IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3542-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3543-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)

BRIEF OF APPELLANTS

WEISSMAN & MINTZ
Flavio Komuves, Esq. (018891997)
fkomuves@weissmanmintz.com
Brett M. Pugach, Esq. (032572011)
bpugach@weissmanmintz.com
Steven P. Weissman, Esq. (024581978)
sweissman@weissmanmintz.com
220 Davidson Avenue, Suite 410
Somerset, New Jersey 08873
732.563.4565

BROMBERG LAW LLC
Yael Bromberg, Esq. (036412011)
ybromberg@bromberglawllc.com
43 West 43rd Street, Suite 32
New York, New York 10036
212.859.5083

Professor Joel Rogers (Admitted Pro Hac Vice)
University of Wisconsin Law School
jrogers60@gmail.com
975 Bascom Mall
Madison, Wisconsin 53706
609.347.9889

Professor Nate Ela (Admitted Pro Hac Vice)
University of Cincinnati College of Law
nate.ela@gmail.com
P.O Box 210040
Cincinnati, Ohio 45221
513.556.0866

Counsel and on the Brief for Appellants Moderate Party and Richard A. Wolfe

UNITED TO PROTECT DEMOCRACY
Farbod K. Faraji, Esq. (263272018)
farbod.faraji@protectdemocracy.org
Beau C. Tremitiere, Esq. (Admitted Pro Hac Vice)
beau.tremitiere@protectdemocracy.org
2020 Pennsylvania Avenue NW, Suite 163
Washington, D.C. 20006
202.579.4582

Counsel and on the Brief for Appellants Michael Tomasco and William Kibler

TABLE OF CONTENTS

TABLE OF JUDGMENTS iii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 3

STATEMENT OF FACTS 4

A. Appellants Are Moderate New Jersey Voters Working Together to Elect Moderate Candidates and Reduce Political Extremism 4

B. Fusion Was a Widespread and Positive Force in Elections, Both in New Jersey and Nationally 10

C. Fusion Was Outlawed Starting in the Late 1880s to Preserve Democratic and Republican Party Control 12

D. Federal Courts Split on Whether Anti-Fusion Laws Violate the U.S. Constitution.....17

E. A Rigid Two-Party System is Driving Extreme Polarization and Corroding Our Democracy 19

F. Fusion Would Strengthen Democracy in New Jersey by Making Politics More Responsive and Representative 21

G. Fusion Would Be Simple and Easy to Administer in New Jersey 25

LEGAL ARGUMENT 28

I. THE ANTI-FUSION LAWS VIOLATE THE FUNDAMENTAL RIGHT TO VOTE (Pa1-2) 33

A. Under Settled Precedent, Anti-Fusion Laws Violate the Right to Vote 34

B. Anti-Fusion Laws Cannot Survive Strict Scrutiny 38

C. Anti-Fusion Laws Fail Under a Burden-Interest Balancing Test 42

II. THE ANTI-FUSION LAWS VIOLATE THE FUNDAMENTAL RIGHT TO FREE SPEECH AND POLITICAL ASSOCIATION (Pa1-2) ...53

A. The State Constitution Warrants Greater Protection for Free Speech and Political Association Than the U.S. Supreme Court Recognized Under the First Amendment in Timmons 55

B. The Anti-Fusion Laws Impermissibly Burden the State Constitution's Freedom of Speech and Political Association Without an Adequate Justification 61

III. THE ANTI-FUSION LAWS VIOLATE THE FUNDAMENTAL RIGHT TO ASSEMBLE AND MAKE OPINIONS KNOWN TO REPRESENTATIVES (Pa1-2) 73

A. Assembly/Opinion Clause Guarantees the Right to Collective Political Action That Conveys a Group's Preferences to Elected Officials 73

B. The Anti-Fusion Laws Impermissibly Burden the Collective Political Rights Protected by the Assembly/Opinion Clause 77

IV. THE ANTI-FUSION LAWS VIOLATE EQUAL PROTECTION (Pa1-2) 79

V. THE STATE CONSTITUTION PROHIBITS "AGGREGATING" CROSS-NOMINATIONS (Pa1-2) 88

CONCLUSION 89

TABLE OF JUDGMENTS

Secretary of State letter, dated June 8, 2022 .....Pa1
Secretary of State letter, dated July 19, 2022 .....Pa2

TABLE OF AUTHORITIES

Cases

Afran v. City of Somerset, 244 N.J. Super. 229 (App. Div. 1990) 34
Anderson v. Celebrezze, 460 U.S. 780 (1983).....passim
Anderson v. Martin, 375 U.S. 399 (1964) 62
Batko v. Sayreville Democratic Org., 373 N.J. Super. 93 (App. Div. 2004)....59
Burdick v. Takushi, 504 U.S. 428 (1992) 39
Burgos v. State, 222 N.J. 175 (2015).....74
Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).....4, 66, 89
Catania v. Haberle, 123 N.J. 438 (1990) 60
City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 44
Common Cause Ind. v. Indiv. Members of the Ind. Election Comm'n, 800 F.3d 913 (7th Cir. 2015).....41
Council of Alt. Political Parties v. State, 344 N.J. Super. 225 (App. Div. 2001) .....passim
Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) 43, 44, 53, 79
Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008) 69
Democratic Party of U.S. v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981) 66
DePascale v. State, 211 N.J. 40 (2012).....38
Devane v. Touhey, 304 N.E.2d 229 (N.Y. 1973).....38
Doe v. Poritz, 142 N.J. 1 (1995).....79
Driscoll v. Burlington–Bristol Bridge Co., 8 N.J. 433 (1952) 29
Driscoll v. Stapleton, 473 P.3d 386 (Mont. 2020) 41
Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71 (2014) 57
Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989)....50, 62, 66, 73
Gangemi v. Rosengard, 44 N.J. 166 (1965).....34, 35, 36, 52
Gansz v. Johnson, 9 N.J. Super. 565 (Law Div. 1950) 36
Garden State Equality v. Dow, 434 N.J. Super. 163 (Law Div.), stay denied, 216 N.J. 314 (2013).....29
Green Party v. Hartz Mt. Indus., 164 N.J. 127 (2000) 56, 82

Greenberg v. Kimmelman, 99 N.J. 552 (1985) 54, 79, 80
Harper v. Hall, 868 S.E.2d 499 (N.C. 2022).....40
Harrison v. Jones, 44 N.J. Super. 456 (App. Div. 1957).....59
Hartman v. Covert, 303 N.J. Super. 326 (Law. Div. 1997).....64, 67
Hopper v. Britt, 96 N.E. 371 (N.Y. 1911) 14, 38, 88
Hudspeth v. Swayze, 85 N.J.L. 592 (E. & A. 1914) 29
Imbrie v. Marsh, 5 N.J. Super. 239 (App. Div. 1949).....36
In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 331 N.J. Super. 31 (App. Div. 2000) 34, 39
In re Attorney General's "Directive on Exit Polling: Media & Non-Partisan Pub. Interest Grps.," issued July 18, 2007, 200 N.J. 283 (2009) 34, 80
In re City Clerk of Paterson, 88 A. 694 (N.J. Sup. Ct. 1913).....passim
In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, Fourth Legislative Dist., 427 N.J. Super. 410 (Law Div.), aff'd, 210 N.J. 29 (2012).....39
Jersey City v. Kelly, 134 N.J.L. 239 (E. & A. 1946) 81
Kusper v. Pontikes, 414 U.S. 51 (1973) 66
Lautenberg v. Kelly, 280 N.J. 76 (Law Div. 1994).....59
League of Women Voters of Mich. v. Sec'y of State, 959 N.W.2d 1 (Mich. Ct. App. 2020) 35
Libertarian Party of Ark. v. Thurston, 962 F.3d 390 (8th Cir. 2020).....15
Madison v. State, 163 P.3d 757 (Wash. 2007).....40
Matter of Callahan, 93 N.E. 262 (N.Y. 1910).....passim
Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482 (2012)....82
Mont. Democratic Party v. Jacobsen, 518 P.3d 58 (Mont. 2022).....41
Mont. Democratic Party v. Jacobsen, Case No.: DV 21-0451, 2022 WL 16735253 (Mt. Dist. Ct. Sept. 30, 2022) 41
N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 138 N.J. 326 (1994).....56
N.J. Democratic Party, Inc., v. Samson, 175 N.J. 178 (2002).....60
N.J. State Bar Ass'n v. State, 387 N.J. Super. 24 (App. Div. 2006) 79
Norman v. Reed, 502 U.S. 279 (1992).....43, 53, 58, 66

Patriot Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections, 95 F.3d 253 (3d Cir. 1996) .....passim
Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609 (2000) 82
Quaremba v. Allan, 67 N.J. 1 (1975) 59
Randall v. Sorrell, 548 U.S. 232 (2006) 72
Reform Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections, 174 F.3d 305 (3d Cir. 1999) .....passim
Reynolds v. Sims, 377 U.S. 533 (1964) 34
Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47 (2006) 67
State v. Butterworth, 104 N.J.L. 579 (N.J. 1928) 74
State v. Hempele, 120 N.J. 182 (1990) 54
State v. Hunt, 91 N.J. 338 (1982) .....passim
State v. Melvin, 248 N.J. 321 (2021) 39
State v. Parker, 26 Vt. 357 (1854) 29
State v. Schmid, 84 N.J. 535 (1980) .....passim
State v. Williams, 93 N.J. 39 (1983) 57
Stevenson v. Gilfert, 13 N.J. 496 (1953) 36
Swamp v. Kennedy, 950 F.2d 383 (7th Cir. 1991) 18
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 45, 66
Tashjian v. Republican Party, 479 U.S. 208 (1986) 52, 66
Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) .....passim
Tully v. Edgar, 664 N.E.2d 43 (Ill. 1996) 40
Twin Cities Area New Party v. McKenna, 73 F.3d 196 (8th Cir. 1996) 17, 68, 71
Wesberry v. Sanders, 376 U.S. 1 (1964) 34
Williams v. Rhodes, 393 U.S. 23 (1968) .....passim
Worden v. Mercer Cty. Bd. of Elections, 61 N.J. 325 (1972) .....passim
Working Families Party v. Commonwealth, 209 A.3d 270 (Pa. 2019) 86, 87

Constitutional Provisions

N.J. CONST. art. I, ¶ 1 79

N.J. CONST. art. I, ¶ 2(a) 22, 28, 38, 40
N.J. CONST. art. I, ¶ 6 .....53, 57, 74
N.J. CONST. art. I, ¶ 18 .....53, 57, 73
N.J. CONST. art. II, § 1, ¶ 3(a) 34, 37, 40
MASS. CONST. (1780), art. XIX 76
N.Y. CONST. (1894), art. II, § 1 37

Statutes and Rules

L. 1903, c. 248, § 3.....15
L. 1907, c. 278, § 2.....13
L. 1920, c. 349.....14
N.J.A.C. 19:25-11.2.....15
N.J.S.A. 19:1-1.....15
N.J.S.A. 19:5-1.....15
N.J.S.A. 19:5-2.....15
N.J.S.A. 19:5-3.....15
N.J.S.A. 19:5-4.....15
N.J.S.A. 19:5-5.....15
N.J.S.A. 19:5-6.....15
N.J.S.A. 19:6-3.....15
N.J.S.A. 19:13-1.....15
N.J.S.A. 19:13-4.....2, 16, 59
N.J.S.A. 19:13-8.....2, 15
N.J.S.A. 19:14-2.....2, 16
N.J.S.A. 19:14-6.....15, 59
N.J.S.A. 19:14-8.....59
N.J.S.A. 19:14-9.....2, 16
N.J.S.A. 19:23-15.....2, 15
N.J.S.A. 19:23-17.....59
N.J.S.A. 19:45-1.....15

N.J.S.A. 19:49-2 59
N.J.S.A. 52:13H-4 15
R. 1:36-3.....41
R. 2:6-1(a)(2) 4

Other Authorities

Alexi McCammond & Andrew Solender, The Big Scrub, AXIOS (Aug. 31, 2022), https://perma.cc/39FH-P4J4 24

Andy Craig, The First Amendment and Fusion Voting, CATO INSTITUTE (Sept. 26, 2022), https://perma.cc/HYJ7-P3XK.....22

Benjamin D. Black, Developments in the State Regulation of Major and Minor Political Parties, 82 CORNELL L. REV. 109 (1996).....64

CARL E. PRINCE, NEW JERSEY'S JEFFERSONIAN REPUBLICANS: THE GENESIS OF AN EARLY POLITICAL MACHINE (1967) 76

Cassidy Reller, Learning from Fusing Party Independence, Informative Electoral Signals and Legislative Adaptation (Presented at Am. Pol. Sci. Conf. 2022), https://perma.cc/FPY8-LETY.....23

COREY BROOKS, LIBERTY POWER: ANTISLAVERY THIRD PARTIES AND THE TRANSFORMATION OF AMERICAN POLITICS (2016) 11

Daniel P. Tokaji, Gerrymandering and Association, 59 WILLIAM & MARY L. REV. 2159 (2018) 62

David Wildstein, Imperiale Was Only Independent Candidate to Win Beyond Local Level, N.J. GLOBE (Nov. 1, 2018), https://perma.cc/4QQU-8WJ7 6

Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 SUP. CT. REV. 95 .....19, 68

FEDERALIST NO. 10 (Madison) 45

Hon. Lynn Adelman, The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court, 56 IDAHO L. REV. 108 (2019).....12, 19

Hon. William J. Brennan, Jr., State Constitutions and the Protections of Individual Rights, 90 HARV. L. REV. 489 (1977).....41

Is Our Democracy Under Threat? Interview with John Farmer, RUTGERS TODAY (Oct. 26, 2022), https://perma.cc/AKT5-5J44 20

J.J. Gass & Adam Morse, BRENNAN CENTER FOR JUSTICE, More Choices, More Voices: A Primer on Fusion (Oct. 2, 2006), https://perma.cc/6TMP-BEW4 .....47, 70

James N. Druckman et al., Affective polarization, local contexts and public opinion in America, 5 NATURE 28 (2021), https://perma.cc/P6PE-S6U5 20

Jeffrey Mongiello, Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture, 41 SETON HALL L. REV. 1111 (2011).....15, 36

JOHN ADAMS, LETTER TO JONATHAN JACKSON, OCTOBER 2, 1780 45

JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES (1776) IN 4 PAPERS OF JOHN ADAMS (1979).....76

John B. Wefing, The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism, 29 RUTGERS L.J. 701 (1998) 31, 40

JOHN SIDES ET AL., THE BITTER END: THE 2020 PRESIDENTIAL CAMPAIGN AND THE CHALLENGE TO AMERICAN DEMOCRACY (2022) 20

Joshua A. Douglas, A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations That Adversely Impact an Individual's Right to Vote, 75 GEO. WASH. L. REV. 372 (2007) 65

Kevin Arlyck, The Founders' Forfeiture, 119 COLUM. L. REV. 1449 (2019) ...77

LISA JANE DISCH, THE TYRANNY OF THE TWO-PARTY SYSTEM (2002) 89

N.J. Moderate Party, 2023 Plans (Nov. 2022), https://perma.cc/DB9Q-8L7T .. 7

NEW AMERICA, New Jersey Voters on Political Extremism, Political Parties, and Reforming the State's Electoral System (Nov. 2022), https://perma.cc/D7EF-N9KD 9

Nikolas Bowie, The Constitutional Right of Self-Government, 130 YALE L.J. 1652 (2021).....57, 75, 76

NOAM GIDRON ET AL., AMERICAN AFFECTIVE POLARIZATION IN COMPARATIVE PERSPECTIVE (Nov. 2020, Cambridge Univ. Press) 46

Peter Argersinger, "A Place on the Ballot": Fusion Politics and Antifusion Laws, 85 AM. HIST. REV. 287 (1980) 10, 11, 13

PROCEEDINGS OF THE N.J STATE CONSTITUTION CONVENTION OF 1844 (1942), https://perma.cc/C5CZ-39CY 29, 30, 77

Rachel Kleinfeld, The Rise of Political Violence in the United States, 32 JOURNAL OF DEMOCRACY 160 (2021) 21, 46

RALPH S. BOOTS, THE DIRECT PRIMARY IN NEW JERSEY (1917).....13, 58

Renee Steinhagen, Giving New Jersey's Minor Political Parties a Chance: Permitting Alternative Voting Systems in Local Elections, 253 N.J. LAW. 15 (Aug. 2008) 5, 16

Richard L. Hasen, Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition, 1997 SUP. CT. REV. 331 19

Richard L. Hasen, The Democracy Canon, 62 STAN. L. REV. 69 (2009) 60

ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION (2012).....29, 31, 40, 54

RUDOLPH J. PASLER & MARGARET C. PASLER, THE NEW JERSEY FEDERALISTS (1975).....10, 77

Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 STAN. L. REV. 643 (1998) 19

William Kibler, I'm Suing N.J. Because I Shouldn't Have to Vote for a Democrat or a Republican, STAR-LEDGER (Dec. 1, 2022), https://perma.cc/H73C-H8XY 8, 9

William R. Kirschner, Fusion and the Associational Rights of Minor Parties, 95 COLUM. L. REV. 683 (1995).....16

PRELIMINARY STATEMENT

The Moderate Party, Richard Wolfe, Michael Tomasco, and William Kibler ("Appellants") seek to exercise fundamental rights that are guaranteed under the New Jersey Constitution and essential to a healthy democratic society. They want to nominate competitive, politically moderate candidates on the ballot, even if a candidate has also been nominated by another party. For decades, parties in New Jersey routinely "cross-nominated" the same candidate, yet laws passed a century ago for the express purpose of stifling electoral competition prevent the Moderate Party from doing so today. This appeal challenges the legality of those laws under the New Jersey Constitution's right to vote, right to free speech and political association, right to assemble and make opinions known to representatives, and right to equal protection.

"Fusion voting" is when a candidate is cross-nominated on the ballot by more than one party. As with all other nominations, a cross-nominated candidate appears on a party's ballot line. Voters can vote for the cross-nominated candidate on the party line of their choice. Each party's vote sum for a candidate is tallied separately—to allow for a clear breakdown of the candidate's support—before being combined to determine the total votes cast for that candidate. Throughout the 1800s and early 1900s, fusion voting flourished in New Jersey and throughout the country, permitting minor parties and their voters

to assume a meaningful role in politics. In New York and Connecticut, fusion remains legal and allows voters who are not Democrats or Republicans to associate and constructively participate in the political process.

Starting in 1921, the New Jersey Legislature passed a number of "anti-fusion" laws to prohibit cross-nominations and insulate the Democratic and Republican Parties from electoral competition. These laws remain codified today at N.J.S.A. 19:13-4, 19:13-8, 19:14-2, 19:14-9, and 19:23-15. The anti-fusion laws severely and impermissibly burden the rights of Appellants to nominate and vote for their preferred candidates, to associate with one another to advance shared political goals, and to act collectively to convey their political opinions to their representatives. These laws deny equal protection by relegating Appellants to an electoral under-class: their fundamental political rights are severely burdened, while the major parties and their respective supporters suffer no harm and are instead afforded disproportionate electoral influence. Despite the electorate's overwhelming desire for more electoral choices and widespread frustration with the two major parties, anti-fusion laws have predestined every minor party in New Jersey to political failure.

Under binding New Jersey precedent, strict scrutiny is used to evaluate whether state laws violate fundamental political rights guaranteed under the New Jersey Constitution. Under that standard, there are no compelling state

interests that can justify the onerous burdens imposed by the anti-fusion laws. Nor are these laws narrowly tailored, given the availability of less restrictive means for addressing any legitimate concerns. Even under a burden-interest balancing test akin to the federal Anderson-Burdick standard, no state interests are sufficiently weighty to warrant these onerous burdens. Notably, the record on appeal debunks the hypothetical justifications advanced in prior cases to support anti-fusion laws in other states.

New Jersey courts have a long tradition of vigorously defending the fundamental rights enshrined in the State Constitution. The judiciary's duty to safeguard these rights takes on particular importance when the legislature enacts laws—like the anti-fusion laws here—that fundamentally distort the political process to entrench the status quo. With political extremism and hyper-polarization putting democracy itself in peril, the urgency of ensuring a free, open, and equal politics has never been greater. Accordingly, Appellants respectfully ask the court to declare the anti-fusion laws unconstitutional.

PROCEDURAL HISTORY

On June 7, 2022, the Moderate Party submitted petitions signed by Wolfe, Kibler, Tomasco, and hundreds of other voters nominating Tom Malinowski as the party's candidate in the 7th Congressional District. (Pa304-69.) On June 8, Respondent Secretary Way denied the petitions because Malinowski had also

sought the Democratic Party's primary nomination. (Pa1.) On July 8, the Moderate Party requested reconsideration (Pa546-49), which the Secretary denied 11 days later. (Pa2.)[1] The Appellants filed timely notices of appeal (Pa3-31), which were consolidated. (Pa550-51.) The court granted the New Jersey Republican State Committee's motion to intervene (Pa552-59) and Appellants' motion to file a combined, ninety-page opening brief. (Pa550-51.)

STATEMENT OF FACTS

A. Appellants Are Moderate New Jersey Voters Working Together to Elect Moderate Candidates and Reduce Political Extremism

A healthy democracy must permit like-minded individuals to come together in support of policies, principles, and candidates to further common goals. Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000). Parties, voters, and candidates must each have the ability to play a meaningful role in the political process. Anderson v. Celebrezze, 460 U.S. 780, 792-94 (1983). This necessarily requires avenues for new ideas and new faces to enter the democratic marketplace. Id. Consistent with these basic and fundamental principles, a group of Republican, Democratic, and unaffiliated New Jersey voters formed the Moderate Party.

[1] Extensive legal briefing was submitted with the initial petition and the application for reconsideration and are referenced at Pa33, ¶¶ 3, 7 and Pa38, ¶¶ 3, 7; those briefs are omitted from the Appendix per R. 2:6-1(a)(2).

The Moderate Party aims to protect "the rights of moderate, centrist, and unaffiliated voters" by nominating candidates "who hold centrist and moderate positions." (Pa56.) By not just supporting, but also nominating such candidates, they boost candidates who will "reach across the aisle to compromise on contentious issues." (Pa47.) They want to elect candidates who demonstrate an unshakable commitment to democracy, the rule of law, and the time-honored principle of accepting defeat. At its core, the Moderate Party wants to support candidates who put the public good over any partisan agenda. (Pa41-74.)

Crucially, the Moderate Party and its supporters do not want to nominate protest candidates destined to fail. (See Pa47.) New Jersey's federal and state races are single-winner, plurality elections, which all but ensure that only two candidates can be competitive.[2] A key reason is that most voters engage in "strategic voting": even when their top preference is a minor-party candidate, but one who is unlikely to win, voters will instead use their ballot to minimize the chances that their least-preferred major-party candidate will be elected. This means voting for the lesser of two evils: the other major party candidate.[3] As a

[2] This dynamic is known as Duverger's Law. Most other advanced democracies use multi-winner legislative districts, which permit a greater number of candidates to be competitive and therefore permit candidates from multiple parties to routinely win seats. Renee Steinhagen, Giving New Jersey's Minor Political Parties a Chance: Permitting Alternative Voting Systems in Local Elections, 253 N.J. LAW. 15, 16 nn.9, 12 (Aug. 2008).

[3] Id. at 15 & n.4.

result, Democratic and Republican candidates have won every federal and state election in New Jersey over the past fifty years.[4] This dynamic artificially inflates support for major parties and impairs minor party formation and growth.

The Moderate Party is particularly concerned that standalone candidates could be spoilers and pull votes away from competitive, moderate candidates. (Pa47, 81, 156-57, 197, 213, 240.) Instead, like minor parties routinely do in New York and Connecticut where fusion is permitted, they want to play a constructive role by cross-nominating competitive candidates who share their values. (Pa47-52.) Accordingly, the Moderate Party assessed the two leading candidates in the 7th Congressional District and decided to nominate Rep. Malinowski because he "exemplifies the ideals of the Moderate Party." (Pa46-47.)[5] Putting Malinowski on the Moderate Party ballot line as its nominee was mission-critical. It was not sufficient to simply "endorse" Malinowski and urge voters to support him on the Democratic line. Moderate Party supporters knew that "vot[ing] for him on the Democratic Party line" would "inadvertently[] convey [their] support for the policies of the Democratic Party as a whole—many of which [they] do not support." (Pa48.) Indeed, many moderate and unaffiliated voters would sit out the race if forced to support the Democratic

[4] David Wildstein, Imperiale Was Only Independent Candidate to Win Beyond Local Level, N.J. GLOBE (Nov. 1, 2018), https://perma.cc/4QQU-8WJ7.
[5] He readily accepted the nomination. (Pa50; see Pa237-31.)

Party to vote for Malinowski, as state law requires. (Id.; see Pa80, 138.)[6]

Richard Wolfe believes the Moderate Party's approach is vital to combat the extremism that has subsumed our politics. Wolfe, a tax lawyer, is a lifelong "moderately conservative Republican," but has been "politically homeless" as a result of the Republican Party "mov[ing] away from its core values" and repeatedly embracing extreme and dangerous views. (Pa42-44.) The Moderate Party offers a new way. It is a "[p]olitical home for centrist voters"—like Wolfe—"who reject extremist Democratic and Republican officeholders and candidates." (Pa46.) Wolfe believes that the Moderate Party's commitment to nominating competitive candidates ensures that voters like him won't be "tilting at windmills" in support of quixotic candidates that are destined to lose. (Pa47.) In Wolfe's view, today's political stakes are "[f]ar too important to cast what amounts to a symbolic vote." (Id.)

Michael Tomasco had likewise been a "reliable Republican voter." (Pa77.) Since voting for Donald Trump in 2016, Tomasco feels that "the Republican Party seemingly did everything possible to push [him] away." (Pa78.) Yet, even when the alternative is a far-right extremist, Tomasco is

[6] The Moderate Party plans to cross-nominate competitive center-right and center-left candidates in the 2023 state and local elections, and in all elections thereafter. (Pa51); N.J. Moderate Party, 2023 Plans (Nov. 2022), https://perma.cc/DB9Q-8L7T.

"reluctant[]" to vote Democratic, saying, "I know that this vote sends a signal that I support everything the party stands for, and believe me, I don't." (Pa79.) He insists that if "the major parties continue to move to polar extremes" and "the only way to cast a vote for a competitive candidate is to vote Democratic or Republican," "it seems entirely plausible that I could be forced to abstain from voting." (Pa80.) Instead of "throwing away a vote on a [minor] candidate who is guaranteed to lose," Tomasco wants a Moderate Party ballot line to vote for competitive candidates and to send a "clear message of support" for "moderation, compromise, and a commitment to democracy." (Pa79-81.)

William Kibler is another moderate stranded between the two major parties. He is a West Point graduate and combat veteran who believes, as did President Reagan, in "peace through strength." William Kibler, I'm Suing N.J. Because I Shouldn't Have to Vote for a Democrat or a Republican, STAR-LEDGER (Dec. 1, 2022), https://perma.cc/H73C-H8XY. He supports fiscal prudence and reasonable protections for law-abiding gun owners. Id. He also is a staunch environmentalist and works at a non-profit fighting to keep New Jersey's waterways clean. Id. Kibler unambiguously rejects the idea that recent elections were rigged. Id. With these cross-cutting views, Kibler finds it hard to advance his perspective with his ballot. Id. A vote for a moderate candidate on a major party line implies unquestioning support for a platform he opposes. Id.

In some races, when his preferred choice was assured victory, he has voted for a Green Party candidate hoping to bolster the environmentalist platform. Id. Yet, he knows that voting for a standalone minor party candidate in a close race can backfire and undermine any expressive purpose of that vote. Id.

Wolfe, Tomasco, and Kibler are not alone in these views. In the 7th Congressional District, more voters are unaffiliated than are registered with either the Democratic or Republican Party. Statewide, the trends are similar: nearly 37% of all voters are unaffiliated. (Pa49, nn.1&2.) A recent report by the think-tank New America studying the New Jersey electorate found that most voters are both frustrated with the rigid nature of today's two-party system and unwilling to support standalone minor party candidates. If fusion were permitted, roughly two-thirds of moderates and independents say they would likely vote on a centrist minor party's ballot line for a cross-nominated competitive candidate.[7] In so doing, they would be building on a rich, and ongoing, American tradition.

---

[7] NEW AMERICA, New Jersey Voters on Political Extremism, Political Parties, and Reforming the State's Electoral System (Nov. 2022), https://perma.cc/D7EF-N9KD (finding that roughly two-thirds of N.J. voters believe the two major parties fail to "represent[] the values, beliefs, and policy preferences" of the electorate and therefore want more choices on the ballot; nearly half of N.J. voters have wanted to vote for a standalone minor party candidate, but have refrained from doing so for strategic reasons; and that nearly three-quarters of N.J. voters believe that votes for standalone minor party candidates are wasted).

B. Fusion Was a Widespread and Positive Force in Elections, Both in New Jersey and Nationally

Fusion is neither a modern concept, nor unique to New York and Connecticut. For much of the 1800s and early 1900s, cross-nominations were an inherent and unquestioned feature of elections in New Jersey and throughout the country. (Pa212.) Then, as now, the key function of parties was to nominate and support the election of their preferred candidates. Sometimes, a candidate would be nominated by one party, but often would be cross-nominated by multiple parties. Peter Argersinger, "A Place on the Ballot": Fusion Politics and Antifusion Laws, 85 AM. HIST. REV. 287, 288–90 (1980) (Pa371-73);[8] (Pa272-74).

As early as the 1820s, minor parties routinely fused with the out-of-power major party in an attempt to form a majority coalition. (Pa371-73); RUDOLPH J. PASLER & MARGARET C. PASLER, THE NEW JERSEY FEDERALISTS 214 (1975) (Pa461). In the 1850s, minor abolitionist parties and cross-nominations played a key role in the collapse of the Whigs and emergence of the Republicans as the

[8] The Appendix includes reprints of press columns, book excerpts, and academic articles which are cited in this brief and might not otherwise be readily accessible. (See Pa370-464.) These materials were not included in the record in the agency proceedings below and have been included in the Appendix for the convenience of the court and parties, upon consultation with the Clerk's Office.

first major party to forcefully oppose slavery. (Pa184.)[9] After the Civil War, minor parties fused with Republicans in the South to challenge Jim Crow Democrats and Democrats in the North to challenge Gilded Age Republicans. Argersinger, supra at 288-90 (Pa371-73). "Between 1878 and 1892 minor parties held the balance of power at least once in every state but Vermont, and from the mid-1880s they held that power in a majority of states in nearly every election, culminating in 1892 when neither major party secured a majority of the electorate in nearly three-quarters of the states." Id. at 289 (Pa372).

Fusion allowed voters and parties to express their views in a manner that more fully captured the range of opinions throughout the electorate. Id. at 288-90 (Pa371-73). Crucially, fusion ensured that dissenting voices would not be reduced to a mere "protest vote"; instead, fusion voting made it possible that minor party "leaders could gain office, and that their demands might be heard." Id. (Pa371-73). Fusion allows voters to cast their ballot for a candidate that they would not support if they had to vote for that person on the ballot line of a major party. At the same time, fusion enables voters to form alliances to put a check on the dominant party in power. Id. (Pa371-73). In this role, minor parties "spurr[ed] public awareness of new issues and crises," including efforts by the

[9] See COREY BROOKS, LIBERTY POWER: ANTISLAVERY THIRD PARTIES AND THE TRANSFORMATION OF AMERICAN POLITICS 194-97 (2016) (Pa427-28).

Liberty Party to abolish slavery and the Workingman's Party to establish the 10-hour day decades later, among numerous examples. (Pa184.)

New Jersey was no exception, with parties fusing routinely in local, state, and federal elections. (Pa272-74.) Fusion candidates won many races and made countless others more competitive. (Id.) Mahlon Pitney, who later served on the U.S. Supreme Court, was first elected to Congress with cross-nominations from two parties. (Id.) It is this rich tradition which the Moderate Party now wishes to carry forward.

C. Fusion Was Outlawed Starting in the Late 1880s to Preserve Democratic and Republican Party Control

In the late 1880s, state governments began asserting "unprecedented control over the electoral process" with state-printed ballots, ending the practice of voters casting party-printed ballots. Hon. Lynn Adelman, The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court, 56 IDAHO L. REV. 108, 109-10 (2019). Unfortunately, this new system gave the major party controlling a state government previously unimaginable power to manipulate the ballot and electoral rules to institutionalize their electoral advantage. Id.

Banning fusion was a common strategy. The major parties implemented bans to deprive all other parties from utilizing their most effective means of joining together to challenge their power. Id. One Republican state legislator

famously admitted the prevailing reason for the fusion bans: "We don't propose to let the Democrats make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. We can whip them single-handed, but don't intend to fight all creation." Argersinger, supra at 296 (Pa379).

In 1907, the New Jersey state legislature followed the trend, passing a law to prohibit fusion voting. L. 1907, c. 278, § 2. However, just four years later New Jersey Governor Woodrow Wilson mobilized the legislature to pass the "Geran Law," a landmark reform which expressly re-legalized fusion in an omnibus effort to enhance the direct influence of voters and shield them from the undue influence of political machinery. RALPH S. BOOTS, THE DIRECT PRIMARY IN NEW JERSEY 31-33 (1917) (Pa397-99).[10] After a brief hiatus, fusion was back, with two Republican-Progressive cross-nominated candidates immediately running in the 1912 congressional elections. (Pa273.)

Voters across the political spectrum shared Wilson's view that fusion was central to a healthy democracy—as did courts. In 1910 and 1911, New York's top court struck down legislative attempts to ban fusion, recognizing that fusion was protected under the New York Constitution. Matter of Callahan, 93 N.E.

[10] Among other changes, the Geran Law mandated direct party primaries for all offices, allowing party voters to pick the nominees that would appear on the general election ballot, rather than by a corrupt, backroom process run by party bosses with no voter accountability. BOOTS, supra at 31-33 (Pa397-99).

262 (N.Y. 1910); Hopper v. Britt, 96 N.E. 371 (N.Y. 1911). And in 1913, the Supreme Court of New Jersey—then, an intermediate appeals court—ruled that, if the Geran Law hadn't already superseded the 1907 fusion ban, the ban would nonetheless likely violate the New Jersey Constitution. In re City Clerk of Paterson, 88 A. 694, 695 (N.J. Sup. Ct. 1913).

Nevertheless, fusion remained deeply unpopular among one key constituency: "machine politicians." (Pa462.) A press account from 1917 emphasized that dominant party politicians "were so hard hit [under the Geran law and] have been squirming ever since and devising ways to extract the teeth from that law and disarm the independent voters of New Jersey." Id. Another paper noted that after years of failed efforts to unwind the law, in 1920 the Legislature "jammed through by steam roller methods the bill of the machines," delivering the long-sought "destruction of the Geran election reform law." (Pa463); see L. 1920, c. 349. These efforts were "intended to be discriminatory in favor of Republican and Democratic organizations," at the cost of minor parties that had long been important electoral actors. (Pa464.)

The legislature's first step was to make it effectively impossible for minor parties to qualify as a statutory "political party." To qualify, an aspiring party must receive at least 10% of all votes cast across the 80 General Assembly races

in the general election. N.J.S.A. 19:1-1.[11] And only statutory parties are afforded critical institutional advantages like a state-funded primary election (N.J.S.A. 19:5-1, 19:45-1), as well as pivotal ballot advantages, such as preferential position and a dedicated party column on the general election ballot that visually links its candidates together in prominent, large-point print. N.J.S.A. 19:5-1, 19:14-6.[12] All other parties must submit a signature petition for each candidate they nominate, N.J.S.A. 19:13-1, and they lack the right to a party column header or to have their nominations grouped. (See, e.g., Pa293, 297.)

With minor parties weakened, major party leaders in the legislature pushed through anti-fusion laws. Mongiello, supra at 1122-24 & nn.73-80. The substance of these laws, which remain codified today, prohibit: candidates from accepting multiple nominations (N.J.S.A. 19:13-8, 19:23-15); multiple parties or groups of petitioners from nominating the same candidate (N.J.S.A. 19:13-

---

[11] Previously, statutory status could be attained in a specific jurisdiction by receiving 5 percent of the vote in the General Assembly election(s) in that area. L. 1903, c. 248, § 3; see also Jeffrey Mongiello, Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture, 41 SETON HALL L. REV. 1111, 1123 n.73 (2011). Unlike other states, New Jersey does not permit minor parties to gain statutory status via signature gathering. Cf. Libertarian Party of Ark. v. Thurston, 962 F.3d 390, 404 (8th Cir. 2020).

[12] Other off-ballot benefits include (but are not limited to) creation of state, county, and municipal party committees that directly support party nominees (N.J.S.A. 19:5-2 to -6); enhanced limits on campaign finance contributions (N.J.A.C. 19:25-11.2); and membership or an equal share of adherents on various boards or other government entities. E.g., N.J.S.A. 19:6-3 (County Board of Elections); N.J.S.A. 52:13H-4 (Council on Local Mandates).

4); and candidates from appearing more than once on the ballot. N.J.S.A. 19:14-2, 19:14-9.

In New Jersey and other states that banned fusion, minor parties predictably withered and the two major parties cemented their control over the political domain.[13] Yet even in this regard New Jersey stands out as an outlier for its "unique hostility to minor parties": not a single minor party has achieved statutory party status in New Jersey in the century since these laws were passed. (Pa185-86.)[14] The Democratic and Republican Parties have long enjoyed unique state-granted benefits denied all others.

New York's experience with fusion—where its legal status has permitted a small number of minor parties to flourish and routinely influence elections—underscores the stifling impact of New Jersey's anti-fusion laws on political association and participation. Without the votes on the Liberal Party line, John F. Kennedy would have lost New York—and the presidency—to Richard Nixon in 1960. Likewise, Franklin Roosevelt and Ronald Reagan each relied on votes from a minor party's ballot line to carry the Empire State.[15] In Connecticut,

---

[13] Steinhagen, supra at 16 n.15.

[14] By contrast, minor parties routinely qualify in nearly every state. After New Jersey, Virginia and Pennsylvania are the most hostile to minor parties, but even there, minor parties have qualified in recent decades. (Pa185-86.)

[15] William R. Kirschner, Fusion and the Associational Rights of Minor Parties, 95 COLUM. L. REV. 683, 684 & n.2 (1995).

where fusion remains legal, minor parties have thrived and played a key role in recent decades. (Pa136-40, 172, 177-81, 186, 200-01, 203-08, 212, 243-46.) In both states, fusion has been easy to understand and administer and is widely embraced by voters. (Infra pp.25-27.)

D. Federal Courts Split on Whether Anti-Fusion Laws Violate the U.S. Constitution

Recognizing that fusion was necessary for voters outside of the two major parties to meaningfully participate in the political process, aspiring minor parties challenged several state fusion bans under the U.S. Constitution in the 1990s. The Eighth Circuit struck down a ban for impermissibly burdening associational rights, concluding that "[t]he burden on the New Party's associational rights is severe" and the "ban on multiple party nomination is broader than necessary to serve the State's asserted interests, regardless of their importance." Twin Cities Area New Party v. McKenna, 73 F.3d 196, 198-99 (8th Cir. 1996). The Third Circuit reached the same conclusion, holding that "[t]he state [anti-fusion] laws severely burden the Party's right to choose its standard-bearer and build its political organization, without supporting a compelling countervailing state interest" and that such laws "facially discriminate against minor political parties and their supporters." Patriot Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections, 95 F.3d 253, 270 (3d Cir. 1996). A divided Seventh Circuit upheld Wisconsin's ban, with Judges Easterbrook, Posner, and Ripple writing

separately to explain why the law was unconstitutional. Swamp v. Kennedy, 950 F.2d 383, 388-89 (7th Cir. 1991) (Ripple, J., dissenting from denial of rehearing en banc) ("A state's interest in political stability does not give it the right to frustrate freely made political alliances simply to protect artificially the political status quo.").

On a thin factual record—one entirely unlike the record here—the U.S. Supreme Court reversed the Eighth Circuit in 1997, holding that Minnesota's fusion ban did not violate the associational rights guaranteed by the First and Fourteenth Amendments. Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997). The majority ruled that prohibiting a party from nominating its preferred candidate imposed merely a modest burden on the party's associational rights and that two alleged state interests adequately justified the burden. Id. at 359-63. First, the majority credited hypothetical concerns (lacking any supporting evidence and dispelled by the historical record) that permitting fusion could lead to an over-proliferation of new parties and turn the ballot into "a billboard for political advertising." Id. at 365. Second, despite contrary precedent, the majority held that a state legislature could ban fusion to "favor the traditional two-party system" in the pursuit of "political stability." Id. at 367.

Justices Stevens, Souter, and Ginsburg dissented, explaining that a party's ability to nominate its preferred candidate on the ballot was central to its

associative purpose and that the pretextual justifications for banning fusion were unsubstantiated, unpersuasive, and illegitimate. Id. at 370-82 (Stevens, J., dissenting); id. at 382-84 (Souter, J., dissenting). The majority was widely criticized by the country's foremost voting rights experts for, among other reasons, abruptly departing from settled principles to defend a Democratic and Republican duopoly against natural electoral competition.[16]

E. A Rigid Two-Party System is Driving Extreme Polarization and Corroding Our Democracy

Central to the majority ruling in Timmons was a key factual presumption—an exclusionary two-party system would facilitate "political stability"—that has proven incorrect in the intervening years. After decades of ideological overlap between the two major parties and a broad diversity of views on each side, the Democratic and Republican Parties have become ideologically distinct and substantially more internally homogenous. (Pa147-49.) This sorting has produced a dangerous, self–reinforcing cycle of polarization, as each side reaffirms a mutually exclusive vision of political, cultural, and personal identity,

---

[16] E.g., Richard L. Hasen, Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition, 1997 SUP. CT. REV. 331, 331-32; Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 STAN. L. REV. 643, 673-74 (1998); Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 SUP. CT. REV. 95, 121-25. A U.S. district judge recently authored an essay explaining the Court's errors. Hon. Lynn Adelman, supra at 108-18.

and Democrats and Republicans increasingly view the other side as an illegitimate and existential threat. (Pa143-45.) Animosity toward the other side often plays a central role in shaping new political positions and mobilizing support. (Pa154.)[17] Expression of internal dissent is often perceived as alignment with a political enemy, and, particularly on the right, moderating voices are increasingly exiled. (Pa143.) And with only two electorally relevant parties competing to win single-winner plurality races, every political conflict is necessarily zero-sum. (Pa151-53.) The self-reinforcing nature of these problems suggests they are likely to get even worse. (Pa153-55.)[18]

Both major parties are casting our elections in existential terms and giving a platform to ideas that were, just a generation ago, far outside of the mainstream.[19] Of particular concern is the growing share of leaders on the right who are willing to take whatever measures they deem necessary to win—

---

[17] See also James N. Druckman et al., Affective polarization, local contexts and public opinion in America, 5 NATURE 28 (2021), https://perma.cc/P6PE-S6U5 (exploring connection between partisan animosity and formation of new policy preferences).

[18] In Dr. Drutman's view, these trends are largely explained by the sorting of voters by geography, demographics, and values; the nationalization of media and politics; and extremely narrow overall partisan margins. (Pa146-55.) Other scholars posit alternative causal explanations. E.g., JOHN SIDES ET AL., THE BITTER END: THE 2020 PRESIDENTIAL CAMPAIGN AND THE CHALLENGE TO AMERICAN DEMOCRACY (2022). But the fact that these changes have occurred is beyond dispute.

[19] See Is Our Democracy Under Threat? Interview with John Farmer, RUTGERS TODAY (Oct. 26, 2022), https://perma.cc/AKT5-5J44.

including subverting or abandoning democracy itself. (Pa143-46.) These dynamics played a substantial role in the violent attack on the U.S. Capitol on January 6, 2021. (Pa238.) And they continue to fuel ongoing efforts to delegitimize the results of the 2020 presidential election, as well as the 2021 gubernatorial election here in New Jersey.[20]

Put simply, in the twenty-five years since Timmons, the rigid two-party system has not produced "political stability." Rather, it has accelerated political polarization and extremism and made compromise and conciliation more difficult. Not coincidentally, politically-motivated violence is on the rise.[21]

F. Fusion Would Strengthen Democracy in New Jersey by Making Politics More Responsive and Representative

Removing New Jersey's ban on cross-nominations would allow voters to meaningfully and constructively associate outside of the two major parties. A third or potentially fourth political party would likely become electorally relevant, making New Jersey's two-party system less rigid and exclusionary and softening the most dangerous aspects of today's zero-sum politics. (Pa156-61,

[20] Rep. Steve Scalise, Paul Pelosi, and Heather Heyer are just a few of the countless elected officials, relatives, and ordinary citizens who have been targets of such violence in recent years.

[21] See Rachel Kleinfeld, The Rise of Political Violence in the United States, 32 JOURNAL OF DEMOCRACY 160 (2021).

256-70.)[22] One Connecticut official credits "the presence of thoughtful and engaged fusion-oriented minor parties [for] provid[ing] the stability and balance" in the Constitution State that is "increasingly absent from our national politics." (Pa139-40.)

The certifications of former Connecticut Secretary of State Miles Rapoport, New York City Comptroller Brad Lander, other cross-nominated officials, and leaders of influential minor parties in New York and Connecticut, as well as the reports by Dr. Lee Drutman and Dr. Jack Santucci, explain the myriad additional ways re-introducing fusion would ensure that "[a]ll political power [remains] inherent in the people." N.J. CONST. art. I, ¶ 2(a).[23] By permitting minor parties to cross-nominate, fusion empowers officials to better represent the will of the electorate. (E.g., Pa136-40, 156-61, 171-73, 178-81, 198-200, 203-08; see also Pa47-52, 79–80.) Election results are more

---

[22] A scholar at the Cato Institute has noted that "[i]n an age of hyper-polarization, restoring fusion offers an important way to break up the strict duopoly of American politics." Andy Craig, The First Amendment and Fusion Voting, CATO INSTITUTE (Sept. 26, 2022), https://perma.cc/HYJ7-P3XK.

[23] Miles Rapoport, former Connecticut Secretary of State (Pa203-18); Brad Lander, NYC Comptroller (Pa282-86); James Albis, former Connecticut State Representative (Pa136-40); Joseph Sokolovic, member of Bridgeport Public Schools Board of Education (Pa177-81); Michael Telesca, chairman of the Independent Party of Connecticut (Pa243-54); Karen Scharff, former co-chair of NY Working Families Party (Pa168-75); William Lipton, former state director of NY Working Families Party (Pa196-201); Dr. Lee Drutman (Pa142-66); Dr. Jack Santucci (Pa256-70). A Brennan Center for Justice report also discusses several of these points. (Infra p.48 & n.46.)

informative when voters can specify between nominating parties for competitive candidates; when a candidate receives a meaningful share of their votes on a minor party line, that sends a clear signal that the minor party's agenda reflects the values and priorities of a sizable segment of the electorate. (E.g., Pa137-38, 204-05, 212, 283-86.) Elected officials act accordingly, adjusting their priorities and changing their legislative behavior based upon a better understanding of their constituency's preferences. (Id.)[24] When an official has a minor party's cross-nomination, their electoral future is no longer tied solely to "unquestioning fidelity" to the major party leadership on all issues, and they can leverage their minor party support to shape the major party platform. (Pa205; see also Pa137-39, 171-74, 178-81, 196-201, 283-86, 244-46.)

Cross-nominations also provide voters with more accurate and nuanced information about candidates at the most crucial point of the voting process. (E.g., Pa137-38, 283-86, 178-79.) For example, a Moderate Party cross-nomination highlights which candidate in a race is more centrist precisely when many moderate voters are deciding whom to support. Without this information, generalized views of the two major parties can be controlling, even when one

[24] See Cassidy Reller, Learning from Fusing Party Independence, Informative Electoral Signals and Legislative Adaptation (Presented at Am. Pol. Sci. Conf. 2022), https://perma.cc/FPY8-LETY (explaining how cross-nominations shape legislative conduct).

candidate is much closer to the center. So long as the Moderate Party cannot distinguish its nominees on the ballot, some centrist voters will struggle to discern which candidates are truly moderate given that many candidates attempt to conceal controversial positions after winning their major party's primary.[25]

A minor party's cross-nomination can engage "voters disillusioned by the two-party system," "giv[ing] a greater voice to citizens who feel alienated from the political process" and thus increase overall participation. (Pa137, 139, 159-61, 173, 207-08, 285.) Fusion also provides voters with "an effective way to have [their] voices heard on major issues," and allows them to "see the direct impact of political engagement on their lives . . . [which] reduces alienation and encourages people to see that government can take constructive actions." (Pa173.) Keeping voters "committed to representative government as the means of resolving our many differences" is crucial, because "[o]therwise, people might entertain dangerous alternatives." Kibler, supra.

Fusion would also make more elections competitive, as cross-nominations by the Moderate Party expand the persuadable share of the electorate who would otherwise judge candidates only on their major party affiliation. (Pa159-61.)

---

[25] E.g., Alexi McCammond & Andrew Solender, The Big Scrub, AXIOS (Aug. 31, 2022), https://perma.cc/39FH-P4J4 ("Republican candidates around the country are trying to disappear the hardline anti-abortion stances they took during their primaries.").

Today, many voters' strong dislike of one of the major parties categorically precludes their support for that party's nominees. Id. A Moderate Party cross-nomination would signal that there is more to a candidate than their affiliated major party. And the separate ballot line would permit voters to focus on the quality of the individual candidate, apart from negative views on the affiliated major party. Id. These dynamics could substantially increase the pool of potential voters willing to consider and support a cross-nominated candidate, therefore rendering more elections more competitive. Id.

G. Fusion Would Be Simple and Easy to Administer in New Jersey

In addition to its salutary effects for democracy, bringing fusion back to New Jersey would be, as a practical matter, straightforward. Princeton Professor Andrew W. Appel has examined the voting machines and election management systems used by each county in New Jersey and found that all have been used in another state with fusion, meaning that "the voting equipment used in New Jersey can accommodate fusion voting."[26] (Pa84-88.) He further concluded that any "voting machines that New Jersey might purchase in the future" would likewise accommodate fusion, given that "the major voting-machine vendors

[26] Professor Appel is a leading electoral scholar and has testified about election technology before the U.S. House of Representatives, the New Jersey Legislature, and the Superior Court of New Jersey, and has been qualified as an expert on voting machines in federal and state court. (Pa84; see Pa89-100.)

sell in a national market, in which three states already use fusion voting," so "new voting systems are designed to accommodate fusion voting." (Pa84.)[27]

New Jersey's ballots can also accommodate cross-nominations. The record contains a number of illustrative ballots comparing how the November 2022 election would look with or without cross-nominations. (Pa288-303.) As is self-evident from these visuals, the addition of the Moderate Party's nomination neither crowds the ballot nor creates confusion. Indeed, if the Moderate Party had instead nominated a standalone candidate in the 7th Congressional District, which it could have done under current law, the ballot would look nearly identical to the fusion examples, apart from a different candidate name appearing on the Moderate Party line. (Pa295, 297, 301, 303.)

Ballot design expert Whitney Quesenbery examined closely analogous ballots from New York (where fusion is routine) to confirm that New Jersey's ballots can readily be adopted to permit cross-nominations. (Pa220-35.) Her "professional opinion [is] that fusion voting can be implemented with neither voter confusion nor any meaningful disruption to election administration." (Pa220.) These conclusions are bolstered by a sample of ballots used in recent Connecticut elections with cross-nominations. (Pa112-21.) As is apparent from

[27] The third state referenced here is South Carolina, which recently passed a law prohibiting fusion effective January 2023.

the face of these ballots, they are neither crowded nor confusing. Voters can easily identify their preferred candidate and have no difficulty choosing the party line that fits them best. (See Pa206.)

New York and Connecticut election officials confirm that administering elections with fusion is uncomplicated. (Pa129-34, 203-09, 276-80.) They handle a substantial volume of calls, emails, letters, and other inquiries from voters, candidates, party officials, and others with questions about election administration, yet no more than "a small handful of these inquiries" involve questions about fusion. (Pa132; see Pa280 (another official "cannot recall ever having received an inquiry from a voter confused about fusion voting").) The time and resources spent on administrative tasks relating to fusion, if any, are de minimis. (E.g., Pa279-80.) One Connecticut official estimates that, each year, his office spends less than $10 (in a $300,000 budget) and approximately 2 hours (out of nearly 6,000 staffing hours) on these tasks. (Pa133.)

The former Connecticut Secretary of State, Miles Rapoport, stated that in his "decades of experience with fusion," the "[c]ommonly cited concerns . . . have never . . . materialized." (Pa204.) Administrators easily gathered results and calculated the winners. (Pa206.) Rapoport continued to study fusion while running the think-tank Demos, which released a report finding no negative consequences where fusion was used. (Pa207-08, 211-18.)

Allowing fusion might even reduce the number of candidates on the ballot, as minor parties cross-nominate competitive candidates in lieu of running separate spoilers. Recent election records show that Connecticut's and New York's ballots have averaged approximately 3 and 2.5 candidates (respectively) in federal and gubernatorial elections, compared to 4.5 candidates in comparable New Jersey elections. (Pa102-13, 123-27.)

LEGAL ARGUMENT

New Jersey's anti-fusion laws violate four fundamental rights guaranteed under the State Constitution: the right to vote; the right to free speech and political association; the right to peaceably assemble and make opinions known to representatives; and the right to equal protection.[28] A violation of any of these rights is sufficient to find the anti-fusion laws unconstitutional. But the cumulative burden on these rights is extraordinary and permits only one conclusion: the anti-fusion laws cannot stand under the New Jersey Constitution.

As an initial matter, the court evaluates the constitutional rights implicated in this case consistent with the principle in the State Constitution's Bill of Rights that "[a]ll political power is inherent in the people." N.J. CONST. art. I, ¶ 2(a).

[28] The specific laws at issue here are listed supra pp.15-16. While this brief discusses other statutes in order to accurately describe the entire regulatory scheme in which minor parties and their voters and nominees attempt to participate in the political process, no other provisions are challenged here.

The Constitution emphasizes that "the people . . . have the right at all times to alter or reform the [government]." Id. This guarantee ensures that the legislature cannot irrevocably transfer political power into some other institution(s) apart from the electorate itself or functionally prohibit the people from changing the composition of government.

Although statutes enacted by the legislature enjoy a presumption of constitutionality, Garden State Equality v. Dow, 434 N.J. Super. 163, 187 (Law Div.), stay denied, 216 N.J. 314 (2013), "the source of authority for New Jersey's government is and continues to be the people of the state." ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION 45 (2012) (Pa407); see also Hudspeth v. Swayze, 85 N.J.L. 592, 598 (E. & A. 1914) ("[L]egislators are confessedly the mere agents and instruments of the people, to express their sovereign and superior will." (quoting State v. Parker, 26 Vt. 357, 364 (1854))). The State Constitution ensures that "[t]he citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations." Driscoll v. Burlington–Bristol Bridge Co., 8 N.J. 433, 476 (1952). In fact, the Bill of Rights was adopted in 1844 as a "restriction upon legislative action" to "guard all the avenues by which the people's rights may be invaded." PROCEEDINGS OF THE N.J STATE CONSTITUTION CONVENTION OF 1844 170 (1942), https://perma.cc/C5CZ-39CY. Thus, this court must construe

the fundamental rights implicated in this case so as to "circumscribe the action of the legislature within its legitimate and proper sphere." Id.[29]

First, the anti-fusion laws violate the State Constitution's right to vote. The New Jersey Supreme Court (then, in its role as an intermediate appellate court) has already recognized that this right to vote is rendered illusory when a party's voters are prohibited from supporting their party's nominee on the ballot. See Paterson, 88 A. at 695. Compelling a voter to support a different party in order to vote for their nominee is no cure. Strict scrutiny applies to laws that infringe upon such fundamental rights: there is no compelling interest that justifies this severe burden, and the anti-fusion laws are not narrowly tailored. See Worden v. Mercer Cty. Bd. of Elections, 61 N.J. 325, 346 (1972). Even under a burden-interest balancing test, there are no sufficiently important interests to compensate for the heavy burden on this essential political right.

Second, the anti-fusion laws violate the State Constitution's right to free speech and political association because they preclude meaningful political association outside of the two major parties. When, as here, a minor party nominates a candidate who also accepts a nomination from a major party, the

[29] A number of delegates, including future U.S. Senator John Conover Ten Eyck, expressed similar sentiments. E.g., 1844 PROCEEDINGS at 170 ("[A]ll power springs from the people, they should declare that the great fundamental doctrines of civil liberty should not be interfered with in any way, but that minor matters should be left with the Legislature.").

minor party is barred from identifying its nominee on the ballot. Worse, the government compels minor party voters to manifest their support for a major party in order to vote for their own party's nominee. When the same person is nominated, the Moderate Party must either remain off the ballot, or name some individual who is not their preferred choice and risk spoiling the race by undermining their preferred choice. Strict scrutiny is again the applicable standard. See Worden, 61 N.J. at 346. Given the severe burden, lack of any compelling interest, and absence of narrow tailoring, the anti-fusion laws are unconstitutional. Even under a burden-interest balancing test, there is no sufficiently important interest to justify laws that ensure minor parties and their voters cannot meaningfully associate within the electoral process.

For decades, "New Jersey has been a leader in th[e] reemergence of state constitutional law" by recognizing that state constitutional guarantees "go[] beyond federal minimum standards." WILLIAMS, supra at 52-53 (Pa411).[30] The New Jersey Supreme Court has already held that the State Constitution's freedom of speech and political association is more protective than the federal counterpart. State v. Schmid, 84 N.J. 535, 553-60 (1980). Bolstered by New

[30] New Jersey courts have "regularly" and "enthusiastically embraced" the robust protections set forth in the New Jersey Constitution, irrespective of the federal judiciary's crimped reading of (some) federal constitutional rights. John B. Wefing, The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism, 29 RUTGERS L.J. 701, 705 (1998).

Jersey's unique history and tradition, these factors compel the conclusion that the New Jersey Constitution's freedom of speech and political association provisions prohibit the state legislature from banning fusion, notwithstanding the U.S. Supreme Court's contrary view with respect to the federal Constitution in Timmons. The majority opinion in Timmons itself offers little persuasive value given its poor reasoning, unexplained departure from settled doctrine, and reliance on since-discredited factual presumptions.

Third, the anti-fusion laws violate the State Constitution's right to peaceably assemble and make opinions known to representatives because they prevent minor party voters from acting collectively in order to convey their preferences to elected officials. This guarantee arises from the plain text of the State Constitution. Review of the historical record confirms that this right was originally understood as ensuring that citizens could work together to have a meaningful voice in government. Voters like Wolfe, Tomasco, and Kibler are precluded from uniting together to signal their values and priorities to their representatives; that is precisely what is conveyed by the Moderate Party's nomination on the ballot and the votes cast on the Moderate Party line. Given the severe burden imposed on this fundamental political right, strict scrutiny is again the appropriate standard. See Worden, 61 N.J. at 346. In the absence of compelling interests or narrow tailoring, the anti-fusion laws are

unconstitutional. The absence of any sufficiently important state interests means that these burdensome laws are unconstitutional even if a burden-interest balancing test were applied instead.

Finally, the anti-fusion laws violate the State Constitution's guarantee of equal protection. Together, these laws impose a substantial and disproportionate burden on the fundamental rights of minor parties, their voters, and candidates earning their cross-nomination. In the absence of a public need for these heavy burdens, and in light of the degree to which these laws disproportionately favor the two major parties, they are unconstitutional. Presented with an analogous situation in Council of Alt. Political Parties v. State [hereinafter "CAPP"], the Appellate Division reached this same conclusion. 344 N.J. Super. 225 (App. Div. 2001). Other courts have also recognized that prohibiting fusion violates equal protection. E.g., Reform Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections, 174 F.3d 305 (3d Cir. 1999); Callahan, 93 N.E. at 262-63.

I. THE ANTI-FUSION LAWS VIOLATE THE FUNDAMENTAL RIGHT TO VOTE (Pa1-2)

The anti-fusion laws impose an impermissibly severe burden on the State Constitution's fundamental right to vote. Given that this right "holds an exalted position in our State Constitution," New Jersey courts have enforced it with corresponding vigor. In re Attorney General's "Directive on Exit Polling: Media & Non-Partisan Pub. Interest Grps.," issued July 18, 2007, 200 N.J. 283, 302

(2009).[31] When the Paterson court reviewed the 1907 anti-fusion law, it recognized that such restrictions are incompatible with this fundamental political right. 88 A. at 695-96. Strict scrutiny applies to laws, like those at issue here, that burden fundamental voting rights protected by the State Constitution. See Worden, 61 N.J. at 346. Absent any compelling interest or narrow tailoring, the anti-fusion laws cannot withstand strict scrutiny. Even under a burden-interest balancing test, the anti-fusion laws are unconstitutional.

A. Under Settled Precedent, Anti-Fusion Laws Violate the Right to Vote

In New Jersey, the right to vote "is the citizen's sword and shield" and "the keystone of a truly democratic society." Gangemi v. Rosengard, 44 N.J. 166, 170 (1965).[32] Yet, "[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth." Reynolds v. Sims, 377 U.S. 533, 555 n.29 (1964). "'To vote' means to express

---

[31] N.J. CONST. art. II, § 1, ¶ 3(a) ("Every citizen . . . shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people.") (emphasis added).

[32] See e.g., Gangemi, 44 N.J. at 170 ("'Other rights, even the most basic, are illusory if the right to vote is undermined.'" (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)); Worden, 61 N.J. at 334 ("[T]he right to vote is a very fundamental one."); In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 331 N.J. Super. 31, 37 (App. Div. 2000) ("Voting is a fundamental right."); Afran v. City of Somerset, 244 N.J. Super. 229, 232 (App. Div. 1990) ("[T]he right to vote is the bedrock upon which the entire structure of our system of government rests.") (Pressler, J.).

a personal political preference and to have that preference counted." League of Women Voters of Mich. v. Sec'y of State, 959 N.W.2d 1, 27 (Mich. Ct. App. 2020) (emphasis original). Moreover, "the right to vote would be empty indeed if it did not include the right of choice for whom to vote." Gangemi, 44 N.J. at 170 (citing Paterson, 88 A. at 695-96). Thus, central to this right is the ability of (i) parties to nominate their preferred candidates on the ballot and (ii) their supporters to reinforce that nomination at the ballot box.

The Paterson court embraced this expansive view of the State Constitution's right to vote when it analyzed the 1907 anti-fusion law. 88 A. at 695-96. Paterson made clear that the right to vote is impermissibly burdened when a party cannot nominate on the ballot the qualified candidate of its choosing. Compelling a party's voters to support a different party in order to vote for their own nominee only compounds the constitutional injury. Chief Justice Gummere explained:

> The right of suffrage is a constitutional right. The Legislature . . . may pass laws to insure the security of the ballot and the rights of voters. But I conceive that the Legislature has no right to pass a law which in any way infringes upon the right of voters to select as their candidate for office any person who is qualified to hold that office.

Id. at 695. Notably, the court recognized "the right of voters to be untrammeled in the selection of their candidates for office" and that "[t]he Legislature may change the method of selection; but it cannot abridge the right of selection." Id.

Thus, the court expressed "at least very grave doubts of the power of the Legislature to dictate to the people of the state who shall be their choice, either as a candidate for nomination or as a candidate for election." Id.[33] Remarkably, a few years later, the legislature ignored Paterson and adopted the anti-fusion laws at issue here. Mongiello, supra at 1123-24 & nn.76-77.

Paterson remains good law. E.g., Gangemi, 44 N.J. at 170; Imbrie v. Marsh, 5 N.J. Super. 239, 245 (App. Div. 1949). For example, in Gansz v. Johnson, the Law Division relied on Paterson to put a nominee on the ballot despite a law "limit[ing] the right of the convention, committee, or other body to nominate as its candidate any person who is qualified for the office" because that rule would violate "[t]he electors[']. . . right to vote for whom they will for public office and the Legislature cannot deprive them of that right." 9 N.J. Super. 565, 567 (Law Div. 1950).[34]

---

[33] Because the Geran Law expressly authorized fusion and therefore superseded the 1907 anti-fusion law, the Court did not need to take the formal step of striking down the 1907 law as unconstitutional. Paterson, 88 A. at 695-96; see Mongiello, supra at 1122 & n.71.

[34] In Stevenson v. Gilfert, the New Jersey Supreme Court upheld a law requiring that a party must select one of its members when filling an "emergency" vacancy arising after the primary, since the party's voters could not "as a practical matter . . . speak for themselves." 13 N.J. 496, 505 (1953). If not, these voters were vulnerable to "political manipulations which deprive them of their chosen candidates and substitute candidates of a different party espousing adverse political principles." Id. By its own terms, Stevenson limited its holding to this unique "emergency" context and therefore did not abrogate Paterson. Nor is

Shortly before Paterson, the New York Court of Appeals, the highest court in the state, took a similar approach in striking down an anti-fusion law. See Callahan, 93 N.E. at 262-63. The right to vote in New York's constitution in effect at that time was nearly identical to its counterpart in the New Jersey Constitution.[35] In holding the anti-fusion law violated the right to vote, the Chief Judge declared: "if the Legislature does grant to any convention, committee or body the right to make nominations, it cannot limit the right of such convention, committee or body to nominate as its candidate any person who is qualified for the office." Id. at 262. The Chief Judge further expounded:

> The electors have the right to vote for whom they will for public office, and this right cannot be denied them by any legislation. Equally, any body of the electors has the right to choose whom it will for its candidate for office and to appeal to the whole electorate for votes in his behalf.

Id. (internal citations omitted).

Chief Judge Cullen called out the anti-fusion law for what it was: "the legislative provision is solely intended to prevent political combinations and

---

Stevenson relevant here, where the Moderate Party is barred from nominating the candidate of its choosing in the first instance.

[35] Compare N.J. CONST. art. II, § 1, ¶ 3(a) (qualified electors "shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people"), with N.Y. CONST. (1894), art. II, § 1 (qualified electors "shall be entitled to vote at such election . . . for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people").

fusions, and this is the very thing that I insist there is no right to prevent or hamper as long as our theory of government prevails, that the source of all power is the people, as represented by the electors." Id. at 263.[36] New York's highest court has twice affirmed these principles. Devane v. Touhey, 304 N.E.2d 229, 230 (N.Y. 1973) (affirming that state laws may not "prevent a qualified elector from exercising his constitutional right to vote for a candidate and party of his choice"); Britt, 96 N.E. at 375.

This appeal presents the same issues as Paterson and Callahan and warrants the same conclusion: the anti-fusion laws violate the right to vote. While the legislature may "make . . . policy choices as it deals with critical issues confronting the State," those "choices, however, must be made within a constitutional framework and it is the obligation of the judicial branch to insist that that framework be respected and observed." DePascale v. State, 211 N.J. 40, 63 (2012).

B. Anti-Fusion Laws Cannot Survive Strict Scrutiny

In the early 1970s, the New Jersey Supreme Court adopted the strict scrutiny test to evaluate state laws that infringe upon fundamental voting rights

[36] The New York Court of Appeals recognized that fidelity to popular sovereignty is incompatible with anti-fusion laws. Callahan, 93 N.E. at 263. The court's recognition that "the source of all power is the people, as represented by the electors" mirrors closely the New Jersey Constitution's promise that "[a]ll political power is inherent in the people." N.J. CONST., art. I, ¶ 2(a).

under the federal or state constitution. Worden, 61 N.J. at 346.[37] The U.S. Supreme Court subsequently adopted a burden-interest balancing test, known as Anderson-Burdick, for voting right claims under the U.S. Constitution.[38] Yet, the New Jersey Supreme Court has never disturbed the rule set forth in Worden for violations of core political rights under the State Constitution: strict scrutiny still applies. E.g., In re Absentee Ballots, 331 N.J. Super. at 37-38 ("Voting is a fundamental right. As with all fundamental rights, there can be no interference with an individual's right to vote, 'unless a compelling state interest to justify the restriction is shown.'" (quoting Worden, 61 N.J. at 346)).

Applying a heightened standard for violations of the State Constitution necessarily follows from the fact that "our own Constitution affords greater protection for individual rights than its federal counterpart." State v. Melvin, 248 N.J. 321, 347 (2021) (citing State v. Gilmore, 103 N.J. 508, 522-24, 545

---

[37] Worden held: "Since it is so patently sound and so just in its consequences, we adopt the compelling state interest test in its broadest aspects, not only for compliance with the Federal Constitution but also for purposes of our own State Constitution and legislation; under the test a restriction . . . must be stricken unless a compelling state interest to justify the restriction is shown." 61 N.J. at 346; see also Gangemi, 44 N.J. at 171 (explaining that an infringement on "the right to vote" can only be sustained if "the reason for the inroad . . . [is] real, and clear, and compelling"). "[S]trict scrutiny" and "the compelling-state-interest test" are synonyms. In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, Fourth Legislative Dist., 427 N.J. Super. 410, 435 (Law Div.), aff'd, 210 N.J. 29 (2012).

