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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PRELIMINARY STATEMENT

The Moderate Party, Richard Wolfe, Michael Tomasco, and William Kibler ("Appellants") seek to exercise fundamental rights that are guaranteed under the New Jersey Constitution and essential to a healthy democratic society. They want to nominate competitive, politically moderate candidates on the ballot, even if a candidate has also been nominated by another party. For decades, parties in New Jersey routinely "cross-nominated" the same candidate, yet laws passed a century ago for the express purpose of stifling electoral competition prevent the Moderate Party from doing so today. This appeal challenges the legality of those laws under the New Jersey Constitution's right to vote, right to free speech and political association, right to assemble and make opinions known to representatives, and right to equal protection.

"Fusion voting" is when a candidate is cross-nominated on the ballot by more than one party. As with all other nominations, a cross-nominated candidate appears on a party's ballot line. Voters can vote for the cross-nominated candidate on the party line of their choice. Each party's vote sum for a candidate is tallied separately—to allow for a clear breakdown of the candidate's support—before being combined to determine the total votes cast for that candidate. Throughout the 1800s and early 1900s, fusion voting flourished in New Jersey and throughout the country, permitting minor parties and their voters

to assume a meaningful role in politics. In New York and Connecticut, fusion remains legal and allows voters who are not Democrats or Republicans to associate and constructively participate in the political process.

Starting in 1921, the New Jersey Legislature passed a number of "anti-fusion" laws to prohibit cross-nominations and insulate the Democratic and Republican Parties from electoral competition. These laws remain codified today at N.J.S.A. 19:13-4, 19:13-8, 19:14-2, 19:14-9, and 19:23-15. The anti-fusion laws severely and impermissibly burden the rights of Appellants to nominate and vote for their preferred candidates, to associate with one another to advance shared political goals, and to act collectively to convey their political opinions to their representatives. These laws deny equal protection by relegating Appellants to an electoral under-class: their fundamental political rights are severely burdened, while the major parties and their respective supporters suffer no harm and are instead afforded disproportionate electoral influence. Despite the electorate's overwhelming desire for more electoral choices and widespread frustration with the two major parties, anti-fusion laws have predestined every minor party in New Jersey to political failure.

Under binding New Jersey precedent, strict scrutiny is used to evaluate whether state laws violate fundamental political rights guaranteed under the New Jersey Constitution. Under that standard, there are no compelling state

interests that can justify the onerous burdens imposed by the anti-fusion laws. Nor are these laws narrowly tailored, given the availability of less restrictive means for addressing any legitimate concerns. Even under a burden-interest balancing test akin to the federal Anderson-Burdick standard, no state interests are sufficiently weighty to warrant these onerous burdens. Notably, the record on appeal debunks the hypothetical justifications advanced in prior cases to support anti-fusion laws in other states.

New Jersey courts have a long tradition of vigorously defending the fundamental rights enshrined in the State Constitution. The judiciary's duty to safeguard these rights takes on particular importance when the legislature enacts laws—like the anti-fusion laws here—that fundamentally distort the political process to entrench the status quo. With political extremism and hyper-polarization putting democracy itself in peril, the urgency of ensuring a free, open, and equal politics has never been greater. Accordingly, Appellants respectfully ask the court to declare the anti-fusion laws unconstitutional.

PROCEDURAL HISTORY

On June 7, 2022, the Moderate Party submitted petitions signed by Wolfe, Kibler, Tomasco, and hundreds of other voters nominating Tom Malinowski as the party's candidate in the 7th Congressional District. (Pa304-69.) On June 8, Respondent Secretary Way denied the petitions because Malinowski had also

sought the Democratic Party's primary nomination. (Pa1.) On July 8, the Moderate Party requested reconsideration (Pa546-49), which the Secretary denied 11 days later. (Pa2.)[1] The Appellants filed timely notices of appeal (Pa3-31), which were consolidated. (Pa550-51.) The court granted the New Jersey Republican State Committee's motion to intervene (Pa552-59) and Appellants' motion to file a combined, ninety-page opening brief. (Pa550-51.)

STATEMENT OF FACTS

A. Appellants Are Moderate New Jersey Voters Working Together to Elect Moderate Candidates and Reduce Political Extremism

A healthy democracy must permit like-minded individuals to come together in support of policies, principles, and candidates to further common goals. Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000). Parties, voters, and candidates must each have the ability to play a meaningful role in the political process. Anderson v. Celebrezze, 460 U.S. 780, 792-94 (1983). This necessarily requires avenues for new ideas and new faces to enter the democratic marketplace. Id. Consistent with these basic and fundamental principles, a group of Republican, Democratic, and unaffiliated New Jersey voters formed the Moderate Party.

[1] Extensive legal briefing was submitted with the initial petition and the application for reconsideration and are referenced at Pa33, ¶¶ 3, 7 and Pa38, ¶¶ 3, 7; those briefs are omitted from the Appendix per R. 2:6-1(a)(2).

The Moderate Party aims to protect "the rights of moderate, centrist, and unaffiliated voters" by nominating candidates "who hold centrist and moderate positions." (Pa56.) By not just supporting, but also nominating such candidates, they boost candidates who will "reach across the aisle to compromise on contentious issues." (Pa47.) They want to elect candidates who demonstrate an unshakable commitment to democracy, the rule of law, and the time-honored principle of accepting defeat. At its core, the Moderate Party wants to support candidates who put the public good over any partisan agenda. (Pa41-74.)

Crucially, the Moderate Party and its supporters do not want to nominate protest candidates destined to fail. (See Pa47.) New Jersey's federal and state races are single-winner, plurality elections, which all but ensure that only two candidates can be competitive.[2] A key reason is that most voters engage in "strategic voting": even when their top preference is a minor-party candidate, but one who is unlikely to win, voters will instead use their ballot to minimize the chances that their least-preferred major-party candidate will be elected. This means voting for the lesser of two evils: the other major party candidate.[3] As a

[2] This dynamic is known as Duverger's Law. Most other advanced democracies use multi-winner legislative districts, which permit a greater number of candidates to be competitive and therefore permit candidates from multiple parties to routinely win seats. Renee Steinhagen, Giving New Jersey's Minor Political Parties a Chance: Permitting Alternative Voting Systems in Local Elections, 253 N.J. LAW. 15, 16 nn.9, 12 (Aug. 2008).

[3] Id. at 15 & n.4.

result, Democratic and Republican candidates have won every federal and state election in New Jersey over the past fifty years.[4] This dynamic artificially inflates support for major parties and impairs minor party formation and growth.

The Moderate Party is particularly concerned that standalone candidates could be spoilers and pull votes away from competitive, moderate candidates. (Pa47, 81, 156-57, 197, 213, 240.) Instead, like minor parties routinely do in New York and Connecticut where fusion is permitted, they want to play a constructive role by cross-nominating competitive candidates who share their values. (Pa47-52.) Accordingly, the Moderate Party assessed the two leading candidates in the 7th Congressional District and decided to nominate Rep. Malinowski because he "exemplifies the ideals of the Moderate Party." (Pa46-47.)[5] Putting Malinowski on the Moderate Party ballot line as its nominee was mission-critical. It was not sufficient to simply "endorse" Malinowski and urge voters to support him on the Democratic line. Moderate Party supporters knew that "vot[ing] for him on the Democratic Party line" would "inadvertently[] convey [their] support for the policies of the Democratic Party as a whole—many of which [they] do not support." (Pa48.) Indeed, many moderate and unaffiliated voters would sit out the race if forced to support the Democratic

[4] David Wildstein, Imperiale Was Only Independent Candidate to Win Beyond Local Level, N.J. GLOBE (Nov. 1, 2018), https://perma.cc/4QQU-8WJ7.
[5] He readily accepted the nomination. (Pa50; see Pa237-31.)

Party to vote for Malinowski, as state law requires. (Id.; see Pa80, 138.)[6]

Richard Wolfe believes the Moderate Party's approach is vital to combat the extremism that has subsumed our politics. Wolfe, a tax lawyer, is a lifelong "moderately conservative Republican," but has been "politically homeless" as a result of the Republican Party "mov[ing] away from its core values" and repeatedly embracing extreme and dangerous views. (Pa42-44.) The Moderate Party offers a new way. It is a "[p]olitical home for centrist voters"—like Wolfe—"who reject extremist Democratic and Republican officeholders and candidates." (Pa46.) Wolfe believes that the Moderate Party's commitment to nominating competitive candidates ensures that voters like him won't be "tilting at windmills" in support of quixotic candidates that are destined to lose. (Pa47.) In Wolfe's view, today's political stakes are "[f]ar too important to cast what amounts to a symbolic vote." (Id.)

Michael Tomasco had likewise been a "reliable Republican voter." (Pa77.) Since voting for Donald Trump in 2016, Tomasco feels that "the Republican Party seemingly did everything possible to push [him] away." (Pa78.) Yet, even when the alternative is a far-right extremist, Tomasco is

[6] The Moderate Party plans to cross-nominate competitive center-right and center-left candidates in the 2023 state and local elections, and in all elections thereafter. (Pa51); N.J. Moderate Party, 2023 Plans (Nov. 2022), https://perma.cc/DB9Q-8L7T.

"reluctant[]" to vote Democratic, saying, "I know that this vote sends a signal that I support everything the party stands for, and believe me, I don't." (Pa79.) He insists that if "the major parties continue to move to polar extremes" and "the only way to cast a vote for a competitive candidate is to vote Democratic or Republican," "it seems entirely plausible that I could be forced to abstain from voting." (Pa80.) Instead of "throwing away a vote on a [minor] candidate who is guaranteed to lose," Tomasco wants a Moderate Party ballot line to vote for competitive candidates and to send a "clear message of support" for "moderation, compromise, and a commitment to democracy." (Pa79-81.)

William Kibler is another moderate stranded between the two major parties. He is a West Point graduate and combat veteran who believes, as did President Reagan, in "peace through strength." William Kibler, I'm Suing N.J. Because I Shouldn't Have to Vote for a Democrat or a Republican, STAR-LEDGER (Dec. 1, 2022), https://perma.cc/H73C-H8XY. He supports fiscal prudence and reasonable protections for law-abiding gun owners. Id. He also is a staunch environmentalist and works at a non-profit fighting to keep New Jersey's waterways clean. Id. Kibler unambiguously rejects the idea that recent elections were rigged. Id. With these cross-cutting views, Kibler finds it hard to advance his perspective with his ballot. Id. A vote for a moderate candidate on a major party line implies unquestioning support for a platform he opposes. Id.

In some races, when his preferred choice was assured victory, he has voted for a Green Party candidate hoping to bolster the environmentalist platform. Id. Yet, he knows that voting for a standalone minor party candidate in a close race can backfire and undermine any expressive purpose of that vote. Id.

Wolfe, Tomasco, and Kibler are not alone in these views. In the 7th Congressional District, more voters are unaffiliated than are registered with either the Democratic or Republican Party. Statewide, the trends are similar: nearly 37% of all voters are unaffiliated. (Pa49, nn.1&2.) A recent report by the think-tank New America studying the New Jersey electorate found that most voters are both frustrated with the rigid nature of today's two-party system and unwilling to support standalone minor party candidates. If fusion were permitted, roughly two-thirds of moderates and independents say they would likely vote on a centrist minor party's ballot line for a cross-nominated competitive candidate.[7] In so doing, they would be building on a rich, and ongoing, American tradition.

[7] NEW AMERICA, New Jersey Voters on Political Extremism, Political Parties, and Reforming the State's Electoral System (Nov. 2022), https://perma.cc/D7EF-N9KD (finding that roughly two-thirds of N.J. voters believe the two major parties fail to "represent[] the values, beliefs, and policy preferences" of the electorate and therefore want more choices on the ballot; nearly half of N.J. voters have wanted to vote for a standalone minor party candidate, but have refrained from doing so for strategic reasons; and that nearly three-quarters of N.J. voters believe that votes for standalone minor party candidates are wasted).

B. Fusion Was a Widespread and Positive Force in Elections, Both in New Jersey and Nationally

Fusion is neither a modern concept, nor unique to New York and Connecticut. For much of the 1800s and early 1900s, cross-nominations were an inherent and unquestioned feature of elections in New Jersey and throughout the country. (Pa212.) Then, as now, the key function of parties was to nominate and support the election of their preferred candidates. Sometimes, a candidate would be nominated by one party, but often would be cross-nominated by multiple parties. Peter Argersinger, "A Place on the Ballot": Fusion Politics and Antifusion Laws, 85 AM. HIST. REV. 287, 288–90 (1980) (Pa371-73);[8] (Pa272-74).

As early as the 1820s, minor parties routinely fused with the out-of-power major party in an attempt to form a majority coalition. (Pa371-73); RUDOLPH J. PASLER & MARGARET C. PASLER, THE NEW JERSEY FEDERALISTS 214 (1975) (Pa461). In the 1850s, minor abolitionist parties and cross-nominations played a key role in the collapse of the Whigs and emergence of the Republicans as the

[8] The Appendix includes reprints of press columns, book excerpts, and academic articles which are cited in this brief and might not otherwise be readily accessible. (See Pa370-464.) These materials were not included in the record in the agency proceedings below and have been included in the Appendix for the convenience of the court and parties, upon consultation with the Clerk's Office.

first major party to forcefully oppose slavery. (Pa184.)[9] After the Civil War, minor parties fused with Republicans in the South to challenge Jim Crow Democrats and Democrats in the North to challenge Gilded Age Republicans. Argersinger, supra at 288-90 (Pa371-73). "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, culminating in 1892 when neither major party secured a majority of the electorate in nearly three-quarters of the states." Id. at 289 (Pa372).

Fusion allowed voters and parties to express their views in a manner that more fully captured the range of opinions throughout the electorate. Id. at 288-90 (Pa371-73). Crucially, fusion ensured that dissenting voices would not be reduced to a mere "protest vote"; instead, fusion voting made it possible that minor party "leaders could gain office, and that their demands might be heard." Id. (Pa371-73). Fusion allows voters to cast their ballot for a candidate that they would not support if they had to vote for that person on the ballot line of a major party. At the same time, fusion enables voters to form alliances to put a check on the dominant party in power. Id. (Pa371-73). In this role, minor parties "spurr[ed] public awareness of new issues and crises," including efforts by the

[9] See COREY BROOKS, LIBERTY POWER: ANTISLAVERY THIRD PARTIES AND THE TRANSFORMATION OF AMERICAN POLITICS 194-97 (2016) (Pa427-28).

Liberty Party to abolish slavery and the Workingman's Party to establish the 10-hour day decades later, among numerous examples. (Pa184.)

