IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION, Docket No. A-3542-21T2 On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
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AMICUS CURIAE BRIEF OF NEW JERSEY LIBERTARIAN PARTY

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PRELIMINARY STATEMENT

In Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), the United States Supreme Court upheld Minnesota's anti-fusion laws against a challenge alleging they violated the New Party's associational rights under the First and Fourteenth Amendments. Specifically, in 1994 the New Party chose Andy Dawkins as its candidate for State Representative. Because Dawkins already was the nominee of the Minnesota Democratic-Farmer-Labor Party, election officials refused to accept the New Party's nominating petition on the ground that Minnesota's election laws prohibited a candidate from appearing on the ballot as the candidate of more than one party. The New Party filed suit, alleging that Minnesota's anti-fusion law denied the New Party its First Amendment right to nominate its preferred candidate, and deprived its members of the right to vote for Dawkins as the New Party's candidate.

The District Court granted summary judgment to the State. The Eighth Circuit Court of Appeals reversed, concluding that Minnesota's anti-fusion laws were broader than necessary. The Supreme Court reversed the Court of Appeals, concluding that Minnesota's anti-fusion laws did not severely burden the New Party's rights, and that the State's interests in preserving the two-party system was sufficiently weighty to justify whatever burden was imposed on the New Party by the anti-fusion laws.

This appeal challenging the ruling of New Jersey's Acting Secretary of State that enforced New Jersey's anti-fusion ban addresses the validity of New Jersey's anti-fusion ban under New Jersey's expansive State constitutional protections of the right to vote and the right to free speech.

As we demonstrate below, the historical background of fusion voting, the clear political motivation for anti-fusion laws, and the extremely adverse effect those laws have had on minor parties argue powerfully for their invalidation. Fusion candidacies – nomination of a candidate by more than one party – was commonplace in late nineteenth century politics, and because of fusion voting, minor parties held the balance of power in most states until the early 1890s. Because Republicans were then the dominant party, fusion candidacies allowed Democrats frequently to combine with minor parties that supported the Democratic candidate. Eventually, in the late 1890s, legislatures in Republican controlled states passed laws providing that candidates could not appear on the ballot as nominees of more than one political party. Today, states permitting fusion candidacies are rare.

Similarly protective motivations prompted the New Jersey Legislature to pass anti-fusion legislation in 1921. As a result, minor parties in New Jersey cannot nominate either Democratic or Republican candidates as their own party's choice. Minor party members face the Hobson's choice of backing

candidates who cannot win or voting for a major party candidate on the major party lines, but not as their own party's candidate. As a result, minor parties have a weakened status in New Jersey. No minor party candidate has won a statewide election in New Jersey in the past one hundred years.

Timmons is a weak decision. In sustaining the Minnesota anti-fusion law, the Supreme Court relied on the State's interest in preserving the two-party system, an interest never even advanced by Minnesota. Because our state's courts have construed our State Constitution's protections much more expansively than the Supreme Court's First Amendment jurisprudence, it is highly unlikely that our Supreme Court would sustain New Jersey's anti-fusion laws. This court's disposition of this appeal should anticipate that result.

ARGUMENT

I. THE NEW JERSEY SUPREME COURT IS HIGHLY UNLIKELY TO FOLLOW TIMMONS WHEN CONSIDERING WHETHER ANTI-FUSION LAWS VIOLATE THE STATE CONSTITUTION

A. New Jersey's Constitutional Protections are More Robust than the Protections Afforded by the First Amendment.

In State v. Schmidt, 84 N.J. 535 (1980), our Supreme Court reversed defendant's conviction for distributing political literature on Princeton's campus. In his opinion for the Court, Justice Handler observed that

> [a] basis for finding exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and

> assembly is found in part in the language employed. Our Constitution affirmatively recognizes these freedoms . . .
>
> The constitutional pronouncements, **more sweeping in scope than the language of the First Amendment**, were incorporated into the organic law of this State with the adoption of the 1844 Constitution. N.J. Const. (1844), Art.1 pars. 5 and 18.
>
> [Schmidt, 84 N.J. at 557 (emphasis added).]

New Jersey political speech enjoys a "preferred" position among our constitutional values. State v. Miller, 83 N.J. 402, 411 (1980). In New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326 (1994), Chief Justice Wilentz's opinion emphasized the preeminent status of our State Constitution's protection of free speech: "Precedent, text, structure and history all compel the conclusion that the New Jersey Constitution's right of free speech is **broader** than the right against government abridgement of speech found in the First Amendment." Id. at 353 (emphasis added).

