

IN RE TOM MALINOWSKI,
PETITION FOR NOMINATION FOR
GENERAL ELECTION,
NOVEMBER 8, 2022, FOR UNITED
STATES HOUSE OF
REPRESENTATIVES NEW JERSEY
CONGRESSIONAL DISTRICT 7

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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)

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**BRIEF OF AMICI CURIAE, BIPARTISAN FORMER MEMBERS OF
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MURPHY, JOHN J. SCHWARZ, AND DAVID A. TROTT IN SUPPORT OF
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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

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