[38] See Anderson, 460 U.S. at 789; Burdick v. Takushi, 504 U.S. 428, 434 (1992).

(1986)); see State v. Hunt, 91 N.J. 338, 345 (1982); Schmid, 84 N.J. at 553-60.[39] The State Constitution expressly and affirmatively grants the right to vote,[40] while courts recognize an implied right to vote in the U.S. Constitution. Thus, strict scrutiny is necessary to ensure that "the people" retain their "right at all times to alter or reform the [government]." N.J. CONST. art. I, ¶ 2(a).

While New Jersey "has been a leader" in "going beyond federal minimum standards" when interpreting the State Constitution, it is not alone. WILLIAMS, supra at 52-53 (Pa411).[41] Illinois, North Carolina, Washington, and other states use strict scrutiny when their state constitutional right to vote is threatened. See Tully v. Edgar, 664 N.E.2d 43, 47 (Ill. 1996); Harper v. Hall, 868 S.E.2d 499, 543 (N.C. 2022); Madison v. State, 163 P.3d 757, 767 (Wash. 2007). Recently, the Montana Supreme Court affirmed its strict scrutiny standard for state laws

---

[39] WILLIAMS, supra at 52-53 (Pa411) ("New Jersey has been a leader in this reemergence of state constitutional law. . . . Decisions in New Jersey going beyond federal minimum standards, as well as similar rulings in virtually all of the other states, have truly reflected a 'New Judicial Federalism.'"); Wefing, supra at 705 ("[T]he court has enthusiastically embraced the New Federalism movement. As the [U.S.] Supreme Court has become more conservative in recent years, many state courts have chosen to use their state constitutions to grant greater rights than given under the [U.S.] Constitution. The New Jersey Supreme Court has regularly done this.").

[40] N.J. CONST. art. II, § 1, ¶ 3(a) (qualified electors "shall be entitled to vote").

[41] See Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 MICH. L. REV. 859, 861 (2021) ("State constitutions . . . provide a stronger foundation for protecting democracy than their federal counterpart. In text, history, and structure alike, they privilege 'rule by the people,' and especially rule by popular majorities.").

burdening the Montana Constitution's right to vote. Mont. Democratic Party v. Jacobsen, 518 P.3d 58, 65-67 (Mont. 2022); see Driscoll v. Stapleton, 473 P.3d 386, 392-94 (Mont. 2020). The rationale was simple: strict scrutiny applies to laws that burden the Montana Constitution's fundamental rights, and the right to vote is fundamental. Jacobsen, 518 P.3d at 65-66.[42] The same is true here.[43]

Applying strict scrutiny in this case compels one conclusion: the anti-fusion laws are unconstitutional. By barring the Moderate Party from nominating its qualified choice on the ballot, these laws severely burden the fundamental right to vote. Paterson, 88 A. at 695-96; Callahan, 93 N.E. at 262-63.[44] Moderate Party voters are barred from supporting their nominee on their party's (legally entitled) line; instead, they are compelled to support the

---

[42] See also Mont. Democratic Party v. Jacobsen, Case No. DV 21-0451, 2022 WL 16735253, at *65-67 (Mt. Dist. Ct. Sept. 30, 2022) (trial court opinion explaining why Montana courts use strict scrutiny). This unpublished case is reprinted in the Appendix at Pa471-545. R. 1:36-3. No contrary unpublished decisions are known to counsel.

[43] In 1977, Justice Brennan lamented the degradation of federal constitutional protections and insisted that "state courts cannot rest . . . [for federal law] must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." Hon. William J. Brennan, Jr., State Constitutions and the Protections of Individual Rights, 90 HARV. L. REV. 489, 491 (1977).

[44] "When an election law reduces or forecloses the opportunity for electoral choice, it restricts a market where a voter might effectively and meaningfully exercise his choice between competing ideas or candidates, and thus severely burdens the right to vote." Common Cause Ind. v. Indiv. Members of the Ind. Election Comm'n, 800 F.3d 913, 920-21 (7th Cir. 2015).

Democratic or Republican Party, organizations whose values they may scorn, or sit out the race altogether. (See Pa45-50, 77-80.) As discussed in the following section, none of the interests likely to be asserted to justify the anti-fusion laws are "compelling." Worden, 61 N.J. at 346. Even if a given interest is substantial in the abstract, Worden requires a searching review into whether available evidence substantiates the concern. Id. at 348. Drawing from real-world experience and leading academic research, the record disproves all such concerns here. Finally, the wholesale prohibition on fusion is far from narrowly tailored. Any interest, for example, in avoiding ballot overcrowding could be addressed through obvious, less restrictive means, such as modestly increasing signature requirements for nominating petitions. Patriot Party, 95 F.3d at 266.

C. Anti-Fusion Laws Fail Under a Burden-Interest Balancing Test

Even if the New Jersey Supreme Court overruled Worden and adopted a burden-interest balancing test (similar to the federal Anderson-Burdick framework) for violations of the State Constitution's right to vote, the anti-fusion laws are still unconstitutional. This standard requires a court to "first consider the character and magnitude of the asserted injury to the rights" at issue, and "then . . . identify and evaluate the precise interests put forward by the State as justifications for the burden imposed." Anderson, 460 U.S. at 789. In so doing, the court must undertake an independent assessment of "the

legitimacy and strength of those interests" and "the extent to which those interests make it necessary to burden the plaintiff's rights." Id.; see Burdick, 504 U.S. at 434.

In every case, a challenged law "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008) (quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992). When the burden is "severe," the challenged law is unconstitutional unless it is "narrowly drawn to advance a state interest of compelling importance." Norman, 502 U.S. at 289. In this case, the burden is severe: the Moderate Party and its supporters are categorically barred from nominating competitive candidates on the ballot in this and all future elections. See Williams v. Rhodes, 393 U.S. 23, 31 (1968) ("[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."); Anderson, 460 U.S. at 787 (same). As a result, Moderate Party supporters are compelled to cast their ballot for a different party (Democratic or Republican) to support their party's nominee. These burdens are compounded by the aggregate impact of the anti-fusion laws and other laws imposing effectively insuperable burdens on minor parties, supra pp.14-16, which make it practically impossible for groups of concerned voters to mobilize and constructively influence electoral politics

outside of the Democratic or Republican Parties. (See Pa44-51, 76-81.)

The legislature's protectionist motivations for the anti-fusion laws were self-evident and undermine any other state interests that might be advanced in litigation. Cf. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985). The following interests have been raised (and rejected) in prior lawsuits challenging anti-fusion laws in other states, and if raised by Respondents and/or Intervenor here they should be similarly rejected. The record makes clear that these interests rely on faulty premises, are insubstantial or speculative, are in fact undermined by the anti-fusion laws, and nevertheless could be vindicated through much more narrowly tailored legislation aimed at the specific concern raised, rather than a wholesale ban on fusion voting. Even if the burdens were found to be less than severe (they are not), none of the following state interests are "sufficiently weighty" to support the ban. Crawford, 553 U.S. at 191.

Protecting the Democratic and Republican Duopoly: Courts have repeatedly recognized that states lack any legitimate interest in insulating the Democratic and Republican Parties from electoral competition; rather, courts hold that minor parties are a necessary feature of a healthy and responsive democracy. The U.S. Supreme Court has said that "[a]ll political ideas cannot and should not be channeled" exclusively through "two major parties," that history teaches us that political activity by minority parties is often at "vanguard

of democratic thought," and that excluding the voice of minority parties "would be a symptom of grave illness in our society." Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957). The U.S. Supreme Court has also rejected a proposed state interest in "promot[ing] a two-party system in order to encourage compromise and political stability" because giving "two particular parties—the Republicans and the Democrats . . . a complete monopoly" would eviscerate the "[c]ompetition in ideas and governmental policies . . . at the core of our electoral process and of the First Amendment freedoms." Williams, 393 U.S. at 31-32.[45]

In CAPP, the Appellate Division affirmed that "[t]he right of an alternative party to organize and disseminate its message cannot be minimized" and that the State may not "marginalize[] voters and political organizations who depart from or disagree with the status quo." 344 N.J. Super. at 236, 238. The Appellate Division clarified that an interest in ensuring fair and honest elections does not give the state "an unconditional license to insure the preservation of the present political order." Id. at 242-43. As is true with anti-fusion laws, the

[45] Early constitutional luminaries feared the entrenchment of two hegemonic parties. JOHN ADAMS, LETTER TO JONATHAN JACKSON, OCTOBER 2, 1780 ("There is nothing I dread So much, as a Division of the Republick into two great Parties, each arranged under its Leader, and concerting Measures in opposition to each other. This, in my humble Apprehension is to be dreaded as the greatest political Evil, under our Constitution."). They recognized that more parties were needed to prevent tyrannical consolidation and abuse of power. E.g., FEDERALIST NO. 10 (Madison).

laws struck down in CAPP constituted a "statutory scheme [that] imposes a significant handicap on [minor] parties' ability to organize while reinforcing the position of the established statutory parties." Id. at 242.

As discussed infra pp.71-73, Timmons was an aberration in elevating two-party protectionism as a valid interest. Even taking this point at face value, Timmons justified the suppression of electoral competition on the assumption that an exclusionary two-party system promoted a healthy and stable politics. 520 U.S. at 366-67. Simple observation of politics since that time, substantiated by research from Dr. Lee Drutman and countless others, plainly refutes that assumption: our rigid two-party system is a key driver of today's political instability and democratic decline. (Pa142-61.)[46] Further, the record demonstrates why minor party cross-nominations can actually help strengthen the two major parties. According to NYC Comptroller Brad Lander:

> [F]usion actually can strengthen the major parties and prevent fragmentation. Fusion can serve as a pressure valve, allowing for a constructive and collaborative re-direction of discontented energy at the edges of a major party. The stakes of major party control are substantially lessened when there is an alternative, viable path to political power. While individual egos can (and certainly have)

[46] "Two-party systems are also more correlated with violence than are multiparty systems, perhaps because they create us-them dynamics that deepen polarization." Kleinfeld, supra at 169. Other scholars have found that affective polarization (i.e., dislike of political opponents) has increased more rapidly in the U.S. recently than in advanced democracies lacking a rigid two-party system. E.g., NOAM GIDRON ET AL., AMERICAN AFFECTIVE POLARIZATION IN COMPARATIVE PERSPECTIVE (Nov. 2020, Cambridge Univ. Press).

> muddy the waters, a working, though competitive and at times adversarial, relationship is possible between a major party and minor party that are ideologically related, but distinct. Without fusion, this insurgent energy is either directed into movement for a spoiler third party or existential in-fighting over the heart and soul (and purse strings) of the major party. Not only can that process itself tear a party apart, but it can create an opening for an extremist faction to swallow whole one of the two major parties. Sadly, that's the story of today's Republican Party at the national level, and in many states too.

(Pa285) (emphasis original).

Consistent with longstanding trends in states permitting fusion, Dr. Drutman's report explains that allowing cross-nominations would permit only a modest number of additional parties—likely 2 to 3—to become electorally relevant. (Pa158-59.) The Brennan Center for Justice likewise concludes that "[f]usion can improve our democracy by increasing the role of third parties," but would not jeopardize the core structure of the two-party system.[47] Absent "evidence of . . . crippling proliferation of minor parties," and in light of a state's "authority to set reasonable threshold requirements for parties seeking admission to the ballot," such arguments to the contrary have been rejected. Reform Party, 174 F.3d at 317.

Preventing Ballot Overcrowding: Currently, New Jersey ballots have an average of 4.5 candidates for each federal and statewide election. (Pa123-27.)

[47] J.J. Gass & Adam Morse, BRENNAN CENTER FOR JUSTICE, More Choices, More Voices: A Primer on Fusion at 8 (Oct. 2, 2006), https://perma.cc/6TMP-BEW4.

Drawing from experience in New York and Connecticut, permitting cross-nominations is unlikely to increase the number of candidates on New Jersey ballots, as minor parties who currently have no choice but to run as standalone candidates would instead cross-nominate competitive candidates. (Pa102-13.) This is the case in New York and Connecticut, where the Working Families Party, Conservative Party, and others rarely add additional candidates to the ballot. With fusion, the emergence of a serious minor party could reduce the demand for the number of discrete candidates submitting nominating petitions, given the new opportunity for meaningful participation outside of the two major parties. Review of ballots with cross-nominations (such as the illustrative examples of New Jersey ballots or actual ballots from Connecticut and New York) confirms there is no overcrowding. (Pa112-21, 220-35, 288-303.)

Reflecting on his "decades of experience with fusion" as a chairman of the committee overseeing election administration, chief statewide election officer, and scholar of electoral systems, Miles Rapoport concludes that "concerns" of "ballot overcrowding . . . are unwarranted and have never . . . materialized." (Pa204; see Pa206 (recalling that "ballots never grew crowded with candidates or cross-endorsements").)

This evidence is consistent with Justice Harlan's observation in his Williams concurrence that up to "eight candidacies cannot be said, in light of

experience, to carry a significant danger of voter confusion." 393 U.S. at 47 (Harlan, J., concurring). Moreover, as noted above, the State may "set reasonable threshold requirements for parties seeking admission to the ballot" without categorically banning fusion. Reform Party, 174 F.3d at 317; Timmons, 520 U.S. at 376 (Stevens, J., dissenting); (see Pa204.)[48]

Avoiding Voter Confusion: Permitting parties to cross-nominate candidates on the ballot would not confuse voters. Again, visual examples of actual and illustrative ballots with cross-nominations show how modest the changes would be. (E.g., Pa112-21, 220-35, 288-303.) A voter would make one selection per office, as they do now. The only difference is that some candidates may be listed twice, if they earn and accept a second party's nomination. Former Connecticut Secretary of State Rapoport explains that Connecticut voters easily understood how to vote with cross-nominations on the ballot, even at a time when fusion made its resurgence after a period of disuse. (Pa203-07.) Local

[48] Concerns that the ballot could become a "billboard for political advertising" where a "candidate or party could . . . associat[e] his or its name with popular slogans and catchphrases" are unjustified. Timmons, 520 U.S. at 365. Justices Stevens, Ginsburg, and Souter rejected as "farfetched" and "entirely hypothetical" the suggestion that "members of the major parties will begin to create dozens of minor parties with detailed, issue-oriented titles for the sole purpose of nominating candidates under those titles." Id. at 376 (Stevens, J., dissenting). This problem has never materialized in New York or Connecticut, nor did it occur when fusion was common in New Jersey and throughout the country in the 1800s and early 1900s.

officials in New York and Connecticut likewise agree that voters are rarely, if ever, confused by cross-nominations on the ballot. (Pa132, 279-80.) Leading ballot design expert Whitney Quesenbery has reached the same conclusion, as has the think-tank Demos. (Pa211-18, 220.) Unsurprisingly, courts have agreed, declining to credit speculation about confusion as a justification for prohibiting fusion. E.g., Reform Party, 174 F.3d at 317. Even Timmons didn't credit the state's "alleged paternalistic interest in 'avoiding voter confusion.'" 520 U.S. at 370 n.13. As a general rule, "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 228 (1989).

Ensuring an Election Winner Is Identified: Officials in New York and Connecticut have not had difficulty calculating results of races with cross-nominations. (E.g., Pa213-14.) Former Connecticut Secretary of State Rapoport avers that officials under his supervision "were able to accurately and easily count and verify vote totals in the dozens of races . . . featuring cross-endorsements." (Pa206.) Given that New Jersey's ballots, voting machines, election management systems, and canvassing laws could all easily accommodate cross-nominations (Pa84-88, 220-35, 288-303), New Jersey would continue to easily identify winners.

Preventing Party Free-Riding: Major party advocates have argued that minor parties unfairly benefit by nominating a competitive candidate who also has a major party nomination. Timmons, 520 U.S. at 365-66. That is, minor parties ride the coattails of popular candidates to gain undeserved support. Id. This is wrong. The Moderate Party was "not trying to capitalize on [Malinowski's] status as someone else's candidate, but to identify him as their own choice." Id. at 376 n.5 (Stevens, J., dissenting). And the true problem is that the status quo exaggerates the support of the two major parties and suppresses support for minor parties. Polling and voter registration data reveal an electorate desperate for alternatives to the two major parties.[49] Yet, every November, all but a handful of votes are cast on the Democratic or Republican lines because there is no other way to cast a meaningful ballot.

Permitting a competitive candidate like Malinowski to have his Moderate Party nomination (which he eagerly accepted) on the ballot would allow Wolfe, Tomasco, Kibler, and other like-minded voters to accurately register the ideological basis for their support. They're not Democrats, but anti-fusion laws distort their votes and imply otherwise. Fusion does not guarantee anything for

[49] More than a third of voters in the 7th Congressional District and statewide have chosen not to register with either the Democratic Party or Republican Party. (Pa49, nn.1&2.) More than two-thirds of all New Jersey voters believe more electorally competitive parties are needed; among independent and moderate voters, three-in-four hold this view. (See supra p.9 & n.7.)

minor parties; their ballot lines will only attract votes if they nominate candidates voters like and promote ideas voters support.

Avoiding Administrative Costs: Administrative convenience cannot justify burdening constitutional rights. See, e.g., Gangemi, 44 N.J. at 173 (holding that a law's "administrative convenience" cannot "support the restraint it imposes upon the voters' choice of candidate[s]"); Tashjian v. Republican Party, 479 U.S. 208, 218 (1986) ("[T]he possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing . . . First Amendment rights."). Even still, election systems expert Professor Appel confirms that New Jersey's current (and future) voting machines and election management systems can easily accommodate cross-nominations. (Pa84-88.) Similarly, ballot design expert Whitney Quesenberry confirms that different ballot structures used throughout New Jersey can accommodate fusion. (Pa220-35.) Demonstrative examples of New Jersey ballots for the November 2022 election with and without fusion illustrate this point. (Pa288-303.) A report by the think-tank Demos identified no discernible costs associated with administering an election where fusion is permitted. (Pa213-17.) Likewise, local officials in New York and Connecticut report negligible burdens associated with the administration of elections with cross-nominations. For example, in Fairfield, Connecticut, the administrative cost of

fusion is estimated as $10 in expenditures and 2 hours of staff time—a de minimis cost. (Pa129-34; see Pa276-80 (official in Ulster County, New York providing comparable estimates).)

* * *

None of the foregoing interests are "compelling" so as to justify the anti-fusion laws' "severe" burden on the right to vote. Norman, 502 U.S. at 289. Even if the burden here was found to be less than severe than it is, none of these interests are "sufficiently weighty" to justify even a modest encroachment on the fundamental right to vote, Crawford, 553 U.S. at 191, nor can they justify the cumulative burdens resulting from encroachment on the other fundamental rights described below.

II. THE ANTI-FUSION LAWS VIOLATE THE FUNDAMENTAL RIGHT TO FREE SPEECH AND POLITICAL ASSOCIATION (Pa1-2)

The anti-fusion laws violate the State Constitution's freedom of speech and political association by prohibiting the Moderate Party from nominating its preferred candidates on the ballot.[50] Moderate Party voters are forced to

[50] The New Jersey Supreme Court has held that "expressional and associational rights" are "strongly protected under the State Constitution." Schmid, 84 N.J. at 556-57. These rights arise from art. I, ¶¶ 6 and 18, which provide, respectively:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law

associate with and vote for the Democratic or Republican Party to support the Moderate Party nominee. In the aggregate, the anti-fusion laws suppress the development of all minor parties, even when much of the electorate is eager to associate outside of the two major parties. (See supra p.9 & n.7.)

New Jersey courts bear "ultimate responsibility for interpreting the New Jersey Constitution." Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985). In so doing, they often find that state constitutional freedoms "surpass the guarantees of the federal Constitution" as interpreted by federal courts. Schmid, 84 N.J. at 553; e.g., State v. Hempele, 120 N.J. 182, 196 (1990) ("When the United States Constitution affords our citizens less protection than does the New Jersey Constitution, we have not merely the authority to give full effect to the State protection, we have the duty to do so.").[51]

Where, as happened in Timmons, the U.S. Supreme Court has interpreted a provision in the U.S. Constitution, New Jersey courts use the factors set forth in Hunt to determine whether the federal ruling has persuasive value in

---

> shall be passed to restrain or abridge the liberty of speech or of the press. . . .
>
> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.

[51] New Jersey courts have "regularly" and "enthusiastically" recognized the expansive reach of the State Constitution far beyond its federal counterpart. WILLIAMS, supra at 52-53 (Pa411).

interpreting a similar provision in the State Constitution. 91 N.J. at 363-68. In this case, every relevant factor compels a rejection of the U.S. Supreme Court's constrained view of associational freedom and its endorsement of two-party exclusionary politics. That the central holdings of Timmons collapse upon examination only reinforces this conclusion.

Instead, this court must apply strict scrutiny because the anti-fusion laws impose a severe burden on a fundamental political right protected by the State Constitution. Worden, 61 N.J. at 346. Absent any compelling interests or narrow tailoring, these burdensome laws violate the State Constitution's freedom of speech and political association. Even under a burden-interest balancing test, the laws are unconstitutional because there are no adequate interests to justify such onerous burdens.

A. The State Constitution Warrants Greater Protection for Free Speech and Political Association Than the U.S. Supreme Court Recognized Under the First Amendment in Timmons

A threshold issue is whether the New Jersey courts should look to the U.S. Supreme Court's treatment of federal associational freedoms in Timmons when analyzing the State Constitution's freedom of speech and political association in this case. As a general matter, the New Jersey Supreme Court has already held that these state provisions warrant greater protection than have been afforded their federal counterparts. Schmid, 84 N.J. at 553-60; see N.J. Coal. Against War

in the Middle E. v. J.M.B. Realty Corp., 138 N.J. 326, 353 (1994) ("Precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than . . . the First Amendment."). In the context of whether the legislature can lawfully prohibit a minor party from nominating its preferred candidate, all of the relevant Hunt factors point to the same conclusion: the State Constitution's freedom of speech and political association extend much further than the federal rights discussed in Timmons.

1. Constitutional text, constitutional structure, and legislative history warrant greater protections under the State Constitution

When analyzing political speech and association, there are key textual, structural, and historical differences between the New Jersey and U.S. Constitutions. See Hunt, 91 N.J. at 364-66. The New Jersey Supreme Court has held that such differences support reading these state provisions more expansively than their federal analogs. Schmid, 84 N.J. at 553-60.

Beginning with the text, "the New Jersey Constitution's free speech provision is . . . broader than practically all others in the nation." Green Party v. Hartz Mt. Indus., 164 N.J. 127, 145 (2000). The State Constitution is "more sweeping in scope than the language of the First Amendment." Schmid, 84 N.J. at 557-58 ("[T]he explicit affirmation of these fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction

upon them."); see Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 78-79 (2014) (these provisions are among "the broadest in the nation" and "afford[] greater protection than the First Amendment"). While the First Amendment states that "Congress shall make no law" abridging the freedom of speech and assembly, the State Constitution affirmatively grants a broader suite of rights, including: the right to "freely speak, write and publish" and "the right freely to assemble together, to consult for the common good, [and] to make known their opinions to their representatives." N.J. CONST. art. I, ¶¶ 6, 18.

"[T]he provisions of the State Constitution dealing with expressional freedoms antedate the application of the First Amendment to the states and are set forth more expansively." State v. Williams, 93 N.J. 39, 58 (1983).[52] Accordingly, New Jersey courts adhere to "the presumed intent of those who framed our present Constitution" by vigorously defending these state constitutional freedoms. Schmid, 84 N.J. at 559.

2. State law, history, and tradition also warrant stronger protections under the State Constitution

New Jersey's unique history, tradition, and case law also warrant more expansive speech and association protections than afforded under the U.S.

[52] See Schmid, 84 N.J. at 557 (art. I, ¶ 6 was based on the New York Constitution); Nikolas Bowie, The Constitutional Right of Self-Government, 130 YALE L.J. 1652, 1733-34 (2021) (art. I, ¶ 18 was based on the Massachusetts Constitution).

Constitution. See Hunt, 91 N.J. at 365-67. For much of the 19th century, and well into the 20th, candidates routinely earned nominations from multiple parties. (Pa272-74.) Cross-nominated candidates, including a future U.S. Supreme Court justice, won many races and made countless others more competitive. (Id.) The first legislative attempt to prohibit fusion was quickly reversed by the Geran Law. Shortly thereafter, the Paterson court recognized that even without the Geran Law, the right of parties to nominate qualified candidates of their choosing was sacrosanct. 88 A. at 695-96.

New Jersey law recognizes that speech and associational rights protect the ability "of citizens to associate and form political parties." CAPP, 344 N.J. Super. at 236. "This includes the right to create and advance new parties which enhances the constitutional interests of like-minded voters to gather to pursue common ends." Id. (citing Norman, 502 U.S. at 288). Laws that thwart minor party building "hinder[] not only the voter but also the organization from associating with others with similar views on public issues." Id. This landmark case reflects a juridical recognition that the associational rights of minor parties and their voters are particularly important in New Jersey.[53]

[53] Not only does New Jersey recognize that a healthy democracy requires that voters be permitted to associate in parties, state law ensures that voters decide who ends up on the ballot. New Jersey was among the first states to adopt a direct primary system that centered voters (and not corrupt party bosses) in the party nomination process. BOOTS, supra at 17-21 (Pa391-95).

New Jersey law also recognizes that candidates must be permitted to convey their political associations on the ballot.[54] State law ensures that primary candidates can have their chosen "slogan" on the primary ballot and that allied candidates can be bracketed together on the ballot under their common slogan. N.J.S.A. 19:23-17, 19:49-2. Likewise in the general election, state law ensures that candidates can appear along with the name of their nominating party. N.J.S.A. 19:13-4, 19:14–6, 19:14-8.

The Appellate Division recently held that the "free speech and associational rights of every candidate" compels such "fundamental . . . expressive" rights "as a matter of constitutional imperative." Schundler, 377 N.J. Super. at 348-49.[55] New Jersey courts have long protected these rights. E.g., Quaremba v. Allan, 67 N.J. 1, 13 (1975); Harrison v. Jones, 44 N.J. Super. 456, 461 (App. Div. 1957). Settled law also prohibits the legislature from interfering with a party's decision to place its endorsement of a candidate on the primary ballot because doing so would violate speech and association rights. Batko v. Sayreville Democratic Org., 373 N.J. Super. 93 (App. Div. 2004). This body of

---

[54] See Lautenberg v. Kelly, 280 N.J. 76, 83 (Law Div. 1994) ("[B]anning a candidate from associating with and advancing the views of a political party on the ballot is clearly a restraint on the right of association."), rev'd in part on other grounds by Schundler v. Donovan, 377 N.J. Super. 339, 348-49 (App. Div.), aff'd, 183 N.J. 383 (2005).

[55] Only primary ballots were at issue in these cases, but the rationale applies equally to general election ballots as well.

law recognizes the importance of how a candidate appears on the ballot and the uniquely expressive value of on-the-ballot language in informing voters, communicating a candidate's message, and facilitating political association.

Finally, New Jersey courts are a national leader in applying the "Democracy Canon," an interpretive presumption that election laws are to be liberally construed in favor of electoral access, choice, and participation. Richard L. Hasen, The Democracy Canon, 62 STAN. L. REV. 69, 106-09 (2009). Absent conclusive evidence to the contrary, New Jersey courts presume that elections laws are designed "'to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day.'" N.J. Democratic Party, Inc., v. Samson, 175 N.J. 178, 190 (2002) (quoting Catania v. Haberle, 123 N.J. 438, 448 (1990)).

* * *

The Hunt factors demonstrate that the constricted view of speech and associational freedom in Timmons is incompatible with the New Jersey Constitution and the state's long-standing commitment to these fundamental rights.[56] Rather, the court must account for the "exceptional vitality" of these

[56] Hunt also noted that "[d]istinctive public attitudes of [the] state's citizenry" can justify reading the State Constitution more expansively. 91 N.J. at 367.

rights "in the New Jersey Constitution" in determining whether the anti-fusion laws withstand scrutiny. Schmid, 84 N.J. at 555-56.

B. The Anti-Fusion Laws Impermissibly Burden the State Constitution's Freedom of Speech and Political Association Without an Adequate Justification

Regardless of which test is employed—strict scrutiny or burden-interest balancing—disposition of this claim is the same: the anti-fusion laws violate the New Jersey Constitution's freedom of speech and political association.

Case law dictates that strict scrutiny applies to laws like these that strike at the heart of the fundamental political rights of speech and association. Worden, 61 N.J. at 346.[57] Because the anti-fusion laws restrict speech and associational rights of minor parties, voters, and nominees, and there are no compelling interests to justify these poorly tailored laws, they fail strict scrutiny and are unconstitutional.

The result is the same under a burden-interest balancing test. Per the Hunt analysis above, the Court undertakes this analysis in light of the State

---

Given the extraordinary desire for more competitive party options in New Jersey, this factor further supports this conclusion. (Supra p.9 & n.7.)

[57] In cases like Schmid where permitting one person to exercise their state constitutional rights would violate another person's due process rights, New Jersey courts necessarily employ a balancing test to weigh competing individual rights. 84 N.J. at 560. There are no competing individual rights here, where the only question is whether the legislature has exceeded its authority by unlawfully encroaching upon the associational freedoms of minor parties, their voters, and their nominees. Thus, Worden is controlling and strict scrutiny applies.

Constitution's heightened protection for freedom of speech and political association. And the outcome is clear: the burdens on minor parties, voters, and nominees are extraordinary and far outweigh any purported state interest.

1. The Burdens on Minor Parties, Their Voters, and Their Nominees Are Severe

The anti-fusion laws impose severe burdens on minor parties. The core function of a party is to nominate its preferred candidates on the ballot in order to support their election and promote the party's policy goals. Eu, 489 U.S. at 223-24. A nomination on the ballot is the lynchpin of its associational purpose: "at the most crucial stage in the electoral process—the instant before the vote is cast"—the party's ballot line brings together like-minded voters to support aligned candidates in furtherance of the party's priorities. Anderson v. Martin, 375 U.S. 399, 402 (1964).[58] Precluding a party from nominating its top choice imposes a heavy burden. Patriot Party, 95 F.3d at 258-60.

Recent case law, in conjunction with New Jersey's more expansive reading of these constitutional provisions, underscores that laws encroaching expressive and associational rights of minor parties are viewed with suspicion. In CAPP, the Appellate Division affirmed that state laws may not encroach upon

[58] See Daniel P. Tokaji, Gerrymandering and Association, 59 WILLIAM & MARY L. REV. 2159, 2177 (2018) ("[T]he ballot is one of the central loci for voters, candidates, and parties to associate politically.").

a minor party's "rights to express political ideas and to associate to exchange the ideas to further their political goals." 344 N.J. Super. at 241-42. Laws that have the "effect of 'help[ing] to entrench the decided organizational advantage that the major parties hold over new parties struggling for existence'" are particularly harmful. Id. at 241 (quoting Reform Party, 174 F.3d at 314). Equally suspect is a "statutory scheme [that] imposes a significant handicap on [minor] parties' ability to organize while reinforcing the position of the established statutory parties," because such laws "subsidize the party-building activities of the statutorily recognized parties by stifling political discussion and association of [minor] parties." Id. at 242. The anti-fusion laws suffer from these fatal flaws: by suppressing minor party development and inflating major party support, the laws impose a severe burden on the Moderate Party's associational freedom.[59]

New Jersey's anti-fusion laws impose a Hobson's choice on the Moderate Party by rendering illusory the power to nominate its standard-bearers. To pursue the state-granted privileges that subsidize the major parties' success, the Moderate Party must run spoilers in the hopes of meeting the to-date-impossible

[59] Anti-fusion laws can also harm a minor party trying to run standalone candidates, as unusually popular minor party candidates are at risk of being poached by a major party. Given the abysmal track record of minor party candidates in New Jersey over the past century, it would be rational for such candidates to switch allegiance to improve the likelihood of victory, even if they would otherwise prefer to remain with the minor party.

10% vote threshold—even though attaining such levels of support would undermine the party's core purpose of actually helping moderates win. (Pa46-48, 60.) Alternatively, if the Moderate Party wants to support its nominees in order to combat political extremism, it must take itself off the ballot and encourage its voters to support another party—boosting support for a rival party, relegating itself to a mere interest group,[60] and guaranteeing that it will never become a statutory party.[61] Either way, anti-fusion laws force the party to change how it operates and undermine its own associational objectives. See Hartman v. Covert, 303 N.J. Super. 326, 334 (Law. Div. 1997) (limiting "parties' discretion in how to organize themselves and select their leaders" constitutes a "particularly strong" burden).

The Timmons majority misapprehended the severity of the burden imposed by anti-fusion laws. It concluded that such laws "do[] not severely burden [a minor political] party's associational rights" because the party can nominate its second or third choices on the ballot or campaign for their preferred

---

[60] A party is indistinguishable from a labor union or the Chamber of Commerce if all it can do is make endorsements, send mailers, and knock doors. (See Pa206 ("[E}ndorsements were different in kind than [a party's] imprimatur on the ballot itself.").)

[61] See Benjamin D. Black, Developments in the State Regulation of Major and Minor Political Parties, 82 CORNELL L. REV. 109, 159 (1996) ("If the actual effect of a state law on minor parties' political activities is considered . . ., and minor parties cannot survive without fusion, it is difficult to understand what state law could be more 'burdensome.'").

candidate and encourage voters to support him on another party's ballot line. 520 U.S. at 359. In the majority's view, anti-fusion laws did not even touch upon "political parties' internal affairs and core associational activities." Id. at 360.

This is wrong. As recognized in the dissent, minor party voters "unquestionably have a constitutional right to select their nominees for public office and to communicate the identity of their nominees to the voting public. Both the right to choose and the right to advise voters of that choice are entitled to the highest respect." Timmons, 520 U.S. at 371 (Stevens, J., dissenting).

The Timmons majority's burden ruling was a striking and unexplained departure from settled precedent on associational freedom.[62] In Sweezy, the Court explained why protecting minor parties' associational freedoms was necessary for the health of American democracy:

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately

[62] See Joshua A. Douglas, A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations That Adversely Impact an Individual's Right to Vote, 75 GEO. WASH. L. REV. 372, 379 (2007) (noting that the Timmons "never provided any reasons for why the regulation did not impose a severe burden beyond its own knee-jerk reaction").

> accepted . . . The absence of such voices would be a symptom of grave illness in our society.

354 U.S. at 250-51. Tashjian recognized that a party's selection of a nominee is the "crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." 479 U.S. at 216. Eu recognized that "[f]reedom of association means . . . that a political party has a right to identify the people who constitute the association, and to select a standard bearer who best represents the party's ideologies and preferences," concluding that "[d]epriving a political party of the power to endorse suffocates this right." 489 U.S. at 224 (internal citations and quotation marks omitted). The list of contradictory cases is long.[63]

And in the years since Timmons, the U.S. Supreme Court has rejected the majority's rationale in other cases. Jones struck down California's blanket primary law because it deprived parties of the "ability to perform the 'basic function' of choosing their own leaders," and therefore imposed a "severe and unnecessary" burden on associational rights. 530 U.S. at 580, 586. Jones cannot be reconciled with Timmons, where prohibiting a party from nominating its preferred candidate only because another group of voters nominates them "d[id]

[63] E.g., Kusper v. Pontikes, 414 U.S. 51 (1973); Democratic Party of U.S. v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981); Anderson, 460 U.S. at 792-93; Norman, 502 U.S. at 288-89.

not severely burden that party's associational rights." 520 U.S. at 359.

Relatedly, the Court's recent "compelled speech" jurisprudence bars the state from compelling individuals to speak a prescribed message, directly or as a condition to other protected conduct. E.g., Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47, 61 (2006) ("First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."). This doctrine conflicts with Timmons, which took no issue with states compelling parties to nominate their second (or even third) choice, even though their top choice is qualified, and compelling their voters to vote for a rival party to support their own nominee.

Lest there be any doubt about the burden posed in this case, it is indisputable that New Jersey's anti-fusion laws were passed with the intent of placing a severe burden on minor parties. See Hartman, 303 N.J. Super. at 334 (evaluating the law's intent in applying a burden-interest balancing test).[64] In Timmons, the majority failed to grapple with the fact that, as Justice Stevens highlighted, anti-fusion laws "were passed by the parties in power in state legislatures [to] squelch the threat posed by the opposition's combined voting

[64] The Third Circuit found it "significant that many [anti-fusion] laws were motivated by a dominant political party's desire to eliminate or reduce the influence of third parties in the political system." Patriot Party, 95 F.3d at 260 n.3.

force" and that the intent behind the law "provide[s] some indication of the kind of burden the States themselves believed they were imposing on the smaller parties' effective association." 520 U.S. at 378 n.6 (quoting McKenna, 73 F.3d at 198); see Garrett, supra at 122 (explaining that "Timmons did not acknowledge" that "fusion bans can be examples of 'partisan lockup' of the government by the two major parties or of duopolistic behavior that may reduce competition"). In this case, contemporaneous news sources reveal that statutes like the anti-fusion laws were "intended to be discriminatory in favor of Republican and Democratic organizations," at the cost of minor parties. (Pa464.) In fact, anti-fusion laws have been so successful in satisfying this discriminatory intent that they have rendered viable minor parties nonexistent in New Jersey, further corroborating that these laws impose a severe burden. (Pa183-86.)[65]

The burdens that anti-fusion laws place on minor party voters are equally severe. These voters must either refrain from voting for their preferred candidate or abandon their party at the ballot box and support a rival party in order to

[65] The Timmons majority's claim that anti-fusion laws neither "preclude[] minor political parties from developing and organizing" nor "exclude[] a particular group of citizens, or a political party, from participation" strains credulity. 520 U.S. at 361. Minor parties were active and meaningful political actors when cross-nominations were permitted nationwide and have continued to play that role in the limited places where fusion has survived. (Supra pp.10-12, 16-17.) That anti-fusion laws render minor parties politically irrelevant is an undeniable fact—and the laws' self-evident purpose.

support their party's nominee. In casting such a vote, these voters unwillingly assist the major parties by helping them retain statutory status and the corresponding taxpayer-funded primaries, seats on powerful government boards, and preferential position on general election ballots denied their own party. (Supra pp.14-16 & n.12.) In this case, the anti-fusion laws force Wolfe, Tomasco, and Kibler to either vote for a party they do not support or abstain from voting altogether. (Pa44-51, 77-81); see Anderson, 460 U.S. at 793.

Anti-fusion laws also impose severe burdens on minor party nominees barred from communicating their association to like-minded voters when it matters most—on the ballot. (Pa137-38, 178-79, 283-86.) Anti-fusion laws punish candidates for engaging in more speech and associational activity by barring them from accepting the nomination from a second party. Cf. Davis v. Fed. Election Comm'n, 554 U.S. 724, 739 (2008) (punishing a candidate for exercising more speech rights imposes a substantial burden and is unconstitutional). Discouraging candidates from appealing to a broader range of voters and parties is antithetical to representative democracy itself. Id. at 742 ("[I]t is a dangerous business for Congress to use the election laws to influence the voters' choices" or "level electoral opportunities.").

Thus, the burdens imposed on minor parties, their voters, and their

nominees by the anti-fusion laws are severe.[66]

2. There are No Adequate State Interests to Justify These Burdens

As discussed above, there are no "sufficiently weighty" interests that withstand even cursory review on this record, especially in light of how poorly tailored the anti-fusion laws are to any legitimate policy concerns. (Supra pp.42-53); Crawford, 553 U.S. at 191. In assessing the possible interests in this case, the Timmons majority again offers little persuasive value.

The majority credited interests in preventing minor party free-riding and party proliferation without any supporting evidence. 520 U.S. at 365-66. As discussed supra pp.51-52, there is overwhelming evidence that the free-riding problem occurs in the reverse: anti-fusion laws artificially inflate the votes cast on Democratic and Republican lines far beyond "their own appeal to the voters." Id. at 366. And the evidence from New York and Connecticut shows that permitting cross-nominations does not lead to an excessive number of parties. (E.g., Pa112-21, 158-59, 204, 206-07); Morse & Gass, supra at 7-8. Two federal

[66] Another reason why Timmons has little persuasive value in assessing the burden here is the higher baseline burden on associational freedom in New Jersey, as evidenced by no minor parties achieving statutory status and major party candidates being undefeated for decades. (Supra pp.6, 16.) New Jersey is substantially different from Minnesota, which had a uniquely successful minor party (Farmer-Labor Party) and elected a minor party candidate (Jesse Ventura) as governor a year after Timmons.

appellate courts actually examined these interests and found them wanting.[67]

The Timmons majority further justified anti-fusion laws with the state's purported interest in preserving a rigid two-party system. 520 U.S. at 366-67. As discussed above, the Court's presumption that such a system would foster political stability has been thoroughly debunked. (Supra pp.19-21 (explaining how a rigid two-party system has instead contributed to democratic decline).) This holding was also an unexplained departure from Williams, which rejected a proposed interest in "promot[ing] a two-party system in order to encourage compromise and political stability" because giving "two particular parties—the Republicans and the Democrats . . . a complete monopoly" eliminated "[c]ompetition in ideas and governmental policies . . . at the core of our electoral process and . . . freedoms." 393 U.S. at 31-32. Williams emphasized that open electoral competition was a hallmark of American democracy:

> There is . . . no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. . . . New parties struggling for their place must have the time and opportunity to organize . . . to meet reasonable requirements for ballot position, just as the old parties have had in the past.

[67] McKenna, 73 F.3d at 199-200; Patriot Party, 95 F.3d at 264-68; see Hasen, 1997 SUP. CT. REV. at 339 (explaining that "reasonable ballot access laws can prevent . . . sham parties" and minor parties only get credit for votes cast on their lines).

393 U.S. at 32.[68]

As Justices Stevens, Souter, and Ginsburg argued in the Timmons dissent, the Court "ha[d] previously required more than a bare assertion that some particular state interest is served by a burdensome election requirement." 520 U.S. at 375 (Stevens, J., dissenting). Indeed, Timmons has proven an aberration, as the Court has continued to scrutinize purported interests, sometimes discovering upon closer inspection that an election law can in fact "harm the electoral process" by "prov[ing] an obstacle to the very electoral fairness it seeks to promote." Randall v. Sorrell, 548 U.S. 232, 249 (2006). Such is the case here, where even a cursory review shows that the anti-fusion laws fail to address any actual policy concern while entrenching a rigid political duopoly and thereby undermining democratic health and stability.

* * *

When balancing the severe burdens with any purported justifications, the court should conclude that anti-fusion laws unconstitutionally infringe upon the associational freedom of the Moderate Party, its voters, and its nominees. Even if the burdens were deemed to be less severe than they are, the laws nonetheless

[68] Notably, this issue—the purported state interest in protecting an exclusionary two-party system—was not briefed by any party in Timmons, and Minnesota expressly disavowed any reliance upon it during oral argument. See Timmons, Tr. of Oral Arg. at 26; Timmons, 520 U.S. at 377-78 (Stevens, J., dissenting).

violate the State Constitution given the absence of any adequate state interests and complete lack of any tailoring.

III. THE ANTI-FUSION LAWS VIOLATE THE FUNDAMENTAL RIGHT TO ASSEMBLE AND MAKE OPINIONS KNOWN TO REPRESENTATIVES (Pa1-2)

The anti-fusion laws are also incompatible with the State Constitution's guarantee that "[t]he people have the right freely to assemble together" and "to make known their opinion to their representatives." N.J. CONST. art. I, ¶ 18 ("Assembly/Opinion Clause"). This provision guarantees the right of voters to act collectively in the political process to convey their preferences to elected officials—precisely the purpose and effect of a minor party's cross-nomination on the ballot. Cf. Eu, 489 U.S. at 223-24. This reading is confirmed by the original understanding of this language when it was incorporated into the State Constitution in 1844. Because the anti-fusion laws preclude voters outside of the Democratic and Republican Parties from working together in the political process to convey their views to their representatives, these fundamental rights are severely burdened. Under the controlling strict scrutiny standard, the lack of compelling interests and narrow tailoring render the anti-fusion laws unconstitutional. The same result holds under a burden-interest balancing test.

A. Assembly/Opinion Clause Guarantees the Right to Collective Political Action That Conveys a Group's Preferences to Elected Officials

This case presents a question of first impression as to whether the anti-fusion laws burden rights guaranteed under New Jersey's Assembly/Opinion Clause. The answer is clear: the anti-fusion laws violate the Assembly/Opinion Clause, which "must be given the most liberal and comprehensive construction," State v. Butterworth, 104 N.J.L. 579, 582 (N.J. 1928),[69] because they prevent voters outside of the two major parties from taking collective political action that would effectively express their shared views to their representatives.

Starting with the plain language, the right of "the people" to "assemble together" refers to collective action with a shared purpose, and the right "to make known their opinion to their representatives" refers to the effective expression of that group's political views to elected officials.[70] That captures perfectly a cross-nomination on the ballot: a group of like-minded voters has come together outside of the major parties to signal why one of the competitive candidates has their support. (Pa46-52.) When Moderate Party supporters vote

---

[69] See Schmid, 84 N.J. at 557 (recognizing that rights enshrined in the Assembly/Opinion Clause enjoy "exceptional vitality").

[70] The phrase "make opinions known to representatives" specifically covers expressive political conduct that informs elected officials. Ignoring this key dimension would render this provision duplicative of the separate guarantee that "[e]very person may freely speak, write and publish his sentiments on all subjects." N.J. CONST. art. I, ¶ 6; see Burgos v. State, 222 N.J. 175, 203 (2015) ("We do not support interpretations that render statutory language as surplusage or meaningless, and we certainly do not do so in the case of constitutional interdictions.").

on their party's line, they close the circle, sending a "clear message" to their nominee—and the opponent—that their support was earned by the nominee's commitment to "moderation, compromise, and a commitment to democracy" and that future support would hinge upon these key values. (Pa79-81.)

The historical record bolsters this conclusion. When a part of the State Constitution is "directly derived from earlier sources," New Jersey courts will look to those sources to determine its meaning, scope, and effect. Schmid, 84 N.J. at 557. When New Jersey added the Assembly/Opinion Clause in 1844, it modeled the clause on the Massachusetts Constitution of 1780, not the First Amendment.[71] Bowie, supra at 1733-34.

By 1780, the right to assemble and communicate directly to representatives was widely recognized as ensuring that ordinary people, acting together, retained an effective voice in governing affairs and the ability to wield collective power to influence policy. Id. at 1703-08.[72] Indeed, much of the pre-Revolutionary conflict between Massachusetts and the Crown focused on whether the colonists could "assemble" and sustain provincial "assemblies" to settle questions of colonial policy. Id. at 1663-94. The prevailing sentiment was that if policy was made without such public participation, government itself was

[71] As noted above, the purpose of the Bill of Rights was to protect the people from an overzealous legislature. (Supra p.30 & n.29.)
[72] For a detailed review of this history, see Bowie, supra at 1663-94, 1703-08.

illegitimate. Id. Leading voices in Massachusetts, such as John Adams, believed it necessary to enshrine these rights in the Commonwealth's new constitution in order to ensure the new government would truly be representative of and responsive to the people. Id. at 1698-99.[73]

In adopting the language from the Massachusetts Constitution, New Jersey embraced the Commonwealth's expansive conception of participatory government in the modern context where parties were the key institutions for collective political action.[74] The drafters of New Jersey's 1844 constitution understood political parties and cross-nominations to be part of how the people came together to shape and influence the direction of government and express their opinions to their representatives. By 1844, parties had been central political institutions for decades. CARL E. PRINCE, NEW JERSEY'S JEFFERSONIAN REPUBLICANS: THE GENESIS OF AN EARLY POLITICAL MACHINE 41-68 (1967) (Pa431-58). Notably, one of the state legislators who called the 1844 convention

---

[73] Adams insisted that representative government be "in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them." Bowie, supra at 1699 (quoting JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES (1776) IN 4 PAPERS OF JOHN ADAMS 87 (1979)).

[74] New Jersey replaced Massachusetts Constitution's "right . . . to . . . give instructions to their representatives" with the "right to make their opinions known to their representatives." MASS. CONST. of 1780, art. XIX; Bowie, supra at 1707, 1733-34. While New Jersey voters could not directly manipulate the conduct of their representatives, the underlying principle, that they were guaranteed effective means of conveying their political views, was unchanged.

had been elected with cross-nominations from two parties. PASLER & PASLER, supra at 214 (Pa461); 1844 PROCEEDINGS at 14.

For decades after the Assembly/Opinion Clause was adopted, New Jersey's elections were faithful to its promise.[75] Voters collaborated through minor parties, using cross-nominations to elevate new issues into the political mainstream. Each cross-nomination sent a clear message as to which issues warranted the minor party's support. And minor party votes cast on Election Day substantiated the nominations, allowing like-minded portions of the electorate to come together to convey their collective priorities directly to their representatives.

B. The Anti-Fusion Laws Impermissibly Burden the Collective Political Rights Protected by the Assembly/Opinion Clause

The anti-fusion laws eliminated this avenue for collective political action and imposed an extraordinary burden on the Assembly/Opinion Clause rights of minor parties and their voters. This was the legislature's purpose: to prevent voters from working together in minor parties to meaningfully influence politics and policy. Argersinger, supra at 298-306 (Pa381-89). Because these are fundamental political rights guaranteed under the State Constitution, Worden

[75] See Kevin Arlyck, The Founders' Forfeiture, 119 COLUM. L. REV. 1449, 1504-05 & n.323 (2019) (subsequent history can be "highly probative" of public understanding at the time of ratification).

compels strict scrutiny. 61 N.J. at 346. As discussed supra pp.42-53, there are no compelling interests that justify prohibiting fusion, nor is a sweeping ban narrowly tailored to any legitimate policy concern. Thus, the anti-fusion laws are unconstitutional under the Assembly/Opinion Clause.

The result would be the same under a burden-interest balancing test: there are no sufficiently important interests to justify the severe burden imposed on Assembly/Opinion Clause rights. Prohibiting cross-nominations makes it all but impossible for voters outside of the Democratic and Republican Parties to collectively and effectively convey their political preferences to their representatives. (Pa47-51, 77-81.) At the ballot box, minor party voters are barred from accurately signaling their support for their party's priorities and values when voting for their nominee—that is, expressing why a candidate earned their support and how they want the candidate to govern if elected. (Id.)

Instead, voters are compelled to support their preferred candidate on the ballot line of a major party they do not support, implying approval for a major party agenda they do not share. There is no comparable means by which a group of like-minded voters can "assemble" to "make known their opinions to their representatives." These restrictions impose a severe burden on Wolfe, Tomasco, and Kibler. (Supra pp.7-9.) Available evidence suggests there are millions of New Jersey voters whose true preferences are similarly silenced when forced to

support one of two major parties on the ballot. (Supra p.9 & n.7.) As discussed supra pp.42-53, there are no sufficiently important interests, and the blanket ban on fusion is in no way narrowly tailored to any legitimate concerns. Crawford, 553 U.S. at 191. Even if these burdens were deemed less than severe (they are not), the end result is the same: the anti-fusion laws violate the Assembly/Opinion Clause and are therefore unconstitutional.

IV. THE ANTI-FUSION LAWS VIOLATE EQUAL PROTECTION (Pa1-2)

The anti-fusion laws violate the guarantee of equal protection by imposing disproportionate and unjustifiable burdens on minor parties, their voters, and their nominees.[76] State law subjects such claims to a balancing test that "consider[s] the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg, 99 N.J. at 567.[77] Here, all three factors compel the conclusion that these discriminatory laws are unconstitutional.

---

[76] The "expansive language [in art. I, ¶ 1] guarantees the fundamental constitutional right to equal protection." N.J. State Bar Ass'n v. State, 387 N.J. Super. 24, 40 (App. Div. 2006); see N.J. CONST. art. I, ¶ 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty . . . ."). This provision also ensures substantive due process and therefore prohibits arbitrary, capricious, or unreasonable state action. Greenberg, 99 N.J. at 570.

[77] Equal protection "under the State Constitution can in some situations be broader than the right conferred by the [federal] Equal Protection Clause." Doe v. Poritz, 142 N.J. 1, 94 (1995).

First, the "affected right[s]" are fundamental. Id. "[O]ur State Constitution devotes an entire article enumerating the rights and duties associated with elections and suffrage." In re Attorney General's Directive, 200 N.J. at 302. Voting, association, and assembly rights enjoy "exceptional vitality in the New Jersey Constitution." Schmid, 84 N.J. at 555-56. These rights collectively ensure an equal opportunity to participate meaningfully in the political process.

Second, the anti-fusion laws substantially and directly intrude upon these fundamental rights. The disproportionate burden imposed on each right is alone sufficient to invalidate these laws. For example, the laws compel minor party voters to associate with and tangibly support the Democratic or Republican Party to vote for their own party's nominee. Barred from voting under the party label that warranted their vote, these voters lose their "right . . . to cast their votes effectively," as voting for their nominee incorrectly signals support for a different party and its agenda. Williams, 393 U.S. at 30.[78] Further, the anti-fusion laws perpetually bar the Moderate Party from nominating its preferred candidates on the ballot—that is, performing the central function of a party. (Pa59-60.) On the other hand, the major parties can nominate their preferred candidates on the ballot, and their voters are not forced to associate with or

[78] Candidates who earn the support of more than one party are arbitrarily barred from presenting themselves truthfully to the electorate; instead, any viable candidate must be a Democrat or a Republican, nothing more, and nothing less.

provide material support to another party to cast a meaningful vote.

Even more onerous is the cumulative impact, an overwhelming burden relegating minor parties and their voters to a permanent electoral under-class. See Jersey City v. Kelly, 134 N.J.L. 239, 248 (E. & A. 1946) ("In determining the constitutionality of an act of the Legislature it must be considered according to its effect as a whole."); Patriot Party, 95 F.3d at 269 ("[W]e must measure the totality of the burden that the laws place on the voting and associational rights of political parties and individual voters . . . ."). In a century with the anti-fusion laws and 10% vote threshold, no minor party has achieved statutory status; in this regard, New Jersey is, by far, the most oppressive state in the country. (Supra p.16 & n.14.) This distinction perpetually elevates only the Democratic and Republican Parties and imbues them with state-granted advantages and a veneer of state-sanctioned legitimacy denied all others.

By forcing the Moderate Party to forsake its preferred candidates, the anti-fusion laws leave only two options; each undermines the party and sustains the duopolistic status quo. The Moderate Party could nominate a lesser choice. But like countless protest candidates nominated by minor parties, that person would lose. Any effort to promote that candidacy would risk spoiling the race for the Moderate Party's preferred candidate, and the Moderate Party would alienate the large swath of the electorate flatly opposed to spoilers. (Pa47, 80-81; supra

p.9 n.7.) Or the Moderate Party could sit out the election, nominating no one on the ballot. This lose-lose dilemma directly intrudes upon fundamental political rights. Patriot Party, 95 F.3d at 269 (anti-fusion laws impose a heavy burden because they force minor parties and their voters to choose between these "unsatisfactory alternatives").

Third, there is no public need for banning fusion. When, as here, there is a "great[] burden" on an "important . . . constitutional right," the state must prove an exceptional "need . . . to justify interference with the exercise of that right." Green Party, 164 N.J. at 149; see Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 496 (2012); Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 632 (2000). New York and Connecticut's rich tradition of successful elections featuring fusion disproves any purported need. As discussed supra pp.42-53, none of the interests asserted to justify anti-fusion laws in other states withstand scrutiny here. A complete prohibition on fusion is overbroad and poorly tailored: any concerns, for example, regarding possible ballot overcrowding could be addressed through less restrictive means, such as modestly increasing signature requirements for nominating petitions. See Timmons, 520 U.S. at 376 (Stevens, J., dissenting); (Pa204.) For these reasons, the anti-fusion laws are plainly unlawful under the balancing test.

These issues mirror those in CAPP, where the Appellate Division held that

state laws precluding voters from registering with any parties other than the Democratic or Republican Parties violated equal protection. 344 N.J. Super. at 241-44. There, the "statutory scheme impose[d] a significant handicap on [all other] parties' ability to organize while reinforcing the position of the established statutory parties." Id. at 242. The Appellate Division emphasized that "[t]he State is not free, particularly at State expense, to enhance or to subsidize the party-building activities of the statutorily recognized parties by stifling political discussion and association of alternative political parties." Id. The court rejected the State's argument that the law merely "denies the alternative parties a benefit"; rather, it impermissibly entangled the State "in the efforts by the established parties to maintain the status quo." Id. Because the asserted state interests in "maintenance of ballot integrity, avoidance of voter confusion, and ensuring electoral fairness" did not "justify the burdens imposed," the statute was held unconstitutional. Id. at 243-44. The anti-fusion laws likewise misuse the levers of the state to enhance political power of the two major parties and suppress any minor party from growing into a serious political entity, all without an important, let alone compelling, justification.

Two of the U.S. Supreme Court's seminal decisions on ballot access under the U.S. Constitution confirm that anti-fusion laws violate equal protection. In Williams, the Court struck down an Ohio law which made it virtually impossible

for minor parties to get their parties' names—and their parties' candidates—on the ballot. 393 U.S. at 24, 30-34. As in New Jersey today,

> the Ohio laws . . . give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Id. at 31. The Court rejected the proposed interest in "promot[ing] a two-party system in order to encourage compromise and political stability." Id. at 31-32. Giving "the Republicans and the Democrats . . . a complete monopoly" would end the "[c]ompetition in ideas and governmental policies . . . at the core of our electoral process and [constitutional] freedoms." Id. at 32.

In Anderson, the Court struck down an Ohio law imposing unreasonable filing requirements for independent candidates. 460 U.S. at 790-806. Because "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational preference," the Court held that the law impermissibly limited "the availability of political opportunity." Id. at 792-93. Like the laws at issue here, the Ohio law "discriminate[d] . . . against those voters whose political preferences lie outside the existing political parties" and

"limit[ed] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group." Id. at 794.

Other courts have recognized that anti-fusion laws impose grossly disproportionate burdens and therefore violate equal protection. The Third Circuit struck down a Pennsylvania anti-fusion law for denying minor parties and their voters equal protection. Patriot Party, 95 F.3d at 268-70. The law placed a heavy burden on minor party voters because it forced them to choose among three unsatisfactory alternatives: "wasting" a vote on a minor party candidate with little chance of winning, voting for a second-choice major party candidate, and not voting at all. Id. at 269. The court also recognized that the anti-fusion law severely burdened minor parties because it prevented

> a minor party from nominating its best candidate and from forming a critical type of consensual political alliance that would help it to build support . . . . Thus, the challenged laws help to entrench the decided organizational advantage that the major parties hold over new parties struggling for existence.

Id. Because the law did not "protect[] any significant countervailing state interest," it was held unconstitutional. Id. at 269-70.[79] The same is true in New

[79] After Timmons, the Third Circuit reheard this case en banc and affirmed its initial ruling because "[n]othing in the Timmons opinion itself weakens the equal protection analysis" and "no equal protection claim was asserted or considered by the Court in Timmons." Reform Party, 174 F.3d at 312-18. The result was the same regardless of whether the burden was deemed severe. Id. at 314-15. Then-Judge Alito joined the en banc panel's decision.

Jersey: the anti-fusion laws force Moderate Party voters to "choose among three unsatisfactory alternatives" and prohibit the Moderate Party "from nominating its best candidate" and forging a "consensual political alliance." Id. Because these anti-fusion laws "entrench the decided organizational advantage [of] the major parties without "protecting any significant countervailing state interest," they violate equal protection. Id.

Recently, the Supreme Court of Pennsylvania narrowly divided over the constitutionality of a different anti-fusion law. Working Families Party v. Commonwealth, 209 A.3d 270 (Pa. 2019).[80] Four justices rejected an equal protection claim, without actually analyzing the disproportionate burdens imposed on minor parties, voters, and nominees. Id. at 282-84. Instead, their holding turned on a circular conclusion that a state interest in enforcing aspects of the anti-fusion laws was sufficient justification to uphold the laws in toto. Id.

In contrast, three dissenting justices explored in detail the real-world role of parties and fusion before concluding that equal protection is incompatible with anti-fusion "statutes that so entrench power in major parties to the exclusion of minor parties." Id. at 305 (Wecht, J., dissenting); see id. at 288-94, 299-304 (Wecht, J., dissenting). In their view, the "regulations . . . plainly

[80] Neither the majority nor the dissent suggested that Timmons controlled either the state and federal equal protection claims.

impose asymmetrical burdens on voters and parties based upon nothing more than numerosity and relative popularity—which in part are determined by a self-reinforcing system in which political power begets more political power to the manifest exclusion of marginal and minority political coalitions and dissenting perspectives." Id. at 305 (Wecht, J., dissenting).

When, as in Pennsylvania and New Jersey, a minor party's legal status turns on its share of the overall vote and fusion is prohibited, minor party voters face a lose-lose dilemma:

> If forced to choose between voting his first-choice candidate without the desired affiliation or his second-choice candidate as the nominee of his preferred party, the voter must choose between voting for whom he believes to be the candidate who best embodies his political values or casting a ballot in furtherance of the success of the party with which he identifies. Should the voter choose to vote candidate rather than party, his vote adversely affects his favored party in its quest to improve its status under Pennsylvania law. When a party member votes for the nominee of another party, not only does he reduce the numerator by not furnishing a vote for his chosen party, he also increases the denominator by casting a vote that effectively supports another party for classification purposes, with the practical effect of reducing his party's likelihood of elevating its status in the next election.

Id. at 306 (Wecht, J., dissenting) (emphasis original). This inequity is unlawful.

The New York Court of Appeals likewise recognized the equal protection issues implicated by anti-fusion laws. A key rationale for striking down a "legislative provision . . . solely intended to prevent political combinations and fusions" was that the state "must not discriminate in favor of one set of

candidates against another set." Callahan, 93 N.E. at 263. In striking down another legislative attempt to "mak[e] it more difficult to vote fusion or coalition tickets," New York's highest court held that "each voter shall have the same facilities as any other voter in expressing his will at the ballot-box, so far as practicable." Britt, 96 N.E. at 373. Permitting such a law to stand would produce "great difficulty in turning out the party in power" as a result of "the unequal opportunities to vote afforded the electors." Id. at 374.

Taken together, these decisions help illustrate what the record in this case makes clear: New Jersey's prohibition on fusion imposes extraordinary burdens on the Moderate Party, its voters, and candidates who would seek its nomination. Major parties and their supporters suffer no comparable burdens. No post hoc justification for these laws can justify this grossly disproportionate treatment.

V. THE STATE CONSTITUTION PROHIBITS "AGGREGATING" CROSS-NOMINATIONS (Pa1-2)

If this court finds the anti-fusion laws unconstitutional and permits fusion hereafter, it should clarify that the state may not "aggregate" cross-nominations, as aggregation would violate the State Constitution. The Eighth Circuit failed to include this clarification when it found Minnesota's anti-fusion laws unconstitutional, and the Minnesota legislature subsequently required aggregation to perpetuate the major parties' duopoly while appearing to permit fusion. LISA JANE DISCH, THE TYRANNY OF THE TWO-PARTY SYSTEM 24-25

(2002) (Pa423.)[81]

Aggregation is when a cross-nominated candidate has all nominating parties listed next to their name, thereby preventing a voter from specifying which of the nominating parties warranted their vote. (Pa130.) Unable to specify a party, a voter is barred from associating with just their party and is instead compelled to associate with all nominating parties to support their party's nominee, in clear violation of associational freedom. See Jones, 530 U.S. at 577. Further, because aggregation makes it impossible to separately count votes received by each cross-nominating party, a minor party that cross-nominates candidates could never achieve statutory status in New Jersey. Simply put, aggregating cross-nominations would perpetuate many of the same constitutional injuries produced by the anti-fusion laws. The state must not be permitted to render illusory such fundamental rights. Thus, if this court finds the anti-fusion laws unconstitutional, it should clarify that, whether through statute, regulation, or practice, the state may not aggregate cross-nominations.

CONCLUSION

The anti-fusion laws violate the New Jersey Constitution. Future elections should permit cross-nominations on the ballot.

---

[81] The U.S. Supreme Court then overturned the Eighth Circuit in Timmons, allowing for reinstatement of the prior fusion ban.

Respectfully submitted,

WEISSMAN & MINTZ
Flavio L. Komuves (018891997)
Brett M. Pugach (032572011)
Steven P. Weissman (024581978)
220 Davidson Avenue, Suite 410
Somerset, New Jersey 08873
732.563.4565

BROMBERG LAW LLC
Yael Bromberg (036412011)
43 West 43rd Street, Suite 32
New York, New York 10036
212.859.5083

Professor Joel Rogers (Admitted Pro Hac Vice)
University of Wisconsin Law School
975 Bascom Mall
Madison, Wisconsin 53706
609.347.9889

Professor Nate Ela (Admitted Pro Hac Vice)
University of Cincinnati College of Law
P.O. Box 210040
Cincinnati, Ohio 45221
513.556.0866

Counsel for Appellants
Moderate Party and Richard A. Wolfe

UNITED TO PROTECT DEMOCRACY
Farbod K. Faraji (263272018)
Beau C. Tremitiere (Admitted Pro Hac Vice)
2020 Pennsylvania Avenue NW
Suite 163
Washington, D.C. 20006
202.579.4582

Counsel for Appellants
Michael Tomasco and William Kibler

By: */s/ Flavio L. Komuves*
Dated: December 16, 2022

By: */s/ Farbod K. Faraji*

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN RE PETITION FILED BY MODERATE PARTY NOMINATING HON. TOM MALINOWSKI FOR CONGRESS IN CONGRESSIONAL DISTRICT 7	DOCKET NO. A-003542-21 A-003543-21 CIVIL ACTION (CONSOLIDATED) ON APPEAL FROM ADMINISTRATIVE ACTIONS OF THE SECRETARY OF STATE DATED JUNE 8, 2022 AND JULY 19, 2022
IN RE PETITION FILED BY MODERATE PARTY NOMINATING HON. TOM MALINOWSKI FOR CONGRESS IN CONGRESSIONAL DISTRICT 7	

BRIEF OF INTERVENOR NEW JERSEY REPUBLICAN STATE COMMITTEE, INC.

ARCHER & GREINER, P.C.
Jason N. Sena, Esq. (016842012)
10 Highway 35
Red Bank, NJ 07701
(732) 268-8000

Attorneys for Intervenor
New Jersey Republican State Committee, Inc.

