

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 NOS. A-3542-21T2,  
A-3543-21T2

CIVIL ACTION

ON APPEAL FROM:  
FINAL AGENCY ACTION IN THE  
DEPARTMENT OF STATE  
HON. TAHESHA WAY,  
SECRETARY OF STATE

**BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER**

Dated: August 25, 2023

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## **STATEMENT OF THE INTEREST OF AMICUS CURIAE**

The Brennan Center for Justice at NYU School of Law<sup>1</sup> is a not-for-profit, non-partisan think tank and public interest law institute. The Brennan Center respectfully refers the Court to the Certification of David J. Fioccola accompanying its Motion to Appear as Amicus Curiae, which explains its interest in this case.

### **PRELIMINARY STATEMENT**

The New Jersey Assembly Clause guarantees this state’s residents “the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.” N.J. CONST. art. I, ¶ 18. Since the Assembly Clause’s adoption in 1844, courts have rarely addressed its meaning. Its application to the state’s anti-fusion laws is thus an important question of first impression that warrants a closer examination of the clause’s origin, meaning, structure, and purpose. These considerations support a broad interpretation of the right to assemble extending to collective political action and representative government, including support for minor parties.

Part I of this brief explores existing assembly clause jurisprudence. New Jersey’s Supreme Court has held that New Jersey’s Assembly Clause is “more

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<sup>1</sup> This brief does not purport to convey the position, if any, of NYU School of Law.

sweeping in scope than the language of the First Amendment.” *State v. Schmid*, 84 N.J. 535, 557 (1980). Other state courts have come to similar conclusions regarding their own assembly right.

Part II analyzes the text and placement of New Jersey’s Assembly Clause. While the federal Constitution pairs free assembly with guarantees of free expression, New Jersey—like other states—couples its Assembly Clause with constitutional provisions designed to facilitate participation in a representative government. And unlike the federal Constitution, New Jersey places its Bill of Rights at the beginning of the Constitution, signaling that the state government’s priority is protecting individual rights.

Part III examines the “sweeping” scope of New Jersey’s Assembly Clause by looking to its history. Colonial New England’s rich tradition of local self-government shaped the right to free assembly. In response to British incursions on the colonies’ self-rule, Revolutionary Era thinkers articulated a robust right to participate in representative government. Those thinkers inspired the assembly clauses in state constitutions, including New Jersey’s.

Part IV contextualizes New Jersey’s Assembly Clause as one example of the democratic values imbued in state constitutions. The pro-democracy features inherent in state constitutions have provided state courts, including

New Jersey's, with an expansive foundation for protecting the democratic rights of their residents.

## **PROCEDURAL HISTORY AND STATEMENT OF THE FACTS**

Amicus adopts Appellants' Procedural History and Statement of Facts.

## **ARGUMENT**

### **I. STATE ASSEMBLY CLAUSES PROTECT POLITICAL PARTICIPATION AND REPRESENTATIVE GOVERNMENT INDEPENDENT OF THE FEDERAL CONSTITUTION.**

The New Jersey Supreme Court has recognized the state Assembly Clause's "exceptional vitality," *Schmid*, 84 N.J. at 557, and emphasized that its language is "more sweeping in scope than the language of the First Amendment." *Id.* The Court has thus already held that New Jersey's Assembly Clause is more protective than the First Amendment, constraining not only government action but also, in some circumstances, private interference with free speech rights. *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 192 N.J. 344, 364 (2007). This treatment is consistent with the Court's well-established status as a "leader" in interpreting its state's Constitution more broadly than its federal counterpart. Robert F. Williams, *The Evolution of State and Federal Constitutional Rights in New Jersey*, 69 Rutgers U.L. Rev. 1417, 1427–29 (2017).

Other state high courts have also recognized that their assembly clauses should be construed independently of their federal analog. *See Commonwealth*



*v. Tate*, 495 Pa. 158, 169 (1981); *Deras v. Myers*, 272 Or. 47, 64 (1975) (en banc). Recently, the Massachusetts Supreme Judicial Court interpreted its assembly clause broadly to strike down the town of Southborough’s public comment policy. *Barron v. Kolenda*, 491 Mass 408, 416, 419 (2023). That policy required comments in public meetings to be “respectful and courteous, free of rude, personal or slanderous remarks.” *Id.* at 411 n.5. The court noted that the clause’s text “envisions a politically active and engaged, even aggrieved and angry, populace.” *Id.* at 415. And it explained that the clause arose “out of fierce opposition to governmental authority” during the Revolutionary Era and was understood by its drafters, John and Samuel Adams, as essential to self-government. *Id.* at 416. The court thus concluded that “rude, personal, and disrespectful” conduct was protected and Southborough’s public comment policy “contradicted . . . the letter and purpose of” Massachusetts’s assembly clause. *Id.* at 416, 419. The *Barron* court’s decision is particularly persuasive because New Jersey’s Constitution drew inspiration from Massachusetts’s document. *See* Section III *infra*.

