

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

UNITED WISCONSIN, et al.,
Plaintiffs,

v.

Case No. 2025-CV-1438

WISCONSIN ELECTIONS COMMISSION,
Defendant.

**AMICI CURIAE BRIEF OF PROFESSORS SETH MASKET, NOLAN MCCARTY,
AND HANS NOEL**

The prohibition on fusion voting directly implicates the broad rights of free association and expression guaranteed by the Wisconsin Constitution, particularly with respect to political parties. Amici are distinguished scholars in the academic field of political science and are familiar with the function and role of political parties in American society. Their credentials are set forth on Exhibit A. Amici hope the Court finds this brief helpful when considering the function and value of political parties in the democratic process.

“Fusion voting” is a practice in which a candidate for office is nominated by more than one political party, often at least one major party (i.e., the Democratic Party or Republican Party) as well as a minor party (i.e., not part of the duopoly). As a supplement to Plaintiffs’ thorough analysis in their opening brief, Amici provide the Court with additional information regarding political parties and fusion voting.

The Court should avoid a narrow, candidate-centric analysis. Individuals engage in political association and expression primarily through their relationships with political parties rather than candidates. For this reason, the Court should employ a more comprehensive analysis that considers party-centric concerns. In such an analysis, the rights of association and expression guaranteed by the Wisconsin Constitution are incompatible with a prohibition on fusion voting. Such a prohibition impermissibly burdens the associational and expressive rights of political parties as well as their individual members and nominees. Further, these prohibitions cannot be justified by analogy to politically neutral restrictions that are substantively distinct.

**AN UNDERSTANDING OF POLITICAL PARTIES PROVIDES NECESSARY
CONTEXT FOR CONSIDERING HOW FUSION VOTING AFFECTS
CONSTITUTIONAL RIGHTS**

As described by Plaintiffs in their opening summary judgment brief, Wisconsin's Constitution provides broad protections for associational and expressive rights. *See* Wis. Const. art. I, §§ 1, 3, 4, 22. These guarantees can provide protections even broader than those provided by the U.S. Constitution. *See State v. Knapp*, 2005 WI 127, ¶¶ 57, 59, 285 Wis. 2d 86, 700 N.W.2d 899. Analysis of these rights in the context of fusion voting includes considering how political parties function in our democracy.¹

Political parties are critical institutions that serve unique and valuable roles in our democratic system. Thus, this Court should consider the function and importance of political parties themselves rather than limit its analysis only to the rights of individual

¹ Amici argue that this case is not foreclosed by *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898). *Runge* addressed the meaning of the fusion-voting prohibition statute itself and whether it violated Wis. Const. art. III, § 3, which provided at that time that all votes shall be by ballot. *Runge* did not hold, suggest, or even discuss whether the statute violated constitutional rights of association or free speech, whether of individuals or political party entities.

voters in a candidate-centric framework. Party-centric concerns include (1) the rights and interests of political parties themselves, and (2) the rights of individuals to associate with a party of their choice rather than a particular candidate. In practical reality, the keystone features of our democratic system rely on party association.

Political parties are essential for a healthy and responsive democracy

Political parties are so central to our democracy that modern democracy is “unthinkable” without them. E.E. Schattschneider, *Party Government* 1 (1942). Although political parties are not explicitly required by the United States or Wisconsin constitutions, they emerge naturally out of the political environment created by those documents. John H. Aldrich, *Why Parties? A Second Look* 3-26 (2d ed. 2011).

Political parties shape the political landscape. They organize legislatures, select candidates, and mobilize voters. Political institutions at odds with political parties tend to fail. Seth Masket & Hans Noel, *Political Parties* (2021); *see also* Seth Masket & Hans Noel, *Prioritizing Parties*, in MORE THAN RED AND BLUE: POLITICAL PARTIES AND AMERICAN DEMOCRACY 164-173 (Am. Pol. Sci. Ass’n & Protect Democracy 2023).

How political parties assume such importance is explained by the “responsible party” theory of government. This model is based on the difficulty voters have in monitoring individual politicians. It is more practicable for voters to evaluate the performance of parties instead. A voter can easily assign parties credit or blame according to how the voter feels about the state of things. *See* Am. Pol. Sci. Ass’n, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, AM. POL. SCI. REV., Sept. 1950, at 37-84.

In this commonsense model, party labels and affiliations convey a tremendous amount of information to voters without requiring research of individual candidates. “To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986). Where fusion voting is permitted, party labels convey even greater information because a fusion candidate is affiliated not only with their major party but also with a minor party that may identify them as a certain type of Democrat or Republican.

As Justice Scalia explained, a “political party’s expressive mission” is “principally to promote the election of candidates who will implement [the party’s] views. . . . That is achieved in large part by marking candidates with the party’s seal of approval,” given that party labels are “a central consideration for most voters.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 463-64 (2008) (Scalia, J., dissenting).