Date of submission to the court: June 9, 2023

TABLE OF CONTENTS

Page(s)

TABLE OF JUDGMENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

PROCEDURAL HISTORY 2

I. June 7, 2022: Nominating Petition of Moderate Party. 2

II. June 8 & July 19, 2022: Secretary of State Rejection of Petition. 2

III. July 20, 2022: Notices of Appeal. 3

IV. August 10, 2022: Motion to Intervene by NJGOP. 3

V. March 20, 2023: Motions to Dismiss by State and NJGOP. 3

VI. May 1, 2023: Denial of Motions to Dismiss by State and NJGOP. 4

STATEMENT OF FACTS 4

I. June 2-7, 2022: The Creation of the Moderate Party and Nomination of Malinowski. 4

II. August 8, 2022: NJGOP's Warning of Manipulative Behavior has Already Proven True 7

ARGUMENT 11

I. UNDER THE FEDERAL CONSTITUTION, PROHIBITING FUSION VOTING IS A VALID EXERCISE OF THE LEGISLATURE'S AUTHORITY TO REGULATE THE TIME, PLACE AND MANNER OF ELECTIONS 12

A. As a matter of federal law, Plaintiffs' constitutional challenge should be analyzed under the burden-balancing standard, not strict scrutiny. 15

B. As a matter of federal law, New Jersey's prohibition of fusion voting is a valid use of its power to regulate elections. 23

II. UNDER THE STATE CONSTITUTION, THE CENTURY-OLD BAN ON FUSION VOTING IS A VALID EXERCISE OF THE LEGISLATURE'S RIGHT TO REGULATE ELECTIONS. 26

A. In the context of regulating election mechanics, the New Jersey Constitution does not grant greater protections for free speech than the U.S. Constitution. 27

B. In the context of regulating election mechanics, the New Jersey Constitution does not grant greater protections for the right to assemble than the U.S. Constitution. 32

III. APPELLANTS' DEMAND THAT THE COURT PREDETERMINE THAT ONLY DISAGGREGATED FUSION VOTING IS PERMISSIBLE UNDER THE STATE CONSTITUTION SEEKS AN ADVISORY OPINION 34

CONCLUSION 36

Table of Authorities

Page(s)

Federal Cases

Anderson v. Celebrezze,
460 U.S. 780, 792 n.12 21

Bankers Life & Casualty Co. v. Crenshaw,
486 U.S. 71 (1988) 13

Borden v. Sch. Dist.,
523 F.3d 153 (3d Cir. 2008) 28

Bullock v. Carter,
405 U.S. 134 (1972) 24, 25

Burdick v. Takushi,
504 U.S. 428 (1992) 15, 16, 17, 21

Caruso v. Yamhill Cnty. ex rel. Cnty. Comm'r,
422 F.3d 848 (9th Cir. 2005) 17

Colorado Republican Federal Campaign Comm. v. Federal Election Comm.,
518 U.S. 604 (1996) 14

Mazo v. New Jersey Sec. of State,
54 F.4th 124 (3d Cir. 2022) ..... *passim*

Price v. N.Y. State Bd. of Elections,
540 F.3d 101 (2d Cir. 2008) 16

Rosen v. Brown,
970 F.2d 169 (6th Cir. 1992) 17

Sam Party of N.Y. v. Kosinski,
987 F.3d 267 (2nd Cir. 2021) 15, 16, 20

Storer v. Brown,
415 U.S. 724 (1974) 17, 24

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) ..... *passim*

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008) 16, 25

State Cases

Chamber of Commerce v. State,
89 N.J. 131 (1982) 33, 34

Council of Alternative Political Parties v. State, Div. of Elections,
344 N.J.Super. 225 (App.Div. 2001) 20

Hamilton Amusement Center v. Verniero,
156 N.J. 254 (1998) 28

State v. Hunt,
91 N.J. 338 (1982) ..... *passim*

State v. Roach,
219 N.J. 58 (2014) 26

Twp. of Pennsauken v. Schad,
160 N.J. 156 (1999) 28

State Statutes

N.J.S.A. 19:3-5.1 28

N.J.S.A. 19:13-8 28

N.J.S.A. 19:14-9 28

N.J.S.A. 19:23-25.1 29

N.J.S.A. 19:23-45 29

N.J.S.A. 19:34-65 30

N.J.S.A. 19:34-66 30

1921 N.J. Sess. Law, c. 196, § 59 ..... 12, 29

1921 N.J. Sess. Law, c. 196, § 60 ..... 13, 29

Rules

N.J.R.E. 802 12

N.J.R.E. 902 ..... 8, 10

Constitutional Provisions

New Jersey Constitution (1947), Art. I, Para. 6 27

New Jersey Constitution (1947), Art. I, Para. 18 ..... 30, 31

New Jersey Constitution, Article II 11

U.S. Constitution, Amendment I 27, 30

U.S. Constitution, Article I, § 4 ..... 11, 13, 25, 29

Other Authorities

Ballotpedia, Fusion Voting, https://ballotpedia.org/Fusion_voting (last visited May 25, 2023, 10:11am) 22

David Wildstein, "N.J. Moderate Party Funded by Pelosi Super PAC", New Jersey Globe (October 13, 2022) https://newjerseyglobe.com/congress/n-j-moderate-party-funded-by-pelosi-super-pac/ 10

David Wildstein, "Sue Altman announced bid to unseat Tom Kean in NJ-7", New Jersey Globe, May 31, 2023 https://newjerseyglobe.com/congress/sue-altman-announces-bid-to-unseat-tom-kean-in-nj-7/ 5

Federal Election Commission website, Moderate Party Independent Fund Statement of Organization https://docquery.fec.gov/pdf/760/202208089525138760/202208089525138760.pdf 7

Federal Election Commission website, Moderate Party Independent Fund Statement of Receipts, https://www.fec.gov/data/receipts/?committee_id=C00822379&two_year_transaction_period=2022&data_type=processed 8

The Federalist, No. 10 (Madison) 24

Google Ad Transparency, Moderate Party Independent Fund, https://adstransparency.google.com/advertiser/AR0029937674399 7767681?region=US&topic=political (last visited May 25, 2023, 11:26 pm) 23

Google Ad Transparency, Moderate Party Independent Fund, https://adstransparency.google.com/advertiser/AR0029937674399 7767681?region=US&topic=political (last visited May 25, 2023, 11:26pm) 8

House Majority PAC website, https://www.thehousemajoritypac.com/(last visited May 25, 2023, 11:23pm) 8, 23

Jeffrey Monginello, Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture, 41 Seton Hall L. Rev. 1111, 1121 (2011) 12

Matt Friedman, "The Democratic, I mean, 'Moderate Party'", Politico (October 14, 2022) https://www.politico.com/newsletters/new-jersey-playbook/2022/10/14/the-democratic-i-mean-moderate-party-00061806 10

Matt Friedman, "Progressive activist Altman helping to organize 'Moderate Party' efforts", Politico (June 13, 2022) https://www.politico.com/news/2022/06/13/progressive-activist-altman-organize-moderate-party-efforts-00039150 9

New Jersey Election Law Enforcement Commission webpage, public search tool https://www.njelecefilesearch.com/SearchPACReports (last visited May 25, 2023, 10:53pm) 6

Prime Policy Group website, Jennifer Holdsworth biography, https://www.prime-policy.com/our-people/jennifer-c-holdsworth (last visited May 25, 2023, 10:49 PM) 5

INTRODUCTION

Appellants - and the professional political operatives orchestrating the circumstances of this case - are attempting to manipulate our State's General Election ballot to favor one major party and handicap another under the guise of promoting the rights of "minor parties." In doing so, they challenge several statutes that have been law for more than 100 years and insist that no reading of those statutes could pass constitutional muster. That is plainly wrong and the Appellants' claims should be rejected.

This precise issue has already been decided by the United States Supreme Court and the Appellants have not made the necessary legal showing to allow departure from that Court's decision. While the New Jersey Constitution does offer greater protections to free speech and free association claims in certain contexts, that does not translate to an unrestricted right to free speech and free association when it comes to the State Legislature's right to regulate the mechanics of the election process. Limiting the number of times a candidate can appear on the general election ballot is the quintessential function of the regulation of the mechanics of the election process and that policy determination is entitled to deference. The Appellants' right to engage in expressive conduct on the ballot is entitled to a far lesser degree of constitutional protection under both the U.S. and New Jersey Constitutions. Using

the appropriate standard of review – the burden-balancing test – the Legislature's choice to disallow fusion voting passes constitutional muster.

In short, Appellants ask this Court for an extraordinary pronouncement: a rule that fusion voting is not only permitted, but a constitutional right. To the contrary, the United States Supreme Court has made it abundantly clear that fusion voting is not a constitutional right. Further, fusion voting is prohibited in 45 of the 50 states and has been prohibited in New Jersey for over 100 years. Finally, the New Jersey Constitution does not guarantee the right to fusion voting and the Court should maintain the constitutionality of New Jersey's infinitely reasonable and non-discriminatory election regulations.

PROCEDURAL HISTORY

I. June 7, 2022: Nominating Petition of Moderate Party.

This saga began on June 7, 2022, when a newly formed corporate entity entitled the "Moderate Party" filed a petition nominating former Congressman Tom Malinowski as a candidate for election, even though Malinowski already filed a Certificate of Acceptance for the nomination for that office from the Democratic Party in its Primary Election, which was held on the same date.

II. June 8 & July 19, 2022: Secretary of State Rejection of Petition.

The next day, the Secretary of State correctly rejected that petition. (Pa1). A month later, on July 8, 2022, the Appellants requested what they described as

"reconsideration" of the Secretary of State's decision. On July 19, 2022, the Secretary correctly rejected this request. (Pa2).

III. July 20, 2022: Notices of Appeal.

On July 20, 2022, Appellants filed Notices of Appeal directly with the Appellate Division challenging the Secretary of State's rejection of the petition. (Pa3a, 23a).

IV. August 10, 2022: Motion to Intervene by NJGOP.

On August 10, 2022, the New Jersey Republican State Committee, Inc. ("NJGOP") filed motions to intervene to address the important constitutional issues, procedural issues, and potentially far-reaching effects that a decision in this case could have. (Pa552, Pa555). By Orders dated September 15, 2022, the Court granted NJGOP's motions. (Pa558, Pa559).

Following the entry of an Order consolidating these appeals, an Order removing this case from an expedited track and the granting of several extensions of the initial briefing schedule, Appellants filed a merits brief on December 19, 2022.

V. March 20, 2023: Motions to Dismiss by State and NJGOP.

On March 20, 2023, the State filed a Notice of Motion to dismiss this appeal, or alternatively to transfer the matter to the Law Division to allow a factual record to be developed. On the same date, NJGOP filed a similar Notice of Motion which also sought to strike a portion of Appellants' appendix, as well as a Notice of Motion

permitting an extension of time to file its merits brief in the event either motion was denied. The State later filed a similar Notice of Motion seeking an extension.

VI. May 1, 2023: Denial of Motions to Dismiss by State and NJGOP.

By Orders dated May 1, 2023, the Court denied the Motions to Dismiss filed by the State and NJGOP, holding in pertinent part that the documents submitted in Appellants' appendix "are of little if any assistance to the court in deciding the legal issues relating to appellants' facial constitutional challenge." In an Order of the same date, the Court granted the State and NJGOP the right to file its merits brief no later than June 9, 2023.

STATEMENT OF FACTS

All of the following facts are contained in Appellants' Appendix or are matters of public record of which the Court can take judicial notice. These facts are presented for the purpose of demonstrating to the Court how the circumstances surrounding this case were engineered by professional political operatives, and how fusion voting, if permitted, would likely be misused by political operatives to inappropriately manipulate the election process and confuse voters.

I. June 2-7, 2022: The Creation of the Moderate Party and Nomination of Malinowski.

The facts demonstrate the relative ease and speed with which political operatives affiliated with a major political party can organize and form a new "minor

political party" in an effort to obfuscate the election process and attempt to boost the electoral prospects of that major party.

On June 2, 2022 – five days before the filing deadline for Direct Nominating Petitions in the November 2022 General Election – the Appellant, "Moderate Party Inc.", was formed by the filing of a Certificate of Incorporation with the New Jersey Secretary of State. (Pa55a). The Certificate of Incorporation lists Michele Garay, Craig Schrader, and Jennifer Holdsworth of 2800 South Arlington Ridge Rd., Arlington, Virginia, as the Moderate Party's Board of Trustees. (Pa56a). Ms. Holdsworth is the former Political Director for the New Jersey Democratic State Committee and has served in formal and consulting roles on Democratic political campaigns on the State and federal levels. See Prime Policy Group website, Jennifer Holdsworth biography, https://www.prime-policy.com/our-people/jennifer-c-holdsworth (last visited May 25, 2023, 10:49 PM).

Three days later, on June 5, 2022, the Executive Director of the far-left New Jersey Working Families Party, Susan Altman, served as one of several circulators of a Petition to nominate now-former Congressman Tom Malinowski as the official candidate of the Moderate Party in New Jersey's 7th Congressional District. (Pa352a).[1] Appellants Richard Wolfe, William Kibler, and Michael Tomasco all

---

[1] In the time between the entry of the Court's May 2, 2023 Orders and the filing of this brief, Susan Altman declared her intention to run for Congress in New Jersey's 7th Congressional District. See David Wildstein, "Sue Altman announced bid to

signed the same petition sheet circulated by Ms. Altman, which indicates that she physically met with each of them on or around June 5, 2022. (Pa351a).

Two days later, on June 7, 2023, the Nominating Petition was filed with the Secretary of State. (Pa1). It is unknown whether the Moderate Party has any members other than Wolfe, Garay, Shrader, Kibler, and Tomasco; nor has any such information been made part of the record.

On the same day, Mr. Shrader and Ms. Garay filed a Form D-4 with the New Jersey Election Law Enforcement Commission, representing to the State's campaign finance regulatory agency that the Moderate Party was not actually a political party (as had just been represented to the Secretary of State through the filing of the Nominating Petition), but a Continuing Political Committee, the New Jersey State law version of a Political Action Committee. See New Jersey Election Law Enforcement Commission webpage, public search tool https://www.njelecefilesearch.com/SearchPACReports (last visited May 25, 2023, 10:53pm).[2]

---

unseat Tom Kean in NJ-7", New Jersey Globe, May 31, 2023 https://newjerseyglobe.com/congress/sue-altman-announces-bid-to-unseat-tom-kean-in-nj-7/ (last visited May 31, 2023, 9:31am)

2 The Moderate Party's filings with the Election Law Enforcement Commission are publicly available and can be viewed by typing "Moderate Party" into the search field found at this link and clicking "search."

On June 8, 2022, the next day, the Secretary of State appropriately rejected the Nominating Petition since Malinowski had already accepted the nomination of the Democratic Party for the same office. (Pa1).

All of these events occurred speedily within the span of just six calendar days. The simplicity of the entire process – payment of nominal fees to the State and filing a few forms – illustrates how easily a few people can form a "political party" which they now claim entitles them a place on the General Election ballot.

II. August 8, 2022: NJGOP's Warning of Manipulative Behavior has Already Proven True.

This case was initiated with the filing of Notices of Appeal by the Appellants on July 20, 2022. The Appellants ask the Court to force the State to allow "disaggregated fusion voting," which allows a single candidate to appear on the general election ballot an unlimited number of times so long as a "political party" nominates that candidate to run under their banner. (Pa1, 11). The limitless potential for abuse that such a system would permit in New Jersey's unique political environment, where there are either federal or State elections every year, was foreshadowed in NJGOP's August 10, 2022 Motion to Intervene. Unknown at that time was the fact that the abuse had already begun to occur.

By August 8, 2022 – before NJGOP even sought to intervene in this case – the handlers of the "Moderate Party" were already at work. On that date, a Statement of Organization was filed with the Federal Election Commission ("FEC")

establishing the Super PAC coincidently named the "Moderate Party Independent Fund", which has an address of P.O. Box 15320, Washington, D.C. See Federal Election Commission website, Moderate Party Independent Fund Statement of Organization https://docquery.fec.gov/pdf/760/202208089525138760/202208089525138760.pdf (last visited May 25, 2023, 10:15pm).[3] One only needs to note who is funding this group to understand who is engineering the circumstances of this case: the *sole* donor to the "Moderate Party Independent Fund" was the House Majority PAC, which donated $500,000.00 on September 8, 2022. See Federal Election Commission website, Moderate Party Independent Fund Statement of Receipts, https://www.fec.gov/data/receipts/?committee_id=C00822379&two_year_transaction_period=2022&data_type=processed (last visited May 25, 2023, 11:21pm). The House Majority PAC describes its mission as follows: "protect and expand the Democratic House Majority." See House Majority PAC website, https://www.thehousemajoritypac.com/(last visited May 25, 2023, 11:23pm).

Inclusion of the words "Moderate Party" in the name of an allegedly non-connected Super PAC from Washington, D.C., was not an accident. According to Google's voluntary disclosure of spending on digital advertising through its

---

[3] The public documents filed with the Federal Election Commission found at the links contained in this brief are self-authenticating documents under New Jersey Rule of Evidence 902.

platform, the Moderate Party Independent Fund spent $231,000 running digital ads in New Jersey in October and November 2022 See Google Ad Transparency, Moderate Party Independent Fund, https://adstransparency.google.com/advertiser/AR00299376743997767681?region=US&topic=political (last visited May 25, 2023, 11:26pm). Those ads supported former Congressman Malinowski's candidacy and prominently featured Appellant Rick Wolfe and Michele Garay, who identified herself in the ad as the "Chairperson of the New Jersey Moderate Party." It took less than 60 days from the start of this case for the Democratic Party to use the Moderate Party as a front to attempt to manipulate the election process to benefit its own candidate, all of which was predicted by NJGOP in the August 10, 2022 Certification of NJGOP Executive Director Thomas Szymanski, supporting the NJGOP's Motion to Intervene.

Local media has extensively reported on the thinly veiled efforts of the Democratic Party and Working Families Party to "stand behind the curtain" while using the Moderate Party as a front in the political arena. After her involvement with this case was exposed, New Jersey Working Families Party Executive Director Susan Altman was not shy about her efforts and goals: "'For New Jersey, this is a one-two punch to make our democracy stronger,' said Altman, whose role with the

Moderate Party has not previously been reported."[4] See Matt Friedman, "Progressive activist Altman helping to organize 'Moderate Party' efforts", Politico (June 13, 2022) https://www.politico.com/news/2022/06/13/progressive-activist-altman-organize-moderate-party-efforts-00039150 (last visited May 26, 2023, 11:01pm)[5] The media continued to take note of the puppet-string-pulling by the Democratic and Working Families parties throughout the 2022 election season. See Matt Friedman, "The Democratic, I mean, 'Moderate Party'", Politico (October 14, 2022) https://www.politico.com/newsletters/new-jersey-playbook/2022/10/14/the-democratic-i-mean-moderate-party-00061806 (last visited May 26, 2023, 11:16pm) ("While the face of the Moderate Party is a Republican committeeman from Malinowski's hometown, I and my fellow New Jersey reporters have long made clear that it's in large part pushed by the left, if not the New Jersey Democratic establishment. So the fact that it's funded by Democrats shouldn't be a surprise"); David Wildstein, "N.J. Moderate Party Funded by Pelosi Super PAC", New Jersey Globe (October 13, 2022) https://newjerseyglobe.com/congress/n-j-moderate-party-funded-by-pelosi-super-pac/ (last visited May 26, 2023, 11:17pm) ("The New Jersey Moderate Party, which sought to run Rep. Tom Malinowski (D-Ringoes) as their

---

4 The "one-two punch" to which Altman refers is (1) this case which challenges the way New Jersey conducts General Elections, and (2) another case which she is orchestrating to challenge the way New Jersey conducts Primary Elections.

5 The online articles found at the links contained in this brief are self-authenticating documents under New Jersey Rule of Evidence 902.

candidate in order to let the two-term congressman's name appears twice on the general election ballot, was funded by national Democrats, records show").

It is no secret that if this case is successful, the Working Families Party, the Moderate Party, and any couple of people who manage to get together and fill out forms and pay a nominal fee to the State to form a corporation will also have the ability to manipulate general election ballots by "cross-nominating" candidates of other political parties and, using Washington, D.C. Super PACs to fund their operations all the while.

ARGUMENT

New Jersey lawfully has prohibited fusion voting for over a century. New Jersey's fusion voting prohibition was duly enacted by the Legislature and is a valid exercise of its authority to regulate the time, place, and manner of elections pursuant to the Elections Clause, Article I, Section 4 of the United States Constitution and r Article II of the New Jersey Constitution. The prohibition on fusion voting does not impose any burden whatsoever, much less a severe burden, on voting rights, and so it is entitled to higher deference, lesser scrutiny, and a presumption of validity. Supporting the prohibition's validity are important policy rationales including discouraging factionalism, discouraging political gamesmanship, and ensuring ballot fairness.

Accordingly, New Jersey's statutory prohibition on fusion voting is lawful and constitutional. Appellants' arguments to the contrary defy logic, New Jersey law, and the practices of the majority of other States.

I. UNDER THE FEDERAL CONSTITUTION, PROHIBITING FUSION VOTING IS A VALID EXERCISE OF THE LEGISLATURE'S AUTHORITY TO REGULATE THE TIME, PLACE AND MANNER OF ELECTIONS.

For over a century, the New Jersey Legislature has expressly banned all forms of fusion voting, and for good reason. The practice of "disaggregated fusion voting" that Appellants advocate for allows the same candidate to appear on the general election ballot multiple times; once for each "party" nomination that they receive. If a candidate is nominated by ten political parties, regardless of how many members those "parties" have according to Appellants' logic, the same candidate appears on the general election ballot ten times on ten separate columns. If the documents submitted in Appellants' Appendix are to be believed, some form of fusion voting occurred in New Jersey from the early 19th Century until it was banned in 1921.[6] In

---

6 In support of the proposition that New Jersey political parties "fues[ed] routinely in local, state and federal elections" until fusion voting was banned by the Legislature in the 1920's, Appellants cite to a document entitled "Chart of NJ Fusion Candidates." (Pa272a – 274a.) It is unclear who prepared this document or when. Like many that were submitted in Appellants' Appendix, this document is textbook hearsay in that it is submitted for the truth of its contents without meeting the requirements of the New Jersey Rules of Evidence and thus cannot be relied upon for the truth of the matters asserted therein. See N.J.R.E. 802. Nonetheless, the purpose of referencing the document in this brief does not depend on the veracity of its contents.

truth, however, the Legislature only expressly allowed fusion voting for a period of 10 years between 1911 and 1921. See Jeffrey Monginello, Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture, 41 Seton Hall L. Rev. 1111, 1121 (2011). In 1921, the Legislature made the legitimate policy decision to "restrict[] the appearance of name of person to but once on the ticket for the same office" by disallowing candidates who had already accepted a primary nomination from being nominated by petition, 1921 N.J. Sess. Law, c. 196, sec. 59, at 551, and prohibiting candidates from accepting petition nominations if they had already accepted a primary nomination. 1921 N.J. Sess. Law, c. 196, sec. 60, at 551.

New Jersey's statutory prohibition of fusion voting is within the Legislature's authority to regulate elections and is valid under the Elections Clause of the United States Constitution.[7] The Elections Clause of the U.S. Constitution vests the primary authority to regulate the time, place, and manner of federal elections with State legislatures. U.S. Const., Art. I, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the

---

7 The fusion voting prohibition is also valid under the New Jersey Constitution. The same analysis conducted under the United States Constitution in heading I of the Argument section in this brief is applicable under the New Jersey Constitution. See heading II of the Argument section in this brief, supra at 23.

legislature thereof"). Laws duly enacted by State legislatures are presumed valid. See Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 81 (1988).

The Legislature's choice to regulate the mechanics of the election process by limiting the number of times the same candidate can appear on the general election ballots is reviewed using the burden-balancing standard, not strict scrutiny as the Appellants claim. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997); Mazo v. New Jersey Sec. of State, 54 F.4th 124, 140-141 (3d Cir. 2022). Under the burden-balancing standard of review, the Legislature's policy decision easily passes muster by advancing the important State interests of basic ballot fairness and prohibiting political gamesmanship and deceptive tactics, which public documents show has already begun to occur in this case. The U.S. Supreme Court has already addressed the very same issue and held that there is no constitutional right to engage in fusion voting, and the outcome here should be no different.

The analysis conducted and conclusion reached under the New Jersey Constitution should be the same. Under State v. Hunt, 91 N.J. 338 (1982), New Jersey courts may depart from the guidance of U.S. Supreme Court opinions on constitutional issues only where a number of factors are met; such as whether the rights existing under the New Jersey Constitution are different than the rights under the U.S. Constitution. Appellants fail to satisfy the Hunt factors, which in turn requires that the U.S. Supreme Court's opinion in Timmons be followed. Even when

these issues are analyzed under the New Jersey Constitution, Appellants' claims still fail.

A. As a matter of federal law, Plaintiffs' constitutional challenge should be analyzed under the burden-balancing standard, not strict scrutiny.

"The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." Timmons, 520 U.S. at 357 (citing Colorado Republican Federal Campaign Comm. v. Federal Election Comm., 518 U.S. 604, 616 (1996) (citations omitted)). However, "it is also clear that States may, and inevitably *must*, enact reasonable regulations of parties, elections, and ballots to reduce election-and campaign-related disorder." Id. at 358 (emphasis added) (citing Burdick v. Takushi, 504 U.S. 428, 433 (1992). This is because, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Burdick, 504 U.S. at 433 (emphasis added).

When analyzing whether State election law violates First and Fourteenth Amendment associational rights, courts measure the "character and magnitude" of the "burden the State's rule imposes on those rights against the interests the State contends justify the burden, and consider the extent to which the State's concerns make the burden necessary." Id. If the State election law imposes "severe burdens"

on plaintiffs' rights then it (1) must be narrowly tailored and (2) advance a compelling State interest. Id.

"Courts have identified three types of severe burdens on the right of individuals to associate as a political party." Sam Party of N.Y. v. Kosinski, 987 F.3d 267, 274 (2nd Cir. 2021). "First are regulations meddling in a political party's internal affairs." Id. "Second are regulations restricting 'core associational activities' of the party or its members." Id. "Third are regulations that 'make it virtually impossible' for minor parties to qualify for the ballot." Id.

If the State election law imposes "lesser burdens", the State's "important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." Timmons, 520 U.S. at 358. (citations omitted) (internal quotation marks omitted). However, the lesser scrutiny warranted by "lesser burdens" is not "pure rational basis review." Sam Party of N.Y., 987 F.3d 267, 274 (2d Cir. 2021) (citing Price v. N.Y. State Bd. of Elections, 540 F.3d 101, 108 (2d Cir. 2008)). "Rather, the court must actually weigh the burdens imposed on the plaintiff against the precise interests put forward by the State, and the court must take into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." Id. (citations omitted) (internal quotation marks omitted). "Review under this balancing test is "quite deferential," and no "elaborate, empirical verification" is required." Id. (quoting Timmons, 520 U.S. at 364). Accordingly,

the Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 452 (2008) (emphasis added) (citing Burdick, 504 U.S. at 438).

Less than a month before Appellants' merits brief was filed, the Third Circuit Court of Appeals decided the Mazo case and upheld a New Jersey statute which regulates use of slogans on primary election ballots following a challenge on First Amendment grounds using the same burden-balancing standard that applies to this case. In Mazo, the plaintiff challenged the State's requirement that a candidate obtain prior consent from a third party whose name was sought to be used in that candidate's slogan on the primary election ballot. Mazo, 54 F.4th at 144. The Court applied the burden-balancing standard to analyze the plaintiff's First Amendment claims because while the regulation burdened a fundamental right, it primarily regulated the mechanics of the election process, rather than political speech. Id. The Court's reasoning in applying the burden-balancing standard is on point in this case:

> For ballots to be effective tools for selecting candidates and conveying the will of voters, they must be short, clear, and free from confusing or fraudulent content. **This necessarily limits the degree to which the ballot may—or should—be used as a means of political communication**. See Burdick, 504 U.S. at 438, 112 S.Ct. 2059 ("[T]he function of the election process is to 'winnow out and finally reject all but the chosen candidates[.]'") (quoting Storer, 415 U.S. at 735, 94 S.Ct. 1274); id. ("Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."); Timmons, 520 U.S. at 365, 117 S.Ct.

> 1364 (**treating ballots as forums for political expression "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising"**); Caruso v. Yamhill Cnty. ex rel. Cnty. Comm'r, 422 F.3d 848, 851, 856 (9th Cir. 2005) (**"[T]he fact that the ballot is 'crucial' to an election does not imply that [initiative proponent] therefore has a First Amendment right to communicate a specific message through it."**); Rosen v. Brown, 970 F.2d 169, 175 (6th Cir. 1992) (ballots are "State-devised form[s]" that are "necessarily short" and thus not suitable "for narrative statements by candidates").

Mazo, 54 F.4th at 154 (emphasis added).

The Third Circuit reasoned that the burden-balancing standard has always been applied to a wide range of electoral process regulations:

> The Courts of Appeals have followed suit, scrutinizing under Anderson-Burdick laws regulating, e.g., the order in which candidates' names appear on the ballot, whether the ballot is electronic, the form and content of ballot initiatives, absentee voting, early voting, nomination of candidates, voter registration, the counting of ballots, polling hours, voter identification and proof-of-citizenship requirements, regulation of voter data, the appointment and qualifications of election workers, the use of primaries or caucuses, the use of straight-ticket voting, the use of ranked choice voting, the cancellation of an uncontested primary, the use of district-level or at-large election systems, and the composition of Independent Redistricting Commissions. Even beyond laws governing the voting process itself, the appellate courts regularly apply Anderson-Burdick to regulations affecting candidates, including the qualifications of elected and appointed officers, the filling of vacancies and special elections, term limits, and even the expulsion of elected officials. **Though each of these regulations necessarily implicated speech and association to some degree, each was nonetheless primarily directed at regulating specific mechanics of the electoral process.**

Mazo, 54 F.4th at 140-141 (internal citations omitted) (emphasis added).

The Court further noted that "the Supreme Court has been skeptical of efforts to assert an unqualified right to speech via the ballot, but it has nonetheless applied the Anderson-Burdick balancing test to laws that regulate ballot speech." Mazo, 54 F.4th at 143.

In analyzing "[t]he distinction between 'pure speech' and the mechanics of the electoral process [there are] two distinguishing factors to consider: the location and timing (the 'where and when') and the nature and character (the 'how and what') of the regulated speech." Mazo, 54 F.4th at 142. The plaintiffs in Mazo argued, as the Appellants do here, that the ballot itself was not an electoral mechanic, but a forum for parties to engage in expressive conduct. Mazo, 54 F.4th at 144. In rejecting that proposition, the Third Circuit noted that "speech that occurs on the ballot or within the voting process will typically trigger application of the Anderson-Burdick balancing test" whereas "speech that relates to an election but occurs nowhere near the ballot or any other electoral mechanism is treated as core political speech entitled to the fullest First Amendment protection." Mazo, 54 F.4th at 142.

As to the nature and character of the speech being regulated, the Court noted that "distinguishing between laws directed to the mechanics of the electoral process and those aimed at core political speech is the nature and the character of the regulated speech: what is being said and how it is communicated." Mazo, 54 F.4th at 142. The Court "characterized the lodestar for 'core political speech' as the

involvement of 'interactive communication concerning political change.'" Mazo, 54 F.4th at 142 (internal citations omitted). In considering the level of protection afforded to conduct, the Court focused on whether the conduct had "the potential to spark direct interaction and conversation." Mazo, 54 F.4th at 143. The Mazo Court ultimately rejected the plaintiff's claims that the consent requirement severely burdened an expressive right, holding that

> the consent requirement imposes only a minimal burden because (a) the requirement is nondiscriminatory and applies equally to all candidates and slogans; (b) the requirement leaves open ample and adequate alternatives for expression and association; and (c) Appellants have failed to provide evidence of any specific burden on either themselves or any other candidate.

Mazo, 54 F.4th at 146.

Here, based on these precedents, it is abundantly clear that New Jersey's prohibition of fusion voting is within its authority to regulate elections and is valid under the United States Constitution. Disallowing fusion voting in New Jersey does not impose any, much less even remotely, severe burdens on the associational rights of the "Moderate Party." Therefore, the proper standard is a burden-balancing test instead of strict scrutiny.

Under that standard, New Jersey's numerous and legitimate policy rationales supporting its fusion voting prohibition outweigh the lesser burdens, if any, imposed on the "Moderate Party" by such prohibition. New Jersey's prohibition of fusion voting regulates merely the mechanics of the electoral process. See Mazo, 54 F.4th

at 143. The prohibition is not regulating political speech, the "Moderate Party's" internal affairs, or "core associational activities." Neither has the prohibition done anything to make it "virtually impossible" for the "Moderate Party" to get on the ballot. See Sam Party of N.Y., 987 F.3d at 274. New Jersey is not dictating who the party nominates, but has simply set forth rules for nominating a candidate, which all political parties must follow. See Council of Alternative Political Parties v. State, Div. of Elections, 344 N.J.Super. 225, 237 (App.Div. 2001) ("Notably, the ban applied to all parties, major and minor alike") (citing Timmons, 520 U.S. at 360).

It is not controversial that the "Moderate Party" should be able to select their own candidate. "It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate." Timmons, 520 U.S. 351 at 359. "A particular candidate might be ineligible for office, unwilling to serve, or, as here, another party's candidate." Id.

A particular candidate being disallowed from appearing on the ballot as a particular party's candidate "does not severely burden that party's association rights." Id. (citing Burdick, 504 U.S. at 440 n.10 ("It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation, that while it affects the right to vote, is eminently reasonable"); Anderson, 460 U.S. at 792 n.12 ("Although a disaffiliation provision may preclude ... voters from supporting a particular

ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements")). New Jersey's regulations serve merely to "reduce the universe of potential candidates who may appear on the ballot as the Party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer the other party." Timmons, 520 U.S. at 363.

New Jersey's ban of fusion voting also does not limit the "Moderate Party" and its members' ability to "endorse, support, or vote for anyone they like." Plaintiffs are free to support and vote for whoever they want in the upcoming election. They have already done so by appearing in ads funded by the Super PAC, the "Moderate Party Independent Fund" in the 2022 General Election. The "Moderate Party" is free to nominate any *eligible* candidate they desire. Tom Malinowski could have accepted the "Moderate Party" nomination or the Democratic Party nomination, but not both. The burdens on Appellants resulting from New Jersey's prohibition of fusion voting are not existent and certainly "not severe" – at all. See id. Appellants still had the chance to vote for the candidate of their choosing. Therefore, strict scrutiny should not apply; rather, the Court should utilize the burden-balancing test discussed above.

New Jersey's prohibition on fusion voting is not some radical law that is an outlier among state laws regulating election administration. Indeed, like New Jersey,

"[m]ost states prohibit multiple-party, or 'fusion,' candidacies for elected office." Timmons, 520 U.S. at 353. Currently 45 States prohibit fusion voting in one form or another. See Ballotpedia, Fusion Voting, https://ballotpedia.org/Fusion_voting (last visited May 25, 2023, 10:11am). Appellants' handlers employ a tortured interpretation of the New Jersey Constitution to force the acceptance of a seldom used voting practice purely to obtain a political advantage, which should not be allowed.

B. As a matter of federal law, New Jersey's prohibition of fusion voting is a valid use of its power to regulate elections.

Under the burden-balancing analytical framework, New Jersey's prohibition of fusion voting is valid under the United States Constitution. States are permitted to enact reasonable election laws and it is indisputable that States "have a strong interest in the stability of their political systems." Timmons, 520 U.S. at 366. Moreover, States are not obligated to "remove all of the many hurdles third parties face in the American political arena today." Timmons, 520 U.S. at 367.

The burdens imposed upon the "Moderate Party" as a result of New Jersey's prohibition on fusion voting are nonexistent. Id. On the other hand, numerous policy reasons exist to support New Jersey's ban on fusion voting. New Jersey has a legitimate interest in discouraging political gamesmanship such as party raiding and party jumping.

There is already evidence that political gamesmanship is occurring via the Moderate Party. Just after the Moderate Party was formed, a Super-PAC named "The Moderate Party Independent Fund" was formed and has spent at least $231,000 in television ads on behalf of the "Moderate Party of New Jersey" in the 2022 General Election See Google Ad Transparency, Moderate Party Independent Fund, https://adstransparency.google.com/advertiser/AR00299376743997767681?region =US&topic=political (last visited May 25, 2023, 11:26 pm). The sole donor to the Super-PAC was the House Majority PAC, which is affiliated with Congresswoman Nancy Pelosi and describes its mission as follows: "protect and expand the Democratic House Majority." See House Majority PAC website, https://www.thehousemajoritypac.com/(last visited May 25, 2023, 11:23 PM). None of this was an accident or a coincidence. One of the largest Democratic Super PACs in the nation did not fund the Moderate Party's political communications because they were seeking to support groups with diverse political views; it did so because the Moderate Party is being used as a vehicle to support Democratic candidates. Permitting the Moderate Party to engage in cross nomination — contrary to duly longstanding New Jersey law — will only increase political gamesmanship like this in New Jersey, like what has already occurred in the 2022 election cycle

There are multiple other concerns with fusion voting. First, allowing numerous minor parties to form and cross-nominate major party candidates creates the risk of factionalism. The Legislature "apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government." See Storer v. Brown, 415 U.S. 724, 736 (1974) (citing The Federalist, No. 10 (Madison)). The Legislature's policy judgment in disallowing fusion voting to avoid the type of unrestrained factionalism that has been demonstrated in the context of this case – where adherents of a major party form front groups to cross-nominate and fund that major party's candidate – is a perfectly legitimate policy determination. These deceptive tactics further no public interest and the attempt to disguise them as an issue of individual rights is disingenuous at best.

Also, it is in New Jersey's interest to ensure ballot fairness and ensure majority support for electoral victors. The U.S. Supreme Court has established that regulating the number of candidates that appear on the general election ballot is a legitimate State interest. Bullock v. Carter, 405 U.S. 134, 145 (1972). The same policy interest supports regulating the number of times the same candidate can appear on the ballot. New Jersey "understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and

burden of runoff elections." See id. The prohibition on fusion voting is one method by which New Jersey regulates the number of candidates that appear on the ballot, or the number of times the same candidate can appear on the ballot, and reduces voter confusion.

New Jersey has "important regulatory interests" in regulating elections in the State, and thus the burden on the Moderate Party as a result of those regulations is minimal, at best. See Wash. State Grange, 552 U.S. at 452. New Jersey has passed "reasonable, politically neutral regulations" to effectively regulate their elections. See ibid. Therefore, the Court should uphold New Jersey's regulations as a valid exercise of the State Legislature's authority to regulate the time, place and manner of federal elections under Article I, section 4 of the U.S. Constitution.

II. UNDER THE STATE CONSTITUTION, THE CENTURY-OLD BAN ON FUSION VOTING IS A VALID EXERCISE OF THE LEGISLATURE'S RIGHT TO REGULATE ELECTIONS.

Appellants have failed to show that the specific rights at issue here under the New Jersey Constitution are fundamentally different than the same rights under the United States Constitution. Indeed, the rights implicated are essentially identical. Because the specific rights at issue are essentially the same under both the New Jersey Constitution and the United States Constitution, the analytical framework laid out in Timmons should govern, and Appellants' challenge should fail.

A. In the context of regulating election mechanics, the New Jersey Constitution does not grant greater protections for free speech than the U.S. Constitution.

"The opinions of the Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address." State v. Hunt, 91 N.J. 338, 363 (1982) (Handler, J., concurring). In Hunt, Justice Handler outlined "certain considerations for determining when to rely on the State Constitution as an independent source of individual rights." State v. Roach, 219 N.J. 58, 73-74 (2014). Those factors include: (1) textual language; (2) legislative history; (3) preexisting State law; (4) structural differences; (5) matters of particular state interest or local concern; (6) State traditions; and (7) public attitudes. Hunt, 91 N.J. at 364–68 (Handler, J., concurring).

Here, the factors laid out in Hunt do not support the proposition that the New Jersey Constitution grants greater protection for free speech and political association than the United States Constitution in the context of regulation of election mechanics. First, the Court should look to the text of both documents. The United States Constitution states that Congress shall make no law abridging "the freedom of speech or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I. The New Jersey Constitution states: "Every person may freely speak, write and publish

his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. (1947), Art. I, Para. 6.

There is no distinct language in the New Jersey Constitution – or elsewhere, including any of the seven Hunt factors – that suggests the State right to "freely speak" is more expansive than the United States Constitution in this specific context of regulating election mechanics. And the phrasing of the right does not appear to be so different that it would warrant a different result under these circumstances.

Plaintiffs make much out of the structure of both Constitutions, arguing that the New Jersey Constitution grants the right to "freely speak" whereas the U.S. Constitution restricts Congress's ability to make any law that abridges people's rights to freedom of speech. See Appellants' Br. at 56-57. However, in this context, this is a distinction without a difference. The right to freedom of speech in New Jersey could be broader in certain contexts as our Courts have held in very specific instances, but Appellants have not provided sufficient evidence that illustrates why the State Constitution provides a broader protection in this context of simply regulating election mechanics. There is nothing in the language itself or any related authorities that suggests the right is substantially more expansive or would somehow be expansive enough to encompass a constitutional right to fusion voting.

To the contrary, courts have repeatedly agreed, holding that the New Jersey "Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment [and therefore] federal constitutional principles guide the Court's analysis." Twp. of Pennsauken v. Schad, 160 N.J. 156, 176 (1999) (citing Hamilton Amusement Center v. Verniero, 156 N.J. 254, 264-65 (1998)). See also Hamilton Amusement Center, 156 N.J. 264-65 ("Because we ordinarily interpret our State Constitution's free speech clause to be no more restrictive than the federal free speech clause, ... "[w]e rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution" (internal citations omitted)). Accord Borden v. Sch. Dist., 523 F.3d 153, 168 n.7 (3d Cir. 2008).

Next, the Court should look to the history of New Jersey law to determine whether fusion voting is a constitutional right. Nothing in the legislative history, in preexisting State law, or in the history and traditions of New Jersey support the proposition that fusion voting is a New Jersey State constitutional right. To the contrary, New Jersey has a long history of prohibiting manipulative legal practices in the context of elections. See, e.g., N.J.S.A. 19:14-9 (sore loser law prohibiting candidate who seeks but loses a major party nomination from being nominated by petition in the general election); N.J.S.A. 19:23-25.1 (requiring prior written consent of a person whose name is included in a candidate's ballot slogan); N.J.S.A. 19:23-45 (prohibiting "party raiding" by requiring association with a political party 55 days

in advance of a primary); N.J.S.A. 19:34-65 ("No person shall perform any function in the campaign of a candidate for public office or party position for the purpose of impeding the campaign of such candidate while concealing that he is actually acting under the instructions of, or on behalf of, another candidate or such other candidate's paid or volunteer campaign staff."); N.J.S.A. 19:34-66 (prohibiting the initiation of any communication "which purports to or appears to originate from, or be on behalf of, the campaign of a candidate for public office or party position, for the purpose of impeding the campaign of such candidate while failing to reveal specifically in such communication that he is acting under the instructions of, or on behalf of, another candidate or such other candidate's paid or volunteer campaign staff.").

Today, fusion voting is statutorily prohibited in New Jersey. See N.J.S.A. 19:3-5.1; N.J.S.A. 19:13-8. And it has been prohibited in New Jersey for over a century since 1921. 1921 N.J. Sess. Laws, c. 196, sec. 59 & 60, at 551. In fact, that prohibition survived the 1947 adoption of the current New Jersey Constitution, 26 years after the 1921 statutory enactment; further, it has remained in force under that same 1947 New Jersey Constitution for 76 years. Plaintiffs make much of the fact that fusion voting was permitted "[f]or much of the 19th century" and into the 20th century. (Appellants' Br. 58.) This argument ignores that the relic of fusion voting has been prohibited in New Jersey for over 100 years – a longer duration of time than it was ever in practice by Appellants' own admission, and significantly longer

than the 10 years that it was expressly permitted by statute. The proposition that a voting practice that occurred in ancient history of New Jersey somehow supports the proposition that fusion voting is a right protected under the State constitution, when that same practice has been disallowed for a period of more than 100 years – during which our current New Jersey Constitution was adopted in 1947 – is thoroughly unconvincing.

Lastly, election mechanics and their regulation are not a "particular state interest or local concern" under Hunt. States across the Union have been granted the sole authority to regulate the time, place, and manner of elections under the U.S. Const., Art. I, §4, cl. 1. And there is nothing to suggest that the people of New Jersey in particular are clamoring for fusion voting. Appellants' attempt to insert the results of an alleged poll, which was taken during the pendency of this litigation for the apparent purpose of being used in this litigation to support Appellants' position, falls flat. This "poll", which was conducted by persons unknown asking unknown questions to unidentified respondents, is the definition of hearsay, is just as unreliable, and is akin to fabricating a document for purposes of litigation. Indeed, as discussed above, prohibiting fusion voting is the majority rule across the country, including New Jersey. In all but a handful of States fusion voting is prohibited.

Appellants fail to satisfy the Hunt factors to warrant conducting a separate analysis and departing from the holding in Timmons.

B. In the context of regulating election mechanics, the New Jersey Constitution does not grant greater protections for the right to assemble than the U.S. Constitution.

Much of the analysis above as to Appellants' free speech claims is also applicable to Appellants' right to assemble claim. The United States Constitution states Congress shall make no law abridging "the freedom of speech or the press; or *the right of the people peaceably to assemble*, and to petition the Government for a redress of grievances." U.S. Const., Amend. I (emphasis added). The New Jersey Constitution states: "The people have the right freely to assemble together, to consult for the common good, to make known their opinion to their representatives, and to petition for redress of grievances." N.J. Const. (1947), Art. I, Para. 18.

There is nothing in the language of the New Jersey Constitution that suggests the State right to "freely assemble together" is more expansive than the federal "right of the people peaceably to assemble" in the context of prohibiting fusion voting. See Hunt, 91 N.J. at 364–68 (Handler, J., concurring). Both constitutions clearly establish the right of the people to assemble. Under any of the seven Hunt factors, there is nothing that suggests the State right to "freely assemble" is expansive enough to include fusion voting. See id. And Appellants have offered nothing to the contrary. Again, fusion voting has been prohibited in New Jersey for over a century and has been banned for longer than it was ever allowed. Neither is there

any State or local peculiar interest in election law and no distinctive desire of the New Jersey citizenry for fusion voting. See id.

Appellants have failed to show that the specific rights at issue here under the New Jersey Constitution are fundamentally different than the same rights under the United States Constitution. As a result, the analytical framework laid out in Timmons should govern, and Appellants' challenges should fail.

Even if the analysis in this case somehow fundamentally differs from federal law—which it does not—the result is the same. It is not clear that any party has ever couched a ballot access claim under N.J. Const. (1947), Art. I, Para. 18, nor has any court ever invalidated duly enacted and widely practiced election administration procedures such as the fusion voting prohibition at issue in this case under N.J. Const. (1947), Art. I, Para. 18. Appellants freedom of association claims are truly over-reaching and facially inapplicable. New Jersey is not prohibiting the Moderate Party from associating with any of its members, nor is New Jersey prohibiting the Moderate Party from associating with its candidates of choice. Appellants themselves have demonstrated this in the 2022 General Election by broadcasting videos supporting their chosen candidate all over the Internet. New Jersey is simply prohibiting candidates from engaging in political gamesmanship by appearing on the ballot multiple times; something 45 other states presently prohibit. This Court

should reject Appellants novel claims and protect New Jersey's authority to regulate the administration of its elections.

III. APPELLANTS' DEMAND THAT THE COURT PREDETERMINE THAT ONLY DISAGGREGATED FUSION VOTING IS PERMISSIBLE UNDER THE STATE CONSTITUTION SEEKS AN ADVISORY OPINION

Appellants' request that the Court predetermine that only disaggregated fusion voting can pass muster under the State Constitution, when the Legislature has disallowed all forms of fusion voting, constitutes an impermissible request for an advisory opinion and should be rejected. Appellants ask that the Court order that if the ban on fusion voting is found to be unconstitutional, only "disaggregated fusion voting" – where each political party is given its own column on the ballot – can possibly be legal. It is evidently Appellants' position that "aggregated fusion voting" – where endorsements from multiple political parties are aggregated and listed underneath a candidate's name on a single column on the ballot – cannot survive constitutional review even though the Legislature has not permitted either aggregated or disaggregated fusion voting at all. Put another way, Appellants ask the Court to decide in advance what the Legislature can or cannot do if the Court decides that it cannot disallow fusion voting altogether.

Appellants' request unlawfully seeks an advisory opinion and should be rejected. To maintain an action in New Jersey courts, there must be a "justiciable controversy between adverse parties." Chamber of Commerce v. State, 89 N.J. 131,

140 (1982). The Court should not rule "upon a state of facts which are future, contingent and uncertain." Id.

Even if this Court holds that the Legislature cannot ban all forms of fusion voting as it has for over 100 years, it is inappropriate for Appellants to seek what would amount to an advisory opinion as to what regulations the Legislature might impose in the future if the fusion voting ban were nullified. As of today, the Legislature has not chosen one form of fusion voting over another; it has disallowed all forms of fusion voting. Here, Appellants request the Court "put the cart before the horse" and disallow the Legislature from allowing "aggregated fusion voting" if it holds that anti-fusion laws are unconstitutional. (Appellants' Br. at 88.) Appellants ask this Court to make a constitutional ruling on a future, hypothetical set of facts, and command the Legislature as to what laws it can pass before it passes them. Since there are currently no laws permitting any form of fusion voting in New Jersey, and hence no "justiciable controversy between adverse parties" on what types of fusion voting can be allowed, this request improperly seeks an advisory opinion. See Chamber of Commerce, 89 N.J. at 140. This Court should reject this request and allow the legislative process to play out as to what forms of fusion voting should be allowed if New Jersey's fusion voting ban is held to be unconstitutional (which it should not be).

CONCLUSION

For all of the foregoing reasons, this Court should deny Plaintiff's appeal and affirm the decision of the Secretary of State.

Respectfully submitted,

ARCHER & GREINER
A Professional Corporation
Attorneys for New Jersey Republican State Committee, Inc.

By: _____
Jason N. Sena, Esq.

Dated: June 9, 2023

227290989 v2

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NOS. A-3542-21/A-3543-21 Civil Action On Appeal from: A Final Agency Decision of the New Jersey Division of Elections
IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	Sat Below: Hon. Tahesha Way, Secretary of State

BRIEF ON BEHALF OF RESPONDENTS TAHESHA WAY AND NEW JERSEY DIVISION OF ELECTIONS

Steven M. Gleeson (087092013)
Tim Sheehan (179892016)
Deputy Attorneys General
On the Brief

Angela Cai
Sookie Bae-Park
Assistant Attorneys General
Of Counsel

MATTHEW J. PLATKIN
Attorney General of New Jersey
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
Attorney for Respondents
(609) 376-2955
Steven.Gleeson@law.njoag.gov

Submitted: June 12, 2023

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

COUNTERSTATEMENT OF PROCEDURAL HISTORY 3

COUNTERSTATEMENT OF FACTS 6

A. Since The Early 1900s, The Vast Majority Of State Legislatures Have Banned Fusion Voting 6

B. Courts Nearly Uniformly Rejected Early Constitutional Challenges to Fusion Bans 11

C. The Framers Of The 1947 Constitution Specifically Rejected An Amendment Authorizing Fusion Candidacies 13

D. Subsequent Challenges To Fusion Bans Have Been Rejected 16

ARGUMENT

POINT I

APPELLANTS' CHALLENGE FAILS BECAUSE THE UNITED STATES CONSTITUTION DOES NOT REQUIRE FUSION VOTING AND THE STATE CONSTITUTION'S PROTECTIONS ARE CO-EXTENSIVE 17

A. The Supreme Court Of The United States Already Rejected Appellants' Claims Under the Federal Constitution 18

B. Timmons Is Dispositive Because The New Jersey Constitution Does Not Establish Any Greater Right To Fusion Voting 22

C. Appellants' Claim That Their Record Makes This Case Different Also Fails 33

POINT II

EVEN IF THE NEW JERSEY CONSTITUTION AFFORDED BROADER RIGHTS, APPELLANTS HAVE NOT MET THEIR BURDEN TO INVALIDATE THE FUSION STATUTES 35

A. Anderson-Burdick Interest-Balancing Governs These Challenges 36

B. The Fusion Statutes Do Not Violate The Right To Vote 41

1. The Fusion Statutes Do Not Burden Appellants' Right To Vote 42

2. The Fusion Statutes Promote Compelling State Interests 45

3. Appellants Overstate The Benefit To Third Parties 55

C. The Fusion Statutes Do Not Violate The Rights To Free Speech Or Political Association 59

D. The Fusion Statutes Do Not Violate The Right To Assemble 63

E. The Fusion Statutes Do Not Violate Equal Protection 65

CONCLUSION 68

TABLE OF AUTHORITIES

Cases **Page(s)**

Allendale Congregation of Jehovah's Witnesses v. Grosman,
30 N.J. 273 (1959) 63

Anderson v. Celebrezze,
460 U.S. 780 (1983) 18, 36, 43

Barone v. Dept. of Human Servs., Div. of Medical Assistance
and Health Servs., 107 N.J. 355 (1987) 32

Burdick v. Takushi,
504 U.S. 428 (1992) 18, 19, 21, 36, 37

California Democratic Party v. Jones,
530 U.S. 567 (2000) 61, 62

Caviglia v. Royal Tours of Am.,
178 N.J. 460 (2004) 32, 67

Council of Alternative Political Parties v. State Division of Elections,
344 N.J. Super. 225 (App. Div. 2001) 38, 41, 54

Dublirer v. 2000 Linwood Ave. Owners, Inc.,
220 N.J. 71 (2014) 27

E & J Equities, LLC v. Bd. of Adjustment of Twp. of Franklin,
226 N.J. 549 (2016) 26, 27

Eu v. San Francisco County Democratic Central Committee,
489 U.S. 214 (1989) 38

Friends of Governor Tom Kean v. New Jersey Election Law
Enf't Comm'n, 114 N.J. 33 (1989) 53

Gangemi v. Berry,
25 N.J. 1 (1957) 17, 42

Gangemi v. Rosengard,
44 N.J. 166 (1965) 36, 54

Greenberg v. Kimmelman,
99 N.J. 552 (1985) 65

Gonzalez v. State Apportionment Comm'n,
428 N.J. Super. 333 (App. Div. 2012) 53

Gusciora v. Christie,
No. A-5608-10, 2013 WL 5015499 (N.J. Super. Ct.
App. Div. Sept. 16, 2013) 38

Hamilton Amusement Ctr. v. Verniero,
156 N.J. 254 (1998) 27

Headen v. Jersey City Bd. of Educ.,
212 N.J. 437 (2012) 23

Horizon Health Ctr. v. Felicissimo,
263 N.J. Super 200 (App. Div. 1993) 27

In re Absentee Ballots Cast by Five Residents of Trenton
Psychiatric Hospital, 331 N.J. Super. 31 (App. Div. 2000) 30, 41

In re City Clerk of Paterson,
88 A. 694 (N.J. Sup. Ct. 1913) 54

In re Contest of November 8, 2011 General Election,
210 N.J. 29 (2012) 39

In re Street,
451 A.2d 427 (Pa. 1982) 16, 59

Kovacs v. Cooper,
135 N.J.L. 64 (Sup. Ct. 1946) 31

League of Women Voters of Mich. v. Sec'y of State,
959 N.W.2d 1 (Mich. Ct. App. 2020) 42

Lewis v. Harris,
188 N.J. 415 (2006) 65

Libertarian Party of Va. v. Alcorn,
826 F.3d 708 (4th Cir. 2016) 53

Mazo v. N.J. Sec'y of State,
54 F.4th 124 (3d Cir. 2022) 37, 61

Munro v. Socialist Workers Party,
479 U.S. 189 (1986) 52

Nelson v. South Brunswick Planning Bd.,
84 N.J. Super. 265 (App. Div. 1964) 65, 66

N.J. Democratic Party, Inc. v. Samson,
175 N.J. 178 (2002) 33, 53

People ex rel. McCormick v. Czarnecki,
107 N.E. 625 (Ill. 1915) 12, 42, 45, 48

Quaremba v. Allan,
67 N.J. 1 (1975) 28

Railway Express Agency v. New York,
336 U.S. 106 (1949) 65

Ray v. State Election Bd.,
422 N.E.2d 714 (Ind. Ct. App. 1981) 16

Reform Party of Allegheny County v. Allegheny County Department of Elections, 174 F.3d 305 (3d Cir. 1999) 66, 67

Rose v. Parker, 91 N.J.L. 84 (1917)..... 42

Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elections, 438 N.J. Super. 93 (App. Div. 2014)..... 30

Rutgers University Student Assembly v. Middlesex County Board of Elections, 446 N.J. Super. 221 (App. Div. 2016) .....passim

Sadloch v. Allan, 25 N.J. 118 (1957).....41, 51

Schundler v. Donovan, 377 N.J. Super. 339 (App. Div. 2005).....28, 38

Senna v. Florimont, 196 N.J. 469 (2008)..... 28

Smith v. Penta, 81 N.J. 65 (1979)..... 44

State v. Anderson, 76 N.W. 482 (Wis. 1898).....11, 23, 43, 51

State v. Buckner, 223 N.J. 1 (2015).....17, 23, 24, 40

State ex rel. Bateman v. Bode, 45 N.E. 195 (Ohio 1896).....13, 42

State ex rel. Dunn v. Coburn, 168 S.W. 956 (Mo. 1914) 12, 47, 48

State ex rel. Fisk v. Porter,
100 N.W. 1080 (N.D. 1904).....13, 42

State v. Hunt,
91 N.J. 338 (1982).....25, 26, 29

State v. Lenihan,
219 N.J. 251 (2014)..... 17

State v. Murzda,
116 N.J.L. 219 (1936)..... 23

State v. Schmid,
84 N.J. 535 (1980).....27, 63

State v. Superior Court,
111 P. 233, 234 (Wash. 1910)..... 13

State v. Wileman,
143 P. 565 (Mont. 1914).....12, 42

State v. Williams,
93 N.J. 39 (1983)..... 28

Stevenson v. Gilfert,
13 N.J. 496 (1953)..... 54

Storer v. Brown,
415 U.S. 724 (1974) 22

Swamp v. Kennedy,
950 F.2d 383 (7th Cir. 1991).....passim

Tashjian v. Republican Party of Conn.,
479 U.S. 208 (1986) 62

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) .....passim

Texter v. Dep't of Human Servs.,
88 N.J. 376 (1982) 57

Wene v. Meyner,
13 N.J. 185 (1953) 39, 40, 41

Whirlpool Props., Inc. v. Director, Div. of Taxation,
208 N.J. 141 (2011) 17

W.J.A. v. D.A.,
210 N.J. 299 (2012) 28

Worden v. Mercer County Bd. of Elections,
61 N.J. 325 (1972) 28, 29

Working Families Party v. Commonwealth,
209 A.3d 270 (Pa. 2019) 16, 42, 59, 66

Constitutional Provisions

N.J. Const. art. I, ¶¶ 6 26

N.J. Const. art. I, ¶¶ 18 .....26, 65

N.J. Const. Art. 1, ¶ 19 .....32, 62

N.J. Const. art. II, § 1, ¶ 3(a) 30, 41

N.J. Const. art. III, ¶ 1 57

Statutes

Ala. Code § 17-16-21 7

Ala. Code § 17-16-14 7

Alaska Stat. § 15.25.030(14) 7
Ariz. Rev. Stat. Ann. § 16-311(A) 7
Cal. Elec. Code § 8002.5(a) 7
Colo. Rev. Stat. § 1-4-601(2) 7
Conn. Gen. Stat. § 9-242 ..... 7, 57
Conn. Gen. Stat. § 9-453(t) 7, 57
D.C. Code Ann. § 1-1001.08 7
Del. Code Ann. tit. 15, § 4108 6
Fla. Stat. § 99.021(1)(b) 7
Ga. Code Ann. § 21-2-137 6
Haw. Rev. Stat. § 12-3(a)(7) 7
Idaho Code § 33-628 (1932) 10
Ill. Comp. Stat. Ch. 10, § 5/7-12(9) 6
Iowa Code § 49.39 7
Ind. Code § 3-10-1-15 6
Kan. Stat. Ann. § 25-213(c) 6
Ky. Rev. Stat. Ann. § 118.335 6
La. Rev. Stat. Ann. § 1280.25 6
Mass. Gen. L. ch. 53, § 48 7
Md. Elec. Law § 5-203 7
Me. Rev. Stat. tit. 21-A, § 334 7
Mich. Comp. Laws § 168.692 7
Minn. Stat. § 204B 6, 9
Mo. Rev. Stat. § 115.351 6
Mont. Code Ann. § 13-10-303 7

Mont. Rev. Code § 682 (1935) 10
N.C. Gen. Stat. § 163-106 7
N.D. Cent. Code § 16.1-12-06 7
N.D. Rev. Code § 16-0506 (1943) 10
Neb. Rev. Stat. § 32-612(2) 6
Nev. Rev. Stat. § 293.177 7
N.H. Rev. Stat. Ann. § 655:14 7
N.M. Stat. Ann. § 1-8-2 7
N.M. Stat. Ann. § 1-8-3 7
N.M. Stat. Ann. § 1-8-18 7
N.Y. Elec. Law § 6-120 7
N.Y. Elec. Law § 6-146 7
N.Y. Elec. Law § 9-112(4) 7
Ohio Rev. Code Ann. § 3513.07 7
Okla. Stat. tit. 26, § 5-105 7
Or. Rev. Stat. § 254.135 7
25 Pa. Cons. Stat. Ann. § 2870(f) 6
R.I. Gen. Laws § 17-14-1 7
S.C. Code Ann. § 7-11-10(C) 7
Tenn. Code Ann. § 2-5-101(f)(1) 6
Tex. Elec. Code Ann. § 162.015 6
Vt. Stat. Ann. § 2474 ..... 7, 57
Wash. Rev. Stat. Ann. § 5274(6) 10
W. Va. Code § 3-5-7 7
Wis. Stat. Ann. § 8.15(7) 6

Wyo. Comp. Stat. § 31-1404 (1945)..... 10

Wyo. Stat. § 22-5-204..... 7

L. 1898, c. 139, § 41..... 9

L. 1911, c. 183, §§ 53-54..... 9

L. 1921, c. 196, §§ 59-60..... 10

L. 1922, c. 242, § 32..... 10

L. 1930, c. 187..... 10

N.J.S.A. 19:13-4..... 6, 10

N.J.S.A. 19:13-8.....4, 6, 10

N.J.S.A 19:14-2..... 6, 10

N.J.S.A 19:14-9.....6, 10, 60, 64

N.J.S.A. 19:13-5..... 45

N.J.S.A. 19:23-15..... 6, 10

N.J.S.A. 40:45-5..... 43

Rules

Pressler & Verniero, N.J. Court Rules, R. 1:36-3 (2023)..... 39

Other Authorities

Adam Winkler, Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915, 100 Colum. L. Rev. 873 (2000)..... 7, 8, 9

Celia Curtis, Comment, Cross-endorsement by Political Parties: A "Very Pretty Jungle"?, 29 Pace L. Rev. 765 (2009).....9, 39, 46, 58

Hirano and Snyderjr, The Decline of Third-Party Voting in the United States, Journal of Politics Vol. 69, No. 1 (2007)..... 58

James Gray Pope, Fusion, Timmons v. Twin Cities Area New Party, and the Future of Third Parties in the United States, 50 Rutgers L. Rev. 473 (1998) 9, 56

John C. Fortier & Norman J. Ornstein, The Absentee Ballot and the Secret Ballot: Challenges for Election Reform, 36 U. Mich. J.L. Reform 483 (2003) 8

John F. Reynolds, Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920 (1988).....8, 9, 58

Jay M. Zitter, State Constitutional Right of Freedom to Assembly Provisions, 41 A.L.R. 7th Art. 7 (2023) 63

Nicholas Bowie, The Constitutional Right of Self-Government, 130 Yale L.J. 1652 (2021) 32

2 Proceedings of the New Jersey Constitutional Convention of 1947 .14, 15, 31

3 Proceedings of the New Jersey Constitutional Convention of 1947 15

PRELIMINARY STATEMENT

Appellants wish to relitigate a decision that the New Jersey Legislature, the Framers of the New Jersey Constitution, and the United States Supreme Court have already made. This court should reject their invitation to overturn century-old laws, rewrite constitutional history, and discard federal constitutional precedent.

In the early 1920s, New Jersey and many other States—about 40 in all today—banned fusion voting, which allows one candidate to appear multiple times on a general election ballot as the nominee of multiple parties. Twenty-five years later, the New Jersey Constitutional Convention considered the very question posed in this appeal: whether the Legislature may make the policy choice to ban fusion voting. In rejecting proposals that would have enshrined fusion voting as a constitutional right, the Framers of the 1947 Constitution definitively answered in the affirmative. Declining to enumerate such a right, the new Constitution confirmed that the Legislature was free to maintain its longstanding prohibition on fusion voting.

Seventy-five years later, Appellants launch this novel challenge to the constitutional validity of the Legislature's choice. But their position is impossible to square with the history and intent of the Framers of the 1947 Constitution, which decided the very opposite. And because the United States

Supreme Court has already definitively held in Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), that the federal Constitution does not require states to permit fusion voting, Appellants resort to policy arguments in asking this court to jettison the century-old laws. At bottom, Appellants' argument is that they prefer the policies of only a handful of states to the policies adopted by the Legislature of this State and at least 39 others—but second-guessing policy decisions is outside the province of this court.

Even without this constitutional history, Appellants cannot bear the heavy burden of demonstrating that our duly-enacted statutes are unconstitutional. Because New Jersey's Fusion Statutes apply equally to all parties and nominees, do not limit any voter's ability to vote for the candidate of their choice, and allow candidates who have secured the nominations of multiple parties to communicate those endorsements on the ballot, any intrusion on constitutional rights is nonexistent to minimal. New Jersey's Fusion Statutes merely prohibit a candidate's name from appearing on the ballot twice. Indeed, the ability to communicate multiple-party endorsements on the ballot sets New Jersey's Fusion Statutes on even firmer footing than those upheld by the United States Supreme Court and numerous other state courts, and further undermine Appellants' challenge. New Jersey's statutes simply do not implicate—and at

most, minimally burden—the right to vote, freedoms of speech, association, and assembly, and the right to equal protection.

And because States must always balance individual rights against the State's interests regarding proper and efficient administration of elections, any constitutional impingement must be balanced against state interests. The Fusion Statutes serve numerous compelling state interests, such as preventing ballot manipulation, political gamesmanship, voter confusion, and decreased voter choice; in promoting accountability via maintaining distinctions between parties; and protecting the stability of the political system. And while Appellants suggest that fusion voting would cure numerous ills they ascribe to the difficulty third parties experience in gaining traction, there is little reason to believe their hopes of fusion-as-panacea will materialize. This court should deny these claims.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

This litigation commenced with a nomination petition the Moderate Party submitted to New Jersey Secretary of State Tahesha Way on June 7, 2022 to nominate Tom Malinowski as the Moderate Party Candidate for the 7th Congressional District in the November 2022 General Election. Pa304. Appended to the petition was a legal brief raising a facial challenge to the constitutionality of the Fusion Statutes and a voluminous appendix.

On June 8, Secretary Way denied the petition because Malinowski had previously submitted a petition declaring as a candidate in the June 2022 Democratic Party primary election for the same office. (Pa1). The denial was based on N.J.S.A. 19:13-8, which prevents a candidate from signing an acceptance of a nomination petition if they already accepted a primary nomination for the same office. Secretary Way denied the Moderate Party's request for reconsideration of the denial. (Pa2).

On July 20, 2022, Appellants the Moderate Party and Richard Wolfe appealed the Secretary's decision; Michael Tomasco and William Kibler filed an identical appeal, docketed as A-3542-21 and A-3543-21, respectively. On August 2, this court accelerated the appeals on its own motion. On the same day, at the court's direction, the State filed its Statement of Items Comprising the Record in both appeals.

A series of procedural motions ensued. On August 3, 2022, the court issued identical peremptory scheduling orders in both appeals. A week later, the Republican State Committee moved to intervene in the appeals. On August 15, the State moved to remove the appeals from the accelerated track, while Appellants moved to consolidate the appeals and to file an overlength brief. None of the above applications was opposed; in fact, Appellants filed papers in

support of removing the appeals from the accelerated track. In September 2022, the court granted all four motions.

Appellants obtained (on consent) two thirty-day extensions to file their brief, and ultimately filed a corrected brief on December 16. The State obtained extensions (on consent) to file a response to March 20, 2023. On that date, the State filed a motion to dismiss or, in the alternative, to transfer to the Law Division. The motion contended that, at a minimum, a remand was appropriate to develop a record addressing the issues raised by Appellants' facial constitutional challenges, since the Secretary had no opportunity (or authority) to develop a factual record before deciding the Petition. Otherwise, the appellate record would effectively be limited to Appellants' 545-page appendix, which is comprised of numerous witness certifications and empirical sources. The Republican State Committee filed a similar motion. On March 29, 2023, the State filed a second motion to extend time to file its merits brief.

On May 2, 2023, Judges Messano and Gummer entered an order denying the State's motion to dismiss or transfer, granting its motion to extend, and setting a peremptory deadline for its merits brief of June 9, 2023. In declining to remand to develop a more complete record, the court explained that "issues involved in a facial constitutional challenge are purely legal, and thus appropriate for judicial resolution without developing additional facts." Order,

M-3846-22 at 2 (internal quotation marks omitted). The court noted the State's concern that Appellants' "certifications and other exhibits" in the record "would otherwise go unrebutted," but found that these materials "are of little if any assistance to the court in deciding the legal issues relating to appellants' facial constitutional challenge." This brief follows.

COUNTERSTATEMENT OF FACTS

A. Since The Early 1900s, The Vast Majority Of State Legislatures Have Banned Fusion Voting.

New Jersey's laws prohibiting fusion voting[1] represent the norm across the Nation. Approximately 40 states directly or indirectly prohibit fusion tickets. See Timmons, 520 U.S. at 357 ("[I]n this century, fusion has become the exception, not the rule.").[2] The Attorney General is aware of only four states

[1] New Jersey's prohibition is reflected in several statutes. N.J.S.A. 19:13-8 prohibits a candidate from accepting a nomination petition if they have accepted a primary nomination or any other nomination petition. N.J.S.A. 19:13-4 provides: "No such petition shall undertake to nominate any candidate who has accepted the nomination for the primary for such petition." N.J.S.A 19:14-2 and 19:14-9 limit a candidate to appearing once on the ballot for a given office. N.J.S.A. 19:23-15 bars a candidate from pursuing a nomination in a party primary via nomination petition and then declaring as an independent for the same office at the general election.

[2] Sixteen states (including New Jersey) directly prohibit fusion in at least some elections. See Del. Code Ann. tit. 15, § 4108; Ga. Code Ann. § 21-2-137; Ill. Comp. Stat. Ch. 10, § 5/7-12(9); Ind. Code § 3-10-1-15; Kan. Stat. Ann. § 25-213(c); Ky. Rev. Stat. Ann. § 118.335; La. Rev. Stat. Ann. § 1280.25; Minn. Stat. § 204B.06; Mo. Rev. Stat. § 115.351; Neb. Rev. Stat. § 32-612(2); 25 Pa.

that permit fusion candidacies. See Conn. Gen. Stat. §§ 9-242, 9-453(t); N.Y. Elec. Law §§ 6-120, 6-146, 9-112(4); Or. Rev. Stat. § 254.135; Vt. Stat. Ann. § 2474.