New Jersey was no exception, with parties fusing routinely in local, state, and federal elections. (Pa272-74.) Fusion candidates won many races and made countless others more competitive. (Id.) Mahlon Pitney, who later served on the U.S. Supreme Court, was first elected to Congress with cross-nominations from two parties. (Id.) It is this rich tradition which the Moderate Party now wishes to carry forward.

C. Fusion Was Outlawed Starting in the Late 1880s to Preserve Democratic and Republican Party Control

In the late 1880s, state governments began asserting "unprecedented control over the electoral process" with state-printed ballots, ending the practice of voters casting party-printed ballots. Hon. Lynn Adelman, The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court, 56 IDAHO L. REV. 108, 109-10 (2019). Unfortunately, this new system gave the major party controlling a state government previously unimaginable power to manipulate the ballot and electoral rules to institutionalize their electoral advantage. Id.

Banning fusion was a common strategy. The major parties implemented bans to deprive all other parties from utilizing their most effective means of joining together to challenge their power. Id. One Republican state legislator

famously admitted the prevailing reason for the fusion bans: "We don't propose to let the Democrats make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. We can whip them single-handed, but don't intend to fight all creation." Argersinger, supra at 296 (Pa379).

In 1907, the New Jersey state legislature followed the trend, passing a law to prohibit fusion voting. L. 1907, c. 278, § 2. However, just four years later New Jersey Governor Woodrow Wilson mobilized the legislature to pass the "Geran Law," a landmark reform which expressly re-legalized fusion in an omnibus effort to enhance the direct influence of voters and shield them from the undue influence of political machinery. RALPH S. BOOTS, THE DIRECT PRIMARY IN NEW JERSEY 31-33 (1917) (Pa397-99).[10] After a brief hiatus, fusion was back, with two Republican-Progressive cross-nominated candidates immediately running in the 1912 congressional elections. (Pa273.)

Voters across the political spectrum shared Wilson's view that fusion was central to a healthy democracy—as did courts. In 1910 and 1911, New York's top court struck down legislative attempts to ban fusion, recognizing that fusion was protected under the New York Constitution. Matter of Callahan, 93 N.E.

[10] Among other changes, the Geran Law mandated direct party primaries for all offices, allowing party voters to pick the nominees that would appear on the general election ballot, rather than by a corrupt, backroom process run by party bosses with no voter accountability. BOOTS, supra at 31-33 (Pa397-99).

262 (N.Y. 1910); Hopper v. Britt, 96 N.E. 371 (N.Y. 1911). And in 1913, the Supreme Court of New Jersey—then, an intermediate appeals court—ruled that, if the Geran Law hadn't already superseded the 1907 fusion ban, the ban would nonetheless likely violate the New Jersey Constitution. In re City Clerk of Paterson, 88 A. 694, 695 (N.J. Sup. Ct. 1913).

Nevertheless, fusion remained deeply unpopular among one key constituency: "machine politicians." (Pa462.) A press account from 1917 emphasized that dominant party politicians "were so hard hit [under the Geran law and] have been squirming ever since and devising ways to extract the teeth from that law and disarm the independent voters of New Jersey." Id. Another paper noted that after years of failed efforts to unwind the law, in 1920 the Legislature "jammed through by steam roller methods the bill of the machines," delivering the long-sought "destruction of the Geran election reform law." (Pa463); see L. 1920, c. 349. These efforts were "intended to be discriminatory in favor of Republican and Democratic organizations," at the cost of minor parties that had long been important electoral actors. (Pa464.)

The legislature's first step was to make it effectively impossible for minor parties to qualify as a statutory "political party." To qualify, an aspiring party must receive at least 10% of all votes cast across the 80 General Assembly races

in the general election. N.J.S.A. 19:1-1.[11] And only statutory parties are afforded critical institutional advantages like a state-funded primary election (N.J.S.A. 19:5-1, 19:45-1), as well as pivotal ballot advantages, such as preferential position and a dedicated party column on the general election ballot that visually links its candidates together in prominent, large-point print. N.J.S.A. 19:5-1, 19:14-6.[12] All other parties must submit a signature petition for each candidate they nominate, N.J.S.A. 19:13-1, and they lack the right to a party column header or to have their nominations grouped. (See, e.g., Pa293, 297.)

With minor parties weakened, major party leaders in the legislature pushed through anti-fusion laws. Mongiello, supra at 1122-24 & nn.73-80. The substance of these laws, which remain codified today, prohibit: candidates from accepting multiple nominations (N.J.S.A. 19:13-8, 19:23-15); multiple parties or groups of petitioners from nominating the same candidate (N.J.S.A. 19:13-

[11] Previously, statutory status could be attained in a specific jurisdiction by receiving 5 percent of the vote in the General Assembly election(s) in that area. L. 1903, c. 248, § 3; see also Jeffrey Mongiello, Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture, 41 SETON HALL L. REV. 1111, 1123 n.73 (2011). Unlike other states, New Jersey does not permit minor parties to gain statutory status via signature gathering. Cf. Libertarian Party of Ark. v. Thurston, 962 F.3d 390, 404 (8th Cir. 2020).

[12] Other off-ballot benefits include (but are not limited to) creation of state, county, and municipal party committees that directly support party nominees (N.J.S.A. 19:5-2 to -6); enhanced limits on campaign finance contributions (N.J.A.C. 19:25-11.2); and membership or an equal share of adherents on various boards or other government entities. E.g., N.J.S.A. 19:6-3 (County Board of Elections); N.J.S.A. 52:13H-4 (Council on Local Mandates).

4); and candidates from appearing more than once on the ballot. N.J.S.A. 19:14-2, 19:14-9.

In New Jersey and other states that banned fusion, minor parties predictably withered and the two major parties cemented their control over the political domain.[13] Yet even in this regard New Jersey stands out as an outlier for its "unique hostility to minor parties": not a single minor party has achieved statutory party status in New Jersey in the century since these laws were passed. (Pa185-86.)[14] The Democratic and Republican Parties have long enjoyed unique state-granted benefits denied all others.

New York's experience with fusion—where its legal status has permitted a small number of minor parties to flourish and routinely influence elections—underscores the stifling impact of New Jersey's anti-fusion laws on political association and participation. Without the votes on the Liberal Party line, John F. Kennedy would have lost New York—and the presidency—to Richard Nixon in 1960. Likewise, Franklin Roosevelt and Ronald Reagan each relied on votes from a minor party's ballot line to carry the Empire State.[15] In Connecticut,

[13] Steinhagen, supra at 16 n.15.
[14] By contrast, minor parties routinely qualify in nearly every state. After New Jersey, Virginia and Pennsylvania are the most hostile to minor parties, but even there, minor parties have qualified in recent decades. (Pa185-86.)
[15] William R. Kirschner, Fusion and the Associational Rights of Minor Parties, 95 COLUM. L. REV. 683, 684 & n.2 (1995).

where fusion remains legal, minor parties have thrived and played a key role in recent decades. (Pa136-40, 172, 177-81, 186, 200-01, 203-08, 212, 243-46.) In both states, fusion has been easy to understand and administer and is widely embraced by voters. (Infra pp.25-27.)

D. Federal Courts Split on Whether Anti-Fusion Laws Violate the U.S. Constitution

Recognizing that fusion was necessary for voters outside of the two major parties to meaningfully participate in the political process, aspiring minor parties challenged several state fusion bans under the U.S. Constitution in the 1990s. The Eighth Circuit struck down a ban for impermissibly burdening associational rights, concluding that "[t]he burden on the New Party's associational rights is severe" and the "ban on multiple party nomination is broader than necessary to serve the State's asserted interests, regardless of their importance." Twin Cities Area New Party v. McKenna, 73 F.3d 196, 198-99 (8th Cir. 1996). The Third Circuit reached the same conclusion, holding that "[t]he state [anti-fusion] laws severely burden the Party's right to choose its standard-bearer and build its political organization, without supporting a compelling countervailing state interest" and that such laws "facially discriminate against minor political parties and their supporters." Patriot Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections, 95 F.3d 253, 270 (3d Cir. 1996). A divided Seventh Circuit upheld Wisconsin's ban, with Judges Easterbrook, Posner, and Ripple writing

separately to explain why the law was unconstitutional. Swamp v. Kennedy, 950 F.2d 383, 388-89 (7th Cir. 1991) (Ripple, J., dissenting from denial of rehearing en banc) ("A state's interest in political stability does not give it the right to frustrate freely made political alliances simply to protect artificially the political status quo.").

On a thin factual record—one entirely unlike the record here—the U.S. Supreme Court reversed the Eighth Circuit in 1997, holding that Minnesota's fusion ban did not violate the associational rights guaranteed by the First and Fourteenth Amendments. Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997). The majority ruled that prohibiting a party from nominating its preferred candidate imposed merely a modest burden on the party's associational rights and that two alleged state interests adequately justified the burden. Id. at 359-63. First, the majority credited hypothetical concerns (lacking any supporting evidence and dispelled by the historical record) that permitting fusion could lead to an over-proliferation of new parties and turn the ballot into "a billboard for political advertising." Id. at 365. Second, despite contrary precedent, the majority held that a state legislature could ban fusion to "favor the traditional two-party system" in the pursuit of "political stability." Id. at 367.

Justices Stevens, Souter, and Ginsburg dissented, explaining that a party's ability to nominate its preferred candidate on the ballot was central to its

associative purpose and that the pretextual justifications for banning fusion were unsubstantiated, unpersuasive, and illegitimate. Id. at 370-82 (Stevens, J., dissenting); id. at 382-84 (Souter, J., dissenting). The majority was widely criticized by the country's foremost voting rights experts for, among other reasons, abruptly departing from settled principles to defend a Democratic and Republican duopoly against natural electoral competition.[16]

E. A Rigid Two-Party System is Driving Extreme Polarization and Corroding Our Democracy

Central to the majority ruling in Timmons was a key factual presumption—an exclusionary two-party system would facilitate "political stability"—that has proven incorrect in the intervening years. After decades of ideological overlap between the two major parties and a broad diversity of views on each side, the Democratic and Republican Parties have become ideologically distinct and substantially more internally homogenous. (Pa147-49.) This sorting has produced a dangerous, self–reinforcing cycle of polarization, as each side reaffirms a mutually exclusive vision of political, cultural, and personal identity,

[16] E.g., Richard L. Hasen, Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition, 1997 SUP. CT. REV. 331, 331-32; Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 STAN. L. REV. 643, 673-74 (1998); Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 SUP. CT. REV. 95, 121-25. A U.S. district judge recently authored an essay explaining the Court's errors. Hon. Lynn Adelman, supra at 108-18.

and Democrats and Republicans increasingly view the other side as an illegitimate and existential threat. (Pa143-45.) Animosity toward the other side often plays a central role in shaping new political positions and mobilizing support. (Pa154.)[17] Expression of internal dissent is often perceived as alignment with a political enemy, and, particularly on the right, moderating voices are increasingly exiled. (Pa143.) And with only two electorally relevant parties competing to win single-winner plurality races, every political conflict is necessarily zero-sum. (Pa151-53.) The self-reinforcing nature of these problems suggests they are likely to get even worse. (Pa153-55.)[18]

Both major parties are casting our elections in existential terms and giving a platform to ideas that were, just a generation ago, far outside of the mainstream.[19] Of particular concern is the growing share of leaders on the right who are willing to take whatever measures they deem necessary to win—

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[17] See also James N. Druckman et al., Affective polarization, local contexts and public opinion in America, 5 NATURE 28 (2021), https://perma.cc/P6PE-S6U5 (exploring connection between partisan animosity and formation of new policy preferences).

[18] In Dr. Drutman's view, these trends are largely explained by the sorting of voters by geography, demographics, and values; the nationalization of media and politics; and extremely narrow overall partisan margins. (Pa146-55.) Other scholars posit alternative causal explanations. E.g., JOHN SIDES ET AL., THE BITTER END: THE 2020 PRESIDENTIAL CAMPAIGN AND THE CHALLENGE TO AMERICAN DEMOCRACY (2022). But the fact that these changes have occurred is beyond dispute.

[19] See Is Our Democracy Under Threat? Interview with John Farmer, RUTGERS TODAY (Oct. 26, 2022), https://perma.cc/AKT5-5J44.

including subverting or abandoning democracy itself. (Pa143-46.) These dynamics played a substantial role in the violent attack on the U.S. Capitol on January 6, 2021. (Pa238.) And they continue to fuel ongoing efforts to delegitimize the results of the 2020 presidential election, as well as the 2021 gubernatorial election here in New Jersey.[20]

Put simply, in the twenty-five years since Timmons, the rigid two-party system has not produced "political stability." Rather, it has accelerated political polarization and extremism and made compromise and conciliation more difficult. Not coincidentally, politically-motivated violence is on the rise.[21]

F. Fusion Would Strengthen Democracy in New Jersey by Making Politics More Responsive and Representative

Removing New Jersey's ban on cross-nominations would allow voters to meaningfully and constructively associate outside of the two major parties. A third or potentially fourth political party would likely become electorally relevant, making New Jersey's two-party system less rigid and exclusionary and softening the most dangerous aspects of today's zero-sum politics. (Pa156-61,

[20] Rep. Steve Scalise, Paul Pelosi, and Heather Heyer are just a few of the countless elected officials, relatives, and ordinary citizens who have been targets of such violence in recent years.

[21] See Rachel Kleinfeld, The Rise of Political Violence in the United States, 32 JOURNAL OF DEMOCRACY 160 (2021).

256-70.)[22] One Connecticut official credits "the presence of thoughtful and engaged fusion-oriented minor parties [for] provid[ing] the stability and balance" in the Constitution State that is "increasingly absent from our national politics." (Pa139-40.)

The certifications of former Connecticut Secretary of State Miles Rapoport, New York City Comptroller Brad Lander, other cross-nominated officials, and leaders of influential minor parties in New York and Connecticut, as well as the reports by Dr. Lee Drutman and Dr. Jack Santucci, explain the myriad additional ways re-introducing fusion would ensure that "[a]ll political power [remains] inherent in the people." N.J. CONST. art. I, ¶ 2(a).[23] By permitting minor parties to cross-nominate, fusion empowers officials to better represent the will of the electorate. (E.g., Pa136-40, 156-61, 171-73, 178-81, 198-200, 203-08; see also Pa47-52, 79–80.) Election results are more

[22] A scholar at the Cato Institute has noted that "[i]n an age of hyper-polarization, restoring fusion offers an important way to break up the strict duopoly of American politics." Andy Craig, The First Amendment and Fusion Voting, CATO INSTITUTE (Sept. 26, 2022), https://perma.cc/HYJ7-P3XK.