## **II. THE TEXT AND STRUCTURE OF NEW JERSEY’S ASSEMBLY CLAUSE COMPEL AN INDEPENDENT INTERPRETATION OF NEW JERSEY’S ASSEMBLY RIGHT.**

The United States Supreme Court has treated the federal assembly right as an adjunct of the rights to free speech and press in part because the First

Amendment couples the Assembly Clause with the Establishment, Free Exercise, Free Speech, and Press Clauses. Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543, 547 n.10 (2009); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). But New Jersey’s Constitution pairs the assembly right not with rights of free expression, but instead with “provisions declaratory of the general principles of republican government.” Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale L.J. 1652, 1727 (2021) (internal quotation marks omitted); N.J. CONST. art. I, ¶ 18.

New Jersey courts recognize that “the phrasing of a particular provision in our charter may be so significantly different from the language used to address the same subject in the federal Constitution that we can feel free to interpret our provision on an independent basis.” *State v. Hunt*, 91 N.J. 338, 364 (1982) (Handler, J., concurring). Here, one of the reasons for treating “the [federal] right of assembly as simply a facet of the right of free expression” does not apply to its New Jersey counterpart. El-Haj, *supra* at 547 n.10.

And while the federal Constitution places the Bill of Rights at the end of the document, the states, including New Jersey, generally place their bill of rights at the beginning. This placement “announce[s] that the protection of rights is the first task of government.” Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 Publius 11, 15 (Winter 1982).

### **III. NEW JERSEY’S ASSEMBLY RIGHT IS ROOTED IN A RICH HISTORY OF POLITICAL PARTICIPATION AND REPRESENTATIVE GOVERNMENT.**

New Jersey courts look to multiple factors when construing the rights guaranteed by the New Jersey Constitution: text, history, preexisting law, structure, state interests, local concerns, tradition, and public attitudes. *See Hunt*, 91 N.J. at 363-67 (Handler, J., concurring). While not an exclusive factor, history can play a useful role where, as here, courts have had few previous opportunities to interpret a constitutional provision. *Id.* at 365. Historical context can underscore a provision’s significance, challenge interpretive assumptions, and suggest alternative meanings. *See Bowie, supra* at 1724-25. Recognizing these benefits, New Jersey courts have frequently used historical evidence as an interpretive aid. *See, e.g., State v. Novembrino*, 105 N.J. 95, 147 (1987). This section follows this tradition by exploring the history of New Jersey’s Assembly Clause.

#### **A. The Right To Assemble Is Grounded In The Colonial Tradition Of Local Self-Government.**

Despite the New Jersey Assembly Clause’s relatively late adoption in the state’s 1844 Constitution, the New Jersey Supreme Court has recognized that the provision was “derived from earlier sources.” *Schmid*, 84 N.J. at 557. Our examination of those sources begins in colonial Massachusetts, where the assembly right originated. *Barron*, 491 Mass at 414-17; *Lahman v. Grand*

*Aerie of Fraternal Order of Eagles*, 121 P.3d 671, 680 (Or. App. 2005). John Adams believed that the state’s “primitive institutions . . . produced a decisive effect . . . by the influence they had on the minds of the other colonies.”

Bowie, *supra* at 1663 (quoting Letter from John Adams to the Abbé de Mably (1782) in 5 *The Works of John Adams, Second President of the United States* 492, 494-95 (1851), alteration and first omission in original)). Consistent with Adams’ assessment, the delegates to New Jersey’s 1844 constitutional convention frequently looked to the Massachusetts constitution for inspiration. *See, e.g.*, New Jersey Writer’s Project, *New Jersey State Constitutional Convention of 1844* 109, 403, 458, 535 (1844).

Adams viewed the town meeting as one of Massachusetts’ most important “institutions.” Bowie, *supra* at 1663. At these meetings, town residents exercised their right to assemble “to make such Laws and Constitutions as may concern the welfare of their Town.” *Id.* at 1664. They also formally directed the agenda of the colonial General Assembly by “draft[ing] for their representatives binding orders, or ‘instructions,’ to vote particular ways.” *Id.* at 1665-66; *see also* Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* 455, 448-50 (1930). Together, “these powers . . . made town meetings one of the most powerful political institutions in colonial Massachusetts.” Bowie, *supra*

at 1666. Notably, parts of New Jersey adopted this model of local government. *State Commission on County and Municipal Government, Modern Forms of Municipal Government* 2, 9 (1992). The power wielded in town meetings demonstrates that the right to assemble historically encompassed meaningful participation in passing legislation and influencing the decisions of other legislative bodies.