B. The Interests Asserted by Minnesota and Relied on by the Timmons Court in Support of Minnesota's Anti-Fusion Law are Insufficient to Sustain New Jersey's Anti-Fusion Statutes.

In Timmons, Minnesota asserted three State interests in support of its anti-fusion law. The first was an interest in avoiding exploitation of fusion by nominating a major party candidate also as the candidate of the "No New Taxes" or "Stop Crime Now" party. The New Party responded that Minnesota easily could avoid manipulation of that sort by adopting more rigorous ballot access

standards. The Timmons Court rejected that response, noting that Minnesota "need not tailor the means it chooses to promote ballot integrity." 520 U.S. at 365.

Significantly, Minnesota's concern about a profusion of parties with titles that also serve as political slogans is less relevant in New Jersey. The legislative restrictions on minor parties in New Jersey significantly diminish any concerns that minor parties, absent an anti-fusion law, would form multiple new parties with politically significant names to increase their vote totals.

The second interest asserted by Minnesota in Timmons was the fear that "fusion would enable minor parties, by nominating a major party's candidate, to bootstrap their way to major-party status in the next election and circumvent the State's nominating petition requirement for minor parties." Id. at 366. Although the Supreme Court acknowledged the validity of that interest asserted by Minnesota, it bears little relevance to New Jersey.

A third interest advanced by Minnesota was that of avoiding voter confusion, an interest that the Timmons Court expressly declined to rely on. 520 U.S. at 369, n.13. The Timmons Court elected to rely primarily on an interest that Minnesota did not advance: the interest of a state in enacting "reasonable election regulations that may, in practice, favor the traditional two-party system." Id. at 367. The Court observed that "[t]he Constitution permits the

Minnesota Legislature to decide that political stability is best served through a healthy two-party system." Ibid.

Dissenting, Justice Stevens contended that the Court impermissibly had relied on the State's interest in preserving the two-party system. He observed:

> Even if the State had put forward this interest to support its laws, it would not be sufficient to justify the fusion ban. In most States, perhaps in all, there are two and only two major political parties. It is not surprising, therefore, that most States have enacted election laws that impose burdens on the development and growth of third parties. The law at issue in this case is undeniably such a law. The fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality.
>
> [Id. at 378.]

II. WELL REASONED STATE AND FEDERAL CASELAW DEMONSTRATE THAT TIMMONS IS AN OUTLIER THAT IS INCONSISTENT WITH PREVAILING PRECEDENT AND IGNORES THE POWERFUL POLITICAL AND PARTISAN MOTIVATION FOR ANTI-FUSION LAWS.

As was noted in our Preliminary Statement, there is no dispute that the consistent and dominant motivation for the numerous anti-fusion laws passed throughout the country was the desire of the Republican Party to prevent minor parties from nominating and supporting candidates that already had been designated as candidates of the Democratic party. The historical background is detailed in a landmark article, A Place on the Ballot: Fusion Politics and Anti-

Fusion Laws, 85 AM. Hist. Rev. 287 (1980), authored by Peter H. Argersinger, History Professor Emeritus at Southern Illinois University.

> 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. . . . By offering additional votes in a closely divided electorate, fusion became a continuing objective not only of third party leaders seeking personal advancement or limited, tangible goals but also of Democratic politicians interested in immediate partisan advantage. The tactic of fusion enabled Democrats to secure the votes of independents or disaffected Republicans who never considered voting directly for the Democrats they hated . . . .
>
> [Id. at 289-90.]

Professor Argersinger explains that as states began to abandon party ballots in favor of a system of public control over ballots – the so-called Australian system – that change gave Republican legislatures the opportunity to undermine fusion voting by passing laws that prohibited a candidate's name from appearing more than once on the official ballot.

> The Republicans' modifications of the Australian ballot . . . were based on a simple prohibition against listing a candidate's name more than once on the official ballot. . . . Although other ballot adjustments increased its effectiveness, this simple prohibition against double listing became the basic feature of what the Nebraska supreme court described as a Republican effort to use the Australian ballot as a 'scheme to put the voters in a straight jacket.'
>
> [Id. at 291-92.]