[23] Miles Rapoport, former Connecticut Secretary of State (Pa203-18); Brad Lander, NYC Comptroller (Pa282-86); James Albis, former Connecticut State Representative (Pa136-40); Joseph Sokolovic, member of Bridgeport Public Schools Board of Education (Pa177-81); Michael Telesca, chairman of the Independent Party of Connecticut (Pa243-54); Karen Scharff, former co-chair of NY Working Families Party (Pa168-75); William Lipton, former state director of NY Working Families Party (Pa196-201); Dr. Lee Drutman (Pa142-66); Dr. Jack Santucci (Pa256-70). A Brennan Center for Justice report also discusses several of these points. (Infra p.48 & n.46.)

informative when voters can specify between nominating parties for competitive candidates; when a candidate receives a meaningful share of their votes on a minor party line, that sends a clear signal that the minor party's agenda reflects the values and priorities of a sizable segment of the electorate. (E.g., Pa137-38, 204-05, 212, 283-86.) Elected officials act accordingly, adjusting their priorities and changing their legislative behavior based upon a better understanding of their constituency's preferences. (Id.)[24] When an official has a minor party's cross-nomination, their electoral future is no longer tied solely to "unquestioning fidelity" to the major party leadership on all issues, and they can leverage their minor party support to shape the major party platform. (Pa205; see also Pa137-39, 171-74, 178-81, 196-201, 283-86, 244-46.)

Cross-nominations also provide voters with more accurate and nuanced information about candidates at the most crucial point of the voting process. (E.g., Pa137-38, 283-86, 178-79.) For example, a Moderate Party cross-nomination highlights which candidate in a race is more centrist precisely when many moderate voters are deciding whom to support. Without this information, generalized views of the two major parties can be controlling, even when one

[24] See Cassidy Reller, Learning from Fusing Party Independence, Informative Electoral Signals and Legislative Adaptation (Presented at Am. Pol. Sci. Conf. 2022), https://perma.cc/FPY8-LETY (explaining how cross-nominations shape legislative conduct).

candidate is much closer to the center. So long as the Moderate Party cannot distinguish its nominees on the ballot, some centrist voters will struggle to discern which candidates are truly moderate given that many candidates attempt to conceal controversial positions after winning their major party's primary.[25]

A minor party's cross-nomination can engage "voters disillusioned by the two-party system," "giv[ing] a greater voice to citizens who feel alienated from the political process" and thus increase overall participation. (Pa137, 139, 159-61, 173, 207-08, 285.) Fusion also provides voters with "an effective way to have [their] voices heard on major issues," and allows them to "see the direct impact of political engagement on their lives . . . [which] reduces alienation and encourages people to see that government can take constructive actions." (Pa173.) Keeping voters "committed to representative government as the means of resolving our many differences" is crucial, because "[o]therwise, people might entertain dangerous alternatives." Kibler, supra.

Fusion would also make more elections competitive, as cross-nominations by the Moderate Party expand the persuadable share of the electorate who would otherwise judge candidates only on their major party affiliation. (Pa159-61.)

[25] E.g., Alexi McCammond & Andrew Solender, The Big Scrub, AXIOS (Aug. 31, 2022), https://perma.cc/39FH-P4J4 ("Republican candidates around the country are trying to disappear the hardline anti-abortion stances they took during their primaries.").

Today, many voters' strong dislike of one of the major parties categorically precludes their support for that party's nominees. Id. A Moderate Party cross-nomination would signal that there is more to a candidate than their affiliated major party. And the separate ballot line would permit voters to focus on the quality of the individual candidate, apart from negative views on the affiliated major party. Id. These dynamics could substantially increase the pool of potential voters willing to consider and support a cross-nominated candidate, therefore rendering more elections more competitive. Id.

G. Fusion Would Be Simple and Easy to Administer in New Jersey

In addition to its salutary effects for democracy, bringing fusion back to New Jersey would be, as a practical matter, straightforward. Princeton Professor Andrew W. Appel has examined the voting machines and election management systems used by each county in New Jersey and found that all have been used in another state with fusion, meaning that "the voting equipment used in New Jersey can accommodate fusion voting."[26] (Pa84-88.) He further concluded that any "voting machines that New Jersey might purchase in the future" would likewise accommodate fusion, given that "the major voting-machine vendors

[26] Professor Appel is a leading electoral scholar and has testified about election technology before the U.S. House of Representatives, the New Jersey Legislature, and the Superior Court of New Jersey, and has been qualified as an expert on voting machines in federal and state court. (Pa84; see Pa89-100.)

sell in a national market, in which three states already use fusion voting," so "new voting systems are designed to accommodate fusion voting." (Pa84.)[27]

New Jersey's ballots can also accommodate cross-nominations. The record contains a number of illustrative ballots comparing how the November 2022 election would look with or without cross-nominations. (Pa288-303.) As is self-evident from these visuals, the addition of the Moderate Party's nomination neither crowds the ballot nor creates confusion. Indeed, if the Moderate Party had instead nominated a standalone candidate in the 7th Congressional District, which it could have done under current law, the ballot would look nearly identical to the fusion examples, apart from a different candidate name appearing on the Moderate Party line. (Pa295, 297, 301, 303.)

Ballot design expert Whitney Quesenbery examined closely analogous ballots from New York (where fusion is routine) to confirm that New Jersey's ballots can readily be adopted to permit cross-nominations. (Pa220-35.) Her "professional opinion [is] that fusion voting can be implemented with neither voter confusion nor any meaningful disruption to election administration." (Pa220.) These conclusions are bolstered by a sample of ballots used in recent Connecticut elections with cross-nominations. (Pa112-21.) As is apparent from

[27] The third state referenced here is South Carolina, which recently passed a law prohibiting fusion effective January 2023.

the face of these ballots, they are neither crowded nor confusing. Voters can easily identify their preferred candidate and have no difficulty choosing the party line that fits them best. (See Pa206.)

New York and Connecticut election officials confirm that administering elections with fusion is uncomplicated. (Pa129-34, 203-09, 276-80.) They handle a substantial volume of calls, emails, letters, and other inquiries from voters, candidates, party officials, and others with questions about election administration, yet no more than "a small handful of these inquiries" involve questions about fusion. (Pa132; see Pa280 (another official "cannot recall ever having received an inquiry from a voter confused about fusion voting").) The time and resources spent on administrative tasks relating to fusion, if any, are de minimis. (E.g., Pa279-80.) One Connecticut official estimates that, each year, his office spends less than $10 (in a $300,000 budget) and approximately 2 hours (out of nearly 6,000 staffing hours) on these tasks. (Pa133.)

The former Connecticut Secretary of State, Miles Rapoport, stated that in his "decades of experience with fusion," the "[c]ommonly cited concerns . . . have never . . . materialized." (Pa204.) Administrators easily gathered results and calculated the winners. (Pa206.) Rapoport continued to study fusion while running the think-tank Demos, which released a report finding no negative consequences where fusion was used. (Pa207-08, 211-18.)

Allowing fusion might even reduce the number of candidates on the ballot, as minor parties cross-nominate competitive candidates in lieu of running separate spoilers. Recent election records show that Connecticut's and New York's ballots have averaged approximately 3 and 2.5 candidates (respectively) in federal and gubernatorial elections, compared to 4.5 candidates in comparable New Jersey elections. (Pa102-13, 123-27.)

LEGAL ARGUMENT

New Jersey's anti-fusion laws violate four fundamental rights guaranteed under the State Constitution: the right to vote; the right to free speech and political association; the right to peaceably assemble and make opinions known to representatives; and the right to equal protection.[28] A violation of any of these rights is sufficient to find the anti-fusion laws unconstitutional. But the cumulative burden on these rights is extraordinary and permits only one conclusion: the anti-fusion laws cannot stand under the New Jersey Constitution.

As an initial matter, the court evaluates the constitutional rights implicated in this case consistent with the principle in the State Constitution's Bill of Rights that "[a]ll political power is inherent in the people." N.J. CONST. art. I, ¶ 2(a).

[28] The specific laws at issue here are listed supra pp.15-16. While this brief discusses other statutes in order to accurately describe the entire regulatory scheme in which minor parties and their voters and nominees attempt to participate in the political process, no other provisions are challenged here.

The Constitution emphasizes that "the people . . . have the right at all times to alter or reform the [government]." Id. This guarantee ensures that the legislature cannot irrevocably transfer political power into some other institution(s) apart from the electorate itself or functionally prohibit the people from changing the composition of government.

Although statutes enacted by the legislature enjoy a presumption of constitutionality, Garden State Equality v. Dow, 434 N.J. Super. 163, 187 (Law Div.), stay denied, 216 N.J. 314 (2013), "the source of authority for New Jersey's government is and continues to be the people of the state." ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION 45 (2012) (Pa407); see also Hudspeth v. Swayze, 85 N.J.L. 592, 598 (E. & A. 1914) ("[L]egislators are confessedly the mere agents and instruments of the people, to express their sovereign and superior will." (quoting State v. Parker, 26 Vt. 357, 364 (1854))). The State Constitution ensures that "[t]he citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations." Driscoll v. Burlington–Bristol Bridge Co., 8 N.J. 433, 476 (1952). In fact, the Bill of Rights was adopted in 1844 as a "restriction upon legislative action" to "guard all the avenues by which the people's rights may be invaded." PROCEEDINGS OF THE N.J STATE CONSTITUTION CONVENTION OF 1844 170 (1942), https://perma.cc/C5CZ-39CY. Thus, this court must construe

the fundamental rights implicated in this case so as to "circumscribe the action of the legislature within its legitimate and proper sphere." Id.[29]

First, the anti-fusion laws violate the State Constitution's right to vote. The New Jersey Supreme Court (then, in its role as an intermediate appellate court) has already recognized that this right to vote is rendered illusory when a party's voters are prohibited from supporting their party's nominee on the ballot. See Paterson, 88 A. at 695. Compelling a voter to support a different party in order to vote for their nominee is no cure. Strict scrutiny applies to laws that infringe upon such fundamental rights: there is no compelling interest that justifies this severe burden, and the anti-fusion laws are not narrowly tailored. See Worden v. Mercer Cty. Bd. of Elections, 61 N.J. 325, 346 (1972). Even under a burden-interest balancing test, there are no sufficiently important interests to compensate for the heavy burden on this essential political right.

Second, the anti-fusion laws violate the State Constitution's right to free speech and political association because they preclude meaningful political association outside of the two major parties. When, as here, a minor party nominates a candidate who also accepts a nomination from a major party, the

[29] A number of delegates, including future U.S. Senator John Conover Ten Eyck, expressed similar sentiments. E.g., 1844 PROCEEDINGS at 170 ("[A]ll power springs from the people, they should declare that the great fundamental doctrines of civil liberty should not be interfered with in any way, but that minor matters should be left with the Legislature.").

minor party is barred from identifying its nominee on the ballot. Worse, the government compels minor party voters to manifest their support for a major party in order to vote for their own party's nominee. When the same person is nominated, the Moderate Party must either remain off the ballot, or name some individual who is not their preferred choice and risk spoiling the race by undermining their preferred choice. Strict scrutiny is again the applicable standard. See Worden, 61 N.J. at 346. Given the severe burden, lack of any compelling interest, and absence of narrow tailoring, the anti-fusion laws are unconstitutional. Even under a burden-interest balancing test, there is no sufficiently important interest to justify laws that ensure minor parties and their voters cannot meaningfully associate within the electoral process.

For decades, "New Jersey has been a leader in th[e] reemergence of state constitutional law" by recognizing that state constitutional guarantees "go[] beyond federal minimum standards." WILLIAMS, supra at 52-53 (Pa411).[30] The New Jersey Supreme Court has already held that the State Constitution's freedom of speech and political association is more protective than the federal counterpart. State v. Schmid, 84 N.J. 535, 553-60 (1980). Bolstered by New

[30] New Jersey courts have "regularly" and "enthusiastically embraced" the robust protections set forth in the New Jersey Constitution, irrespective of the federal judiciary's crimped reading of (some) federal constitutional rights. John B. Wefing, The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism, 29 RUTGERS L.J. 701, 705 (1998).

Jersey's unique history and tradition, these factors compel the conclusion that the New Jersey Constitution's freedom of speech and political association provisions prohibit the state legislature from banning fusion, notwithstanding the U.S. Supreme Court's contrary view with respect to the federal Constitution in Timmons. The majority opinion in Timmons itself offers little persuasive value given its poor reasoning, unexplained departure from settled doctrine, and reliance on since-discredited factual presumptions.

Third, the anti-fusion laws violate the State Constitution's right to peaceably assemble and make opinions known to representatives because they prevent minor party voters from acting collectively in order to convey their preferences to elected officials. This guarantee arises from the plain text of the State Constitution. Review of the historical record confirms that this right was originally understood as ensuring that citizens could work together to have a meaningful voice in government. Voters like Wolfe, Tomasco, and Kibler are precluded from uniting together to signal their values and priorities to their representatives; that is precisely what is conveyed by the Moderate Party's nomination on the ballot and the votes cast on the Moderate Party line. Given the severe burden imposed on this fundamental political right, strict scrutiny is again the appropriate standard. See Worden, 61 N.J. at 346. In the absence of compelling interests or narrow tailoring, the anti-fusion laws are

unconstitutional. The absence of any sufficiently important state interests means that these burdensome laws are unconstitutional even if a burden-interest balancing test were applied instead.

Finally, the anti-fusion laws violate the State Constitution's guarantee of equal protection. Together, these laws impose a substantial and disproportionate burden on the fundamental rights of minor parties, their voters, and candidates earning their cross-nomination. In the absence of a public need for these heavy burdens, and in light of the degree to which these laws disproportionately favor the two major parties, they are unconstitutional. Presented with an analogous situation in Council of Alt. Political Parties v. State [hereinafter "CAPP"], the Appellate Division reached this same conclusion. 344 N.J. Super. 225 (App. Div. 2001). Other courts have also recognized that prohibiting fusion violates equal protection. E.g., Reform Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections, 174 F.3d 305 (3d Cir. 1999); Callahan, 93 N.E. at 262-63.

I. THE ANTI-FUSION LAWS VIOLATE THE FUNDAMENTAL RIGHT TO VOTE (Pa1-2)

The anti-fusion laws impose an impermissibly severe burden on the State Constitution's fundamental right to vote. Given that this right "holds an exalted position in our State Constitution," New Jersey courts have enforced it with corresponding vigor. In re Attorney General's "Directive on Exit Polling: Media & Non-Partisan Pub. Interest Grps.," issued July 18, 2007, 200 N.J. 283, 302

(2009).[31] When the Paterson court reviewed the 1907 anti-fusion law, it recognized that such restrictions are incompatible with this fundamental political right. 88 A. at 695-96. Strict scrutiny applies to laws, like those at issue here, that burden fundamental voting rights protected by the State Constitution. See Worden, 61 N.J. at 346. Absent any compelling interest or narrow tailoring, the anti-fusion laws cannot withstand strict scrutiny. Even under a burden-interest balancing test, the anti-fusion laws are unconstitutional.

