STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 12

UNITED WISCONSIN, et al.,

Plaintiffs,

v. Case No. 25-CV-1438

WISCONSIN ELECTIONS COMMISSION,

Defendant.

DEFENDANT'S COMBINED BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Wisconsin, like almost all other states, prohibits one candidate from being listed multiple times on the ballot as the nominee for multiple parties, a practice sometimes called "fusion voting." Anti-fusion laws like Wisconsin's have existed for more than a century and have been repeatedly upheld as constitutional by courts across the nation, including by both the U.S. Supreme Court and the Wisconsin Supreme Court. The result here can be no different.

Plaintiffs—United Wisconsin, an aspiring political party that wants to cross-nominate other parties' candidates, and several of its members or prospective members—argue that fusion voting would be a valuable election reform and ask this Court to declare Wisconsin's anti-fusion laws unconstitutional under the Wisconsin Constitution. But binding precedent bars their claims. The Wisconsin Supreme Court has already upheld Wisconsin's anti-fusion laws as constitutional under the Wisconsin Constitution in *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898). One hundred years later, the U.S. Court of Appeals for the Seventh Circuit again upheld Wisconsin's anti-fusion laws as constitutional under the U.S. Constitution, concluding that any burdens on freedom of speech or association are not severe and justified by Wisconsin's compelling state interests. *Swamp v. Kennedy*, 950 F.2d 383, 384–86 (7th Cir. 1991). And five years after that, the U.S. Supreme Court confirmed the constitutionality of a state anti-fusion law, for generally the same reasons. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

Plaintiffs want to relitigate the long-settled question of whether Wisconsin's anti-fusion laws are constitutional, but they offer no persuasive reason why this

Court can or should reach a different result. Even if their claims were not already barred by the dispositive precedent in *Runge*, Plaintiffs' constitutional claims fail under the governing legal standards: Wisconsin's interest-balancing test for election regulations and rational basis review. And even though strict scrutiny does not apply, the challenged laws would pass muster under that standard too. A fusion ban is a narrowly tailored method of preventing political parties in Wisconsin from raiding one another through abuse of cross-filing procedures.

With no material factual disputes and clear precedent to guide it, this Court should hold that Wisconsin's anti-fusion laws are constitutional, deny summary judgment to Plaintiffs, and grant summary judgment in favor of Defendant Wisconsin Elections Commission ("the Commission").

STATEMENT OF THE CASE

I. Background regarding fusion voting.

A. Over the past century, almost all states enacted anti-fusion statutes.

Wisconsin's anti-fusion statutes, Wis. Stat. §§ 8.03(1) and 8.15(7), represent the norm across the United States. Around 40 states directly or indirectly prohibit fusion voting. *See Timmons*, 520 U.S. at 357 ("[I]n this century, fusion has become the exception, not the rule."). Only a handful of states permit fusion voting: New York and Connecticut permit disaggregated fusion voting, and Oregon and Vermont permit aggregated fusion voting. (Lodahl Decl. Ex. A:13 ("Atkinson-Tahk Report").)

State anti-fusion laws are rooted in historical efforts to reform the electoral system and were enacted as part of a broader shift toward state-administered elections in the late 1800s. (Atkinson-Tahk Report 7–11.) Prior to the introduction of

the Australian ballot (a standardized, government-printed ballot cast in secret), voters in the United States either cast their votes by voice or provided their own ballots. (*Id.* at 7.) In the latter case, voters commonly obtained their ballots from political parties, who printed their own ballots with the party's slate of candidates. (*Id.*) That allowed local party bosses to control what appeared on ballots, demand bribes from candidates for inclusion on the ballot, and generally corrupt the electoral process. (*Id.* at 8.) Moreover, since a single state-printed ballot didn't yet exist, the question of whether a candidate could appear multiple times on a single ballot didn't arise, either. (*Id.* at 7–8.)

Widespread reports of corruption during the 1888 presidential election galvanized support for electoral reform, including a transition to government-printed ballots. (*Id.* at 9.) The switch to government-printed ballots meant that states needed to make choices about how candidates may appear on the ballot and how ballots should be organized. (*Id.*) Among other reforms, many states enacted statutes that prohibited a candidate from appearing on the ballot as the nominee of more than one party, including Wisconsin. (*Id.* at 11, 55.)

B. Wisconsin enacted its fusion ban in 1897.

In 1897, Wisconsin enacted legislation prohibiting the same candidate from appearing multiple times on the ballot. (*Id.* at 55.) Traditional forms of legislative history shed no light on the Legislature's motivation, but the legislation was adopted at a time when multiple states nationwide were enacting similar measures. (*Id.*) In these jurisdictions, including neighboring Illinois and Iowa, legislators and citizens alike publicly supported these anti-fusion measures as promoting ballot clarity,

minimizing voter confusion, and addressing concern about "deceptive" or "combination" tickets. (*Id.*) In 1896, one year before Wisconsin enacted its anti-fusion statute, the Ohio high court observed that its comparable law was enacted for the purpose of combatting corruption: "[c]ertain evil practices had grown up by reason of placing the name of a candidate upon the same ballot more than once, and the general assembly attempted to prevent such practice by providing that the name of each candidate should appear on the ballot but once." *State ex rel. Bateman v. Bode*, 45 N.E. 195, 196 (Ohio 1896).

Plaintiffs claim that Wisconsin's anti-fusion statutes were enacted because of invidious partisan motive "to stunt the growth of small parties and limit electoral competition," and further assert that this historical record is "undeniable." (Doc. 24:13, 14.) But Plaintiffs greatly overstate the strength of the evidence on which these inferences rely, primarily a handful of post-enactment newspaper articles. (Atkinson-Tahk Report 58.) At most, the evidence shows that the Legislature was acting "from a mix of institutional, ideological, and political considerations" that, at minimum, also included "ballot clarity, voter comprehension, and skepticism toward multi-label candidacies." (*Id.* at 58–62.)

C. Early state constitutional challenges to anti-fusion laws were rejected by courts, including in Wisconsin.

Courts have almost uniformly upheld these anti-fusion laws against constitutional challenges. Generally, courts assessing anti-fusion laws have reasoned that voters remain free to vote for any candidate they wish, the laws apply equally to all candidates, and that such laws advance valid state interests in managing the ballot, preserving the integrity of the election process, and reducing voter confusion.

The Wisconsin Supreme Court considered a state constitutional challenge to its anti-fusion statute in 1898, just a year after its enactment. *Runge*, 76 N.W. at 483. The court upheld the statute as constitutional and found it to be a reasonable ballot regulation. *Id*. at 486. That the law prevented a political party from nominating its preferred candidate did not render it constitutionally infirm because the "individual right of the citizen to vote for the candidates of his choice" was "not impaired" and all candidates had a "reasonable opportunity" to appear "on the official ballot under a party designation." *Id*. at 486–87.

Other states' high courts likewise upheld their anti-fusion laws as constitutional.[1] In addition to promoting ballot clarity and minimizing voter confusion, some courts also recognized that the laws furthered the valid state interest in preventing corrupt practices arising from cross-nominations. In upholding Illinois's fusion ban, the supreme court explained that "[i]t was well known that minor political parties by exchanges of favors succeeded, by fusions at elections, against a party having a much larger number of voters than either of the parties to the fusion." *People ex rel. McCormick v. Czarnecki*, 107 N.E. 625, 628 (Ill. 1914), *reh'g denied*, (Feb. 4, 1915). Missouri's highest court similarly emphasized a candidate's ability to manipulate fusion in order to appear to one group of voters to support a

[1] *See, e.g.*, *State v. Wileman*, 143 P. 565, 566–67 (Mont. 1914) (fusion ban did not interfere with right to vote or "right of naming candidates for public office"); *State v. Superior Ct. of King Cnty.*, 111 P. 233, 235–39 (Wash. 1910) (anti-fusion statute did not violate constitutional rights of fusion candidate, his voters, or the rights of the nominating political parties; "[t]he provision referred to is but a regulation, and we think a reasonable one, in regard to the printing of tickets"); *State ex rel. Fisk v. Porter*, 100 N.W. 1080, 1081 (N.D. 1904) (similar); *Bode*, 45 N.E. at 196–97 (similar); *Todd v. Bd. of Election Comm'rs*, 64 N.W. 496 (Mich. 1895) (similar); *but see Hopper v. Britt*, 96 N.E. 371 (N.Y. 1911) (anti-fusion statute did violate state constitution).

particular platform, while appearing to voters of a "different political faith" to support a different set of principles. *State ex rel. Dunn v. Coburn*, 168 S.W. 956, 958 (Mo. 1914). And these courts agreed with *Runge*'s conclusion that a fusion ban pursues those legitimate goals without infringing on voters' or candidates' rights, since it does not preclude "any or all voters voting for [that candidate] at the election" and "permits every voter to vote for whomsoever he pleases." *McCormick*, 107 N.E. at 627; *Dunn*, 168 S.W. at 958 (reiterating law leaves voter free to "vot[e] for whom he pleases").

