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CIRCUIT COURT
DANE COUNTY, WI
2025CV001438

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 12

DANE COUNTY

UNITED WISCONSIN, et al.,

Plaintiffs,

v.

Case No. 2025CV1438

Code: 30701

Declaratory Judgment

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**PLAINTIFFS' CONSOLIDATED OPPOSITION BRIEF TO DEFENDANT'S
CROSS-MOTION FOR SUMMARY JUDGMENT AND
REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs' opening brief (Dkt. 24) detailed Wisconsin's unique history, intertwined with cross-party coalitionalism, and explained how Wisconsin's fusion ban burdens fundamental rights for minor parties, like Plaintiff United Wisconsin, and voters, like the individual Plaintiffs. The State's response (and its own request for summary judgment) rests on three propositions: (1) the Court should follow the State's lead and turn a blind eye to Plaintiffs' evidence, (2) each constitutional claim in this case collapses into an empty shell of rational-basis review, and (3) the State may prop up Wisconsin's fusion ban with conjectural interests untethered from the historical record and lacking any plausible rationale. All three fatally flawed propositions should be rejected.

Strikingly, the State's brief (Dkt. 58) largely sidesteps the evidentiary record Plaintiffs have amassed, one different in kind from the record in any prior fusion voting case cited by either party. Plaintiffs brought this Court extensive historical, empirical, and expert evidence establishing: that fusion was a longstanding, prominent feature of Wisconsin's political ecosystem; that the fusion ban was enacted in a highly partisan context to disadvantage minor parties and stifle competition; that fusion does not lead to the State's hypothesized administrative, electoral, or democratic harms; and that minor parties today lack any path to electoral relevance without fusion. Rather than attempt to rebut that evidence with competing facts, the State mostly ignores it. (This is true notwithstanding the State's own experts acknowledging Plaintiffs' historical account is based on "valuable," "detailed," and "largely accurate" "archival research." (Dkt. 25 at 101 (Atkinson-Tahk rep. at 62))) The material facts are beyond serious dispute, and they substantiate Plaintiffs' legal claims.

Nor does precedent foreclose relief. Prior cases about fusion do not address the theories advanced here under Wisconsin's Declaration of Rights. Those cases featured nothing close to the extensive evidentiary record before this Court. And those cases do not resolve whether Wisconsin's fusion ban survives strict scrutiny—or even a proper application of rational-basis analysis—when tested against evidence of Wisconsin history, burdens imposed on voters and minor political parties, and the weakness of the State's claimed regulatory interests.

The State’s legal arguments in defense of the fusion ban are equally flawed. Wisconsin’s Constitution—whether under Sections 1, 3, 4, or 22, of Article I—requires assessing real burdens against valid governmental interests. The State instead proposes a desiccated form of review under which the State expects courts will bless invented, post hoc justifications for legislative action, disregard contrary evidence, and sustain laws on the bases of asserted interests that were not considered during debates over enactment in the past and that lack the benefit of evidentiary support in the present. The specious test the State tries to pass off as rational-basis review would have this Court abdicate the judiciary’s essential role in our system of checks and balances.

As shown in Plaintiffs’ opening brief and below, Wisconsin’s fusion ban is irreconcilable with the constitutional provisions invoked in this case. Judgment should be granted to Plaintiffs. In the alternative, if the Court finds that material facts remain in dispute, the parties’ competing evidence should be addressed at an evidentiary hearing.

THE LEGAL STANDARD AT SUMMARY JUDGMENT AND THE STATE’S MISLEADING FACTUAL ACCOUNT

“Generally, when both parties file cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the case to be decided solely on the legal issues presented.” *Carlin Lake Ass’n v. Carlin Club Props., LLC*, 2019 WI App 24, ¶19, 387 Wis. 2d 640, 929 N.W.2d 228. Here, the State’s brief muddies the waters with a misleading and sometimes tangential account of the record evidence. This should not derail adjudication of the legal issues.