These fusion bans are the national norm deeply rooted in historical efforts to reform the electoral system.[3] Until the late 1800s, there was "no official ballot" or "official list of candidates," and all ballots cast in American elections were either write-in ballots or those printed by political parties themselves with no state oversight. Adam Winkler, Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915, 100 Colum. L. Rev.

Cons. Stat. Ann. § 2870(f); S.C. Code Ann. § 7-11-10(C); Tenn. Code Ann. § 2-5-101(f)(1); Tex. Elec. Code Ann. § 162.015; Wis. Stat. Ann. § 8.15(7).

Four states allow a candidate to accept only one nomination. Iowa Code § 49.39; Mich. Comp. Laws § 168.692; Mont. Code Ann. § 13-10-303; N.D. Cent. Code § 16.1-12-06.

Twenty states and the District of Columbia effectively prohibit fusion tickets by requiring that a candidate be registered in the party from which they seek nomination. See Ala. Code §§ 17-16-21, 17-16-14; Alaska Stat. § 15.25.030(14); Ariz. Rev. Stat. Ann. § 16-311(A); Cal. Elec. Code § 8002.5(a); Colo. Rev. Stat. § 1-4-601(2); D.C. Code Ann. § 1-1001.08; Fla. Stat. § 99.021(1)(b); Haw. Rev. Stat. § 12-3(a)(7); Me. Rev. Stat. tit. 21-A, § 334; Md. Elec. Law § 5-203; Mass. Gen. L. ch. 53, § 48; Nev. Rev. Stat. § 293.177; N.H. Rev. Stat. Ann. § 655:14; N.M. Stat. Ann. §§ 1-8-2, 1-8-3, 1-8-18; N.C. Gen. Stat. § 163-106; Ohio Rev. Code Ann. § 3513.07; Okla. Stat. tit. 26, § 5-105; R.I. Gen. Laws § 17-14-1; W. Va. Code § 3-5-7; Wyo. Stat. § 22-5-204.

[3] Delaware and South Carolina enacted their laws in the past decade. Del. Code Ann. tit. 15, § 4108; S.C. Code Ann. § 7-11-10(C).

873, 876 (2000); see also (Pa373). That meant local party bosses effectively controlled which candidates appeared on party-printed ballots, which facilitated demanding bribes from candidates to be included on the ballot and printing counterfeit ballots of a rival party with substituted names to deceive voters into voting for their opponents. See Winkler, Voters' Rights, at 883. New Jersey was no exception: with few election regulations, party bosses sought to bribe voters and distributed ballots "well designed to assure the casting of only a straight ticket for all the candidates on the slate." John F. Reynolds, Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920 47 (1988).

The need for reform was brought into sharp relief by the 1888 Presidential election, which was marred by "widespread incidents of bribery, intimidation, and fraudulent voting." Pa373-74. That election spurred many states to adopt the Australian ballot, an official state-printed ballot that lists all duly nominated candidates in one place and is distributed only at the polling place, to ensure secret voting and one-vote-per-voter. See John C. Fortier & Norman J. Ornstein, The Absentee Ballot and the Secret Ballot: Challenges for Election Reform, 36 U. Mich. J.L. Reform 483, 487 (2003); Pa374.

New Jersey enacted its own reforms in the 1890s, requiring the use of secret ballots, voting booths, and buffer-zone rules. See Reynolds, Testing

Democracy, at 57-58. And further efforts followed, including when New Jersey passed the first direct-primary law in 1903, and the Geran Act in 1911, which, inter alia, required voter registration and established a single ballot in which voters select a candidate for each office rather than selecting one box to cast an entire partisan slate. See L. 1911, c. 183, §§ 53-54; Reynolds, Testing Democracy, at 63, 132, 142; Pa374 (distinguishing this "office-bloc" format from "party-column" ballot which groups candidates by political party).

With the use of single omnibus ballots, many states saw a further need for reform, including ensuring ballots did not become overcrowded or confusing. James Gray Pope, Fusion, Timmons v. Twin Cities Area New Party, and the Future of Third Parties in the United States, 50 Rutgers L. Rev. 473, 484 (1998); Celia Curtis, Comment, Cross-endorsement by Political Parties: A "Very Pretty Jungle"?, 29 Pace L. Rev. 765, 771 (2009) (Pa376). These restrictions included requiring a minimum number of signatures for nominating petitions, e.g., L. 1898, c. 139, § 41; Minn. Stat. § 204B.08, and granting automatic placement on the general election ballot only to political parties who received a certain percentage of the vote at the prior election, see Winkler, Voters' Rights, at 884.

In that same vein, at the turn of the century, thirteen states and New Jersey passed laws barring a candidate from appearing on the ballot as the candidate of more than one party (or appearing as both a party's candidate and a candidate

via nominating petition). See (Pa385). After briefly permitting "fusion" tickets in 1911, see L. 1911, c. 183, § 54, in 1921, the New Jersey Legislature reversed course and passed two laws barring a candidate who accepts a primary nomination from engaging a nomination petition and barring a candidate from accepting a nomination petition where they already accepted a primary nomination or any other petition. L. 1921, c. 196, §§ 59-60. Both provisions survived a significant revision to the election code in 1930, see L. 1930, c. 187, ¶¶ 117 § 8, 280 § 15, and are codified at N.J.S.A. 19:13-4, -8. This bar on multiple-party nominations was reinforced by a 1922 law requiring a candidate to appear only once on the ballot for a given office. L. 1922, c. 242, § 32 (codified at N.J.S.A. 19:14-2); see also N.J.S.A. 19:14-9 (similar). New Jersey also prohibits candidates from proceeding by direct nomination petition as an independent in the general election after seeking nomination via a party primary. See N.J.S.A. 19:23-15 (collectively, "Fusion Statutes").

A large swath of states followed suit in the ensuing decades with similar bans. See, e.g., Idaho Code § 33-628 (1932); Mont. Rev. Code § 682 (1935); N.D. Rev. Code § 16-0506 (1943); Wash. Rev. Stat. Ann. § 5274(6); Wyo. Comp. Stat. § 31-1404 (1945) (Da1-9). That list continued to grow and, by the end of the twentieth century, "approximately 40" states prohibited fusion. Timmons, 520 U.S. at 370.

B. Courts Nearly Uniformly Rejected Early Constitutional Challenges To Fusion Bans.

In the century-plus since the early enactments against fusion voting, courts have swiftly and almost uniformly upheld these laws, reasoning that voters remain free to vote for any candidate they wish and the laws advance valid state interests in ballot integrity and management, reducing voter confusion, and preventing abuses.

In an illustrative case, the Supreme Court of Wisconsin rejected an early state constitutional challenge to a statute requiring that a candidate nominated by multiple parties for the same office appear on the ballot only under "the party which first nominated him." State v. Anderson, 76 N.W. 482, 483 (Wis. 1898). The Court found this was a reasonable ballot regulation, explaining that without some policing of a candidate's representation on the ballot, "there would be no limit to its size and it would be so complicated and confusing as to certainly materially impair the freedom of the elective franchise." Id. at 486. That the law prevented a political party from nominating its preferred candidate did not render it constitutionally infirm, because the "individual right of the citizen to vote for the candidates of his choice" was "not impaired" and all candidates had a "reasonable opportunity" to appear "on the official ballot under a party designation." Id. at 486-87.

Other states' high courts found that states also have a valid interest in preventing abuses of cross-nominations. In upholding Illinois's fusion ban, the Supreme Court of Illinois explained that "[i]t was well known that minor political parties by exchanges of favors succeeded, by fusions at elections, against a party having a much larger number of voters than either of the parties to the fusion." People ex rel. McCormick v. Czarnecki, 107 N.E. 625, 628 (Ill. 1915). Missouri's highest court likewise emphasized a candidate's ability to manipulate fusion in order to appear to one group of voters to support a particular platform, while appearing to voters of a "different political faith" to support a disparate set of principles. State ex rel. Dunn v. Coburn, 168 S.W. 956, 958 (Mo. 1914). And these courts agreed with the Supreme Court of Wisconsin that a fusion ban pursues those legitimate goals without infringing on voters' or candidates' rights, since it does not preclude "any or all voters voting for [that candidate] at the election" and "permits every voter to vote for whomsoever he pleases." McCormick, 107 N.E. at 627; Dunn, 168 S.W. at 958 (reiterating law leaves voter free to "vot[e] for whom he pleases").

While Appellants identify one state court that invalidated a fusion ban under its state constitution, see (Pb13) (citing New York), the overwhelming majority of courts upheld these laws. See also, e.g., State v. Wileman, 143 P. 565, 566-67 (Mont. 1914) (law did not interfere with right to vote or "right of

naming candidates for public office"); State v. Superior Court, 111 P. 233, 234, 237-38 (Wash. 1910) (law did not violate political parties' or fusion candidate's rights); State ex rel. Fisk v. Porter, 100 N.W. 1080, 1081 (N.D. 1904) (similar); State ex rel. Bateman v. Bode, 45 N.E. 195, 196-97 (Ohio 1896).

C. The Framers Of The 1947 Constitution Specifically Rejected An Amendment Authorizing Fusion Candidacies.

By the time of New Jersey's 1947 Constitutional Convention, its Fusion Statutes had been on the books for over twenty years, and numerous parallel state statutes existed in other states, which the weight of state-court authority endorsed as constitutional. Supra at 9-13. There is ample evidence that the Framers of the 1947 Constitution were aware of the debate over fusion bans, yet they chose not to disturb the Legislature's authority to maintain these laws.

Delegates to the 1947 Convention were specifically urged to enshrine a constitutional right to fusion candidacies, but declined to do so. Delegate Spencer Miller, Jr., of Essex County introduced a proposal referred to the Committee on Rights, Privileges, Amendments and Miscellaneous Provisions, which stated:

> The Right to Nominate Candidates. (A new paragraph to be included in Article IV, Section VII.)
>
> *Resolved*, that the following be agreed upon as part of the proposed new State Constitution:

> The right of any legally qualified group of petitioners or of the voting members of any legally recognized political party to nominate any qualified person for an elective public office shall not be denied or abridged because he is not a member of the party or on account of his nomination by some other party or group.
>
> [2 Proceedings of the New Jersey Constitutional Convention of 1947 1010 (emphasis added).]

And while that proposal—"Proposal 25"—was pending, the Committee discussed whether a constitutional amendment would be needed to prevent the Legislature from maintaining a fusion ban:

> MR. IRVING LEUCHTER: I am here today representing the CIO from Union County, and the purpose of my appearance here is first to secure a Legislature which will be effective and responsible.
>
> . . .
>
> We advocate certain changes which we believe will result in both efficient and responsible legislative action:
> . . .
>
> Four, independent political parties: The course of American history demonstrates that the independent political party is a catalytic agent in the stream of American democracy. New ideas and concepts, which have eventually been adopted and accepted by the whole nation, have with some exceptions (Wilson and Roosevelt) been introduced and spread by independent parties. Accordingly, such parties should be given the fullest reign, and not so restricted that lip service only is paid to their right to exist and function. Such undue restrictions are present in laws which prevent such independent parties from nominating a candidate who

> is also the nominee of another party. The Constitution should specifically provide that the Legislature may enact no law which prohibits a candidate from standing for election as the candidate of more than one political party.
> . . .
>
> [DELEGATE] WESLEY L. LANCE: Is there anything in our present Constitution which prevents legislation authorizing a man to run on both tickets?
>
> MR. LEUCHTER: No, there is not; but I would like to have put in a prohibition from preventing the legislation.
>
> [3 Proceedings of the New Jersey Constitutional Convention of 1947 614-16].

The Legislative Committee rejected Proposal 25. See id. at 650; 2 Proceedings of the New Jersey Constitutional Convention of 1947 1078 (noting proposal "received careful consideration" but was rejected). Additionally, two groups—the New Jersey Committee for Constitutional Revision and New Jersey State Industrial Union Council, CIO—submitted identical proposals that the new constitution "[f]orbid legislation prohibiting a candidate running on more than one party ticket." 3 Proceedings of the New Jersey Constitutional Convention of 1947 872, 888 ("NJCCR/NJIUC Proposals"). Neither was adopted. The 1947 Constitution "carefully considered," but ultimately chose not to, disturb the validity of the pre-existing Fusion Statutes.

D. Subsequent Challenges To Fusion Bans Have Been Rejected.

The Attorney General is not aware of any challenge to New Jersey's Fusion Statutes after 1947, until the instant case. And the near-consensus of state courts continued to reject constitutional challenges to fusion bans. See, e.g., In re Street, 451 A.2d 427, 432 (Pa. 1982) (upholding Pennsylvania anti-fusion statute against federal constitutional challenge); Ray v. State Election Bd., 422 N.E.2d 714, 719 (Ind. Ct. App. 1981) (holding that while particular elements of Indiana's prohibition on cross-filing were unconstitutionally vague, there is no general right to cross-file petitions); Working Families Party v. Commonwealth, 209 A.3d 270 (Pa. 2019) (upholding Pennsylvania anti-fusion statute against state constitutional challenge).

Challenges to fusion bans in federal court fared no better. See, e.g., Swamp v. Kennedy, 950 F.2d 383, 386 (7th Cir. 1991) (rejecting constitutional challenge to Wisconsin's prohibition on multiple party nominations). In 1997, the United States Supreme Court spoke definitively on the constitutionality of fusion bans in Timmons. The Court held that Minnesota's fusion ban was a reasonable ballot regulation that does not violate First Amendment associational freedoms. See infra at 19.

ARGUMENT

POINT I

APPELLANTS' CHALLENGE FAILS BECAUSE THE UNITED STATES CONSTITUTION DOES NOT REQUIRE FUSION VOTING AND THE STATE CONSTITUTION'S PROTECTIONS ARE CO-EXTENSIVE.

Appellants bear a "heavy burden" in asking this court to invalidate the century-old fusion ban as unconstitutional. State v. Buckner, 223 N.J. 1, 14 (2015). Appellants can only overcome the "strong presumption of constitutionality" of the law by showing that "its repugnancy to the constitution is clear beyond reasonable doubt." Ibid. (quoting Gangemi v. Berry, 25 N.J. 1, 10 (1957)) (emphasis in original). Thus, "[e]ven where a statute's constitutionality is 'fairly debatable, courts will uphold' the law." State v. Lenihan, 219 N.J. 251, 266 (2014). And because Appellants bring a facial challenge, they must overcome the additional hurdle of "establish[ing] that no set of circumstances exists under which the Act would be valid." Whirlpool Props., Inc. v. Director, Div. of Taxation, 208 N.J. 141, 175 (2011).

Appellants fail to meet their heavy burden for several reasons. First, the Supreme Court of the United States already rejected Appellants' view that the U.S. Constitution guarantees a right to fusion voting. Second, the Framers of the 1947 Constitution also declined to make fusion voting a protected right under

our State Constitution. These circumstances conclusively preclude any finding that this law's invalidity is "clear beyond reasonable doubt."

A. The Supreme Court Of The United States Already Rejected Appellants' Claims Under the Federal Constitution.

U.S. Supreme Court authority is the first obstacle Appellants face. In Timmons, 520 U.S. 351, a 6-3 Court upheld Minnesota's fusion ban against a constitutional challenge. In Timmons, a third party (New Party) sought to nominate as its candidate in the general election an individual who had already declared his candidacy in the separate Democratic-Farmer-Labor Party's (DFL) primary. Id. at 354. A Minnesota law barred the New Party's nomination, because the statute "prohibit[s] a candidate from appearing on the ballot as the candidate of more than one party," regardless of whether the candidate and other party consented. Ibid. The party sued in federal court, alleging that Minnesota's fusion ban violated its freedom of association under the First and Fourteenth Amendments to the U.S. Constitution. Id. at 355.

The Supreme Court rejected the challenge. The Court first confirmed that such challenges are governed by the Anderson-Burdick interest-balancing standard, since states "inevitably must" enact some reasonable regulations of ballots "to reduce election- and campaign-related disorder," yet every regulation invariably encroaches on a party's rights of association and expression. Id. at 358-59 (citing Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v.

Takushi, 504 U.S. 428 (1992)). Laws imposing "severe burdens" on a plaintiff's rights "must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" Ibid. (quoting Burdick, 504 U.S. at 434).

The Court found that the burdens that the Minnesota statute imposed on associational rights—while "not trivial—are not severe." Id. at 363. A minor party's inability to have its first-choice candidate appear as its nominee on the ballot "does not severely burden [its] associational rights," since the burden is a function of the candidate's choice to accept a different party's nomination. Id. at 359. Indeed, a fusion ban limits the "universe of potential candidates" available to this party "only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party." Id. at 363. But the minor party remains "free to try to convince" its preferred candidate to relinquish his earlier nomination and accept its nomination instead. Id. at 360.[4] And the ban does not restrict the party's or its members' ability "to endorse, support, or vote for anyone they like" or "directly limit the party's access to the ballot." Id. at 363.

[4] The Court thus endorsed the Seventh Circuit's conclusion in Swamp, 950 F.2d, at 385. Id. ("[A] party may nominate any candidate that the party can convince to be its candidate.").

The Court also disagreed that limiting a party's ability to use the ballot as a means of conveying a particularized message to voters about "the nature of its support" for a candidate severely burdens associational rights. Id. at 362-63. As the Court explained, "[b]allots serve primarily to elect candidates, not as forums for political expression"—and meanwhile, nothing in the fusion ban restricts a minor party's ability to use those other avenues of expression to communicate to voters. Ibid. Indeed, a minor party and its members enjoy the same right as all other participants to "campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate." Id. at 363. Accordingly, a fusion ban is constitutional so long as the State's "important regulatory interests" justify the imposition on parties' rights. Id. at 358.

The Court then held that the law survived this lesser scrutiny. First, it noted that the statute advanced the state's valid interest "in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." Id. at 364. The Court found that without the statute, candidates could exploit fusion as a way to attach their names to slogans appealing to various political factions, which "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising." Id. at 365. Relatedly, minor parties may use fusion

to freeride off the "popularity of another party's candidate" to win enough votes to attain "major-party status in the next election," where they may otherwise have lacked the signatures needed to gain access to the ballot via nominating petition. Id. at 366. A state "surely has a valid interest" in ensuring that only minor parties that "are bona fide and actually supported, on their own merits," secure access to the ballot. Ibid.

Further, states have a "strong interest" in preserving political stability by preventing the "unrestrained factionalism" fusion facilitates. Id. at 366, 368. The Court found that given the potential harms in "splintered parties and unrestrained factionalism," states could permissibly conclude "that political stability is best served through a healthy two-party system." Id. at 367, 368. But the Court was explicit that states have no valid interest in preserving the two-party system simply for its own sake, or in enacting "unreasonably exclusionary restrictions" under the guise of "political stability." Id. at 367. Rather, "the States' interest permits them to enact reasonable regulations that may, in practice, favor the traditional two-party system." Ibid. And the Court stressed that it has upheld far more exclusionary laws on this rationale than a fusion ban, including laws banning write-in voting, see Burdick, 504 U.S. at 439, and prohibiting a candidate who was affiliated with a party at any time during the year before the primary election from appearing on the ballot as an

independent or candidate of another party, see Storer v. Brown, 415 U.S. 724, 728 (1974). While those laws "absolutely banned many candidacies," a fusion ban "only prohibits a candidate from being named twice" on the ballot. 520 U.S. at 369. The "weighty" state interests in ballot integrity and political stability thus outweigh the more limited burden imposed by a fusion ban. Id. at 369-70.[5] Thus, the Court concluded, Minnesota's fusion-voting ban did not violate the Constitution.

B. Timmons Is Dispositive Because The New Jersey Constitution Does Not Establish Any Greater Right To Fusion Voting.

Given Timmons's definitive holding, Appellants' only recourse is to argue that the decision's analytical approach should be cast aside, asserting that the State Constitution "warrants greater protection" for free speech and political associational rights than its federal counterpart. (Pb55-56). But this argument falters right out of the gate: the Framers of the 1947 Constitution specifically rejected a constitutional right to fusion voting. And even putting aside that dispositive history, Appellants also fail to show that the State Constitution's protections are broader in any way that is relevant to fusion voting.

[5] The Court also noted that in Swamp, the Seventh Circuit upheld Wisconsin's fusion ban by citing to additional compelling state interests, including "avoiding voter confusion." Timmons, 520 U.S. at 364 (quoting Swamp, 950 F.2d at 386).

1. Appellants face an insurmountable burden in demonstrating the State Constitution establishes any greater right to fusion voting than the federal constitution, because the Framers of New Jersey's 1947 constitution consciously refused to create a right to fusion voting.

As set forth above, by the time of the 1947 Convention, New Jersey—along with many other states—had already long prohibited fusion voting. Supra at 9-10; see Anderson, 76 N.W. at 486-87. The 1947 Constitution's silence itself strongly suggests that our Constitution does not grant a right to fusion voting, because "[w]hen the framers of the constitution intended that a subject should be placed beyond legislative control[,] they said so." Buckner, 223 N.J. at 15. There can be little doubt that the Framers were aware of the existence of both the longstanding legislation and the policy debate over the bar on fusion, ibid.; cf. Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 449 (2012) (presuming "that the Legislature was aware of its own enactments"). And they were aware of the implications of their silence, since "[a] constitutional prohibition against the exercise of a particular power" of the Legislature needs to be explicit. State v. Murzda, 116 N.J.L. 219, 223 (1936). It was "the settled rule of judicial policy" in New Jersey long before the 1947 Constitutional convention "that a legislative enactment will not be declared void unless its repugnancy to the Constitution is so manifest as to leave no room for reasonable doubt." Ibid.

Appellants' position is even weaker, because the historical record shows not acquiescence, but an express repudiation. The Framers rejected multiple proposals to place the specific matter at issue "beyond legislative control." Buckner, 223 N.J. at 15. The NJCCR/NJIUC proposals would have definitively precluded legislation "prohibiting a candidate running on more than one party ticket." See supra at 15. Proposal 25 would have added a constitutional amendment recognizing the "right" to "nominate any qualified person for an elective office," without regard to "his nomination by some other party or group." See supra at 13-14. In declining to adopt any of the three proposals, the Framers of the 1947 Convention chose to preserve the Legislature's authority to maintain a fusion ban in any way. See supra at 13-15.

As this court has recognized, acquiescence to a pre-1947 practice is a heavy thumb on the scale in favor of its constitutionality—even in the absence of the direct-rejection history in this case. In Rutgers University Student Assembly v. Middlesex County Board of Elections, 446 N.J. Super. 221 (App. Div. 2016) ("RUSA II"), this court rejected a claim that New Jersey's 21-day advance-registration requirement (which was first enacted before the 1947 Convention) violated the right to vote under the State Constitution, noting that the Framers of the Convention "were obviously aware of, but did nothing to disturb, this well-established requirement when they adopted" the 1947

Constitution. Id. at 224, 230. Likewise, the Framers' conscious refusal to establish a right to fusion voting is powerful evidence that the Fusion Statutes comport with the State Constitution, even more so given their explicit rejection of Proposal 25.

Given that history, Justice Handler's concurrence in State v. Hunt, 91 N.J. 338 (1982) undermines, not supports, Appellants' effort to source the right rejected by Timmons in the State Constitution. See (Pb55); Hunt, 91 N.J. at 363-68 (offering criteria for identifying when State Constitution should deviate from U.S. Constitution's protection of individual rights to prevent "erosion or dilution of constitutional doctrine"). The Hunt factors—in particular, the "legislative history" of the constitutional provision, the "preexisting state law," and the state's "history and traditions"—weigh against Appellants. 91 N.J. at 365, 366-67 (Handler, J., concurring). Here, the Legislature's longstanding endorsement of a fusion ban, reinforced by the history of the 1947 Constitution, make clear that New Jersey in particular did not write a constitution that forbids the longstanding state practice against fusion bans. Appellants' reliance on the Geran Act—which briefly authorized fusion—underscores the point, see (Pb58), as that short-lived law was repealed in 1921 and replaced by a fusion ban which has been the law of the land for over 100 years. Moreover, the national trend in both legislative sentiment and judicial review—both of which overwhelmingly

support fusion bans—indicate that the issue is not one of "particular State Interest or Local Concern," another Hunt analysis factor. 91 N.J. at 366; see Timmons, 520 U.S. at 370 (noting that "approximately 40 other states . . . do not permit fusion"). In short, nothing in Hunt supports the novel, ahistorical expansion of state constitutional law Appellants seek, when the legislative history of our state constitution directly contradicts that position.

2. Even without that remarkably dispositive constitutional history, Appellants are wrong to suggest that New Jersey courts have construed State constitutional rights in the elections context as farther-reaching than their federal counterparts. See N.J. Const. art. I, ¶¶ 6, 18. Appellants invoke general language about the State constitution without citing to a single case that reaches that holding. And they ignore this court's caselaw interpreting the federal and state constitutions coextensively in the elections context in particular.

Appellants' main argument is that New Jersey's free speech provision stretches beyond the First Amendment—and the constitutions of nearly every other state—to uniquely protect the right to fusion voting. But our "State Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment." E & J Equities, LLC v. Bd. of Adjustment of Twp. of Franklin, 226 N.J. 549, 568 (2016) (emphasis added) (applying same substantive standards in reviewing free-speech challenge to billboard ordinance under

Federal and State Constitutions). State courts thus "rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution." Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264-65 (1998) (reviewing free-speech challenge to sign regulation under Federal and State Constitutions) (citation omitted). Appellants cite cases about the right to free speech in wholly inapposite contexts. (Pb56-60).

There are only two recognized contexts in which the "State constitutional provision has been construed more broadly in scope than the First Amendment," and neither apply here. Horizon Health Ctr. v. Felicissimo, 263 N.J. Super 200, 213-14 (App. Div. 1993); E & J Equities, 226 N.J. at 568. First, the State clause lacks the U.S. Constitution's "state action" requirement, and is thus enforceable against certain private actors. See, e.g. Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 79 (2014); State v. Schmid, 84 N.J. 535, 559 (1980). But that says nothing about the substantive reach of the clause in the elections context where the question of state action is not at issue. The second exception involves defamation, and is equally inapposite: New Jersey requires "proof of actual malice to statements regarding private citizens in matters of public concern,"

whereas the First Amendment does not. W.J.A. v. D.A., 210 N.J. 299, 242 (2012); Senna v. Florimont, 196 N.J. 469, 484 (2008).[6]

As for the right to associate, Appellants cite no case suggesting that the freedom of association enjoys greater protection under the State Constitution. Schundler v. Donovan, 377 N.J. Super. 339, 347-49 (App. Div. 2005) (cited at Pb60) analyzes only the U.S. Constitution's freedom of association, and says nothing about whether the State and Federal rights are co-extensive.

Appellant's reliance on Worden v. Mercer County Bd. of Elections, 61 N.J. 325 (1972) for the proposition that the right to vote in New Jersey is more expansive than its federal counterpart, is unavailing. Worden reviewed a ruling by election officials that prohibited college and graduate students in Mercer County from registering to vote where they actually resided, instead requiring them to register to vote where their parents resided. Id. at 327-30. Worden extensively analyzed federal constitutional law, including the passage of the Twenty-Sixth Amendment and United States Supreme Court precedents adopting the "compelling state interest test" in cases where states "impose[d]

[6] Appellants' other cases are even farther afield. State v. Williams, 93 N.J. 39, 57-59 (1983) determined that *both* the federal and State constitutions protect a public right of access to criminal pretrial hearings. See id. at 59 ("[T]hese rights as recognized under the State Constitution are fully consistent with those that are found under and protected by the First Amendment."). And Quaremba v. Allan, 67 N.J. 1 (1975) did not compare the State and federal rights.

restrictions beyond ordinary resi[d]ence requirements." Id. at 334-38. The Court then confirmed that it read the state and federal constitutional rights to vote in harmony by adopting the federal "compelling state interest test" for both analyses. Id. at 346.

While Appellants insist that Worden stands for the proposition that all right-to-vote claims under the State Constitution must be evaluated under the strict scrutiny test, it does not. Worden applied the compelling state interest test precisely because it was the federal standard for evaluating a restriction that completely prohibited students from registering to vote where they resided. Id. at 334, 346. Worden does not hold that such a standard applies to state constitutional claims when the federal constitutional analysis demands a lower level of scrutiny for less severe burdens on the right to vote. Instead, its repeated references to the parallelism between federal and state right-to-vote doctrine suggests that the two are coterminous. See id.; see also Hunt, 91 N.J. at 363 (Handler, J., concurring) ("We have recently recognized the importance of federal sources of constitutional doctrine. The opinions of the [United States] Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address." (citation omitted)).

In fact, this court has applied the federal constitutional framework to resolve state constitutional challenges to election laws. In RUSA II, this court specifically evaluated the advance-registration requirement under N.J. Const. art. II, § 1, ¶ 3(a). 446 N.J. Super. at 224-25. In an earlier iteration of the challenge, this court first concluded that Worden's application of strict scrutiny was not an indication that all right-to-vote claims under the state constitution automatically trigger that analysis (a departure from the sliding scale Anderson-Burdick federal framework). Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elections, 438 N.J. Super. 93, 103 (App. Div. 2014) ("RUSA I"); see infra at 39-40. Rather, Worden applied strict scrutiny because the challenged policy "prevented the students from voting under any circumstances." Ibid. Thus, both panels of this court in RUSA I and II confirmed that there was no daylight between the federal and state constitutional analyses for a right-to-vote challenge.[7]

[7] Likewise, In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital, 331 N.J. Super. 31 (App. Div. 2000), concerned five residents of a psychiatric hospital who had their ballots challenged, segregated, and at risk of not being counted because of the voters' alleged incompetence to vote. 331 N.J. Super. at 34-35. Thus, those voters risked having their right to vote denied entirely and were being treated differently than non-residents of the psychiatric hospital. No member of the Moderate Party or any other voter faces a comparable risk of total disenfranchisement by the Fusion Statutes.

To the extent Appellants suggest that the State Constitution's assembly clause is broader than the federal one, see (Pb76), that is unsupported by any evidence. Our courts have always discussed the state and federal rights coterminously. See Kovacs v. Cooper, 135 N.J.L. 64, 66 (Sup. Ct. 1946) (discussing "the freedoms of speech and assembly" as "enunciated and preserved by the New Jersey and United States Constitutions"), aff'd, 135 N.J.L. 584 (1947), aff'd, 336 U.S. 77 (1949). And the proceedings of the 1947 Constitutional Convention make clear the Framers viewed the assembly right as identical to the federal right. See 2 Proceedings of the New Jersey Constitutional Convention of 1947 1357 (Prof. Willard Heckel's analysis for Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention stating: "This paragraph is similar to the restriction placed on Congress by the Federal Constitution"); (Da13). And in submitting an amendment to the Committee on Rights opposing the addition of language regarding labor organizing, delegate Robert Carey described the original provision as a "verbatim copy of the Article on this subject in our Federal and State Constitutions for over a century." Id. at 1038. The Constitution ultimately

retained a labor organization provision, but in a separate paragraph. N.J. Const. art. I, ¶ 19.[8]

Finally, Appellants have not shown that equal protection under the State Constitution encompasses a broader right to fusion than the U.S. Constitution. In analyzing whether a statute violates equal protection under the State Constitution, our courts "apply a flexible balancing test that weighs the nature of the right, the extent of the governmental restriction on the right, and whether the restriction is in the public interest." Caviglia v. Royal Tours of Am., 178 N.J. 460, 479 (2004). Although this balancing test is not identical to the three-tiered approach used under the U.S. Constitution, "[t]o a large extent, the considerations guiding our equal protection analysis under the New Jersey Constitution are implicit in the three tier approach applied by the Supreme Court under the Federal Constitution" and "the two tests will often yield the same result." Barone v. Dept. of Human Servs., Div. of Medical Assistance and Health Servs., 107 N.J. 355, 368 (1987) (emphasis added).

[8] Appellants' citation to Founding-era evidence sheds no light on their premise that there is a right to convey support for a candidate in a particular way on the ballot via fusion voting. The article Appellants cite suggests early state constitutions' assembly clauses encompassed the right of local governments to enact popular-sovereignty measures without explicit permission of state or federal governments. See Nicholas Bowie, The Constitutional Right of Self-Government, 130 Yale L.J. 1652, 1662-63 (2021). That issue is not implicated in this challenge regarding fusion voting.

Because Appellants fail to establish that the State Constitution's protections are different or greater in any way that informs the constitutionality of a fusion ban, Timmons controls the outcome of this case. Fusion voting does not violate either the Federal or State Constitutions.[9]

C. Appellants' Claim That Their Record Makes This Case Different Also Fails.[10]

While Appellants also argue that their factual record requires departing from Timmons, see (Pb18, 68, 70 n.65, 71), this court already made clear that Appellants' record has no bearing on this facial challenge, which is all that is at issue here. See Order, M-3846-22 at 2 (noting that record is "of little if any assistance to the court in deciding the legal issues relating to appellants' facial constitutional challenge"). And Appellants provide little analysis of what the Timmons respondents lacked in record evidence that Appellants now attempt to

[9] The "Democracy Canon" is farther afield, see (Pb60), as this is merely a canon of statutory interpretation, and there is no dispute here as to the meaning of the Fusion Statutes. See N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 190 (2002).

[10] The State respectfully reiterates its objection to resolving this facial challenge based on Appellants' one-sided record for the reasons it stated in its motion to dismiss. Moreover, before the May 2, 2023 order, the State did not anticipate a peremptory timeline cutting off a record-building period, as the appeals had recently been removed from the accelerated track and its prior extension requests were based on consent. Thus, the State did not have an adequate opportunity to develop a factual record, or to cross-examine or otherwise test Appellants' proffered evidence.

remediate. Indeed, Appellants' record covers substantially the same terrain as what the Timmons Court considered: the Timmons respondents also presented evidence regarding how fusion voting could be administered, see No. 95-1608, Br. of Respondents, 1996 WL 501955, at *26-30 (U.S. Aug. 30, 1996); the purported absence of practical difficulties in states allowing fusion, specifically including whether voter confusion was a problem in Connecticut and New York, see id. at *22, 34-39; and whether fusion bans stymied the development of third parties, see id. at *9, 28-29 (discussing need for vote disaggregation), 32-33. Appellants' record thus says little about why the result should be different here.

And to the degree this court agrees with Appellants that their record provides any basis to distinguish Timmons, then the one-sided opportunity to develop a record precludes that approach; instead, further record development would be necessary. In either event, whatever evidential value Appellants' record has, that cannot overcome the "strong presumption of validity" the Fusion Statutes enjoy where the Framers specifically refused to grant a right to fusion voting in the 1947 Constitution.

POINT II

EVEN IF THE NEW JERSEY CONSTITUTION AFFORDED BROADER RIGHTS, APPELLANTS HAVE NOT MET THEIR BURDEN TO INVALIDATE THE FUSION STATUTES.

The above analysis makes amply clear that there is no basis for this court to depart from the United States Supreme Court's holding in Timmons that fusion ban statutes are constitutional. But even if this court conducts its review of New Jersey's Fusion Statutes on a clean slate, the same result is warranted. As a threshold matter, the familiar Anderson-Burdick standard governs these state constitutional challenges to a ballot regulation.

Under that standard, the burden imposed by the law is not severe—whether the focus is on the right to vote, the rights to association and speech, right to assembly, or right to equal protection—and therefore strict scrutiny is categorically inapplicable. In fact, compared to the fusion bans upheld by the United States Supreme Court, the Pennsylvania Supreme Court, and numerous other state courts, New Jersey's Fusion Statutes impose an even lower burden on rights because our State laws allow candidates to communicate their endorsement by a different party via a slogan on the ballot. Moreover, the Fusion Statutes are supported by compelling state interests because they advance important interests in ballot integrity, promoting political stability, and mitigating voter confusion, without drawing discriminatory lines.

A. Anderson-Burdick Interest-Balancing Governs These Challenges.

This court should follow its prior precedents and employ the Anderson-Burdick test to evaluate challenges to elections statutes sounding in right-to-vote or freedom of speech, association, and assembly theories pursuant to the State Constitution. This court's continued application of the test is warranted because it ensures that individual rights and the government's interest in administering free and fair elections are appropriately balanced. Appellants offer no valid reason for why this court should jettison that approach.

It is well-settled that "government must play an active role in structuring elections." Burdick, 504 U.S. at 433. As the United States Supreme Court explained, "[a]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Timmons, 520 U.S. at 358 (quoting Burdick, 504 U.S. at 433); see also Gangemi v. Rosengard, 44 N.J. 166, 172-73 (1965) (recognizing the need for "regulatory machinery" to prevent "confusion at the polls" and "fraudulent ballots [that] might jeopardize the election process."). Such regulation "inevitably affects[,] at least to some degree," individual liberties such as the "individual's right to vote" or constitutional rights to free association or free speech. Anderson, 460 U.S. at 788.

Since competition between these twin interests is inevitable in a well-ordered democratic election system, courts adopt a test that is "more flexible than the rigid tiers of scrutiny under a traditional First Amendment analysis." Mazo v. N.J. Sec'y of State, 54 F.4th 124, 137 (3d Cir. 2022) (citations omitted); see also Burdick, 504 U.S. at 433 (noting rigid application of strict scrutiny to every ballot regulation "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."); Timmons, 520 U.S. at 358-59; RUSA II, 446 N.J. Super. at 231. Under that test, named after the Supreme Court decisions in Anderson and Burdick, courts must:

> [W]eigh the "character and magnitude" of the burden the State's rule imposes on [constitutional] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary . . . . Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions."
>
> [Timmons, 520 U.S. at 358 (quoting Burdick, 504 U.S. at 434).]

As Timmons confirms, Anderson-Burdick's balancing approach is tailormade for the competing interests inherent in a constitutional challenge to fusion bans. Any burden that the state law imposes on individual rights is weighed against the State's interests regarding administration of elections, and the State may

only pursue its goals to "the extent . . . the State's concerns make the burden necessary." Id. at 358.

This court has both explicitly and implicitly adopted the well-reasoned underpinnings of the Anderson-Burdick test in assessing the constitutionality of state elections regulations. In RUSA II, this court explicitly adopted the Anderson-Burdick test to evaluate the validity of a state advance-registration requirement for voters, citing the test's "flexible analytical approach" as appropriate for elections challenges. 446 N.J. Super. at 231. And this court has repeatedly endorsed applying Anderson-Burdick in other elections challenges. For example, in Schundler v. Donovan, 377 N.J. Super. 339 (App. Div.), aff'd, 183 N.J. 383 (2005), a case about New Jersey's ballot design statute, this court confirmed that the approach in Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 222 (1989), which applied the Anderson-Burdick test, was the appropriate framework for evaluating challenges to elections statutes. 377 N.J. Super. at 347 (quoting Eu and assessing whether the "regulation ... is necessary to the integrity of the electoral process"). Likewise, in Council of Alternative Political Parties v. State Division of Elections, 344 N.J. Super. 225, 236 (App. Div. 2001) ("CAPP"), this court employed the Anderson-Burdick test to strike down a statute that precluded registered voters from declaring a party affiliation other than Republican, Democrat, or Independent. See also Gusciora

v. Christie, No. A-5608-10, 2013 WL 5015499, at *10 (N.J. Super. Ct. App. Div. Sept. 16, 2013) ("[T]he proper analysis to apply is the flexible approach set forth in Burdick.").[11]

While our Supreme Court has not considered whether to adopt the Anderson-Burdick test to review election laws, the Court has long endorsed a balancing approach and rejected a strict-scrutiny-for-all method. In In re Contest of November 8, 2011 General Election, 210 N.J. 29 (2012), for example, the Court applied intermediate scrutiny in an equal protection challenge to a durational residency requirement to run for legislative office, reasoning that such a rule does "not 'directly interfere with the exercise of the fundamental right to vote'" and specifically rejecting a strict scrutiny standard. Id. at 49, 55. And in Wene v. Meyner, 13 N.J. 185, 192 (1953), in construing a primary-election statute, the Court remarked that [t]he Legislature may invoke measures reasonably appropriate to secure the integrity of the nominating process in the service of the community welfare." Id. at 192.

---

[11] While unpublished opinions do not constitute precedent and are not binding on any court, the Attorney General cites to one here to illustrate the consistent approach taken by this court. See Pressler & Verniero, Current N.J. Court Rules, cmt. 2 to R. 1:36-3 (2023). The Attorney General is not aware of any contrary unpublished opinions.[12] And unbounded use of cross-nominations is not a hypothetical scenario. In the absence of anti-fusion laws in New York, former New York City Mayor Fiorello LaGuardia ran under nine different party labels during his political career and, in 1941 alone, was cross-nominated by four separate parties. See Curtis, Cross-Endorsement, at 791-92.

Appellants offer no principled reason why this court should abandon this approach, other than to insist that because the Fusion Statutes "infringe" on fundamental rights, strict scrutiny must apply. (Pb30, 31, 32, 39). But that assertion merely begs the question, since nearly all challenges to election regulations—including those underlying Anderson, Burdick, Timmons, and RUSA II—implicate some fundamental rights. Instead, Appellants only rely on Worden, arguing that because that court applied strict scrutiny, it must do so in every voting rights case under the State Constitution. But that reliance is misplaced for the reasons the RUSA II court explained. Noting that Worden reviewed regulations that treated "similarly situated citizens … differently" and led to the wholesale "exclusion of a large number of otherwise eligible voters" from being able to vote at all, RUSA II found that nothing in Worden foreclosed a flexible approach whereby particularly severe burdens on constitutional rights merit a heightened showing of state interest, while lesser burdens could be justified by sufficiently "important regulatory interests." Id. at 232, 234; see supra at 28-30. After all, Worden's application of strict scrutiny is consistent with Anderson-Burdick's framework, which itself requires that "severe burdens" on constitutional rights satisfy strict scrutiny. Timmons, 520 U.S. at 358. More fundamentally, Appellants overlook that Worden predates Anderson and Burdick, and that this court has since adopted Anderson-Burdick's

balancing approach. See RUSA II, 446 N.J. Super. at 234; CAPP, 344 N.J. Super. at 235 (cited at Pb46, 63). This court should follow those precedents.

B. The Fusion Statutes Do Not Violate The Right To Vote.

Merely prohibiting a candidate from appearing multiple times on a ballot for the same office under the nomination of multiple parties does not burden the rights of voters to cast ballots for their preferred candidates. Any alleged impact of fusion ban statutes on voting rights is indirect or minimal at best and is justified by the State's important regulatory interests in preventing ballot manipulation, political gamesmanship, voter confusion, and decreased voter choice, maintaining voter confidence in party accountability, and maintaining the stability of the political system.

Without doubt, our State Constitution protects citizens' rights to vote. N.J. Const. art. II, § 1, ¶ 3(a); In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 331 N.J. Super. 31, 37 (App. Div. 2000). But like all fundamental rights, the right to vote is subject to reasonable regulations enacted by the Legislature. See, e.g., Wene, 13 N.J. at 192; Sadloch v. Allan, 25 N.J. 118, 122 (1957) ("[T]here can be no doubt about the authority of the Legislature to adopt reasonable regulations for the conduct of primary and general elections. Such regulations, of course, may control the manner of preparation of the ballot, so long as they do not prevent a qualified elector from

exercising his constitutional right to vote for any person he chooses."); Gangemi v. Berry, 25 N.J. at 12; Rose v. Parker, 91 N.J.L. 84, 86-87 (1917).

1. The Fusion Statutes Do Not Burden Appellants' Right To Vote.

The threshold problem with Appellants' right-to-vote claim is that the Fusion Statutes do not materially impinge on the right to vote or establish any barriers for any citizen to vote for the candidate of their choice. Candidates like Malinowski still appear on the ballot, and voters may vote for him (or any other candidate). See, e.g., Working Families Party, 209 A.3d at 281-82 (finding challengers "had the opportunity to support and vote for the candidate of their choice" under Pennsylvania fusion ban); McCormick, 107 N.E. at 629 ("Each candidate has the opportunity to have his name appear upon the ballot once, and every voter has the opportunity to vote for him, which secures to both every right guaranteed by the Constitution."); Bateman, 45 N.E. at 196 ("[I]f an opportunity is given them to vote for the candidates of their choice, by placing the names once, in plain print, upon the ballots, it is all that can in fairness be required."); Fisk, 100 N.W. at 1081; Superior Court, 111 P. at 237; Wileman, 143 P. at 566. See also Timmons, 560 U.S. at 363 (Minnesota's fusion statutes did not impinge on the New Party or its members' ability to "endorse, support, or vote for anyone they like"). And there is no question that the voters' preference of candidate is "counted." (Pb35) (quoting League of Women Voters

of Mich. v. Sec'y of State, 959 N.W.2d 1, 27 (Mich. Ct. App. 2020)). That every voter has an opportunity to vote for their preferred candidate under New Jersey's Fusion Statutes ends the right-to-vote inquiry.

Appellants instead conflate a separate claim—the alleged speech and associational right of the Moderate Party to indicate their preference for Malinowski as their standard-bearer on the ballot, and the same speech and associational right of a voter to indicate their support for the Moderate Party on the ballot—with the right to vote. (Pb35). But nothing in their cited cases suggests that there is a standalone right to use the ballot not only to vote for a candidate, but to also vote for a political party. See Anderson, 76 N.W. at 486 ("Mere party fealty and party sentiment . . . are not the subjects of constitutional care."). And a right-to-vote theory based on a right to choose not only a candidate, but a political party, would invalidate numerous other statutes. After all, many states, including New Jersey, operate nonpartisan elections for certain positions. See, e.g., N.J.S.A. 40:45-5 et seq. (providing for certain nonpartisan municipal elections). In those cases, no voter may use the ballot as a means to select their preferred party, but there is little question that such nonpartisan elections do not violate the right to vote. Even in partisan elections, an elected candidate may later choose to disaffiliate with the party that nominated him, or to affiliate with another party.

Thus, while the Fusion Statutes might minimally burden Appellants' right to speak and associate, see infra at 59-63, they do not burden their right to vote—which protects the right to select a candidate, not a party. Cf. Smith v. Penta, 81 N.J. 65, 73 (1979) (holding that registered members of one political party have no right to participate in primary elections of another, because art. II, § 3 of our Constitution could not "possibly be read as encompassing the right to participate in a particular party's candidate selection process").

In any event, even if the Fusion Statutes did implicate the right to vote, they work "no more than a minimal burden upon plaintiffs' right to vote." RUSA II, 446 N.J. Super. at 234. That is because voters can still select their preferred candidate. In fact, they can select their preferred candidate whose name is accompanied by an endorsement slogan linking the candidate to the voter's preferred party. Thus, the right to vote for a preferred candidate and the party he has affiliated with are left undisturbed. While Appellants insist that they would prefer to vote for Malinowski under a different ballot configuration, it is Malinowski who chose to appear on the ballot under the Democratic Party instead of the Moderate Party. See Timmons, 520 U.S. at 363 (observing that candidates affected by fusion bans are "individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party"). And the difference between the voter's ideal ballot

configuration and the status quo imposes at most a minimal burden on the right to vote, since the underlying act of selecting a candidate or party affiliation in the form of a slogan is still available to Appellants.

2. The Fusion Statutes Promote Compelling State Interests.

Regardless of the precise degree of burden—if any—that the Fusion Statutes place on the right to vote, a variety of important regulatory interests shield them against a constitutional challenge.

First, the State has a compelling interest in ensuring that the ballot remains free from manipulation. Allowing cross-nominations would "undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising," Timmons, 520 U.S. at 365, a practice that the State has more than legitimate reason to prevent. Fusion voting—allowing candidates to appear multiple times on the ballot as the nominee of different parties—incentivizes candidates to use cross-nominations as a means of using the ballot for political advertising and advantage. For example, a candidate could create or seek the nomination of multiple minor parties and obtain those parties' nominations by petition by obtaining a relatively low number of signatures, see N.J.S.A. 19:13-5 (requiring no more than 100 signatures, except for statewide positions, which require 800), something that a major-party candidate could easily accomplish. That candidate could then leverage the

repetition of his name on the ballot and the names and slogans of the minor parties as a series of campaign advertisements on the ballot itself (i.e., "No New Taxes Party" or "Stop Crime Now Party," each accompanied by a slogan).

Employed by major party candidates, such an approach may allow them to monopolize ballot real estate by working up multiple cross-nominations to promote their preferred message. See McCormick, 107 N.E. at 629 ("If the relator can be the candidate of two parties, he can be the candidate of all six parties of the state; and if he has that right every other candidate has the same right[.]"). And fringe candidates may be incentivized to rack up multiple nominations from minor parties by obtaining the bare minimum of signature petitions with modest to little support from the general electorate. That approach could convince voters that the candidate has wider support than he does, because he appears on the ballot so many times.[12] And although Timmons and other courts have long identified this problem, Appellants conspicuously give it short shrift in their otherwise lengthy discussion about state interests. (Pb43-52).

Second, the State has an interest in preventing political gamesmanship through the cross-nomination process. Fusion voting effectively turns the ballot

[12] And unbounded use of cross-nominations is not a hypothetical scenario. In the absence of anti-fusion laws in New York, former New York City Mayor Fiorello LaGuardia ran under nine different party labels during his political career and, in 1941 alone, was cross-nominated by four separate parties. See Curtis, Cross-Endorsement, at 791-92.

into precious real estate, for candidates and parties to capitalize instead of an apolitical utilitarian vehicle for voting. For example, a minor party that advances a single issue ("Self-Service Gas Pumps" or "Save the Dolphins") could leverage its precious ballot real estate by trading the opportunity to repeat a major candidate's name under its banner for the major party's adoption of the single issue. Moreover, a minor party that may not have received sufficient support otherwise could inflate their support by signaling their intention to nominate a major party candidate. Thus, "voters who might not sign a minor party's nominating petition based on the party's own views and candidates might do so if they viewed the minor party as just another way of nominating the same person nominated by one of the major parties." Timmons, 520 U.S. at 366.

While Appellants' response is to assert that the Moderate Party was not trying to "capitalize on Malinowski's status as someone else's candidate" in this case, (Pb51-52), that is hardly assurance against the risk of such effects in the future. The State has a legitimate interest in ensuring that political parties establish true support on the merits of their positions, instead of leveraging cross-nominations as a political carrot for their own benefit. See Dunn, 168 S.W. at 958 (noting that fusion incentivizes candidates who are "not of the political faith indicated by the ticket upon which he permits his name to go, yet the unsuspecting masses are deceived"). And such practices undermine the public's

confidence that "minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support." Id.; see also, e.g., State ex rel. Dunn, 168 S.W. at 957; People ex rel. McCormick, 107 N.E. at 628.

Third, fusion policies can lead to decreased voter choice. Although Appellants tout the strengthening of third parties as a benefit of fusion voting, (Pb21-25), they acknowledge that their preferred approach is to repeat the selection of other parties. Appellants' own arguments show that fusion voting disincentivizes minor parties from identifying new standard-bearers who best represent that party, and instead incentivizes nominating candidates who already have the backing of a major political party. Allowing minority parties to simply select already-popular candidates of major parties "decreases real competition; forcing parties to cho[o]se their own candidates promotes competition." Swamp, 950 F.2d at 385. And as the Timmons Court noted, when California allowed cross-filing, "Earl Warren was the nominee of both major parties, and was therefore able to run unopposed in California's general election. It appears to be widely accepted that California's cross-filing system stifled electoral competition and undermined the role of distinctive political parties." 520 U.S. at 368, n.13 (citing historical sources).

This very case demonstrates the point. Appellants claim that fusion voting will create "avenues for new ideas and new faces to enter the democratic marketplace," (Pb4), but the Moderate Party's admitted objective is selecting existing popular candidates who are already likely to win elections (Pb4-6). After all, the Moderate Party's desire to engage in fusion voting arises from a desire not to introduce "new faces," since they express concern that "standalone candidates could be spoilers and pull votes away from competitive, moderate candidates." (Pb6). Indeed, the Moderate Party "assessed the two leading candidates" from existing major parties "in the 7th Congressional District" when choosing their nominee. Ibid. Other minor parties may be well-inclined to adopt similar practices, decreasing the candidate choices available to voters.

Fourth, the Fusion Statutes promote distinctions between parties, which has negative impacts for voter confidence and accountability. As Judge Fairchild explained in his Swamp concurrence, prohibitions on cross-filing petitions promote this additional, narrower interest "in maintaining the distinct identity of parties": "People may rationally believe that in a party system, each party should have a distinct ideology, platform, and the like, and it seems arguable that the distinct identity of parties will be blurred if persons are permitted to present themselves as the candidate of more than one party." Swamp, 950 F.2d at 387 (Fairchild, J., concurring). In short, voters are likely to

believe that a candidate who is the representative of one distinct party ideology is more likely to represent those interests fully than a candidate who is the nominal standard-bearer for multiple parties, and rightly doubt that "one candidate is unlikely to be able, conscientiously and effectively, to represent more than one party in the same election." Ibid.

Indeed, the Wisconsin Supreme Court recognized a similar compelling state interest in evaluating the state's fusion ban 125 years ago, noting: "when the candidates of one party are identical with those of another it is supposed, and not unreasonably, that for the time being at least, though there be two organizations there is but one platform of principles, and that one party designation on the official ballot will satisfy all legitimate requirements of both." Anderson, 76 N.W. at 487 (concluding State has legitimate interest in avoiding such erosion of party distinction and resulting confusion). And our Supreme Court, considering related "sore loser" provisions that prevent a candidate who did not receive the nomination of one party from submitting a nominating petition for another, expressed similar concerns:

> Manifest also is the legislative design to protect the integrity of the nominating process at primary elections and to withhold the privilege of inclusion on the ballot printed at public expense of the name of a person who assumes the cloak of an independent candidate after professing membership in a particular party, adherence to its general principles, and on that basis seeking the

> designation as a standard bearer of the party for elective office.
>
> [Sadloch, 25 N.J. at 124].

The fusion ban statutes promote a similar legislative design to protect the integrity of the nomination process by preventing a candidate from accepting nominations from multiple parties that may have competing, if not contradictory, platforms. While a candidate may benefit from drawing on another party's base or using the cross-nominations to promote the breadth of that candidate's principles, the Legislature and the courts have noted that it would come at the expense of voters' confidence in their knowledge of the candidate's stances on the issues or the political parties' platforms.

Next, and relatedly, the State has a compelling interest in preventing voter confusion. As the Seventh Circuit recognized in Swamp, avoiding voter confusion was a "compelling state interest" that justified a prohibition on fusion voting. Without a fusion ban, "an unlimited number of minority parties could nominate the candidate of a major party for the same office, causing serious confusion for voters. Because the candidate would be presented by the different parties as representing the particular views and preferences of each party, it would be difficult for voters to distinguish between the parties." Ibid; Anderson, 76 N.W. at 486-87. While Appellants fault the State for not identifying empirical evidence of voters not knowing how to vote on a fusion ballot, the

State need not provide empiric evidence of voter confusion prior to legislating against it. See Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986) ("To require States to prove actual voter confusion . . . as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate."). And although Appellants submitted declarations from New York and Connecticut witnesses proclaiming their personal opinions that there is no voter confusion, the State had no opportunity to cross examine the basis for those opinions, or to submit its own record evidence. See supra at 33, n.10. Moreover, the State's interest in preventing voter confusion are separate from the concerns addressed in Appellants' appendix, as the impact is not limited to confusion regarding how to cast a ballot or why a name appears twice on the ballot. Rather, voters may be confused by what issues and positions a party and candidate actually stand for, and whether the cross-nominated candidate will more faithfully hew to the issues and positions of one party or another.

In addition, "[s]tates have a strong interest in the stability of their political systems," in the form of an overall two-party system, so long as third parties have opportunities to develop and flourish. Timmons, 520 U.S. at 366-67. A state may not enact "unreasonably exclusionary restrictions" against minor and

third parties, but it "need not remove all of the many hurdles third parties face in the American political arena today." Ibid. As our Supreme Court has recognized, "[a]lthough the participation of third-party candidates supports a robust democracy, we recognize the present reality of the two-party system as an organizing principle of the political process in this country." Samson, 175 N.J. at 198; see also Friends of Governor Tom Kean v. New Jersey Election Law Enf't Comm'n, 114 N.J. 33, 35 (1989); Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 367-68 (App. Div. 2012); Libertarian Party of Va. v. Alcorn, 826 F.3d 708, 720 (4th Cir. 2016), cert. denied, 137 S. Ct. 1093 (2017). While Appellants insist the State cannot endorse any interest in the stability of a two-party system, that argument proves too much. Numerous foundational elections policies across the nation—including single-member districts, winner-take-all vote-counting, and tying ballot access and public funding to past-election performance—all serve that goal. As the Timmons Court explained, as "[m]any features of our political system … make it difficult for third parties to succeed in American politics." 520 U.S. at 362. But the U.S. Constitution "does not require" states to level the playing field by permitting fusion "any more than it requires them to move to proportional-representation elections or public financing of campaigns." Ibid.

Fusion bans strike the proper balance between promoting the State's legitimate interest in political stability while still allowing third parties ample room to develop. For that reason, Appellants' reliance on CAPP is unpersuasive. That case involved a statute that prohibited voters from declaring a party affiliation of anything but one of the two major parties and Independent. 344 N.J. Super. at 228-29. That policy worked a directly discriminatory rule against third parties, something that cannot be said for the instant laws, which not only allow minor parties to appear on the ballot and select their own candidates, but also allow a candidate of a major party to affiliate himself with the minor party via a slogan. Moreover, as discussed infra, at 66-67, fusion bans treat major and minor parties equally.

Finally, Appellants read too much into stray dicta in a single-judge oral decision, In re City Clerk of Paterson, 88 A. 694 (N.J. Sup. Ct. 1913); see also Rosengard, 44 N.J. at 170 (noting Paterson was "not officially reported"); Stevenson v. Gilfert, 13 N.J. 496, 503-04 (1953) (expressing skepticism about the holding and reasoning in Paterson). In Paterson, the former intermediate appeals court ordered the city clerk to place a candidate on the ballot as the nominee of both the Republican and Progressive Parties. 88 A. at 695. The court's holding is statutory: it determined that the operative 1911 Geran Act did not forbid the cross-nomination, and rejected an argument that it should instead

apply a superseded 1907 law which stated that "petitioners shall nominate for office one of their own party." Ibid. Even though its decision was based on an application of the 1911 Act, the court then strayed into dicta, questioning whether the 1907 law would have contravened the right to vote, since it barred voters from nominating a candidate at the primary who was not a member of that party. Ibid. But that discussion makes evident that the non-binding dicta in Paterson has no bearing here: the 1907 law was not a fusion ban, but rather directly barred voters from voting for certain candidates if they were not members of the same party. By contrast, the Fusion Statutes do not preclude any voter from voting for their preferred candidate, but rather only prohibit a candidate from appearing twice on the ballot.

3. Appellants Overstate The Benefit To Third Parties

Appellants tout fusion voting as the solution to the lackluster success of third parties in American politics. But their own proffered evidence hardly shows that striking down the Fusion Statutes would solve the problems they identify. Fusion voting is simply not the panacea Appellants proclaim.

First, Appellants blame fusion bans for the lack of success of minor parties in New Jersey in particular (Pb16), but New Jersey is not alone in prohibiting fusion voting. Appellants overlook the tension that their own submissions highlight: some of the very states they identify as places where minor parties

have succeeded also prohibit fusion voting. After all, Appellants acknowledge that "minor parties routinely qualify [for statutory party status] in nearly every state," (Pb16 n.3), but nearly every state also bans fusion voting. Appellants also ignore historical evidence of third parties flourishing even in states that prohibited fusion voting. And as the Timmons Court explained, "[b]etween the First and Second World Wars, for example, various radical, agrarian, and labor-oriented parties thrived, without fusion, in the Midwest." 520 U.S. at 361 n.9. As an illustrative example, "[t]he strongest state-level third parties of the twentieth century – North Dakota's Nonpartisan League, Minnesota's Farmer-Labor Party, and Wisconsin's Progressive Party – all rose to power despite anti-fusion laws." Pope, Future of Third Parties, at 489.[13]

Second, Appellants acknowledge that simply allowing fusion voting will not accomplish their ultimate their goal of minor party success by reaching the vote thresholds: instead, they require a mandate that votes for a particular candidate be tallied according to which party designation accompanied each vote. (Pb89-90). That, Appellants say, is the only way for the Moderate Party to potentially reach the vote threshold required to attain statutory-party status.

[13] Indeed, just a year after the United States Supreme Court upheld Minnesota's ban on fusion voting, the state elected as governor the Reform Party candidate, Jesse Ventura.

But the only relief that this court could offer in this challenge—striking down existing statutes—cannot accomplish that goal. And to the extent that Appellants are asking this court to effectively legislate a new vote-tally process, that is far outside the scope of the court's authority. After all, states that permit fusion voting have separate statutes that govern how to allocate the votes cast for a fusion candidate, and not all choose to proportionally allocate those votes in the manner Appellants suggest. The decision of how to tally votes cast in a fusion-voting scenario is a separate legislative determination. Compare Vt. Stat. Ann. § 2474(b)(1) (requiring a fusion candidate to designate "for which party the votes cast for him or her shall be counted for the purposes of determining whether his or her designated party shall be a major political party. The party so designated shall be the first party to be printed immediately after the candidate's name on the ballot"), with Conn. Gen. Stat. § 9-242(b) (setting a mathematical formula that allocates to each nominating party its proportional share of the total number of votes for that fusion candidate). This court cannot legislate policy, and Appellants' argument about the benefits of vote disaggregation simply will not be realized from any judicial decision. See N.J. Const. art. III, ¶ 1; Texter v. Dep't of Human Servs., 88 N.J. 376, 382-83 (1982) (courts are prevented from "usurping policy decisions from other branches of government.").

Finally, while Appellants blame nearly all ills of the modern-day political system (including "delegitimiz[ation] of the 2020 presidential election" and political extremism) on century-old prohibitions on fusion voting, (Pb19-21), those ascriptions are poorly-conceived. Indeed, in New Jersey, it seems that the decline in political participation and the proliferation of third parties preceded the State's adoption of its first fusion ban. See Reynolds, Testing Democracy, at 164 (explaining that by 1920, "[p]opular participation waned in what had become one-on-one contests between the Democratic and Republican nominees"). And numerous other factors besides fusion contribute to the lack of traction of third parties in today's political system, such as "the prominence of single member districts; the electoral college and presidential system; the state of the economy; the high cost of political campaigns; the rise of candidate-centered politics; and the centralization of economic and political power at the national level." Hirano and Snyderjr, The Decline of Third-Party Voting in the United States, Journal of Politics Vol. 69, No. 1 (2007), 2-3; see also Curtis 781-82 ("[T]he burden of petition requirements and other ballot-access laws which impose, for example, unrealistic filing deadlines and fees for minor third parties overshadows any inability to appear more than once on a ballot.").

* * * * *

New Jersey's Fusion Statutes do not prevent anyone from voting for a candidate of their choice. To the extent that there is any burden on the right to vote, it is indirect and minimal, and supported by compelling state interests.

C. The Fusion Statutes Do Not Violate The Rights To Free Speech Or Political Association.

New Jersey's Fusion Statutes impose at most a minimal burden on the right to free speech and association, and do nothing to prevent a party from associating with a candidate through endorsement or other channels of support. See Timmons, 520 U.S. at 363; Working Families Party, 209 A.3d at 285-86.

As the Pennsylvania Supreme Court explained in rejecting a state-constitution speech and associational challenge to that state's fusion ban, "Appellants and like-minded members of the Working Families Party were able to meet and decide that the candidate who best represented their values was Rabb. They then had [the] opportunity to participate fully in the political process, culminating in casting their votes for the candidate of their choice." Working Families Party, 209 A.3d at 285-86. The Timmons Court similarly concluded that even a ballot that completely prevents a party from "using the ballot to communicate to the public that it supports a particular candidate who is already another party's candidate" did not impose a major burden on speech and associational rights. 520 U.S. at 362-63; see also Street, 499 Pa. at 38 ("Nor is there any basis for appellants' assertion that [the minor-party candidate's]

ineligibility as a candidate of the Republican Party impairs the Republican Party's First Amendment right to support [his] candidacy."); Swamp, 950 F.2d at 385 (concluding "the right of party members to associate is only limited to the extent that they are prevented from placing on their primary ballot the name of a candidate who has previously been placed on the primary ballot of another party," which does "not substantially burden" the party's associational interests). In short, a party may choose to affiliate with whatever candidate it wants, endorse that candidate on the ballot itself, and support that candidate in myriad other ways. The Fusion Statutes only prohibit the candidate from appearing on the ballot twice.

In fact, New Jersey's statutory scheme imposes an even lesser burden on speech and associational rights because it does allow the ballot to be used to express the Moderate Party's views. New Jersey allows candidates to express association with another party on the ballot itself. N.J.S.A. 19:14-9 provides:

> A candidate who receives more than one nomination for the same office, either from more than one political party or from more than one group of petitioners, or from one or more political parties and one or more groups of petitioners, shall have his name printed on the official general election ballot in only one column to be selected by him from among the columns to which his nominations entitle him, and shall have such designations after his name as he shall select, consisting of the names of the political parties nominating him, with the words "Indorsed By", if he so desires, and the several designations to which he is entitled by the other

> nominations, if any, and printed in such order as he shall select.
>
> [N.J.S.A. 19:14-9.]

For example, in this case, Malinowski was permitted to indicate his affiliation with the Moderate Party on the ballot. (Pa295). Thus, the Moderate Party was fully "able to use the ballot to communicate information about itself" and its eligible candidates. Timmons, 520 U.S. at 363.

Appellants' arguments about freedom of expression and association boil down to the notion that a ballot that lists Malinowski with an endorsement by the Moderate Party does not capture the Moderate Party's message in the precise form it prefers: a separate listing that has no overlap with the Democratic Party's affiliation with Malinowksi. (Pb64). But "[b]allots serve primarily to elect candidates, not as forums for political expression." Timmons, 520 U.S. at 363. To the extent the Moderate Party prefers a slightly different format for expressing its association with Malinowski, the burden on First Amendment freedoms is slight. Because the Moderate Party has "every other possible avenue" to align itself with Malinowski, including on the ballot itself, the mere prohibition on Malinowski's name appearing on both the Democratic and Moderate Party columns cannot reasonably be considered a "severe" burden on speech or association. Mazo, 54 F.4th at 151-52 ("[W]hether a particular

restriction on speech violates the First Amendment depends in part on whether alternative channels exist.").

New Jersey's Fusion Statutes also do not implicate a political party's internal affairs or associational activities. Appellants' reference to California Democratic Party v. Jones, 530 U.S. 567 (2000) entirely misses the mark. The law at issue in Jones allowed unaffiliated voters to vote in a party's primary election against the party's wishes. Id. at 570-71. The United States Supreme Court held that the law meddled in a political party's internal affairs and associational choices. Id. at 577; see also Tashjian v. Republican Party of Conn., 479 U.S. 208, 215-16 (1986) (striking down a law prohibiting a political party from choosing to allow unaffiliated and independent voters to participate in its primary). But fusion ban laws do not restrict who a party may associate with, and by no means require the Moderate Party to accept interference from unaffiliated voters.

Because the alleged burdens on speech and association are not severe, the State's interest "need only be 'sufficiently weighty to justify the limitation' imposed." Timmons, 520 U.S. at 364; RUSA II, 446 N.J. Super. at 234. As discussed above, supra at 46-56, the State's numerous compelling state interests justify the minimal incursions on speech and associational rights.

D. The Fusion Statutes Do Not Violate The Right To Assemble.

It is unclear how Appellants' claim based on the assembly clause of the New Jersey Constitution, N.J. Const. art. I, ¶ 19, is distinct from their claims based on speech and association. Appellants argue that fusion bans implicate the assembly clause because they "prevent voters outside of the two major parties from taking collective political action that would effectively express their shared views to their representatives." (Pb74-75) (emphasis added). But that is indistinct from their argument as to freedom of expression and association.

Appellants likewise cite no New Jersey law distinguishing between the right to assemble and the rights to speech or association. Cf., e.g., Schmid, 84 N.J. 535 (evaluating right to distribute political literature on private university campus under unified "speech and assembly" analysis).[14] And in other cases, the right to assembly was discussed in the context of a physical assembly, such as gathering for worship. See Allendale Congregation of Jehovah's Witnesses v. Grosman, 30 N.J. 273, 278 (1959); see also Jay M. Zitter, State Constitutional Right of Freedom to Assembly Provisions, 41 A.L.R. 7th Art. 7 (2023) (discussing cases focused on gatherings in public spaces for expressive

[14] As discussed above, supra at 27, Schmid found that the New Jersey constitution's protections—unlike the federal First Amendment—lack a state action requirement.

purposes). The Attorney General is not aware of any New Jersey precedent tying the right to assembly to a particular method of casting one's vote on the ballot. In short, Appellants failed to demonstrate that the framers of the State Constitution intended the right to assemble to exist beyond rights to free expression already discussed in Part II.C, supra at 59-63.