There has been a recent interest in relitigating the constitutionality of anti-fusion laws under state constitutions, including lawsuits in Pennsylvania, New Jersey, and Kansas. *See Working Fams. Party v. Commonwealth of Pa.*, 209 A.3d 270, 282 (Penn. 2019); *In re Malinowski*, 332 A.3d 755 (N.J. Super. Ct. App. Div. 2025), *cert. denied*, 346 A.3d 1220 (N.J. 2025); *United Kansas, Inc. v. Schwab*, Case No. SA 2024-CV-0152 (D. Ct. Kan. Mar. 3, 2025) (decision filed herewith as Lodahl Aff. Ex. C), *on appeal*, Case No. 25-128896 (Kan. Ct. App. 2025). To date, these state courts have upheld their states' anti-fusion laws as constitutional.

II. The complaint and the challenged statutes.

Plaintiffs ask this Court to facially invalidate Wis. Stat. §§ 8.03(1) and 8.15(7), two election administration statutes which, together, prevent fusion voting in Wisconsin. (Doc. 2 ¶ 1.) Wisconsin Stat. § 8.15(7) contains three related election rules: (1) "A candidate may not run in more than one party primary at the same time;" (2) "No filing official may accept nomination papers for the same person in the same election for more than one party;" and (3) "A person who files nomination papers as the candidate of a recognized political party may not file nomination papers as an

independent candidate for the same office at the same election." Wisconsin Stat. § 8.03(1) provides, in relevant part, that "[t]he name of any candidate who is nominated to the same office by more than one party or primary . . . shall appear under the party first nominating him or her."

Plaintiffs seek a declaration that the challenged statutes are facially unconstitutional under Wis. Const. art. I, § 22, the so-called "free government" clause (Doc. 2:31–32); under Wis. Const. art. I, § 1, which guarantees equal protection under the law (Doc. 2:29–30); and under Wis. Const. art. I, §§ 3 and 4, which protects the freedom of speech and association (Doc. 2:27–28). They also seek a permanent injunction barring the Commission from enforcing the statutes. (Doc. 2:32.)

LEGAL STANDARDS

In reviewing a constitutional challenge to a statute, the statute is presumed constitutional. *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 25, 383 Wis. 2d 1, 914 N.W.2d 678. This "presumption of constitutionality is based on respect for a co-equal branch of government." *Id.* ¶ 26. It "is the product of [the courts'] recognition that the judiciary is not positioned to make the economic, social, and political decisions that fall within the province of the legislature." *Porter v. State*, 2018 WI 79, ¶ 29, 382 Wis. 2d 697, 913 N.W.2d 842 (citation omitted). If any doubt exists about a statute's constitutionality, courts must resolve that doubt in favor of constitutionality. *Mayo*, 383 Wis. 2d 1, ¶ 26. Courts must not "reweigh the policy choices" of the Legislature. *Id.* And Plaintiffs' facial challenge must show that anti-fusion laws burden all voters' constitutional rights severely and broadly enough

in relation to the law's "plainly legitimate sweep" to justify facial invalidation. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202–03 (2008) (citation omitted).

Under Wis. Stat. § 802.08(2), a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Defeating a motion for summary judgment "requires the opposing party to set forth facts showing that there is a genuine issue for trial" *Kraemer Bros., Inc. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). "Any factual dispute will not necessarily preclude summary judgment, only disputes of material fact . . . ." *Murphy v. Columbus McKinnon Corp.*, 2022 WI 109, ¶ 42, 405 Wis. 2d 157, 982 N.W.2d 898.

ARGUMENT

I. Binding Wisconsin Supreme Court precedent bars Plaintiffs' challenge to Wisconsin's anti-fusion laws.

This is not the first time a court has considered a constitutional challenge to Wisconsin's fusion voting ban. Shortly after its enactment, the Wisconsin Supreme Court affirmed the law's constitutionality in *Runge*, and the Seventh Circuit did the same a hundred years later in *Swamp*. These cases foreclose Plaintiffs' challenge.

Runge involved a virtually identical state constitutional challenge to the original version of Wis. Stat. § 8.03(1), which materially tracks the modern version.[2]

[2] *Compare* Wis. Stat. § 38 (1898) ("When any person is nominated for the same office by more than one party or convention his name shall be placed upon the ticket under the designation of the party which first nominated him . . . ."), *with* Wis. Stat. § 8.03(1) ("The name of any candidate who is nominated to the same office by more than one party or primary or nominated for more than one partisan or state nonpartisan office shall appear under the party first nominating him or her or under the office to which he or she was first nominated.").

Much like Plaintiffs here, the *Runge* challengers contended that "[t]he right of political organization is a fundamental right" and that the anti-fusion law "infringe[d] upon the equal rights and franchises of the citizens."[3] (Lodahl Aff. Ex. B:16–17.) The law did so not just by "extinguish[ing] *ipso facto* the political organization" seeking to cross-nominate a candidate, (*id.* at 16), but also by "forc[ing]" a voter "into endorsing the principles of another political party at the expense of his own," (*id.* at 38). In fact, the law raised "not merely a question of individual rights, but of broader interests," including the "rights of whole parties and their candidates." (*Id.* at 35–36.) And, again echoing Plaintiffs, the challengers argued that fusion "tends to eliminate the dangers to a republican form of government incident to partisan politics" and thus "advance[s] in the direction and interest of good government." (*Id.* at 18.)

The court disagreed. It noted how "many" other states also "prohibit the double printing of names of candidates" but that it could not find any cases in which "that feature . . . render[ed] the law unconstitutional." *Runge*, 100 Wis. at 486. It thus concluded that constitutional objections to Wisconsin's similar anti-fusion law had already been "settled beyond reasonable controversy." *Id.*

The heart of *Runge*'s analysis is worth reviewing in full, but a few snippets bolster the point. Generally, "the right to vote . . . cannot be secured without legislative regulations," which "within reasonable limits, strengthen and make effective the constitutional guaranties instead of impairing or destroying them." *Id.*

[3] The challengers elsewhere argued that the fusion ban was "an attempt to discriminate against classes of voter, and its effect, if allowed to be valid, would be to subject such classes to the alternative of partial disenfranchisement, or to the casting of their votes upon more burdensome conditions than others." (Lodahl Aff. Ex. B:43.)

And the Wisconsin Constitution is primarily concerned with "the individual right of the citizen to vote for the candidates of his choice," not "[m]ere party fealty and party sentiment." *Id.* Moreover, "[s]ome discrimination . . . is unavoidable in any practicable system of voting by the use of official ballots; otherwise there would be no limit to its size and it would be so complicated and confusing as to certainly materially impair the freedom of the elective franchise." *Id.*

The anti-fusion law therefore was a "proper legislative regulation" because, among other things, it prevented the "confusion and uncertainty that would arise . . . from the double printing of names." *Id.* at 487. The regulation accomplished this goal in that "when the candidates of one party are identical with those of another it is supposed, and not unreasonably, that . . . though there be two organizations there is but one platform of principles." *Id.* The court thus concluded it was "unable to see anything in the present ballot law which passes beyond the bounds of reasonable regulation in view of the end sought,--the right of all to vote in secrecy and upon the basis of political equality and purity." *Id.* at 486.