A. Under Settled Precedent, Anti-Fusion Laws Violate the Right to Vote

In New Jersey, the right to vote "is the citizen's sword and shield" and "the keystone of a truly democratic society." Gangemi v. Rosengard, 44 N.J. 166, 170 (1965).[32] Yet, "[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth." Reynolds v. Sims, 377 U.S. 533, 555 n.29 (1964). "'To vote' means to express

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[31] N.J. CONST. art. II, § 1, ¶ 3(a) ("Every citizen . . . shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people.") (emphasis added).

[32] See e.g., Gangemi, 44 N.J. at 170 ("'Other rights, even the most basic, are illusory if the right to vote is undermined.'" (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)); Worden, 61 N.J. at 334 ("[T]he right to vote is a very fundamental one."); In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 331 N.J. Super. 31, 37 (App. Div. 2000) ("Voting is a fundamental right."); Afran v. City of Somerset, 244 N.J. Super. 229, 232 (App. Div. 1990) ("[T]he right to vote is the bedrock upon which the entire structure of our system of government rests.") (Pressler, J.).

a personal political preference and to have that preference counted." League of Women Voters of Mich. v. Sec'y of State, 959 N.W.2d 1, 27 (Mich. Ct. App. 2020) (emphasis original). Moreover, "the right to vote would be empty indeed if it did not include the right of choice for whom to vote." Gangemi, 44 N.J. at 170 (citing Paterson, 88 A. at 695-96). Thus, central to this right is the ability of (i) parties to nominate their preferred candidates on the ballot and (ii) their supporters to reinforce that nomination at the ballot box.

The Paterson court embraced this expansive view of the State Constitution's right to vote when it analyzed the 1907 anti-fusion law. 88 A. at 695-96. Paterson made clear that the right to vote is impermissibly burdened when a party cannot nominate on the ballot the qualified candidate of its choosing. Compelling a party's voters to support a different party in order to vote for their own nominee only compounds the constitutional injury. Chief Justice Gummere explained:

> The right of suffrage is a constitutional right. The Legislature . . . may pass laws to insure the security of the ballot and the rights of 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.

Id. at 695. Notably, the court recognized "the right of voters to be untrammeled in the selection of their candidates for office" and that "[t]he Legislature may change the method of selection; but it cannot abridge the right of selection." Id.

Thus, the court expressed "at least very grave doubts of the power of the Legislature to dictate to the people of the state who shall be their choice, either as a candidate for nomination or as a candidate for election." Id.[33] Remarkably, a few years later, the legislature ignored Paterson and adopted the anti-fusion laws at issue here. Mongiello, supra at 1123-24 & nn.76-77.

Paterson remains good law. E.g., Gangemi, 44 N.J. at 170; Imbrie v. Marsh, 5 N.J. Super. 239, 245 (App. Div. 1949). For example, in Gansz v. Johnson, the Law Division relied on Paterson to put a nominee on the ballot despite a law "limit[ing] the right of the convention, committee, or other body to nominate as its candidate any person who is qualified for the office" because that rule would violate "[t]he electors[']s . . . right to vote for whom they will for public office and the Legislature cannot deprive them of that right." 9 N.J. Super. 565, 567 (Law Div. 1950).[34]

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[33] Because the Geran Law expressly authorized fusion and therefore superseded the 1907 anti-fusion law, the Court did not need to take the formal step of striking down the 1907 law as unconstitutional. Paterson, 88 A. at 695-96; see Mongiello, supra at 1122 & n.71.

[34] In Stevenson v. Gilfert, the New Jersey Supreme Court upheld a law requiring that a party must select one of its members when filling an "emergency" vacancy arising after the primary, since the party's voters could not "as a practical matter . . . speak for themselves." 13 N.J. 496, 505 (1953). If not, these voters were vulnerable to "political manipulations which deprive them of their chosen candidates and substitute candidates of a different party espousing adverse political principles." Id. By its own terms, Stevenson limited its holding to this unique "emergency" context and therefore did not abrogate Paterson. Nor is

Shortly before Paterson, the New York Court of Appeals, the highest court in the state, took a similar approach in striking down an anti-fusion law. See Callahan, 93 N.E. at 262-63. The right to vote in New York's constitution in effect at that time was nearly identical to its counterpart in the New Jersey Constitution.[35] In holding the anti-fusion law violated the right to vote, the Chief Judge declared: "if the Legislature does grant to any convention, committee or body the right to make nominations, it cannot limit the right of such convention, committee or body to nominate as its candidate any person who is qualified for the office." Id. at 262. The Chief Judge further expounded:

> The electors have the right to vote for whom they will for public office, and this right cannot be denied them by any legislation. Equally, any body of the electors has the right to choose whom it will for its candidate for office and to appeal to the whole electorate for votes in his behalf.

Id. (internal citations omitted).

Chief Judge Cullen called out the anti-fusion law for what it was: "the legislative provision is solely intended to prevent political combinations and

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Stevenson relevant here, where the Moderate Party is barred from nominating the candidate of its choosing in the first instance.

[35] Compare N.J. CONST. art. II, § 1, ¶ 3(a) (qualified electors "shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people"), with N.Y. CONST. (1894), art. II, § 1 (qualified electors "shall be entitled to vote at such election . . . for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people").

fusions, and this is the very thing that I insist there is no right to prevent or hamper as long as our theory of government prevails, that the source of all power is the people, as represented by the electors." Id. at 263.[36] New York's highest court has twice affirmed these principles. Devane v. Touhey, 304 N.E.2d 229, 230 (N.Y. 1973) (affirming that state laws may not "prevent a qualified elector from exercising his constitutional right to vote for a candidate and party of his choice"); Britt, 96 N.E. at 375.

This appeal presents the same issues as Paterson and Callahan and warrants the same conclusion: the anti-fusion laws violate the right to vote. While the legislature may "make . . . policy choices as it deals with critical issues confronting the State," those "choices, however, must be made within a constitutional framework and it is the obligation of the judicial branch to insist that that framework be respected and observed." DePascale v. State, 211 N.J. 40, 63 (2012).

B. Anti-Fusion Laws Cannot Survive Strict Scrutiny

In the early 1970s, the New Jersey Supreme Court adopted the strict scrutiny test to evaluate state laws that infringe upon fundamental voting rights

[36] The New York Court of Appeals recognized that fidelity to popular sovereignty is incompatible with anti-fusion laws. Callahan, 93 N.E. at 263. The court's recognition that "the source of all power is the people, as represented by the electors" mirrors closely the New Jersey Constitution's promise that "[a]ll political power is inherent in the people." N.J. CONST., art. I, ¶ 2(a).

under the federal or state constitution. Worden, 61 N.J. at 346.[37] The U.S. Supreme Court subsequently adopted a burden-interest balancing test, known as Anderson-Burdick, for voting right claims under the U.S. Constitution.[38] Yet, the New Jersey Supreme Court has never disturbed the rule set forth in Worden for violations of core political rights under the State Constitution: strict scrutiny still applies. E.g., In re Absentee Ballots, 331 N.J. Super. at 37-38 ("Voting is a fundamental right. As with all fundamental rights, there can be no interference with an individual's right to vote, 'unless a compelling state interest to justify the restriction is shown.'" (quoting Worden, 61 N.J. at 346)).

Applying a heightened standard for violations of the State Constitution necessarily follows from the fact that "our own Constitution affords greater protection for individual rights than its federal counterpart." State v. Melvin, 248 N.J. 321, 347 (2021) (citing State v. Gilmore, 103 N.J. 508, 522-24, 545

[37] Worden held: "Since it is so patently sound and so just in its consequences, we adopt the compelling state interest test in its broadest aspects, not only for compliance with the Federal Constitution but also for purposes of our own State Constitution and legislation; under the test a restriction . . . must be stricken unless a compelling state interest to justify the restriction is shown." 61 N.J. at 346; see also Gangemi, 44 N.J. at 171 (explaining that an infringement on "the right to vote" can only be sustained if "the reason for the inroad . . . [is] real, and clear, and compelling"). "[S]trict scrutiny" and "the compelling-state-interest test" are synonyms. In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, Fourth Legislative Dist., 427 N.J. Super. 410, 435 (Law Div.), aff'd, 210 N.J. 29 (2012).

[38] See Anderson, 460 U.S. at 789; Burdick v. Takushi, 504 U.S. 428, 434 (1992).

(1986)); see State v. Hunt, 91 N.J. 338, 345 (1982); Schmid, 84 N.J. at 553-60.[39] The State Constitution expressly and affirmatively grants the right to vote,[40] while courts recognize an implied right to vote in the U.S. Constitution. Thus, strict scrutiny is necessary to ensure that "the people" retain their "right at all times to alter or reform the [government]." N.J. CONST. art. I, ¶ 2(a).

While New Jersey "has been a leader" in "going beyond federal minimum standards" when interpreting the State Constitution, it is not alone. WILLIAMS, supra at 52-53 (Pa411).[41] Illinois, North Carolina, Washington, and other states use strict scrutiny when their state constitutional right to vote is threatened. See Tully v. Edgar, 664 N.E.2d 43, 47 (Ill. 1996); Harper v. Hall, 868 S.E.2d 499, 543 (N.C. 2022); Madison v. State, 163 P.3d 757, 767 (Wash. 2007). Recently, the Montana Supreme Court affirmed its strict scrutiny standard for state laws

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[39] WILLIAMS, supra at 52-53 (Pa411) ("New Jersey has been a leader in this reemergence of state constitutional law. . . . Decisions in New Jersey going beyond federal minimum standards, as well as similar rulings in virtually all of the other states, have truly reflected a 'New Judicial Federalism.'"); Wefing, supra at 705 ("[T]he court has enthusiastically embraced the New Federalism movement. As the [U.S.] Supreme Court has become more conservative in recent years, many state courts have chosen to use their state constitutions to grant greater rights than given under the [U.S.] Constitution. The New Jersey Supreme Court has regularly done this.").

[40] N.J. CONST. art. II, § 1, ¶ 3(a) (qualified electors "shall be entitled to vote").

[41] See Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 MICH. L. REV. 859, 861 (2021) ("State constitutions . . . provide a stronger foundation for protecting democracy than their federal counterpart. In text, history, and structure alike, they privilege 'rule by the people,' and especially rule by popular majorities.").

burdening the Montana Constitution's right to vote. Mont. Democratic Party v. Jacobsen, 518 P.3d 58, 65-67 (Mont. 2022); see Driscoll v. Stapleton, 473 P.3d 386, 392-94 (Mont. 2020). The rationale was simple: strict scrutiny applies to laws that burden the Montana Constitution's fundamental rights, and the right to vote is fundamental. Jacobsen, 518 P.3d at 65-66.[42] The same is true here.[43]

Applying strict scrutiny in this case compels one conclusion: the anti-fusion laws are unconstitutional. By barring the Moderate Party from nominating its qualified choice on the ballot, these laws severely burden the fundamental right to vote. Paterson, 88 A. at 695-96; Callahan, 93 N.E. at 262-63.[44] Moderate Party voters are barred from supporting their nominee on their party's (legally entitled) line; instead, they are compelled to support the

[42] See also Mont. Democratic Party v. Jacobsen, Case No. DV 21-0451, 2022 WL 16735253, at *65-67 (Mt. Dist. Ct. Sept. 30, 2022) (trial court opinion explaining why Montana courts use strict scrutiny). This unpublished case is reprinted in the Appendix at Pa471-545. R. 1:36-3. No contrary unpublished decisions are known to counsel.

[43] In 1977, Justice Brennan lamented the degradation of federal constitutional protections and insisted that "state courts cannot rest . . . [for federal law] must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." Hon. William J. Brennan, Jr., State Constitutions and the Protections of Individual Rights, 90 HARV. L. REV. 489, 491 (1977).

[44] "When an election law reduces or forecloses the opportunity for electoral choice, it restricts a market where a voter might effectively and meaningfully exercise his choice between competing ideas or candidates, and thus severely burdens the right to vote." Common Cause Ind. v. Indiv. Members of the Ind. Election Comm'n, 800 F.3d 913, 920-21 (7th Cir. 2015).

Democratic or Republican Party, organizations whose values they may scorn, or sit out the race altogether. (See Pa45-50, 77-80.) As discussed in the following section, none of the interests likely to be asserted to justify the anti-fusion laws are "compelling." Worden, 61 N.J. at 346. Even if a given interest is substantial in the abstract, Worden requires a searching review into whether available evidence substantiates the concern. Id. at 348. Drawing from real-world experience and leading academic research, the record disproves all such concerns here. Finally, the wholesale prohibition on fusion is far from narrowly tailored. Any interest, for example, in avoiding ballot overcrowding could be addressed through obvious, less restrictive means, such as modestly increasing signature requirements for nominating petitions. Patriot Party, 95 F.3d at 266.

C. Anti-Fusion Laws Fail Under a Burden-Interest Balancing Test

Even if the New Jersey Supreme Court overruled Worden and adopted a burden-interest balancing test (similar to the federal Anderson-Burdick framework) for violations of the State Constitution's right to vote, the anti-fusion laws are still unconstitutional. This standard requires a court to "first consider the character and magnitude of the asserted injury to the rights" at issue, and "then . . . identify and evaluate the precise interests put forward by the State as justifications for the burden imposed." Anderson, 460 U.S. at 789. In so doing, the court must undertake an independent assessment of "the

legitimacy and strength of those interests" and "the extent to which those interests make it necessary to burden the plaintiff's rights." Id.; see Burdick, 504 U.S. at 434.

In every case, a challenged law "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008) (quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992). When the burden is "severe," the challenged law is unconstitutional unless it is "narrowly drawn to advance a state interest of compelling importance." Norman, 502 U.S. at 289. In this case, the burden is severe: the Moderate Party and its supporters are categorically barred from nominating competitive candidates on the ballot in this and all future elections. See Williams v. Rhodes, 393 U.S. 23, 31 (1968) ("[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."); Anderson, 460 U.S. at 787 (same). As a result, Moderate Party supporters are compelled to cast their ballot for a different party (Democratic or Republican) to support their party's nominee. These burdens are compounded by the aggregate impact of the anti-fusion laws and other laws imposing effectively insuperable burdens on minor parties, supra pp.14-16, which make it practically impossible for groups of concerned voters to mobilize and constructively influence electoral politics

outside of the Democratic or Republican Parties. (See Pa44-51, 76-81.)