Where a complaint asserts a cognizable legal claim, the court must “examine the moving party’s affidavits to determine whether they establish a prima facie case for summary judgment.” *Murphy v. Columbus McKinnon Corp.*, 2022 WI 109, ¶42, 405 Wis. 2d 157, 982 N.W.2d 898 (quoted source omitted). A party “may not rest upon [] mere allegations or denials of the pleadings” to defeat summary judgment but must instead “set forth specific facts showing [] there is a genuine issue for trial.” *Andruss v. Divine Savior Healthcare, Inc.*, 2022 WI 27, ¶23, 401 Wis. 2d 368, 973 N.W.2d 435 (quoted source omitted). Many of the State’s arguments rest on differences in

interpretation or application of law, but some key divergences between the record evidence and the State’s brief merit discussion.

First, the State cites its experts’ report for the proposition that “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.” (Dkt. 58 at 3) Plaintiffs concede that election administration began to be centralized in the late 1800s. (*Id.*) And they acknowledge that this included, following the 1888 presidential election (in which, among other circumstances, incumbent President Grover Cleveland won the popular vote but lost the electoral vote to Benjamin Harrison)¹, the introduction of the government-printed “Australian ballot.” (*Id.* at 4) But try as the State might, there is no support to be found—in the State’s experts’ report or elsewhere—for lumping the fusion ban in with Wisconsin’s other election-law changes of the era. To the contrary, that attempted conflation is flatly contradicted by the deep historical record compiled by Plaintiffs’ expert, Professor Lisa Disch. (*See* Dkt. 24 at 24–26²; Dkt. 27, Exs. A & B)

The uncontested record shows that in the mid-1890s, the Republican Party—faced with a Democratic Party weakened after the Civil War and reliant on coalitional fusion tickets with an array of minor parties—tried to and did ban fusion voting where it held power.³ The story was the same in Oregon, South Dakota, North Dakota, Pennsylvania, Wyoming, Iowa, Michigan, Indiana, and of course, Wisconsin, whose massive Republican legislative supermajority and Republican Governor Edward Scofield enacted the ban with nary a word of documented debate. (*See* Dkt. 27 at 33–37, 59–75) Nothing but post hoc assertions by Republican Party-tied sources supports the State’s contention that Wisconsin’s fusion ban was anything other than an attempt to

¹ *Presidential Election of 1888: A Resource Guide*, LIBR. OF CONG., <https://guides.loc.gov/presidential-election-1888> (last visited Aug. 5, 2026).

² References to docket items use the PDF page numbers embossed by the Court’s e-filing system.

³ Notably, the Democratic and Republican Parties of the late-nineteenth century differ markedly from those same parties today. The sea changes in the parties’ respective ideologies, coalitions, and strategies make it inapposite to ascribe the parties’ actions in the historical account addressed here to the parties’ current views. The fact that, notwithstanding the degree of change in American politics since Wisconsin adopted its fusion ban, the Democratic and Republican Parties continue to have duopoly control is a testament to the power of the fusion ban more than to any other political dynamic.

disenfranchise minor parties and, by extension, the Democratic Party with which the minor parties sometimes fused.⁴ The facts are stark: Wisconsin is the only state where pro-fusion legislation was enacted (by Democrats) before it was banned (by Republicans). The State dismisses as “a handful of post-enactment newspaper articles” (Dkt. 58 at 5) the historical consensus that can be discounted only by ignoring the deep history and tradition of fusion politics in Wisconsin, up through 1897.⁵ (Dkt. 95 ¶¶17–23)

Second, the State advances the claim that fusion voting existed in Wisconsin for only seven years as an “experiment.” (Dkt. 58 at 26) This is a flagrant distortion of the evidence, rooted in the

⁴ Even on the courts, support for the fusion ban came primarily from those with ties to the Republican Party. The circuit court judge who heard the *Runge* case, Daniel Harris Johnson, had served three terms as a Republican member of the Assembly before he took the bench. *Annals of the Legislature; Comprising the Legislative Assemblies of the Territory and State*, WIS. BLUE BOOK, 221, 238, 240 (1872). When the case reached the Wisconsin Supreme Court, all Justices who joined the majority were affiliated with the Republican Party, while the lone dissenter had Democratic Party ties. The majority included:

- Chief Justice John B. Cassoday, previously elected Speaker of the Assembly as a Republican. *Former Justices: John B. Cassoday*, WIS. SUPREME COURT, <https://www.wicourts.gov/courts/supreme/justices/retired/cassoday.htm> (last visited Aug. 6, 2026);
- Justice Roujet Marshall, appointed to the Supreme Court by Republican Governor William H. Upham. *Former Justices: Roujet D. Marshall*, WIS. SUPREME COURT, <https://www.wicourts.gov/courts/supreme/justices/retired/marshall.htm> (last visited Aug. 6, 2026);
- Justice Silas Pinney, elected mayor of Madison as a Democrat, *The City Election*, WIS. STATE J. (Apr. 8, 1874) at 1, but defeated by a Democrat when he sought re-election as an independent with Republican support, *The City Election*, WIS. STATE J. (Apr. 3, 1876) at 4. After leaving partisan office, Pinney was elected Justice with strong Republican Party support, over an opponent sponsored by the Democratic Party. *See Pinney is Elected*, WIS. STATE J. (Apr. 8, 1891) at 1; and
- Justice Charles V. Bardeen, having been recently appointed to the Supreme Court by Republican Governor Edward Scofield, who signed the fusion ban into law. *Bardeen the Man*, WIS. STATE J. (Jan. 25, 1898) at 4.

Justice John B. Winslow, the sole dissenter, was the only member of the Court appointed by a Democrat, Governor George Wilbur Peck. *Winslow Appointed*, RACINE DAILY J. (May 4, 1891) at 4. [All newspaper articles cited here available on [newspapers.com](https://www.newspapers.com), through the Wisconsin State Law Library.]

At this time in Wisconsin history, candidates for judicial office were generally nominated through political party conventions and supported by political party campaign efforts. *See, e.g., Jenny Peek, Appointed or Elected: Why Wisconsin Supreme Court Justices Are Voted In*, WPR (Aug. 23, 2019), available at <https://www.wpr.org/justice/appointed-or-elected-why-wisconsin-supreme-court-justices-are-voted> (quoting former Justice Janine Geske as saying before the 1900s, “political parties would nominate somebody as the party candidate and judges and justices would run actually on a party”).

⁵ The State is correct that this history includes a handful of newspaper articles supporting the fusion ban. The State did not need to look far to discover this, as Professor Disch included that fact in her report. (*See, e.g.,* Dkt. 27 at 36–37) These newspaper articles, as well as others opposing the ban, help fill the void left by the absence of traditional legislative history to contextualize a measure passed without recorded debate.

State's unduly narrow view of "fusion voting" as encompassing only State-printed ballots on which some candidates were cross-endorsed by more than one party. (*Id.* at 25) The State ignores that fusion was common in Wisconsin and was a fundamental practice for the State's first half-century, regardless of what form ballots took. The undisputed historical record demonstrates that "cross-party coalition building" was "a defining practice of Wisconsin politics from [the State's] beginnings." (Dkt. 95 ¶18) Wisconsin's 1848 Constitution itself emerged from a cross-party coalition of Whigs and Democrats, and fusion in its various forms remained a central mechanism through which political minorities, reform movements, labor organizations, and emerging parties obtained representation and influence. (*Id.* ¶¶20–27) Indeed, fusion was so entrenched in Wisconsin political culture that when Democrats briefly gained legislative control in 1891, they enacted the nation's only statutory protection for fusion. (*Id.* ¶31) The seven-year period on which the State fixates was, therefore, not the beginning of fusion in Wisconsin. It was a brief, culminating period during which Wisconsin's longstanding tradition of cross-party coalitionalism was expressly accommodated on the Australian-style ballot, before Republicans reversed course and banned fusion in 1897. (*Id.* ¶¶31, 35, 38–40) The State's attempt to reduce half a century of political practice to a seven-year "experiment" flies in the face of the historical record.

Third, the State's brief minimizes the burdens imposed by the fusion ban, complaining that Plaintiffs' brief contains "sweeping assertions about the effect of Wisconsin's fusion ban that are unsupported by their expert reports or any other cited authority." (Dkt. 58 at 33) To accomplish this sleight of hand, the State ignores contrary evidence while amplifying prior courts' condescension towards minor parties and the untenable position to which our political duopoly consigns them. The record reflects: that, historically, fusion was the primary mechanism through which minor political parties in Wisconsin exercised political influence; that the Republican-dominated Legislature (and a Republican Governor) enacted the fusion ban after Democrats and smaller parties had successfully used fusion to gain power; and that modern minor parties remain structurally incapable of competing effectively without access to coalition-building tools such as fusion. (Dkt. 95 ¶¶17–29, 38–54, 64–66) The State does not meaningfully rebut any of these points.