New York's highest Court addressed the validity of New York's anti-fusion laws in In re Callahan, 93 N.E. 262 (N.Y. 1910). There, the New York

Court of Appeals invalidated New York's anti-fusion law as arbitrary and an unauthorized exercise of legislative power. Chief Justice Cullen observed:

> If [the Legislature] cannot enact arbitrary exclusion from office, equally it cannot enact arbitrary exclusions from candidacy for office. What exclusion could be more arbitrary than that one party or organization should not be permitted to nominate the candidate of another.
>
> [Id. at 61.]

The issue returned to the New York Court of Appeals one year later after the Legislature again passed a law barring fusion candidacies. Again, the Court of Appeals invalidated the law. In re Hopper v. Britt, 96 N.E. 371 (N.Y. 1911).

In In re city Clerk of Paterson, 88 A. 694 (N.J. S. Ct. 1913), the Supreme Court of New Jersey (then an intermediate court), addressed the validity of an application to the Paterson City Clerk to place the name of candidate Fordyce on the official primary ballot of both the Republican and Progressive parties. The court noted that a statute passed by the Legislature in 1911 makes clear that a political party has the right to nominate a candidate of another party, and that that statute superseded a 1907 law that required a party to nominate only candidates who were members of that party.

Ruling that Fordyce could be placed on the ballots of both the Republican and Progressive parties, the court nevertheless expressed grave doubt about the

constitutionality of the 1907 law, which had the practical effect of banning fusion candidacies:

> But if this act of 1911 had never been passed, and it was clear that the provision of the act of 1907 was mandatory, I should nevertheless be inclined to think that the refusal of the clerk in this instance was not legally justifiable.
>
> The right of suffrage is a constitutional right. The Legislature may deal with it so far as it is necessary to protect it; may pass laws to insure the security of the ballot and the rights of the voters. But I conceive that the Legislature has no right to pass a law which in any way infringes upon the right of voters to select as their candidate for office any person who is qualified to hold that office. . . . The Legislature may change the method of selection; but it cannot abridge the right of selection.
>
> [Id. at 694.]

State courts' skepticism about the soundness of Timmons is fortified by the United States Supreme Court's consistently emphatic support of the First Amendment rights of political parties. In a series of significant First Amendment cases, the Court steadfastly underscored the importance it attached to preventing Legislative regulations from encroaching on the free speech and assembly rights of parties. See, e.g., Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 224 (1989) (invalidating California election law that prohibited parties from endorsing candidates in their own party primaries and stating that

> [f]reedom of association means not only that an individual voter has the right to associate with the political party of her choice . . . , but also that a political party has a right to 'identify the people who constitute the association,' . . . and to select a 'standard bearer who

> best represents the party's ideologies and preferences.') (citations omitted);

Anderson v. Calabrezze, 460 U.S. 780, 793-94 (1983) (invalidating Ohio law requiring independent candidate for President John Anderson to file his nominating petition in Ohio by March 29, 1980, weeks before Anderson had announced his intention to run for President, and stating

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and – of particular importance – against those voters whose political preferences lie outside the existing political parties.;

Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 215-16 (1986) (invalidating Connecticut statute that prohibited Connecticut Republican Party from allowing independent voters to participate in Party's primary elections, and stating

> As we have said, ' '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' ' (citations omitted);

Williams v. Rhodes, 393 U.S. 23, 31 (1968) (invalidating Ohio election statute requiring so many signatures on petitions for nominations for President and Vice-President as to preclude new political parties and old parties with limited membership to nominate candidates and stating

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus

> denied an equal opportunity to win votes. . . . [T]his Court ha[s] consistently held that 'only a compelling state interest in the regulations of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.';

Norman v. Reed, 502 U.S. 279, 288-89 (1993) (invalidating as unconstitutional Illinois statute prohibiting use of a political party's name in Cook County because of prior use of party name in City of Chicago and stating

> For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. . . . To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation . . . . (citation omitted);

California Democratic Party v. Jones, 530 U.S. 567, 575-76 (2000) (invalidating California open primary law that compelled parties to open their primary elections to voters who were not party members, quoting with approval from Justice Stevens's dissent in Timmons, and stating

> Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.' Eu, supra, at 224 (internal quotation marks omitted).

Similarly, other federal and New Jersey decisions have emphasized the high priority accorded to the autonomy and critical role of minor political parties. In Patriot Party of Allegheny County v. Allegheny County Department of Elections, 95 F.3d 253 (3d. Cir. 1996), plaintiff Patriot Party challenged the

validity of Pennsylvania statutes that prohibited the Patriot Party, and other minor political parties, from "'cross-nominating' a candidate for political office when that candidate already has been nominated for the same office by another political party." Id. at 255. The Third Circuit invalidated the Pennsylvania anti-fusion law: "[w]e therefore find unpersuasive each interest that the Department has offered to justify its ban on cross-nomination by minor parties." Id. at 267.