The Seventh Circuit held the same a hundred years later in *Swamp*, a case involving a challenge to Wisconsin's anti-fusion law under the federal constitution. 950 F.2d at 384. *Swamp* first rejected the argument that the law "infringes upon party autonomy," given that "a party may nominate any candidate that the party can convince to be *its* candidate." *Id.* at 385. And it also rejected the argument that the law "is disproportionately burdensome on minority parties." *Id.* For one, "[a]llowing minority parties to leech onto larger parties for support decreases real competition; forcing parties to chose their own candidates promotes competition." *Id.* And the law

does not prohibit a minority party from "publiciz[ing] its views," since the party can still "support a candidate previously nominated by another party." *Id.* at 386.

To be sure, the anti-fusion law does impose some burden on small parties, but *Swamp* held that any such burden is "justified by compelling state interests." *Id.* One is "[a]voiding voter confusion," since otherwise an "unlimited number of minority parties could nominate the candidate of a major party," making it "difficult for voters to distinguish between the parties." *Id.* Another is "preserving the integrity of [the] election process" by "curtail 'raiding,' whereby voters who are sympathetic with one party vote on the ballot of another party so as to influence or determine the results of that other party's primary." *Id.* And a third is "[m]aintaining a stable political system" by "limit[ing] involuntary fusion of political parties," a corollary of the raiding effect. *Id.*

Together, *Runge* and *Swamp* leave no room for Plaintiffs' challenge. *Runge* already affirmed the anti-fusion law's validity under the Wisconsin Constitution and *Swamp* did the same under the federal constitution. Although Plaintiffs may be able to dodge *Swamp*'s binding effect by pleading only state constitutional claims, they cannot avoid *Runge*, which already confronted and rejected such claims.

II. Wisconsin's anti-fusion laws comply with *Anderson-Burdick*, which provides the applicable test.

Even if *Runge* and *Swamp* didn't foreclose Plaintiffs' challenge, it would still fail under Wisconsin's governing test for analyzing the constitutionality of election regulations.

A. Wisconsin applies the equivalent of the *Anderson-Burdick* balancing test when reviewing election regulations.

Wisconsin courts analyze constitutional challenges to election regulations using an equivalent of the federal *Anderson-Burdick* test, under which courts first consider the character and magnitude of the asserted injury to the rights protected by the applicable constitutional provisions. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 22, 26–39, 357 Wis. 2d 469, 851 N.W.2d 262 (referencing *Anderson v. Celebrezze*, 460 U.S. 780, 789). A "severe" burden on those rights triggers strict scrutiny. *Id.* ¶ 22. But when the burden is "not severe," the court will apply "a rational basis level of judicial scrutiny," and a "reasonably related," significant state interest will suffice to uphold the law. *Id.* ¶¶ 22, 80; *see also Tully v. Okeson*, 977 F.3d 608, 616 (7th Cir. 2020) ("[A]ll election laws affecting the right to vote are subject to the *Anderson/Burdick* test, but election laws that do not curtail the right to vote need only pass rational-basis scrutiny."). When weighing an election regulation's burden against state interests, the court must consider "the whole electoral system," not just the single provision at issue. *Luft v. Evers*, 963 F.3d 665, 671–72 (7th Cir. 2020).

Applying rational basis scrutiny to most election regulations is consistent with the general principle that, while the right to cast a ballot cannot be substantially impaired, "the legislature has the constitutional power to say how, when and where his ballot shall be cast." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949).

B. Courts have affirmed the validity of fusion voting bans using the *Anderson-Burdick* test.

Most prominently, the U.S. Supreme Court used the *Anderson-Burdick* test to uphold anti-fusion laws in *Timmons*. On the first prong of *Anderson-Burdick*, *Timmons* found that the burdens imposed by anti-fusion laws are "not severe." 520 U.S. at 365. *Timmons*' crucial insight is that such laws don't restrict a party's "right to select its own candidate" or otherwise regulate the party's "internal affairs and core associational activities." *Id.* at 359–60. The party can still "try to convince" the candidate to appear as their candidate or "endorse a candidate who . . . will not appear on the ballot as the party's candidate." *Id.* at 360. Moreover, anti-fusion laws don't "directly preclude[ ] minor political parties from developing and organizing," "exclude[ ]" anyone "from participation in the election process," or otherwise "directly limit . . . access to the ballot." *Id.* at 361, 363. The party ultimately "remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen." *Id.* at 361.

To be sure, anti-fusion laws restrict what a party may communicate on the ballot—namely, that it supports the same candidate as another party. So, in that sense, anti-fusion laws burden a party's interest in "hav[ing] its nominee *appear on the ballot* as that party's candidate." *Id.* at 359. (emphasis added). This "slightly" affects the party's ability to "send a message to the voters and to its preferred candidates." *Id.* at 363. But "[b]allots serve primarily to elect candidates, not as forums for political expression," *id.*, and so this burden does not trigger strict scrutiny. Instead, fusion bans need to serve "sufficiently weighty" state interests,

which can be established without "elaborate, empirical verification." *Id.* at 364 (citation omitted).

Anti-fusion laws pass that test, *Timmons* held, for several reasons. For one, they serve states' interest in "protecting the integrity, fairness, and efficiency of their ballots and election processes," given that "a candidate or party could easily exploit fusion as a way of associating his or its name with popular slogans and catchphrases." *Id.* at 364–65. Further, ballot-access rules would be undermined if "minor parties [could] capitalize on the popularity of another party's candidate, rather than on their own appeal to the voters." *Id.* at 366. States can aim to ensure that "minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits." *Id.* And states also can aim at maintaining "the stability of their political systems," including through mechanisms—like anti-fusion laws—that "in practice, favor the traditional two-party system." *Id.* at 366–67.

New Jersey's intermediate appellate court also recently upheld its anti-fusion law against a state constitutional challenge using the *Anderson-Burdick* test. *See In re Malinowski*, 332 A.3d 755. That court also declined to apply strict scrutiny, reasoning that fusion bans don't "treat[ ] . . . group[s] of voters differently" or "directly interfere[ ] with their ability to exercise their right to vote"—rather, they "limit[ ] what can be listed on the official ballot." *Id.* at 768. That is a "minimal burden" because "[a]ll voters remain free to vote for [their preferred] candidate" and any party may still "publicly endors[e] or support[ ]" the candidate of their choice. *Id.* Such laws "advance[ ] important election-regulatory interests," including "preventing ballot manipulation, political gamesmanship, voter confusion, and decreased voter choice,

maintaining voter confidence in party accountability, and maintaining the stability of the political system." *Id.* at 769.

C. Wisconsin's fusion ban likewise satisfies *Anderson-Burdick*.

Wisconsin's fusion voting restrictions are constitutional under the *Anderson-Burdick* test, too. For the same reasons as in *Timmons* and *Malinowski*, the burden imposed by Wisconsin's fusion restriction is "not severe," *Timmons*, 520 U.S. at 365, and even "minimal," *In re Malinowski*, 332 A.3d at 768. United Wisconsin (like any other political party) remains free to support any candidate, urge any candidate to be its standard-bearer, and spread its message anywhere it wants—aside from having an already-nominated candidate appear for a second time on state-printed ballots.

And, also like in *Timmons* and *Malinowski*, Wisconsin's restriction serves many "important regulatory interests," *Timmons*, 520 U.S. at 358 (citation omitted). Although none require "elaborate, empirical verification," *id.* at 364, the state's experts provide support for them all.

Avoiding risk of voter confusion. Multiple listings of the same candidate "could plausibly mislead or at least distract" the kind of "marginal or low-information voter for whom party labels operate as heuristics." (Atkinson-Tahk Report 46.) That is because "minor-party cues can be misunderstood." (*Id.*; *see also id.* at 40–41.) Plaintiffs say there is no evidence that fusion causes confusion which, aside from being irrelevant to rational basis review (*see* section II.D. *infra*), is inaccurate. (Atkinson-Tahk Report 19–21, 40–41, 46, 54, 64–65 (discussing confusion).) Moreover, "the proliferation of minor parties under fusion voting can lead to poor ballot design," as has happened in New York elections. (*Id.* at 46; *see also id.* at 19–20.)