Instead, it relies on cases that either lacked a developed factual record or presumed, without evidence, that minor parties can flourish notwithstanding fusion bans.

But summary judgment cannot proceed by ignoring undisputed facts. The State frequently does not invoke a factual *dispute* but, instead, simply ignores evidence and highlights convenient text from other fusion voting cases. Because “[t]he key question in determining whether factual issues exist is what a reasonable jury could conclude from the evidence,” *Cincinnati Ins. Co. v. Ropicky*, 2026 WI 25, ¶77, 421 Wis. 2d 165, 36 N.W.3d 917, “mere conjecture [] does not satisfy the nonmoving party’s obligation to oppose summary judgment by advancing specific facts showing the presence of a genuine material dispute,” *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶35, 254 Wis. 2d 77, 646 N.W.2d 777. The question is not whether a court in another case, on another record, once described a fusion ban as imposing only modest burdens. The question is whether the record *in this case* demonstrates severe burdens *here*. And, in this case, it does. United Wisconsin and individual Plaintiffs do not seek some marginal advantage, but instead, access to the only realistic mechanism by which a new or niche party can support a viable candidate while preserving its independent identity. The State offers no evidence these burdens are insignificant and merely asserts that they are. On summary judgment, *ipse dixit* cannot overcome evidence.

ARGUMENT

I. *Runge, Swamp, and Timmons* Are Distinguishable on Their Undeveloped Factual Records, Differing Claims, and Incorrect Application of Legal Principles.

The State repeatedly insists that other courts have already decided this issue, precluding Plaintiffs’ claims. Not so. The State cites three decisions, each distinguishable based on their undeveloped factual records, their focus on legal theories distinct from those asserted here, and in one case, a conflict with later pronouncements of the U.S. Supreme Court. Each case warrants analysis, but such consideration shows that none of these cases disposes of this one.

Runge. The State points to *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898), which addressed the fusion ban the year after it was passed and is the only case to ever apply the Wisconsin Constitution to it. However, what the State calls a “dispositive precedent”

resulting from “a virtually identical state constitutional challenge” to the fusion ban (Dkt. 58 at 3, 9 n.2) is entirely distinguishable.⁶ *Runge* asserted that the fusion ban violated the guarantee in Article III, Section 3, of the Wisconsin Constitution “that all votes shall be by ballot.” 100 Wis. at 530. The theory was that banning fusion eviscerated a voter’s “constitutional privilege of making his own ballot and depositing it as so prepared.” *Id.*⁷ The *Runge* decision at no point addresses, much less adjudicates, claims like those raised here that the fusion ban violates several provisions of Wisconsin’s Declaration of Rights.⁸ Plaintiffs have not been able to find a hint of any court ever applying those provisions to Wisconsin’s fusion ban.⁹ The State’s averment that *Runge* “rejected a speech and associational rights challenge under the state constitution” (Dkt. 58 at 34) is incorrect.

⁶ The State supports its “virtually identical” characterization with a footnote comparing the text of the fusion-ban statute from 1897 to that of today’s fusion-ban statute. (Dkt. 58 at 9 n.2) No one disputes that the current ban is substantially the same. That does not make *Runge*’s Article III challenge to that ban the same as the Article I claims presented here.

⁷ The Wisconsin Supreme Court rejected this, favoring a plain meaning interpretation of “ballot” as meaning “a paper so prepared by printing or writing thereon as to show the voter’s choice.” *Runge*, 100 Wis. at 530.

⁸ The State repeatedly quotes snippets plucked out of context from *Runge*’s briefs (*see* Dkt. 58 at 10 n.3 (quoting Dkt. 61 at 127 (Lodahl Decl. at B:43))), to no avail. The State fails to show that *Runge* addressed any claim under Article I. The Court recognized the claim before it as contending that the fusion ban “violates section 3, art. 3, of the constitution of Wisconsin.” *Runge*, 100 Wis. at 530. The Court considered that claim from several angles, *see id.* at 530–36, before concluding that the Court “cannot pronounce it unconstitutional with that degree of certainty requisite to judicial condemnation,” *id.* at 536.