The legislature's protectionist motivations for the anti-fusion laws were self-evident and undermine any other state interests that might be advanced in litigation. Cf. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985). The following interests have been raised (and rejected) in prior lawsuits challenging anti-fusion laws in other states, and if raised by Respondents and/or Intervenor here they should be similarly rejected. The record makes clear that these interests rely on faulty premises, are insubstantial or speculative, are in fact undermined by the anti-fusion laws, and nevertheless could be vindicated through much more narrowly tailored legislation aimed at the specific concern raised, rather than a wholesale ban on fusion voting. Even if the burdens were found to be less than severe (they are not), none of the following state interests are "sufficiently weighty" to support the ban. Crawford, 553 U.S. at 191.

Protecting the Democratic and Republican Duopoly: Courts have repeatedly recognized that states lack any legitimate interest in insulating the Democratic and Republican Parties from electoral competition; rather, courts hold that minor parties are a necessary feature of a healthy and responsive democracy. The U.S. Supreme Court has said that "[a]ll political ideas cannot and should not be channeled" exclusively through "two major parties," that history teaches us that political activity by minority parties is often at "vanguard

of democratic thought," and that excluding the voice of minority parties "would be a symptom of grave illness in our society." Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957). The U.S. Supreme Court has also rejected a proposed state interest in "promot[ing] a two-party system in order to encourage compromise and political stability" because giving "two particular parties—the Republicans and the Democrats . . . a complete monopoly" would eviscerate the "[c]ompetition in ideas and governmental policies . . . at the core of our electoral process and of the First Amendment freedoms." Williams, 393 U.S. at 31-32.[45]

In CAPP, the Appellate Division affirmed that "[t]he right of an alternative party to organize and disseminate its message cannot be minimized" and that the State may not "marginalize[] voters and political organizations who depart from or disagree with the status quo." 344 N.J. Super. at 236, 238. The Appellate Division clarified that an interest in ensuring fair and honest elections does not give the state "an unconditional license to insure the preservation of the present political order." Id. at 242-43. As is true with anti-fusion laws, the

[45] Early constitutional luminaries feared the entrenchment of two hegemonic parties. JOHN ADAMS, LETTER TO JONATHAN JACKSON, OCTOBER 2, 1780 ("There is nothing I dread So much, as a Division of the Republick into two great Parties, each arranged under its Leader, and concerting Measures in opposition to each other. This, in my humble Apprehension is to be dreaded as the greatest political Evil, under our Constitution."). They recognized that more parties were needed to prevent tyrannical consolidation and abuse of power. E.g., FEDERALIST NO. 10 (Madison).

laws struck down in CAPP constituted a "statutory scheme [that] imposes a significant handicap on [minor] parties' ability to organize while reinforcing the position of the established statutory parties." Id. at 242.

As discussed infra pp.71-73, Timmons was an aberration in elevating two-party protectionism as a valid interest. Even taking this point at face value, Timmons justified the suppression of electoral competition on the assumption that an exclusionary two-party system promoted a healthy and stable politics. 520 U.S. at 366-67. Simple observation of politics since that time, substantiated by research from Dr. Lee Drutman and countless others, plainly refutes that assumption: our rigid two-party system is a key driver of today's political instability and democratic decline. (Pa142-61.)[46] Further, the record demonstrates why minor party cross-nominations can actually help strengthen the two major parties. According to NYC Comptroller Brad Lander:

> [F]usion actually can strengthen the major parties and prevent fragmentation. Fusion can serve as a pressure valve, allowing for a constructive and collaborative re-direction of discontented energy at the edges of a major party. The stakes of major party control are substantially lessened when there is an alternative, viable path to political power. While individual egos can (and certainly have)

[46] "Two-party systems are also more correlated with violence than are multiparty systems, perhaps because they create us-them dynamics that deepen polarization." Kleinfeld, supra at 169. Other scholars have found that affective polarization (i.e., dislike of political opponents) has increased more rapidly in the U.S. recently than in advanced democracies lacking a rigid two-party system. E.g., NOAM GIDRON ET AL., AMERICAN AFFECTIVE POLARIZATION IN COMPARATIVE PERSPECTIVE (Nov. 2020, Cambridge Univ. Press).

> muddy the waters, a working, though competitive and at times adversarial, relationship is possible between a major party and minor party that are ideologically related, but distinct. Without fusion, this insurgent energy is either directed into movement for a spoiler third party or existential in-fighting over the heart and soul (and purse strings) of the major party. Not only can that process itself tear a party apart, but it can create an opening for an extremist faction to swallow whole one of the two major parties. Sadly, that's the story of today's Republican Party at the national level, and in many states too.

(Pa285) (emphasis original).

Consistent with longstanding trends in states permitting fusion, Dr. Drutman's report explains that allowing cross-nominations would permit only a modest number of additional parties—likely 2 to 3—to become electorally relevant. (Pa158-59.) The Brennan Center for Justice likewise concludes that "[f]usion can improve our democracy by increasing the role of third parties," but would not jeopardize the core structure of the two-party system.[47] Absent "evidence of . . . crippling proliferation of minor parties," and in light of a state's "authority to set reasonable threshold requirements for parties seeking admission to the ballot," such arguments to the contrary have been rejected. Reform Party, 174 F.3d at 317.

Preventing Ballot Overcrowding: Currently, New Jersey ballots have an average of 4.5 candidates for each federal and statewide election. (Pa123-27.)

[47] J.J. Gass & Adam Morse, BRENNAN CENTER FOR JUSTICE, More Choices, More Voices: A Primer on Fusion at 8 (Oct. 2, 2006), https://perma.cc/6TMP-BEW4.

Drawing from experience in New York and Connecticut, permitting cross-nominations is unlikely to increase the number of candidates on New Jersey ballots, as minor parties who currently have no choice but to run as standalone candidates would instead cross-nominate competitive candidates. (Pa102-13.) This is the case in New York and Connecticut, where the Working Families Party, Conservative Party, and others rarely add additional candidates to the ballot. With fusion, the emergence of a serious minor party could reduce the demand for the number of discrete candidates submitting nominating petitions, given the new opportunity for meaningful participation outside of the two major parties. Review of ballots with cross-nominations (such as the illustrative examples of New Jersey ballots or actual ballots from Connecticut and New York) confirms there is no overcrowding. (Pa112-21, 220-35, 288-303.)

Reflecting on his "decades of experience with fusion" as a chairman of the committee overseeing election administration, chief statewide election officer, and scholar of electoral systems, Miles Rapoport concludes that "concerns" of "ballot overcrowding . . . are unwarranted and have never . . . materialized." (Pa204; see Pa206 (recalling that "ballots never grew crowded with candidates or cross-endorsements").)

This evidence is consistent with Justice Harlan's observation in his Williams concurrence that up to "eight candidacies cannot be said, in light of

experience, to carry a significant danger of voter confusion." 393 U.S. at 47 (Harlan, J., concurring). Moreover, as noted above, the State may "set reasonable threshold requirements for parties seeking admission to the ballot" without categorically banning fusion. Reform Party, 174 F.3d at 317; Timmons, 520 U.S. at 376 (Stevens, J., dissenting); (see Pa204.)[48]

Avoiding Voter Confusion: Permitting parties to cross-nominate candidates on the ballot would not confuse voters. Again, visual examples of actual and illustrative ballots with cross-nominations show how modest the changes would be. (E.g., Pa112-21, 220-35, 288-303.) A voter would make one selection per office, as they do now. The only difference is that some candidates may be listed twice, if they earn and accept a second party's nomination. Former Connecticut Secretary of State Rapoport explains that Connecticut voters easily understood how to vote with cross-nominations on the ballot, even at a time when fusion made its resurgence after a period of disuse. (Pa203-07.) Local

[48] Concerns that the ballot could become a "billboard for political advertising" where a "candidate or party could . . . associat[e] his or its name with popular slogans and catchphrases" are unjustified. Timmons, 520 U.S. at 365. Justices Stevens, Ginsburg, and Souter rejected as "farfetched" and "entirely hypothetical" the suggestion that "members of the major parties will begin to create dozens of minor parties with detailed, issue-oriented titles for the sole purpose of nominating candidates under those titles." Id. at 376 (Stevens, J., dissenting). This problem has never materialized in New York or Connecticut, nor did it occur when fusion was common in New Jersey and throughout the country in the 1800s and early 1900s.

officials in New York and Connecticut likewise agree that voters are rarely, if ever, confused by cross-nominations on the ballot. (Pa132, 279-80.) Leading ballot design expert Whitney Quesenbery has reached the same conclusion, as has the think-tank Demos. (Pa211-18, 220.) Unsurprisingly, courts have agreed, declining to credit speculation about confusion as a justification for prohibiting fusion. E.g., Reform Party, 174 F.3d at 317. Even Timmons didn't credit the state's "alleged paternalistic interest in 'avoiding voter confusion.'" 520 U.S. at 370 n.13. As a general rule, "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 228 (1989).

Ensuring an Election Winner Is Identified: Officials in New York and Connecticut have not had difficulty calculating results of races with cross-nominations. (E.g., Pa213-14.) Former Connecticut Secretary of State Rapoport avers that officials under his supervision "were able to accurately and easily count and verify vote totals in the dozens of races . . . featuring cross-endorsements." (Pa206.) Given that New Jersey's ballots, voting machines, election management systems, and canvassing laws could all easily accommodate cross-nominations (Pa84-88, 220-35, 288-303), New Jersey would continue to easily identify winners.

Preventing Party Free-Riding: Major party advocates have argued that minor parties unfairly benefit by nominating a competitive candidate who also has a major party nomination. Timmons, 520 U.S. at 365-66. That is, minor parties ride the coattails of popular candidates to gain undeserved support. Id. This is wrong. The Moderate Party was "not trying to capitalize on [Malinowski's] status as someone else's candidate, but to identify him as their own choice." Id. at 376 n.5 (Stevens, J., dissenting). And the true problem is that the status quo exaggerates the support of the two major parties and suppresses support for minor parties. Polling and voter registration data reveal an electorate desperate for alternatives to the two major parties.[49] Yet, every November, all but a handful of votes are cast on the Democratic or Republican lines because there is no other way to cast a meaningful ballot.

Permitting a competitive candidate like Malinowski to have his Moderate Party nomination (which he eagerly accepted) on the ballot would allow Wolfe, Tomasco, Kibler, and other like-minded voters to accurately register the ideological basis for their support. They're not Democrats, but anti-fusion laws distort their votes and imply otherwise. Fusion does not guarantee anything for

[49] More than a third of voters in the 7th Congressional District and statewide have chosen not to register with either the Democratic Party or Republican Party. (Pa49, nn.1&2.) More than two-thirds of all New Jersey voters believe more electorally competitive parties are needed; among independent and moderate voters, three-in-four hold this view. (See supra p.9 & n.7.)

minor parties; their ballot lines will only attract votes if they nominate candidates voters like and promote ideas voters support.

Avoiding Administrative Costs: Administrative convenience cannot justify burdening constitutional rights. See, e.g., Gangemi, 44 N.J. at 173 (holding that a law's "administrative convenience" cannot "support the restraint it imposes upon the voters' choice of candidate[s]"); Tashjian v. Republican Party, 479 U.S. 208, 218 (1986) ("[T]he possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing . . . First Amendment rights."). Even still, election systems expert Professor Appel confirms that New Jersey's current (and future) voting machines and election management systems can easily accommodate cross-nominations. (Pa84-88.) Similarly, ballot design expert Whitney Quesenberry confirms that different ballot structures used throughout New Jersey can accommodate fusion. (Pa220-35.) Demonstrative examples of New Jersey ballots for the November 2022 election with and without fusion illustrate this point. (Pa288-303.) A report by the think-tank Demos identified no discernible costs associated with administering an election where fusion is permitted. (Pa213-17.) Likewise, local officials in New York and Connecticut report negligible burdens associated with the administration of elections with cross-nominations. For example, in Fairfield, Connecticut, the administrative cost of

fusion is estimated as $10 in expenditures and 2 hours of staff time—a de minimis cost. (Pa129-34; see Pa276-80 (official in Ulster County, New York providing comparable estimates).)

* * *

None of the foregoing interests are "compelling" so as to justify the anti-fusion laws' "severe" burden on the right to vote. Norman, 502 U.S. at 289. Even if the burden here was found to be less than severe than it is, none of these interests are "sufficiently weighty" to justify even a modest encroachment on the fundamental right to vote, Crawford, 553 U.S. at 191, nor can they justify the cumulative burdens resulting from encroachment on the other fundamental rights described below.

II. THE ANTI-FUSION LAWS VIOLATE THE FUNDAMENTAL RIGHT TO FREE SPEECH AND POLITICAL ASSOCIATION (Pa1-2)

The anti-fusion laws violate the State Constitution's freedom of speech and political association by prohibiting the Moderate Party from nominating its preferred candidates on the ballot.[50] Moderate Party voters are forced to

[50] The New Jersey Supreme Court has held that "expressional and associational rights" are "strongly protected under the State Constitution." Schmid, 84 N.J. at 556-57. These rights arise from art. I, ¶¶ 6 and 18, which provide, respectively:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law

associate with and vote for the Democratic or Republican Party to support the Moderate Party nominee. In the aggregate, the anti-fusion laws suppress the development of all minor parties, even when much of the electorate is eager to associate outside of the two major parties. (See supra p.9 & n.7.)

New Jersey courts bear "ultimate responsibility for interpreting the New Jersey Constitution." Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985). In so doing, they often find that state constitutional freedoms "surpass the guarantees of the federal Constitution" as interpreted by federal courts. Schmid, 84 N.J. at 553; e.g., State v. Hempele, 120 N.J. 182, 196 (1990) ("When the United States Constitution affords our citizens less protection than does the New Jersey Constitution, we have not merely the authority to give full effect to the State protection, we have the duty to do so.").[51]

Where, as happened in Timmons, the U.S. Supreme Court has interpreted a provision in the U.S. Constitution, New Jersey courts use the factors set forth in Hunt to determine whether the federal ruling has persuasive value in

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> shall be passed to restrain or abridge the liberty of speech or of the press. . . .
>
> The people have 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.

[51] New Jersey courts have "regularly" and "enthusiastically" recognized the expansive reach of the State Constitution far beyond its federal counterpart. WILLIAMS, supra at 52-53 (Pa411).

interpreting a similar provision in the State Constitution. 91 N.J. at 363-68. In this case, every relevant factor compels a rejection of the U.S. Supreme Court's constrained view of associational freedom and its endorsement of two-party exclusionary politics. That the central holdings of Timmons collapse upon examination only reinforces this conclusion.