**B. Colonists Developed A Broad Conception Of The Right To Assemble In Direct Response To British Restrictions.**

***1. Massachusetts' model of powerful town meetings informed the colonists' resistance to British rule.***

Town meetings were also important venues for protesting British intrusions into colonial affairs. Bowie, *supra* at 1666. In the years leading up to the Revolutionary War, town meetings voiced resistance to British policies through instructions to their colonial assemblies. In 1764, for example, colonists became alarmed by rumors of a potential sugar tax. *Id.* at 1668-69. Acting on town meeting instructions, the Massachusetts General Assembly led several states in protesting Parliament's power to tax the colonies. *Id.* New Jersey's House of Assembly similarly issued resolutions protesting the Stamp Act, *see* The Stamp Act Resolves of the New Jersey Assembly (1765) in Larry R. Gerlach, *New Jersey in the American Revolution 1763-1783 A Documentary History* 22-24 (1975), and supporting a boycott of British goods to oppose the

Townshend duties, *see The Resolution of the New Jersey Assembly Supporting the Boycott to Oppose Townshend Duties* (1769) in Gerlach, *supra* at 48.

Informal assemblies were equally significant. “[O]ver the summer of 1765, thousands of individuals . . . began organizing clubs, gatherings, and other informal assemblies” to resist British taxation. Bowie, *supra* at 1669. New Jersey, for example, boasted multiple chapters of the Sons of Liberty, Gerlach, *supra* at 27, a group founded to oppose the Stamp Act, Bowie, *supra* at 1669. These extralegal assemblies came to resemble formal legislatures. The Stamp Act Congress was composed of delegates from throughout the colonies and asserted its right “to petition the King, or either House of Parliament.” Bowie, *supra* at 1669-70. In New Jersey, the colony-wide New Brunswick Convention of 1774 “assumed temporary direction of the resistance movement” and “appoint[ed] delegates to the First Continental Congress.” Gerlach, *supra* at 76-77. These assemblies “advanced the notion that legitimate political authority derived . . . from the people at large.” *Id.* at 97.

British authorities attempted to stifle colonial resistance by undermining assemblies’ legislative powers or banning assembly altogether. Parliament passed the Restraining Act to prohibit New York’s General Assembly from enacting other legislation until it agreed to make appropriations “for furnishing his Majesty’s Troops.” Bowie, *supra* at 1671. Massachusetts’s General

Assembly and town meetings faced even harsher treatment. The colony's governor prorogued the General Assembly after a dispute over its authority to control the colonial governor's salary. *Id.* at 1680-81. And after the Boston Tea Party, Parliament prohibited most Massachusetts town meetings without the governor's consent. *Id.* at 1686-87. New Jersey's legislature was not spared—Royal Governor William Franklin prorogued it following a dispute “over the supplying of . . . barracks” for British soldiers. Gerlach, *supra* at 61.

**2. *The colonists' response to British restrictions shaped the right to assemble.***

British interference with colonial assemblies prompted the colonists to assert a natural right to assemble. Following the ban on town meetings, Massachusetts residents met in county conventions of towns, insisting that “we have, within ourselves, the exclusive right of originating each and every law respecting ourselves.” Bowie, *supra* at 1689. Committees of correspondence throughout the colonies, including New Jersey, “organized themselves into meetings like the Boston town meeting” and asserted an inherent right to assemble. *Id.* at 1690-91; *Letter of the Committee of Correspondence of the New Jersey Assembly to the Boston Committee of Correspondence (1774)* in Gerlach, *supra* at 68.

American writers also began to articulate the basis and scope of the assembly right. Pennsylvania lawyer John Dickinson wrote a widely

republished essay arguing that the purpose of an assembly was “to obtain redress of grievances,” but that this was impossible if an assembly “had no other method of engaging attention, than by complaining.” Bowie, *supra* at 1672-73. Samuel Adams agreed, writing that a similar restriction imposed “throughout the colonies . . . would be a short and easy method of . . . depriving the people of a fundamental right of the constitution, namely, that every man shall be present in the body which legislates for him.” *Id.* at 1674. The colonists thus described a right that included the ability to complain effectively through collective political action. *Id.* at 1672, 1676.