Preventing sham parties. Without a fusion restriction, "major party candidates have a strong incentive to create ad-hoc 'Sham Parties.'" (*Id.* at 37.) Exactly that has happened in New York, with major party candidates also running on lines for parties with names like "Protect Animals" and "Tax Cut Now." (*Id.* at 18–21, 39.) Allowing candidates to "highlight a campaign slogan on the ballot" risks "a ballot cluttered" with such material, which exacerbates voter confusion concerns. (*Id.* at 37.) The state could instead try to prevent this problem by "erect[ing] high barriers to party formation," but that would "insulate incumbent minor parties from competition and make it difficult for genuine new movements to emerge." (*Id.*) Wisconsin's fusion restriction avoids this dilemma entirely.

Preventing cross-filing and "raiding." Removing Wisconsin's fusion restriction would reintroduce "cross-filing," whereby "candidates can compete in multiple parties' primaries" by "fil[ing] nomination papers for the primary elections of multiple political parties simultaneously." (*Id.* at 29.) History shows that this can "erode[ ] the integrity of political parties by allowing 'raiding' and 'hostile takeovers.'" (*Id.*) For instance, before California decided to ban fusion voting, Earl Warren and Richard Nixon once won the nominations of both major parties when running for Governor and U.S. House, respectively. (*Id.* at 30.) This risk of party capture is "even more acute for minor parties" due to their small electorates: a major party candidate "can mobilize a relatively small number of their own supporters to vote in the minor

party's primary" and thus "seize the minor party's nomination against the wishes of its actual membership." (*Id.*)[4]

Preventing sore losers. "[S]ore loser" laws "prevent a candidate who has been defeated in a primary election from subsequently appearing on the general election ballot for that same office in the same year." (*Id.* at 33.) They "ensur[e] that the results of a primary are definitive," in that they force candidates "to accept the primary outcome as a final determination of their eligibility for the general ballot." (*Id.*) This "promote[s] political stability, prevent voter confusion, and mitigate the 'spoiler effect' that occurs when multiple candidates from the same ideological faction compete in a general election." (*Id.*) Without Wisconsin's anti-fusion laws, candidates could "file nomination papers for a major party primary while *simultaneously* filing as an independent or as the nominee of a minor party, resulting in a chaotic new paradigm concerning candidates who lose primary elections" by allowing them to "'hedge' against rejection by the primary electorate." (*Id.* at 34–35.)

Avoiding polarization. Ironically, fusion voting could conceivably increase polarization. It could do so by "intensify[ing] policy-seeking leverage by ideologically distinctive minor parties," as shown by New York's experience, which would have the effect of "pulling major-party nominees toward poles" rather than to the center. (*Id.* at 47; *see also id.* at 17–18, 39–40, 43–44.)

[4] Cross-filing's "raiding" dynamic can be mitigated, but the solution has its own problems. New York uses the so-called "Wilson-Pakula" system, whereby "candidates not enrolled in a particular party [can] only run in a partisan primary upon securing a formal authorization . . . from the relevant party committee." (Atkinson-Tahk Report at 13–14.) This has both "centralize[d] power in the hands of party activists and leaders rather than the rank-and-file electorate" and "laid the groundwork for instances of political corruption." (*Id.* at 14; *see also id.* at 16–17.) Again, Wisconsin's anti-fusion laws avoid this dilemma. (*Id.* at 36–37.)

Maintaining party strength. Strong political parties "function as a public good," in that they can more easily "coordinate platforms, discipline officeholders, or assemble broad governing coalitions." (*Id.* at 46.) But fusion voting "risk[s] turning parties into fluid brands or transactional coalitions rather than coherent governing organizations." (*Id.* at 47.) This could "weaken[ ] parties' gatekeeping capacity and exacerbat[e] candidate-centered, polarized politics." (*Id.*)

D. Plaintiffs misunderstand rational basis review.

Although they do not address *Anderson-Burdick*, Plaintiffs nevertheless contend that Wisconsin's fusion ban fails rational basis review. (Doc. 24:36–39.) But Plaintiffs drastically overstate what the state must show to satisfy this standard.

No "evidence-based justification" is necessary at all (Doc. 24:36), since a court searches for "any reasonably conceivable state of facts . . . [that] could provide a rational basis for the classification," *In re Commitment of Alger*, 2015 WI 3, ¶ 50, 360 Wis. 2d 193, 858 N.W.2d 346 (citation omitted). The Legislature's enactment "may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), and courts need not evaluate any explicit statement of purpose or legislative history, *see State v. Radke*, 2003 WI 7, ¶ 27, 259 Wis. 2d 13, 657 N.W.2d 66. Further, once a court identifies some rational basis that would sustain the law, "the court must assume the legislature passed the act on that basis." *Blake v. Jossart*, 2016 WI 57, ¶ 32, 370 Wis. 2d 1, 884 N.W.2d 484 (citation omitted). The Legislature "need not have actually based its decision on the reason conceived by a reviewing court." *In re Commitment of Alger*, 360 Wis. 2d 193, ¶ 50.

A law flunks rational basis review only if it is "'patently arbitrary' and bears no rational relationship to a legitimate government interest." *Id.* ¶ 39 (citation omitted). So, even a "weak" interest that might be "contradicted" by some facts is enough. (Doc. 24:37.) And nothing forbids "*post hoc* . . . state interests" either. (Doc. 24:38); *see Metro. Milwaukee Ass'n of Com., Inc. v. City of Milwaukee*, 2011 WI App 45, ¶ 52, 332 Wis. 2d 459, 798 N.W.2d 287 ("[L]egislation survives [a] substantive due process challenge if the court can conceive of a rational basis for [it].").

The state interests identified above—all bolstered by expert testimony—clear the low bar of rationality. And even if Plaintiffs' entire challenge isn't foreclosed by *Runge*, *Swamp*, and *Timmons*, at least their rational basis argument has to be. Each case articulated multiple legitimate state interests that a fusion ban like Wisconsin's rationally serves. (*See supra* Arg. I., II.B.) It is safe to say that the U.S. Supreme Court, the Wisconsin Supreme Court, and the Seventh Circuit did not all reach irrational conclusions (nor can this Court conclude otherwise, at least given the binding precedent in *Runge*).

E. Wisconsin's ban would survive strict scrutiny anyway.

Assuming the *Anderson-Burdick* framework did trigger strict scrutiny, the fusion ban would still survive. Perhaps the law is not narrowly tailored and necessary to serve every state interest identified above, but it is the only way to accomplish one of them: avoiding the cross-filing dilemma.

Again, without a fusion ban, political parties could "raid[ ]" each other—a major party could essentially take over a minor party, or a minor party could tarnish

a major-party's brand. *See Swamp*, 950 F.2d at 386; (Atkinson-Tahk Report 29–33, 36–37). Wisconsin could avoid this problem by requiring candidates to secure approval from a party committee before seeking the party's nomination, but that centralized party-approval process creates serious corruption problems, as shown by New York's experience. "[P]reventing corruption" is a "compelling state interest." *See Gard v. Wis. State Elections Bd.*, 156 Wis. 2d 28, 46, 456 N.W.2d 809 (1990); (Atkinson-Tahk Report 13–17, 36–37). Or Wisconsin could end its long tradition of open primaries, which since 1903 (as long as the state has had a primary system) has allowed voters to participate in the primary of their choice. *See* 1903 Wis. Laws ch. 451; *Democratic Party of U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 121 (1981) (allowing that Wisconsin's "open primary serves compelling state interest by encouraging voter participation"); (Atkinson-Tahk Report 36–37).

Those are three bad options: allowing raiding, instituting a corruption-prone approval process, or ending open primaries. The only way to avoid having to choose among them is a fusion ban—the very definition of a narrowly tailored regulation necessary to serve a compelling state interest.