⁹ In places, *Runge* does appear to touch, obliquely, on equal protection. *See* 100 Wis. at 535 (“Some discrimination between classes as to the manner of securing representation upon the ballot is unavoidable.”). The State insists this means the case addressed a claim “that the anti-fusion law ‘infringe[d] upon the equal rights and franchises of the citizens.’” (Dkt. 58 at 10 (quoting Dkt. 61 at 100 (Lodahl Decl. at Exh. B:16))) But the State ignores that, on the same pages cited, *Runge*’s brief expressly asserts that any emphasis on equal rights relied on “***the 14th amendment to the Constitution of the United States***.” (Dkt. 61 at 101 (Lodahl Decl. at Exh. B:17) (emphasis added)) Nowhere in the materials the State cites did any party raise equal protection under the Wisconsin Constitution, like the claim Plaintiffs assert here. Dwarfing this single reference to equal protection are the briefs’ extensive focus on the right to vote under Article III of the Wisconsin Constitution. (*See id.* at 104, 122, 124–28, 138 (Lodahl Decl. at Exh. B:20, 38, 40–44, 54))

In the State’s zeal to project a Wisconsin-Constitution-based equal protection claim onto *Runge*, it distorts his lawyer’s own assertion that *Runge* “elsewhere argued that the fusion ban was ‘an attempt to discriminate against classes of voter[s], 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.’” (Dkt. 58 at 10 n.3 (quoting Dkt. 61 at 127 (Lodahl Decl. at Exh. B:43))) But in an effort to unmoor this argument from the right to vote, in which it was rooted, the State truncated it. Immediately following the fragment the State quotes is a concluding clause, which complains that the fusion ban unfairly advantages some voters vis-à-vis “others, no better entitled under the fundamental law to the

In evaluating the voting-rights claim, *Runge* employed what courts would today recognize as a highly deferential rational-basis inquiry, explaining that “so long as the end be legitimate and within the scope of the constitution, all means appropriate and plainly adapted to such end and consistent with the letter and spirit of the constitution, if not prohibited, are constitutional.” 100 Wis. at 534. Here, strict scrutiny applies because the fusion ban burdens fundamental rights of political speech, association, and equal protection in the context of the electoral process. *Runge*’s underlying premise is that the Legislature can engage in “reasonable regulation” of elections. *Id.* at 536. With the benefit of nearly 130 more years, Plaintiffs have developed a factual record demonstrating that the fusion ban has operated to consign minor parties to political irrelevance, depriving them of the only realistic mechanism for translating political support into electoral influence. Even under *Runge*’s deferential framework, that record dooms the ban.

In the absence of a robust record, the *Runge* Court also accepted at face value the State’s arguments that a fusion ballot “would be so complicated and confusing as to ***certainly materially*** impair the freedom of the elective franchise.” *Id.* at 535 (emphasis added). Putting aside Plaintiffs’ actual evidence that (1) voluntary fusion operated in Wisconsin after the adoption of the State-produced ballot, and (2) modern fusion ballots produce no such confusion (Dkt. 95 ¶¶55–60), the *Runge* Court, in hindsight, made several constitutionally inappropriate assumptions:

- That voters could not “correctly perform” the task of voting under a fusion regime, because they would be exhausted or duped by multiple ballot listings. *Runge*, 100 Wis. at 536–37. This is contradicted by record evidence, practice in other states (whose voters are no smarter than Wisconsinites), and modern judicial decisions with greater respect for voters’ intelligence. *Wash. State Grange v. Wash. State Republican Party*, 522 U.S. 442, 454 (2008) (rejecting “sheer speculation” about voter confusion about party labels); *State ex rel. Two Unnamed Pet’rs v. Peterson*, 2015 WI 85, ¶45, 363 Wis. 2d 1, 866 N.W.2d 165 (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010)) (“The right of citizens to ... use information to reach consensus is a precondition of enlightened self-government ...”).

free and untrammelled exercise of the right of suffrage.” (Dkt. 61 at 127 (Lodahl Decl. at Exh. B:43) (quoting *Eaton v. Brown*, 31 P. 250, 251 (Cal. 1892))) Though the State wishes otherwise, *Runge* is about the right to vote. Any strands of equal protection analysis rely solely on the 14th Amendment, rather than the Wisconsin Constitution.