Thus, this case should not be assessed exclusively in the context of individual voters and candidates. Political association and expression are exercised primarily with respect to parties, not candidates. To the extent defendants and certain caselaw argue that these rights are not burdened because individual voters may still vote for the specific candidate of their choice, the argument ignores significant burdens that the prohibition on fusion voting imposes on parties, voters, and nominees.

Wisconsin’s prohibition on fusion voting severely burdens associational rights

A prohibition on fusion voting—i.e., a statutory restriction on the ability of a party to nominate its preferred candidate—imposes significant burdens on the associational and

expressive freedoms of political parties. These burdens on the parties, in turn, impose burdens on their individual members and nominees.

The federal appeals court in *SAM Party of N.Y. v. Kosinski* observed that “[c]ourts have identified three types of severe burdens on the right of individuals to associate as a political party.” 987 F.3d 267, 275 (2d Cir. 2021). These burdens are regulations: (1) “meddling in a political party’s internal affairs,” (2) “restricting the ‘core associational activities’ of the party or its members,” and (3) “‘mak[ing] it virtually impossible’ for minor parties to qualify for the ballot.” *Id.*

The prohibition on fusion voting inflicts all three of these burdens on Wisconsin political parties, their members, and their nominees. A narrow, candidate-centric approach turns a willfully blind eye to these burdens.

Regarding meddling in internal affairs, Wisconsin’s prohibition on fusion has one purpose and one function: to limit whom a party can choose as its candidate. The prohibition is a statutory veto on the quintessential internal affair of a party: the nomination of a candidate. This is precisely the sort of meddling that burdens the ability of a party (and its members and nominees) to associate freely. The nomination of a chosen candidate is a political party’s most important act. *See* Kathleen Bawn, Marty Cohen, David Karol, Seth Masket, Hans Noel & John R. Zaller, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 *PERSPS. ON POL.* 571-597 (2012); *see also* Marty Cohen, David Karol, Hans Noel & John Zaller, *The Party Decides: Presidential Nominations Before and After Reform* (2008); Schattschneider, *supra*, at 64; Seth Masket & Hans Noel, *Prioritizing Parties*, *supra*.

The U.S. Supreme Court, acknowledging the associational rights of parties, observed that “[i]n no area is the political association’s right to exclude more important than in the process of selecting its nominee.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). The nomination process “often determines the party’s positions on the most significant public policy issues of the day,” and “even when those positions are predetermined it is the nominee who becomes the party’s ambassador to the general electorate in winning it over to the party’s views.” *Id.* (adding that some minor parties are “virtually inseparable from their nominees”). “The moment of choosing the party’s 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.’” *Id.* (quoting *Tashjian*, 479 U.S. at 216).

A prohibition on fusion voting also restricts the core associational activities of a party and its members. “Freedom of association . . . encompasses a political party’s decisions about the identity of, and the process for electing, its leaders.” *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989); accord *Tashjian*, 479 U.S. at 235-36 (Scalia, J., dissenting) (“The ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom . . .”).

Nomination of the preferred candidate is not merely one of several core associational activities of a party. Rather, nomination is *the central* function of a party and the ultimate manifestation of its associational purpose. A “party’s choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 372 (1997) (Stevens, J., dissenting). A restriction on a party’s

“right to nominate its first-choice candidate, by limiting [its] ability to convey through its nominee what the Party represents, risks impinging on another core element of any political party’s associational rights—the right to ‘broaden the base of public participation in and support for its activities.’” *Id.* at 372 n.1 (Stevens, J., dissenting) (quoting *Tashjian*, 479 U.S. at 208).

Any other activities that a political party engages in—activism, fundraising, public relations, etc.—are largely irrelevant if the party cannot choose its nominee. If the nomination of the candidate of choice is not a “core associational activity,” then there is no such “core” activity.

When a party’s nomination is restricted, that party is precluded from effectively conveying what it represents. Further, the party is forced to choose between advancing a spoiler candidate or sitting out, thereby reinforcing the existing duopoly on ballot access. The party’s members are coerced into supporting a competing party to vote for their preferred candidate. Even if a voter may still vote for the candidate of choice, the voter must dissociate from their preferred party and associate with a different party instead. In doing so, the voter is compelled to endorse the entire platform of a party with which they have chosen not to associate.

Last, Wisconsin’s prohibition on fusion voting keeps minor parties off the ballot. Inevitably, minor parties will be excluded from the ballot any time they wish to support a competitive candidate. The law limits minor parties to candidates who have not been nominated by a major party. This ensures that the minor party will only ever appear on the ballot if it has no chance to win and it, unwillingly, fields a spoiler candidate. *See Timmons*, 520 U.S. at 372 n.1 (Stevens, J., dissenting) (“A fusion ban burdens the right of a minor

party to broaden its base of support because of the political reality that the dominance of the major parties frequently makes a vote for a minor party or independent candidate a ‘wasted’ vote.”).

History speaks unambiguously as to the inevitable outcomes for minor parties. Under the current regime, minor parties have been intentionally, successfully relegated to almost a century of failure. No minor party candidate has won a statewide election in Wisconsin in more than 80 years. This century of statutory marginalization provides a stark (and not accidental) disincentive. The message to minor parties is clear: the only way to participate is as a wasted-vote spoiler, not a competitor.