III. None of Plaintiffs' challenges to Wisconsin's anti-fusion laws succeed.

Rather than grapple with *Anderson-Burdick*, Plaintiffs offer a grab-bag of constitutional theories: that Wisconsin's anti-fusion laws violate the right to free government, equal protection, and freedom of association. None succeed, primarily because none trigger heightened scrutiny. Rational basis is all that applies here, and anti-fusion laws satisfy it, as explained above.

A. Wisconsin's anti-fusion statutes comply with the "free government" clause.

Plaintiffs' first theory under Wis. Const. art. I, § 22 ("section 22"), fails because this provision doesn't create judicially enforceable rights and wouldn't trigger strict scrutiny even if it did.

1. Section 22 doesn't create judicially enforceable rights.

Plaintiffs first argue that section 22 creates judicially enforceable rights, (Doc. 24:14–17), but they do not cite a single case recognizing an independent "free government" claim resting solely on that provision.

Most of the cases they cite were decided over a hundred years ago and mentioned section 22 in an offhand manner, if at all. One, *State v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098, 1099 (1902), does not mention section 22 a single time when discussing the Wisconsin Constitution's "declared purpose[s]." (Doc. 24:15–16 (citation omitted).) Similarly, the case synopsis of *State v. Levitan*, 190 Wis. 646, 210 N.W. 111 (1926), mentions a claim resting on section 22 (along with the Fourteenth Amendment and article I, § 1), but section 22 never appears in the decision itself.

Plaintiffs' other cases briefly mention section 22 in tandem with other constitutional provisions that are plainly enforceable, making it difficult to tease out section 22's independent force (if any). *State v. Redmon*, 134 Wis. 89, 114 N.W. 137, 138 (1907), referenced article I, § 1, which contains the Wisconsin Constitution's due process and equal protection guarantees, before citing section 22. The same goes for *Ekern v. McGovern*, 154 Wis. 157, 142 N.W. 595, 619 (1913), which also tossed in a quick mention of section 22 while analyzing a due process claim. So too in *Jacobs v. Major*, 139 Wis. 2d 492, 509, 407 N.W.2d 832 (1987) (citation omitted), which, while

analyzing a free speech claim, repeated in one sentence an offhand statement by a 1906 case that section 22 is an "'implied inhibition' against governmental action." In turn, that 1906 case, *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 107 N.W. 500, 518 (1906), also listed section 22 along with article I, § 1, and the Fourteenth Amendment as supporting a due process claim.[5]

These cases thus suggest only that section 22 may bolster ordinary due process claims brought under other constitutional provisions, not that it independently limits government action. In other words, Plaintiffs could bring a traditional due process claim, but they haven't shown that section 22 adds anything new to the mix.

2. Even if section 22, were judicially enforceable, it does not trigger strict scrutiny.

The next step of Plaintiffs' theory is also incorrect: that laws implicating section 22 trigger strict scrutiny. (Doc. 24:17–19.) Even if the provision is independently enforceable, it would impose only a rational basis-type standard.

Take, for instance, *Redmon*. The test applied there doesn't resemble strict scrutiny at all: "[A]ll legislative regulations of human affairs interfering with personal liberty or other private rights, to be legitimate, tested by constitutional limitations, must be reasonably for the public benefit." 114 N.W. at 140. Or consider *Chittenden*, which used a similar formulation: the police power "extends to and

[5] *See also Peppies Courtesy Cab Co. v. City of Kenosha*, 165 Wis. 2d 397, 398–99, 475 N.W.2d 156 (1991) (referencing section 22 as protecting "inherent rights of due process and liberty interests," alongside other state and federal constitutional provisions); *Chi. & N.W. Ry. Co. v. La Follette*, 43 Wis. 2d 631, 642, 169 N.W.2d 441 (1969) ("due process and equal protection challenge" rested on several state and federal constitutional provisions, including section 22); *Graney v. Bd. of Regents of Univ. of Wis. Sys.*, 92 Wis. 2d 745, 751, 286 N.W.2d 138 (Ct. App. 1979) (same, for due process challenge).

permits legislation 'regulating' reasonably 'all matters appertaining to the life, limbs, health, comfort, good morals, peace and safety of society'; in short, to all which promotes the public welfare." 107 N.W. at 517 (citation omitted). Other cases that seem to invoke section 22 use similar tests. *See, e.g.*, *Barth v. Vill. of Shorewood*, 229 Wis. 151, 282 N.W. 89, 94 (1938) (applying "arbitrary and unreasonable classification" test).

These formulations are practically identical to the rational basis test for a substantive due process challenge: "Substantive due process rights 'protect against state action that is arbitrary, wrong, or oppressive,' by 'forbid[ding] a government from exercising power without any reasonable justification in the service of a legitimate governmental objective.'" *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶ 35, 366 Wis. 2d 1, 878 N.W.2d 109 (alteration in original) (citations omitted).

Plaintiffs acknowledge the reasonableness-type tests in cases like *Chittenden* (Doc. 24:18), but then, without any meaningful analysis, conclude that those tests somehow "anticipated both key elements of the strict-scrutiny standard," (Doc. 24:18). They seem to mean that because *Kreutzberg* (which, again, never mentions section 22) used the word "necessary" in the phrase "reasonably necessary," that somehow mimics the strict scrutiny test. But the qualifier "reasonably" relaxes the test, which otherwise mentions nothing like the narrow-tailoring requirement imposed by strict scrutiny.

Plaintiffs' theory proves far too much: it would seemingly require all regulatory statutes to satisfy strict scrutiny. *Kreutzberg* delivered its "reasonably necessary" formulation while discussing "the function of government to restrain liberty under

the police power." 90 N.W. at 1101. So, if *Kreutzberg*'s formulation is indeed strict scrutiny, then every single police power statute—that is, "all regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety"—would have to satisfy strict scrutiny. *Id.* at 1102. That cannot be correct, given that rational basis review applies to statutes that "neither implicate[ ] a fundamental right nor discriminate[ ] against a suspect class." *In re Mental Commitment of Christopher S.*, 366 Wis. 2d 1, ¶ 36 (citation omitted).[6]

While Plaintiffs might respond they seek only strict scrutiny for statutes that affect "fundamental principles"—a category that mimics strict-scrutiny-triggering "fundamental rights"—it then would be unclear what work section 22 is doing independent from a traditional substantive due process claim. Moreover, the cases they cite do not limit section 22 as such; those cases discuss section 22 as part of broad limitations on the police power, and so it is hard to see how those authorities would support a cabined version of Plaintiffs' theory that extends only to "fundamental principles" rather than all police-power statutes.

3. Fusion voting isn't a fundamental right or principle that could trigger section 22 anyway.

Nor can fusion voting be conceived of as a "fundamental right" (or "fundamental principle") that might trigger strict scrutiny under section 22. (Doc. 24:19–21.) The fundamental problem is that Plaintiffs (and their experts)

[6] Plaintiffs' broad reading of *Kreutzberg* would even threaten to resurrect the U.S. Supreme Court's discredited *Lochner*-era jurisprudence. *Cf. Porter*, 382 Wis. 2d 697, ¶¶ 61–71 (Bradley, R.G., J., dissenting) (discussing how *Kreutzberg* supports a broad view of "individual economic liberty").

"elid[e] the difference between cross-party coalition-building generally and the specific institution of the fusion ballot." (Atkinson-Tahk Report 55.)

Perhaps Plaintiffs would have a point if they could show that the *fusion ballot* was a fundamental principle of Wisconsin government, but they cannot. This case is not about a general "coalitional principle" that "encompassed alliances between political parties" in "many different forms." (Doc. 24:19 (citation omitted).) Rather, it is about the specific ballot-administration practice of prohibiting double-printing of candidates. That specific practice was not even possible between Wisconsin's founding and 1889, when individual parties had free rein to design and print their own ballots. (Doc. 24:21–22; Atkinson-Tahk Report 7–12, 56–57.) Only in 1889, when Wisconsin first adopted the Australian ballot—an official state-printed ballot system—did the issue of double-printing candidates on a single ballot even arise.[7] (*Id.* at 57.) And then it took Wisconsin a mere seven years to end its fusion-ballot experiment (Doc. 24:22), a decision "defended on grounds of ballot clarity, voter comprehension, and skepticism toward multi-label candidacies," (Atkinson-Tahk Report 62).