Instead, this court must apply strict scrutiny because the anti-fusion laws impose a severe burden on a fundamental political right protected by the State Constitution. Worden, 61 N.J. at 346. Absent any compelling interests or narrow tailoring, these burdensome laws violate the State Constitution's freedom of speech and political association. Even under a burden-interest balancing test, the laws are unconstitutional because there are no adequate interests to justify such onerous burdens.

A. The State Constitution Warrants Greater Protection for Free Speech and Political Association Than the U.S. Supreme Court Recognized Under the First Amendment in Timmons

A threshold issue is whether the New Jersey courts should look to the U.S. Supreme Court's treatment of federal associational freedoms in Timmons when analyzing the State Constitution's freedom of speech and political association in this case. As a general matter, the New Jersey Supreme Court has already held that these state provisions warrant greater protection than have been afforded their federal counterparts. Schmid, 84 N.J. at 553-60; see N.J. Coal. Against War

in the Middle E. v. J.M.B. Realty Corp., 138 N.J. 326, 353 (1994) ("Precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than . . . the First Amendment."). In the context of whether the legislature can lawfully prohibit a minor party from nominating its preferred candidate, all of the relevant Hunt factors point to the same conclusion: the State Constitution's freedom of speech and political association extend much further than the federal rights discussed in Timmons.

1. Constitutional text, constitutional structure, and legislative history warrant greater protections under the State Constitution

When analyzing political speech and association, there are key textual, structural, and historical differences between the New Jersey and U.S. Constitutions. See Hunt, 91 N.J. at 364-66. The New Jersey Supreme Court has held that such differences support reading these state provisions more expansively than their federal analogs. Schmid, 84 N.J. at 553-60.

Beginning with the text, "the New Jersey Constitution's free speech provision is . . . broader than practically all others in the nation." Green Party v. Hartz Mt. Indus., 164 N.J. 127, 145 (2000). The State Constitution is "more sweeping in scope than the language of the First Amendment." Schmid, 84 N.J. at 557-58 ("[T]he explicit affirmation of these fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction

upon them."); see Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 78-79 (2014) (these provisions are among "the broadest in the nation" and "afford[] greater protection than the First Amendment"). While the First Amendment states that "Congress shall make no law" abridging the freedom of speech and assembly, the State Constitution affirmatively grants a broader suite of rights, including: the right to "freely speak, write and publish" and "the right freely to assemble together, to consult for the common good, [and] to make known their opinions to their representatives." N.J. CONST. art. I, ¶¶ 6, 18.

"[T]he provisions of the State Constitution dealing with expressional freedoms antedate the application of the First Amendment to the states and are set forth more expansively." State v. Williams, 93 N.J. 39, 58 (1983).[52] Accordingly, New Jersey courts adhere to "the presumed intent of those who framed our present Constitution" by vigorously defending these state constitutional freedoms. Schmid, 84 N.J. at 559.

2. State law, history, and tradition also warrant stronger protections under the State Constitution

New Jersey's unique history, tradition, and case law also warrant more expansive speech and association protections than afforded under the U.S.

[52] See Schmid, 84 N.J. at 557 (art. I, ¶ 6 was based on the New York Constitution); Nikolas Bowie, The Constitutional Right of Self-Government, 130 YALE L.J. 1652, 1733-34 (2021) (art. I, ¶ 18 was based on the Massachusetts Constitution).

Constitution. See Hunt, 91 N.J. at 365-67. For much of the 19th century, and well into the 20th, candidates routinely earned nominations from multiple parties. (Pa272-74.) Cross-nominated candidates, including a future U.S. Supreme Court justice, won many races and made countless others more competitive. (Id.) The first legislative attempt to prohibit fusion was quickly reversed by the Geran Law. Shortly thereafter, the Paterson court recognized that even without the Geran Law, the right of parties to nominate qualified candidates of their choosing was sacrosanct. 88 A. at 695-96.

New Jersey law recognizes that speech and associational rights protect the ability "of citizens to associate and form political parties." CAPP, 344 N.J. Super. at 236. "This includes the right to create and advance new parties which enhances the constitutional interests of like-minded voters to gather to pursue common ends." Id. (citing Norman, 502 U.S. at 288). Laws that thwart minor party building "hinder[] not only the voter but also the organization from associating with others with similar views on public issues." Id. This landmark case reflects a juridical recognition that the associational rights of minor parties and their voters are particularly important in New Jersey.[53]

[53] Not only does New Jersey recognize that a healthy democracy requires that voters be permitted to associate in parties, state law ensures that voters decide who ends up on the ballot. New Jersey was among the first states to adopt a direct primary system that centered voters (and not corrupt party bosses) in the party nomination process. BOOTS, supra at 17-21 (Pa391-95).

New Jersey law also recognizes that candidates must be permitted to convey their political associations on the ballot.[54] State law ensures that primary candidates can have their chosen "slogan" on the primary ballot and that allied candidates can be bracketed together on the ballot under their common slogan. N.J.S.A. 19:23-17, 19:49-2. Likewise in the general election, state law ensures that candidates can appear along with the name of their nominating party. N.J.S.A. 19:13-4, 19:14–6, 19:14-8.

The Appellate Division recently held that the "free speech and associational rights of every candidate" compels such "fundamental . . . expressive" rights "as a matter of constitutional imperative." Schundler, 377 N.J. Super. at 348-49.[55] New Jersey courts have long protected these rights. E.g., Quaremba v. Allan, 67 N.J. 1, 13 (1975); Harrison v. Jones, 44 N.J. Super. 456, 461 (App. Div. 1957). Settled law also prohibits the legislature from interfering with a party's decision to place its endorsement of a candidate on the primary ballot because doing so would violate speech and association rights. Batko v. Sayreville Democratic Org., 373 N.J. Super. 93 (App. Div. 2004). This body of

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[54] See Lautenberg v. Kelly, 280 N.J. 76, 83 (Law Div. 1994) ("[B]anning a candidate from associating with and advancing the views of a political party on the ballot is clearly a restraint on the right of association."), rev'd in part on other grounds by Schundler v. Donovan, 377 N.J. Super. 339, 348-49 (App. Div.), aff'd, 183 N.J. 383 (2005).

[55] Only primary ballots were at issue in these cases, but the rationale applies equally to general election ballots as well.

law recognizes the importance of how a candidate appears on the ballot and the uniquely expressive value of on-the-ballot language in informing voters, communicating a candidate's message, and facilitating political association.

Finally, New Jersey courts are a national leader in applying the "Democracy Canon," an interpretive presumption that election laws are to be liberally construed in favor of electoral access, choice, and participation. Richard L. Hasen, The Democracy Canon, 62 STAN. L. REV. 69, 106-09 (2009). Absent conclusive evidence to the contrary, New Jersey courts presume that elections laws are designed "'to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day.'" N.J. Democratic Party, Inc., v. Samson, 175 N.J. 178, 190 (2002) (quoting Catania v. Haberle, 123 N.J. 438, 448 (1990)).

* * *

The Hunt factors demonstrate that the constricted view of speech and associational freedom in Timmons is incompatible with the New Jersey Constitution and the state's long-standing commitment to these fundamental rights.[56] Rather, the court must account for the "exceptional vitality" of these

[56] Hunt also noted that "[d]istinctive public attitudes of [the] state's citizenry" can justify reading the State Constitution more expansively. 91 N.J. at 367.

rights "in the New Jersey Constitution" in determining whether the anti-fusion laws withstand scrutiny. Schmid, 84 N.J. at 555-56.

B. The Anti-Fusion Laws Impermissibly Burden the State Constitution's Freedom of Speech and Political Association Without an Adequate Justification

Regardless of which test is employed—strict scrutiny or burden-interest balancing—disposition of this claim is the same: the anti-fusion laws violate the New Jersey Constitution's freedom of speech and political association.

Case law dictates that strict scrutiny applies to laws like these that strike at the heart of the fundamental political rights of speech and association. Worden, 61 N.J. at 346.[57] Because the anti-fusion laws restrict speech and associational rights of minor parties, voters, and nominees, and there are no compelling interests to justify these poorly tailored laws, they fail strict scrutiny and are unconstitutional.

The result is the same under a burden-interest balancing test. Per the Hunt analysis above, the Court undertakes this analysis in light of the State

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Given the extraordinary desire for more competitive party options in New Jersey, this factor further supports this conclusion. (Supra p.9 & n.7.)

[57] In cases like Schmid where permitting one person to exercise their state constitutional rights would violate another person's due process rights, New Jersey courts necessarily employ a balancing test to weigh competing individual rights. 84 N.J. at 560. There are no competing individual rights here, where the only question is whether the legislature has exceeded its authority by unlawfully encroaching upon the associational freedoms of minor parties, their voters, and their nominees. Thus, Worden is controlling and strict scrutiny applies.

Constitution's heightened protection for freedom of speech and political association. And the outcome is clear: the burdens on minor parties, voters, and nominees are extraordinary and far outweigh any purported state interest.

1. The Burdens on Minor Parties, Their Voters, and Their Nominees Are Severe

The anti-fusion laws impose severe burdens on minor parties. The core function of a party is to nominate its preferred candidates on the ballot in order to support their election and promote the party's policy goals. Eu, 489 U.S. at 223-24. A nomination on the ballot is the lynchpin of its associational purpose: "at the most crucial stage in the electoral process—the instant before the vote is cast"—the party's ballot line brings together like-minded voters to support aligned candidates in furtherance of the party's priorities. Anderson v. Martin, 375 U.S. 399, 402 (1964).[58] Precluding a party from nominating its top choice imposes a heavy burden. Patriot Party, 95 F.3d at 258-60.

Recent case law, in conjunction with New Jersey's more expansive reading of these constitutional provisions, underscores that laws encroaching expressive and associational rights of minor parties are viewed with suspicion. In CAPP, the Appellate Division affirmed that state laws may not encroach upon

[58] See Daniel P. Tokaji, Gerrymandering and Association, 59 WILLIAM & MARY L. REV. 2159, 2177 (2018) ("[T]he ballot is one of the central loci for voters, candidates, and parties to associate politically.").

a minor party's "rights to express political ideas and to associate to exchange the ideas to further their political goals." 344 N.J. Super. at 241-42. Laws that have the "effect of 'help[ing] to entrench the decided organizational advantage that the major parties hold over new parties struggling for existence'" are particularly harmful. Id. at 241 (quoting Reform Party, 174 F.3d at 314). Equally suspect is a "statutory scheme [that] imposes a significant handicap on [minor] parties' ability to organize while reinforcing the position of the established statutory parties," because such laws "subsidize the party-building activities of the statutorily recognized parties by stifling political discussion and association of [minor] parties." Id. at 242. The anti-fusion laws suffer from these fatal flaws: by suppressing minor party development and inflating major party support, the laws impose a severe burden on the Moderate Party's associational freedom.[59]

New Jersey's anti-fusion laws impose a Hobson's choice on the Moderate Party by rendering illusory the power to nominate its standard-bearers. To pursue the state-granted privileges that subsidize the major parties' success, the Moderate Party must run spoilers in the hopes of meeting the to-date-impossible

[59] Anti-fusion laws can also harm a minor party trying to run standalone candidates, as unusually popular minor party candidates are at risk of being poached by a major party. Given the abysmal track record of minor party candidates in New Jersey over the past century, it would be rational for such candidates to switch allegiance to improve the likelihood of victory, even if they would otherwise prefer to remain with the minor party.

10% vote threshold—even though attaining such levels of support would undermine the party's core purpose of actually helping moderates win. (Pa46-48, 60.) Alternatively, if the Moderate Party wants to support its nominees in order to combat political extremism, it must take itself off the ballot and encourage its voters to support another party—boosting support for a rival party, relegating itself to a mere interest group,[60] and guaranteeing that it will never become a statutory party.[61] Either way, anti-fusion laws force the party to change how it operates and undermine its own associational objectives. See Hartman v. Covert, 303 N.J. Super. 326, 334 (Law. Div. 1997) (limiting "parties' discretion in how to organize themselves and select their leaders" constitutes a "particularly strong" burden).

The Timmons majority misapprehended the severity of the burden imposed by anti-fusion laws. It concluded that such laws "do[] not severely burden [a minor political] party's associational rights" because the party can nominate its second or third choices on the ballot or campaign for their preferred

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[60] A party is indistinguishable from a labor union or the Chamber of Commerce if all it can do is make endorsements, send mailers, and knock doors. (See Pa206 ("[E}ndorsements were different in kind than [a party's] imprimatur on the ballot itself.").)

[61] See Benjamin D. Black, Developments in the State Regulation of Major and Minor Political Parties, 82 CORNELL L. REV. 109, 159 (1996) ("If the actual effect of a state law on minor parties' political activities is considered . . ., and minor parties cannot survive without fusion, it is difficult to understand what state law could be more 'burdensome.'").

candidate and encourage voters to support him on another party's ballot line. 520 U.S. at 359. In the majority's view, anti-fusion laws did not even touch upon "political parties' internal affairs and core associational activities." Id. at 360.

This is wrong. As recognized in the dissent, minor party voters "unquestionably have a constitutional right to select their nominees for public office and to communicate the identity of their nominees to the voting public. Both the right to choose and the right to advise voters of that choice are entitled to the highest respect." Timmons, 520 U.S. at 371 (Stevens, J., dissenting).

The Timmons majority's burden ruling was a striking and unexplained departure from settled precedent on associational freedom.[62] In Sweezy, the Court explained why protecting minor parties' associational freedoms was necessary for the health of American democracy:

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately

[62] See Joshua A. Douglas, A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations That Adversely Impact an Individual's Right to Vote, 75 GEO. WASH. L. REV. 372, 379 (2007) (noting that the Timmons "never provided any reasons for why the regulation did not impose a severe burden beyond its own knee-jerk reaction").

> accepted . . . The absence of such voices would be a symptom of grave illness in our society.

354 U.S. at 250-51. Tashjian recognized that a party's selection of a nominee is the "crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." 479 U.S. at 216. Eu recognized that "[f]reedom of association means . . . 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," concluding that "[d]epriving a political party of the power to endorse suffocates this right." 489 U.S. at 224 (internal citations and quotation marks omitted). The list of contradictory cases is long.[63]

And in the years since Timmons, the U.S. Supreme Court has rejected the majority's rationale in other cases. Jones struck down California's blanket primary law because it deprived parties of the "ability to perform the 'basic function' of choosing their own leaders," and therefore imposed a "severe and unnecessary" burden on associational rights. 530 U.S. at 580, 586. Jones cannot be reconciled with Timmons, where prohibiting a party from nominating its preferred candidate only because another group of voters nominates them "d[id]

[63] E.g., Kusper v. Pontikes, 414 U.S. 51 (1973); Democratic Party of U.S. v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981); Anderson, 460 U.S. at 792-93; Norman, 502 U.S. at 288-89.

not severely burden that party's associational rights." 520 U.S. at 359.

