

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)

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**BRIEF OF *AMICI CURIAE* PROFESSORS SETH MASKET, NOLAN
McCARTY, AND HANS NOEL**

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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.

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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 minor¹ 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,

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