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

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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]

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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

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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

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[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]

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[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

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[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.

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[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

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[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]

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[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.

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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]

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[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.

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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.").

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Respectfully submitted,

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