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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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**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

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**BRIEF OF PROFESSORS PETER ARGERSINGER, DALE BAUM, COREY
BROOKS, LISA DISCH, COLIN GORDON, IRA KATZNELSON, MICHAEL
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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).

racers, 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.

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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.