Regardless of whether the right to assembly is merely a restatement of Appellants' claims regarding speech and association, or is a separate variant, the Fusion Statutes do not impose a severe burden on the right. It is difficult to see how the Moderate Party or its voters have been deprived of the ability to "send[] a 'clear message' to their nominee . . . that their support was earned by the nominee's commitment to" Moderate Party values, (Pb75), when it is the Moderate Party that nominated Malinowski in the first place and whose endorsement he garnered on the ballot. The Fusion Statutes do not restrict members of the Moderate Party from gathering anywhere to discuss their party's business, nominations, platforms, or any other subject. Nor do they prohibit members from any expressive activity, including by casting a ballot for their preferred candidate regardless of whether that candidate is the Moderate Party's nominee or not.

Further, Appellants ignore the alternative means for the Moderate Party to come together to express their support for a specific candidate. As discussed

above, supra at 61, a candidate has the ability to list on the ballot itself the endorsement of another party. N.J.S.A. 19:14-9. As such, the Moderate Party can send a "clear message" that they align themselves with a specific nominee due to their platform. Therefore, New Jersey's Fusion Statutes do not implicate a severe burden on the people's right to assemble or make their opinion known to their representatives under Article 1, Paragraph 18, of the State Constitution. To the extent it imposes any burden on that right at all, it is amply justified by the State's compelling interests discussed supra in Part II.B, at 46-56.

E. The Fusion Statutes Do Not Violate Equal Protection.

Appellants' equal protection claim parrots the same arguments as their right to vote and rights to speech and association claims. See (Pb81-83). But their equal protection claim fails for the simple reason that New Jersey's Fusion Statutes are facially neutral and do not discriminate between major and minor parties. The fusion ban prevents cross-nomination by the Republican and Democratic Parties, the Moderate Party, and every other political party.

Equal protection requires that statutes "apply evenhandedly to similarly situated people." Lewis v. Harris, 188 N.J. 415, 443 (2006); see also Greenberg v. Kimmelman, 99 N.J. 552, 562 (1985) ("[W]hen a court declares a statute invalid on equal protection grounds, it is not saying that the legislative means are forbidden, but that the Legislature must write evenhandedly." (quoting

Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)); Nelson v. South Brunswick Planning Bd., 84 N.J. Super. 265, 277 (App. Div. 1964) ("[Equal protection] is infringed only where persons who are situated alike are not treated alike."). Where a law "is completely general and neutral in its terms," there is no violation of equal protection even though some parties "may incidentally benefit from basically nondiscriminatory legislation." Nelson, 84 N.J. Super. at 277-78.

New Jersey's Fusion Statutes are facially neutral and do not differentiate between major and minor political parties. All parties—major and minor—are prohibited from cross-nominating. In this case, had the Moderate Party been the first to nominate Malinowski, and had Malinowski accepted, the Democratic Party would have likewise been prohibited from nominating him. In other words, the statutes create no suspect classifications among political parties, and work no disparate impact in their application to different political parties.

The Pennsylvania Supreme Court rejected a similar claim in Working Families Party, 209 A.3d at 282-84. Addressing appellants' equal protection claim under the Federal Constitution, the court noted that Pennsylvania's "anti-fusion statutes are facially neutral." Id. at 282. It distinguished the challenged statutes from the fusion ban struck down by Reform Party of Allegheny County v. Allegheny County Department of Elections, 174 F.3d 305 (3d Cir. 1999) (en

banc), because that statute discriminated between major parties and minor parties by permitting cross-nomination for the former but prohibiting it for the latter. Id. at 282-83. The court also repeated the Third Circuit's suggestion that "the Commonwealth's reasons for supporting the statutes might justify a general ban on cross-nomination." Id. at 283. The Pennsylvania Supreme Court further explained that even if the Pennsylvania system "create[d] a disparate impact on political bodies, the justification for the anti-fusion provisions raised by the Commonwealth is substantially related to an important governmental interest and therefore survives intermediate scrutiny." Id. at 283-84.

The same is true here. Even if this court finds reason to apply an equal protection analysis, New Jersey's Fusion Statutes pass muster. As discussed, whether a statute violates equal protection under the State Constitution turns on "a flexible balancing test that weighs the nature of the right, the extent of the governmental restriction on the right, and whether the restriction is in the public interest." Caviglia, 178 N.J. at 479. Here, the Fusion Statutes inflict little to no intrusion on any constitutional right. Moreover, the State has thoroughly articulated the compelling state interests in prohibiting cross-nomination. See Point II.B., supra. Appellants have failed to demonstrate that the Fusion Statutes violate principles of equal protection under the State Constitution.

CONCLUSION

This court should dismiss Appellants' appeal.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: _/s/ Steven M. Gleeson_____
Steven M. Gleeson
Deputy Attorney General
Attorney ID No. 087092013

Dated: June 9, 2023

In re TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-3542-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
In re TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-3543-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)

BRIEF OF *AMICI CURIAE* PROFESSORS SETH MASKET, NOLAN McCARTY, AND HANS NOEL

Zachary D. Wellbrock (036872011)
Anselmi & Carvelli, LLP
56 Headquarters Plaza
West Tower, Fifth Floor
Morristown, New Jersey 07960
(973) 635-6300

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI* 1

PRELIMINARY STATEMENT 3

PROCEDURAL HISTORY AND STATEMENT OF FACTS 4

ARGUMENT 4

I. AN UNDERSTANDING OF POLITICAL PARTIES PROVIDES CONTEXT NECESSARY FOR CONSIDERING HOW FUSION VOTING AFFECTS THE CONSTITUTIONAL RIGHTS AT ISSUE 4

II. THE COURT'S ANALYSIS SHOULD INCLUDE POLITICAL PARTIES BECAUSE PARTIES ARE ESSENTIAL TO A HEALTHY AND RESPONSIVE DEMOCRACY. 5

III. A PROHIBITION ON FUSION VOTING SEVERELY BURDENS THE ASSOCIATIONAL RIGHTS OF PARTIES, AS WELL AS THOSE OF THEIR INDIVIDUAL MEMBERS AND NOMINEES. 7

A. A prohibition on fusion voting meddles in the internal affairs of political parties 8

B. A prohibition on fusion voting restricts the "core associational activities" of political parties. 9

C. A prohibition on fusion voting does in fact keep minor parties off the ballot 11

IV. OTHER, POLITICALLY NEUTRAL ELIGIBILITY REQUIREMENTS ARE FUNDAMENTALLY UNLIKE THE PROHIBITION ON FUSION VOTING. 12

A. The indiscriminate analysis of *Timmons* does not determine the outcome of this case because the New Jersey Constitution provides broader guarantees of free association and expression. 13

B. Politically neutral restrictions are distinct and cannot justify a prohibition on fusion voting. 13

CONCLUSION 15

TABLE OF AUTHORITIES

State Cases

Council of Alt. Political Parties v. State, Div. of Elections,
344 N.J. Super. 225 (App. Div. 2001) 15

N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.,
138 N.J. 326 (1994) 4

State v. Schmid,
84 N.J. 535 (1980) 4

State v. Williams,
93 N.J. 39 (1983) 4

Federal Cases

Cal. Democratic Party v. Jones,
530 U.S. 567 (2000)..... 9

Eu v. S.F. Cty. Democratic Cent. Comm.,
489 U.S. 214 (1989)..... 9

Sam Party of N.Y. v. Kosinski,
987 F.3d 267 (2d Cir. 2021)..... 7, 8

Tashjian v. Republican Party of Conn.,
479 U.S. 208 (1986)..... 6, 10

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997).....10, 11, 13

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008)..... 7

Constitutional Provisions

N.J. Const., Art. I, ¶ 6..... 4

N.J. Const., Art. I, ¶ 18..... 4

N.J. Const., Art. IV, § I, ¶ 2..... 14

N.J. Const., Art. V, § I, ¶ 2 14

U.S. Const., Art. I, § 2 14

U.S. Const., Art. I, § 3 14

U.S. Const., Art. II, § 1 14

Statutes

N.J.S.A. § 19:1-1 3

N.J.S.A. § 19:13-5 14

Other Authorities

American Political Science Association, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties,* AMERICAN POLITICAL SCIENCE REVIEW, Sept. 1950 6

David Wildstein, *Imperiale Was Only Independent Candidate to Win Beyond Local Level*, N.J. GLOBE (Nov. 1, 2018) 12

E.E. Schattschneider, *Party Government* (1942) 5, 8

John Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* (2d ed. 2011) 5

Kathy Bawn, Marty Cohen, David Karol, Seth Masket, Hans Noel and John R. Zaller, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSPECTIVES ON POLITICS 571 (2012) 8

Marty Cohen, David Karol, Hans Noel and John Zaller, *The Party Decides: Presidential Nominations Before and After Reform* (2008) 8

Seth Masket and Hans Noel, *Political Parties* (2021) 5

Seth Masket and Hans Noel, *Prioritizing Parties, in* MORE THAN RED AND BLUE: POLITICAL PARTIES AND AMERICAN DEMOCRACY (American Political Science Association and Protect Democracy, 2023) 5, 9

STATEMENT OF INTEREST OF *AMICI*

The prohibition on fusion voting from which this matter arises directly implicates the broad rights of free association and expression guaranteed by the New Jersey Constitution, particularly with respect to political parties.

Amici are distinguished scholars in the academic field of political science, and are familiar with the function and role of political parties in American society. *Amici* respectfully submit this memorandum, with the hope that the Court may find it helpful in its consideration of the function and value of recognizing political parties as part of the democratic process.

Professor Seth Masket is a professor of political science and director of the Center on American Politics at the University of Denver. He is the author of several books, including *The Inevitable Party: Why Attempts to Kill the Party System Fail and How They Weaken Democracy* (Oxford University Press, 2016), and *No Middle Ground: How Informal Party Organizations Control Nominations and Polarize Legislatures* (University of Michigan Press, 2009). His research has appeared in the *American Journal of Political Science*, the *British Journal of Political Science*, and other publications. He received his PhD from UCLA.

Professor Nolan McCarty is the Susan Dod Brown Professor of Politics and Public Affairs and Vice Dean for Strategic Initiatives at the School of Public

and International Affairs at Princeton University. From 2011 to 2018, he served as the chair of the Princeton Politics Department. He has authored several books, including *Polarization: What Everyone Needs to Know* (Oxford University Press, 2019) and *Political Game Theory* (Cambridge University Press, 2006, with Adam Meirowitz). His work has appeared in the *American Political Science Review*, the *American Journal of Political Science*, the *Journal of Politics*, the *Proceedings of the National Academy of Science*, and many other journals. He received his PhD from Carnegie Mellon University. He was elected to the American Academy of Arts and Sciences in 2010.

Professor Hans Noel is an associate professor of political science at Georgetown University. He is the author of *Political Ideologies and Political Parties in America* (Cambridge University Press, 2013) and *The Party Decides: Presidential Nominations Before and After Reform* (University of Chicago Press, 2008, with Marty Cohen, David Karol and John Zaller). His research has appeared in the *American Political Science Review*, the *Journal of Politics*, and the *British Journal of Political Science*, among other journals. He received his PhD from UCLA in 2006.

Professor Masket and Professor Noel also co-authored *Political Parties* (Norton, 2021), a university level textbook for political science and/or American government courses examining the role of political parties in the United States.

PRELIMINARY STATEMENT

"Fusion voting" is a practice in which a candidate for office is nominated by more than one political party, often at least one major party as well as a minor[1] party. As a supplement to Appellants' thorough analysis, *Amici* respectfully submit this memorandum to provide the Court with additional context with respect to political parties and fusion voting.

Respondents and Intervenors present a narrow, candidate-centric analysis. The Court should avoid such a narrow framework. Individuals engage in political association and expression primarily through their relationships with political parties rather than candidates. For this reason, the Court should employ a more comprehensive analysis that also considers party-centric concerns.

In such an analysis, the rights of association and expression guaranteed by the New Jersey Constitution are clearly incompatible with a prohibition on fusion voting. A prohibition on fusion voting impermissibly burdens the associational and expressive rights of political parties as well as their individual members and nominees. Further, these prohibitions cannot be justified by analogy to politically neutral restrictions that are substantively distinct.

---

[1] Tellingly, only the Democratic Party and Republican Party satisfy New Jersey's statutory definition of a "political party." *See* N.J.S.A. § 19:1-1. *Amici* use the term "minor party" illustratively to refer to the Moderate Party as well as other political parties that serve an identical function but do not meet the draconian statutory definition.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Amici join the procedural history and statement of facts of Appellants.

ARGUMENT

I. AN UNDERSTANDING OF POLITICAL PARTIES PROVIDES CONTEXT NECESSARY FOR CONSIDERING HOW FUSION VOTING AFFECTS THE CONSTITUTIONAL RIGHTS AT ISSUE.

Political parties are critical institutions that serve unique and valuable roles in our democratic system. Thus, the Court must consider the function and importance of political parties themselves rather than constrain its analysis to the rights of individual voters in a candidate-centric framework.

As described in Appellants' merits brief, the New Jersey Constitution unambiguously provides broad protections for associational and expressive rights. *See* N.J. Const., Art. I, ¶¶ 6, 18. These guarantees are even broader than those provided by the United States Constitution. *See N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326, 353 (1994); *State v. Williams*, 93 N.J. 39, 58 (1983).

Any analysis of these rights in the context of fusion voting requires a consideration, *inter alia*, of how political parties function in our democracy. This will facilitate a full and thorough analysis, serving the Court's "affirmative obligation to protect … the freedoms of speech and assembly." *State v. Schmid*, 84 N.J. 535, 559 (1980) (citations omitted).

II. THE COURT'S ANALYSIS SHOULD INCLUDE POLITICAL PARTIES BECAUSE PARTIES ARE ESSENTIAL TO A HEALTHY AND RESPONSIVE DEMOCRACY.

Respondents and Intervenor address "freedoms of speech and assembly" (*id.*) of individual New Jerseyans to vote for individual candidates. However, the Court should also consider party-centric concerns: (1) the rights and interests of political parties themselves, and (2) the rights of individuals to associate with a party of their choice rather than a particular candidate. As a practical reality, the keystone features of our democratic system rely upon party association.

Political parties are so central to our democracy that "modern democracy" is "unthinkable" without them. E.E. Schattschneider, *Party Government* 1 (1942). Although political parties are not explicitly required by the United States or New Jersey Constitutions, they emerge naturally out of the political environment created by those documents. John Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* 3-26 (2d ed. 2011).

Political parties shape the entire political landscape. Parties organize legislatures, select candidates, and mobilize voters. Political institutions at odds with political parties tend to fail. Seth Masket and Hans Noel, *Political Parties* (2021). *See also* Seth Masket and Hans Noel, *Prioritizing Parties, in* MORE THAN RED AND BLUE: POLITICAL PARTIES AND AMERICAN DEMOCRACY 164-173 (American Political Science Association and Protect Democracy, 2023).

The mechanism by which political parties assume such importance is illuminated by the "responsible party" theory of government. This model is predicated on the difficulty of voters to monitor individual politicians. It is much more practicable for voters to evaluate the performance of parties instead. A voter can easily assign parties either credit or blame according to how the voter feels about the state of things. *See* American Political Science Association, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties,* AMERICAN POLITICAL SCIENCE REVIEW, Sept. 1950, at 37-84.

In this commonsense model, party labels and affiliations carry a tremendous amount of information to voters without requiring research of individual candidates. "To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986). Where fusion voting is permitted, party labels convey even greater information because a fusion candidate is affiliated not only with their major party but also with a minor party that may identify them as a certain type of Democrat or Republican.

As Justice Scalia explained, "[a] political party's expressive mission" is "principally to promote the election of candidates who will implement [the

party's] views.… That is achieved in large part by marking candidates with the party's seal of approval" given that "party labels are … a central consideration for most voters." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 464-65 (2008) (Scalia, J., dissenting) (citing *Tashjian*, 479 U.S. at 216).

Thus, this case should not be assessed exclusively in the context of individual voters and candidates. Political association and expression are exercised primarily with respect to parties, not candidates. Respondents argue that these rights are not burdened because individual voters may still vote for the specific candidate of their choice. This argument ignores significant burdens that the prohibition on fusion voting imposes on parties, voters, and nominees.

III. A PROHIBITION ON FUSION VOTING SEVERELY BURDENS THE ASSOCIATIONAL RIGHTS OF PARTIES, AS WELL AS THOSE OF THEIR INDIVIDUAL MEMBERS AND NOMINEES.

A prohibition on fusion voting – that is, a restriction on the ability of a party to nominate its preferred candidate – imposes a significant burden on the associational and expressive freedoms of political parties. These burdens on the parties, in turn, result in burdens on their individual members and nominees.

Quite appropriately, Intervenors cite *Sam Party of N.Y. v. Kosinski*, 987 F.3d 267 (2d Cir. 2021), in discussing the relevant burdens to be considered. There, the Court of Appeals observed that "[c]ourts have identified three types of severe burdens on the right of individuals to associate as a political party."

Id. at 275. These are: (1) "regulations meddling in a political party's internal affairs," (2) "regulations restricting the 'core associational activities' of the party or its members," and (3) "regulations that 'make it virtually impossible' for minor parties to qualify for the ballot." *Id.* (citations omitted).

The prohibition on fusion voting inflicts all three of these burdens upon New Jersey political parties, their members, and their nominees. Respondents' narrow, candidate-centric approach turns a willfully blind eye to these burdens.

A. A prohibition on fusion voting meddles in the internal affairs of political parties.

The prohibition on fusion voting has one purpose and one function: to limit who a party can choose to nominate as its candidate. Thus, the prohibition is a statutory veto on the quintessential "internal affair" of the party: the nomination of a candidate. This is precisely the sort of "meddling" that burdens the ability of a party – and its members and nominees – to associate freely.

The nomination of a chosen candidate is a political party's most important act. *See* Kathy Bawn, Marty Cohen, David Karol, Seth Masket, Hans Noel and John R. Zaller, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSPECTIVES ON POLITICS 571-597 (2012). *See also* Marty Cohen, David Karol, Hans Noel and John Zaller, *The Party Decides: Presidential Nominations Before and After Reform* (2008); E.E. Schattschneider, *Party Government* 64 (1942); Seth Masket and Hans Noel,

Prioritizing Parties, in MORE THAN RED AND BLUE: POLITICAL PARTIES AND AMERICAN DEMOCRACY 164-173 (The American Political Science Association and Protect Democracy, 2023).

The United States Supreme Court, acknowledging the associational rights of parties, observed that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). "[The nomination] process often determines the party's positions on the most significant public policy issues of the day" and "even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." *Id.* (adding that some minor parties are "virtually inseparable from their nominees."). "The moment of choosing the party's nominee … is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'" *Id.* (quoting *Tashjian*, 479 U.S. at 216).

B. A prohibition on fusion voting restricts the "core associational activities" of political parties.

The prohibition on fusion voting also "restrict[s] the 'core associational activities' of the party [and] its members." "Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214,

229 (1989). *See also Tashjian*, 479 U.S. at 235-36 (Scalia, J., dissenting) ("The ability of the members of the Republican Party to select their own candidate, on the other hand, unquestionably implicates an associational freedom.").

Nomination of the preferred candidate is not merely one of several "core associational activities" of a party. Rather, nomination is the central function of a party and is the ultimate manifestation of its associational purpose.

"[A] party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 372 (1997) (Stevens, J., dissenting). A restriction on a party's "right to nominate its first-choice candidate, by limiting [its] ability to convey through its nominee what the Party represents, risks impinging on another core element of any political party's associational rights – the right to 'broaden the base of public participation in and support for its activities.'" *Id.* at 372 n.1 (Stevens, J., dissenting) (quoting *Tashjian,* 479 U.S. at 208).

Any other activities that a political party engages in – *e.g.*, activism, fundraising, public relations – are rendered largely irrelevant if the party cannot choose its nominee. If the nomination of the candidate of its choice is not a "core associational activity," then there is no such "core" activity. If an external, statutory veto does not "restrict" this activity, then there is no such "restriction."

Respondents' "no harm" argument actually illustrates this burden. When a party's nomination is restricted, that party is precluded from effectively conveying what it represents. Additionally, the party is forced to choose between advancing a "spoiler" candidate or sitting out, thereby reinforcing the existing duopoly on ballot access. The party's members are coerced into supporting a competing party in order to vote for their preferred candidate. It is of little value to point out that such a voter may still vote for the candidate of their choice – the voter must dissociate from their preferred party and associate with a different party instead. In doing so, this voter is compelled to endorse the entire platform of a party with which they have affirmatively chosen not to associate.

C. A prohibition on fusion voting does in fact keep minor parties off the ballot.

Last, the prohibition on fusion voting "'make[s] it virtually impossible' for minor parties to qualify for the ballot." This point requires no imagination. It is exactly what happened in this very case.

Nor is this scenario unique to this case. Inevitably, minor parties will be excluded from the ballot any time they wish to support a competitive candidate. The law limits minor parties to candidates who have not been nominated by a major party. This ensures that the minor party will only ever appear on the ballot if it has no chance to win and that it must, unwillingly, field a "spoiler" candidate. *See Timmons*, 520 U.S. at 372 n.1 (Stevens, J., dissenting) ("A fusion

ban burdens the right of a minor party to broaden its base of support because of the political reality that the dominance of the major parties frequently makes a vote for a minor party or independent candidate a 'wasted' vote.").

This is not hyperbole. History speaks unambiguously as to the inevitable outcomes for minor parties. Under the current regime, minor parties have been (intentionally, successfully) relegated to a century of failure. They have been shut out of electoral victory: every federal and state election in New Jersey has been won by a major party candidate for the past *fifty* years.[2] They have also been denied access to the ballot. For over *one hundred* years, not one minor party has attained recognition as a "political party" in New Jersey.

This century of statutory marginalization provides a stark – and not accidental – disincentive. The message to minor parties is loud and clear: the only way to participate is as a "wasted vote" spoiler, not a competitor.

IV. OTHER, POLITICALLY NEUTRAL ELIGIBILITY REQUIREMENTS ARE FUNDAMENTALLY UNLIKE THE PROHIBITION ON FUSION VOTING.

Finally, the prohibition on fusion voting must be distinguished from other limitations on ballot access. Facially neutral, non-political eligibility requirements are different in kind. They cannot justify the prohibition.

---

[2] David Wildstein, *Imperiale Was Only Independent Candidate to Win Beyond Local Level*, N.J. GLOBE (Nov. 1, 2018).

A. The indiscriminate analysis of *Timmons* does not determine the outcome of this case because the New Jersey Constitution provides broader guarantees of free association and expression.

The United States Supreme Court has conflated these distinct kinds of restrictions, treating a prohibition on fusion voting as equivalent to age and residency requirements. *See Timmons*, 520 U.S. at 359 n.8. *Timmons* does not control here since New Jersey's Constitution is more protective than its federal counterpart. Nevertheless, *Amici* address this issue to draw a critical distinction.

B. Politically neutral restrictions are distinct and cannot justify a prohibition on fusion voting.

A prohibition on fusion voting serves only one purpose: the consolidation of political power within the two existing major parties. Such a prohibition places an immense and undue burden upon minor parties and voters while serving no legitimate governmental interest.

In stark contrast, politically neutral restrictions – such as age, residency, consent, and reasonable petition signature requirements – impose no substantively disparate impact. They affect all parties equally and do not limit the systemic competitiveness or relevance of minor parties. They do not reflect partisan motivations and have obvious, politically neutral policy justifications.

For example, age restrictions serve a compelling interest in ensuring that candidates for positions of public trust possess the maturity and development required by the important office they seek. For this goal, a minimum age is a

sensible, easily verifiable, and neutral proxy. Age requirements have long been recognized as appropriate at the State and Federal levels. In fact, age requirements are often enshrined in plain constitutional text, rendering any analogy to anti-fusion *statutes* absurd. *See, e.g.*, N.J. Const., Art. IV, § I, ¶ 2 and Art. V, § I, ¶ 2; U.S. Const., Art. I, §§ 2 -3 and Art. II, § 1.

Residency restrictions serve compelling interests in ensuring that elected officials have some relationship and interest in the area they serve. These rules promote familiarity with constituents and the issues that matter to them.

Consent requirements are self-evidently reasonable. A person should not be compelled to serve as a party nominee, just as they should not be compelled to vote for a party, against their will. Respect for associational and expressive freedoms easily justifies prohibitions on non-consensual nominations.

Requiring a reasonable minimum number of petition signatures serves the interest of preventing ballot overcrowding and excluding frivolous nominations lacking *de minimis* support. Such requirements are not onerous. *See* N.J.S.A. § 19:13-5 (requiring 800 signatures for statewide contests, 100 signatures for most races). These low bars serve their purpose without a politically disparate impact.

Anti-fusion laws have none of these characteristics. They are not neutral and do not affect all parties equally. By definition, the burden is borne exclusively by minor parties. The benefits accrue exclusively to major parties.

This is inherently partisan. By design, these protectionist measures directly affect the substance of elections by regulating the competitive balance between minor and major parties – despite providing no corresponding benefits to the State, the collective electorate, or any individual voters.

Thus, a prohibition on fusion voting is completely distinct from neutral eligibility restrictions. The latter cannot be used to justify the former. Although the State "has a valid interest in … assur[ing] the fair, honest and efficient administration of the primary and general election process," it "does not have an unconditional license to insure the preservation of the present political order." *Council of Alt. Political Parties v. State, Div. of Elections*, 344 N.J. Super. 225, 242-43 (App. Div. 2001) (citing *Timmons*, 520 U.S. at 366).

CONCLUSION

Accordingly, Professors Masket, McCarty, and Noel respectfully submit that this Court should find for Appellants and reverse the decision below.

Respectfully submitted,

ANSELMI & CARVELLI, LLP
56 Headquarters Plaza
West Tower, Fifth Floor
Morristown, New Jersey 07960
973-635-6300
Attorneys for Amici Curiae Professors Seth Masket, Nolan McCarty, and Hans Noel

By: _____
Zachary D. Wellbrock, Esq.

Dated: August 24, 2023

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3542-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3542-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)

BRIEF OF AMICI CURIAE, BIPARTISAN FORMER MEMBERS OF CONGRESS BRUCE BRALEY, RICHARD A. GEPHARDT, PATRICK J. MURPHY, JOHN J. SCHWARZ, AND DAVID A. TROTT IN SUPPORT OF APPELLANTS MODERATE PARTY, RICHARD A. WOLFE, MICHAEL TOMASCO, AND WILLIAM KIBLER

Ryan Chabot (162262015)
Matthew Wollin*
Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007 USA

Brittany Blueitt Amadi*
Wilmer Cutler Pickering Hale and Dorr LLP
2100 Pennsylvania Ave NW
Washington DC 20037

Counsel for Amici Curiae Bruce Braley, Richard A. Gephardt, Patrick J. Murphy, John J. Schwarz, and David A. Trott

**Admitted pro hac vice*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i
STATEMENT OF INTEREST BY AMICI CURIAE 1
PRELIMINARY STATEMENT 1
ARGUMENT 2
I. Election Outcomes Are Significantly Impacted By Anti-Fusion Laws. 2
II. The Decreasing Numbers Of Moderate Lawmakers Elected To Office Destabilizes American Politics. 4
A. American Politics Are More Polarized Than Ever Before. 4
B. Hyper-Polarization And A Shrinking Center In Congress Pose A Significant Threat To American Democracy. 6
C. Polarization Has Made It Increasingly Challenging For Moderate Lawmakers To Be Elected To Office Despite Public Eagerness For Moderate Solutions. 10
CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Other Authorities

Catherine Clifford, *'I don't plan to vote ever again': The psychology of why so many people don't vote, even in 2020*, CNBC (Oct. 30, 2020), https://perma.cc/34PW-34E9 12

Congress and the Public, Gallup, https://news.gallup.com/poll/1600/congress-public.aspx 7

Dana Blanton, *Fox News Poll: Polarization defines the midterm election*, Fox News (Oct. 16, 2022), https://perma.cc/J4NB-T49U.....5

David Wasserman, *Realignment, More Than Redistricting, Has Decimated Swing House Seats*, The Cook Political Report (Apr. 5, 2023), https://perma.cc/74AF-AWX3 10

Debt Limit, U.S. Department of the Treasury, https://perma.cc/VQ42-NEL7..... 8

Drew Desilver, *The polarization in today's Congress has roots that go back decades,* Pew Research Center (Mar. 10, 2022), https://perma.cc/T9A6-TCSU.....11

Elisa Shearer & Jeffrey Gottfried, *Half of those who aren't learning about the election feel their vote doesn't matter,* Pew Research Center (Mar. 4, 2016), https://perma.cc/S6GD-EYPY 12

Emily Brooks & Michael Schnell, *House GOP passes repeal of IRS funding boost as its first bill in the majority*, The Hill (Jan. 9, 2023), https://perma.cc/34GS-9ZWR 9

Emily Cochrane, *Retiring Congress Members See Rough Roads Ahead. They Won't Miss the Gridlock.*, N.Y. Times (Jan. 1, 2023), https://perma.cc/6NKK-FBTB 7

Government Accountability Office, *Debt Limit: Analysis of 2011-2012 Actions Taken and Effect of Delayed Increase on Borrowing Costs*, Report to the Congress (July 2012), https://www.gao.gov/assets/gao-12-701.pdf 8

How fusion voting played a role in American politics, MSNBC (Apr. 2, 2014), https://perma.cc/CM2H-VHEW 2

Jeffrey M. Jones, *U.S. Party Preferences Evenly Split in 2022 After Shift to GOP*, Gallup (Jan. 12, 2023), https://perma.cc/WW7G-K5SA 14

Jeffrey Mongiello, *Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture,* 41 Seton Hall L. Rev. 1111 (2011) 4

John LaLoggia, *6 facts about U.S. political independents*, Pew Research Center (May 15, 2019), https://perma.cc/GT5A-8AD3 12

J.J. Gass & Adam Morse, *More Choices, More Voices: A Primer on Fusion*, Brennan Center for Justice (Oct. 2, 2006), https://perma.cc/5868-3G38 3

Lee Drutman, *New Jersey Voters on Political Extremism, Political Parties, and Reforming the State's Electoral System*, New America (Nov. 22, 2022), https://perma.cc/7MCU-ZV2B 3, 13, 14

Levi Boxell et al., *Cross-Country Trends in Affective Polarization*, National Bureau of Economic Research Working Paper Series, Working Paper 26669 (Jan. 2020), https://www.nber.org/papers/w26669 5

Mark Murray, *'Anger on their minds': NBC News poll finds sky-high interest and polarization ahead of midterms*, CNBC (Oct. 23, 2022), https://perma.cc/HKV6-B9YN 4

Martin Tolchin, *Social Security: Compromise at Long Last*, N.Y. Times (Jan. 20, 1983), https://perma.cc/73M9-7AKY 9

Michael Dimock & Richard Wike, *America is exceptional in the nature of its political divide*, Pew Research Center (Nov. 13, 2020), https://perma.cc/3A4P-ZLGV 6

Moneywatch, *Biden signs debt ceiling bill that pulls U.S. back from brink of unprecedented default*, CBS News (June 3, 2023), https://perma.cc/44JP-5RKQ.....8

Niels Lesniewski, *Bipartisan ADA celebration clouded by current climate*, Roll Call (July 26, 2021), https://perma.cc/T8LD-4WQ5..... 9

Noah Berman, *What Happens When the U.S. Hits Its Debt Ceiling?* Council on Foreign Relations (last updated June 27, 2023), https://perma.cc/XD84-PGGT 8

Our Legislature, "Party Influence," N.J. Legislature, https://perma.cc/JQ8S-ASPS 15

Program for Public Consultation, *Common Ground of the American People: Policy Positions Supported By Both Democrats & Republicans*, School of Public Policy, University of Maryland (Aug. 7, 2020), https://vop.org/wp-content/uploads/2021/07/CGOAP_0721.pdf 9

Rhodes Cook, *Registering By Party: Where the Democrats and Republicans Are Ahead*, UVA Center for Politics (July 12, 2018), https://perma.cc/DT3K-HL5T 14

Roberto Stefan Foa & Yascha Mounk, *The Democratic Discontent*, 27 J. DEM 3, 7 (July 2016), https://perma.cc/C4YR-65VX..... 7

The Cook Political Report: 2024 House Race Ratings, The Cook Political Report (Feb. 28, 2023), https://perma.cc/GT52-K4WG.....11

STATEMENT OF INTEREST BY AMICI CURIAE

Amici curiae are a bipartisan group of former members of the United States Congress, who respectfully refer the Court to their Application Of Bruce Braley, Richard A. Gephardt, Patrick J. Murphy, John J. Schwarz, and David A. Trott For Leave To Appear As *Amici Curiae*, filed on July 10, 2023, for their complete Statement of Interest.

PRELIMINARY STATEMENT

Fusion voting, which enables cross-party nomination, allows candidates to more freely represent the interests of larger segments of the population. With fusion voting, candidates who secure the nomination of a major political party can also serve as the nominee for smaller political parties, including moderate parties. A candidate's cross-nomination by a moderate party sends a clear message to moderate voters—which constitute over one third of the New Jersey electorate—that the candidate is likely to prioritize their needs. That message in turn encourages moderate voters to show up at the polls, leading to the election of more moderate candidates. And election of moderate candidates promotes cross-party dialogue, reduces political polarization, and enhances the health of American democracy.

Without anti-fusion laws, moderate candidates could exercise their full range of associational rights and provide more information to voters as to their values and priorities. This goes directly against Respondents' arguments that (1) the current system promotes political stability, *see* Db21-22, (2) cross-nomination would make it harder for voters to understand candidates' positions, *see* Db51-52, and (3) anti-fusion laws do not burden the associational rights of candidates and parties, *see* Db59-62. The opposite is true: permitting fusion voting would constitute a clear step toward easing some of the polarization that has become so prevalent in our government in recent years.

ARGUMENT

I. Election Outcomes Are Significantly Impacted By Anti-Fusion Laws.

By barring candidates from accepting a second party's nomination, anti-fusion laws place moderate candidates in an impossible position. Moderate candidates have two choices. On the one hand, they could seek the nomination of a smaller, more moderate party whose policy views and values closely match their own. But doing so all but guarantees electoral defeat in an environment where many voters perceive it as futile to cast their vote for the nominee of a party other than one of the two major parties. *See How fusion voting played a role in American politics*, MSNBC (Apr. 2, 2014), https://perma.cc/CM2H-

VHEW. Indeed, as Appellants point out, candidates from the two major parties have won every federal and state election in New Jersey for the past 50 years. *See* Pb5. Alternatively, moderate candidates can seek the exclusive nomination of one of the major parties, even though they might disagree with the broader party platform. In doing so, they simultaneously face competition from a smaller moderate party's nominee, whose presence on the ballot will likely cannibalize moderate voters from the center, rendering it more difficult for the more moderate of the major party candidates to get elected.

In contrast, if parties are permitted to nominate their preferred candidates, moderate candidates may freely associate with, speak for, and earn the support of the large swath of the electorate hungry for an alternative to political extremism. *See* Lee Drutman, *New Jersey Voters on Political Extremism, Political Parties, and Reforming the State's Electoral System*, New America (Nov. 22, 2022), https://perma.cc/7MCU-ZV2B. Earning nominations from both a major party and a minor moderate party provides moderate candidates with a crucial tool to communicate their centrist views to voters, and earn votes from both independent voters and moderate voters affiliated with the opposing party. *See* J.J. Gass & Adam Morse, *More Choices, More Voices: A Primer on Fusion*, Brennan Center for Justice (Oct. 2, 2006), https://perma.cc/5868-3G38.

It also makes it less likely that the moderate party will split moderate votes by nominating a third candidate, in turn increasing the likelihood that a moderate candidate will actually be elected. *See* Jeffrey Mongiello, *Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture,* 41 Seton Hall L. Rev. 1111, 1117 (2011).

In short, laws that prohibit political parties from nominating their preferred candidate disproportionately harm moderate candidates, voters, and parties—and systematically weaken democracy itself.

II. The Decreasing Numbers Of Moderate Lawmakers Elected To Office Destabilizes American Politics.

A. American Politics Are More Polarized Than Ever Before.

It is widely recognized that polarization in American politics have reached levels that have now become, by any standard, extreme. In the lead up to the 2022 midterm elections, an NBC poll found that 81 percent of Democrats said they believed that the Republican Party's agenda could "destroy America as we know it," while 79 percent of Republicans believed the same of the Democratic Party's agenda. Mark Murray, *'Anger on their minds': NBC News poll finds sky-high interest and polarization ahead of midterms*, CNBC (Oct. 23, 2022), https://perma.cc/HKV6-B9YN. A Fox News poll from the same time period

found that only 18 percent of Democrats and 9 percent of Republicans believe that the other party wants "what's best for the country." Dana Blanton, *Fox News Poll: Polarization defines the midterm election*, Fox News (Oct. 16, 2022), https://perma.cc/J4NB-T49U.

Moreover, American polarization is unique as compared to other developed democratic nations. A January 2020 study conducted by researchers at Brown and Stanford on "affective polarization"—a phenomenon in which citizens feel more negatively toward other political parties and its members than toward their own—found that the United States has experienced the largest increase in affective polarization of any of the twelve countries studied. *See* Levi Boxell et al., *Cross-Country Trends in Affective Polarization*, National Bureau of Economic Research Working Paper Series, Working Paper 26669 (Jan. 2020), https://www.nber.org/papers/w26669.[1] Polling by Pew Research Center identified perceptions surrounding the coronavirus pandemic as a particularly stark example of the polarization present in the United States:

> Over the summer [of 2020], 76% of Republicans (including independents who lean to the party) felt the U.S. had done a good job dealing with the coronavirus outbreak, compared

[1] The 12 nations studied were the U.S., Switzerland, France, Denmark, Canada, New Zealand, Japan, Australia, Britain, Norway, Sweden, and Germany.

> with just 29% of those who do not identify with the Republican Party. This 47 percentage point gap was the largest gap found between those who support the governing party and those who do not across 14 nations surveyed. Moreover, 77% of Americans said the country was now more divided than before the outbreak, as compared with a median of 47% in the 13 other nations surveyed.[2]

This is not an abstract concern: polarization has had a significant impact on the democratic system of government in the United States.

B. Hyper-Polarization And A Shrinking Center In Congress Pose A Significant Threat To American Democracy.

The deleterious effects of increasing polarization are readily apparent at the national level. Passing routine legislation has become a gargantuan task and attempts to pass forward-thinking legislative initiatives have become all but futile. Such partisanship in turn may have the effect of eroding public trust in government, leading more people to conclude that our democratic institutions are simply not up to the task of addressing the most urgent public challenges. These dangerous trends in turn only lead to further polarization. This is a self-perpetuating cycle with disastrous consequences for the future of our

[2] The 14 nations surveyed were Canada, the U.S., Denmark, Sweden, the U.K., Italy, the Netherlands, Belgium, France, Germany, Spain, South Korea, Australia, and Japan. *See* Michael Dimock & Richard Wike, *America is exceptional in the nature of its political divide*, Pew Research Center (Nov. 13, 2020), https://perma.cc/3A4P-ZLGV.

democracy. *See* Roberto Stefan Foa & Yascha Mounk, *The Democratic Discontent*, 27 J. DEM 3, 7 (July 2016), https://perma.cc/C4YR-65VX.

Indeed, many of our former colleagues have commented on Congress' inability to get things done, with Republican Senator Richard M. Burr, who retired in 2023 after serving in Congress for nearly three decades, asking, "Can we be a visionary body versus a crisis management institution?" Emily Cochrane, *Retiring Congress Members See Rough Roads Ahead. They Won't Miss the Gridlock.*, N.Y. Times (Jan. 1, 2023), https://perma.cc/6NKK-FBTB. Representative John Yarmuth of Kentucky, the former Democratic chairman of the House Budget Committee, similarly observed: "There are far more members here who are engaged in performance art and performance art only now, and they really have no interest in governing." *Id.* When reflecting on the 118th Congress, Yarmouth warned: "The next two years are really going to be brutally painful, and they're going to be painful for the country." *Id.* The electorate has become significantly discouraged by these trends as well—a February 2023 joint poll by Gallup and Newsweek puts the approval rating for Congress at 18 percent. *Congress and the Public*, Gallup, https://news.gallup.com/poll/1600/congress-public.aspx.

One notable example of Congress' difficulty in passing even routine legislation is the raising of the debt ceiling. The debt ceiling has been lifted 78 times since 1960: 49 times under Republican presidents and 29 times under Democratic presidents. *See Debt Limit*, U.S. Department of the Treasury, https://perma.cc/VQ42-NEL7. Given the (previously) universally accepted importance of ensuring that the United States can meet its financial obligations, raising the debt ceiling was once a relatively unexceptional action in Congress. Noah Berman, *What Happens When the U.S. Hits Its Debt Ceiling?*, Council on Foreign Relations (last updated June 27, 2023), https://perma.cc/XD84-PGGT. But in 2011, a deadlock between President Obama and congressional Republicans resulted in the debt ceiling being raised just two days before the Treasury estimated it would run out of money; the resulting (and unprecedented) credit rating downgrade increased U.S. borrowing costs by $1.3 billion in that year alone. Government Accountability Office, *Debt Limit: Analysis of 2011-2012 Actions Taken and Effect of Delayed Increase on Borrowing Costs*, Report to the Congress (July 2012), https://www.gao.gov/assets/gao-12-701.pdf. This year, that crisis repeated itself, with a debt limit bill being signed into law just two days before the Treasury estimated it would run out of money—after months of acrimonious debate and bitter brinkmanship. Moneywatch, *Biden signs debt*

ceiling bill that pulls U.S. back from brink of unprecedented default, CBS News (June 3, 2023), https://perma.cc/44JP-5RKQ.

Historically, and to this day, moderates have been dealmakers willing to work across the aisle. *See, e.g.*, Niels Lesniewski, *Bipartisan ADA celebration clouded by current climate*, Roll Call (July 26, 2021), https://perma.cc/T8LD-4WQ5; Martin Tolchin, *Social Security: Compromise at Long Last*, N.Y. Times (Jan. 20, 1983), https://perma.cc/73M9-7AKY. They set aside partisan talking points and find common ground on key principles to address urgent societal problems. Bipartisan support for legislation can also insulate it from future attacks—unlike party-line laws which often invite efforts at repeal when legislative majorities change. *See, e.g.*, Emily Brooks & Michael Schnell, *House GOP passes repeal of IRS funding boost as its first bill in the majority*, The Hill (Jan. 9, 2023), https://perma.cc/34GS-9ZWR. A study conducted by the University of Maryland's School of Public Policy found that in each of 18 categories of public policy ranging from healthcare to police reform, there were over 100 policy proposals that garnered support of more than two-thirds of Americans overall—the vast majority of which have not been enacted. Program for Public Consultation, *Common Ground of the American People: Policy Positions Supported By Both Democrats & Republicans*, School of Public

Policy, University of Maryland (Aug. 7, 2020), https://vop.org/wp-content/uploads/2021/07/CGOAP_0721.pdf. In the coming year, it is not hard to envision Congress struggling to reach consensus on must-pass spending bills, let alone legislative efforts that tackle far-reaching and pervasive problems.

In short, increasingly deep political divides, exacerbated by anti-fusion laws that artificially deprive the moderate center of the political power its popular support would otherwise provide, pose significant challenges to the proper functioning of government.

C. Polarization Has Made It Increasingly Challenging For Moderate Lawmakers To Be Elected To Office Despite Public Eagerness For Moderate Solutions.

The increase in political polarization has also led to a decrease in the number of legislative elections that are truly competitive. In an increasing number of congressional districts, the winner of the dominant major party primary is all but assured election. An analysis conducted by the Cook Political Report, a nonpartisan newsletter, found that while in 1999, there were 164 swing districts (districts in which the margin in the presidential race was within 5 percentage points of the national result), there were only 82 such districts remaining in 2023. David Wasserman, *Realignment, More Than Redistricting, Has Decimated Swing House Seats*, The Cook Political Report (Apr. 5, 2023),

https://perma.cc/74AF-AWX3. And for "hyper-swing" seats (districts in which the margin in the presidential race was within 3 percentage points of the national result), the decline is even more drastic, going from 107 districts in 1999 to just 45 in 2023. *Id.* "[U]rban/rural polarization has driven most of the competitive decline." *Id.* The result is that only 16 percent of all U.S. House races are anticipated to be competitive in 2024, and just 5 percent will be considered "tossups." *The Cook Political Report: 2024 House Race Ratings*, The Cook Political Report (June 8, 2023), https://perma.cc/GT52-K4WG.

The decrease in competitive districts has unsurprisingly corresponded with a decrease in moderate lawmakers elected to Congress. Analysis by the Pew Research Center that examined national lawmakers' ideological positions based on their roll-call votes found that today, there are just under 30 moderate lawmakers left on Capitol Hill from both parties combined, compared to the more than 160 such lawmakers in the early 1970s. Drew Desilver, *The polarization in today's Congress has roots that go back decades*, Pew Research Center (Mar. 10, 2022), https://perma.cc/T9A6-TCSU. That same analysis also found that in the same time period, both the Democratic and Republican members in the House and Senate have shifted further from the center and more toward the poles of their own parties. *Id.*

As a result, many voters have come to believe that their votes do not matter, in large part because elections are not perceived as being genuinely competitive. *See* Catherine Clifford, *'I don't plan to vote ever again': The psychology of why so many people don't vote, even in 2020*, CNBC (Oct. 30, 2020), https://perma.cc/34PW-34E9. And when voters believe that their votes do not matter, they are less inclined to vote. For instance, a study conducted in 2016 by the Pew Research Center found that nearly 40 percent of Americans did not believe their vote would have a significant impact on how the government functions. Elisa Shearer & Jeffrey Gottfried, *Half of those who aren't learning about the election feel their vote doesn't matter*, Pew Research Center (Mar. 4, 2016), https://perma.cc/S6GD-EYPY. This is particularly true for voters who identify as moderate or do not affiliate with any particular party, with research from the Pew Research Center indicating that independents both feel more negatively about candidates affiliated with the major parties than either Democrats or Republicans do, and are less likely to vote. John LaLoggia, *6 facts about U.S. political independents*, Pew Research Center (May 15, 2019), https://perma.cc/GT5A-8AD3. The net result is a reduction in the number of voters willing to show up at the polls due to a perception that their votes do not

matter in such a polarized environment. That phenomenon directly undermines a fundamental tenet of our democracy.

New Jersey is not exempt from these worrisome trends: New America conducted a 2022 survey that revealed widespread political dissatisfaction among New Jersey voters, particularly when it comes to the rigid two-party system. Drutman, *New Jersey Voters on Political Extremism*, *supra*, at 3. Indeed, 81 percent of respondents agreed that "the two-party system in the United States is not working because of all the fighting and gridlock, with both sides unable to solve important public problems," and 76 percent agreed that "'political polarization' between the two parties is a 'big problem' affecting the nation's ability to solve collective problems." *Id.* These opinions cut across party lines, as "[l]arge majorities of Democrats, Republicans, and Independents [in New Jersey] consider the divide between the two major parties as a major obstacle in solving the nation's public problems and collective issues." *Id.*

The polarization in American politics is particularly problematic given that fewer Americans identify with either major party than at any other time in the last three decades. Gallup recently found that only 28 percent of Americans identify as Democrats and only 28 percent identify as Republicans, while 41 percent identify as independents—the highest percentage since at least 1988.

Jeffrey M. Jones, *U.S. Party Preferences Evenly Split in 2022 After Shift to GOP*, Gallup (Jan. 12, 2023), https://perma.cc/WW7G-K5SA. Similarly, the University of Virginia Center for Politics found that nearly one third of the states that have registration by party had more voters registering as independents than as Democrats or Republicans as of July 2018—a roughly 50% increase in the number of voters registering as independents since the beginning of the century. Rhodes Cook, *Registering By Party: Where the Democrats and Republicans Are Ahead*, UVA Center for Politics (July 12, 2018), https://perma.cc/DT3K-HL5T.

Cross-nomination provides voters with the ability to vote for a major party ***candidate*** who best aligns with their values without having to cast their vote for the major ***party*** itself—rendering many more districts competitive by increasing the number of moderate voters who show up to the polls, and by enabling those voters to vote on a moderate party line. For instance, in one poll of New Jersey residents, 57 percent of respondents said that they would likely vote on a third party's line cross-nominating a competitive candidate. *See* Drutman, *New Jersey Voters on Political Extremism*, *supra*, at 3. Indeed, 58 percent of respondents supported New Jersey reinstating fusion voting, and 68 percent agreed that "by allowing voters to choose both the candidate they prefer and the party label closest to their values, a fusion system can better express the

citizenry's views." *Id.* In fact, 57 percent of respondents agreed that fusion voting would "help reduce extreme partisanship and polarization." *Id.*

Nonetheless, despite majority support for reinstating fusion voting across Democrats, Republicans, and Independents, the state legislature has not taken any action to repeal the anti-fusion laws and correct the error it made a century ago in passing them. That failure is unsurprising: as a result of the anti-fusion laws, the state legislature itself is largely partisan, *see Our Legislature*, "Party Influence," N.J. Legislature, https://perma.cc/JQ8S-ASPS, with its members largely benefiting from maintaining the status quo.

CONCLUSION

Despite a clear public appetite for a middle path forward, it is more difficult than ever to elect moderate lawmakers and enact moderate solutions. Laws that prevent parties from nominating their preferred candidates exacerbate these difficulties. It is essential that these burdens on democracy be removed to enable a better path forward to moderate solutions. Thus, this Court should reverse the denial of the Moderate Party's petition to nominate Tom Malinowski as the party's candidate in the 7th Congressional District, and hold that the anti-fusion voting laws may not be enforced in New Jersey elections.

Respectfully submitted,

/s/ Ryan Chabot
Dated: August 24, 2023

Ryan Chabot (162262015)
Matthew Wollin*
Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007 USA
(212) 230-8800
ryan.chabot@wilmerhale.com
matthew.wollin@wilmerhale.com

Brittany Blueitt Amadi*
Wilmer Cutler Pickering Hale and Dorr LLP
2100 Pennsylvania Ave NW
Washington DC 20037
(202) 663-6000
brittany.amadi@wilmerhale.com

Counsel for Amici Curiae Bruce Braley, Richard A. Gephardt, Patrick J. Murphy, John J. Schwarz, and David A. Trott
**Admitted pro hac vice*

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NOS. A-3542-21T2, A-3543-21T2 CIVIL ACTION ON APPEAL FROM: FINAL AGENCY ACTION IN THE DEPARTMENT OF STATE HON. TAHESHA WAY, SECRETARY OF STATE

BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER

Dated: August 25, 2023

Alicia Bannon (NJ ID 041292010)
Douglas Keith (*pro hac vice*)
Lauren Miller (*pro hac vice*)
THE BRENNAN CENTER
120 Broadway, Suite 1750
New York, NY 10271
T: (646) 292-8310
F: (212) 463-7308
Emails:
bannona@brennan.law.nyu.edu
keithd@brennan.law.nyu.edu
millerl@brennan.law.nyu.edu

Joseph R. Palmore
(*pro hac vice*)
MORRISON & FOERSTER LLP
2100 L Street NW, Suite 900
Washington, DC 20037
T: (202) 887-1500
F: (202) 887-0763
Email: JPalmore@mofo.com

*David J. Fioccola, Esq.
(NJ ID 013022000)
MORRISON & FOERSTER LLP
250 West 55th Street
New York, NY 10019
T: (212) 468-8000
F: (212) 468-7900
Email: DFioccola@mofo.com

Joel F. Wacks
(*pro hac vice*)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
T: (415) 268-7000
F: (415) 268-7522
Email: JWacks@mofo.com

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS, AND RULINGS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE INTEREST OF AMICUS CURIAE 1

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS 3

ARGUMENT 3

I. STATE ASSEMBLY CLAUSES PROTECT POLITICAL PARTICIPATION AND REPRESENTATIVE GOVERNMENT INDEPENDENT OF THE FEDERAL CONSTITUTION. 3

II. THE TEXT AND STRUCTURE OF NEW JERSEY'S ASSEMBLY CLAUSE COMPEL AN INDEPENDENT INTERPRETATION OF NEW JERSEY'S ASSEMBLY RIGHT. 4

III. NEW JERSEY'S ASSEMBLY RIGHT IS ROOTED IN A RICH HISTORY OF POLITICAL PARTICIPATION AND REPRESENTATIVE GOVERNMENT. 6

A. The Right To Assemble Is Grounded In The Colonial Tradition Of Local Self-Government. 6

B. Colonists Developed A Broad Conception Of The Right To Assemble In Direct Response To British Restrictions. 8

1. Massachusetts' model of powerful town meetings informed the colonists' resistance to British rule. 8

2. The colonists' response to British restrictions shaped the right to assemble. 10

C. Early State Constitutions Drew On The Colonial Understanding Of The Right To Assemble. 11

IV. THE DEMOCRATIC CHARACTER OF STATE CONSTITUTIONS INFORMS THE INTERPRETATION OF PROVISIONS LIKE NEW JERSEY'S ASSEMBLY CLAUSE 13

CONCLUSION 15

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

Date	Document	Page
06/08/2022	Secretary of State Letter	Pa1
07/19/2022	Secretary of State Letter	Pa2

TABLE OF AUTHORITIES

Page(s)

Cases

Barron v. Kolenda,
491 Mass 408 (2023) 4, 7

Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n,
192 N.J. 344 (2007) 3

Commonwealth v. Tate,
495 Pa. 158 (1981).....4

Deras v. Myers,
272 Or. 47 (1975).....4

Lahman v. Grand Aerie of Fraternal Order of Eagles,
121 P.3d 671 (Or. App. 2005) 7

League of Women Voters of Pa. v. Commonwealth,
645 Pa. 1 (2018).....14

State v. Hunt,
91 N.J. 338 (1982) 5, 6

State v. Novembrino,
105 N.J. 95 (1987) 6

State v. Schmid,
84 N.J. 535 (1980) 2, 3, 6, 14

In the Matter of the 2021 Redistricting Cases,
528 P.3d 40 (Alaska 2023) 14

Thomas v. Collins,
323 U.S. 516 (1945).....5

Statutes

N.J. CONST. art. I, ¶ 18 .....1, 5, 13

N.J. CONST. art. I, ¶ 18 (1844) 13

N.J. CONST. art. I, ¶ 2a 13

N.J. CONST. art. IX, ¶ 6 13

Other Authorities

Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale L.J. 1652 (2021) 5, 7, 8, 9, 10, 11, 13

Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021).....13

Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543 (2009).....5

Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 Publius 11 (Winter 1982) 6

Larry R. Gerlach, *New Jersey in the American Revolution 1763-1783 A Documentary History* (1975) 8, 9

Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* (1930) 8, 12, 13

New Jersey Writer's Project, *New Jersey State Constitutional Convention of 1844* (1844) 7

Robert F. Williams, *The Evolution of State and Federal Constitutional Rights in New Jersey*, 69 Rutgers U.L. Rev. 1417 (2017) 3

State Commission on County and Municipal Government, Modern Forms of Municipal Government 9 (1992) 8

The Works of John Adams, Second President of the United States (1851) 7

STATEMENT OF THE INTEREST OF AMICUS CURIAE

The Brennan Center for Justice at NYU School of Law[1] is a not-for-profit, non-partisan think tank and public interest law institute. The Brennan Center respectfully refers the Court to the Certification of David J. Fioccola accompanying its Motion to Appear as Amicus Curiae, which explains its interest in this case.

PRELIMINARY STATEMENT

The New Jersey Assembly Clause guarantees this state's residents "the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." N.J. CONST. art. I, ¶ 18. Since the Assembly Clause's adoption in 1844, courts have rarely addressed its meaning. Its application to the state's anti-fusion laws is thus an important question of first impression that warrants a closer examination of the clause's origin, meaning, structure, and purpose. These considerations support a broad interpretation of the right to assemble extending to collective political action and representative government, including support for minor parties.

Part I of this brief explores existing assembly clause jurisprudence. New Jersey's Supreme Court has held that New Jersey's Assembly Clause is "more

[1] This brief does not purport to convey the position, if any, of NYU School of Law.

sweeping in scope than the language of the First Amendment." *State v. Schmid*, 84 N.J. 535, 557 (1980). Other state courts have come to similar conclusions regarding their own assembly right.

Part II analyzes the text and placement of New Jersey's Assembly Clause. While the federal Constitution pairs free assembly with guarantees of free expression, New Jersey—like other states—couples its Assembly Clause with constitutional provisions designed to facilitate participation in a representative government. And unlike the federal Constitution, New Jersey places its Bill of Rights at the beginning of the Constitution, signaling that the state government's priority is protecting individual rights.

Part III examines the "sweeping" scope of New Jersey's Assembly Clause by looking to its history. Colonial New England's rich tradition of local self-government shaped the right to free assembly. In response to British incursions on the colonies' self-rule, Revolutionary Era thinkers articulated a robust right to participate in representative government. Those thinkers inspired the assembly clauses in state constitutions, including New Jersey's.

Part IV contextualizes New Jersey's Assembly Clause as one example of the democratic values imbued in state constitutions. The pro-democracy features inherent in state constitutions have provided state courts, including

New Jersey's, with an expansive foundation for protecting the democratic rights of their residents.

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

Amicus adopts Appellants' Procedural History and Statement of Facts.

ARGUMENT

I. STATE ASSEMBLY CLAUSES PROTECT POLITICAL PARTICIPATION AND REPRESENTATIVE GOVERNMENT INDEPENDENT OF THE FEDERAL CONSTITUTION.

The New Jersey Supreme Court has recognized the state Assembly Clause's "exceptional vitality," *Schmid*, 84 N.J. at 557, and emphasized that its language is "more sweeping in scope than the language of the First Amendment." *Id.* The Court has thus already held that New Jersey's Assembly Clause is more protective than the First Amendment, constraining not only government action but also, in some circumstances, private interference with free speech rights. *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 192 N.J. 344, 364 (2007). This treatment is consistent with the Court's well-established status as a "leader" in interpreting its state's Constitution more broadly than its federal counterpart. Robert F. Williams, *The Evolution of State and Federal Constitutional Rights in New Jersey*, 69 Rutgers U.L. Rev. 1417, 1427–29 (2017).

Other state high courts have also recognized that their assembly clauses should be construed independently of their federal analog. *See Commonwealth*

v. Tate, 495 Pa. 158, 169 (1981); *Deras v. Myers*, 272 Or. 47, 64 (1975) (en banc). Recently, the Massachusetts Supreme Judicial Court interpreted its assembly clause broadly to strike down the town of Southborough's public comment policy. *Barron v. Kolenda*, 491 Mass 408, 416, 419 (2023). That policy required comments in public meetings to be "respectful and courteous, free of rude, personal or slanderous remarks." *Id.* at 411 n.5. The court noted that the clause's text "envisions a politically active and engaged, even aggrieved and angry, populace." *Id.* at 415. And it explained that the clause arose "out of fierce opposition to governmental authority" during the Revolutionary Era and was understood by its drafters, John and Samuel Adams, as essential to self-government. *Id.* at 416. The court thus concluded that "rude, personal, and disrespectful" conduct was protected and Southborough's public comment policy "contradicted . . . the letter and purpose of" Massachusetts's assembly clause. *Id.* at 416, 419. The *Barron* court's decision is particularly persuasive because New Jersey's Constitution drew inspiration from Massachusetts's document. *See* Section III *infra*.

II. THE TEXT AND STRUCTURE OF NEW JERSEY'S ASSEMBLY CLAUSE COMPEL AN INDEPENDENT INTERPRETATION OF NEW JERSEY'S ASSEMBLY RIGHT.

The United States Supreme Court has treated the federal assembly right as an adjunct of the rights to free speech and press in part because the First

Amendment couples the Assembly Clause with the Establishment, Free Exercise, Free Speech, and Press Clauses. Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543, 547 n.10 (2009); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). But New Jersey's Constitution pairs the assembly right not with rights of free expression, but instead with "provisions declaratory of the general principles of republican government." Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale L.J. 1652, 1727 (2021) (internal quotation marks omitted); N.J. CONST. art. I, ¶ 18.

New Jersey courts recognize that "the phrasing of a particular provision in our charter may be so significantly different from the language used to address the same subject in the federal Constitution that we can feel free to interpret our provision on an independent basis." *State v. Hunt*, 91 N.J. 338, 364 (1982) (Handler, J., concurring). Here, one of the reasons for treating "the [federal] right of assembly as simply a facet of the right of free expression" does not apply to its New Jersey counterpart. El-Haj, *supra* at 547 n.10.

And while the federal Constitution places the Bill of Rights at the end of the document, the states, including New Jersey, generally place their bill of rights at the beginning. This placement "announce[s] that the protection of rights is the first task of government." Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 Publius 11, 15 (Winter 1982).

III. NEW JERSEY'S ASSEMBLY RIGHT IS ROOTED IN A RICH HISTORY OF POLITICAL PARTICIPATION AND REPRESENTATIVE GOVERNMENT.

New Jersey courts look to multiple factors when construing the rights guaranteed by the New Jersey Constitution: text, history, preexisting law, structure, state interests, local concerns, tradition, and public attitudes. *See Hunt*, 91 N.J. at 363-67 (Handler, J., concurring). While not an exclusive factor, history can play a useful role where, as here, courts have had few previous opportunities to interpret a constitutional provision. *Id.* at 365. Historical context can underscore a provision's significance, challenge interpretive assumptions, and suggest alternative meanings. *See* Bowie, *supra* at 1724-25. Recognizing these benefits, New Jersey courts have frequently used historical evidence as an interpretive aid. *See, e.g.*, *State v. Novembrino*, 105 N.J. 95, 147 (1987). This section follows this tradition by exploring the history of New Jersey's Assembly Clause.

A. The Right To Assemble Is Grounded In The Colonial Tradition Of Local Self-Government.

Despite the New Jersey Assembly Clause's relatively late adoption in the state's 1844 Constitution, the New Jersey Supreme Court has recognized that the provision was "derived from earlier sources." *Schmid*, 84 N.J. at 557. Our examination of those sources begins in colonial Massachusetts, where the assembly right originated. *Barron*, 491 Mass at 414-17; *Lahman v. Grand*

Aerie of Fraternal Order of Eagles, 121 P.3d 671, 680 (Or. App. 2005). John Adams believed that the state's "primitive institutions . . . produced a decisive effect . . . by the influence they had on the minds of the other colonies." Bowie, *supra* at 1663 (quoting Letter from John Adams to the Abbé de Mably (1782) in 5 *The Works of John Adams, Second President of the United States* 492, 494-95 (1851), alteration and first omission in original)). Consistent with Adams' assessment, the delegates to New Jersey's 1844 constitutional convention frequently looked to the Massachusetts constitution for inspiration. *See, e.g.*, New Jersey Writer's Project, *New Jersey State Constitutional Convention of 1844* 109, 403, 458, 535 (1844).

Adams viewed the town meeting as one of Massachusetts' most important "institutions." Bowie, *supra* at 1663. At these meetings, town residents exercised their right to assemble "to make such Laws and Constitutions as may concern the welfare of their Town." *Id.* at 1664. They also formally directed the agenda of the colonial General Assembly by "draft[ing] for their representatives binding orders, or 'instructions,' to vote particular ways." *Id.* at 1665-66; *see also* Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* 455, 448-50 (1930). Together, "these powers . . . made town meetings one of the most powerful political institutions in colonial Massachusetts." Bowie, *supra*

at 1666. Notably, parts of New Jersey adopted this model of local government. *State Commission on County and Municipal Government, Modern Forms of Municipal Government* 2, 9 (1992). The power wielded in town meetings demonstrates that the right to assemble historically encompassed meaningful participation in passing legislation and influencing the decisions of other legislative bodies.

B. Colonists Developed A Broad Conception Of The Right To Assemble In Direct Response To British Restrictions.

1. Massachusetts' model of powerful town meetings informed the colonists' resistance to British rule.

Town meetings were also important venues for protesting British intrusions into colonial affairs. Bowie, *supra* at 1666. In the years leading up to the Revolutionary War, town meetings voiced resistance to British policies through instructions to their colonial assemblies. In 1764, for example, colonists became alarmed by rumors of a potential sugar tax. *Id.* at 1668-69. Acting on town meeting instructions, the Massachusetts General Assembly led several states in protesting Parliament's power to tax the colonies. *Id.* New Jersey's House of Assembly similarly issued resolutions protesting the Stamp Act, *see* The Stamp Act Resolves of the New Jersey Assembly (1765) in Larry R. Gerlach, *New Jersey in the American Revolution 1763-1783 A Documentary History* 22-24 (1975), and supporting a boycott of British goods to oppose the

Townshend duties, *see The Resolution of the New Jersey Assembly Supporting the Boycott to Oppose Townshend Duties* (1769) in Gerlach, *supra* at 48.

Informal assemblies were equally significant. "[O]ver the summer of 1765, thousands of individuals . . . began organizing clubs, gatherings, and other informal assemblies" to resist British taxation. Bowie, *supra* at 1669. New Jersey, for example, boasted multiple chapters of the Sons of Liberty, Gerlach, *supra* at 27, a group founded to oppose the Stamp Act, Bowie, *supra* at 1669. These extralegal assemblies came to resemble formal legislatures. The Stamp Act Congress was composed of delegates from throughout the colonies and asserted its right "to petition the King, or either House of Parliament." Bowie, *supra* at 1669-70. In New Jersey, the colony-wide New Brunswick Convention of 1774 "assumed temporary direction of the resistance movement" and "appoint[ed] delegates to the First Continental Congress." Gerlach, *supra* at 76-77. These assemblies "advanced the notion that legitimate political authority derived . . . from the people at large." *Id.* at 97.

British authorities attempted to stifle colonial resistance by undermining assemblies' legislative powers or banning assembly altogether. Parliament passed the Restraining Act to prohibit New York's General Assembly from enacting other legislation until it agreed to make appropriations "for furnishing his Majesty's Troops." Bowie, *supra* at 1671. Massachusetts's General

Assembly and town meetings faced even harsher treatment. The colony's governor prorogued the General Assembly after a dispute over its authority to control the colonial governor's salary. *Id.* at 1680-81. And after the Boston Tea Party, Parliament prohibited most Massachusetts town meetings without the governor's consent. *Id.* at 1686-87. New Jersey's legislature was not spared—Royal Governor William Franklin prorogued it following a dispute "over the supplying of . . . barracks" for British soldiers. Gerlach, *supra* at 61.

2. The colonists' response to British restrictions shaped the right to assemble.

British interference with colonial assemblies prompted the colonists to assert a natural right to assemble. Following the ban on town meetings, Massachusetts residents met in county conventions of towns, insisting that "we have, within ourselves, the exclusive right of originating each and every law respecting ourselves." Bowie, *supra* at 1689. Committees of correspondence throughout the colonies, including New Jersey, "organized themselves into meetings like the Boston town meeting" and asserted an inherent right to assemble. *Id.* at 1690-91; *Letter of the Committee of Correspondence of the New Jersey Assembly to the Boston Committee of Correspondence* (1774) in Gerlach, *supra* at 68.

American writers also began to articulate the basis and scope of the assembly right. Pennsylvania lawyer John Dickinson wrote a widely

republished essay arguing that the purpose of an assembly was "to obtain redress of grievances," but that this was impossible if an assembly "had no other method of engaging attention, than by complaining." Bowie, *supra* at 1672-73. Samuel Adams agreed, writing that a similar restriction imposed "throughout the colonies . . . would be a short and easy method of . . . depriving the people of a fundamental right of the constitution, namely, that every man shall be present in the body which legislates for him." *Id.* at 1674. The colonists thus described a right that included the ability to complain effectively through collective political action. *Id.* at 1672, 1676.

Against this backdrop, the Continental Congress—itself an extralegal assembly—included the following grievance in its Declaration of Rights: "[A]ssemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal, & reasonable petitions to the crown for redress, have been repeatedly treated with contempt." *Id.* at 1693.

C. Early State Constitutions Drew On The Colonial Understanding Of The Right To Assemble.

On the advice of the Continental Congress, the colonies began to adopt written constitutions. *Id.* at 1697-98. On August 16, 1776, Pennsylvania became the first state to adopt a constitutional right to assembly. *Id.* at 1701. The Pennsylvania constitution declared "[t]hat the people have a right to

assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance." Luce, *supra* at 453.

Although Pennsylvania's assembly clause surely drew from the similarly-worded grievance in the Declaration of Rights, it contained a notable addition: An explicit right to instruct representatives. *See* Bowie, *supra* at 1701-02; *see also* Luce, *supra* at 453. This innovation "betrays the influence of [Samuel] Adams or someone else from New England, because Pennsylvania had no similar tradition of assembling in town meetings to instruct representatives." Bowie, *supra* at 1702. Just as the colonies mimicked the town meeting structure when resisting British incursions, Bowie, *supra* at 1732, many states followed Pennsylvania and drew upon the Massachusetts tradition by including a right to instruct in their constitutions, *see* Luce, *supra* at 454-55; *see also* Bowie, *supra* at 1732-34. The colonial understanding of the assembly right thus informed the earliest assembly clauses.