In short, a seven-year experiment in ballot design almost fifty years after the state's founding isn't a "fundamental principle" of Wisconsin government.

* * *

In the end, it matters little whether section 22 creates enforceable rights (it doesn't) or whether it triggers strict scrutiny (it doesn't). Either way, Wisconsin's

[7] Indeed, even the *Runge* challengers emphasized how their dispute with the fusion ban only arose due to the introduction of the Australian ballot. (Lodahl Aff. Ex. B:29, 32.)

fusion ban survives either rational basis review or strict scrutiny, for the same reasons it satisfies the traditional *Anderson-Burdick* test.

B. Wisconsin's anti-fusion statutes comply with equal protection guarantees.

Plaintiffs' equal protection claim likewise fails. First, Plaintiffs fail to establish the threshold element of an equal protection claim: a statutory classification that treats one group differently from a similarly situated group. Wisconsin's anti-fusion statutes apply equally to all candidates nominated for office and to all political parties. Second, Wisconsin applies the same equal protection analysis as the federal courts, and under this standard, rational basis review applies. Wisconsin's anti-fusion statutes survive rational basis review, as explained above. Plaintiffs urge this Court to instead apply the law of a different jurisdiction—New Jersey—but that is not something this Court is empowered to do. Third, Plaintiffs' partisan animus theory fails on both the law and the facts.

1. Wisconsin's anti-fusion statutes apply to all political parties equally, and so no equal protection claim can arise.

In evaluating an equal protection claim, courts first ask whether, through the challenged law, the government has "created a distinct classification of citizens" and then, if so, whether the challenged law "treats this class significantly different from all others similarly situated." *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 23, 332 Wis. 2d 85, 796 N.W.2d717.

Plaintiffs' claim fails at this first step. Wisconsin's anti-fusion statutes are facially neutral and do not discriminate between major and minor parties—all are equally prohibited from nominating another party's candidate. There is no "distinct

classification" whatsoever, let alone two classes that are treated "significantly different." *Id.* Indeed, the facial neutrality of anti-fusion laws has doomed recent equal protection challenges in two other states.

In *Working Families Party*, the Pennsylvania high court reasoned that because "political parties and political bodies are treated equally," "anti-fusion statutes are facially neutral" and thus comply with equal protection. 209 A.3d at 282 (citation omitted). The court distinguished *Reform Party of Allegheny County v. Allegheny County Department of Elections*, 174 F.3d 305 (3d Cir. 1999), on which Plaintiffs rely here, because the statute there "allowed the major parties to cross-nominate but . . . disallowed minor parties from doing the same." *Working Fams. Party*, 209 A.3d at 283 (quoting *Reform Party of Allegheny Cnty.*, 174 F.3d at 315). That kind of discrimination is exactly what is missing here.

Other state courts agree. In New Jersey, *In re Malinowski* observed that such laws "appl[y] to all candidates nominated for office, from 'major and minor[ity] parties alike.'" 332 A.3d at 768 (alteration in original) (citation omitted). And state courts adjudicating early constitutional challenges to anti-fusion laws similarly rejected equal protection arguments. *See Bode*, 45 N.E. at 196; *see also Todd*, 64 N.W. at 498 (law "is general, and aims at no political party").

Perhaps recognizing the problem posed by the law's facial neutrality, Plaintiffs assert that their equal protection claim is grounded instead in "discriminatory intent and burden." (Doc. 24:26.) But they cite no Wisconsin case invalidating a law on equal protection grounds based on discriminatory intent or burden when the law applies identically to the regulated population such that there is no differential treatment.

And a disparate impact theory would make little sense here anyway, given that prominent minor parties like the Green Party do not even support Plaintiffs' proposed reform. (Atkinson-Tahk Report 16.[8]) In other words, because not all minor parties perceive anti-fusion laws as a burden, it is hard to envision how they could be uniformly harmed in a way that might conceivably support a disparate impact theory.

2. Plaintiffs' equal protection claim also fails under rational basis review, the governing legal standard.

Plaintiffs' equal protection claim also fails because, even if it could clear the differential treatment hurdle, rational basis review still applies. Wisconsin uses the same tiered equal protection analysis as federal courts, not New Jersey's balancing test. And, as explained above and in *Runge*, *Swamp*, and *Timmons*, Wisconsin's anti-fusion statutes easily pass rational basis review.

a. Wisconsin's tiered equal protection analysis is the same as the federal standard.

"Article I, Section 1 [of the Wisconsin Constitution] has been interpreted as providing the same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution." *Mayo*, 383 Wis. 2d 1, ¶ 35. So, the equal protection clauses of the state and federal constitutions are "substantial equivalents" of one another. *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90 (citation omitted).

[8] In fact, the Green Party has described fusion voting as "ballot lines-for-hire used to entrench the two-party system and provide political cover for the Democratic and Republican parties" through "patronage machines that masquerade as small parties" that make it "all but impossible for legitimate, independent third-parties like the Greens to compete." The Green Party of the United States, *Green Party Agrees it is Time to Get Rid of Electoral Fusion*, https://www.gp.org/time_to_get_rid_of_electoral_fusion (last visited June 15, 2026).

When evaluating an equal protection claim, the court first identifies the appropriate level of scrutiny. *A.M.B. v. Cir. Ct. of Ashland Cnty.*, 2024 WI 18, ¶ 12, 411 Wis. 2d 389, 5 N.W.3d 238. If the statute implicates a fundamental right or disadvantages a suspect class, strict scrutiny generally applies; if not, rational basis review applies. *Id.* ¶¶ 12–13. As noted above, Wisconsin applies this same tiered approach in the election law context: regulations that impose "severe" burdens on electoral rights warrant strict scrutiny, but if the burdens are non-severe, the legislation is "presumed valid" and the court "will apply a rational basis level of judicial scrutiny." *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶ 22.

Plaintiffs acknowledge that this is the law in Wisconsin. (Doc. 24:33.) Nonetheless, they urge this Court to instead apply "New Jersey's equal protection balancing test." (Doc. 24:27–33.) But this Court is bound by Wisconsin precedent.[9]

b. Rational basis review applies, and Wisconsin's anti-fusion statutes pass rational basis review.

Alternatively, Plaintiffs argue that Wisconsin's anti-fusion statutes fail under Wisconsin's existing equal protection framework, which they argue demands strict scrutiny. (Doc. 24:33.) They are wrong. Even assuming their disparate impact theory could support an equal protection claim (again, these are facially neutral statutes), rational basis review would still apply because anti-fusion statutes do not severely burden fundamental rights or discriminate against a suspect

[9] Plaintiffs cite Justice Dallet's concurrence in *A.M.B.* as support for their proposed balancing test, but that is not a majority opinion of the court, and in any event, Justice Dallet's concurrence does not suggest a different standard of review for equal protection claims; rather, it urges litigants and the court to read Wis. Const. art 1, § 1 as providing a broader range of substantive protections than the Fourteenth Amendment. (Doc. 24:27 (citing *A.M.B.*, 411 Wis. 2d 389, ¶¶ 50, 57 (Dallet, J., concurring)).)

class. *See A.M.B.*, 411 Wis. 2d 389, ¶¶ 12–13; *Milwaukee Branch of NAACP*, 357 Wis. 2d 469, ¶ 22. Plaintiffs contend that strict scrutiny applies "because history shows the ban was enacted as a form of invidious political discrimination and because it places a severe burden on freedom to participate in the political process." (Doc. 24:33.) Neither is true.

"Invidious discrimination." Plaintiffs' threshold problem here is that, even accepting their unsupported disparate impact theory, they fail to identify a suspect class that could trigger strict scrutiny. Instead, Plaintiffs contend that Wisconsin's anti-fusion laws were supposedly "enacted by politicians who deliberately sought to protect or advance narrow partisan interests" by targeting "minor parties." (Doc. 24:34, 35.) This argument has both legal and factual defects.