Against this backdrop, the Continental Congress—itsself an extralegal assembly—included the following grievance in its Declaration of Rights: “[A]ssemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal, & reasonable petitions to the crown for redress, have been repeatedly treated with contempt.” *Id.* at 1693.

### **C. Early State Constitutions Drew On The Colonial Understanding Of The Right To Assemble.**

On the advice of the Continental Congress, the colonies began to adopt written constitutions. *Id.* at 1697-98. On August 16, 1776, Pennsylvania became the first state to adopt a constitutional right to assembly. *Id.* at 1701. The Pennsylvania constitution declared “[t]hat the people have a right to



assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.” Luce, *supra* at 453.

Although Pennsylvania’s assembly clause surely drew from the similarly-worded grievance in the Declaration of Rights, it contained a notable addition: An explicit right to instruct representatives. *See* Bowie, *supra* at 1701-02; *see also* Luce, *supra* at 453. This innovation “betrays the influence of [Samuel] Adams or someone else from New England, because Pennsylvania had no similar tradition of assembling in town meetings to instruct representatives.” Bowie, *supra* at 1702. Just as the colonies mimicked the town meeting structure when resisting British incursions, Bowie, *supra* at 1732, many states followed Pennsylvania and drew upon the Massachusetts tradition by including a right to instruct in their constitutions, *see* Luce, *supra* at 454-55; *see also* Bowie, *supra* at 1732-34. The colonial understanding of the assembly right thus informed the earliest assembly clauses.

That understanding is equally relevant when interpreting the subsequent assembly clauses modeled on early state constitutions. “[W]hen new states joined the Union and existing states amended their original constitutions, they often copied the first state assembly clauses word for word.” Bowie, *supra* at 1732. Today, 42 state constitutions contain assembly clauses following the

structure first adopted by Pennsylvania. *Id.* at 1657, 1727. New Jersey’s 1844 Constitution was no exception. It adopted the basic structure of Pennsylvania’s provision, although it introduced a new formulation of the right to instruction, declaring that the people have a right “to make known their opinions to their representatives.” N.J. CONST. OF 1844, Art. I, ¶ 18; *see* Luce, *supra* at 455. The language adopted by the 1844 convention was carried over, unamended, into New Jersey’s current Constitution. N.J. CONST. art. I, ¶ 18.

#### **IV. THE DEMOCRATIC CHARACTER OF STATE CONSTITUTIONS INFORMS THE INTERPRETATION OF PROVISIONS LIKE NEW JERSEY’S ASSEMBLY CLAUSE.**

State constitutions—including New Jersey’s—privilege democratic rights to a far greater extent than their federal counterpart. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 863-64 (2021). This commitment is evident in three features common to state constitutions. First, most state constitutions, like New Jersey’s, “include[] an express commitment to popular sovereignty.” *Id.* at 869-70; N.J. CONST. art. I, ¶ 2a (“All political power is inherent in the people.”). “Second, state constitutions embrace majority rule as the best approximation of popular will.” *Id.* at 880. New Jersey’s Constitution, for example, includes a provision allowing adoption of constitutional amendments by a majority of legally qualified voters. N.J. CONST. art. IX, ¶ 6. Third,

“state constitutions also embrace a commitment to political equality,” evidenced both in provisions intended to guarantee “equal access to political institutions,” and those that ensure “equal treatment of members of the political community by those institutions.” Bulman-Pozen, *supra* at 890.

Accordingly, state courts, including New Jersey’s, have found violations of democratic rights under their own constitutions even absent an equivalent federal remedy. In *Schmid*, for example, the New Jersey Supreme Court held that Princeton University violated New Jersey’s guarantees of free speech and assembly by prohibiting the distribution of political literature, while declining to decide whether the First Amendment applied to the actions of a private university. *Schmid*, 84 N.J. at 538, 553, 569; *see also League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 96–97, 114 (2018) (holding that a partisan gerrymander violated Pennsylvania’s Free Elections Clause); *In the Matter of the 2021 Redistricting Cases*, 528 P.3d 40, 92 (Alaska 2023) (declining to “follow the [U.S.] Supreme Court’s lead” in “holding that political gerrymandering claims are non-justiciable”).

\* \* \*

This case presents this Court with a unique opportunity to clarify the content and scope of New Jersey’s Assembly Clause. The clause’s text and history, as well as existing precedent, show that it not only operates

independently from speech, press, and petition rights, but also protects those who gather for political participation and representative government, including those who wish to support a political candidate on a minor party line.

### **CONCLUSION**

Secretary Way's decision should be reversed.

Dated: August 25, 2023

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