That understanding is equally relevant when interpreting the subsequent assembly clauses modeled on early state constitutions. "[W]hen new states joined the Union and existing states amended their original constitutions, they often copied the first state assembly clauses word for word." Bowie, *supra* at 1732. Today, 42 state constitutions contain assembly clauses following the

structure first adopted by Pennsylvania. *Id.* at 1657, 1727. New Jersey's 1844 Constitution was no exception. It adopted the basic structure of Pennsylvania's provision, although it introduced a new formulation of the right to instruction, declaring that the people have a right "to make known their opinions to their representatives." N.J. CONST. OF 1844, Art. I, ¶ 18; *see* Luce, *supra* at 455. The language adopted by the 1844 convention was carried over, unamended, into New Jersey's current Constitution. N.J. CONST. art. I, ¶ 18.

IV. THE DEMOCRATIC CHARACTER OF STATE CONSTITUTIONS INFORMS THE INTERPRETATION OF PROVISIONS LIKE NEW JERSEY'S ASSEMBLY CLAUSE.

State constitutions—including New Jersey's—privilege democratic rights to a far greater extent than their federal counterpart. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 863-64 (2021). This commitment is evident in three features common to state constitutions. First, most state constitutions, like New Jersey's, "include[] an express commitment to popular sovereignty." *Id.* at 869-70; N.J. CONST. art. I, ¶ 2a ("All political power is inherent in the people."). "Second, state constitutions embrace majority rule as the best approximation of popular will." *Id.* at 880. New Jersey's Constitution, for example, includes a provision allowing adoption of constitutional amendments by a majority of legally qualified voters. N.J. CONST. art. IX, ¶ 6. Third,

"state constitutions also embrace a commitment to political equality," evidenced both in provisions intended to guarantee "equal access to political institutions," and those that ensure "equal treatment of members of the political community by those institutions." Bulman-Pozen, *supra* at 890.

Accordingly, state courts, including New Jersey's, have found violations of democratic rights under their own constitutions even absent an equivalent federal remedy. In *Schmid*, for example, the New Jersey Supreme Court held that Princeton University violated New Jersey's guarantees of free speech and assembly by prohibiting the distribution of political literature, while declining to decide whether the First Amendment applied to the actions of a private university. *Schmid*, 84 N.J. at 538, 553, 569; *see also League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 96–97, 114 (2018) (holding that a partisan gerrymander violated Pennsylvania's Free Elections Clause); *In the Matter of the 2021 Redistricting Cases*, 528 P.3d 40, 92 (Alaska 2023) (declining to "follow the [U.S.] Supreme Court's lead" in "holding that political gerrymandering claims are non-justiciable").

* * *

This case presents this Court with a unique opportunity to clarify the content and scope of New Jersey's Assembly Clause. The clause's text and history, as well as existing precedent, show that it not only operates

independently from speech, press, and petition rights, but also protects those who gather for political participation and representative government, including those who wish to support a political candidate on a minor party line.

CONCLUSION

Secretary Way's decision should be reversed.

Dated: August 25, 2023

MORRISON & FOERSTER LLP

By: */s/ David J. Fioccola*

David J. Fioccola, Esq.
(NJ ID 013022000)
MORRISON & FOERSTER LLP
250 West 55th Street
New York, NY 10019
T: (212) 468-8000
F: (212) 468-7900
Email: DFioccola@mofo.com

Joel F. Wacks
(*pro hac vice*)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
T: (415) 268-7000
F: (415) 268-7522
Email: JWacks@mofo.com

Alicia Bannon (NJ ID 041292010)
Douglas Keith (*pro hac vice*)
Lauren Miller (*pro hac vice*)
THE BRENNAN CENTER
120 Broadway, Suite 1750
New York, NY 10271
T: (646) 292-8310
F: (212) 463-7308
Emails: bannona@brennan.law.nyu.edu
keithd@brennan.law.nyu.edu
millerl@brennan.law.nyu.edu

Joseph R. Palmore
(*pro hac vice*)
MORRISON & FOERSTER LLP
2100 L Street NW, Suite 900
Washington, DC 20037
T: (202) 887-1500
F: (202) 887-0763
Email: JPalmore@mofo.com

Attorneys for Amicus Curiae the Brennan Center

sf-5614365.10

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	DOCKET NO. A-3542-21T2 CIVIL ACTION On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	DOCKET NO. A-3543-21T2 CIVIL ACTION On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

Liza Weisberg (247192017)
Jeanne LoCicero (02052000)
American Civil Liberties Union
of New Jersey Foundation
570 Broad Street, 11th Floor
P.O. Box 32159
Newark, NJ 07102
973-854-1705
lweisberg@aclu-nj.org

Robert F. Williams (016111980)
Distinguished Professor of Law Emeritus
Rutgers Law School
768 W. Redman Avenue
Haddonfield, NJ 08033
609-330-7600
rfw@camden.rutgers.edu

Ronald K. Chen (027191983)
Rutgers Constitutional Rights Clinic
Center for Law & Justice
123 Washington St.
Newark, NJ 07102
973-353-5378
ronchen@law.rutgers.edu

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY 3

ARGUMENT 3

I. Anti-fusion laws violate the right to vote under the New Jersey Constitution. 3

II. Anti-fusion laws violate the rights to free speech and association under the New Jersey Constitution. 3

A. A primacy approach to state constitutional interpretation is consistent with principles of judicial federalism and gives full effect to the New Jersey Constitution's independent free speech and association guarantees. 3

B. Applying the *Hunt* factors compels divergence from federal constitutional free speech and association analyses of anti-fusion laws. 11

C. New Jersey's anti-fusion laws severely burden the rights of minor parties, candidates, and voters to freely speak and associate. 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Council of Alt. Pol. Parties v. State, 344 N.J. Super. 225 (App. Div. 2001)... 13

Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) 9

Dunn v. Blumstein, 405 U.S. 330 (1972) 15

E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549 (2016) 12

Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214 (1989) ... 13

Garrity v. State of N.J., 385 U.S. 493 (1967) 15

Greenberg v. Kimmelman, 99 N.J. 552 (1985) 11

Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254 (1998)..... 12

Lautenberg v. Kelly, 280 N.J. 76 (Law Div. 1994), *rev'd in part on other grounds by Schundler v. Donovan*, 377 N.J. Super. 339 (App. Div. 2005)..... 14

New State Ice Co. v. Liebmann, 285 U.S. 262 (1931) 7

Robinson v. Cahill, 62 N.J. 473 (1973), *on reargument*, 63 N.J. 196 (1973) *and on reh'g*, 69 N.J. 133 (1975). 9

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)..... 8

Smith v. Penta, 81 N.J. 65 (1979)..... 13

State v. Hempele, 120 N.J. 182 (1990) 9

State v. Hunt, 91 N.J. 338 (1982) 3-4, 6, 7, 9

State v. Schmid, 84 N.J. 535 (1980) 11-12

State v. Williams, 93 N.J. 39 (1983)..... 4

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997)..... 10

Worden v. Mercer Cnty. Bd. of Elections, 61 N.J. 325 (1972) 11

Constitutions

U.S. Const. art. I, § 4 8

Other Authorities

Hon. Dennis J. Braithwaite*, An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 Rutgers L.J. 1 (2001) 4-5

James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761 (1992) 12

Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 Wash. U.L. Rev. 553 (2015)..... 9

Justin Long, *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41 (2006) 4

Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959 (1985)..... 8

Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 Md. L. Rev. 309 (2017)..... 7-8

Robert F. Utter & Sanford E. Pitler, *Speech, Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 Ind. L. Rev. 635 (1987) 5

Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 Notre Dame L. Rev. 1015 (1997) 6-7

Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of A State Constitutional Consciousness*, 29 Rutgers L.J. 763 (1998)..... 5

Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499 (2005) 12

Ronald K. L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 Tex. L. Rev. 1095 (1985)..... 12-13

Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141 (1985) 12

Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707 (1983)..... 5

William J. Brennan Jr., *Address to the New Jersey Bar*, 33 Guild Prac. 152 (1976) 5

William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) 5

PRELIMINARY STATEMENT

New Jersey's state constitutional tradition has carefully tended the balance of personal freedom against bureaucratic power. Through its attention to evolving needs and notions of citizenship, the New Jersey Supreme Court has shaped a body of rights that command stronger protections than their counterparts in federal law. New Jersey's prohibition on fusion voting is inconsistent with those rights and violates the New Jersey Constitution.

Fusion voting enables a candidate to accept the nomination of more than one political party—typically, the Republican or Democratic Party ("major" parties) and a "minor" party such as the Moderate Party. The candidate then appears on the ballot under the banner of both the major and minor party, and the parties' votes are combined to determine the candidate's count. Thus, voters may register their support for a minor party aligned with their values while influencing the race by voting for a cross-nominated major-party candidate who has a realistic chance of winning. Fusion voting was a successful practice in New Jersey and across the country throughout the late nineteenth and early twentieth centuries, until a wave of fusion bans aimed at entrenching the major-party duopoly swept the states. Fusion voting suffered another blow when the U.S. Supreme Court upheld Minnesota's ban in *Timmons v. Twin Cities Area New Party* in 1997.

But the New Jersey Constitution dictates a different result here. New Jersey's anti-fusion laws violate the right to vote as conceived and secured by the state constitution. New Jersey courts have long recognized that the right to vote encompasses not just the right to mark a ballot, but the right to freely choose for whom to vote and to make one's choice meaningful and effective. Anti-fusion laws impermissibly undermine that right.

Likewise, free speech and association rights enjoy greater protection under the New Jersey Constitution than under the federal constitution. Anti-fusion laws are a direct assault on political expression, which sits at the apex of those rights. The anti-fusion laws inhibit minor parties from nominating their preferred standard-bearers and minor-party voters from conveying support for their party at the polls.

Timmons, decided on First Amendment grounds, offers no safe harbor for New Jersey's fusion ban. The New Jersey Constitution is an independent source of individual liberties. This Court should treat it as the charter of first resort, without regard to the narrower scope of cognate federal constitutional provisions. Relatedly, in decisions like *Timmons*, the U.S. Supreme Court tends to underenforce the federal constitution out of deference to the states; a "primacy" approach to state constitutional interpretation avoids improperly importing that deference into state constitutional doctrine. In short, *Timmons* is

a highly unreliable guide to the resolution of the questions presented here, which turn on the robust protections unique to the rights established by the New Jersey Constitution.

To ensure the health of New Jersey's democracy and to honor our state's constitutional tradition, this Court must reject the ban on fusion voting.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus curiae accepts and incorporates the statement of facts and procedural history recited in Appellants' briefing.

ARGUMENT

I. Anti-fusion laws violate the right to vote under the New Jersey Constitution.

To conform to the fifteen-page limit imposed by the Court on *amici* briefs, *amicus curiae* has removed this section. *Amicus* refers the Court to its original filing for context and elaboration.

II. Anti-fusion laws violate the rights to free speech and association under the New Jersey Constitution.

A. A primacy approach to state constitutional interpretation is consistent with principles of judicial federalism and gives full effect to the New Jersey Constitution's independent free speech and association guarantees.

New Jersey courts sometimes look to a set of non-exhaustive factors first outlined in *State v. Hunt* to determine whether to construe the state constitution as giving rise to broader or stronger rights than the federal constitution. 91 N.J.

338, 358–68 (1982) (Handler, J., concurring); *State v. Williams*, 93 N.J. 39, 58 (1983) (adopting factors outlined by Justice Handler). Resort to the *Hunt* factors reflects an "interstitial" approach to state constitutional interpretation. Under an interstitial approach, courts examine relevant state constitutional provisions to decide if they offer reasons to depart from the presumptively appropriate federal standard. *See* Justin Long, *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41, 48 (2006). In this way, state constitutions operate in the gaps or "interstices" of the federal constitution, serving as a supplementary source of rights.

Although analysis of the *Hunt* factors compels the same result, this Court need not apply the *Hunt* factors to adopt a more expansive view of the New Jersey Constitution's free speech and association rights than the First Amendment supplied in *Timmons*. It can and should reach that end by taking a "primacy" approach instead.

Federal constitutional interpretation carries no presumptive validity under a primacy approach, and thus courts need not search for reasons to deviate from federal precedent. "There is no requirement for the New Jersey Supreme Court to ask when to diverge from federal precedent, and there is no need for such a requirement." Hon. Dennis J. Braithwaite*, An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure*

Jurisprudence Under the New Jersey Constitution, 33 Rutgers L.J. 1, 25 (2001). Rather, "primacy courts focus on the state constitution as an independent source of rights, rely on it as the fundamental law, and do not address federal constitutional issues unless the state constitution does not provide the protection sought." Robert F. Utter & Sanford E. Pitler, *Speech, Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 Ind. L. Rev. 635, 645 (1987). At the core of the case for primacy are principles of judicial federalism.[1]

[1] Justice William J. Brennan Jr. is credited with stimulating the "reemergence" of state constitutional law, often called the "New Judicial Federalism." Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of A State Constitutional Consciousness*, 29 Rutgers L.J. 763, 764 (1998). His famous 1977 Harvard Law Review article, *State Constitutions and the Protection of Individual Rights*, criticized the U.S. Supreme Court's willingness to condone violations of civil liberties in the name of "vague, undefined notions of equity, comity and federalism." William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977). He commented that "the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach." *Id.* at 503. Justice Brennan urged that "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." *Id.* at 491. Notably, the 1977 article was the text of a speech Justice Brennan delivered to the New Jersey State Bar Association the year prior. William J. Brennan Jr., *Address to the New Jersey Bar*, 33 Guild Prac. 152 (1976). Justice Stewart G. Pollock, who served on the New Jersey Supreme Court from 1979 to 1999, referred to this article as the "Magna Carta of state constitutional law." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707, 716 (1983).

Justice Pashman advocated convincingly for primacy in his *Hunt* concurrence. Responding to Justice Handler's separate concurring opinion, which set forth what would come to be known as the *Hunt* factors, Justice Pashman observed that the Court had not previously articulated "any rules, principles or theories explaining when it will go beyond the federal courts in protecting constitutional rights and liberties." *Hunt*, 91 N.J. at 354 (Pashman, J., concurring). The Court had "merely stated [its] undoubted power to construe the New Jersey Constitution in accord with [its] own analysis of the particular right at issue." *Id.* Justice Handler's new framework marked a wrong turn, introducing "a presumption against divergent interpretations of our constitution unless special reasons are shown for New Jersey to take a path different from that chosen at the federal level." *Id.* Justice Pashman "would reverse the presumption." *Id.*

Reversing the presumption—that is, accepting primacy—follows from at least three rationales. First, it accords due respect to the state's highest law and tribunal. Whereas, under an interstitial approach, "a state court is compelled to focus on the [U.S.] Supreme Court's decision, and to explain, in terms of the identified criteria, why it is not following the Supreme Court precedent," a primacy approach puts the state constitution first. Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy*

Problems in Independent State Constitutional Rights Adjudication, 72 Notre Dame L. Rev. 1015, 1023 (1997). State constitutions should speak without "prerequisites," *id.*, so that they may meet their promise as "separate fount[s] of liberty," *Hunt*, 91 N.J. at 356 (Pashman, J., concurring). Emboldened by true independence, state supreme courts "will be naturally led to resist every encroachment upon rights . . . ." Brennan Jr., 90 Harv. L. Rev. at 504.

Second, primacy fosters healthy constitutional diversity. "State supreme courts, if not discouraged from independent constitutional analysis, can serve, in Justice Brandeis' words, 'as a laboratory' testing competing interpretations of constitutional concepts that may better serve the people of those states." *Hunt*, 91 N.J. at 356–57 (Pashman, J., concurring) (quoting *New State Ice Co. v. Liebmann,* 285 U.S. 262, 310–11 (1931) (Brandeis, J., dissenting)).

Third, the decisions of the U.S. Supreme Court reflect a "federalism discount," which make them unsuitable models for state courts considering similar claims under their state constitutions. The concept of the federalism discount refers to the Court's tendency to narrowly construe constitutional provisions as a matter of deference rather than substance. In other words, the Court risks the underenforcement of some federal constitutional rights to preserve room for state supreme courts to adopt alternative approaches. *See* Richard Boldt & Dan Friedman, *Constitutional Incorporation: A*

Consideration of the Judicial Function in State and Federal Constitutional Interpretation, 76 Md. L. Rev. 309, 336 (2017). Similarly, the Court has refrained "from imposing on the States inflexible constitutional restraints" that may not fit conditions in a particular state. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973). *See* Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959, 975–76 (1985) ("State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate."). When state courts uncritically follow federal constitutional precedents, they inherit and reproduce diluted protections—and frustrate the U.S. Supreme Court's purpose in carving doctrinal space for constitutional independence at the state level.

The U.S. Supreme Court's hesitance to impose a one-size-fits-all constitutional solution on the fifty states is especially pronounced in cases concerning federal elections. The Elections Clause of the federal constitution gives state legislatures principal authority to administer federal elections by prescribing their "Times, Places and Manner." *U.S. Const.* art. I, § 4. Although Congress may "make or alter" those rules, skepticism toward congressional power to regulate elections and a corresponding deference to

states has animated the Supreme Court's election law jurisprudence in recent decades. *See* Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 Wash. U.L. Rev. 553, 587–94 (2015). As Justice Scalia observed, "detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States." *Crawford v. Marion Cnty. Election Bd*., 553 U.S. 181, 208 (2008) (Scalia, J., concurring).

The New Jersey Supreme Court has recognized the hazards of importing protections diluted by the federalism discount and the attendant necessity of interpreting the New Jersey Constitution with autonomy. In *Robinson v. Cahill*, for example, the New Jersey Supreme Court affirmed that the "State Constitution could be more demanding" because "there is "absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances." 62 N.J. 473, 490 (1973), *on reargument*, 63 N.J. 196 (1973), *and on reh'g*, 69 N.J. 133 (1975). Likewise, in *State v. Hempele*, the New Jersey Supreme Court recognized that the U.S. Supreme Court, "[c]ognizant of the diversity of laws, customs, and mores within its jurisdiction," is "necessarily 'hesitant to impose on a national level far-reaching constitutional rules binding on each and every state.'" 120 N.J. 182, 197 (1990) (quoting *Hunt*, 91 N.J. at 358 (Pashman, J.,

concurring)) (holding that the warrantless search of a defendant's garbage violated Article 1, paragraph 7 of the New Jersey Constitution, despite the U.S. Supreme Court's contrary decision under the federal constitution).

Timmons is precisely the type of U.S. Supreme Court precedent that state courts should hesitate to adopt. Indeed, the very first line of the *Timmons* decision acknowledges its federalism implications. "*Most States* prohibit multiple-party, or 'fusion,' candidacies for elected office," the Court wrote. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353 (1997) (emphasis added). Had the *Timmons* Court deemed Minnesota's anti-fusion laws unconstitutional, thereby setting a federal floor, it would have effectively toppled fusion bans nationwide without the benefit of a fifty-state record. But the Court here need not consider what "*most states*" do. It need not subordinate its unique constitutional tradition to a "homogenized, abstracted, national vision." Sager, 63 Tex. L. Rev. at 976.

State courts have the duty to adopt reasoned interpretations of the state's supreme law, regardless of how the U.S. Supreme Court interprets a different constitution under different practical and institutional circumstances. *Id.* A primacy approach effectuates this duty.

B. Applying the *Hunt* factors compels divergence from federal constitutional free speech and association analyses of anti-fusion laws.

To conform to the fifteen-page limit imposed by the Court on *amici* briefs, *amicus curiae* has removed this section. *Amicus* refers the Court to its original filing for context and elaboration.

C. New Jersey's anti-fusion laws severely burden the rights of minor parties, candidates, and voters to freely speak and associate.

New Jersey's fusion ban unconstitutionally impairs the expressional and associational rights of minor parties and their voters. Whether assessed under strict scrutiny, consistent with the uncompromising protection for fundamental political rights established in *Worden v. Mercer Cnty. Bd. of Elections*, 61 N.J. 325 (1972), or a traditional burden-interest analysis,[2] the fusion ban must yield to New Jerseyans' constitutionally protected prerogatives to associate together in political parties, to choose their party's standard bearer, and to support that standard bearer on the ballot.

The "exceptional vitality" of New Jersey's free speech and association protections has been "frequently voiced" in our common law. *State v. Schmid*,

[2] With certain exceptions, the New Jersey Supreme Court applies a balancing test to resolve constitutional claims, weighing "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg v. Kimmelman*, 99 N.J. 552, 567 (1985).

84 N.J. 535, 557–58 (1980). They are, of course, at their zenith where political speech is involved.[3]

[3] In cases involving commercial—as opposed to political—speech, the New Jersey Supreme Court has treated the state constitutional free speech clause as coextensive with the First Amendment. *See Hamilton Amusement Ctr. v. Verniero*, 156 N.J. 254, 264–65 (1998); *E&J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin*, 226 N.J. 549, 568 (2016). This interpretative methodology has no application outside the commercial speech context and thus no relevance here. *See E&J Equities, LLC*, 226 N.J. at 567-69 (distinguishing cases involving commercial speech, which "is granted less protection than other constitutionally-guaranteed expression" from cases involving political speech on private property and defamation, in which "the State Constitution provides greater protection" than the First Amendment). Nevertheless, a note of caution about "coextension" and its close cousin, "prospective lockstepping," is warranted.

When state courts seek absolute harmony with federal precedents, they stifle the development of state constitutional doctrine. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 804 (1992). They also generate significant confusion.

The use of terms like "coextensive" risk deciding "*too much.*" Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499, 1521 (2005). In other words, courts appear to "prejudge future cases" when they announce that federal constitutional principles are dispositive of state constitutional questions. *Id.* This phenomenon is known as "prospective lockstepping." As the late Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court warned, "[s]ome states appear to be adopting, apparently in perpetuity, all existing or future United States Supreme Court interpretations of a federal constitutional provision as the governing interpretation of the parallel state constitutional provision." Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1166 (1985). But it is "beyond the state judicial power to *incorporate* the Federal Constitution and its future interpretations into the state constitution." Williams, 46 Wm. & Mary L. Rev. at 1521; *see* Ronald K. L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 Tex. L.

Nominating a candidate is a political party's core associational function and the mechanism by which the party affirms its principles, declares its positions, and appeals to potential members. *See Smith v. Penta*, 81 N.J. 65, 77 (1979) (describing the "associational values" of primary elections, which allow "adherents of some political philosophy to advance their goals, proselytize their beliefs and seek to acquire or perpetuate their power"). Under New Jersey's anti-fusion laws, a minor party's "rights to express political ideas and to associate to exchange these ideas to further their political goals" are constrained the moment any candidate accepts a major-party nomination; from that point forward, the minor party can no longer freely associate with that nominee, who may be the best (or only) representative of the party's political message. *Council of Alt. Pol. Parties v. State*, 344 N.J. Super. 225, 242 (App. Div. 2001); *see also Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 214 (1989) (recognizing a "party's protected freedom of association rights to identify the people who constitute the association and to select a standard-bearer who best represents the party's ideology and preferences").

Rev. 1095, 1116 (1985) (referring to prospective lockstepping as "The Problem of Amending Without Amendments"). Treating New Jersey constitutional free speech protections as coextensive with the First Amendment is inappropriate in this case principally because it is not doctrinally supported; it should also be avoided for its potential to sanction or encourage prospective lockstepping.

A corresponding burden simultaneously falls on the associational rights of candidates. A candidate who becomes a major-party nominee may not thereafter affiliate with a minor party on the ballot. The state thus confiscates the most powerful communicative tool available to political aspirants. *See Lautenberg v. Kelly*, 280 N.J. 76, 83 (Law Div. 1994) (inclusion in a party's column is "the ultimate form of endorsement"), *rev'd in part on other grounds by Schundler v. Donovan*, 377 N.J. Super. 339 (App. Div. 2005).

And perhaps no burden is heavier than the one the fusion ban imposes on voters' free expression. Under the fusion ban, voters are substantially limited in their ability to use the ballot to express support for a minor party's platform. The expressive function that fusion enables is powerful and distinctive; fusion allows voters to offer electoral support to a preferred cross-endorsed candidate while communicating that they would like the candidate to govern more progressively or conservatively or to advance a policy championed by the minor party. The fusion ban blunts the ballot's expressive force.

It is no answer to this restraint that a voter may express minor-party support by voting for a candidate on the minor-party line—which is to say, by backing a "protest" or "spoiler" candidate. Nor, for that matter, is it any consolation that a voter may instead preserve their electoral influence by

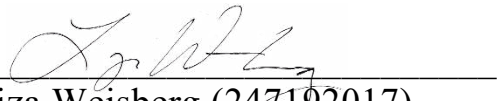
voting for a major-party candidate. In fact, this dilemma highlights the interlocking rights the fusion ban impairs.

Not only do the anti-fusion laws violate New Jerseyans' right to freely speak and to vote, but they pit those fundamental rights against one another. They ensure that the exercise of one is penalized with the forfeiture of the other. These are "rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity v. State of N.J.*, 385 U.S. 493, 500 (1967); *see Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (striking down a durational residence law that unconstitutionally "burden[ed] the right to travel" by forcing individuals to "choose between travel and the basic right to vote"). For a minor-party voter, the decision to cast a ballot for the candidate of one's choice means forgoing the chance to convey electoral support for one's party; conveying electoral support for one's party means abandoning the opportunity to exercise the franchise meaningfully and effectively. This coercive bind is intrinsic to New Jersey's fusion ban and anathema to democratic norms.

CONCLUSION

This Court should strike down New Jersey's anti-fusion laws as violative of the robust and independent rights to vote and to freely speak and associate enshrined in our state constitution.

Respectfully submitted,



Liza Weisberg (247192017)
Jeanne LoCicero (024052000)
American Civil Liberties Union
of New Jersey Foundation
570 Broad Street, 11th Floor
P.O. Box 32159
Newark, NJ 07102
973-854-1705
lweisberg@aclu-nj.org

Robert F. Williams (016111980)
Distinguished Professor of Law Emeritus
Rutgers Law School
768 W. Redman Avenue
Haddonfield, NJ 08033
609-330-7600
rfw@camden.rutgers.edu

Ronald K. Chen (027191983)
Rutgers Constitutional Rights Clinic
Center for Law & Justice
123 Washington St.
Newark, NJ 07102
973-353-5378
ronchen@law.rutgers.edu

Counsel for *Amicus Curiae*

Dated: August 25, 2023

Eric S. Aronson
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
212.806.6627
earonson@stroock.com

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7

Docket No: A-003542-21

BRIEF OF PROFESSORS PETER ARGERSINGER, DALE BAUM, COREY BROOKS, LISA DISCH, COLIN GORDON, IRA KATZNELSON, MICHAEL KAZIN, and J. MORGAN KOUSSER

Eric S. Aronson
Counsel of Record

Jerry H. Goldfeder (admitted *pro hac vice*)

STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
(212) 806-6627
earonson@stroock.com

Counsel for Amici Curiae Peter Argersinger, Dale Baum, Corey Brooks, Lisa Disch, Colin Gordon, Ira Katznelson, Michael Kazin, and J. Morgan Kousser

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST BY AMICUS CURIAE 1

PRELIMINARY STATEMENT 1

ARGUMENT 1

1. Fusion Played a Crucial Role Throughout the 19th Century 1

    1. New Jersey 3

    2. Pennsylvania 3

    3. Iowa and Vermont 4

    4. North Carolina 6

    5. Kansas 8

2. In the Guise of Ballot Reform, Two-Party Dominance Undermined Fusion Voting 9

3. Anti-Fusion Laws Have Had Serious Anti-Democratic Effects 11

4. Modern Fusion Voting: New York and Connecticut as Models 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Alana Semuels, *Can the Working Families Party Keep Winning?*, THE ATLANTIC, Aug. 15, 2016 14

Bilal Sekou et al., Beyond Donkeys and Elephants, Minor Political Parties in Contemporary American Politics, *The New York and Connecticut Working Families Party* (Richard Davis ed. 2020) 15

Brian Lockhart & Keila Torres Ocasio, *Working Families Party Claims Big Victory*, C.T. POST, Feb. 28, 2015 15

Bruce A. Bendler, *The Steam Mill and Jacksonian Politics: The Career of William N. Jeffers*, 4 NJS: AN INTERDISCIPLINARY J. 41 (2018) 3

Ryland Fletcher to John Porter (Chair of Vermont Whig State Committee) July 28, 1854, BURLINGTON FREE PRESS, Aug., 21, 1854 6

DAILY JOURNAL (Montpelier, Vt. Oct. 14, 1854) 6

GREEN MOUNTAIN FREEMAN (Montpelier, Vt. Sept. 14, 1854) 6

Helen G. Edmonds, The Negro and Fusion Politics in North Carolina, 1894-1901 (U. of N.C. Press 1951) 6, 7, 8

Helen L. Sumner et al., History of Labour in the United States, *Citizenship (1827-1833)* (MacMillan Co. Vol. I 1918) 4

Howard A. Scarrow, *Duverger's Law, Fusion and the Decline of American "Third" Parties,* 39 THE WESTERN POLITICAL Q. 634 (1986) 1

J. Morgan Kousser, *Progressivism for Middle-Class Whites Only: The Distribution of Taxation and Expenditures for Education in North Carolina, 1880-1910*, Cal. Inst. of Tech. Working Paper, Paper No. 177 (1979) 7

J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-

1910 (Yale U. Press 1974) 7, 8

Jeffrey Ostler, *Why the Populist Party Was Strong in Kansas and Nebraska but Weak in Iowa*, 23 WESTERN HIST. Q. 451 (1992) 9

Kirk Johnson, *The 1990 Elections: Connecticut – Battle for Governor; Weicker Triumphs Narrowly As Loner in a 3-Way Race*, N.Y. TIMES, Nov. 7, 1990 14

Mark Kornblush, Why America Stopped Voting: The Decline Of Participatory Democracy And The Emergence Of Modern American Politics (N.Y.U. 1999) 12

Melissa R. Michelson & Scott J. Susin, *What's in a Name: The Power of Fusion Politics in a Local Election*, 36 THE U. OF CHICAGO PRESS ON BEHALF OF THE NORTHEASTERN POLITICAL SCIENCE ASSOCIATION 301 (2004) 14

Michael F. Holt, The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War, (Oxford U. Press 1999) 5, 6

Michael J. Dubin, United States Congressional Elections, 1788-1997: The Official Results of the Elections of the 1st through 105th Congresses (McFarland & Co. 1998) 3

MUSCATINE J. Vol. V (Bloomington, Iowa) Mar. 10, 1854 5

Peter H. Argersinger, "*A Place on the Ballot": Fusion Politics and Antifusion Law*, 85 THE AM. HIST. REV. 287 (1980) 2, 10, 11

Peter H. Argersinger, The Limits of Agrarian Radicalism: Western Populism and American Politics (U. Press of Kan. 1995) 8, 9, 12

Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STANFORD L. REV. 335 (1989) 4

Robert R. Dykstra, Bright Radical Star: Black Freedom and White Supremacy on the Hawkeye Frontier (Harvard U. Press 1993) 5

Unsigned Note, *The Constitutionality of Anti-Fusion and Party-Raiding Statutes*, 7 COLUM. L. REV. 1207 (1947) 13

William R. Kirschner, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUMBIA L.R. 683 (1995) 13

William Salter, The Life of James W. Grimes, governor of Iowa, 1854-1858; a senator of the United States (D. Appleton & Co. 1876) 5

STATEMENT OF INTEREST BY AMICUS CURIAE

Amici here are experts on fusion voting in the United States, including in New Jersey. The Court is respectfully referred to the Certification for more information. Amici prepared this brief without compensation.

PRELIMINARY STATEMENT

This brief traces the history of fusion voting, which expanded participation in the democratic process, and facilitated the free association of individuals to strengthen our democracy. This has been true since the early nineteenth century, when minor parties began cross-nominating competitive candidates in New Jersey and throughout the country. When fusion voting was outlawed, it led to a weakening of the democratic process by restricting voter choice. Where fusion still exists, most prominently in New York and Connecticut, its contribution to the democratic process is clear.

ARGUMENT

1. Fusion Played a Crucial Role Throughout the 19th Century

For nearly as long as the United States has had formal political parties, "third," or minor, parties have leveraged their cross-nominations to support and elect competitive candidates.[1] In the 1840s and 1850s, when the two major

[1] Howard A. Scarrow, *Duverger's Law, Fusion and the Decline of American "Third" Parties,* 39 THE WESTERN POLITICAL Q. 634 (1986). The term "third party" is used interchangeably with "minor party" in this brief to highlight the way fusion actually works in elections.

parties either supported or acquiesced to slavery, the Liberty Party, Free Soil Party, and other minor parties opposing slavery used cross-nominations to elect abolitionists at the state and federal level. This dynamic was crucial in forming the antislavery Republican Party as the new major party to replace the ambivalent Whig Party.

Scholars likewise credit fusion with enabling many of the electoral successes recorded by minor parties in the latter part of the 19th century. From 1874 to 1892, such parties received at least 20% of the vote in one or more elections in more than half of the non-southern states based upon their cross-nominations.[2] As a result, in some states these parties played a critical role throughout this era, as the two major political parties were closely matched numerically and the minor parties therefore held the balance of power.[3] This made minor parties and the social movements they represented a consequential force in shaping public policy, particularly regarding economic development, governmental reform, and the political rights of African-Americans and the working class. Thus, fusion voting permitted legislatures to secure long-lasting reforms. The following is a brief survey of fusion's role in New Jersey and

---

[2] *See* Peter H. Argersinger, "*A Place on the Ballot": Fusion Politics and Antifusion Law*, 85 THE AM. HIST. REV. 287, 289 (1980) (hereinafter Argersinger 1980).
[3] *Id.* at 289 ("Between 1878 and 1892 minor parties held the balance of power at least once in every state but Vermont, and from the mid-1880s they held that power in a majority of states in nearly every election.").

other illustrative states during this period.

1. New Jersey

Throughout the 19th and early 20th centuries, more than one hundred candidates for elective office in New Jersey received cross-nominations. (Pa271-74.) Minor parties started making cross-nominations in New Jersey as early as 1826, when congressional candidate George Holcombe ran on both the Democratic Party line and a minor line as well.[4] In 1856, just two years after the Republican Party's founding, two of New Jersey's congressmen were elected through a fusion of the Republican and American parties.[5]

New Jersey's 1878 congressional elections also highlighted the role of fusion. In that election, the Greenback Party (which focused on anti-monopoly, pro-labor issues, including non-gold-backed paper currency, an eight-hour work day, and union protections) mostly nominated Democratic candidates for office. The Democratic candidates fusing with the Greenbackers mostly won, and those without them lost, demonstrating the political efficacy of fusion.

2. Pennsylvania

In neighboring Pennsylvania, the Working Men's Party further

---

[4] Bruce A. Bendler, *The Steam Mill and Jacksonian Politics: The Career of William N. Jeffers*, 4 NJS: AN INTERDISCIPLINARY J. 41, 56 (2018).
[5] Michael J. Dubin, United States Congressional Elections, 1788-1997: The Official Results of the Elections of the 1st through 105th Congresses 87, 176 (McFarland & Co. 1998).

demonstrated fusion's potential in the early 1800s.[6] The party reached its height of success when it nominated twenty-one joint candidates with the Jackson Democrats in the 1828 elections, all of whom were elected.[7] Indeed, *both* major parties tried to ally themselves with the Working Men's Party, ensuring that labor interests would be at the forefront of the elections.[8] This was particularly critical because land-ownership was a requirement to seek public office and many workers could not run for office themselves, compelling them to support one of the two main party candidates.[9] Occasionally, the Working Men's Party nominated its own candidates, but only through cross-nominations were their nominees elected.[10] Thus, it was only through fusion that voters supporting the Working Men's Party were able to achieve their goals.

3. Iowa and Vermont

In the decades preceding the Civil War, minor parties committed to the abolition of slavery used fusion to enact their agenda despite long-standing opposition from the two major parties, the Whigs and Democrats.

---

[6] Helen L. Sumner et al., History of Labour in the United States, *Citizenship (1827-1833)*, 201 (MacMillan Co. Vol. I 1918).
[7] *Id.* at 198.
[8] *Id.* at 199.
[9] Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STANFORD L. REV. 335, 341-42 (1989).
[10] Sumner, *supra* note 6, at 198.

In Iowa, Whigs and anti-slavery advocates used a fusion cross-nomination strategy that elevated the issue of slavery to become a major policy question in the state. After the Kansas-Nebraska Act was introduced, the Iowa Free Soil Party and the Whig Party cross nominated antislavery candidate James Grimes for governor. The Free Soil support proved decisive, as Grimes won narrowly, while Whigs and Free Soilers divided the anti-Democratic vote on down ballot offices where they ran their own, non-cross-nominated candidates. The effects of this election were larger than just the governorship, as the experience of cross-party fusion voting paved the way for the emergence of a new major party—the Republicans—that better represented the electorate's evolving views on slavery and other key issues.[11]

In Vermont, which strongly opposed slavery, Free Democrats and Whigs cross-nominated candidates for many offices in the elections of 1854, again in response to the Kansas-Nebraska Act. In pursuit of the anti-slavery vote, the Whigs nominated Free Democrat Ryland Fletcher for Lieutenant and, reciprocally, Free Democrats supported two Whig candidates in congressional

---

[11] MUSCATINE J. Vol. V (Bloomington, Iowa) Mar. 10, 1854; Michael F. Holt, The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War, 866-868 (Oxford U. Press 1999); Robert R. Dykstra, Bright Radical Star: Black Freedom and White Supremacy on the Hawkeye Frontier 116-117 (Harvard U. Press 1993); William Salter, The Life of James W. Grimes, governor of Iowa, 1854-1858; a senator of the United States, 1859-1869 115-116 (D. Appleton & Co. 1876).

races, but chose their own, non-cross-nominated candidate in a third congressional race. Fletcher received approximately 1,000 votes more than other statewide Whig candidates, demonstrating the effectiveness of cross-nominations to garner votes from antislavery advocates who did not otherwise support Whigs. Ultimately, the issue of slavery became so important to voters that the Vermont Whig Party and the rest of the state's antislavery political community reconstituted themselves as the new Vermont Republican Party.[12] Without fusion voting, these otherwise distinct constituencies might never have come together.

4. North Carolina

In the late 1800s and early 1900s, the cross-racial fusion alliance of the Populists and Republican Party in North Carolina defeated the segregationist "Bourbon Democratic" machine from 1894 through 1898, thanks to increased Black political participation at the polls.[13] Indeed, Populist-Republican fusion produced the highest turnout—85% for both white and Black voters—in a post-Reconstruction southern election, leading to education and economic

---

[12] *Ryland Fletcher to John Porter (Chair of Vermont Whig State Committee) July 28, 1854*, BURLINGTON FREE PRESS, Aug., 21, 1854; GREEN MOUNTAIN FREEMAN (Montpelier, Vt. Sept. 14, 1854); DAILY JOURNAL (Montpelier, Vt. Oct. 14, 1854); Holt, *supra* note 11 at 871-872, 940.

[13] Helen G. Edmonds, The Negro and Fusion Politics in North Carolina, 1894-1901 218 (U. of N.C. Press 1951).

reforms that benefited Black Americans.[14] Unfortunately, the success was short-lived due to white-supremacist backlash.

The specifics of fusion in North Carolina are worth considering. An alliance of local Populists—representing smallholding white farmers—and Republicans—who many white voters were unwilling to support due to their identification as the party of Abraham Lincoln and Black voters—won control of state government following North Carolina's state election in 1894.[15] The newly elected Republican-Populists enacted laws addressing the plight of farmers, including lending reforms and designating federal monies for public schools. The North Carolina legislature further "crowned its achievements" with two rounds of election reform, in 1895 and then again in 1897 following another sweeping fusionist victory.[16]

Specifically, the legislature enacted electoral reforms to secure the voting rights of "tenant farmers, sharecroppers, [and] city workers, white and black."[17] Reform began in 1895 with a wholesale repeal of the election laws of

---

[14] J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910 182-187 (Yale U. Press 1974); J. Morgan Kousser, *Progressivism for Middle-Class Whites Only: The Distribution of Taxation and Expenditures for Education in North Carolina, 1880-1910*, Cal. Inst. of Tech. Working Paper, Paper No. 177 (1979).
[15] Edmonds, *supra* note 13, at 37-38.
[16] *Id.* at 41.
[17] *Id.* at 70, 77.

1877, which Democrats had designed to give themselves sole control over supervising elections and to suppress the votes of "unwary Negroes from 1876 to 1894" and those of "Populists from 1892 to 1894."[18] The fusion-elected alliance repealed such laws, including "intricate" voter registration requirements that Democrats had relied on to reject or even arrest voters on Election Day. In place of such laws, the alliance restricted voter challenges, a practice that Democrats had used to deny registered voters at the polls. All told, voting rights reforms by the fusion-inspired alliance nearly doubled votes cast in "Black counties" from 1892 to 1896.[19] As a result of the reforms made possible by fusion voting, North Carolina at that time had "probably the fairest and most democratic election law in the post-Reconstruction South."[20]

5. Kansas

Kansas Populists and Democrats also used fusion strategically in the early 1890s to increase their power over "strictly local and state political matters."[21] Fusion voting by the two parties arose in response to an increasingly dissatisfied agrarian population, which did not see itself represented by either Democrats or Republicans. Due to economic downturns,

---

[18] *Id*. at 70.
[19] *See id.* at 56.
[20] Kousser, The Shaping of Southern Politics*, supra* note 14 at 187.
[21] Peter H. Argersinger, The Limits of Agrarian Radicalism: Western Populism and American Politics 21, 105 (U. Press of Kan. 1995) (hereinafter Argersinger 1995).

farmers in Kansas began demanding reforms but were ignored by both major parties, each of which was hostile to the interests of small landholders.[22]

Indeed, as a result of its alliance with Democrats in 1897, the Populists obtained a majority in both houses of the state legislature, allowing for the enactment of major reforms. These included "laws providing for railroad regulation, ballot reform, … banking regulation, … antitrust legislation, conservation, and a series of labor protections … [such as] anti-blacklisting, … and improved health and safety conditions for miners."[23] The Populists thrived in Kansas and neighboring Nebraska because fusion "encouraged farmers to form an independent political party" that could align with major party candidates willing to fight for their priorities.

2. In the Guise of Ballot Reform, Two-Party Dominance Undermined Fusion Voting

Minor political parties began to decline in the 1890s with the replacement of the "party ticket" system with the so-called "Australian Ballot." Under the party ticket system, voters selected the ballot of their chosen party and deposited it into the ballot box.[24] The Australian Ballot, in contrast, was a uniform, state-sponsored, state-regulated ballot used by all

---

[22] *See* Jeffrey Ostler, *Why the Populist Party Was Strong in Kansas and Nebraska but Weak in Iowa*, 23 WESTERN HIST. Q. 451, 471 (1992).
[23] Argersinger 1995, *supra* note 21, at 189.
[24] *Id.* at 157.

voters, which contained all of the candidate nominations approved by the state.

Adoption of the Australian Ballot was ostensibly motivated by the problematic presidential elections of the 1880s and public support to eliminate corrupt election practices (unrelated to fusion).[25] However, because implementation of the Australian Ballot was mainly orchestrated by legislatures controlled by the two major parties, "those who controlled the state … [had] the power to structure the system in their own behalf."[26]

And legislatures throughout the U.S. made full use of this power, adopting new electoral restrictions making it difficult for minor parties to accrue political power or present serious electoral or political competition. In dozens of states, laws were passed to prohibit fusion: some were explicit bans, others operated indirectly, but they all had the desired effect of preventing minor parties from cross-nominating and continuing in the prominent role they had played for decades.[27]

One such state was New Jersey, which banned fusion not once, but twice—in 1907 and then, after a brief period of legalization, again in 1921. Since then, all New Jersey voters have been forced to vote for a major party in order to support a competitive candidate.

---

[25] *Id.* at 136.
[26] *Id.* at 136.
[27] *See* Argersinger 1980, *supra* note 2.

3. Anti-Fusion Laws Have Had Serious Anti-Democratic Effects

Anti-fusion laws suppressed votes of third-party and major-party voters alike. In the 1892 presidential race, voters in Oregon received differently configured ballots depending on whether they voted in counties under Democratic or Republican control. Democratic-controlled counties designed the ballot to facilitate fusion by twice listing the name of Nathan Pierce, a Democratic-Populist elector for Grover Cleveland, once on each of the two political party lines. In counties controlled by Republicans, Pierce's name appeared on the ballot only once, identified as a Populist-Democrat. The Republican ballot design forced Pierce supporters to support him as a Democrat, while the Democrat-designed ballots allowed both Populists and Democrats to vote for Pierce on the party line of their choice. In Democratic counties, Pierce received near unanimous support from Populist voters and 92% of the Democratic vote. In Republican counties, 9% of the Populists withheld their votes, as did even higher numbers of Democrats. In those counties, Pierce barely edged out his Republican opponent. The aggregated ballot design suppressed approximately 5,000 Democrat and Populist votes.[28]

Anti-fusion laws have also unmistakably changed the default setting of the American political party system. Following the presidential election of

[28] *See id.* at 294.

1896, "when the possibility of defeat through a fusion of their opponents had thoroughly alarmed Republicans," anti-fusion legislation spread rapidly in Republican-dominated legislatures.[29] Indeed, anti-fusion laws "became so widely adopted in other states—and so useful politically to the dominant party—that its provisions came to be seen *as logically necessary and unexceptionable*."[30] The potential for third-party fusion alliances brought flexibility and competitiveness to politics--a two-party system with flex in the joints. No more.

Over time, anti-fusion laws have clearly limited the "responsiveness of the party system to changing political circumstances."[31] When voters are forced to support one or the other major party to cast a meaningful vote, those parties often have a greater incentive to mobilize their core voters than to adjust their priorities to reflect public sentiment. When a minor party can offer a cross-nomination, major party candidates have an opportunity and imperative to engage a broader swath of the electorate. As history has taught, fusion voting facilitates a more robust and responsive political environment.

---

[29] Argersinger 1995, *supra* note 21, at 20.
[30] *Id.* at 161, 165 (emphasis added).
[31] Mark Kornblush, Why America Stopped Voting: The Decline Of Participatory Democracy And The Emergence Of Modern American Politics 125 (N.Y.U. 1999).

4. Modern Fusion Voting: New York and Connecticut as Models

Despite fusion voting's disappearance in most states, it has remained lawful in New York and Connecticut.[32] Their experiences shed light on some likely effects of permitting third parties in New Jersey to cross-nominate.

Like in other states, the New York Legislature sought to ban fusion voting in the early 20th century. However, the New York Court of Appeals repeatedly ruled at that time that anti-fusion statutes violated the state constitution.[33] While Democrats and Republicans have remained New York's dominant political parties, there have typically been a small number of influential minor parties over the last century. These parties have generated increased political activity, provided the margin of victory for many competitive candidates, and facilitated greater government responsiveness.

For instance, John F. Kennedy won New York's electoral votes (and thus the 1960 presidential election) with a margin of victory owing to the votes he received on the Liberal Party line.[34] Similarly, in the 1993 New York City mayoral election, Republican nominee Rudolph Giuliani ran on the Liberal

---

[32] A few other states, such as California, New Hampshire, Vermont, and Oregon, either allow fusion in specific, limited circumstances or allow multiple nominations but prohibit parties from having their own lines on the ballot.
[33] *See* Unsigned Note, *The Constitutionality of Anti-Fusion and Party-Raiding Statutes*, 7 COLUM. L. REV. 1207, 1211-12 (1947).
[34] William R. Kirschner, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUMBIA L.R. 683, 683 n.2 (1995).

Party line, and, as a result, prevailed over incumbent mayor David Dinkins.[35]

In Connecticut, cross-nominations have been on the ballot in the last few decades. In the early 1990s, a coalition of moderate Democrats, Republicans, and independents formed the politically moderate A Connecticut Party ("ACP").[36] The ACP cross-nominated a mix of Democratic and Republican candidates, including Democratic Secretary of State Miles Rapoport, whose 127,000 ACP votes far exceeded his 2,700 vote margin of victory. (Pa202-18.)

While the retirement of key ACP leadership facilitated the party's demise, the ACP built meaningful support for a moderate "good government" agenda in its brief existence. More recently, the Independent Party of Connecticut has likewise used cross-nomination to support the election of moderate candidates on both sides of the aisle. (Pa242-54.)

And, another example, the Connecticut Working Families Party, was founded in 2002 by labor unions and activists. In the close 2010 election, Democratic candidate Daniel Malloy received 26,308 votes on this minor party line, greater than his margin of victory over Republican Tom Foley.[37] While

---

[35] *See* Melissa R. Michelson & Scott J. Susin, *What's in a Name: The Power of Fusion Politics in a Local Election*, 36 THE U. OF CHICAGO PRESS ON BEHALF OF THE NORTHEASTERN POLITICAL SCIENCE ASSOCIATION 301, 306 (2004).
[36] *See* Kirk Johnson, *The 1990 Elections: Connecticut – Battle for Governor; Weicker Triumphs Narrowly As Loner in a 3-Way Race*, N.Y. TIMES, Nov. 7, 1990.
[37] Alana Semuels, *Can the Working Families Party Keep Winning?*, THE ATLANTIC, Aug. 15, 2016.

the WFP has typically nominated Democratic candidates, it has also nominated philosophically-aligned Republicans.[38] (Pa176-81.) Thus, fusion has succeeded in bringing new voices and new voters into the political process.[39]

CONCLUSION

Fusion voting has an extensive and vital history in the electoral politics of New Jersey and the country writ large. It provides voters with a greater freedom of choice which has been shown to facilitate more responsive lawmaking by aligning our two-party system more closely with the diverse and nuanced views of the voting.

/s/ Eric S. Aronson

Eric S. Aronson, *Counsel of Record*

Jerry H. Goldfeder (admitted *pro hac vice*)
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
(212) 806-6627
earonson@stroock.com

Counsel for Amici Curiae

[38] Brian Lockhart & Keila Torres Ocasio, *Working Families Party Claims Big Victory*, C.T. POST, Feb. 28, 2015; Bilal Sekou et al., Beyond Donkeys and Elephants, Minor Political Parties in Contemporary American Politics, *The New York and Connecticut Working Families Party* 111 (Richard Davis ed. 2020).
[39] Sekou, *supra* note 38 at 109.

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3542-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3543-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)

BRIEF OF AMICUS CURIAE PROFESSOR TABATHA ABU EL-HAJ

SAIBER LLC
Vincent C. Cirilli, Esq. (116472014)
VCirilli@saiber.com
18 Columbia Turnpike, Suite 200
Florham Park, NJ 07932
973.622.3333
Counsel for Amicus Curiae

WACHTELL, LIPTON, ROSEN & KATZ
Jonathan M. Moses, Esq. (038781996)
JMMoses@wlrk.com
Michael L. Thomas, Jr., Esq. (*admitted pro hac vice*)
MLThomas@wlrk.com
51 West 52nd Street
New York, NY 10019
212.403.1000
On the Brief for Amicus Curiae

Date Submitted: August 25, 2023

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY 3

ARGUMENT 3

I. In Failing to Consider the Role of Political Parties as Political Organizers, the Timmons Majority Failed to Appreciate the Full Scope of the First Amendment Burdens Imposed by Anti-Fusion Laws. (Pa1–2) 3

II. In Treating the Benefits to Political Stability of the Two-Party Duopoly as Self-Evident, the Timmons Majority Failed to Consider the Ways That the Two-Party Duopoly Has Failed to Deliver Political Responsiveness or Stability. (Pa1–2)..... 6

A. What Is Responsible Party Government Theory? 7

B. The Two-Party Duopoly Has Failed to Deliver Political Stability or Democratic Accountability. 9

i. Americans' frustrations with the two major political parties threatens political stability and has eroded trust in democracy itself. 11

ii. Fusion benefits the stability of our democracy by productively channeling frustration with the two major parties. 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Americans for Prosperity Found. v. Bonta,
141 S. Ct. 2373 (2021).....6

Anderson v. Celebrezze,
460 U.S. 780 (1983).....5

Ill. State Bd. of Elections v. Socialist Workers Party,
440 U.S. 173 (1979).....3

NAACP v. Button,
371 U.S. 415 (1963).....6

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997).....1

Williams v. Rhodes,
393 U.S. 23 (1968).....3

Other Authorities

AM. POLITICAL SCI. ASS'N, Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties of the American Political Science Association, 44 AM. POL. SCI. REV. 1 (1950).....8

Chris Leaverton & Michael Li, Gerrymandering Competitive Districts to Near Extinction (Aug. 11, 2022), BRENNAN, https://perma.cc/C6C9-YNUB.....11

FAIRLEIGH DICKINSON UNIVERSITY, NJ Residents Under 30 more Progressive but not more Democratic (Dec. 16, 2022), https://perma.cc/V7ES-EG3K.....13

JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY (2022).....11

LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (1st ed. 2008).....9

MARIST, Americans Lack Confidence in New Congress' Ability to Reach Bipartisan Agreement (Dec. 15, 2022), https://perma.cc/Q2U3-G4SP.....12

MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012) 9

Michael J. Klarman, Foreword: The Degradation of American Democracy — And the Court, 134 HARV. L. REV. 1 (2020).....11

Michael W. McConnell, Moderation and Coherence in American Democracy, 99 CALIF. L. REV. 373 (2011) 8

Nancy L. Rosenblum, Primus Inter Pares: Political Parties and Civil Society, 75 CHI.-KENT L. REV. 493 (2000).....8

New Jersey, Statewide Voter Registration Summary (Feb. 1, 2023), https://perma.cc/2MNT-ZNYH.....10

PEW RESEARCH CENTER, As Partisan Hostility Grows, Signs of Frustration With the Two-Party System (Aug. 9, 2022), https://perma.cc/AS2R-5XDA 12

PEW RESEARCH CENTER, Public Trust in Government: 1958-2022 (June 6, 2022), https://perma.cc/L25C-GV4P 12

POLITICO, Democrats Have Won Nine of New Jersey's 12 U.S. House Seats (Jan. 12, 2023), https://perma.cc/TJ6B-NCZR.....14

SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES (2009) 9

Tabatha Abu El-Haj & Didi Kou, Associational Party Building: A Path to Rebuilding Democracy, 122 COLUM. L. REV. FORUM 127 (2022) 6

Tabatha Abu El-Haj, Networking the Party: First Amendment Rights & the Pursuit of Responsive Party Government, 118 COLUM. L. REV. 1225 (2018)..... 4, 7, 10

PRELIMINARY STATEMENT

This amicus brief asserts that the U.S. Supreme Court's interpretation of the U.S. Constitution's freedom of association in Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), lacks persuasive value for this Court in analyzing the freedom of association under New Jersey's Constitution. The decision was grounded in flawed conceptions of what political parties are and what they do in our democracy and rested on assumptions about the benefits of a rigid two-party system that have proven incorrect in the intervening years.

The Timmons majority first erred by failing to identify the precise nature of the constitutional burdens imposed on a minor party and its members by anti-fusion laws. Anti-fusion laws implicate the freedom of association, a right independent and distinct from the freedom of speech. But the Timmons majority focused almost exclusively on the burdens that anti-fusion laws impose on a political party's and its members' political speech rights and correspondingly gave short shrift to a minor political party's strong associational interests in nominating its own standard bearer. In eliding the distinctions between these First Amendment rights, the Court's analysis revealed key misunderstandings about the role of political parties in our democracy; instead of mere vehicles for political speech, political parties are primarily mechanisms for organizing political activity. And by barring minor political parties from nominating their

first-choice candidate, anti-fusion laws deprive minor political parties of an essential party-building mechanism; therefore, in addition to the burdens that anti-fusion laws place on political speech, the laws also place severe burdens on the freedom of association that the Timmons majority failed to appreciate.

A second key error in Timmons was its holding, offered without analysis and with little more than conjecture, that anti-fusion laws are justified by the states' interests in strengthening the two-party system because of the purported political stability that that system creates. That specious conclusion—not argued in the courts below or before the Supreme Court—was wrong. As shown below, anti-fusion laws that systematically marginalize minor parties have failed to deliver political responsiveness and have continued to corrode political stability. This reality undermines the key holdings of Timmons, and itself casts doubt as to whether anti-fusion laws should be permitted by the First Amendment.

For these reasons and for those explained in the Appellants' brief, this Court should strike down New Jersey's anti-fusion laws based on the robust political rights and protections set forth in the New Jersey Constitution.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies on the facts and procedural history provided by the Appellants. (Pb3–28.)

ARGUMENT

I. In Failing to Consider the Role of Political Parties as Political Organizers, the Timmons Majority Failed to Appreciate the Full Scope of the First Amendment Burdens Imposed by Anti-Fusion Laws. (Pa1–2)

The Timmons majority first erred by failing to identify the precise First Amendment rights implicated by anti-fusion laws. Though the majority stated that it was "uncontroversial" that the New Party "has a right to select its own candidate," the Court ultimately held that it did not severely burden the New Party's associational rights that its candidate of choice could not appear on the ballot as a New Party candidate because the Party could nominate an alternate candidate or endorse its candidate of choice while staying off the ballot. Id. at 359–60; cf. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) ("The freedom to associate as a political party, a right we have recognized as fundamental, has diminished practical value if the party can be kept off the ballot."); Williams v. Rhodes, 393 U.S. 23, 31 (1968) (observing "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot").

The Court blithely concluded that the associational harm was not severe because the Party "retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign." Timmons, 520 U.S. 520 363. And the Court dismissed out of hand the New Party's weighty interests in its admonishment that "Ballots serve primarily to elect candidates, not as forums for political expression." Timmons, 520 U.S. at 363.

However, to borrow the Court's phrasing, political parties serve primarily to elect candidates, not (merely) as forums for political expression. The Court failed to consider that political parties are political organizers—dynamic amalgams of individuals, organizations, and social networks with often conflicting ideas and messages.[1] If the Court understood what political parties are and what they do, it could not have concluded that a "party's ability to send a message to the voters and to its preferred candidates," with endorsements, campaign ads or door-knocking, substituted for the party's ability to place its chosen, willing, and otherwise qualified candidate on the ballot. Id. Political candidates are not fungible. Candidates possess idiosyncratic backgrounds and characteristics and belong to unique sets of networks and institutions, and their

[1] This is confirmed by this record. See Pa47, 49–51, 60, 81, 156–57, 197, 200, 213, 240; see also Tabatha Abu El-Haj, Networking the Party: First Amendment Rights & the Pursuit of Responsive Party Government, 118 COLUM. L. REV. 1225, 1258–63 (2018).

nominations uniquely drive a party's ability to associate with different constituents throughout the electorate.

Anti-fusion laws impose severe burdens on associational rights because they frustrate a fledgling party's ability to process voter information, mobilize volunteers, identify and recruit new members, fundraise, and calculate the electoral impact of its members' investment in these core associational activities. (Pa199, 205–6, 245–46, 283–84.) Nominating candidates on the ballot uniquely drives a political party's ability to associate with broad and competing interests within the electorate. See Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 224 (1989) (noting that freedom of association means "the right to identify the people who constitute the association" and "to select a standard bearer who best represents the party's ideologies and preferences"). Anti-fusion laws frustrate a minor party's ability to calculate the electoral impact of the party's investment in party-building activities. Prospective party members and donors lose the ability to assess whether the minor party can deliver responsive policy. Cf. Anderson v. Celebrezze, 460 U.S. 780, 792 (1983) ("Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign.").

Timmons lacks persuasive value here because it failed to acknowledge the full scope of the burdens anti-fusion laws place on a minor political party's ability to identify, appeal to, inform, organize, mobilize, and raise money from party supporters. Lack of access to the ballot with a party's first-choice candidate severely impairs a fledgling political party's ability to engage in these core associational activities essential to political organizing.[2] (Pa49–51.) This Court should therefore consider the full scope of the harm and the chilling effect of anti-fusion laws on associational and speech rights and the ways that anti-fusion laws undermine minor political parties' capacity to engage in core associational activities. Cf. Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2384 (2021) ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'") (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).

II. In Treating the Benefits to Political Stability of the Two-Party Duopoly as Self-Evident, the Timmons Majority Failed to Consider the Ways That the Two-Party Duopoly Has Failed to Deliver Political Responsiveness or Stability. (Pa1–2)

Central to the majority ruling in Timmons was the empirical presumption (without any supporting evidence) that an exclusionary two-party system has

[2] See generally Tabatha Abu El-Haj & Didi Kou, Associational Party Building: A Path to Rebuilding Democracy, 122 COLUM. L. REV. FORUM 127 (2022).

facilitated "political stability" in the United States. But in the twenty-five years since Timmons, the two-party duopoly has not produced "political stability" or good governance. Instead, it has contributed to political instability and fanned the flames of extremism. As reviewed below, the Court's flawed presumptions regarding the two-party duopoly—rooted in a mid-twentieth-century school of thought called Responsible Party Government theory—have proven incorrect in the intervening years. This error in the Court's reasoning undermines arguments that a state's interests in upholding the two-party duopoly by means of anti-fusion laws can or should be rooted in concerns about "political stability."

A. What Is Responsible Party Government Theory?

Chief Justice Rehnquist's flawed conception of political parties is consistent with a mid-twentieth-century school of American political science called "Responsible Party Government."[3] In the seminal statement of the theory, a working group of the American Political Science Association declared, "The fundamental requirement of such accountability is a two-party system in which the opposition party acts as the critic of the party in power, developing, defining

[3] See Abu El-Haj, Networking, at 1235–43.

and presenting the policy alternatives . . . ."[4] The electorate then chooses between these two, and only two, ideologically coherent parties on Election Day like consumers purchase goods at a store.[5]

In Responsible Party Government theory, the limited choice of two parties putatively moderates extreme views by forcing disparate coalitions within the electorate to share a banner and by disciplining political parties and candidates in a perpetual competition for support of the median voter. But these accountability mechanisms only work if markets (elections) are competitive because competition provides sellers (political parties and candidates) with an incentive to respond to the demands of consumers (voters).[6]

The Timmons majority's specious conclusion that a "healthy two party system" would "temper the destabilizing effects of party-splintering and excessive factionalism" reflected Responsible Party Government theory's

---

[4] AM. POLITICAL SCI. ASS'N, Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties of the American Political Science Association, 44 AM. POL. SCI. REV. 1, 18 (1950).

[5] Id. at 1–2.

[6] Nancy L. Rosenblum, Primus Inter Pares: Political Parties and Civil Society, 75 CHI.-KENT L. REV. 493, 496 (2000) (explaining that mainstream political science views "electoral parties as cadres of candidates, professional organizers, and hired consultants, and of citizens as consumers of their products"); Michael W. McConnell, Moderation and Coherence in American Democracy, 99 CALIF. L. REV. 373, 379 (2011).

hostility to third parties. Timmons, U.S. 520 at 367; see also id. at 364 (reciting approvingly the state's purported interest in "promoting candidate competition" by "reserving limited ballot space for opposing candidates"). But to the extent the Timmons majority rested its conclusions on the stabilizing effects of the two-party system, Timmons is fatally flawed: political stability and responsive governance have not emerged from our commitment to the two-party duopoly. It is beyond cavil that neither major party today—though arguably as polarized as in any other era—responds to the preferences of the median voter.[7]

B. The Two-Party Duopoly Has Failed to Deliver Political Stability or Democratic Accountability.

The central perceived benefit of the two-party duopoly is political stability, a benefit that Timmons cited specifically as flowing from a strong two-party system. As noted, according to the theory, competition between the two

[7] LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 287 (1st ed. 2008) ("Whatever elections may be doing, they are not forcing elected officials to cater to the policy preferences of the 'median voter.'"); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 163 (2012) ("Whatever empirical validity median voter models may hold with regard to the professed positions of parties and candidates, the findings . . . clearly show that actual government policy does not respond to the preferences of the median voter."); SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 24–25 (2009) (noting a "virtual consensus" that "[c]andidates no longer converge on the median voter" but rather "represent[] the ideologically extreme elements within their parties, despite the electoral risk that this strategy carries").

parties promotes political stability by forcing together coalitions that encompass disparate groups and competing interests. To win the competition for as broad a share of the electorate as possible, the two parties are theoretically discouraged from adopting extreme or insular viewpoints and influence officials to moderate toward the views of the median voters in the electorate.

The intervening years have demonstrated the limitations of the theory's prescriptions. Through much of the twentieth century, the Democratic and Republican Parties competed in a "multiparty system within a two-party system" involving overlapping coalitions and broad factions. (Pa148.) Today by contrast, a variety of factors from partisan gerrymandering to partisan geographic sorting have converged to suppress competition in election districts and the two-party system's electoral incentives pull the major parties and their candidates into narrow social networks comprised of unrepresentative donors and activists.[8]

As a result, a fundamental pillar of the theory—competitive elections—is missing in contemporary American elections, including in the vast majority of New Jersey elections.[9] This lack of competition and thereby electoral

---

[8] See Abu El-Haj, Networking, at 1264.

[9] A standard measure of competitiveness is +/- five percent. By this measure, two-of-twelve congressional districts and four-of-forty state districts in New Jersey were competitive as recently as the 2020 election. See New Jersey, Statewide Voter Registration Summary (Feb. 1, 2023), https://perma.cc/2MNT-ZNYH; Chris Leaverton & Michael Li, Gerrymandering Competitive Districts

accountability has had a plethora of corrosive effects to democratic governance and makes it far less likely that the major parties would seek to achieve success by appealing to the median voter. Instead, the two major political parties can insulate themselves from popular scrutiny and influence while fostering an environment that can be hostile to democracy itself.[10]

i. Americans' frustrations with the two major political parties threatens political stability and has eroded trust in democracy itself.

Putting aside the Responsible Party Government theory's conceptual difficulties, the empirical reality is that contemporary voters' lack of confidence in the government tends to nullify the conclusion that the two-party system represents, channels, and rationalizes diverse and conflicting interests in American society. Indeed, given its promised benefit to political accountability,

---

to Near Extinction (Aug. 11, 2022), BRENNAN, https://perma.cc/C6C9-YNUB (noting that "there are now fewer competitive districts than at any point in the last 52 years").

[10] See JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY 12 (2022) ("By endowing states with authority over election administration and other key levers of democracy, national parties can use the states that they control to rig the game in their favor by limiting the ability of their political enemies to participate."); Michael J. Klarman, Foreword: The Degradation of American Democracy — And the Court, 134 HARV. L. REV. 1, 42–66 (2020) (noting various assaults on democracy, including political violence, "aggressively gerrymandered legislative districts; purged [] voter rolls; [] countless impediments to registration and turnout, especially for the poor, the young, and people of color; circumvented and obstructed voter initiatives; and undermined [election] results").

one important measure of the success of the two-party duopoly is voter confidence in the government.

The clearest indication that the two-party duopoly has failed is the long-standing erosion of voter confidence in our government and electoral systems. In the 1950s, when the American Political Science Association wrote the Responsible Party Government report that influenced the Timmons majority's hostility to third parties, Americans generally trusted the federal government. According to Pew Research Center analysis, "In 1958, about three-quarters of Americans trusted the federal government to do the right thing almost always or most of the time."[11] By sharp contrast, today only one-in-five Americans report trusting the government, and the share of Americans who express unfavorable opinions of both major parties has only grown in the last several decades from just six percent in 1994 to over twenty-seven percent.[12]

An NPR/Marist Poll found that sixty-two percent of respondents had little or no confidence in the Democratic Party, while sixty-eight percent had little or no confidence in the Republican Party.[13] Only twenty-five percent of those

---

[11] PEW RESEARCH CENTER, Public Trust in Government: 1958-2022 (June 6, 2022), https://perma.cc/L25C-GV4P.

[12] PEW RESEARCH CENTER, As Partisan Hostility Grows, Signs of Frustration With the Two-Party System (Aug. 9, 2022), https://perma.cc/AS2R-5XDA.

[13] MARIST, Americans Lack Confidence in New Congress' Ability to Reach Bipartisan Agreement (Dec. 15, 2022), https://perma.cc/Q2U3-G4SP.

polled had confidence in Congress, and "almost two-thirds of Republicans expressed little confidence in Congress," despite the fact that their party controlled it.

New Jersey citizens share the country's overwhelmingly negative views of the two major political parties. A December 2022 Fairleigh Dickinson University poll of young New Jersey voters found that seventy-eight percent of respondents agreed that "the current political parties are too corrupt and ineffective to actually get anything done," with forty-two percent "strongly" agreeing.[14] This cynicism extends to views of democracy as an institution: only fifty-six percent of respondents—and only thirty-six percent of Independents—agreed that "democracy is still the best way to run a government." Id.

Political stability suffers when critical masses of the population lose faith that the fundamental mechanisms of democratic accountability can work. This empirical reality casts doubt on the claim that the two-party duopoly delivers political responsiveness and stability.

ii. Fusion benefits the stability of our democracy by productively channeling frustration with the two major parties.

Pluralities of Americans have rejected the two-party duopoly and, lacking clear or meaningful alternatives, now identify as Independents. In New Jersey's

[14] FAIRLEIGH DICKINSON UNIVERSITY, NJ Residents Under 30 more Progressive but not more Democratic (Dec. 16, 2022), https://perma.cc/V7ES-EG3K.

