

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 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

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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