Legally, Plaintiffs cite no cases holding that laws enacted with "narrow partisan interests" in mind trigger strict scrutiny, a proposition that would obviously threaten many laws enacted by a (necessarily) partisan state Legislature. Nor do Plaintiffs cite any cases holding that even intentional efforts to disadvantage minor parties can trigger strict scrutiny. *Cf. Colo. Republican Party v. Griswold*, 715 F. Supp. 3d 1339, 1360 (D. Colo. 2024) (rejecting this proposition because "[p]olitical parties are not 'an inherently suspect class' under the Equal Protection Clause" (citation omitted)); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 414 (W.D. Pa. 2020) ("Political parties are not . . . a suspect class."). To the contrary, states can enact regulations that "favor the traditional two-party system." *Timmons*, 520 U.S. at 367. As for *Williams v. Rhodes*, 393 U.S. 23, 34 (1968), that case found "invidious discrimination" after considering

the challenged "laws taken as a whole," not just why they were enacted. And *Williams* is light years away from this case, since, through strict ballot access rules, Ohio had "made it virtually impossible" for minor parties to be placed on the ballot. *Id.* at 24–25. Plaintiffs make no such allegation here.

Factually, Plaintiffs' equal protection theory—discrimination against "minor parties" (Doc. 24:26)—doesn't even match the alleged intent behind Wisconsin's anti-fusion laws. Even in Plaintiffs' telling, the law primarily reflected a contest between the Republican and Democratic parties, major parties both. (Doc. 24:34–36.) Major parties aim to disadvantage each other all the time; that can hardly justify strict scrutiny. Nor do Plaintiffs even identify clear, concrete evidence of pure partisan intent. Plaintiffs' expert report uses an "inferential leap" to support their theory of partisan motive, but the circumstantial evidence they rely upon "does not even favor" that inference. (Atkinson-Tahk Report 62.) At most, the evidence shows that the Legislature was acting "from a mix of institutional, ideological, and political considerations" that, at minimum, also included "ballot clarity, voter comprehension, and skepticism toward multi-label candidacies." (*Id.* at 58–62.)[10]

"Severe burden." The right that Plaintiffs claim is severely burdened—the so-called "freedom to participate in the political process" (Doc. 24:33)—is not a recognized right under the state or federal constitutions. Perhaps Plaintiffs mean

[10] That "mix of institutional, ideological, and political considerations" motivating the 1897 Wisconsin Legislature would not trigger strict scrutiny. (Atkinson-Tahk Report 62.) But to the extent it is necessary to precisely determine the Legislature's intent (and it isn't, both because it is irrelevant and anti-fusion laws survive strict scrutiny anyway), the expert dispute would preclude summary judgment on this issue. *Cf. Mettler ex rel. Burnett v. Nellis*, 2005 WI App 73, ¶ 11, 280 Wis. 2d 753, 695 N.W.2d 861.

that Wisconsin's anti-fusion statutes burden some combination of the right to vote and the rights of free speech and association under Wis. Const. art. I, §§ 3 and 4, rights which Plaintiffs acknowledge are analyzed identically to the corresponding federal constitutional rights under the First and Fourteenth Amendments. (Doc. 24:40 (citing *Lawson v. Hous. Auth. of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955)). But as shown above, this question has already been resolved by *Runge*, *Swamp*, and *Timmons*: any burdens on the rights to free speech and association posed by anti-fusion laws are not severe and justified by weighty state interests.

Plaintiffs' brief contains many sweeping assertions about the effect of Wisconsin's fusion ban that are unsupported by their expert reports or any other cited authority. (*See*, *e.g.*, Doc. 24:26, 38 (ban "disadvantages everyone who supports any other political group" beyond the two major parties; "foreclose[s]" minor parties from being able to "participate meaningfully in the electoral process;" and strips minor parties "of the only mechanism that has historically allowed them to translate support into electoral influence").) But even if Wisconsin's fusion ban makes it somewhat more difficult for prospective minor parties like United Wisconsin to influence elections, that doesn't make it unconstitutional. As explained in *Timmons*:

> Many features of our political system—*e.g.,* single-member districts, "first past the post" elections, and the high costs of campaigning—make it difficult for third parties to succeed in American politics. But the Constitution does not require States to permit fusion any more than it requires them to move to proportional-representation elections or public financing of campaigns.

520 U.S. at 362 (citation omitted).

Plaintiffs' equal protection claim never gets off the ground because Wisconsin's anti-fusion laws treat everyone equally. And even if Plaintiffs' disparate theory had

legs, they still fail to show that strict scrutiny applies—and Wisconsin's anti-fusion statutes easily pass rational basis review for the reasons explained above.

C. Wisconsin's anti-fusion statutes are not unconstitutional based on freedom of speech or association rights.

Plaintiffs' final claim is that Wisconsin's anti-fusion statutes violate the state constitution's guarantee of free speech and association. *See* Wis. Const. art. I, §§ 3–4. This claim fails for two main reasons.

First, the claim is foreclosed by binding precedent. The Wisconsin Supreme Court's decision in *Runge*, already considered and rejected a speech and associational rights challenge under the state constitution. (*See supra* Arg. I.) And so did *Swamp* and *Timmons* under the federal constitution. As Plaintiffs acknowledge, "the Wisconsin Supreme Court has taken a lockstep approach" with federal law when analyzing free speech and political associational rights. (Doc. 24:40 (citing *Lawson*, 270 Wis. at 274)); *see also Cnty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 388, 588 N.W.2d 236 (1999) ("Wisconsin courts consistently have held that Article I, § 3 of the Wisconsin Constitution guarantees the same freedom of speech rights as the First Amendment of the United States Constitution."). For this reason, Wisconsin courts rely on federal constitutional case law when analyzing speech and association claims under the Wisconsin Constitution. *See*, *e.g.*, *Madison Tchrs., Inc. v. Walker*, 2014 WI 99, ¶¶ 23 n.9, 25, 358 Wis. 2d 1, 851 N.W.2d 337. So, *Swamp* and *Timmons* should control here too.

Second, Plaintiffs urge this Court to apply strict scrutiny, but several traditional free speech doctrines forbid its application here. For one, this case involves government speech on a ballot, not private speech that triggers free speech

protections at all. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (First Amendment "does not regulate government speech"); *Colorado v. Griswold*, 99 F.4th 1234, 1236 (10th Cir. 2024) (ballot-titling measure involved government speech). And even if characterized as private speech, the ballot—state-printed government property—isn't a public forum open for "general public discourse and debate;" rather, the ballot is a nonpublic forum that can be governed by "reasonable" restrictions that don't "discriminate on the basis of viewpoint." *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 864 (7th Cir. 2008) (citation omitted); *see Oettle v. Guthrie*, 189 N.E.3d 22, 27 (Ill. App. Ct. 2020) (ballot is a nonpublic forum). Anti-fusion laws survive this lenient standard, as discussed above.

Plaintiffs argue that this Court should apply strict scrutiny for three reasons, but none are persuasive.

First, Plaintiffs argue that this Court should make a special exception for "the specific context of fusion voting" and apply "the highest degree of scrutiny." (Doc. 24:40–42.) They argue that this approach is warranted because of Wisconsin's early political history and because, in their view, the state constitution protects greater free speech and associational rights. (Doc. 24:40–42.) Plaintiffs' evidence does not support their historical characterization (*see supra* Arg. III.A.3.), but the argument fails anyway because the Wisconsin Supreme Court has already determined that the state and federal guarantees of free speech and association are "coextensive," *Madison Tchrs., Inc.*, 358 Wis. 2d 1, ¶ 23 n.9.

Second, Plaintiffs argue that strict scrutiny should apply because Wisconsin's anti-fusion statutes are a content-based restriction on speech. (Doc. 24:43–45.)