OTHER, POLITICALLY NEUTRAL ELIGIBILITY REQUIREMENTS ARE FUNDAMENTALLY UNLIKE WISCONSIN’S PROHIBITION ON FUSION VOTING

Wisconsin’s prohibition on fusion voting must be distinguished from other limitations on ballot access. Facially neutral, non-political eligibility requirements cannot justify the prohibition on fusion voting because the prohibition serves one purpose only: consolidating political power within the two existing major parties. Such a prohibition places an immense and undue burden upon minor parties and voters while serving no legitimate governmental interest.

In stark contrast, politically neutral restrictions such as age, residency, consent, and reasonable petition signature requirements impose no disparate impact. They affect all parties equally and do not systemically limit the competitiveness or relevance of minor parties. They do not reflect partisan motivations and have obvious, politically neutral policy justifications.

Age restrictions, for example, serve a compelling interest in ensuring that candidates for positions of public trust possess the maturity required by the important

office they seek. A minimum age is a sensible, easily verifiable, and neutral proxy. Age requirements have long been recognized as appropriate at the state and federal levels. They are often enshrined in plain *constitutional* text, rendering any analogy to anti-fusion *statutes* absurd. *See, e.g.*, Wis. Const. art. III, § 1(2), art. IV, § 6.

Residency restrictions serve compelling interests in ensuring that elected officials have some relationship and interest in the area they serve; these rules promote familiarity with constituents and the issues that matter to them. Similarly, consent requirements are self-evidently reasonable. A person should not be compelled to serve as a party nominee, just as they should not be compelled to vote for a party, against their will.

Requiring a reasonable minimum number of nomination signatures serves the interest of excluding nominations lacking even minimal initial support. Such requirements are not onerous. *See* Wis. Stat. §§ 8.10(3), 8.15(6) (requiring 2000 signatures for statewide contests and 20 to 2000 signatures for other races). These low bars serve their purpose without a politically disparate impact.

Anti-fusion laws have none of these characteristics. They are not neutral and do not affect all parties equally. The burden is borne exclusively by minor parties, while benefits accrue exclusively to major parties. These are associational and equal protection issues. By design, these protectionist measures directly affect the substance of elections by regulating the competitive balance between minor and major parties. Wisconsin's prohibition on fusion voting is completely distinct from neutral eligibility restrictions. Although the state has a valid interest in assuring the fair and efficient administration of elections, it does not have an unconditional license to insure the preservation of the present political order.

The analyses in *Timmons* and *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991), addressing federal constitutional rights, do not control here because the Wisconsin Constitution provides broader guarantees of free association and expression. Moreover, in *Timmons*, the U.S. Supreme Court incorrectly conflated neutral restrictions with a prohibition on fusion voting. *See* 520 U.S. at 359 n.8. This court need not follow that faulty reasoning under the Wisconsin Constitution.²

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² Further, as discussed by Plaintiffs (Dkt. 24 at 36-38), the U.S. Supreme Court applied federal constitutional principles to a “sparse, generalized record” (id. at 37), whereas here, history and the factual record compel a different result.

EXHIBIT A
AMICI CREDENTIALS

Professor Seth Masket is a professor of political science at the University of Denver. He is the author of several books, including *The Inevitable Party: Why Attempts to Kill the Party System Fail and How They Weaken Democracy* (Oxford University Press, 2016), and *No Middle Ground: How Informal Party Organizations Control Nominations and Polarize Legislatures* (University of Michigan Press, 2009). His research has appeared in the *American Journal of Political Science*, the *British Journal of Political Science*, and other publications. He received his PhD from UCLA.

Professor Nolan McCarty is the Susan Dod Brown Professor of Politics and Public Affairs and Vice Dean for Academic Affairs at Princeton University. From 2011 to 2018, he served as the chair of the Princeton Politics Department. He has authored several books, including *Polarization: What Everyone Needs to Know* (Oxford University Press, 2019) and *Political Game Theory* (Cambridge University Press, 2006, with Adam Meirowitz). His work has appeared in the *American Political Science Review*, the *American Journal of Political Science*, the *Journal of Politics*, the *Proceedings of the National Academy of Science*, and many other journals. He received his PhD from Carnegie Mellon University. He was elected to the American Academy of Arts and Sciences in 2010.

Professor Hans Noel is an associate professor of political science at Georgetown University. He is the author of *Political Ideologies and Political Parties in America* (Cambridge University Press, 2013) and *The Party Decides: Presidential Nominations Before and After Reform* (University of Chicago Press, 2008, with Marty Cohen, David Karol and John Zaller). His research has appeared in the *American Political*

Science Review, the *Journal of Politics*, and the *British Journal of Political Science*, among other journals. He received his PhD from UCLA in 2006.

Professor Masket and Professor Noel also co-authored *Political Parties* (Norton, 2021), a university level textbook for political science and/or American government courses examining the role of political parties in the United States.