Relatedly, the Court's recent "compelled speech" jurisprudence bars the state from compelling individuals to speak a prescribed message, directly or as a condition to other protected conduct. E.g., Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47, 61 (2006) ("First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."). This doctrine conflicts with Timmons, which took no issue with states compelling parties to nominate their second (or even third) choice, even though their top choice is qualified, and compelling their voters to vote for a rival party to support their own nominee.

Lest there be any doubt about the burden posed in this case, it is indisputable that New Jersey's anti-fusion laws were passed with the intent of placing a severe burden on minor parties. See Hartman, 303 N.J. Super. at 334 (evaluating the law's intent in applying a burden-interest balancing test).[64] In Timmons, the majority failed to grapple with the fact that, as Justice Stevens highlighted, anti-fusion laws "were passed by the parties in power in state legislatures [to] squelch the threat posed by the opposition's combined voting

[64] The Third Circuit found it "significant that many [anti-fusion] laws were motivated by a dominant political party's desire to eliminate or reduce the influence of third parties in the political system." Patriot Party, 95 F.3d at 260 n.3.

force" and that the intent behind the law "provide[s] some indication of the kind of burden the States themselves believed they were imposing on the smaller parties' effective association." 520 U.S. at 378 n.6 (quoting McKenna, 73 F.3d at 198); see Garrett, supra at 122 (explaining that "Timmons did not acknowledge" that "fusion bans can be examples of 'partisan lockup' of the government by the two major parties or of duopolistic behavior that may reduce competition"). In this case, contemporaneous news sources reveal that statutes like the anti-fusion laws were "intended to be discriminatory in favor of Republican and Democratic organizations," at the cost of minor parties. (Pa464.) In fact, anti-fusion laws have been so successful in satisfying this discriminatory intent that they have rendered viable minor parties nonexistent in New Jersey, further corroborating that these laws impose a severe burden. (Pa183-86.)[65]

The burdens that anti-fusion laws place on minor party voters are equally severe. These voters must either refrain from voting for their preferred candidate or abandon their party at the ballot box and support a rival party in order to

[65] The Timmons majority's claim that anti-fusion laws neither "preclude[] minor political parties from developing and organizing" nor "exclude[] a particular group of citizens, or a political party, from participation" strains credulity. 520 U.S. at 361. Minor parties were active and meaningful political actors when cross-nominations were permitted nationwide and have continued to play that role in the limited places where fusion has survived. (Supra pp.10-12, 16-17.) That anti-fusion laws render minor parties politically irrelevant is an undeniable fact—and the laws' self-evident purpose.

support their party's nominee. In casting such a vote, these voters unwillingly assist the major parties by helping them retain statutory status and the corresponding taxpayer-funded primaries, seats on powerful government boards, and preferential position on general election ballots denied their own party. (Supra pp.14-16 & n.12.) In this case, the anti-fusion laws force Wolfe, Tomasco, and Kibler to either vote for a party they do not support or abstain from voting altogether. (Pa44-51, 77-81); see Anderson, 460 U.S. at 793.

Anti-fusion laws also impose severe burdens on minor party nominees barred from communicating their association to like-minded voters when it matters most—on the ballot. (Pa137-38, 178-79, 283-86.) Anti-fusion laws punish candidates for engaging in more speech and associational activity by barring them from accepting the nomination from a second party. Cf. Davis v. Fed. Election Comm'n, 554 U.S. 724, 739 (2008) (punishing a candidate for exercising more speech rights imposes a substantial burden and is unconstitutional). Discouraging candidates from appealing to a broader range of voters and parties is antithetical to representative democracy itself. Id. at 742 ("[I]t is a dangerous business for Congress to use the election laws to influence the voters' choices" or "level electoral opportunities.").

Thus, the burdens imposed on minor parties, their voters, and their

nominees by the anti-fusion laws are severe.[66]

2. There are No Adequate State Interests to Justify These Burdens

As discussed above, there are no "sufficiently weighty" interests that withstand even cursory review on this record, especially in light of how poorly tailored the anti-fusion laws are to any legitimate policy concerns. (Supra pp.42-53); Crawford, 553 U.S. at 191. In assessing the possible interests in this case, the Timmons majority again offers little persuasive value.

The majority credited interests in preventing minor party free-riding and party proliferation without any supporting evidence. 520 U.S. at 365-66. As discussed supra pp.51-52, there is overwhelming evidence that the free-riding problem occurs in the reverse: anti-fusion laws artificially inflate the votes cast on Democratic and Republican lines far beyond "their own appeal to the voters." Id. at 366. And the evidence from New York and Connecticut shows that permitting cross-nominations does not lead to an excessive number of parties. (E.g., Pa112-21, 158-59, 204, 206-07); Morse & Gass, supra at 7-8. Two federal

[66] Another reason why Timmons has little persuasive value in assessing the burden here is the higher baseline burden on associational freedom in New Jersey, as evidenced by no minor parties achieving statutory status and major party candidates being undefeated for decades. (Supra pp.6, 16.) New Jersey is substantially different from Minnesota, which had a uniquely successful minor party (Farmer-Labor Party) and elected a minor party candidate (Jesse Ventura) as governor a year after Timmons.

appellate courts actually examined these interests and found them wanting.[67]

The Timmons majority further justified anti-fusion laws with the state's purported interest in preserving a rigid two-party system. 520 U.S. at 366-67. As discussed above, the Court's presumption that such a system would foster political stability has been thoroughly debunked. (Supra pp.19-21 (explaining how a rigid two-party system has instead contributed to democratic decline).) This holding was also an unexplained departure from Williams, which rejected a proposed interest in "promot[ing] a two-party system in order to encourage compromise and political stability" because giving "two particular parties—the Republicans and the Democrats . . . a complete monopoly" eliminated "[c]ompetition in ideas and governmental policies . . . at the core of our electoral process and . . . freedoms." 393 U.S. at 31-32. Williams emphasized that open electoral competition was a hallmark of American democracy:

> There is . . . no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. . . . New parties struggling for their place must have the time and opportunity to organize . . . to meet reasonable requirements for ballot position, just as the old parties have had in the past.

[67] McKenna, 73 F.3d at 199-200; Patriot Party, 95 F.3d at 264-68; see Hasen, 1997 SUP. CT. REV. at 339 (explaining that "reasonable ballot access laws can prevent . . . sham parties" and minor parties only get credit for votes cast on their lines).

393 U.S. at 32.[68]

As Justices Stevens, Souter, and Ginsburg argued in the Timmons dissent, the Court "ha[d] previously required more than a bare assertion that some particular state interest is served by a burdensome election requirement." 520 U.S. at 375 (Stevens, J., dissenting). Indeed, Timmons has proven an aberration, as the Court has continued to scrutinize purported interests, sometimes discovering upon closer inspection that an election law can in fact "harm the electoral process" by "prov[ing] an obstacle to the very electoral fairness it seeks to promote." Randall v. Sorrell, 548 U.S. 232, 249 (2006). Such is the case here, where even a cursory review shows that the anti-fusion laws fail to address any actual policy concern while entrenching a rigid political duopoly and thereby undermining democratic health and stability.

* * *

When balancing the severe burdens with any purported justifications, the court should conclude that anti-fusion laws unconstitutionally infringe upon the associational freedom of the Moderate Party, its voters, and its nominees. Even if the burdens were deemed to be less severe than they are, the laws nonetheless

[68] Notably, this issue—the purported state interest in protecting an exclusionary two-party system—was not briefed by any party in Timmons, and Minnesota expressly disavowed any reliance upon it during oral argument. See Timmons, Tr. of Oral Arg. at 26; Timmons, 520 U.S. at 377-78 (Stevens, J., dissenting).

violate the State Constitution given the absence of any adequate state interests and complete lack of any tailoring.

III. THE ANTI-FUSION LAWS VIOLATE THE FUNDAMENTAL RIGHT TO ASSEMBLE AND MAKE OPINIONS KNOWN TO REPRESENTATIVES (Pa1-2)

The anti-fusion laws are also incompatible with the State Constitution's guarantee that "[t]he people have the right freely to assemble together" and "to make known their opinion to their representatives." N.J. CONST. art. I, ¶ 18 ("Assembly/Opinion Clause"). This provision guarantees the right of voters to act collectively in the political process to convey their preferences to elected officials—precisely the purpose and effect of a minor party's cross-nomination on the ballot. Cf. Eu, 489 U.S. at 223-24. This reading is confirmed by the original understanding of this language when it was incorporated into the State Constitution in 1844. Because the anti-fusion laws preclude voters outside of the Democratic and Republican Parties from working together in the political process to convey their views to their representatives, these fundamental rights are severely burdened. Under the controlling strict scrutiny standard, the lack of compelling interests and narrow tailoring render the anti-fusion laws unconstitutional. The same result holds under a burden-interest balancing test.

A. Assembly/Opinion Clause Guarantees the Right to Collective Political Action That Conveys a Group's Preferences to Elected Officials

This case presents a question of first impression as to whether the anti-fusion laws burden rights guaranteed under New Jersey's Assembly/Opinion Clause. The answer is clear: the anti-fusion laws violate the Assembly/Opinion Clause, which "must be given the most liberal and comprehensive construction," State v. Butterworth, 104 N.J.L. 579, 582 (N.J. 1928),[69] because they prevent voters outside of the two major parties from taking collective political action that would effectively express their shared views to their representatives.

Starting with the plain language, the right of "the people" to "assemble together" refers to collective action with a shared purpose, and the right "to make known their opinion to their representatives" refers to the effective expression of that group's political views to elected officials.[70] That captures perfectly a cross-nomination on the ballot: a group of like-minded voters has come together outside of the major parties to signal why one of the competitive candidates has their support. (Pa46-52.) When Moderate Party supporters vote

[69] See Schmid, 84 N.J. at 557 (recognizing that rights enshrined in the Assembly/Opinion Clause enjoy "exceptional vitality").

[70] The phrase "make opinions known to representatives" specifically covers expressive political conduct that informs elected officials. Ignoring this key dimension would render this provision duplicative of the separate guarantee that "[e]very person may freely speak, write and publish his sentiments on all subjects." N.J. CONST. art. I, ¶ 6; see Burgos v. State, 222 N.J. 175, 203 (2015) ("We do not support interpretations that render statutory language as surplusage or meaningless, and we certainly do not do so in the case of constitutional interdictions.").

on their party's line, they close the circle, sending a "clear message" to their nominee—and the opponent—that their support was earned by the nominee's commitment to "moderation, compromise, and a commitment to democracy" and that future support would hinge upon these key values. (Pa79-81.)

The historical record bolsters this conclusion. When a part of the State Constitution is "directly derived from earlier sources," New Jersey courts will look to those sources to determine its meaning, scope, and effect. Schmid, 84 N.J. at 557. When New Jersey added the Assembly/Opinion Clause in 1844, it modeled the clause on the Massachusetts Constitution of 1780, not the First Amendment.[71] Bowie, supra at 1733-34.

By 1780, the right to assemble and communicate directly to representatives was widely recognized as ensuring that ordinary people, acting together, retained an effective voice in governing affairs and the ability to wield collective power to influence policy. Id. at 1703-08.[72] Indeed, much of the pre-Revolutionary conflict between Massachusetts and the Crown focused on whether the colonists could "assemble" and sustain provincial "assemblies" to settle questions of colonial policy. Id. at 1663-94. The prevailing sentiment was that if policy was made without such public participation, government itself was

[71] As noted above, the purpose of the Bill of Rights was to protect the people from an overzealous legislature. (Supra p.30 & n.29.)
[72] For a detailed review of this history, see Bowie, supra at 1663-94, 1703-08.

illegitimate. Id. Leading voices in Massachusetts, such as John Adams, believed it necessary to enshrine these rights in the Commonwealth's new constitution in order to ensure the new government would truly be representative of and responsive to the people. Id. at 1698-99.[73]

In adopting the language from the Massachusetts Constitution, New Jersey embraced the Commonwealth's expansive conception of participatory government in the modern context where parties were the key institutions for collective political action.[74] The drafters of New Jersey's 1844 constitution understood political parties and cross-nominations to be part of how the people came together to shape and influence the direction of government and express their opinions to their representatives. By 1844, parties had been central political institutions for decades. CARL E. PRINCE, NEW JERSEY'S JEFFERSONIAN REPUBLICANS: THE GENESIS OF AN EARLY POLITICAL MACHINE 41-68 (1967) (Pa431-58). Notably, one of the state legislators who called the 1844 convention

[73] Adams insisted that representative government be "in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them." Bowie, supra at 1699 (quoting JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES (1776) IN 4 PAPERS OF JOHN ADAMS 87 (1979)).

[74] New Jersey replaced Massachusetts Constitution's "right . . . to . . . give instructions to their representatives" with the "right to make their opinions known to their representatives." MASS. CONST. of 1780, art. XIX; Bowie, supra at 1707, 1733-34. While New Jersey voters could not directly manipulate the conduct of their representatives, the underlying principle, that they were guaranteed effective means of conveying their political views, was unchanged.

had been elected with cross-nominations from two parties. PASLER & PASLER, supra at 214 (Pa461); 1844 PROCEEDINGS at 14.

For decades after the Assembly/Opinion Clause was adopted, New Jersey's elections were faithful to its promise.[75] Voters collaborated through minor parties, using cross-nominations to elevate new issues into the political mainstream. Each cross-nomination sent a clear message as to which issues warranted the minor party's support. And minor party votes cast on Election Day substantiated the nominations, allowing like-minded portions of the electorate to come together to convey their collective priorities directly to their representatives.

B. The Anti-Fusion Laws Impermissibly Burden the Collective Political Rights Protected by the Assembly/Opinion Clause

The anti-fusion laws eliminated this avenue for collective political action and imposed an extraordinary burden on the Assembly/Opinion Clause rights of minor parties and their voters. This was the legislature's purpose: to prevent voters from working together in minor parties to meaningfully influence politics and policy. Argersinger, supra at 298-306 (Pa381-89). Because these are fundamental political rights guaranteed under the State Constitution, Worden

[75] See Kevin Arlyck, The Founders' Forfeiture, 119 COLUM. L. REV. 1449, 1504-05 & n.323 (2019) (subsequent history can be "highly probative" of public understanding at the time of ratification).

compels strict scrutiny. 61 N.J. at 346. As discussed supra pp.42-53, there are no compelling interests that justify prohibiting fusion, nor is a sweeping ban narrowly tailored to any legitimate policy concern. Thus, the anti-fusion laws are unconstitutional under the Assembly/Opinion Clause.