Plaintiffs are incorrect. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed, or the idea or message expressed." *Int. of C. G.*, 2021 WI App 11, ¶ 34, 396 Wis. 2d 105, 955 N.W.2d 443 (citing *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)). In other words, a content-based restriction is one that regulates speech "based on the message it conveys." *Kindschy v. Aish*, 2024 WI 27, ¶ 11, 412 Wis. 2d 319, 8 N.W.3d 1. Here, Wisconsin's anti-fusion statutes do not prevent a candidate from appearing on the ballot because of *the message* she or her nominating party seeks to convey; the restriction is based on whether the candidate has already been nominated by another party. This is a content-neutral regulation because it is "justified without reference to the content of the regulated speech." *State v. Jackson*, 2020 WI App 4, ¶ 6 n.4, 390 Wis. 2d 402, 938 N.W.2d 639 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). And even if anti-fusion laws were content-based, they are viewpoint-neutral, which often triggers only intermediate scrutiny. *Cf. Vidal v. Elster*, 602 U.S. 286, 295 (2024). Wisconsin's anti-fusion laws survive intermediate scrutiny for the same basic reasons that they survive rational basis review. *See Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 495–96 (2025) (laws survive intermediate scrutiny if they "advance[ ] important governmental interests unrelated to the suppression of free speech and do[ ] not burden substantially more speech than necessary to further those interests" (citation omitted)).

Third, Plaintiffs argue that this case is distinguishable from *Timmons* because that case involved "no developed historical or empirical evidence regarding fusion's operation or effects," and the court "did not consider whether the law had a

discriminatory purpose." (Doc. 24:47.) Plaintiffs argue that their evidence shows that the fusion ban "has proven" to be a regulation that "completely insulate[s] the two-party system" from competition—a type of regulation that *Timmons* court would have invalidated. (Doc. 24:47 n.21 (quoting *Timmons*, 520 U.S. at 367).) Plaintiffs' evidence does not establish this proposition, and in any event, they do not explain why evidence of mixed motive would change the court's calculus on whether the law unjustifiably burdens associational rights. Moreover, Plaintiffs forget that their speech rights are greatly diminished when they want to speak on the ballot, a state-sponsored document. *Timmons* makes that point clear: "[b]allots serve primarily to elect candidates, not as forums for political expression." 520 U.S. at 363.

IV. Fusion voting must be implemented by the Legislature, if at all; not through judicial order.

Wisconsin Stat. §§ 8.03(1) and 8.15(7) serve as critical infrastructure in Wisconsin's Election Code, affecting a multitude of election administration functions. Invalidating these statutes as Plaintiffs request would create gaps in Wisconsin's statutory and regulatory election law framework that would then need to be filled by legislation, rulemaking, or policymaking. Fusion voting would not even be able to immediately commence. This practical reality further indicates that reinstating fusion voting is a matter for the Legislature, not the judiciary.

The following outlines some of the immediate questions that would have to be resolved if Wis. Stat. §§ 8.03(1) and 8.15(7) are enjoined.

Aggregated versus disaggregated fusion voting. The difference between aggregated and disaggregated fusion voting is how candidate names and parties are arranged on the ballot. (Atkinson-Tahk Report 5–6; Kehoe Decl. ¶ 4.) In aggregated

fusion voting, the ballot would look largely the same as it does now, but each candidate could have more than one party printed below their name. (*Id.*) In disaggregated fusion voting, each candidate could appear on more than one candidate line per office, one for each party that they are representing. (*Id.*) This means that the same candidate would appear multiple times on the ballot. Existing Wisconsin law does not specify how, if a candidate is nominated by multiple parties, those multiple nominations should be represented on a ballot.

It is unclear whether the Commission has the authority to choose between an aggregated and disaggregated ballot arrangement without input from the Legislature.[11] Even if it has the requisite authority, the choice between aggregated and disaggregated ballot arrangements still involves significant policy trade-offs that are better left to elected representatives. Most prominently, selecting disaggregated fusion would "maximize[ ] ballot clutter" and thereby increase confusion risks, but instead selecting aggregated fusion would "obscure[ ] the number of votes for the minor party" and thereby eliminate most of the practical fusion benefits that Plaintiffs hope to obtain. (Atkinson-Tahk Report 36, 48–49.) This is a critical point: even eliminating Wisconsin's anti-fusion statutes would not guarantee that Wisconsin will use disaggregated fusion voting, which is the only fusion method that would benefit minor parties in the way Plaintiffs foresee.

[11] The Commission has the authority to prescribe and revise all necessary ballot forms to "harmonize with legislation and the current official status of the political parties whenever necessary" under Wis. Stat. § 7.08(1)(a), but it is unclear whether this provision would empower it to choose between an aggregated and disaggregated ballot arrangement. If the Court invalidates Wis. Stat. §§ 8.03(1) and 8.15(7), this question (and others) regarding the scope of the Commission's authority would likely need to be resolved in a remedial phase.

Ballot status issues. In Wisconsin, if a partisan candidate receives at least one percent of the total vote for any office in a statewide election, their party receives ballot status. Wis. Stat. § 5.62(1)(b)1. That grants the party two important privileges: (1) it can participate in the August partisan primary; and (2) it can nominate presidential and vice-presidential candidates directly at a nominating convention, replacing the requirement for those candidates to circulate and file nomination papers. *Id.*; *see also* Wis. Stat. § 8.17(7).

If Wisconsin adopted an aggregated fusion ballot style after the invalidation of its anti-fusion laws, an immediate question would arise that existing law does not answer. Namely, if one candidate is nominated by two parties, how are the two parties credited with the candidate's single vote total for ballot status purposes? That is, if Candidate A is nominated by Party 1 and Party 2, is listed only once on aggregated-fusion-style ballot, and receives 23% of the vote, which party receives which credit for which share of that 23%?[12] The Commission likely lacks the authority to decide this question without new legislation.

Nomination Papers. If Wis. Stat. §§ 8.03(1) and 8.15(7) were invalidated, current law would not answer whether candidates could list more than one party on one set of nomination papers (meaning they only circulate and file once), or whether they must circulate and file one set of nomination papers for each party nominating

[12] If Wisconsin were to instead adopt a disaggregated ballot style, that could significantly increase the number of parties that meet ballot status thresholds under current law. (Kehoe Decl. ¶ 16.) This result seems at odds with the Legislature's demanding standards limiting the number of parties eligible for ballot status. Wis. Stat. § 5.62(1)(b)1.

them. Again, it is unclear whether the Commission has the authority to decide whether one or multiple sets of nomination papers are required without legislation.

Overvoting. An "overvoted" ballot is one in which a voter has voted for more than the maximum number of selections allowed in one contest. (Kehoe Decl. ¶ 20.) Disaggregated fusion voting would likely increase the risk of overvoted ballots, since voters would be presented with the same candidate on multiple lines and could mistakenly believe that they must (or can) select that same candidate on multiple lines. (*Id.*) Ordinarily, a ballot with overvotes is considered invalid and therefore not counted. (*Id.* ¶ 21.) It is unclear whether, as a matter of law, a disaggregated fusion ballot on which the same candidate is selected multiple times would be considered an invalid "overvote." If so, new legislation would be required to create an exception that allows election officials to count such ballots. If not, that would still leave the Commission with difficult choices to make (again, assuming it could make them without new legislation). The Commission would face the same kind of ballot status questions presented above: if the same candidate is selected under multiple party lines, which party receives credit for the vote for ballot status purposes? And if only a single selection on the ballot should be credited, which one?

In sum, invalidating Wisconsin's anti-fusion laws would leave several critical questions unanswered before fusion voting could be implemented. Even if the Commission could answer them all without new legislation (an uncertain prospect), it would need to agree on each solution via majority vote and then implement that choice through formal rulemaking or by issuing guidance. (Kehoe Decl. ¶¶ 4, 8; *see also* Wis. Stat. § 5.05(1e) ("Any action by the commission . . . requires the affirmative

vote of at least two-thirds of the members."). If the six-person Commission could not reach a majority solution, key questions would remain unanswered. Plaintiffs fail to grapple with the problems that would ensue if they succeeded in invalidating the anti-fusion statutes but no one fills in these regulatory gaps before the next election.

CONCLUSION

The Court should deny Plaintiffs' motion for summary judgment and grant summary judgment to Defendant.

Dated this 15th day of June 2026.

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Defendant's Combined Brief in Support of Motion for Summary Judgment and in Response to Plaintiffs' Motion for Summary Judgment with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of June 2026.

Electronically signed by:

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