- That “party fealty and party sentiment ... are not the subjects of constitutional care.” *Runge*, 100 Wis. at 536. This is contradicted by numerous later decisions by the Wisconsin and U.S. Supreme Court protecting the rights of parties to associate freely. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 32 (1968); *Norman v. Reed*, 502 U.S. 279, 288 (1992) (collecting cases for the proposition that “[f]or more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences.” (cited sources omitted)); *Elections Bd. v. Wis. Mfrs. & Commerce*, 227 Wis. 2d 650, ¶16, 597 N.W.2d 721 (1999) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. The right to associate includes the right to band together for the purposes of advocating political ideas or beliefs.” (quoted and cited sources omitted)).
- That “[m]en are supposed to stand for principles when placed in nomination by political parties” and that “one party designation on the official ballot will satisfy all legitimate requirements” to accomplish this. *Runge*, 100 Wis. at 536. This claim has no basis in cited case law or the factual record in that case. It is contradicted by the record in this case regarding the existential double-bind minor parties and their supporters face, absent fusion. (Dkt. 95 ¶¶16, 64–65) And, because it evidences judicial direction of political parties’ decisions about how to appropriately express political ideas and principles, it contravenes “the uncontroversial concept that a neutral, non-partisan court cannot act in support of purely political interests.” *Johnson v. WEC*, 2022 WI 19, ¶191 n.26, 401 Wis. 2d 198, 972 N.W.2d 559 (Karofsky, J., dissenting).

In summary, *Runge*’s relevance—if any—is minimal. The State’s reliance on *Runge* is misplaced.

Swamp. The State also points to *Swamp v. Kennedy*, where the Seventh Circuit rejected a challenge to Wisconsin’s fusion ban on First Amendment free-association grounds. 950 F.2d 383 (7th Cir. 1991), *en banc rehr’g denied* (1992). *Swamp*, like *Runge*, is distinguishable because it did not address the claims under the Wisconsin Constitution raised here. Discerning that this is true in *Swamp* requires little legal archaeology. *Swamp* involved no federal analogues to the claims presented here under Article I, Sections 1 and 22. *See* 950 F.2d at 384. And the questions of freedom of speech and association it raised under the First Amendment may bear similarity to those raised here under Article I, Sections 3 and 4, but these rights are understood differently under the Wisconsin Constitution than they are under the federal one. (*See* Dkt. 24 at 29–39) Further, as to the associational claim, *Swamp* did not address whether Wisconsin’s fusion ban constitutes a content-based speech restriction—which it could not have, given the significant development of

this area of law over the past twenty years—that burdens the associational and speech rights of would-be minor party *voters*, in addition to minor parties themselves. *See infra* Section VI.

Accordingly, the *Swamp* decision not only fails to foreclose Plaintiffs’ claims here but also sheds minimal light on those claims. Plaintiffs submit that, with respect to the issues and legal theories it addressed, *Swamp*’s reasoning is unpersuasive in the context of Wisconsin constitutional law. Parts of *Swamp* simply make no sense. For example, *Swamp* observes that the State has an interest in “assuring that the winner of an election is the choice of a majority or at least a plurality of the voters,” 950 F.2d at 386, but it fails to recognize that this is something that fusion voting could only *assist*, not detract from (*see* Dkt. 24 at 12 (providing example of how fusion voting would improve majoritarianism)).¹⁰ Beyond this, Plaintiffs dispute the *Swamp* Court’s reliance on state officials’ *ipse dixit* regarding the State’s interests in avoiding non-existent voter confusion, preserving election integrity, and avoiding raiding, for the reasons discussed below. *Compare* 950 F.2d at 387–89 *with infra* Section III. These asserted interests cannot withstand scrutiny, especially in the face of evidence showing that the fusion ban does not advance these goals.¹¹ (*See* Dkt. 95 ¶¶55, 56, 60, 62)