7th Congressional District, one of only two competitive congressional districts in New Jersey, unaffiliated and minor party voters compose a larger share of the electorate (35.9 percent) than those registered with either of the two major political parties (33.7 percent Republican to 30.7 percent Democrat).[15] These voters lack the stabilizing influence of a political home where the like-minded can exercise their constitutional rights. (Pa44–45.)

Fusion provides alternative avenues for these residents to meaningfully associate outside of the two major parties. Instead of spending resources on fielding spoiler candidates, fusion empowers minor political parties to contribute to election outcomes, participate in policymaking, and engage broader swaths of the electorate in party-building activities. (Pa240.) And if a minor political party shows that it can deliver votes, the party increases the likelihood that the candidates will aim to satisfy the interests of a more representative electorate. (Pa199–200.) Officials within the two major parties then also benefit from association with a broader cross-section of constituents as fusion empowers these officials to better represent the will of the electorate, providing benefits to democratic accountability and the stability of the broader political system. (Pa204–06.)

---

[15] POLITICO, Democrats Have Won Nine of New Jersey's 12 U.S. House Seats (Jan. 12, 2023), https://perma.cc/TJ6B-NCZR.

The point is not that fusion is constitutional because it is good for democracy, but rather that the Timmons majority turned on its head how banning fusion relates to political stability. Timmons, U.S. 520 at 367. If one is concerned with factionalism and neutralizing the threat of minor parties causing the election of radical candidates with narrow support, anti-fusion laws undermine that objective by increasing the likelihood that disaffected interests will channel political frustration by running and voting for a spoiler candidate.

Fusion gives those disaffected by the major parties meaningful avenues and incentives to constructively associate outside of the two major parties while decreasing the likelihood of a spoiler candidate and increasing the likelihood that the winning candidate attracts broad majority support. Indeed, fusion allows voters who have rejected the platforms of the two major political parties to participate constructively in our democracy by voting for a candidate on a party line that most aligns with their goals. (Pa47, 81, 156–57, 197, 213, 240.) Indeed, channeling political conflict through representative government is the only means by which our system can survive.

CONCLUSION

The Court should reject Timmons' rationales, rule that the challenged anti-fusion laws violate the New Jersey Constitution and that future elections should permit cross-nominations on the ballot.

Respectfully submitted,

SAIBER LLC

s/ Vincent C. Cirilli
Vincent C. Cirilli, Esq. (116472014)
VCirilli@saiber.com
18 Columbia Turnpike, Suite 200
Florham Park, NJ 07932
973.622.3333

WACHTELL, LIPTON, ROSEN & KATZ

s/ Jonathan M. Moses
Jonathan M. Moses, Esq. (038781996)
Michael L. Thomas, Jr., Esq. (*admitted pro hac vice*)
51 West 52nd Street
New York, NY 10019
212.403.1000

Dated: 8/25/2023

Counsel and on the Brief for Amicus Curiae Professor Tabatha Abu El-Haj

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3542-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3543-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)

BRIEF OF AMICUS CURIAE

KIRKLAND & ELLIS LLP
Jay P. Lefkowitz, P.C. (*pro hac vice application pending*)
lefkowitz@kirkland.com
Victoria J. Ryan (287712019)
victoria.ryan@kirkland.com
601 Lexington Ave
New York, NY 10022
Tel: (212) 446-4800

GIBBONS P.C.
Anne M. Collart, Esq. (111702014)
acollart@gibbonslaw.com
One Gateway Center
Newark, NJ 07102-5310
Tel: (973) 596-4737

Counsel for Amicus Curiae the Rainey Center, Cato Institute, and Governor Christine Todd Whitman

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE 1

INTRODUCTION 1

ARGUMENT 3

I. NEW JERSEY'S PROHIBITION OF FUSION NOMINATIONS VIOLATES ITS CITIZENS' RIGHTS OF FREE EXPRESSION AND ASSOCIATION PROTECTED BY NEW JERSEY'S CONSTITUTION. 3

A. Free Expression and Association Are Sacrosanct Under New Jersey Law. 3

B. New Jersey Courts Have Recognized That Candidate Nominations Implicate Both Voters' and Political Parties' Speech and Association Rights, Which the Anti-Fusion Laws Unduly Constrain. 5

C. New Jersey's Anti-Fusion Laws Violate the State Constitution, as the New Jersey Supreme Court Foreshadowed in *Paterson*. 9

II. FEDERAL CONSTITUTIONAL LAW FURTHER COUNSELS IN FAVOR OF FINDING NEW JERSEY'S ANTI-FUSION LAWS UNCONSTITUTIONAL. 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Abrams v. United States, 250 U.S. 616 (1919) 2

Anderson v. Celebrezze, 460 U.S. 780 (1983) 6

Buckley v. Valeo, 424 U.S. 1 (1976) 2, 13

Catania v. Haberle, 123 N.J. 438 (1990) 6

Council of Alternative Pol. Parties v. State, Div. of Elections, 344 N.J. Super. 225 (App. Div. 2001) 7, 8

Citizens Against Rent Control/ Coalition for Fair Housing, et al. v. City of Berkeley, California, et al, 454 U.S. 290 (1981) 13, 14

Colorado Republican Red. Campaign Comm. v. Federal Election Comm'n., 518 U.S. 604 (1996) 13

Dempsey v. Alston, 405 N.J. Super. 499 (App. Div. 2009) 5

Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71 (2014) 4, 11

Dunn v. Blumstein, 405 U.S. 330 (1972) 11

Eu v. San Francisco Cnty. Dem. Cent. Comm., 489 U.S. 214 (1989) 13, 14

Friedland v. State, 149 N.J. Super. 483 (Law Div. 1977) 3

Gansz v. Johnson, 9 N.J. Super. 565 (Law Div. 1950) 8, 9

Green Party v. Hartz Mountain Indus., 164 N.J. 127 (2000) 1, 2, 4, 5, 11

Greenberg v. Kimmelman, 99 N.J. 552 (1985) 5

Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000) 5

In re City Clerk of Paterson, 88 A. 694 (N.J. Sup. Ct. 1913) 9, 10

In re Contest of Nov. 8, 2011 Gen. Election of Off. of N.J. Gen. Assembly, Fourth Legis. Dist., 427 N.J. Super. 410 (Law Div. 2012) 11

In re Grady, 85 N.J. 235 (1981).....5

Lesniak v. Budzash, 133 N.J. 1 (1993).....7

McIntyre v. Ohio Elections Comm'n., 514 U.S. 334 (1995) 1

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 12

NAACP v. Alabama, 357 U.S. 449 (1958).....13

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).....13

Senna v. Florimont, 196 N.J. 469 (2008).....3

State v. Manning, 240 N.J. 308 (2020) 5

State v. Miller, 83 N.J. 402 (1980).....4, 6

State v. Schmid, 84 N.J. 535 (1980)..... 4, 12

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).....13

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).....14

Wash. St. Grange v. Wash. St. Republican Party, 552 U.S. 442 (2008) 6

Whitney v. California, 274 U.S. 357 (1927) 2

Constitutional Provisions

N.J. Const. art. I, ¶ 6 4

U.S. CONST. amend. I.....12

Statutes

N.J.S.A. 19:13-4 1

N.J.S.A. 19:13-8 1

N.J.S.A. 19:14-2 1

N.J.S.A. 19:14-9 1

N.J.S.A. 19:23-15 1

Other Authorities

Andy Craig, *The First Amendment and Fusion Voting*, Cato Institute (Sept. 26, 2022, 1:42 PM) 15

Br. of Appellants, *In re Tom Malinowski, Petition for Nomination For Gen. Election, Nov. 8, 2022, for U.S. House of Representatives N.J. Congressional Dist. 7* 15

Br. on Behalf of Resp'ts Tashea Way and N.J. Div. of Elections, *In re Tom Malinowski, Petition for Nomination For Gen. Election, Nov. 8, 2022, for U.S. House of Representatives N.J. Congressional Dist. 7* 6

Christine Todd Whitman & Robert Torricelli, *Op-Ed: Why We Need a 3rd Political Party in New Jersey*, THE STAR-LEDGER, Apr. 23, 2023 10

J. Stuart Mill, *On Liberty and Considerations on Representative Government* 1 (R. McCallum ed. 1947) 1

Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 101–02 (1992) 12

Star-Ledger Editorial Board, *Op-Ed: Want to Encourage Centrists? Tell the Party Bosses to Back Off*, THE STAR-LEDGER, Apr. 27, 2023 10

STATEMENT OF INTEREST OF AMICUS CURIAE

The Rainey Center, Cato Institute, and former Governor of New Jersey Christine Todd Whitman appear here as Amici Curiae for the Appellants and respectfully refer the court to their Certification of Counsel for a fulsome statement of interest on behalf of each signatory.

INTRODUCTION

New Jersey's prohibitions of fusion voting, codified at N.J.S.A. 19:13-4, 19:13-8, 19:14-2, 19:14-9, and 19:23-15 (together, the "Anti-Fusion Laws"), violate fundamental principles of liberty and democracy that New Jersey and federal courts alike have vigorously defended and enforced. New Jersey's protection of free expression is rooted in respect for a free market of ideas, in which dynamic, open debate promotes truth.[1] These foundational free market principles underly the protections for free speech and free association provided under federal law and extended under the New Jersey Constitution.[2] Indeed, the Framers "designed" the federal First Amendment "to secure the widest

[1] *See Green Party v. Hartz Mountain Indus.*, 164 N.J. 127, 150 (2000) ("[Our] description of the theory of freedom of speech is based on an analogy to the economic market. . . . [It] is based on the assumption that the truth will always win in a free and open encounter with falsehood.") (internal citation and quotation marks omitted).

[2] *See, e.g.*, *id.*; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (citing J. Stuart Mill, *On Liberty and Considerations on Representative Government* 1, 3–4 (R. McCallum ed. 1947) and noting that "our society accords greater weight to the value of free speech than to the dangers of its misuse").

possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[3] Justices have long noted that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[4]

New Jersey's Anti-Fusion Laws unacceptably encumber this free-market exchange of ideas by, among other things, restraining candidate nominations. The candidate nomination process is a critical medium of political expression by which political parties (and, importantly, the voters that comprise those parties) voice their views for the electoral marketplace to evaluate. Nominations therefore contribute to the free exchange of ideas that is venerated in a healthy democracy and respected in New Jersey's jurisprudence. As a result, any laws that restrict parties' ability to nominate otherwise qualified candidates to the ballot must be subject to rigorous scrutiny. Here, the Anti-Fusion Laws cannot withstand such examination. New Jersey's Anti-Fusion Laws should thus be

[3] *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (internal citation and quotation marks omitted).

[4] *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *see also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (explaining that "the ultimate good desired is better reached by a free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market"); *Green Party*, 164 N.J. at 150 ("the exchange of discordant views perpetuates the classical model of freedom that we pursue").

invalidated because: (I) they violate the New Jersey Constitution's guarantee of free expression and association for its citizens and political parties; and (II) federal precedent is instructive on core constitutional principles and further counsels in favor of finding the Anti-Fusion Laws unconstitutional.

ARGUMENT

I. NEW JERSEY'S PROHIBITION OF FUSION NOMINATIONS VIOLATES ITS CITIZENS' RIGHTS OF FREE EXPRESSION AND ASSOCIATION PROTECTED BY NEW JERSEY'S CONSTITUTION.

The Anti-Fusion Laws are in sharp disharmony with New Jersey's broad protections for its citizens'[5] rights of free expression and association and should be overturned because: (A) free speech and association are fundamental rights under New Jersey law; (B) candidate nominations implicate these fundamental rights; and (C) the Anti-Fusion Laws unduly constrain candidate nominations and therefore violate the New Jersey Constitution.

A. Free Expression and Association Are Sacrosanct Under New Jersey Law.

The Anti-Fusion Laws are in tension with New Jersey citizens' fundamental rights of free speech and association, which are sacrosanct under New Jersey law.[6] As New Jersey courts have recognized, "[t]he New Jersey

[5] We use "citizens" broadly to embrace voters, candidates, and the political parties they comprise.

[6] *See, e.g.*, *Senna v. Florimont*, 196 N.J. 469, 480 (2008); *Friedland v. State*, 149 N.J. Super. 483, 490 (Law Div. 1977) ("The right to associate with others for the

Constitution guarantees a broad affirmative right to free speech," one "of the broadest in the nation," and one that "affords greater protection than the First Amendment."[7]

When assessing restrictions upon fundamental state constitutional rights, New Jersey courts "balance the competing interests, giving proper weight to the constitutional values."[8] "The more important the constitutional right sought to be exercised, the greater the [] need must be to justify interference with the exercise of that right."[9] This scrutiny is especially rigorous if the law constrains political speech, which "occupies a preferred position in our system of constitutionally-protected interests."[10] Accordingly, "[w]here political speech is involved, [New Jersey's] tradition insists that government allow the widest room for discussion, the narrowest range for its restriction."[11]

As discussed below, the Anti-Fusion Laws cannot be squared with New Jersey's legal tradition, which has placed tremendous value on debate in the marketplace of ideas.[12]

---

common advancement of political beliefs and ideas is a fundamental one[.]").

[7] *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 220 N.J. 71, 78–79 (2014); *see also State v. Schmid*, 84 N.J. 535, 560 (1980) (quoting N.J. Const. art. I, ¶ 6).

[8] *Green Party*, 164 N.J. at 149.

[9] *Id*.

[10] *State v. Miller*, 83 N.J. 402, 411–12 (1980).

[11] *Id.* (internal quotation marks omitted).

[12] *See, e.g.*, *Green Party*, 164 N.J. at 150. Even beyond the specific context of free speech and association rights, the Anti-Fusion Laws conflict with New Jersey courts'

B. New Jersey Courts Have Recognized That Candidate Nominations Implicate Both Voters' and Political Parties' Speech and Association Rights, Which the Anti-Fusion Laws Unduly Constrain.

The Anti-Fusion Laws restrain the candidate nomination process, interfering with individual rights that New Jersey courts have zealously protected for decades. Applying New Jersey's broad conception of free speech and association, New Jersey courts have recognized that candidate nominations reflect pure political expression by voters and political parties alike. As a result, New Jersey courts have struck down instances of government interference with

---

principled curtailment of government intrusion into its citizens' exercise of their individual rights. Both New Jersey's Constitution and jurisprudence protect certain other important rights from government intrusion across diverse legal contexts, including: (1) family rights; (2) protection from unreasonable searches and seizures; and (3) medical and marital privacy rights. In each instance, the court has articulated that these rights (just like the rights to free expression and association) are held dear and has curtailed government interference with them. *See, e.g.*, *Dempsey v. Alston*, 405 N.J. Super. 499, 511 (App. Div. 2009) (citing *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000)) ("[t]he right of parents to raise their children without undue state interference is well established" under New Jersey law); *State v. Manning*, 240 N.J. 308, 328 (2020) ("[c]ompliance with the warrant requirement is not a mere formality but—as intended by the nation's founders—an essential check on arbitrary government intrusions into the most private sanctums of people's lives"); *In re Grady*, 85 N.J. 235, 249–50 (1981) ("privacy rights [are] protected from undue governmental interference by our State Constitution"); *Greenberg v. Kimmelman*, 99 N.J. 552, 572 (1985) ("As one of life's most intimate choices, the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution."). Because the Anti-Fusion Laws constitute governmental distortion of the political process and implicate fundamental rights of free expression and free association, to allow them to persist would be inconsistent with New Jersey's jurisprudence.

the candidate nomination process to ensure the "widest" protection for political expression.[13] Indeed, New Jersey caselaw recognizes two distinct fundamental interests implicated by restrictions on candidate nominations: (1) voters' expression of their political choice; and (2) political parties' association with their members.[14]

First, with regard to voters, "[t]he general rule applied to the interpretation of our elections laws is that . . . statutes providing requirements for a candidate's name to appear on the ballot will not be construed so as to deprive the voters of the opportunity to make a choice."[15] New Jersey courts recognize, therefore, that without meaningful choice in candidate nomination, voters cannot engage with the electoral marketplace and properly express their political views. In *Lesniak v. Budzash*, for example, the New Jersey Supreme Court rejected the

---

[13] *Miller*, 83 N.J. at 411–12. Despite this established precedent in New Jersey, the State and Intervenor insist that they must impede the nomination process—and the political expression of parties and voters—with the Anti-Fusion laws to protect voters from their own imminent confusion. *See* Br. on Behalf of Resp'ts Tashea Way and N.J. Div. of Elections, *In re Tom Malinowski, Petition for Nomination For Gen. Election, Nov. 8, 2022, for U.S. House of Representatives N.J. Congressional Dist. 7*, at 49–52. The Court should reject this paternalistic justification. Indeed, election law jurisprudence "reflect[s] a greater faith in the ability of individual voters to inform themselves about campaign issues." *See Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 454 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983)).

[14] While we focus on voters and political parties, it bears acknowledging that candidates' expressive and associational rights are also unduly constrained by the Anti-Fusion Laws.

[15] *Catania v. Haberle*, 123 N.J. 438, 442–43 (1990).

state's efforts to prevent unaffiliated voters from signing nominating petitions.[16] The court recognized the important connection between an individual voter's speech and association rights, holding that signing a nominating petition for a specific candidate "demonstrates a voter's intent to affiliate with [a specific party]" of their choosing and support a specific set of "shared political ideals."[17] Here, to strike down the Anti-Fusion Laws would follow *Lesniak*'s example and ensure that state laws do not unjustifiably limit voters' choices.

Similarly, in *Council of Alternative Political Parties v. State, Division of Elections*, the Appellate Division held that a law limiting voters' ability to declare a party affiliation beyond Republican, Democrat, Independent, or Unaffiliated was unconstitutional.[18] Because the law limited voters to a discrete set of options predetermined by the state, instead of allowing a voter to affiliate with the party and candidate that best represented his or her beliefs, the law "transgress[ed] . . . voters['] . . . First Amendment rights of free speech and association."[19] In so holding, the court recognized that the law "marginalize[d]

---

[16] *Lesniak v. Budzash*, 133 N.J. 1, 17 (1993).
[17] *Id.* at 15, 17.
[18] *Council of Alternative Political Parties v. State, Division of Elections*, 344 N.J. Super. 225, 238 (App. Div. 2001) (reasoning that, under such a restriction, "a voter is prevented from publicly expressing a party preference even in the preliminary stages of the electoral process").
[19] *Id.*

voters . . . who depart from or disagree with the status quo."[20] The Anti-Fusion Laws have the same chilling effect on the electoral marketplace. By restricting which candidates parties can nominate, the Anti-Fusion Laws limit voters' ability to align with the party and candidate that best represent their political views. New Jersey courts have consistently rejected such restrictions on voter choice and should again do so here.

Second, beyond voters' individual rights, New Jersey courts have further recognized that candidate nominations are an integral exercise of political parties' distinct rights of free expression and association. For example, the Law Division found a statutory provision requiring a candidate to certify that he was not a member of any other political party to be "unconstitutional" and thus "invalid."[21] The court reasoned that government action should not interfere with a party's ability to choose its desired candidate: the legislature "cannot limit the right of the convention, committee, or other body to nominate as its candidate any person who is qualified for the office."[22] New Jersey courts have thus intervened when necessary to protect political parties' choice of a standard bearer.[23] Here, the Anti-Fusion Laws impede political parties' right to choose

---

[20] *Id.*
[21] *See Gansz v. Johnson*, 9 N.J. Super. 565, 567–68 (Law Div. 1950).
[22] *Id.*
[23] *See, e.g.*, *id.*

their standard bearers and, in turn, attract and identify voters who wish to affiliate with those parties. Thus, the Anti-Fusion Laws inappropriately constrain both voters' and political parties' speech and association rights and for the reasons set forth below, cannot survive state constitutional scrutiny.

C. New Jersey's Anti-Fusion Laws Violate the State Constitution, as the New Jersey Supreme Court Foreshadowed in *Paterson*.

The Anti-Fusion Laws violate the New Jersey Constitution and the democratic principles for which it stands. Indeed, New Jersey precedent from over 100 years ago foreshadowed as much. Even before the current Anti-Fusion Laws were enacted, the New Jersey Supreme Court recognized that any ban on fusion voting would raise democratic and constitutional concerns.[24] In *In re City Clerk of Paterson*, the New Jersey Supreme Court reviewed a challenge to an anti-fusion law that prevented a political party from nominating a candidate already nominated by a different party.[25] Although *Paterson* was ultimately decided on statutory grounds, the court reasoned beyond the statute when rendering its decision and provided insight that informs interpretation of the Anti-Fusion Laws in the instant case.

In particular, the court expressed its unease about the potential antidemocratic consequences of fusion-voting prohibitions—namely, that "a

[24] *See In re City Clerk of Paterson*, 88 A. 694, 696 (N.J. Sup. Ct. 1913).
[25] *See id.* at 695.

political party shall not select a good man for its candidate, perhaps a better man than they have in their own ranks, because he does not wear its style of political garment."[26] The court reasoned that prohibitions on candidate cross-nominations could impair "free and untrammeled expression" by voters and political parties and, thereby, run afoul of constitutional protections.[27] Over 100 years later, the court is now confronted directly with *Paterson*'s prophetic analysis.[28] The practical effects of the Anti-Fusion Laws are exactly as the *Paterson* court feared: a candidate must wear a certain "style of political garment" (i.e., declare a single party affiliation) to be nominated, and other parties are left disempowered and without voice, with a less-preferred candidate or no candidate at all.

---

[26] *Id.* at 696.

[27] *See id.* ("[I]t may at least be well doubted whether it has not infringed a constitutional right of the voters to have a free and untrammeled expression of their choice of who shall be the officer to serve them . . . for, of course, the nominating of a candidate is a mere step in the selection of the officer.").

[28] The *Paterson* Court's view is not just archaic reasoning from a bygone era. In fact, *Paterson*'s logic commands considerable public support today. Commentators have noted broad public support in favor of repealing the New Jersey's Anti-Fusion Laws. *See, e.g.*, Star-Ledger Editorial Board, *Op-Ed: Want to Encourage Centrists? Tell the Party Bosses to Back Off*, THE STAR-LEDGER, Apr. 27, 2023. What is more, New Jersey political leaders with varying ideologies—former Governor Christine Todd Whitman (*Amici*) and former Senator Robert Torricelli—have offered praise for fusion voting, advocated for the Anti-Fusion Laws' reversal, and observed that "[f]usion voting means that a candidate can be nominated by more than one party, and voters then choose not just the candidate they prefer but also the party that is closest to their values." Christine Todd Whitman & Robert Torricelli, *Op-Ed: Why We Need a 3rd Political Party in New Jersey*, THE STAR-LEDGER, Apr. 23, 2023.

The *Paterson* Court's reasoning still stands after a century and counsels that New Jersey's Anti-Fusion Laws are unconstitutional. The Anti-Fusion Laws interfere with both the content of the political speech (i.e., the affiliation with the nominee) and the medium of expression (i.e., the ballot nomination); both ought to be scrupulously protected, as they have otherwise been under New Jersey's caselaw and its constitution.[29] The Court should afford dispositive "weight to the constitutional values" at stake and strike down the Anti-Fusion Laws, where, as here, the state has not justified its "need" to interfere.[30]

II. FEDERAL CONSTITUTIONAL LAW FURTHER COUNSELS IN FAVOR OF FINDING NEW JERSEY'S ANTI-FUSION LAWS UNCONSTITUTIONAL.

As noted above, New Jersey's Constitution goes even further than the federal Constitution (and further than many of its sister states) in its protections for free speech and free association.[31] The New Jersey Supreme Court has recognized that "state constitutions may be distinct repositories of fundamental rights independent of the federal Constitution," although "there nonetheless

---

[29] *See, e.g.*, *In re Contest of Nov. 8, 2011 Gen. Election of Off. of N.J. Gen. Assembly, Fourth Legis. Dist.*, 427 N.J. Super. 410, 433 (Law Div. 2012) (stating that government interference with fundamental individual and collective rights of political expression must pass "exacting standards of precision") (citing *Dunn v. Blumstein*, 405 U.S. 330, 359 (1972)).

[30] *See Green Party*, 164 N.J. at 148–49.

[31] *See Dublirer*, 220 N.J. at 78–79 ("The New Jersey Constitution guarantees a broad affirmative right to free speech," one "of the broadest in the nation" and one that "affords greater protection than the First Amendment.").

exist meaningful parallels."[32] One such parallel is apparent here: federal constitutional law similarly and heartily safeguards free expression and association in the electoral marketplace from government overreach. Foundational principles of federal First Amendment interpretation and Supreme Court jurisprudence together offer considerable authority in favor of finding New Jersey's Anti-Fusion Laws unconstitutional.

First, as the plain language of its text indicates, the federal First Amendment was designed to protect certain fundamental rights—including the freedoms of speech and association—from governmental intrusions like the Anti-Fusion Laws.[33] The United States Supreme Court has emphasized that the First Amendment "has its fullest and most urgent application" where, as here, it is applied to protect speech associated with "campaigns for political office."[34] Thus, New Jersey's Anti-Fusion Laws implicate and transgress the core purpose of the federal First Amendment, since they interfere with both individual expression and group association in the political arena.[35]

---

[32] *Schmid*, 84 N.J. at 560.

[33] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble.").

[34] *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *see also* Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 101–02 (1992) (noting that the Court has "aggressively" protected diverse political speech in elections and recognized that "individuals have a constitutionally protected interest in *effective* self-expression").

[35] *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 459–60 (1958) ("[E]ffective [self-]

Second, when confronted with government interference with political speech and expression, the Supreme Court, like New Jersey courts, has applied stringent scrutiny. Laws interfering with *what* voters or political parties are saying, as well as laws interfering with *how* they choose to say it, are not abided absent a most compelling justification.[36] Indeed, the Supreme Court has closely scrutinized and ultimately invalidated restrictions on voters' and political parties' media of expression, including (1) election spending;[37] (2) primary nomination processes;[38] and (3) candidate endorsements.[39] In each of these instances, the Court recognized the importance of such means to share, promote, and amplify political speech and found the laws that limited them to be unconstitutional. The Anti-Fusion Laws should be treated the same.

---

expression" is "undeniably enhanced by group association."); *Colorado Republican Red. Campaign Comm. v. Federal Election Comm'n.,* 518 U.S. 604, 616 (1996) ("The independent expression of a political party's views is 'core' First Amendment activity"); *Eu v. San Francisco Cnty. Dem. Cent. Comm.*, 489 U.S. 214, 224 (1989) ("It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments.").

[36] In particular, the Supreme Court has recognized that to preserve and promote an "uninhibited, robust, and wide-open" debate in the electoral marketplace, the law must extend protection not only to political speech but also to the media used to disseminate and diffuse such political speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[37] *See Buckley*, 424 U.S. at 15–16, 58–59; *Citizens Against Rent Control/Coalition for Fair Housing, et al. v. City of Berkeley, California, et al,* 454 U.S. 290, 296 (1981); *Colorado Republican Fed. Campaign Comm.*, 518 U.S. at 615–17.

[38] *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214, 216 (1986).

[39] *See Eu*, 489 U.S. at 222–24.

Third, the Supreme Court has observed that "[t]o place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views . . . is clearly a restraint on the right of association."[40] Likewise, the Court has rejected laws like the Anti-Fusion Laws, which interfere with voters' and political parties' rights "to select a standard bearer who best represents the party's ideology and preferences."[41] Such interference "directly hampers the ability of a party to spread its message and hamstring[s] voters seeking to inform themselves."[42] The same is true of the Anti-Fusion Laws. Candidate nominations represent "a means of disseminating ideas" in the electoral marketplace, "integral to the operation of the system of government established by our [federal] Constitution."[43] The more candidates with nuanced views are represented in the electoral marketplace, the more accurately political parties and voters can "debate" and ultimately express their political views for all to understand.[44] Anti-Fusion Laws unacceptably restrict the vocabulary of that debate.[45]

---

[40] *Citizens Against Rent Control*, 454 U.S. at 296.
[41] *See Eu*, 489 U.S. at 224 (internal quotation marks omitted).
[42] *Id.* at 223.
[43] *Id.*
[44] *Id.*
[45] Amici note that the Supreme Court also considered and upheld a prohibition of fusion nominations in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). However, as the other briefs in this case make evident, *Timmons*' two-party protectionism cannot be squared with the Court's consistent endorsement of a

Since the Anti-Fusion Laws cannot survive federal constitutional scrutiny, as described above, they certainly cannot satisfy New Jersey's much more rigorous state constitutional standard. Accordingly, under both federal and New Jersey law, the Court should find New Jersey's Anti-Fusion Laws unconstitutional.

CONCLUSION

While the State and Intervenors suggest that New Jersey voters and political parties must be protected from potential confusion, New Jersey and federal courts alike have long recognized that citizens can be trusted to exercise their own individual rights. This includes their rights to effectively convey support for the candidate of their choice. For the foregoing reasons, this Court should reject the State's unwarranted paternalism and rule in favor of Appellants by holding New Jersey's Anti-Fusion Laws unconstitutional and restore fulsome political expression to New Jersey's electoral marketplace.

---

vibrant democratic marketplace of ideas. The Supreme Court's inconsistent decision in *Timmons* should not undermine the Supreme Court's otherwise rigorous protection of federal First Amendment freedoms. *See* Br. of Appellants, *In re Tom Malinowski, Petition for Nomination For Gen. Election, Nov. 8, 2022, for U.S. House of Representatives N.J. Congressional Dist. 7*, at 64–70; *see also, e.g.*, Andy Craig, *The First Amendment and Fusion Voting*, Cato Institute (Sept. 26, 2022, 1:42 PM), https://www.cato.org/blog/first-amendment-fusion-voting. ("To uphold a ban on fusion on this basis is endorsing the idea that the government can pick one side of [the] debate [between a two-party and multi-party system], favoring [two-party system] proponents and imposing restrictions on the speech and association rights of its opponents.").

August 25, 2023

Respectfully submitted,

/s/ *Victoria J. Ryan*

Jay P. Lefkowitz, P.C. (*pro hac vice application pending*)
lefkowitz@kirkland.com
Victoria J. Ryan (287712019)
victoria.ryan@kirkland.com
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Telephone: (212) 446-4800

/s/ *Anne M. Collart*

Anne M. Collart, Esq. (111702014)
acollart@gibbonslaw.com
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102-5310
Tel: (973) 596-4737

Counsel for Amicus Curiae the Rainey Center, Cato Institute, and Governor Christine Todd Whitman

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7 _____ IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NOS. A-3542-21/A-3543-21 Civil Action On Appeal from: A Final Agency Decision of the New Jersey Division of Elections Sat Below: Hon. Tahesha Way, Secretary of State

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENTS TAHESHA WAY AND NEW JERSEY DIVISION OF ELECTIONS
Submitted: October 3, 2023

Angela Cai
Sookie Bae-Park
Assistant Attorneys General
Of Counsel

Steven M. Gleeson (087092013)
Tim Sheehan (179892016)
Deputy Attorneys General
On the Brief

MATTHEW J. PLATKIN
Attorney General of New Jersey
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
Attorney for Respondents
(609) 376-2955
Steven.Gleeson@law.njoag.gov

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT..... 1

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY..... 2

ARGUMENT

POINT I

UNDER ESTABLISHED PRECEDENT, THE HUNT FACTORS PROVIDE THE GOVERNING LEGAL FRAMEWORK 3

POINT II

AMICI HAVE NOT SHOWN THAT A RIGHT TO FUSION VOTING IS BROADER UNDER THE STATE CONSTITUTION THAN THE FEDERAL..... 7

POINT III

AMICI'S POLICY ARGUMENTS DO NOT UNDERMINE THAT STATE'S IMPORTANT INTERESTS..... 10

CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Page(s)**

Burdick v. Takushi, 504 U.S. 428 (1992).....12

Council of Alternative Political Parties v. State Division of Elections, 344 N.J. Super. 225 (App. Div. 2001).....11

E & J Equities, LLC v. Bd. of Adjustment of Twp. of Franklin, 226 N.J. 549 (2016).....6

Friends of Governor Tom Kean v. New Jersey Election Law Enf't Comm'n, 114 N.J. 33 (1989).....16

Gangemi v. Rosengard, 44 N.J. 166 (1965).....10

Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333 (App. Div. 2012).....17

Greenberg v. Kimmelman, 99 N.J. 552 (1985).....5

In re City Clerk of Paterson, 88 A. 694 (N.J. Sup. Ct. 1913).....10

Joye v. Hunterdon Cent. Reg'l High School Bd. of Educ., 176 N.J. 568 (2003).....5

N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326 (1994).....5

N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178 (2002).....16

Right to Choose v. Byrne, 91 N.J. 287 (1982).....5

Robinson v. Cahill, 62 N.J. 473 (1973).....6

Rutgers Univ. Student Assemb. v. Middlesex Cnty. Bd. of Elections, 446 N.J. Super. 221 (App. Div. 2016).....12

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).....7

State v. Anderson, 76 N.W. 482 (Wis. 1898).....16

State v. Hempele, 120 N.J. 182 (1990).....6

State v. J.R., 227 N.J. 393, 421 (2017).....3

State v. Schmid, 84 N.J. 535 (1980) 5
State v. Williams, 93 N.J. 39 (1983).....5
Swamp v. Kennedy, 950 F.2d 383 (7th Cir. 1991).....16
Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).....4, 12
Worden v. Mercer Cnty. Bd. of Elections, 61 N.J. 325 (1972) 12

PRELIMINARY STATEMENT

Appellants' amici urge this court to invalidate a prohibition on fusion voting that has been on the books for over a century, mirrors nearly every other State's law, and has been upheld against First Amendment challenge by the U.S. Supreme Court. Amici's common theme is that the State Constitution should be read to diverge from federal constitutional precedent in providing a candidate's right to appear on the ballot multiple times, but they provide no valid justification for such a position.

One amicus asks this court to ignore the well-worn standard for when to depart from federal constitutional standards, set forth by Justice Handler in State v. Hunt, 91 N.J. 338 (1982) and followed by this court and our Supreme Court ever since. Given precedent, and the fact that Appellants themselves do not make this argument, this is a nonstarter.

Moreover, directly on-point historical evidence confirms that New Jersey's Constitution, like its federal counterpart, provides no right to fusion voting. Amici's silence on this point is telling. As the State has explained, decades after New Jersey first prohibited fusion voting, and in the wake of litigation over similar laws in other states, delegates to the 1947 Constitutional Convention proposed protections for fusion voting. But those proposals were considered and expressly rejected. Amici's focus on inapposite cases finding

the State Constitution affords greater rights in inapposite contexts, like those not requiring state action to confer standing in free-speech cases, cannot overcome the constitutional history here. As such, there is no basis to depart from settled U.S. Supreme Court precedent.

Moreover, even if this court were to conduct its analysis afresh, amici's arguments still come up short. Despite their opposition to the Anderson-Burdick balancing test, amici provide no principled reason why this court should suddenly abandon that test. And under Anderson-Burdick, the Fusion Statutes visit either no burden or at most a minimal burden on rights, compelling a less exacting review. But regardless of the precise level of burden the Statutes impose, the State's numerous interests amply justify the law. By focusing almost exclusively on policy disagreement with the Fusion Statutes and ignoring those interests, however, the amici briefs offer little aid to this court.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The State relies on the procedural history and counterstatement of facts included in its merits brief.

[1] Because the procedural history and counterstatement of facts are closely related, they are combined for efficiency and the Court's convenience.

ARGUMENT

POINT I

UNDER ESTABLISHED PRECEDENT, THE HUNT FACTORS PROVIDE THE GOVERNING LEGAL FRAMEWORK.

This Court has long employed the factors established in State v. Hunt, 91 N.J. 338, 364 (1982) (Handler, J., concurring), to determine whether and when the State Constitution provides additional rights beyond the U.S. Constitution. Amicus ACLU-NJ urges this court to reject those factors for the first time, and to construe the relevant state constitutional provisions without any regard for the interpretations of a cognate federal clause. (ACLUb4).[2] As an initial matter, the court should not consider this argument because it has "not been asserted by a party," State v. J.R., 227 N.J. 393, 421 (2017), and conflicts with Appellants' acknowledgment that Hunt determines whether to depart from the United States Supreme Court's decision in Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997). (Pb54-55). And even if this court considers the argument, longstanding precedent is to the contrary.

[2] "Pb" refers to Appellants' Brief. "Db" refers to Respondents' Brief. "ACLUb" refers to the American Civil Liberties Union's amicus brief. "Brennanb" refers to the Brennan Center's amicus brief. "CATOb" refers to amicus brief of the Rainey Center, the Cato Institute and Christine Todd Whitman. "NJLPb" refers to the New Jersey Libertarian Party's amicus brief. "Masketb" refers to the amicus brief filed by Prof. Seth Masket, et al. "EL-HAJb" refers to Prof. Tabatha Abu El-Haj's amicus brief.

New Jersey law is established on this point. Following Justice Handler's concurrence in Hunt, our Supreme Court follows a principled approach that starts with federal constitutional interpretations to construe cognate state clauses and analyzes a range of factors to decide whether and when to diverge from the federal standard. 91 N.J. at 362-68 (Handler, J., concurring); id. at 367 (noting "the discovery of unique individual rights in a state constitution does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."). This comparative approach reflects the need, in a range of legal contexts, for "some consistency and uniformity between the state and federal governments in certain areas of judicial administration." Id. at 362-63. The State Constitution thus diverges from the U.S. Constitution's rights protections only when those factors support doing so. Id. at 364-67 (listing seven factors for divergence).

Examples abound. Our Supreme Court applied the Hunt factors in State v. Muhammad, 145 N.J. 23 (1996) in holding that the New Jersey Constitution provides no greater protection than the Eighth Amendment against admission of victim-impact evidence in criminal trials. See id. at 41-44. And it has made similar points in multiple civil and criminal cases. See, e.g., Joye v. Hunterdon Cent. Reg'l High School Bd. of Educ., 176 N.J. 568, 607-08 (2003) (holding State Constitution does not diverge from Fourth Amendment's protection against random drug and alcohol testing in public schools); State v. Williams,

93 N.J. 39, 57-58 (1983) (citing Hunt in considering whether State Constitution provides right to access criminal pretrial proceedings when federal authority was unclear).[3] Of course, as the State readily acknowledges, there are times when our courts have recognized a need to diverge from federal constitutional interpretation. In Right to Choose v. Byrne, 91 N.J. 287 (1982), for example, our Supreme Court held the State Constitution prohibited the state from restricting Medicaid funding to only certain abortions necessary to save life of mother—even though the federal constitution was construed not to provide such a right. Id. at 301. But it did so by using the Hunt framework there as well. Ibid. (citing Hunt, 91 N.J. at 362-63 (Handler, J., concurring)).

Meanwhile, ACLU-NJ cites no New Jersey authority adopting its contrary approach. See (ACLUb4-7).[4] Its reliance on Robinson v. Cahill, 62 N.J. 473

[3] Other decisions cited by amici likewise expressly rely on the Hunt factors. See, e.g., Greenberg v. Kimmelman, 99 N.J. 552, 567-68 (1985) (cited at CATOb4-5 n.12); N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 353 (1994) (explaining that State v. Schmid, 84 N.J. 535 (1980) also "presag[ed] the criteria" later articulated in Justice Handler's Hunt concurrence) (cited at NJLPb4).

[4] The ACLU-NJ's approach would also raise practical questions. The ACLU-NJ cannot explain whether it would mean state courts should ignore U.S. Supreme Court precedent entirely or presume that the State Constitution's protections are always broader—despite contrary precedent. See E & J Equities, LLC v. Bd. of Adjustment of Twp. of Franklin, 226 N.J. 549, 568 (2016). And in urging this court to "not consider" that "most states" accept the constitutionality of a fusion ban, it eliminates yet another helpful source of guidance. (ACLUb10).

(1973), and State v. Hempele, 120 N.J. 182 (1990), is misplaced, as both cases look to federal constitutional holdings as the starting point in the analysis and thus are consistent with the Hunt approach. Robinson (which predates Hunt) began its equal-protection analysis by reviewing U.S. Supreme Court precedent and framed the inquiry as whether the cognate state clause "could be more demanding." See 62 N.J. at 490-91 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)). Hempele likewise stressed that "[i]n interpreting the New Jersey Constitution, we look for direction to the United States Supreme Court, whose opinions can provide 'valuable sources of wisdom for us.'" 120 N.J. at 196 (quoting Hunt, 91 N.J. at 355 (Pashman, J., concurring)).[5] This court should continue to hew to Hunt as precedents require.

POINT II

AMICI CANNOT SHOW THAT THE STATE CONSTITUTION IS MORE EXPANSIVE THAN THE FEDERAL CONSTITUTION IN THE CONTEXT OF FUSION VOTING.

Several amici note that courts have found that some provisions of the State Constitution apply more broadly than their federal counterparts. (ACLUb3-11,

[5] Indeed, ACLU-NJ's theory echoes Justice Pashman's concurrence in Hunt, (see ACLUb6-7), which the Hunt majority implicitly rejected when it reasoned that "[d]ivergent interpretations are unsatisfactory from the public perspective" except where "[s]ound policy reasons … justify a departure." 91 N.J. at 345. As noted above, later cases adhered instead to Justice Handler's approach.

Brennanb3-15, CATOb3-4, NJLPb3-4). However, none has demonstrated that New Jersey's Constitution sweeps more broadly than the U.S. Constitution on fusion voting. Instead, they cite inapposite cases like State v. Schmid, 84 N.J. 535 (1980), which concerned a discrete question of standing under the State Constitution, and explained that the "federal requirements concerning 'state action,' founded primarily in the language of the Fourteenth Amendment and in principles of federal-state relations, do not have the same force when applied to state-based constitutional rights." Schmid, 84 N.J. at 559–60. That distinction is patently inapplicable here.

Critically, amici ignore evidence that is directly relevant: the history of the 1947 Constitutional Convention, which confirms that the New Jersey Constitution does not provide a right to fusion voting, since proposals that would have granted such a right were expressly rejected after careful consideration. That history is especially revealing, and supports the State's position in interpreting the scope of New Jersey's Constitution, for three reasons.

First, New Jersey's Fusion Statutes preceded the 1947 Constitution by several decades and, by the time the Constitutional Convention met, had become deeply enshrined in the state's legal tradition. Second, the experience of other states—which had seen litigation on the identical issue—made apparent the options that the 1947 Framers had before them. Finally, the Convention saw

specific proposals to prohibit the legislature from maintaining fusion bans; the record is plain that those proposals "received careful consideration" but were nonetheless rejected. See (Db13-15). In short, this is not a case where this court must divine the meaning of silence at the constitutional convention. Rather, even the Fusion Statutes' opponents recognized that to overcome the presumption of validity, language would need to be included in the new Constitution to prohibit the Legislature from maintaining a law that "prohibits a candidate from standing for election as the candidate of more than one political party." 3 Proceedings of the New Jersey Constitutional Convention of 1947 614-16. Given that "when the framers of the constitution intended that a subject should be placed beyond legislative control they said so," State v. De Lorenzo, 81 N.J.L. 613, 621 (E. & A.1911), the 1947 Convention's specific rejection of the fusion-voting proposal is at a minimum a heavy thumb on the scale in favor of these statutes' validity, if not dispositive.[6]

Amici (see, e.g., CATOb9-11; NJLPb8-9) misplace reliance on dicta in In re City Clerk of Paterson, 88 A. 694 (N.J. Sup. Ct. 1913) in a single-judge oral

[6] Tellingly, while the Brennan Center's brief acknowledges the importance of constitutional history under Hunt, (Brennanb6-13), it focuses exclusively on 18th-Century Massachusetts history in discussing the Assembly Clause and makes no mention of the directly on-point history in the 1947 New Jersey Constitution. As the State's brief explains, the Framers of New Jersey's 1947 Constitution viewed the Assembly Clause as coextensive with the same clause in the Federal Constitution. (Db31).

decision concerning a different law that did not prohibit fusion, but rather barred voters from nominating a candidate at the primary who was not a member of that party. (See Db54-55).[7] That dicta has not been cited favorably in a majority opinion in New Jersey since 1965, see Gangemi v. Rosengard, 44 N.J. 166, 170 (1965), and never in the context of fusion voting. See also Stevenson v. Gilfert, 13 N.J. 496, 503-04 (1953) (questioning Paterson). And even if it were a precedential holding that invalidates a fusion ban (which, to be clear, it is not), the 1947 Constitutional Convention history confirms that the legislature can maintain anti-fusion statutes. In sum, amici have failed to demonstrate that the State Constitution offers a greater right to fusion voting than the Federal Constitution, which permits state regulation of fusion voting.

POINT III

AMICI'S POLICY ARGUMENTS DO NOT UNDERMINE THE STATE'S IMPORTANT INTERESTS THAT AMPLY SATISFY ANDERSON-BURDICK.

Amici collectively devote dozens of pages to expressing policy disagreements with the Legislature. Although these policy disagreements are

[7] Amicus CATO also misconstrues the decision as one about an anti-fusion statute, (see Catob9), but the statute at issue only limited "the right of the petitioners to putting up for nomination a man who must be of that political party." 88 A. at 695 (emphasis added); ibid. (noting since-repealed 1907 law "limit[ed] the choice of the convention to membership in its own party").

well-intentioned, courts do not invalidate statutes on that basis, because doing so would "usurp[] policy decisions from other branches of government." Texter v. Dep't of Human Servs., 88 N.J. 376, 382-83 (1982). And the Fusion Statutes well withstand constitutional inquiry. Balanced against the minimal burden on constitutional rights, ample and important state interests support the statutes' validity.

To start, there is no reason to question this court's longstanding application of Anderson-Burdick when assessing the constitutionality of elections regulations. (See Db38-29 (collecting cases)). And several amici cite cases that only confirm that the proper test for this constitutional challenge is the Anderson-Burdick interest-balancing test. This is particularly evident through amici's reliance on Council of Alternative Political Parties v. State Division of Elections ("CAPP"), 344 N.J. Super. 225 (App. Div. 2001), which employed the Anderson-Burdick test to assess a constitutional challenge to an election statute and cited favorably to Timmons. (See, e.g., ACLUb13; NJLPb12-13; Masketb15).

To argue that strict scrutiny should apply, amici cite Worden v. Mercer County Board of Elections, 61 N.J. 325 (1972) and various federal cases. (See, e.g., ACLUb11; NJLPb13; CATOb12-14). But Worden does not support any efforts to jettison Anderson-Burdick's flexible balancing test, which requires

strict scrutiny when "rights are subjected to 'severe' restrictions," Burdick v. Takushi, 504 U.S. 428, 433 (1992), and lesser scrutiny when the burden on constitutional rights is less severe. Worden preceded Anderson-Burdick and is in any case fully consistent with Anderson-Burdick. The restriction at issue in Worden was significant: college and graduate students were being deprived of voting in the communities of residence, and "were subjected as a class to questioning beyond all other applicants." Worden, 61 N.J. at 334. That severe burden would have yielded application of strict scrutiny under Anderson-Burdick. See Rutgers Univ. Student Assemb. v. Middlesex Cnty. Bd. of Elections, 446 N.J. Super. 221, 234 (App. Div. 2016) ("RUSA") (noting Worden required strict scrutiny "where similarly situated citizens were treated differently"). Since amici offer no doctrinal or principled reason to deviate from the Anderson-Burdick test, this court should continue to apply it here.

Under that test, the Fusion Statutes are appropriately subject to "less exacting review." Timmons, 520 U.S. at 358-59. As the State explained in its opening brief, the Fusion Statutes do not impose a heavy burden on the freedom of expression, association, or assembly, or pose any equal protection problem. No amici meaningfully engage with the State's analysis that the Fusion Statutes impose no restriction on a voter's ability to cast a vote for their preferred candidate, no restriction on the Moderate Party's ability to select a preferred

standard-bearer and so express on the ballot via an endorsement slogan, and no unequal treatment of major and minor parties. (See Db42-45, 59-62, 64, 66). After all, under New Jersey law, a candidate can express association with multiple parties: the party whose nomination he accepted, and the party whose endorsement is listed next to his name.

Instead, amici focus on the associational and expressive interests of political parties. But the fact that the ballot does not express those associations in precisely the format that the Moderate Party prefers is not a "severe" burden on constitutional rights. Amici cite no precedent suggesting that the constitution protects a standalone right to use the ballot to choose political parties. Rather, our constitution guarantees the right to vote for candidates, a right the Fusion Statutes do not impinge. (Db43). Nor would striking down the Fusion Statutes accomplish the goal amici seek—to be able to use the ballot as a tool to "calculate the electoral impact" of minor-party associational activities by tallying fusion candidate's vote share for that minor party, (EL-HAJb5)—since whether and how to tally votes cast in a fusion-voting scenario would require separate legislation. (Db57).

And finally, compelling State interests justify the Fusion Statutes regardless of the minimal burdens they may impose. For instance, the State identified the important interest in preventing ballot manipulation and

gamesmanship in prohibiting cross nomination, (Db45-48), and no amicus offers any rebuttal on that point. The State also explained that absent prohibitions on fusion voting, unscrupulous candidates could easily use cross-nomination to adopt party names as slogans and advertisements, to monopolize ballot space, or to aggregate fringe parties for the sole purpose of qualifying for ballot placement. (Db45-48).

Some amici, like the Libertarian Party, appear to acknowledge these problems with their position, but merely propose unidentified "legislative restrictions on minor parties in New Jersey" to curb the risk that minor parties "would form multiple new parties with politically significant names to increase their vote totals." (NJLPb5). This is hardly persuasive. For one, there is no support for the notion that a statute could be invalidated on the basis that a separate legislative solution could remedy the harm to state interests. For another, the proposal directly undercuts other arguments advanced by the Libertarian Party, other amici, and Appellants—that additional restrictions targeting minor parties prevent their flourishing in the marketplace of ideas.

Importantly, no amicus has any response to the other important state interests at issue, such as ensuring that major party candidates with considerable resources do not create new minor parties to appear on the ballot multiple times and monopolize ballot real estate with political messages. (See Db45-46). None

address the pernicious downstream effects of allowing such practices that would transform ballots into tools for horse-trading and gamesmanship, (see Db47) (outlining examples), and incentivize minor parties to forego identifying standard-bearers who best represent their interests in favor of candidates who are already backed by a major political party, (see Db48). None offers any rebuttal to the State's interest in highlighting distinctions between parties—thereby promoting voter confidence in political accountability and preventing confusion over what issues and positions a candidate actually stands for and prioritizes. (Db49-52). In fact, amici assert harms when "party members and donors lose the ability to assess whether the minor party can deliver responsive policy," (EL-HAJb5), but that is precisely the harm that would result under their position, since voters will have difficulty discerning how a cross-nominated candidate would resolve any conflicting priorities and platforms of multiple parties, each with their own priorities and platforms. (See Db49-52 (citing Swamp v. Kennedy, 950 F.2d 383, 387 (7th Cir. 1991) (Fairchild, J., concurring); State v. Anderson, 76 N.W. 482, 487 (Wis. 1898))).

When distilled to its essence, amici's arguments question the value that can be attributed to the political stability that the two-party system offers. (See, e.g., EL-HAJb6-15). But that is mere policy disagreement, and ignores New Jersey courts' confirmation that the State has a legitimate interest in preserving

political stability through a two-party system. (See Db52-54 (citing N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 198 (2002); Friends of Governor Tom Kean v. New Jersey Election Law Enf't Comm'n, 114 N.J. 33, 35 (1989); Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 367-68 (App. Div. 2012)). In short, their policy disagreements cannot overcome the numerous and compelling State interests that justify the minimal burden imposed by the Fusion Statutes, which allow voters to cast votes for the candidate of their choice and allow candidates who accept the nomination of one party to express endorsement from another directly on the ballot. Our Constitution requires no more.

CONCLUSION

This court should dismiss Appellants' appeal.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: _/s/ Steven M. Gleeson_____
Steven M. Gleeson
Deputy Attorney General
Attorney ID No. 087092013

Dated: October 3, 2023

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION, Docket No. A-3542-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION, Docket No. A-3543-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)

AMICUS CURIAE BRIEF OF NEW JERSEY LIBERTARIAN PARTY

PASHMAN STEIN WALDER HAYDEN, P.C.
21 Main Street, Suite 200
Hackensack, New Jersey 07601
Ph: (201) 488-8200; F: (201) 488-5556
CJ Griffin (Attorney ID 031422009)
cgriffin@pashmanstein.com

Attorneys for Proposed Amicus Curiae,
New Jersey Libertarian Party

On the brief:
CJ Griffin, Esq. (#031422009)
Joshua P. Law, Esq. (310252019)

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. THE NEW JERSEY SUPREME COURT IS HIGHLY UNLIKELY TO FOLLOW TIMMONS WHEN CONSIDERING WHETHER ANTI-FUSION LAWS VIOLATE THE STATE CONSTITUTION 3

A. New Jersey's Constitutional Protections are More Robust than the Protections Afforded by the First Amendment. 3

B. The Interests Asserted by Minnesota and Relied on by the Timmons Court in Support of Minnesota's Anti-Fusion Law are Insufficient to Sustain New Jersey's Anti-Fusion Statutes. 4

II. WELL REASONED STATE AND FEDERAL CASELAW DEMONSTRATE THAT TIMMONS IS AN OUTLIER THAT IS INCONSISTENT WITH PREVAILING PRECEDENT AND IGNORES THE POWERFUL POLITICAL AND PARTISAN MOTIVATION FOR ANTI-FUSION LAWS. 6

A. The State's Interests Cannot Justify the Burdens Imposed on Minor Parties and Their Members. 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases:

Anderson v. Calabrezze,
460 U.S. 780 (1983)..... 10, 13, 14

Burdick v. Takushi,
504 U.S. 428 (1992).....14

California Democratic Party v. Jones,
530 U.S. 567 (2000).....11

Council of State Alternative Political Parties v. State, Division of Elections,
344 N.J. Super. 225 (App. Div. 2001) 12, 13

Eu v. San Francisco Cnty. Democratic Cent. Comm.,
489 U.S. 214 (1989).....9

Hopper v. Britt,
96 N.E. 371 (N.Y. 1911) 8

In re Callahan,
93 N.E. 262 (N.Y. 1910) 7

In re city Clerk of Paterson,
88 A. 694 (N.J. S.Ct. 1913).....8, 9

New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.,
138 N.J. 326 (1994) 4

Norman v. Reed,
502 U.S. 279 (1993).....11

Patriot Party of Allegheny County v. Allegheny County Department of Elections,
95 F.3d 253 (3d. Cir. 1996).....11, 12

State v. Miller,
83 N.J. 402 (1980) 4

State v. Schmidt,
84 N.J. 535 (1980) 3, 4

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986).....10

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997)..... passim

Williams v. Rhodes,
393 U.S. 23 (1968).....10

Worden v. Mercer Cty. Bd. of Elections,
61 N.J. 325 (1972) 13

PRELIMINARY STATEMENT

In Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), the United States Supreme Court upheld Minnesota's anti-fusion laws against a challenge alleging they violated the New Party's associational rights under the First and Fourteenth Amendments. Specifically, in 1994 the New Party chose Andy Dawkins as its candidate for State Representative. Because Dawkins already was the nominee of the Minnesota Democratic-Farmer-Labor Party, election officials refused to accept the New Party's nominating petition on the ground that Minnesota's election laws prohibited a candidate from appearing on the ballot as the candidate of more than one party. The New Party filed suit, alleging that Minnesota's anti-fusion law denied the New Party its First Amendment right to nominate its preferred candidate, and deprived its members of the right to vote for Dawkins as the New Party's candidate.

The District Court granted summary judgment to the State. The Eighth Circuit Court of Appeals reversed, concluding that Minnesota's anti-fusion laws were broader than necessary. The Supreme Court reversed the Court of Appeals, concluding that Minnesota's anti-fusion laws did not severely burden the New Party's rights, and that the State's interests in preserving the two-party system was sufficiently weighty to justify whatever burden was imposed on the New Party by the anti-fusion laws.

This appeal challenging the ruling of New Jersey's Acting Secretary of State that enforced New Jersey's anti-fusion ban addresses the validity of New Jersey's anti-fusion ban under New Jersey's expansive State constitutional protections of the right to vote and the right to free speech.

As we demonstrate below, the historical background of fusion voting, the clear political motivation for anti-fusion laws, and the extremely adverse effect those laws have had on minor parties argue powerfully for their invalidation. Fusion candidacies – nomination of a candidate by more than one party – was commonplace in late nineteenth century politics, and because of fusion voting, minor parties held the balance of power in most states until the early 1890s. Because Republicans were then the dominant party, fusion candidacies allowed Democrats frequently to combine with minor parties that supported the Democratic candidate. Eventually, in the late 1890s, legislatures in Republican controlled states passed laws providing that candidates could not appear on the ballot as nominees of more than one political party. Today, states permitting fusion candidacies are rare.

Similarly protective motivations prompted the New Jersey Legislature to pass anti-fusion legislation in 1921. As a result, minor parties in New Jersey cannot nominate either Democratic or Republican candidates as their own party's choice. Minor party members face the Hobson's choice of backing

candidates who cannot win or voting for a major party candidate on the major party lines, but not as their own party's candidate. As a result, minor parties have a weakened status in New Jersey. No minor party candidate has won a statewide election in New Jersey in the past one hundred years.

Timmons is a weak decision. In sustaining the Minnesota anti-fusion law, the Supreme Court relied on the State's interest in preserving the two-party system, an interest never even advanced by Minnesota. Because our state's courts have construed our State Constitution's protections much more expansively than the Supreme Court's First Amendment jurisprudence, it is highly unlikely that our Supreme Court would sustain New Jersey's anti-fusion laws. This court's disposition of this appeal should anticipate that result.

ARGUMENT

I. THE NEW JERSEY SUPREME COURT IS HIGHLY UNLIKELY TO FOLLOW TIMMONS WHEN CONSIDERING WHETHER ANTI-FUSION LAWS VIOLATE THE STATE CONSTITUTION

A. New Jersey's Constitutional Protections are More Robust than the Protections Afforded by the First Amendment.

In State v. Schmidt, 84 N.J. 535 (1980), our Supreme Court reversed defendant's conviction for distributing political literature on Princeton's campus. In his opinion for the Court, Justice Handler observed that

> [a] basis for finding exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and

> assembly is found in part in the language employed. Our Constitution affirmatively recognizes these freedoms . . .
>
> The constitutional pronouncements, **more sweeping in scope than the language of the First Amendment**, were incorporated into the organic law of this State with the adoption of the 1844 Constitution. N.J. Const. (1844), Art.1 pars. 5 and 18.
>
> [Schmidt, 84 N.J. at 557 (emphasis added).]

New Jersey political speech enjoys a "preferred" position among our constitutional values. State v. Miller, 83 N.J. 402, 411 (1980). In New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326 (1994), Chief Justice Wilentz's opinion emphasized the preeminent status of our State Constitution's protection of free speech: "Precedent, text, structure and history all compel the conclusion that the New Jersey Constitution's right of free speech is **broader** than the right against government abridgement of speech found in the First Amendment." Id. at 353 (emphasis added).

B. The Interests Asserted by Minnesota and Relied on by the Timmons Court in Support of Minnesota's Anti-Fusion Law are Insufficient to Sustain New Jersey's Anti-Fusion Statutes.

In Timmons, Minnesota asserted three State interests in support of its anti-fusion law. The first was an interest in avoiding exploitation of fusion by nominating a major party candidate also as the candidate of the "No New Taxes" or "Stop Crime Now" party. The New Party responded that Minnesota easily could avoid manipulation of that sort by adopting more rigorous ballot access

standards. The Timmons Court rejected that response, noting that Minnesota "need not tailor the means it chooses to promote ballot integrity." 520 U.S. at 365.

Significantly, Minnesota's concern about a profusion of parties with titles that also serve as political slogans is less relevant in New Jersey. The legislative restrictions on minor parties in New Jersey significantly diminish any concerns that minor parties, absent an anti-fusion law, would form multiple new parties with politically significant names to increase their vote totals.

The second interest asserted by Minnesota in Timmons was the fear that "fusion would enable minor parties, by nominating a major party's candidate, to bootstrap their way to major-party status in the next election and circumvent the State's nominating petition requirement for minor parties." Id. at 366. Although the Supreme Court acknowledged the validity of that interest asserted by Minnesota, it bears little relevance to New Jersey.

A third interest advanced by Minnesota was that of avoiding voter confusion, an interest that the Timmons Court expressly declined to rely on. 520 U.S. at 369, n.13. The Timmons Court elected to rely primarily on an interest that Minnesota did not advance: the interest of a state in enacting "reasonable election regulations that may, in practice, favor the traditional two-party system." Id. at 367. The Court observed that "[t]he Constitution permits the

Minnesota Legislature to decide that political stability is best served through a healthy two-party system." Ibid.

Dissenting, Justice Stevens contended that the Court impermissibly had relied on the State's interest in preserving the two-party system. He observed:

> Even if the State had put forward this interest to support its laws, it would not be sufficient to justify the fusion ban. In most States, perhaps in all, there are two and only two major political parties. It is not surprising, therefore, that most States have enacted election laws that impose burdens on the development and growth of third parties. The law at issue in this case is undeniably such a law. The fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality.
>
> [Id. at 378.]

II. WELL REASONED STATE AND FEDERAL CASELAW DEMONSTRATE THAT TIMMONS IS AN OUTLIER THAT IS INCONSISTENT WITH PREVAILING PRECEDENT AND IGNORES THE POWERFUL POLITICAL AND PARTISAN MOTIVATION FOR ANTI-FUSION LAWS.

As was noted in our Preliminary Statement, there is no dispute that the consistent and dominant motivation for the numerous anti-fusion laws passed throughout the country was the desire of the Republican Party to prevent minor parties from nominating and supporting candidates that already had been designated as candidates of the Democratic party. The historical background is detailed in a landmark article, A Place on the Ballot: Fusion Politics and Anti-

Fusion Laws, 85 AM. Hist. Rev. 287 (1980), authored by Peter H. Argersinger, History Professor Emeritus at Southern Illinois University.

> Between 1878 and 1892 minor parties held the balance of power at least once in every state but Vermont, and from the mid-1880s they held that power in a majority of states in nearly every election. . . . By offering additional votes in a closely divided electorate, fusion became a continuing objective not only of third party leaders seeking personal advancement or limited, tangible goals but also of Democratic politicians interested in immediate partisan advantage. The tactic of fusion enabled Democrats to secure the votes of independents or disaffected Republicans who never considered voting directly for the Democrats they hated . . . .
>
> [Id. at 289-90.]

Professor Argersinger explains that as states began to abandon party ballots in favor of a system of public control over ballots – the so-called Australian system – that change gave Republican legislatures the opportunity to undermine fusion voting by passing laws that prohibited a candidate's name from appearing more than once on the official ballot.

> The Republicans' modifications of the Australian ballot . . . were based on a simple prohibition against listing a candidate's name more than once on the official ballot. . . . Although other ballot adjustments increased its effectiveness, this simple prohibition against double listing became the basic feature of what the Nebraska supreme court described as a Republican effort to use the Australian ballot as a 'scheme to put the voters in a straight jacket.'
>
> [Id. at 291-92.]

New York's highest Court addressed the validity of New York's anti-fusion laws in In re Callahan, 93 N.E. 262 (N.Y. 1910). There, the New York

Court of Appeals invalidated New York's anti-fusion law as arbitrary and an unauthorized exercise of legislative power. Chief Justice Cullen observed:

> If [the Legislature] cannot enact arbitrary exclusion from office, equally it cannot enact arbitrary exclusions from candidacy for office. What exclusion could be more arbitrary than that one party or organization should not be permitted to nominate the candidate of another.
>
> [Id. at 61.]

The issue returned to the New York Court of Appeals one year later after the Legislature again passed a law barring fusion candidacies. Again, the Court of Appeals invalidated the law. In re Hopper v. Britt, 96 N.E. 371 (N.Y. 1911).

In In re city Clerk of Paterson, 88 A. 694 (N.J. S. Ct. 1913), the Supreme Court of New Jersey (then an intermediate court), addressed the validity of an application to the Paterson City Clerk to place the name of candidate Fordyce on the official primary ballot of both the Republican and Progressive parties. The court noted that a statute passed by the Legislature in 1911 makes clear that a political party has the right to nominate a candidate of another party, and that that statute superseded a 1907 law that required a party to nominate only candidates who were members of that party.

Ruling that Fordyce could be placed on the ballots of both the Republican and Progressive parties, the court nevertheless expressed grave doubt about the

constitutionality of the 1907 law, which had the practical effect of banning fusion candidacies:

> But if this act of 1911 had never been passed, and it was clear that the provision of the act of 1907 was mandatory, I should nevertheless be inclined to think that the refusal of the clerk in this instance was not legally justifiable.
>
> The right of suffrage is a constitutional right. The Legislature may deal with it so far as it is necessary to protect it; may pass laws to insure the security of the ballot and the rights of the voters. But I conceive that the Legislature has no right to pass a law which in any way infringes upon the right of voters to select as their candidate for office any person who is qualified to hold that office. . . . The Legislature may change the method of selection; but it cannot abridge the right of selection.
>
> [Id. at 694.]

State courts' skepticism about the soundness of Timmons is fortified by the United States Supreme Court's consistently emphatic support of the First Amendment rights of political parties. In a series of significant First Amendment cases, the Court steadfastly underscored the importance it attached to preventing Legislative regulations from encroaching on the free speech and assembly rights of parties. See, e.g., Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 224 (1989) (invalidating California election law that prohibited parties from endorsing candidates in their own party primaries and stating that

> [f]reedom of association means not only that an individual voter has the right to associate with the political party of her choice . . . , but also that a political party has a right to 'identify the people who constitute the association,' . . . and to select a 'standard bearer who

> best represents the party's ideologies and preferences.') (citations omitted);

Anderson v. Calabrezze, 460 U.S. 780, 793-94 (1983) (invalidating Ohio law requiring independent candidate for President John Anderson to file his nominating petition in Ohio by March 29, 1980, weeks before Anderson had announced his intention to run for President, and stating

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and – of particular importance – against those voters whose political preferences lie outside the existing political parties.;

Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 215-16 (1986) (invalidating Connecticut statute that prohibited Connecticut Republican Party from allowing independent voters to participate in Party's primary elections, and stating

> As we have said, ' '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' ' (citations omitted);

Williams v. Rhodes, 393 U.S. 23, 31 (1968) (invalidating Ohio election statute requiring so many signatures on petitions for nominations for President and Vice-President as to preclude new political parties and old parties with limited membership to nominate candidates and stating

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus

> denied an equal opportunity to win votes. . . . [T]his Court ha[s] consistently held that 'only a compelling state interest in the regulations of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.';

Norman v. Reed, 502 U.S. 279, 288-89 (1993) (invalidating as unconstitutional Illinois statute prohibiting use of a political party's name in Cook County because of prior use of party name in City of Chicago and stating

> For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. . . . To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation . . . . (citation omitted);

California Democratic Party v. Jones, 530 U.S. 567, 575-76 (2000) (invalidating California open primary law that compelled parties to open their primary elections to voters who were not party members, quoting with approval from Justice Stevens's dissent in Timmons, and stating

> Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.' Eu, supra, at 224 (internal quotation marks omitted).

Similarly, other federal and New Jersey decisions have emphasized the high priority accorded to the autonomy and critical role of minor political parties. In Patriot Party of Allegheny County v. Allegheny County Department of Elections, 95 F.3d 253 (3d. Cir. 1996), plaintiff Patriot Party challenged the

validity of Pennsylvania statutes that prohibited the Patriot Party, and other minor political parties, from "'cross-nominating' a candidate for political office when that candidate already has been nominated for the same office by another political party." Id. at 255. The Third Circuit invalidated the Pennsylvania anti-fusion law: "[w]e therefore find unpersuasive each interest that the Department has offered to justify its ban on cross-nomination by minor parties." Id. at 267.

In Council of State Alternative Political Parties v. State, Division of Elections, 344 N.J. Super. 225 (App. Div. 2001), this court addressed a constitutional challenge to two New Jersey statutes, one that prohibited a voter from declaring a party affiliation other than Democrat or Republican, and the other requiring all county clerks to provide five free copies of the registry lists to State-recognized political parties, namely the Democratic and Republican parties. By statute, only political parties that received, in the last election for members of the General Assembly, at least 10 percent of the total vote cast are recognized as a "political party" by the State. Voters were permitted to affiliate with either of those recognized parties when registering for the primary election, or they can declare themselves as "Independent." All other voters are considered "Unaffiliated." As of June 2, 1998, 19.18 percent of registered voters were Republicans, 25.38 percent were declared Democrats, .24 percent were declared Independents, and 55.20 percent were classified Unaffiliated.

Plaintiff, Council of Alternative Political Parties (CAPP), advocated for a more open and responsive political system in New Jersey. Plaintiff contended that the inability of the members of their constituent parties to declare their party affiliation when registering to vote, and for those parties to obtain affiliation lists of their members from election officials, severely burdens their rights of political affiliation and is discriminatory. The trial court agreed.