In Council of State Alternative Political Parties v. State, Division of Elections, 344 N.J. Super. 225 (App. Div. 2001), this court addressed a constitutional challenge to two New Jersey statutes, one that prohibited a voter from declaring a party affiliation other than Democrat or Republican, and the other requiring all county clerks to provide five free copies of the registry lists to State-recognized political parties, namely the Democratic and Republican parties. By statute, only political parties that received, in the last election for members of the General Assembly, at least 10 percent of the total vote cast are recognized as a "political party" by the State. Voters were permitted to affiliate with either of those recognized parties when registering for the primary election, or they can declare themselves as "Independent." All other voters are considered "Unaffiliated." As of June 2, 1998, 19.18 percent of registered voters were Republicans, 25.38 percent were declared Democrats, .24 percent were declared Independents, and 55.20 percent were classified Unaffiliated.

Plaintiff, Council of Alternative Political Parties (CAPP), advocated for a more open and responsive political system in New Jersey. Plaintiff contended that the inability of the members of their constituent parties to declare their party affiliation when registering to vote, and for those parties to obtain affiliation lists of their members from election officials, severely burdens their rights of political affiliation and is discriminatory. The trial court agreed.

Affirming, the Appellate Division concluded that the burdens imposed by the State statutes outweighed any of the State interests advanced to support the preferred treatment of the major parties. The court concluded that the state statutes impermissibly burdened the First Amendment rights of the minor parties and denied those parties their constitutional right to equal protection of the law.

A. The State's Interests Cannot Justify the Burdens Imposed on Minor Parties and Their Members.

Although Appellant, relying on Worden v. Mercer Cty. Bd. of Elections, 61 N.J. 325, 346 (1972), persuasively asserts that New Jersey courts apply "strict scrutiny" to state laws that infringe on constitutionally protected voting rights, Amicus contends that New Jersey's anti-fusion laws also are constitutionally infirm under the burden/balancing test that originated in Anderson v. Calabrezze, 460 U.S. at 789. Under that more flexible standard,

> [a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff

> seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'
>
> [Id. at 789.]

See also Burdick v. Takushi, 504 U.S. 428, 434 (1992).

As noted, the Timmons Court expressly disclaimed any reliance on Minnesota's alleged interest in preventing voter confusion. Timmons, 520 U.S. at 369 n.13. The two other interests asserted by Minnesota have been discussed earlier in this brief and demonstrated to be of limited relevance in New Jersey. The State interest primarily relied on by the Supreme Court – protection of the two-party system – is similarly irrelevant and inapplicable in New Jersey. Since the enactment of anti-fusion laws and the enhanced party qualification law in the 1920s, no minor party in New Jersey has attained the statutory status of a "political party," nor during that same period has any candidate of a minor party been elected to a major public office.

In contrast, the burden on minor parties imposed by New Jersey's anti-fusion laws is enormous. As noted, if the Libertarian Party chooses to support a Democratic or Republican candidate for a specific office, the anti-fusion law prohibits that candidate from appearing on the ballot as a candidate of the Libertarian Party, and Libertarian Party members can vote for that candidate only on the Democratic or Republican party line. So Libertarian Party members

are forced to choose between voting for their preferred candidate as the candidate of a party they neither support nor belong to, or waste their vote on another candidate that is not their preferred choice. That result clearly imposes a severe burden on both the Libertarian Party's constitutional right to support the candidate of its choice as a candidate of the Libertarian Party, and on the constitutional rights of its party members to vote for the Party's preferred candidate as a Libertarian Party candidate, and not as a Democratic or Republican Party candidate. Those burdens clearly outweigh any conceivable state interest asserted in support of the anti-fusion laws.

CONCLUSION

Timmons is not a barrier to the invalidation of New Jersey's anti-fusion laws, and our Supreme Court is not likely to be deterred by the Timmons Court's deference to the two major parties as the interest supporting Minnesota's anti-fusion law. This court should anticipate our Supreme Court's rejection of Timmons' rationale and strike down New Jersey's repressive and anti-democratic laws that prohibit fusion candidacies.

Respectfully submitted,
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By: /s/ CJ Griffin, Esq.

Dated: September 21, 2023