The issue of evidence leads to the final basis for distinguishing *Swamp*. Similar to *Runge*—and to all cases known to Plaintiffs in which a party has challenged a state’s ban on electoral fusion—the *Swamp* decision was based on a sparse factual record. The trial court filings make clear that the whole of the record comprised affidavits from political operatives and State officials and references to other cases which, themselves, relied on generalized assumptions regarding state

¹⁰ The *Swamp* opinion elaborates that “[i]f a candidate appears on the primary ballots of more than one party but is defeated in all of the primaries in which he runs, his name will not be on the general ballot even though he may have received the majority of votes in the aggregate.” 950 F.2d at 386. But if a candidate runs in multiple primaries and is defeated in all of them, that shows the voters in each party’s primary did not want the person as their standard-bearer; it is illogical to aggregate vote totals across party primaries to assess the broader will of an electorate. Fusion voting’s focus is on general-election ballots.

¹¹ *Swamp* also repeatedly suggests the fusion ban seeks to avoid problems that could come with *involuntary* fusion. *See* 950 F.2d at 386 (“if multiple party nominations were permitted, the [Nazi] Party could nominate a candidate who has been nominated by a major party ... in order to ... defeat the candidate”); *id.* (maintaining “a stable political system is a compelling state interest” served by “limits” on “involuntary fusion”). If prohibiting involuntary fusion is the State’s interest, the Wisconsin ban is overbroad as written.

interests and burdens implicated by fusion bans.¹² The thinness of the evidentiary record alone distinguishes *Swamp* from this case. Altogether, *Swamp*, like *Runge*, cannot bear the weight that the State places upon it.

Timmons. The State most frequently cites to *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). (Dkt. 58 at 14–16, 31, 33–34, 36–37) Decided several years after *Swamp*, the *Timmons* case addressed a First Amendment free-association challenge to Minnesota’s fusion ban. As a threshold matter, *Timmons*, as a case arising from Minnesota and alleging federal constitutional violations, does not address, and therefore cannot foreclose, the claims raised here under the Wisconsin Constitution. Beyond that, anticipating the State’s attraction to *Timmons*, Plaintiffs’ opening brief prophylactically explained its shortcomings, including that the *Timmons* Court decided the case on a virtually non-existent factual record, did not assess the history behind Minnesota’s law, did not have the opportunity to evaluate the challenge under contemporary free speech or equal protection principles, and articulated a rationale since rendered suspect by both evidentiary development and subsequent U.S. Supreme Court decisions. (Dkt. 24 at 47–49)

The State offers little in the way of rebuttal. Where it attempts to respond, it twists or conflates Plaintiffs’ arguments. **First**, the State not only dismisses Plaintiffs’ evidence as insufficient to establish that the fusion ban “completely insulate[s] the two-party system” from competition but also seems to claim such information is not even relevant. (Dkt. 58 at 37) However, the U.S. Supreme Court has held that laws that unfairly insulate the political process from meaningful competition with and participation by new, minor, and niche third parties are subject to constitutional scrutiny (which often dooms such laws). *Norman*, 502 U.S. at 288–89;

¹² See, e.g., Mandell Supp. Decl. Exh. A, Pls.’ Proposed Findings of Fact & Conclusions of L. Supp. Mot. Emer. Inj. Relief & Summ. J., *Swamp v. Kennedy*, No. 90-C-504-S, Dkt. 5 (W.D. Wis., filed July 24, 1990) (citing only subjective affidavits of plaintiffs and supporters in support of request to enjoin fusion ban, without evidence regarding fusion ban’s history, specific effects, or burdens, nor evidence undermining validity of asserted State interests); Mandell Supp. Decl. Exh B, Tr. of Hr’g on Mot. for Prelim. Inj. 25:1–34:13, *Swamp v. Kennedy*, No. 90-C-504-S, Dkt. 21 (W.D. Wis., Aug. 9, 1990) (oral denial of preliminary injunction because “nothing in the record” showed fusion ban “chilled” political efforts, referencing state interests based on cases *Bullock v. Carter*, 405 U.S. 134, 145 (1972), and *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973), without reference to supporting affidavits or other evidence for either side).