Affirming, the Appellate Division concluded that the burdens imposed by the State statutes outweighed any of the State interests advanced to support the preferred treatment of the major parties. The court concluded that the state statutes impermissibly burdened the First Amendment rights of the minor parties and denied those parties their constitutional right to equal protection of the law.

A. The State's Interests Cannot Justify the Burdens Imposed on Minor Parties and Their Members.

Although Appellant, relying on Worden v. Mercer Cty. Bd. of Elections, 61 N.J. 325, 346 (1972), persuasively asserts that New Jersey courts apply "strict scrutiny" to state laws that infringe on constitutionally protected voting rights, Amicus contends that New Jersey's anti-fusion laws also are constitutionally infirm under the burden/balancing test that originated in Anderson v. Calabrezze, 460 U.S. at 789. Under that more flexible standard,

> [a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff

> seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'
>
> [Id. at 789.]

See also Burdick v. Takushi, 504 U.S. 428, 434 (1992).

As noted, the Timmons Court expressly disclaimed any reliance on Minnesota's alleged interest in preventing voter confusion. Timmons, 520 U.S. at 369 n.13. The two other interests asserted by Minnesota have been discussed earlier in this brief and demonstrated to be of limited relevance in New Jersey. The State interest primarily relied on by the Supreme Court – protection of the two-party system – is similarly irrelevant and inapplicable in New Jersey. Since the enactment of anti-fusion laws and the enhanced party qualification law in the 1920s, no minor party in New Jersey has attained the statutory status of a "political party," nor during that same period has any candidate of a minor party been elected to a major public office.

In contrast, the burden on minor parties imposed by New Jersey's anti-fusion laws is enormous. As noted, if the Libertarian Party chooses to support a Democratic or Republican candidate for a specific office, the anti-fusion law prohibits that candidate from appearing on the ballot as a candidate of the Libertarian Party, and Libertarian Party members can vote for that candidate only on the Democratic or Republican party line. So Libertarian Party members

are forced to choose between voting for their preferred candidate as the candidate of a party they neither support nor belong to, or waste their vote on another candidate that is not their preferred choice. That result clearly imposes a severe burden on both the Libertarian Party's constitutional right to support the candidate of its choice as a candidate of the Libertarian Party, and on the constitutional rights of its party members to vote for the Party's preferred candidate as a Libertarian Party candidate, and not as a Democratic or Republican Party candidate. Those burdens clearly outweigh any conceivable state interest asserted in support of the anti-fusion laws.

CONCLUSION

Timmons is not a barrier to the invalidation of New Jersey's anti-fusion laws, and our Supreme Court is not likely to be deterred by the Timmons Court's deference to the two major parties as the interest supporting Minnesota's anti-fusion law. This court should anticipate our Supreme Court's rejection of Timmons' rationale and strike down New Jersey's repressive and anti-democratic laws that prohibit fusion candidacies.

Respectfully submitted,
Pashman Stein Walder Hayden, PC

By: /s/ CJ Griffin, Esq.

Dated: September 21, 2023

to Protect Democracy

October 6, 2023

Clerk, Appellate Division
New Jersey Superior Court
P.O. Box 006
25 West Market Street
Trenton, New Jersey 08625

Re: *In re* Tom Malinowski, Petition for Nomination for General Election, November 8, 2022, for United States House of Representatives New Jersey Congressional District 7

Docket Nos. A-3542-21 & A-3543-21 (Consolidated)

Civil Action: On Appeal from a Final Decision of the New Jersey Secretary of State. Sat below: Hon. Tahesha Way, Secretary of State.

Supplemental Letter Brief of Appellants

Honorable Judges of the Appellate Division:

Appellants respectfully submit this supplemental letter brief to clarify issues raised by Amici and correct several misleading and incorrect statements raised in Respondents' supplemental brief filed on October 3, 2023.

First, New Jersey courts have long recognized the "federalism discount" that motivates the U.S. Supreme Court's often-circumscribed interpretation of the U.S. Constitution—that is, a latent presumption against imposing uniform rules in all fifty states in favor of allowing each state to recognize and enforce the specific protections afforded by its own constitution. (ACLUb7-10.)[1] The

[1] "Pb_" refers to Appellants' merits brief; "Prb_" refers to Appellants' reply brief; "Db_" refers to Respondents' merits brief; "Dsb_" refers to Respondents'

New Jersey Supreme Court has time and again acknowledged this unique feature of federal constitutional law as a key justification for recognizing protections afforded by the State Constitution in the face of adverse federal precedent. E.g., State v. Hempele, 120 N.J. 182, 197 (1990); State v. Schmid, 84 N.J. 535, 559 (1980); see also Robinson v. Cahill, 62 N.J. 473, 490 (1973). The Appellate Division recently invoked this feature of federalism to hold that a state constitutional provision affords greater protection than its federal analogue. State v. Caronna, 469 N.J. Super. 462, 481-99 (App. Div. 2021). Notably, the Appellate Division reached that conclusion after citing, discussing, and relying upon both (Pashman and Handler) concurrences in State v. Hunt, 91 N.J. 338 (1982). Caronna, 469 N.J. at 481-86. Respondents' effort to disparage the Pashman concurrence, and the ACLU of NJ's corresponding explanation of the "primacy" of state constitutional protections, is unavailing. (Dsb3-6; ACLUb3-10.) Thus, not only should the state constitutional analysis in this case draw upon the wisdom of both Hunt concurrences, but the "federalism discount" should reduce the persuasive value, if any, given to Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).

Second, Respondents' contention that "'most states' accept the constitutionality of a fusion ban" is simply wrong. (Dsb5 n.5 (quoting

---

supplemental brief; and "ACLUb_" refers to the ACLU of NJ's amicus brief.

ACLUb10).) In truth, Pennsylvania is the only state where anti-fusion laws have withstood a state constitutional challenge in the modern era—and even there, the court was closely divided, with three justices dissenting. Working Families Party v. Commonwealth, 209 A.3d 270 (Pa. 2019). Several states at the turn of the 20th century rejected constitutional challenges to (what were then) newly enacted anti-fusion laws—but their anachronistic deference to legislative prerogative and diminutive treatment of political rights carry little weight today. (Prb21-22.) On the other hand, New York's highest court repeatedly struck down anti-fusion laws as violative of its state constitution. (Pb13-14, 37-38, 87-88.) Relying upon nearly identical constitutional text, the New Jersey court in In re City Clerk of Paterson, 88 A. 694 (N.J. Sup. Ct. 1913), came to the same conclusion. Other states, like Connecticut, do not have anti-fusion laws.

Third, Respondents repeat the same errors[2] from their earlier briefing in arguing that the anti-fusion laws impose a negligible burden justified by appropriate state interests. (Dsb9-15.) While Appellants refrain from reiterating here why Respondents are mistaken as a matter of fact, law, and logic, one new error requires correction: Respondents contend that "a statute could [not] be invalidated on the basis that a separate legislative solution could remedy the

[2] An example: the false claim that the election code allows fusion today. (Ds11-12.) Appellants already debunked that theory. (Prb15-17.) After all, this appeal exists because Respondents kept the Moderate Party's nomination off the ballot.

harm to state interests." (Dsb13.) That is, in a word, incorrect. In applying constitutional scrutiny, courts routinely reach that conclusion when they evaluate how closely tailored a challenged restriction is to a legitimate state interest. E.g., Moriarty v. Bradt, 177 N.J. 84, 103 (2003) ("[W]hen the State seeks, by statute, to interfere with . . . a fundamental right . . . [t]hat statute is thus subject to strict scrutiny and will only pass muster if it is narrowly tailored to serve a compelling interest."). This is true under the Anderson-Burdick standard, where assessing "the extent to which [asserted] interests make it necessary to burden the plaintiff's rights" requires a court to consider whether those same interests can be, or already are, advanced through less burdensome alternatives. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). Restrictions are deemed unconstitutional when there are alternative ways for the government to promote the same interest while imposing a lesser burden on fundamental rights—Respondents even cite a recent example. (See Dsb5 (citing E & J Equities, LLC v. Bd. of Adjustment of Twp. of Franklin, 226 N.J. 549, 568 (2016).) In this appeal, any legitimate interest invoked by Respondents could easily be advanced with regulations addressing those specific concerns—in lieu of a sweeping anti-fusion regime passed for the undisputed purpose of reducing political competition and voter choice.

Fourth, and most importantly, Respondents' attempt to characterize Amici as merely expressing "policy disagreement" with the State is belied by the briefs, each of which offers nuanced insights on core issues central to this appeal. (Dsb9, 14, 15.) The ACLU of NJ, represented by scholars Robert Williams and Ronald Chen, explain why our state's jurisprudence has been protective of fundamental constitutional rights. Former Governor Whitman and two libertarian think tanks discuss why the challenged laws are irreconcilable with doctrinal limits keeping the State from picking winners and losers. First Amendment scholar Tabatha Abu El-Haj explains why Timmons was wrongly decided as a matter of federal constitutional law, therefore depriving it of any persuasive value here.

Former House Majority Leader Richard Gephardt and a bipartisan group of former Representatives, the NJ Libertarian Party, and Nolan McCarty (along with other leading political scientists) detail the specific ways that anti-fusion restrictions burden voters, lawmakers, candidates, and parties, highlighting the necessity of centering parties and their nominating function under existing constitutional doctrine. And finally, the Brennan Center for Justice and a group of leading historians explain key aspects of the political and legal history essential to understanding the meaning and scope of the Assembly/Opinion Clause and the context surrounding the adoption of anti-fusion laws.

* * *

Under the State Constitution, Appellants are guaranteed the opportunity to participate fully and equally in the political process. Appellants ask this Court to recognize that the State's enforcement of the anti-fusion laws breaks this inviolable promise.

Respectfully submitted,

WEISSMAN & MINTZ

220 Davidson Avenue, Suite 410
Somerset, New Jersey 08873
732.563.4565

Attorneys for
Moderate Party and
Richard A. Wolfe

By: */s/ Flavio L. Komuves*

-and-

BROMBERG LAW LLC
43 West 43rd Street
Suite 32
New York, New York 10036
212.859.5083

By: */s/ Yael Bromberg*

Attorneys for
Moderate Party and
Richard A. Wolfe

UNITED TO PROTECT DEMOCRACY
2020 Pennsylvania Ave NW
Suite 163
Washington, D.C. 20006
202.579.4582

Attorneys for
Michael Tomasco and
William Kibler

By: */s/ Farbod K. Faraji*

Dated: October 6, 2023

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3542-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3543-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLANTS

WEISSMAN & MINTZ
Flavio Komuves, Esq. (018891997)
fkomuves@weissmanmintz.com
Brett M. Pugach, Esq. (032572011)
bpugach@weissmanmintz.com
Steven P. Weissman, Esq. (024581978)
sweissman@weissmanmintz.com
220 Davidson Avenue, Suite 410
Somerset, New Jersey 08873
732.563.4565

BROMBERG LAW LLC
Yael Bromberg, Esq. (036412011)
ybromberg@bromberglawllc.com
43 West 43rd Street, Suite 32
New York, New York 10036
212.859.5083

Professor Joel Rogers (Admitted Pro Hac Vice)
University of Wisconsin Law School
jrogers60@gmail.com
975 Bascom Mall
Madison, Wisconsin 53706
609.347.9889

Professor Nate Ela (Admitted Pro Hac Vice)
Temple University Beasley School of Law
nate.ela@gmail.com
1719 North Broad Street
Philadelphia, Pennsylvania 19122
215.204.7861

Counsel and on the Brief for Appellants Moderate Party and Richard A. Wolfe

UNITED TO PROTECT DEMOCRACY
Farbod K. Faraji, Esq. (263272018)
farbod.faraji@protectdemocracy.org
Beau C. Tremitiere, Esq. (Admitted Pro Hac Vice)
beau.tremitiere@protectdemocracy.org
2020 Pennsylvania Avenue NW, Suite 163
Washington, D.C. 20006
202.579.4582

Counsel and on the Brief for Appellants Michael Tomasco and William Kibler

TABLE OF CONTENTS

BRIEF

PRELIMINARY STATEMENT 1

LEGAL ARGUMENT 2

I. THE THREE MAIN POINTS DRIVING THE OPPOSITION BRIEFS ARE WRONG 2

A. This Case Is About the State—Not the Federal—Constitution 2

B. Any Interpretative Inferences from 1947 Constitutional Convention Actually Support Appellants' Position 3

C. Current Law Does Not Allow Cross-Nominations on the Ballot 15

II. THE ANTI-FUSION LAWS VIOLATE THE RIGHT TO VOTE 18

A. Strict Scrutiny Is Required Under Binding Precedent 18

B. These Laws Clearly Impose a Severe Burden on the Right to Vote 19

C. None of the Asserted State Interests Withstand Scrutiny 23

III. THE ANTI-FUSION LAWS VIOLATE THE RIGHT TO FREE SPEECH AND POLITICAL ASSOCIATION 30

IV. THE ANTI-FUSION LAWS VIOLATE THE RIGHT TO ASSEMBLE AND MAKE OPINIONS KNOWN TO REPRESENTATIVES 33

V. THE ANTI-FUSION LAWS VIOLATE EQUAL PROTECTION 34

CONCLUSION 35

SUPPLEMENTAL APPENDIX

Vol. I of Proceedings of the New Jersey Constitutional Convention of 1947 (relevant pages).....Psa1

Vol. II of Proceedings of the New Jersey Constitutional Convention of 1947 (relevant pages)..... Psa4

Vol. III of Proceedings of the New Jersey Constitutional Convention of 1947 (relevant pages)..... Psa16

TABLE OF AUTHORITIES

Cases

Anderson v. State, 76 N.W. 482 (Wisc. 1898) 21, 22, 28
Atl. City Racing Ass'n v. Att'y Gen., 98 N.J. 535 (1985) 10
Borough of Collingswood v. Ringgold, 66 N.J. 350 (1975) 35
Bullock v. Carter, 405 U.S. 134 (1972) 23
Common Cause Ind. v. Individual Members of the Ind. Election Comm'n, 800 F.3d 913 (7th Cir. 2015) 20
Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) 23
Devane v. Touhey, 304 N.E.2d 229 (N.Y. 1973) 20
E&J Equities v. Bd. of Adjustment, 226 N.J. 549 (2016) 31
Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989) 23, 25
Free Speech Coal., Inc. v. Att'y Gen., 825 F.3d 149 (3d Cir. 2016) 23
Frontiero v. Richardson, 411 U.S. 677 (1973) 12
Gangemi v. Berry, 25 N.J. 1 (1957) 9
Garden State Equality v. Dow, 216 N.J. 314 (2013).....10
Green Party v. Hartz Mt. Indus., 164 N.J. 127 (2000).....31
Greenberg v. Kimmelman, 99 N.J. 552 (1985) 35
Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254 (1998) 31
Hand v. Larason, 163 N.J. Super. 68 (Law Div. 1978) 15, 17
In re City Clerk of Paterson, 88 A. 694 (N.J. Sup. Ct. 1913) .....passim
In Re Quinlan, 70 N.J. 10 (1976) 12
Lake Valley Assocs., LLC v. Twp. of Pemberton, 411 N.J. Super. 501 (App. Div. 2010) 19
Lewis v. Harris, 188 N.J. 415 (2006) 10, 33
Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019) 34
Mazo v. N.J. Sec'y of State, 54 F.4th 124 (3d Cir. 2022) 30
Moynihan v. Lynch, 250 N.J. 60 (2022) 12
Munro v. Socialist Workers Party, 479 U.S. 189 (1986).....20

N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 138 N.J. 326 (1994) 31

N.J. Republican State Comm. v. Murphy, 243 N.J. 574 (2020) 2, 33

Patriot Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections, 95 F.3d 253 (3d Cir. 1996) 35

Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609 (2000) 11, 12

Right to Choose v. Byrne, 91 N.J. 287 (1982) 11, 12

Robinson v. Cahill, 62 N.J. 473 (1973) 9, 12

Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections, 446 N.J. Super. 221 (App. Div. 2016) 14, 19

Sadloch v. Allan, 25 N.J. 118 (1957) 28

SAM Party of N.Y. v. Kosinski, 987 F.3d 267 (2d Cir. 2021).....25, 32

Smith v. Penta, 81 N.J. 65 (1979).....20, 21

State ex rel. Bateman v. Bode, 45 N.E. 195 (Ohio 1896).....21

State ex rel. Fisk v. Porter, 100 N.W. 1080 (N.D. 1904).....21

State v. Buckner, 223 N.J. 1 (2015) 12, 13

State v. Gelman, 195 N.J. 475 (2008) 8

State v. Gerald, 113 N.J. 40 (1988) 12

State v. Hunt, 91 N.J. 338 (1982) 2, 3, 30, 31

State v. Murzda, 116 N.J.L. 219 (E. & A. 1936).....13

State v. Novembrino, 105 N.J. 95 (1987) 11

State v. Schmid, 84 N.J. 535 (1980).....34

State v. Trump Hotels & Casino Resorts, Inc., 160 N.J. 505 (1999).....9

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) .....passim

United States v. Stevens, 533 F.3d 218 (3d Cir. 2008).....23

Vreeland v. Byrne, 72 N.J. 292 (1977) 9, 10, 14

Williams v. Rhodes, 393 U.S. 23 (1968) 19

Worden v. Mercer Cty. Bd. of Elections, 61 N.J. 325 (1972).....passim

Constitutional Provisions

N.J. CONST. art. I, ¶ 18 33

N.J. CONST. art. II, § 1, ¶ 3 .....5, 18

N.J. CONST. OF 1844, art. II, ¶ 1 5

Statutes

N.J.S.A. 19:13-4.....17

N.J.S.A. 19:13-8.....17

N.J.S.A. 19:14-9.....15, 16, 17

N.J.S.A. 19:23-15.....17

Or. Rev. Stat. Ann. § 254.135(3)(a) 25

Other Authorities

Arthur Ludington, Ballot Legislation of 1911, 6 AM. POL. SCI. REV. 54 (1912) 15

County of Morris, Official General Election Sample Ballot (Nov. 2022) 16

FEDERALIST NO. 10 .....29, 30

John E. Bebout & Joseph Harrison, The Working of the New Jersey Constitution of 1947, 10 WM. & MARY L. REV. 337 (1968).....5, 14

RICHARD J. CONNORS, THE PROCESS FOR CONSTITUTIONAL REVISION IN NEW JERSEY: 1940-1947, National Municipal League (1970).....7

Richard N. Baisden, Charter for New Jersey: The New Jersey Constitutional Convention of 1947, Division of the State Library, Archives and History, N.J. Dep't of Educ. (1952) 7

ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS (2023).....9

Robert F. Williams, The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents, 27 OKLA. CITY U. L. REV. 189 (2002) 9

ROBERT F. WILLIAMS, THE N.J. STATE CONSTITUTION (2012) 2

State of N.J. Dep't of State, Result of the General Election, Held November 4th, 1947.....5

PRELIMINARY STATEMENT

This appeal presents a simple question: whether Secretary Way's refusal to place the Moderate Party's nomination on the November 2022 ballot violates Appellants' fundamental rights guaranteed in the State Constitution. The constitutional text, precedent, history, and record all point to the same answer: the rejection under the anti-fusion laws was unconstitutional. Neither Respondents nor Intervenor dispute that these laws were passed with the discriminatory purpose of excluding minor parties from the political process and pushing voters to support the two major parties. Nor do they dispute that New Jersey is the most hostile state in the U.S. for minor parties. Nor do their briefs grapple with the history, case law, and evidence that all lead to the unmistakable conclusion that the Secretary's rejection violated the rights to vote, free speech and association, assembly, and equal protection. Instead, they rely on three faulty premises: (1) this case bringing state constitutional claims should be guided by federal law; (2) a little-known proposal during the 1947 constitutional convention controls every legal decision in this case; and (3) cross-nominations are somehow permitted already (though that has not been true for more than a century). These arguments defy state law, precedent, and (at times) common sense. For the reasons set forth below, and those set forth in Appellants' merits brief, this Court should hold that the Secretary's rejection was unconstitutional.

LEGAL ARGUMENT

I. THE THREE MAIN POINTS DRIVING THE OPPOSITION BRIEFS ARE WRONG

A. This Case Is About the State—Not the Federal—Constitution

Rather than engage with the text, history, and structure of the State Constitution, Intervenor and Respondents spend most of their briefs discussing federal law. (Db17-34; Ib12-25.)[1] In so doing, they raise irrelevant federal issues;[2] ignore unique features of state law—including the plain language of the State Constitution; ignore the record; and trivialize this Court's "obligation and . . . ultimate responsibility to interpret the meaning of the Constitution" and apply it to the facts presented. N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 591 (2020) (citation omitted). Federal rulings might provide useful guidance—but they are "not controlling on state courts." State v. Hunt, 91 N.J. 338, 363 (1982) (Handler, J., concurring). New Jersey courts have repeatedly recognized that the State Constitution "goes beyond federal minimum standards." ROBERT F. WILLIAMS, THE N.J. STATE CONSTITUTION 52-53 (2012).

[1] "Pb_" refers to Appellants' merits brief; "Pa_" refers to Appellants' appendix; "Psa_" refers to Appellants' supplemental appendix filed herewith; "Db_" refers to Respondents' merits brief; and "Ib_" refers to Intervenor's merits brief.

[2] Intervenor repeatedly insists that state laws restricting nominations qualify as "time, place, and manner" restrictions under the Elections Clause. (Ib11, 13, 25, 29.) Whether they do or not is irrelevant to whether those laws nonetheless violate fundamental rights guaranteed under the State Constitution.

Timmons v. Twin Cities Area New Party is neither "dispositive" nor "definitive" (Db22), and the Court should reject the invitation to surrender its independence to adopt conclusions reached on different facts construing different constitutional text.[3]

Independent analysis is not only justified, but necessary when, as here, the State Constitution provides an express and affirmative right unenumerated in the U.S. Constitution (e.g., right to vote) or where the State Constitution provides a right without a federal analogue (e.g., right to assemble to "make [] opinions known to [] representatives"). Hunt, 91 N.J. at 364 (Handler, J., concurring). It is up to this Court to decide whether laws that exclude minor parties from real political participation and ensure that an electorate eager for more choice has only two real options on the ballot comport with the New Jersey Constitution.

B. Any Interpretative Inferences from 1947 Constitutional Convention Actually Support Appellants' Position

Respondents insist that the anti-fusion laws comply with fundamental rights long-guaranteed under the State Constitution merely because an eleven-member committee in the 1947 constitutional convention declined to adopt certain proposed language in a closed-door executive session. This sweeping

[3] Even under Respondents' reading of federal law—statutes designed to protect the "two-party system" are lawful "so long as third parties have opportunities to develop and flourish" (Db52)—Appellants must prevail because the anti-fusion laws suffocate the Moderate Party and other minor parties. (See infra p.29.)

assertion collapses upon the slightest scrutiny—Respondents are wrong about the facts and the law, and any inferences run the other direction. Indeed, if accepted, Respondents' interpretive theory would mean that a convention's failure to override a statute in place at the time of a convention would be a defense against a future constitutional challenge, even when the stated purpose of the convention was to remain focused on high-level principles.

On June 12, 1947, Governor Driscoll opened the convention with an address instructing delegates to remain focused on foundational principles and avoid ensconcing specific policy decisions into the revised constitution:

> [I]t [is] all the more important that the organic law under which our State may live for the next century be restricted to the establishment of a sound structure, to the definition of official responsibility and authority, to the assurance of the fundamental rights and liberties of all the people . . . . We can best insure against the pressures of our age and the vicissitudes of the future by limiting our State Constitution to a statement of basic fundamental principles . . . . The State Constitution is an organic document – a basis for government. It should not be a series of legislative enactments . . . . The longer a constitution, the more quickly it fails to meet the requirements of a society that is never static.

(Psa2 (emphasis added).) This approach was appropriate, Governor Driscoll explained, because the courts are empowered with applying broad constitutional principles to judge the validity of challenged laws and practices:

> [J]udicial review of the acts of the Legislature and Executive, giving power to courts to set aside laws and executive action where the judges determine that they violate the written constitution, has come

> to make the quality of our justice synonymous with the values of democracy held by the average citizen.

(Psa3.) Several months later, the convention adjourned after successfully executing the Governor's call to action.[4] In November, voters overwhelmingly approved the revised constitution.[5] Aside from the modernization of the right to vote—guaranteeing the right to vote for "[e]very citizen" rather than just "white male citizen[s]"—the text of the provisions at issue here were unchanged.[6]

Respondents' brief leaves the impression that the question of whether to enshrine a right to cross-nomination was a prominent issue in the proceedings. Not so. For years, advocates had sought a convention to strengthen the power of the state Executive and modernize and unify the state Judiciary. Bebout & Harrison, supra at 339-53. These issues, along with several other fundamental questions, predominated the convention proceedings. Id.

Buried in thousands of pages of hearing transcripts, minutes, reports, and other records are a few scattered references to cross-nominations. Amidst the months of convention proceedings, there was one mention in a Legislative

---

[4] John E. Bebout & Joseph Harrison, The Working of the New Jersey Constitution of 1947, 10 WM. & MARY L. REV. 337, 338 (1968) (commending this "strictly constitutional document, not a code of laws, which establishes a simple governmental system based upon the separation of powers principle").
[5] See State of N.J. Dep't of State, Result of the General Election, Held November 4th, 1947, https://perma.cc/RUY3-R223.
[6] N.J. CONST. OF 1844, art. II, ¶ 1; N.J. CONST. OF 1947, art. II, § 1, ¶ 3.

Committee hearing: witness testimony by a labor representative who advocated several different constitutional amendments, including a constitutional prohibition on laws preventing cross-nominations. (Da14-16.) The record consists of a single question a delegate then asked the witness on whether the 1844 Constitution prohibited state laws authorizing cross-nominations. Id. The Legislative Committee records also contain a corresponding, one-page, itemized list of policy recommendations from the same union, though it is unclear when this was submitted, to whom, and whether it was ever reviewed. (Da19.)[7]

The day before this testimony, a delegate had introduced "Proposal 25." (Da10.) The proposal, which would have added this new provision to Article IV, Section VII, was summarily referred to the Legislative Committee without debate. Id.[8] The next week, in a closed-door executive session, the Committee declined to adopt Proposal 25 and nine other proposals. (Psa17-18.) There is no transcript from the meeting or any other record explaining the Committee's (or any individual delegate's) rationale. The minutes simply state for each proposal: "On motion made, seconded and carried, Proposal No. [x] was rejected." Id.

[7] The identical list was submitted by a second public interest group. (Da18.) These pages are found scattered among dozens of other written submissions from community stakeholders, public interest groups, and civic leaders in a catchall miscellaneous appendix in the convention records.

[8] Respondents erroneously state that Proposal 25 was referred to the Committee on Rights, Privileges, Amendments and Miscellaneous Provisions. (See Db13.)

Two weeks later, the Committee submitted its report to the convention explaining the rationale for its proposed amendments and rejection of two proposals to constitutionalize rules for lobbying and periodic statutory revisions. (Psa5-15.) The report then simply listed the nine proposals that had been considered and rejected in the executive session, noting that "the principles of some were incorporated into the Committee's proposal." (Psa14.)[9]

That's it. No discussion of the anti-fusion laws, how those laws interact with fundamental rights,[10] or Proposal 25.[11] Nor do Respondents cite any debate over fusion during or before the convention. Yet, in their view, "[t]here can be little doubt that the Framers were aware of . . . the policy debate over the bar on fusion" and there is "ample evidence" that fundamental rights must be construed as condoning the anti-fusion laws. (Db13, 23.) They are wrong.

First, Respondents fundamentally mischaracterize the core issue on

---

[9] The report simply stated: "All received careful consideration and although none was adopted in whole or in part, as submitted, the principles of some were incorporated in the Committee's proposal." (Da12.)

[10] Notably, Proposal 25 sought to add a new provision to Article IV (focusing on the Legislature), while the constitutional provisions at issue here are in Article I (rights and privileges) and Article II (suffrage and elections).

[11] The authoritative study on the convention makes no mention of Proposal 25 or fusion. See RICHARD J. CONNORS, THE PROCESS FOR CONSTITUTIONAL REVISION IN NEW JERSEY: 1940-1947, National Municipal League 150-55, 170-72 (1970). Neither does the first study authored in 1952 by a researcher who served the convention. See Richard N. Baisden, Charter for New Jersey: The New Jersey Constitutional Convention of 1947, Division of the State Library, Archives and History, N.J. Dep't of Educ. (1952).

appeal—it is not, as they intimate, whether the State Constitution contains a free-standing, affirmative right to participate in fusion voting. (See Db22.) Rather, the issue is much more circumscribed: whether prohibiting the Moderate Party from cross-nominating its preferred candidate—viewed, as it must be, in the context of other restrictions set forth in the state election code—violates fundamental political rights long guaranteed under the State Constitution. The 1947 proceedings are of little use in resolving this narrow question.

Second, Respondents' implied intent theory rests upon an unsupported factual premise: that Proposal 25 was not adopted because delegates believed the anti-fusion laws in place at the time should be deemed constitutional. In reality, the record is completely silent as to why any particular delegate declined to support Proposal 25, let alone the prevailing view within the Legislative Committee or the full convention. Any number of alternate motivations are equally (if not more) plausible: addressing cross-nominations was inconsistent with the Governor's command to remain focused on broad, foundational principles; the interplay with fundamental political rights could be better addressed by the Judiciary; the Judiciary had already settled this question in noting the probable unconstitutionality of prior anti-fusion laws in In re City Clerk of Paterson, 88 A. 694 (N.J. Sup. Ct. 1913); and so forth. See, e.g., State v. Gelman, 195 N.J. 475, 486 (2008) ("competing plausible interpretations"

make legislative history "unenlightening in resolving the textual ambiguity"). Without evidence as to the convention's views on the anti-fusion laws or why Proposal 25 was not adopted, no intent can be inferred.[12]

Third, Respondents' approach cannot be reconciled with the lodestar of state constitutional interpretation: discerning the "voice of the people," not parsing potentially conflicting motives of delegates. Vreeland v. Byrne, 72 N.J. 292, 302 (1977). "[T]he Constitution derives its force, not from the Convention which framed it, but from the people who ratified it; and the intent to be arrived at is that of the people." Gangemi v. Berry, 25 N.J. 1, 16 (1957); see also State v. Trump Hotels & Casino Resorts, Inc., 160 N.J. 505, 527 (1999).[13]

Here, there is zero evidence that the 1947 electorate intended to insulate the anti-fusion laws from challenge under the expanded provision guaranteeing the right to vote to all adult citizens, or the unchanged provisions guaranteeing freedom of association, the right to assemble to make opinions known to representatives, and equal protection. Neither Proposal 25 nor any question

---

[12] See Robinson v. Cahill, 62 N.J. 473, 513 (1973) (that 1947 convention "did not act upon a recommendation of the [NJ] Federation of Labor that education be funded out of State revenues" was "inaction . . . of doubtful import" in adjudicating scope of state's duty to finance public schools) (citation omitted).

[13] The preeminent state constitutional scholar Robert Williams has discussed this doctrine's use in New Jersey and other states. E.g., Robert F. Williams, The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents, 27 OKLA. CITY U. L. REV. 189 (2002); ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 355-56 (2023).

about fusion was presented to the voters, and there is no indication that this was a topic of public debate. Rather, given how difficult it is to find any references to these issues in the voluminous convention records, it is safe to conclude that voters had no idea that these issues appeared (even if scantly) in the proceedings.

Fourth, using the Committee's decision not to adopt Proposal 25 to narrow these fundamental rights would contravene the long-settled approach to interpreting the "great ordinances of the Constitution." Atl. City Racing Ass'n v. Att'y Gen., 98 N.J. 535, 170 (1985) (defining these as "the due process clause, the equal protection clause, the free speech clause, all or most of the other sections of the Bill of Rights" (quoting Vreeland, 72 N.J. at 304)). "The task of interpreting most if not all of these 'great ordinances' is an evolving and on-going process," as these are "flexible pronouncements constantly evolving responsively to the felt needs of the times." Id. To forever limit the scope of fundamental rights because a proposal to amend a different part of the Constitution was briefly considered in a latter convention is incompatible with this approach. Respondents cannot cite a single case in which our Supreme Court has invoked subsequent conventions or amendments to narrow its interpretation of a fundamental right originally set forth in the 1844 Constitution.[14]

[14] Our Supreme Court instead interprets fundamental rights in keeping with evolving norms and circumstances. E.g., Garden State Equality v. Dow, 216 N.J. 314 (2013); Lewis v. Harris, 188 N.J. 415 (2006); Planned Parenthood of Cent.

Fifth, Respondents' interpretative approach is impossible to reconcile with New Jersey Supreme Court decisions confronting textual "silence." Under their theory, New Jersey courts could never invoke and apply the exclusionary rule because the 1947 convention included a robust debate on a proposal to amend Article I, Paragraph 7 to expressly adopt the exclusionary rule, and a full convention floor voted down the proposal. See State v. Novembrino, 105 N.J. 95, 147-48 (1987). Yet despite the 1947 convention's full public debate of that proposal, the New Jersey Supreme Court subsequently held (and repeatedly affirmed) that the guarantees set forth in Article I, Paragraph 7 required application of the exclusionary rule. Id. This case alone proves the incongruity—and novelty—of Respondents' proposed treatment of the 1947 proceedings here.

This is just one example. In Worden v. Mercer Cty. Bd. of Elections, the New Jersey Supreme Court again reached a holding incompatible with the notion that when fundamental rights provisions are "silent" on a specific application of those rights, that application lacks constitutional protection. 61 N.J. 325 (1972). Worden acknowledged that "the 1947 Constitution contains provisions in Article II for voting by residents but makes no reference to domicil or student

---

N.J. v. Farmer, 165 N.J. 609 (2000); Right to Choose v. Byrne, 91 N.J. 287 (1982). As noted, the purpose of the 1947 convention was to "insure against the pressures of our age and the vicissitudes of the future by limiting our State Constitution to a statement of basic fundamental rights." (Psa2.)

voting" and that under common law, a student was "domiciled" at their parents' home, not their college residence. Id. at 345. Under Respondents' interpretative approach, the Court should have interpreted the constitutional "silence" as rejecting the argument that students were entitled to vote in their college community, because convention delegates would have known the long-standing domicile rules and, by remaining silent on the matter, they were placing them beyond the Court's reach—in perpetuity. But the Court reached the opposite conclusion, holding that the State Constitution's right to vote required that students be permitted to register and vote in their college community. Id. at 348-49. This holding is irreconcilable with Respondents' interpretative approach.

Nor has their approach prevailed in other appeals before our Supreme Court.[15] Respondents' principal case, State v. Buckner (Db17, 23, 24), provides little support, as the Court expressly said its discussion of convention history was dicta. 223 N.J. 1, 20 (2015) (finding "no need to turn to extrinsic sources" because "the language of the Constitution" resolved the interpretive inquiry).

[15] E.g., Moynihan v. Lynch, 250 N.J. 60, 79-91 (2022); Farmer, 165 N.J. at 629-43; State v. Gerald, 113 N.J. 40, 75-90 (1988); Byrne, 91 N.J. at 299-310; In Re Quinlan, 70 N.J. 10, 34-52 (1976); Robinson, 62 N.J. at 492-521. The U.S. Supreme Court has taken a similar approach when interpreting fundamental federal rights. E.g., Frontiero v. Richardson, 411 U.S. 677, 687-88 (1973) (the Equal Protection Clause prohibits sex-based discrimination, despite textual "silence" on this issue and contemporaneous consideration, and eventual rejection, of the Equal Rights Amendment).

There, the issue was whether a new provision adopted in 1947 setting a judicial retirement age precluded the state from temporarily recalling judges above that age. Judicial reform was extensively debated prior to and during the convention,[16] and the recall question received considerable attention. Id. at 20-25; see id. at 24 (concluding that "the issue of recall was squarely before the framers at the Convention"). Thus, the dense historical record compelled the conclusion that, by omitting any mention of recall in the retirement age provision, delegates and the voting public must have intended to defer the question of whether judges may be temporarily recalled to the Legislature. Id. Here, fusion was in no way a prominent issue before or during the convention, and the few references permit a number of plausible inferences as to why Proposal 25 was not adopted. (Supra pp.8-9.) To wit, Buckner was interpreting the scope of a provision added in 1947 by looking at contemporaneous context; here, the few references to a provision not adopted in the 1947 proceedings offer little insight into the meaning of rights ratified in 1844.[17]

---

[16] For example, draft constitutions produced by a state commission (1942) and legislative committee (1944) focused on judicial reform and embraced different positions on the recall issue. Buckner, 223 N.J. at 20-21. During the 1947 convention, "[t]he Committee on the Judiciary heard from dozens of people at ten open meetings" on judicial reform and "[t]estimony at the open meetings and public hearing appears in the historical record." Id. at 21.

[17] Respondents' invocation of State v. Murzda, 116 N.J.L. 219, 223 (E. & A. 1936) (Db23), is unavailing because the "great ordinances of the Constitution" at issue here do not list "explicit" prohibitions on specific topics—they outline

Sixth, to the extent any inferences can be drawn from the 1947 convention, they run the other direction. If we presume that those who adopted and ratified the 1947 convention were generally aware of the state of the law, they therefore knew that the constitutionality of anti-fusion regulations were (at the very least) called into question in Paterson. Thus, their failure to repudiate Paterson should mean that textual "silence" in fact signals acquiescence to the conclusion that such laws are constitutionally infirm. Moreover, an overarching purpose of the revised constitution was to create a more equitable balance of power between the three branches. Bebout & Harrison, supra at 339-53. The state Judiciary was overhauled so it could more effectively and efficiently perform "judicial review of the acts of the Legislature and Executive" and "set aside laws and executive action where the judges determine that they violate the written constitution." (Psa3.) If anything, these structural adjustments reflect an understanding that the Judiciary should be less inclined to unquestioningly defer to acts of the Legislature, especially self-serving measures to entrench power and stifle democratic competition, like the anti-fusion laws.

---

general limits on the exercise of state power and entrust the Judiciary to apply those principles in each case. Vreeland, 72 N.J. at 304. And reliance on Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections, 446 N.J. Super. 221 (App. Div. 2016) ("RUSA II") (Db24-25), is likewise misplaced, as the Appellate Division simply makes a passing reference to the 1947 convention while adopting the incorrect standard of review. (See infra p.19 n.23.)

C. Current Law Does Not Allow Cross-Nominations on the Ballot

Respondents are also wrong, both as a matter of law and reality, to insist that the constitutional burdens imposed by the anti-fusion laws are minimal because state law permits the Moderate Party to place its cross-nominations on the ballot—and that it did so last fall. (See Db2, 35, 44-45, 60-62.)

Under N.J.S.A. 19:14-9, "a candidate who receives more than one nomination for the same office" may accept one nomination and, under the candidate's name in that party's ballot "column," note that they are "Indorsed By" the other nominating group. This is no cure for the issues before the Court: the plain text makes clear that the Moderate Party is still barred from placing its nomination[18] on the ballot. And the Party and its voters would suffer the same constitutional injuries imposed by the anti-fusion laws in this scenario. See Arthur Ludington, Ballot Legislation of 1911, 6 AM. POL. SCI. REV. 54, 57 (1912) (concluding that relegating one party's nomination to an endorsement within another party's column is "grossly unfair and discriminatory"). It is still true that (i) the Moderate Party would lack its own column in which voters could vote for its nominees; (ii) appearing within a major party's column would inextricably associate the Moderate Party with and subordinate it to that party;

[18] Hand v. Larason, 163 N.J. Super. 68, 76 (Law Div. 1978) ("The court notes that the permitted word is 'Indorsed' not 'Nominated.'").

(iii) Moderate Party voters would have no way to register support for their party; (iv) all votes cast for the Moderate Party's nominees would instead be credited to the major party; (v) the Moderate Party would have to urge its members and other voters to support this rival party in order to elect its nominees; and (vi) Moderate Party voters who oppose that other party would have to support it to vote for their own nominees. Not only does this process impermissibly compel and constrain speech and association, but it forces the Moderate Party to aid a rival party in maintaining statutory status (and the corresponding advantages) while ensuring it will never itself meet the 10% threshold to gain statutory status. (See Pb14-15, 89.)

Even so, this is a theoretical exercise—N.J.S.A. 19:14-9 did not apply in this case,[19] nor will it apply in future elections. Why? Because other provisions in the election code limit a candidate to (i) formally entering only one major party primary or (ii) submitting only one minor party nominating petition.

[19] Notwithstanding Respondents' odd claim that "Malinowski was permitted to indicate his affiliation with the Moderate Party on the [2022] ballot" (Db61), the Moderate Party was not, in fact, on the ballot. E.g., County of Morris, Official General Election Sample Ballot (Nov. 2022), https://perma.cc/SXK9-BDLN. After all, this appeal arose from the Secretary's denial of the Moderate Party's nominating petition. (Pa1-2.) In support of this strange assertion, Respondents cite to an exhibit in the record showing the "[e]xpected appearance of . . . a ballot if fusion was legal." (See Db61; Pa294-95 (emphasis added).) Unlike a ballot under N.J.S.A. 19:14-9, this hypothetical ballot lists Malinowski twice, once on the Democratic Party line and again on the Moderate Party line, with separate boxes allowing a (hypothetical) voter to clearly register their support.

N.J.S.A. 19:13-4, 19:13-8, 19:23-15. These restrictions thus prevent candidates from "receiv[ing] more than one nomination" in the first instance. N.J.S.A. 19:14-9. There is one possible exception: a candidate who wins a major party primary exclusively through write-in votes eludes these statutory limits and may also receive a second nomination (from another major party or a minor party).[20] But this is an exception in name only: winning a major party primary with only write-in votes is virtually impossible in a state or federal election, and it would be irrational for a candidate to deliberately exclude themselves from the primary ballot in order to wage a write-in campaign. Tellingly, Respondents do not identify a single candidate who has ever qualified under N.J.S.A. 19:14-9.[21]

Accordingly, N.J.S.A. 19:14-9 offers no reprieve for the constitutional violations at issue here: it imposes constitutional burdens no less onerous than the anti-fusion laws themselves, and, due to other restrictions in the election code, its scope is so narrow as to render any imagined benefits illusory.

* * *

These three errors—trivializing the role of state constitutionalism;

---

[20] N.J.S.A. 19:14-9 would then reduce one of these nominations into the "Indorsed By" designation in the other party's ballot column, as described above. Notably, a candidate may theoretically utilize N.J.S.A. 19:14-9 with two major party nominations, but not with two minor party nominations.

[21] While not cited by Respondents, this seemingly occurred once in the 1970s: a candidate for town mayor won the Republican nomination and the Democratic primary with write-in votes. Hand, 163 N.J. Super. at 75-76.

misapprehending the relevance, if any, of the 1947 convention; and highlighting and misconstruing an unhelpful provision in the election code—are reiterated throughout Respondents' and Intervenor's briefs and therefore undermine nearly every argument raised therein. The following sections respond to additional errors specific to each of the precise constitutional provisions at issue.

II. THE ANTI-FUSION LAWS VIOLATE THE RIGHT TO VOTE

Respondents and Intervenor cannot wish away binding precedent requiring strict scrutiny when, as here, a regulation burdens the right to vote guaranteed in the State Constitution. N.J. CONST. art. II, § 1, ¶ 3(a). None of the asserted interests can justify these onerous restrictions, and even under a burden-balancing standard, excluding this cross-nomination was unconstitutional.

A. Strict Scrutiny Is Required Under Binding Precedent

Respondents and Intervenor may prefer federal cases applying Anderson-Burdick, but Worden provides the controlling standard of review for laws that burden core political rights guaranteed by the State Constitution. 61 N.J. at 346. In that "right to vote" case, the New Jersey Supreme Court plainly held: "we adopt the compelling state interest test in its broadest aspects . . . for purposes of our own State Constitution and legislation." Id.[22] Notably, Worden applied

[22] Worden adopted this standard after finding it "so patently sound and so just in its consequences," Worden, 61 N.J. at 346, not, as Respondents contend, "precisely because" it was the standard used in federal courts. (Db29.)

strict scrutiny even though the key issue was not whether people could vote, but rather, where. Id. at 327-28. While the U.S. Supreme Court's subsequent adoption of the Anderson-Burdick test now governs federal challenges, the New Jersey Supreme Court has never called into question that strict scrutiny is required for claims under the New Jersey Constitution. (See Db39 (acknowledging that our Supreme Court has never "adopt[ed] the Anderson-Burdick test to review election laws" under the State Constitution).)[23]

B. These Laws Clearly Impose a Severe Burden on the Right to Vote

Respondents urge the Court to adopt new limitations on the right to vote, insisting that so long as a voter's preferred candidate is on the general election ballot, nothing the state does can be construed as burdening that right. (Db42-44.) Yet, case law makes clear that the right to vote envisions real and meaningful choice on the ballot, beyond the bare options of voting on the Democratic or Republican lines. See, e.g., Williams v. Rhodes, 393 U.S. 23, 31 (1968) ("[T]he right to vote is heavily burdened if that vote may be cast only for

[23] One of the Appellate Division cases cited in Respondents' opposition is unpublished, and two others correctly apply Anderson-Burdick to federal constitutional challenges. (Db38-39.) The fourth, RUSA II, failed to follow Worden and is therefore not instructive authority. See Lake Valley Assocs., LLC v. Twp. of Pemberton, 411 N.J. Super. 501, 507 (App. Div. 2010) ("Because we are an intermediate appellate court, we are bound to follow the law as it has been expressed by . . . our Supreme Court."). Even on its own terms, RUSA II's use of Anderson-Burdick would not apply here because, unlike RUSA II, "similarly situated citizens were treated differently" in this case. 446 N.J. Super. at 234.

one of two parties at a time when other parties are clamoring for a place on the ballot."); Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986) ("Restrictions upon the access of political parties to the ballot impinge upon . . . the rights of qualified voters to cast their votes effectively."). "When an election law reduces or forecloses the opportunity for electoral choice, it restricts a market where a voter might effectively and meaningfully exercise his choice between competing ideas or candidates, and thus severely burdens the right to vote." Common Cause Ind. v. Individual Members of the Ind. Election Comm'n, 800 F.3d 913, 920 (7th Cir. 2015) (emphasis added). New York's high court has therefore held that state laws may not "prevent a qualified elector from exercising his constitutional right to vote for a candidate and party of his choice." Devane v. Touhey, 304 N.E.2d 229, 230 (N.Y. 1973).

These principles motivated the conclusion in Paterson that "the right of suffrage" means that "the Legislature has no right to pass" laws excluding a party's otherwise qualified cross-nomination from the ballot. 88 A. at 695. Paterson has been repeatedly cited as good law, including since ratification of the 1947 Constitution (Pb36), and the other side identifies no superseding authority to the contrary.[24] The only state case cited in opposition, Smith v. Penta

[24] Recent legislative action meant Paterson "did not need to take the formal step of striking down the 1907 law as unconstitutional." (Pb36 n.33.) But this was no "stray dicta" (Rb54)—Paterson engaged in a rigorous analysis of the issues

(Db44), is irrelevant: the question there was whether the state can stop voters from one party from participating in another party's nomination process, not whether the state can force one party's voters to vote for another party in order to support their own nominee. 81 N.J. 65, 73 (1979).

Respondents' reliance on several decisions from the late 18th and early 19th centuries is misplaced. (See Db42, 50.) When those cases "were decided, the compelling state interest [i.e., strict scrutiny] test was of course unheard of, as was the current judicial approach which recognizes the right to vote as very precious and fundamental and carefully and meticulously scrutinizes efforts to restrict it." Worden, 61 N.J. at 346. Rather, courts often applied rational basis review to laws burdening fundamental rights. E.g., Anderson v. State, 76 N.W. 482, 486 (Wisc. 1898) ("[S]o far as legislative regulations are reasonable and bear on all persons equally so far as practicable . . . , they cannot be rightfully said to contravene any constitutional right."); State ex rel. Bateman v. Bode, 45 N.E. 195, 196 (Ohio 1896) (upholding anti-fusion law because it is "a reasonable regulation of the elective franchise"); State ex rel. Fisk v. Porter, 100 N.W. 1080, 1081 (N.D. 1904) (upholding anti-fusion law because it is "altogether

---

before expressing "grave doubt as to the power of the Legislature to coerce the members of a political party or a group of citizens of a certain political faith into selecting for their nominee a man whom they do not want . . . or to say to them, 'you shall not select the man that you do want.'" 88 A. at 696.

reasonable"). Everyone agrees this is not the appropriate standard today.

Respondents themselves note that some states at the time recognized no constitutional interest in political association—a point universally rejected today. (See Db43 (quoting Anderson, 76 N.W. at 486 ("Mere party fealty and party sentiment, which influences men to desire to be known as members of a particular organization, are not the subjects of constitutional care.").) This historical context makes Paterson and the decisions in New York[25] particularly striking: in an era when courts largely abdicated their duty to protect political rights from legislative encroachment, these jurists were ahead of their time in rigorously examining electoral laws just as their successors would do years later.

As explained in the merits brief, anti-fusion laws do not simply implicate the right to vote—they impose onerous burdens on it. (Pb34-36, 41-42.)[26]

---

[25] See Pb13-14, 37-38, 87-88 (discussing decisions by the New York Court of Appeals in 1910 and 1911 finding the state's anti-fusion laws unconstitutional).

[26] Respondents' insistence that this appeal presents only a "facial" challenge in which the record has "no bearing" is mistaken, factually and legally. (See Db5-6, 33.) The key question before the Court is whether the application of the anti-fusion laws to exclude the Moderate Party's nomination from the ballot is constitutional. In addition to demonstrating the general effects of anti-fusion laws, Appellants have centered their case on the particular impact on the Moderate Party and its voters. (E.g., Pb72; Pa40-82, 236-41.) Contrary to assertions raised by the other side, the state may not privilege one group of voters over another, meaning that the recognition of a constitutional injury here would likely produce a similar conclusion should some other party submit its own cross-nomination. And even in cases that clearly present facial challenges, the record is no less relevant for assessing the severity of constitutional injuries and potential justifications. E.g., Crawford v. Marion Cty. Election Bd., 553

C. None of the Asserted State Interests Withstand Scrutiny

None of the hypothetical interests identified by the other side justify these infringements, regardless of whether the burdens are deemed moderate or severe. (Db45-55; Ib24-26.) Rather, these interests are demonstrably undermined by the anti-fusion laws; are insubstantial or speculative; or could easily be advanced through less restrictive means. (See Pb42-53 (anticipating most of these interests and explaining why they cannot justify these burdensome laws).) Many of them are premised on the insidious idea that suppressing information is good for voters. See Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 228 (1989) ("A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism."). Here are the proposed interests:

Ensure Majority Support (Ib25-26): Intervenor alleges that anti-fusion laws can "assure that the winner is the choice of a majority, or at least a strong plurality." (Ib25-26 (quoting Bullock v. Carter, 405 U.S. 134, 145 (1972)).) The opposite is true: by prohibiting more than one party from nominating the same candidate, anti-fusion laws make it harder for winners to secure broad, cross-

---

U.S. 181, 194, 199 (2008); Free Speech Coal., Inc. v. Att'y Gen., 825 F.3d 149, 157 (3d Cir. 2016); United States v. Stevens, 533 F.3d 218, 233-34 (3d Cir. 2008), aff'd, 559 U.S. 460 (2010). Just because some facial challenges present purely legal questions, the often murky facial-versus-applied distinction itself never compels a court to categorically ignore relevant facts.

cutting support. Forcing minor parties to run protest candidates makes a spoiler effect—and winners with mere plurality support—much more likely.

Increase Voter Choice and Competition (Db48-49): Respondents contend that limiting the ballot to the major party nominees and various minor party protest candidates provides real "voter choice" and "real competition." (Db48.) Yet, minor parties are already forced to run protest candidates—and they receive few votes, despite widespread public desire for more electoral choice. (Pb5-6.) Since the anti-fusion laws went into effect, only one candidate has managed to win a state legislative race without major party support, and none have managed to do so in federal elections. (Pb6.) No minor parties have met the 10% vote threshold to earn statutory party status. (Pb16.) For generations, all state power has remained exclusively with the Democratic and Republican Parties. On the other hand, cross-nominations actually advance "voter choice" (by allowing voters to register support for their preferred party and priorities without wasting their vote) and "real competition" (by making fewer races safe for one side or the other and allowing other parties to compete for some political power).

Prevent Ballot Overcrowding (Ib25-26): Appellants' merits brief explains why this hypothetical concern is contradicted by historical and empirical evidence. (Pb47-49.) Moreover, the Legislature has ample discretion to impose reasonably higher signature requirements for minor party nominations (Pb49;

see also SAM Party of N.Y. v. Kosinski, 987 F.3d 267, 276 (2d Cir. 2021)), or a reasonable limit on the number of nominations that each candidate could accept, as Oregon has done. See Or. Rev. Stat. Ann. § 254.135(3)(a) (setting limit of three nominations, "selected by the candidate").[27]

Prevent Voter Confusion (Ib25-26; Db51-52): Neither form of "voter confusion" hypothesized by the other side withstands scrutiny: even Timmons declined to credit this "alleged paternalistic interest." 520 U.S. 351, 370 n.13 (1997). As to theoretical confusion over "how to cast a ballot or why a name appears twice" (Db51), there have been thousands of fusion elections, past and present, yet not a single authority is cited substantiating this concern. The citations in Appellants' merits brief—which make clear that confusion is not an issue—remain unrebutted. (Pb49-50.)[28] As to the potential confusion over party and candidate positions, Respondents hold voters in shockingly low regard. (Db52); see Eu, 489 U.S. at 228. And in no other context does the government assess, let alone police, the ideological alignment of candidates and parties. Any

[27] In the highly unlikely scenario that such a law had to be enforced to exclude a fourth nomination from the ballot, the law's narrow tailoring to this specific concern would place it on solid constitutional footing.

[28] Respondents fail to mention that the reason they did not "cross examine" witnesses or "submit . . . record evidence" (Db52) is that they waited nearly nine months after receiving record materials before raising evidentiary concerns. The Court appropriately denied their inexplicably belated request to transfer the entire matter to the Law Division. For discussion on their choice to not develop a record and its significance, see Appellants' Opp. Br., M-3846-22.

attempt to do so would, as in this instance, be clearly unconstitutional.

Prevent Ballot Manipulation and Political Gamesmanship (Db45-48; Ib23-24): There is nothing "manipulative" about two parties with distinct but overlapping views nominating the same candidate. Nor is it "gamesmanship" for a minor party to offer its nomination to a candidate who shares its sincerely-held priorities. Justices Stevens, Ginsburg, and Souter aptly dismissed as "farfetched" and "entirely hypothetical" the idea that "members of the major parties will begin to create dozens of minor parties with detailed, issue-oriented titles for the sole purpose of nominating candidates under those titles." Timmons, 520 U.S. at 376 (Stevens, J., dissenting). Nor has a "fringe candidate[]" ever "rack[ed] up multiple nominations from minor parties" to dupe the electorate and swindle his way into office. (Db46.) Despite nearly two centuries of cross-nominations, the other side does not cite a single instance of their imagined problems actually materializing.[29] And again, the Legislature has ample discretion to mitigate against these risks without categorically barring parties from nominating their preferred candidates: that is, by increasing

[29] That multiple parties supported Fiorello LaGuardia during his nearly three decades in politics hardly proves an "unbounded use of cross-nominations." (Db46 n.12.) And Intervenor's error-ridden complaint (Ib6-11) about an independent expenditure by a group unrelated to the Moderate Party has nothing to do with ballot nominations. Nor does Intervenor's spurious claim that the Moderate Party and individual Appellants, one of whom is a Republican officeholder (Pa41), are "puppets" of the "Democratic establishment." (Ib10.)

signature requirements for nominating petitions and/or imposing a reasonable limit on the number of nominations each candidate can accept.

Ensure Votes Reflect Bona Fide Support (Db47-48): Respondents' suggestion that banning cross-nominations is necessary so that vote tallies accurately reflect each party's public support is out of step with the reality in New Jersey. More than a third of New Jersey voters refuse to register as a Democrat or Republican, and more than two-thirds want more competitive parties—but the Democratic and Republican Parties nonetheless get nearly 100% of the votes cast every election. (Pb51 & n.49.) If candidates could accept each party nomination lawfully earned, then party vote totals would tell us something about each party's "bona fide" support in the electorate. Respondents' position rests upon an unsubstantiated and discriminatory premise: that any vote cast for a minor party is inherently suspect, the result of "something else" other than substantive agreement with the party's positions. And again, concerns about ensuring ballot access only for parties with bona fide support can be addressed easily through nominating petition signature requirements and/or a per-candidate limit on nominations.

Promote Distinctions Between Parties (Db49-51)[30]: Respondents make the empirical claim that "promot[ing] distinctions between parties" improves "voter

[30] Like several others proposed here, this interest was not credited in Timmons.

confidence and accountability" without any evidence. (Db49.) But the real problem is the Orwellian presumption underlying their assertion: that the state may lawfully decide which parties are allowed to hold which beliefs. In no other area may the state prohibit different groups of voters from espousing a shared view on a certain issue, yet by their logic, bipartisan legislation erodes voter trust in government and could be prohibited. In truth, today's ballots obscure existing and real distinctions in the political system by forcing candidates with substantial ideological differences (e.g., Joe Manchin and Elizabeth Warren) to appear under a single party label. Permitting these candidates to accept other nominations would allow for an accurate reflection of their distinct politics.

Respondents' reliance on the 1898 Anderson decision is again misplaced, given that court's assumption that two parties have "identical" candidates and represent "one platform of principles." (Db50 (quoting Anderson, 76 N.W. at 487).) Yet, the Moderate Party (like many others have over the years) plans to nominate candidates on both sides of the aisle. (Pa7 n.6.) The group was founded to advance moderate priorities neglected by the major parties and provide a home for centrist voters who are "politically homeless" in our hyper-polarized environment. (Pa4-9.) And unlike the candidate in Sadloch v. Allan, 25 N.J. 118, 124 (1957), who wanted to "assume the cloak of an independent candidate" after pretending to be a Republican, a cross-nominated candidate openly and

unequivocally embraces their affiliation with both supporting groups.

Protect Democratic and Republican Duopoly (Ib23; Db52-54): Neither Respondents nor Intervenor dispute that the Legislature adopted anti-fusion laws precisely because of their direct, exclusionary effects on minor parties. (See Pb12-16.) Nor do they dispute that the New Jersey Supreme Court has never recognized the perpetuation of an exclusionary two-party system as a legitimate, let alone compelling, interest to justify encroaching fundamental rights under the State Constitution. Appellants explain why it would be illogical to create new law embracing any such interest premised upon the false promise that political exclusion delivers "political stability." (Pb44-47.)

Even still, the anti-fusion laws fail to meet Respondents' proposed standard: the state may lawfully burden constitutional rights in the pursuit of "an overall two-party system, so long as third parties have opportunities to develop and flourish." (Db52 (emphasis added).) After a century under these laws, no minor parties have been able to "develop and flourish." New Jersey has become more hostile toward minor parties than any other state, as no minor parties have qualified for the ballot, and only one candidate without major party backing has won a state or federal race. (Pb6.)[31]

[31] By discouraging "factionalism," Intervenor apparently means excluding minor parties. (Ib24.) Reliance on FEDERALIST NO. 10 for this point is ironic, given that James Madison cautioned against "destroying the liberty which is essential

* * *

None of these asserted interests can justify the burden on Appellants' right to vote (or their other fundamental rights, as discussed below).

III. THE ANTI-FUSION LAWS VIOLATE THE RIGHT TO FREE SPEECH AND POLITICAL ASSOCIATION

In discussing these State Constitutional provisions, Respondents mostly focus on their erroneous assertion that state law already permits cross-nominations. (Db60-61.)[32] Intervenor simply says that Timmons is controlling. (Ib14.)[33] Appellants explain above why Respondents' contention is uncredible, and Appellants' merits brief explains the myriad reasons why Timmons offers little persuasive value and the Hunt framework clearly supports an independent analysis of state constitutional law. (Supra pp.15-17; Pb44-73.) Appellants

---

to [the] existence" of "faction," because this "remedy . . . was worse than the disease." FEDERALIST NO. 10. Rather, it would be equally absurd "to abolish liberty, which is essential to political life, because it nourishes faction," as it would be "to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency." Id. To Madison, a "greater variety of parties" and the ensuing competition was the only solution. Id.

[32] In Respondents' view, today "a party may choose to affiliate with whatever candidate it wants [and] endorse that candidate on the ballot itself." (Db60.) They insist (incorrectly) that the only issue here is that "[t]he Fusion Statutes . . . prohibit the candidate from appearing on the ballot twice." Id.

[33] Intervenor also places considerable weight on Mazo v. N.J. Sec'y of State, 54 F.4th 124 (3d Cir. 2022), another federal First Amendment case with little relevance here. Not only were associational rights not in dispute there, but the key issue was whether consent could be required before the name of an individual or organization was used as a ballot slogan. Here, Malinowski readily consented to the Moderate Party's nomination. (Pb6 n.5.)

respond here to two notable points raised in the opposition briefs.

First, Respondents insist that the Court must interpret the State Constitution's speech and association rights as identical to those in the First Amendment, summarily dismissing contrary authority. (Compare Db26-27, with Pb 56-60; Hunt, 91 N.J. at 364 (differences in "textual language" and "phrasing" permit courts "to interpret our provision on an independent basis") (Handler, J., concurring). To justify their position, Respondents cite two cases about commercial speech, which noted that federal and state protections in that context are "generally interpreted as co-extensive." E&J Equities v. Bd. of Adjustment, 226 N.J. 549, 634 (2016); see Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264-65 (1998). Neither case involved electoral issues or political speech, let alone associational rights. As in prior cases involving minor parties, core associational activity, and political speech, inapposite federal authority is no obstacle for the Court to recognize the true scope of state speech and association rights. See, e.g., Green Party v. Hartz Mt. Indus., 164 N.J. 127 (2000); N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 138 N.J. 326 (1994).

Second, Intervenor itself cites a recent Second Circuit decision that provides a useful framework for conceptualizing associational burdens:

> Courts have identified three types of severe burdens on the right of individuals to associate as a political party. First are regulations meddling in a political party's internal affairs. Second are regulations restricting the 'core associational activities' of the party

> or its members. Third are regulations that 'make it virtually impossible' for minor parties to qualify for the ballot.

SAM Party, 987 F.3d at 275 (citations omitted). Qualifying under any of these categories would render a law unconstitutional; the anti-fusion laws meet all three. First, they clearly "meddl[e] in a political party's internal affairs" by limiting the candidates it may consider when selecting standard-bearers; that the state itself is meddling, as opposed to unwelcome non-members as in other cases (Db62), exacerbates the problem. Id. Second, nominating candidates is a party's most fundamental "associational activit[y]"—all else, from canvassing to fundraising to running ads is in service of electing party nominees. Id.[34] Finally, the laws here make it impossible for minor parties to achieve ballot status: no minor party has obtained ballot status in the century since the anti-fusion laws were adopted, and a group like the Moderate Party committed to nominating competitive candidates is systematically excluded from the ballot. Id. However one looks at the associational implications, the burdens are severe.[35]

---

[34] That the Moderate Party may participate in other activities, such as providing their "endorsement or other channels of support" (Db59), is no substitute for this core function. (See Pb6-7, 64, 80-81.) That is particularly true because, without a Moderate Party line on the ballot, any such efforts would materially benefit the rival party whose nomination was not excluded. (Id.)

[35] That minor party voters are compelled to associate with another party to support their own nominee and minor parties are, in practice, barred from achieving statutory status are central problems with the anti-fusion laws. All Appellants ask is that the Court's ruling clearly identify these issues in the constitutional analysis. Because aggregating cross-nominations perpetuates

IV. THE ANTI-FUSION LAWS VIOLATE THE RIGHT TO ASSEMBLE AND MAKE OPINIONS KNOWN TO REPRESENTATIVES

Appellants' merits brief explains in detail why the fundamental rights protected by the State Constitution's Assembly/Opinion Clause are clearly violated by the anti-fusion laws. (Pb73-79.) Nothing in either opposition brief undermines that conclusion. (Db63-65.) The other side ignores the Clause's plain text, which guarantees that "[t]he people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." N.J. CONST. art. I, ¶ 18. While the First Amendment only references the first (assembly) and fourth (petition) of these rights, Respondents and Intervenor pretend the federal and state protections are coextensive.[36] But text guaranteeing New Jerseyans the separate right to "make opinions known to their representatives" must mean something. See Murphy, 243 N.J. at 592 ("Courts avoid interpretations that render language in the Constitution superfluous or meaningless.").

Interpreting this provision requires the historical context in which these

---

these same associational harms (Pb89), a clear ruling on the issues squarely before the Court would provide the other branches with clear guidance for complying with their constitutional obligations. See, e.g., Lewis, 188 N.J. at 463 (specifying two options for Legislature to remedy unconstitutional statutes).

[36] Another key textual difference is that the Assembly/Opinion Clause grants rights in the affirmative, as opposed to the First Amendment's statement that "Congress shall make no law . . . abridging" the covered rights.

rights were enshrined in the State Constitution—context which the other side would prefer to ignore and says nothing to dispute. See State v. Schmid, 84 N.J. 535, 559 (1980). As discussed in the merits brief, this Clause ties directly back to 18th century disputes over self-government, unequal allocation of political power, and opportunities for citizens to collectively disagree with their leaders and meaningfully participate in the democratic process. (See Pb75-77.)[37]

V. THE ANTI-FUSION LAWS VIOLATE EQUAL PROTECTION

Despite the severe burdens on Appellants, and the corresponding advantages afforded to others, the other side has little to say about equal protection. (Pb79-88.) They instead insist that because everyone is barred from cross-nominating, there is no problem. (Db65-67.)[38] Yet, two parties nominated Malinowski, and only one was allowed to have its nomination on the ballot. And in practice, the anti-fusion laws produce two tiers of political participation and an extraordinary cumulative burden on Appellants' voting, speech, association,

[37] To be sure, in the few cases interpreting this Clause, the underlying facts have often involved "a physical assembly" of some sort. (Db63.) But recognizing that the Clause guarantees certain protections in that context does not, as Respondents contend, foreclose this Court from recognizing the Clause's clear application in this electoral context. Their position is not just illogical, but it flies in the face of the original understanding of this constitutional text.

[38] Their argument invokes the Ninth Circuit's wry observation that "[t]he law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." Martin v. City of Boise, 920 F.3d 584, 603 (9th Cir. 2019) (quoting Anatole France, The Red Lily).

assembly, and expressive rights. See Patriot Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections, 95 F.3d 253, 269 (3d Cir. 1996).[39]

Whether these laws are "facially neutral" (Db65) is irrelevant, as no one disputes they were motivated by an "invidious purpose"—to limit minor party participation and influence. Greenberg v. Kimmelman, 99 N.J. 552, 580 (1985); see Pa14-16. Indeed, Respondents and Intervenor hold up the hurdles for minor party participation as justifying features—not bugs—of anti-fusion laws. As discussed supra pp.23-30, neither political protectionism nor any of the other asserted justifications qualify as "an appropriate governmental interest suitably furthered by the differential treatment." Borough of Collingswood v. Ringgold, 66 N.J. 350, 370 (1975) (citation omitted). All three factors under the Greenberg balancing test clearly point to a violation of Article I, Section 1. (See Pb79-88.)

CONCLUSION

The anti-fusion laws violate the New Jersey Constitution. Thus, the Court should reverse the Secretary's rejection of Appellants' nominating petition.

Respectfully submitted,

WEISSMAN & MINTZ
Flavio L. Komuves (018891997)
Brett M. Pugach (032572011)
Steven P. Weissman (024581978)

UNITED TO PROTECT DEMOCRACY
Farbod K. Faraji (263272018)
Beau C. Tremitiere (Admitted

[39] On the other hand, non-partisan elections affect all candidates equally by preventing everyone from having a partisan affiliation on the ballot. (See Db43.)

220 Davidson Avenue, Suite 410
Somerset, New Jersey 08873
732.563.4565

BROMBERG LAW LLC
Yael Bromberg (036412011)
43 West 43rd Street, Suite 32
New York, New York 10036
212.859.5083

Professor Joel Rogers (Admitted Pro Hac Vice)
University of Wisconsin Law School
975 Bascom Mall
Madison, Wisconsin 53706
609.347.9889

Professor Nate Ela (Admitted Pro Hac Vice)
Temple University Beasley School of Law
1719 North Broad Street
Philadelphia, Pennsylvania 19122
215.204.7861

Counsel for Appellants
Moderate Party and Richard A. Wolfe

Pro Hac Vice)
2020 Pennsylvania Avenue NW
Suite 163
Washington, D.C. 20006
202.579.4582

Counsel for Appellants
Michael Tomasco and William Kibler

By: */s/ Flavio L. Komuves*
Dated: July 10, 2023

By: */s/ Farbod K. Faraji*