which the Court is likely to be equally divided,” Carney’s attorney Michael McConnell, of Wilson Sonsini Goodrich & Rosati, replied.

It’s a view shared by Ilya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, who has been tracking the case.

Shapiro said that he could see the court issuing a narrow ruling that allows the “bare majority” principle, or the requirement of differing parties, to stand while striking down the “major party” principle, which essentially restricts consideration to only Democrats and Republicans.

“I don’t think the court will want to make big waves or have major pronouncements that will force many state judiciaries and federal agencies to change the way they go about doing business or change the nature of political appointments in the presidential administration,” he said.

Garrett Epps, a retired University of Baltimore School of Law professor who spent much of his career studying Chief Justice John Roberts, isn’t so sure how the court will rule though. He believes a narrow ruling is possible, but Roberts may also seek to keep the court out of a national debate on the partisanship of the judiciary – an issue he’s clashed with President Trump over.

“I think [Roberts] will be praying that the new appointee doesn’t arrive to hear the case, and that you have a 4-4 affirm. So the case just goes away, the Supreme Court doesn’t have any fingerprints on it,” he said.

Because a broader ruling on the case would wade into restricting states’ rights to form their own judiciary, Epps said he believes the ruling will try to avoid overreaching.

“It’s a wild card, and it’s one that in a jurisprudential way the stakes are low, but in practical terms the stakes are higher than they seem,” he said.

For what it's worth, Shapiro said the justices to pay the most attention to are Elena Kagan and Samuel Alito.

"They tend to zero in on exactly what a case will turn on, regardless of whether it's a 7-2 or 5-4 vote," he said.

We'll be listening too because the future of Delaware's business reputation hangs in the balance.