The result would be the same under a burden-interest balancing test: there are no sufficiently important interests to justify the severe burden imposed on Assembly/Opinion Clause rights. Prohibiting cross-nominations makes it all but impossible for voters outside of the Democratic and Republican Parties to collectively and effectively convey their political preferences to their representatives. (Pa47-51, 77-81.) At the ballot box, minor party voters are barred from accurately signaling their support for their party's priorities and values when voting for their nominee—that is, expressing why a candidate earned their support and how they want the candidate to govern if elected. (Id.)

Instead, voters are compelled to support their preferred candidate on the ballot line of a major party they do not support, implying approval for a major party agenda they do not share. There is no comparable means by which a group of like-minded voters can "assemble" to "make known their opinions to their representatives." These restrictions impose a severe burden on Wolfe, Tomasco, and Kibler. (Supra pp.7-9.) Available evidence suggests there are millions of New Jersey voters whose true preferences are similarly silenced when forced to

support one of two major parties on the ballot. (Supra p.9 & n.7.) As discussed supra pp.42-53, there are no sufficiently important interests, and the blanket ban on fusion is in no way narrowly tailored to any legitimate concerns. Crawford, 553 U.S. at 191. Even if these burdens were deemed less than severe (they are not), the end result is the same: the anti-fusion laws violate the Assembly/Opinion Clause and are therefore unconstitutional.

IV. THE ANTI-FUSION LAWS VIOLATE EQUAL PROTECTION (Pa1-2)

The anti-fusion laws violate the guarantee of equal protection by imposing disproportionate and unjustifiable burdens on minor parties, their voters, and their nominees.[76] State law subjects such claims to a balancing test that "consider[s] the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg, 99 N.J. at 567.[77] Here, all three factors compel the conclusion that these discriminatory laws are unconstitutional.

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[76] The "expansive language [in art. I, ¶ 1] guarantees the fundamental constitutional right to equal protection." N.J. State Bar Ass'n v. State, 387 N.J. Super. 24, 40 (App. Div. 2006); see N.J. CONST. art. I, ¶ 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty . . . ."). This provision also ensures substantive due process and therefore prohibits arbitrary, capricious, or unreasonable state action. Greenberg, 99 N.J. at 570.

[77] Equal protection "under the State Constitution can in some situations be broader than the right conferred by the [federal] Equal Protection Clause." Doe v. Poritz, 142 N.J. 1, 94 (1995).

First, the "affected right[s]" are fundamental. Id. "[O]ur State Constitution devotes an entire article enumerating the rights and duties associated with elections and suffrage." In re Attorney General's Directive, 200 N.J. at 302. Voting, association, and assembly rights enjoy "exceptional vitality in the New Jersey Constitution." Schmid, 84 N.J. at 555-56. These rights collectively ensure an equal opportunity to participate meaningfully in the political process.

Second, the anti-fusion laws substantially and directly intrude upon these fundamental rights. The disproportionate burden imposed on each right is alone sufficient to invalidate these laws. For example, the laws compel minor party voters to associate with and tangibly support the Democratic or Republican Party to vote for their own party's nominee. Barred from voting under the party label that warranted their vote, these voters lose their "right . . . to cast their votes effectively," as voting for their nominee incorrectly signals support for a different party and its agenda. Williams, 393 U.S. at 30.[78] Further, the anti-fusion laws perpetually bar the Moderate Party from nominating its preferred candidates on the ballot—that is, performing the central function of a party. (Pa59-60.) On the other hand, the major parties can nominate their preferred candidates on the ballot, and their voters are not forced to associate with or

[78] Candidates who earn the support of more than one party are arbitrarily barred from presenting themselves truthfully to the electorate; instead, any viable candidate must be a Democrat or a Republican, nothing more, and nothing less.

provide material support to another party to cast a meaningful vote.

Even more onerous is the cumulative impact, an overwhelming burden relegating minor parties and their voters to a permanent electoral under-class. See Jersey City v. Kelly, 134 N.J.L. 239, 248 (E. & A. 1946) ("In determining the constitutionality of an act of the Legislature it must be considered according to its effect as a whole."); Patriot Party, 95 F.3d at 269 ("[W]e must measure the totality of the burden that the laws place on the voting and associational rights of political parties and individual voters . . . ."). In a century with the anti-fusion laws and 10% vote threshold, no minor party has achieved statutory status; in this regard, New Jersey is, by far, the most oppressive state in the country. (Supra p.16 & n.14.) This distinction perpetually elevates only the Democratic and Republican Parties and imbues them with state-granted advantages and a veneer of state-sanctioned legitimacy denied all others.

By forcing the Moderate Party to forsake its preferred candidates, the anti-fusion laws leave only two options; each undermines the party and sustains the duopolistic status quo. The Moderate Party could nominate a lesser choice. But like countless protest candidates nominated by minor parties, that person would lose. Any effort to promote that candidacy would risk spoiling the race for the Moderate Party's preferred candidate, and the Moderate Party would alienate the large swath of the electorate flatly opposed to spoilers. (Pa47, 80-81; supra

p.9 n.7.) Or the Moderate Party could sit out the election, nominating no one on the ballot. This lose-lose dilemma directly intrudes upon fundamental political rights. Patriot Party, 95 F.3d at 269 (anti-fusion laws impose a heavy burden because they force minor parties and their voters to choose between these "unsatisfactory alternatives").

Third, there is no public need for banning fusion. When, as here, there is a "great[] burden" on an "important . . . constitutional right," the state must prove an exceptional "need . . . to justify interference with the exercise of that right." Green Party, 164 N.J. at 149; see Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 496 (2012); Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 632 (2000). New York and Connecticut's rich tradition of successful elections featuring fusion disproves any purported need. As discussed supra pp.42-53, none of the interests asserted to justify anti-fusion laws in other states withstand scrutiny here. A complete prohibition on fusion is overbroad and poorly tailored: any concerns, for example, regarding possible ballot overcrowding could be addressed through less restrictive means, such as modestly increasing signature requirements for nominating petitions. See Timmons, 520 U.S. at 376 (Stevens, J., dissenting); (Pa204.) For these reasons, the anti-fusion laws are plainly unlawful under the balancing test.

These issues mirror those in CAPP, where the Appellate Division held that

state laws precluding voters from registering with any parties other than the Democratic or Republican Parties violated equal protection. 344 N.J. Super. at 241-44. There, the "statutory scheme impose[d] a significant handicap on [all other] parties' ability to organize while reinforcing the position of the established statutory parties." Id. at 242. The Appellate Division emphasized that "[t]he State is not free, particularly at State expense, to enhance or to subsidize the party-building activities of the statutorily recognized parties by stifling political discussion and association of alternative political parties." Id. The court rejected the State's argument that the law merely "denies the alternative parties a benefit"; rather, it impermissibly entangled the State "in the efforts by the established parties to maintain the status quo." Id. Because the asserted state interests in "maintenance of ballot integrity, avoidance of voter confusion, and ensuring electoral fairness" did not "justify the burdens imposed," the statute was held unconstitutional. Id. at 243-44. The anti-fusion laws likewise misuse the levers of the state to enhance political power of the two major parties and suppress any minor party from growing into a serious political entity, all without an important, let alone compelling, justification.

Two of the U.S. Supreme Court's seminal decisions on ballot access under the U.S. Constitution confirm that anti-fusion laws violate equal protection. In Williams, the Court struck down an Ohio law which made it virtually impossible

for minor parties to get their parties' names—and their parties' candidates—on the ballot. 393 U.S. at 24, 30-34. As in New Jersey today,

> the Ohio laws . . . give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. 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. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.

Id. at 31. The Court rejected the proposed interest in "promot[ing] a two-party system in order to encourage compromise and political stability." Id. at 31-32. Giving "the Republicans and the Democrats . . . a complete monopoly" would end the "[c]ompetition in ideas and governmental policies . . . at the core of our electoral process and [constitutional] freedoms." Id. at 32.

In Anderson, the Court struck down an Ohio law imposing unreasonable filing requirements for independent candidates. 460 U.S. at 790-806. Because "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational preference," the Court held that the law impermissibly limited "the availability of political opportunity." Id. at 792-93. Like the laws at issue here, the Ohio law "discriminate[d] . . . against those voters whose political preferences lie outside the existing political parties" and

"limit[ed] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group." Id. at 794.

Other courts have recognized that anti-fusion laws impose grossly disproportionate burdens and therefore violate equal protection. The Third Circuit struck down a Pennsylvania anti-fusion law for denying minor parties and their voters equal protection. Patriot Party, 95 F.3d at 268-70. The law placed a heavy burden on minor party voters because it forced them to choose among three unsatisfactory alternatives: "wasting" a vote on a minor party candidate with little chance of winning, voting for a second-choice major party candidate, and not voting at all. Id. at 269. The court also recognized that the anti-fusion law severely burdened minor parties because it prevented

> a minor party from nominating its best candidate and from forming a critical type of consensual political alliance that would help it to build support . . . . Thus, the challenged laws help to entrench the decided organizational advantage that the major parties hold over new parties struggling for existence.

Id. Because the law did not "protect[] any significant countervailing state interest," it was held unconstitutional. Id. at 269-70.[79] The same is true in New

[79] After Timmons, the Third Circuit reheard this case en banc and affirmed its initial ruling because "[n]othing in the Timmons opinion itself weakens the equal protection analysis" and "no equal protection claim was asserted or considered by the Court in Timmons." Reform Party, 174 F.3d at 312-18. The result was the same regardless of whether the burden was deemed severe. Id. at 314-15. Then-Judge Alito joined the en banc panel's decision.

Jersey: the anti-fusion laws force Moderate Party voters to "choose among three unsatisfactory alternatives" and prohibit the Moderate Party "from nominating its best candidate" and forging a "consensual political alliance." Id. Because these anti-fusion laws "entrench the decided organizational advantage [of] the major parties without "protecting any significant countervailing state interest," they violate equal protection. Id.

Recently, the Supreme Court of Pennsylvania narrowly divided over the constitutionality of a different anti-fusion law. Working Families Party v. Commonwealth, 209 A.3d 270 (Pa. 2019).[80] Four justices rejected an equal protection claim, without actually analyzing the disproportionate burdens imposed on minor parties, voters, and nominees. Id. at 282-84. Instead, their holding turned on a circular conclusion that a state interest in enforcing aspects of the anti-fusion laws was sufficient justification to uphold the laws in toto. Id.

In contrast, three dissenting justices explored in detail the real-world role of parties and fusion before concluding that equal protection is incompatible with anti-fusion "statutes that so entrench power in major parties to the exclusion of minor parties." Id. at 305 (Wecht, J., dissenting); see id. at 288-94, 299-304 (Wecht, J., dissenting). In their view, the "regulations . . . plainly

[80] Neither the majority nor the dissent suggested that Timmons controlled either the state and federal equal protection claims.

impose asymmetrical burdens on voters and parties based upon nothing more than numerosity and relative popularity—which in part are determined by a self-reinforcing system in which political power begets more political power to the manifest exclusion of marginal and minority political coalitions and dissenting perspectives." Id. at 305 (Wecht, J., dissenting).

When, as in Pennsylvania and New Jersey, a minor party's legal status turns on its share of the overall vote and fusion is prohibited, minor party voters face a lose-lose dilemma:

> If forced to choose between voting his first-choice candidate without the desired affiliation or his second-choice candidate as the nominee of his preferred party, the voter must choose between voting for whom he believes to be the candidate who best embodies his political values or casting a ballot in furtherance of the success of the party with which he identifies. Should the voter choose to vote candidate rather than party, his vote adversely affects his favored party in its quest to improve its status under Pennsylvania law. When a party member votes for the nominee of another party, not only does he reduce the numerator by not furnishing a vote for his chosen party, he also increases the denominator by casting a vote that effectively supports another party for classification purposes, with the practical effect of reducing his party's likelihood of elevating its status in the next election.

Id. at 306 (Wecht, J., dissenting) (emphasis original). This inequity is unlawful.

The New York Court of Appeals likewise recognized the equal protection issues implicated by anti-fusion laws. A key rationale for striking down a "legislative provision . . . solely intended to prevent political combinations and fusions" was that the state "must not discriminate in favor of one set of

candidates against another set." Callahan, 93 N.E. at 263. In striking down another legislative attempt to "mak[e] it more difficult to vote fusion or coalition tickets," New York's highest court held that "each voter shall have the same facilities as any other voter in expressing his will at the ballot-box, so far as practicable." Britt, 96 N.E. at 373. Permitting such a law to stand would produce "great difficulty in turning out the party in power" as a result of "the unequal opportunities to vote afforded the electors." Id. at 374.

Taken together, these decisions help illustrate what the record in this case makes clear: New Jersey's prohibition on fusion imposes extraordinary burdens on the Moderate Party, its voters, and candidates who would seek its nomination. Major parties and their supporters suffer no comparable burdens. No post hoc justification for these laws can justify this grossly disproportionate treatment.

V. THE STATE CONSTITUTION PROHIBITS "AGGREGATING" CROSS-NOMINATIONS (Pa1-2)

If this court finds the anti-fusion laws unconstitutional and permits fusion hereafter, it should clarify that the state may not "aggregate" cross-nominations, as aggregation would violate the State Constitution. The Eighth Circuit failed to include this clarification when it found Minnesota's anti-fusion laws unconstitutional, and the Minnesota legislature subsequently required aggregation to perpetuate the major parties' duopoly while appearing to permit fusion. LISA JANE DISCH, THE TYRANNY OF THE TWO-PARTY SYSTEM 24-25

(2002) (Pa423.)[81]

Aggregation is when a cross-nominated candidate has all nominating parties listed next to their name, thereby preventing a voter from specifying which of the nominating parties warranted their vote. (Pa130.) Unable to specify a party, a voter is barred from associating with just their party and is instead compelled to associate with all nominating parties to support their party's nominee, in clear violation of associational freedom. See Jones, 530 U.S. at 577. Further, because aggregation makes it impossible to separately count votes received by each cross-nominating party, a minor party that cross-nominates candidates could never achieve statutory status in New Jersey. Simply put, aggregating cross-nominations would perpetuate many of the same constitutional injuries produced by the anti-fusion laws. The state must not be permitted to render illusory such fundamental rights. Thus, if this court finds the anti-fusion laws unconstitutional, it should clarify that, whether through statute, regulation, or practice, the state may not aggregate cross-nominations.

CONCLUSION

The anti-fusion laws violate the New Jersey Constitution. Future elections should permit cross-nominations on the ballot.

[81] The U.S. Supreme Court then overturned the Eighth Circuit in Timmons, allowing for reinstatement of the prior fusion ban.

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