see also *Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). At the summary judgment stage, it is relevant that Plaintiffs have adduced **evidence** showing that Wisconsin’s fusion ban serves as a “kill switch” on minor parties’ ability to advance their interests through political association. (Dkt. 95 ¶¶63–64; Dkt. 28 at 26–28 (Drutman rep. at 23–25); Dkt. 28 at 40, 43, 52, 54 (Drutman rebuttal at 10, 13, 22, 24); Dkt. 29 at 2, 4, 6 (Cantor Decl. ¶¶9, 13, 23); Dkt. 30 at 2 (Andrews Decl. ¶6)) It is also relevant that the State has not marshalled contrary **evidence**, because “mere conjecture [] does not satisfy the nonmoving party’s obligation to oppose summary judgment by advancing specific facts showing the presence of a genuine material dispute.” *Physicians Plus Ins. Corp.*, 2002 WI 80, ¶35. Here, Plaintiffs supply evidence, and the State responds with only *ipse dixit*. To the extent that the Court’s decision turns on whether the evidence establishes that the fusion ban unduly burdens Plaintiffs’ associational rights, Plaintiffs are entitled to summary judgment.¹³

Second, the State chides Plaintiffs for “forget[ting] that their speech rights are greatly diminished when they want to speak on the ballot.” (Dkt. 58 at 37) But no one denies the State may enact reasonable time, place, and manner restrictions on protected speech or assemblies that “do [] not provide for subject-matter censorship[.]” (Dkt. 24 at 45 (noting potential ways the State could narrowly tailor limits on fusion voting without imposing an outright ban); see also *id.* (noting viability of content-neutral regulations on speech and assembly)) The problems are that the fusion ban: (i) is not a reasonable regulation but a flat ban that extinguishes the only viable form of

¹³ Notably, *Timmons* appears to be an aberration in terms of the Supreme Court’s approach to evaluating the burden of ballot-access restrictions. Across numerous cases, the Court has routinely considered the practical impacts—in concrete terms—of various restrictions that would limit candidates’ access. See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 578 (2000) (“The evidence in this case demonstrates that under California’s blanket primary system, the prospect of having a party’s nominee determined by adherents of an opposing party is far from remote—indeed, it is a clear and present danger”); see also *Bullock*, 405 U.S. at 134 (Texas statute required exorbitant filing fees); *Williams*, 393 U.S. 23 (Ohio statute required, *inter alia*, excessive number of petition signatures); *Anderson*, 460 U.S. 780 (Ohio statute established unreasonably early filing deadline). Yet in *Timmons*, the Court, on almost no evidentiary record, rejected out of hand the notion that banning fusion sounds a death knell for minor or novel political parties. Not only did *Timmons* deviate from the Court’s established approach to similar issues, but here, Plaintiffs have provided what was absent from *Timmons*: evidence that denying access to fusion has incapacitated meaningful third-party political activity. (Dkt. 95 ¶¶2–3, 44–47, 52–54, 63–66)

voluntary political participation for minor parties like United Wisconsin, and (ii) is not subject to the First Amendment cases addressing time, place, and manner restrictions but, instead, implicates additional doctrines that implicate strict scrutiny, including Wisconsin Constitution article I, section 22, the doctrine of content-based speech restrictions, and more. *See infra* Section II.B.

In sum, *Timmons* is relevant, if at all, only to Plaintiffs' freedom of association claim and no others, including their freedom of speech claim and the many post-*Timmons* cases it relies upon. (See Dkt. 24 at 43–45) Even as to freedom of association, *Timmons* shrinks in the face of the significant evidence Plaintiffs have marshalled about the extensive burdens caused by Wisconsin's fusion ban—and the State's anemic rebuttal. Likewise, to the extent *Timmons* informs the viability of various speculative interests the State posits to justify the fusion ban, the factual record distinguishes the case, both as to the extent of Plaintiffs' burdened rights and based on the State's striking lack of an evidentiary basis for its purported regulatory interests.

II. Strict Scrutiny Applies Here, Based on the Documented Burdens at Issue; Regardless, Plaintiffs Also Prevail under a Proper Application of Rational-Basis Review.

A. Wisconsin's fusion ban imposes severe burdens on Plaintiffs.

The State dismisses the burdens of the fusion ban throughout its brief, citing to prior cases finding the burdens of similar restrictions were not severe. (See, e.g., Dkt. 58 at 16) However, as noted, none of those cases were decided on a detailed evidentiary record establishing the extent of the burdens and elucidating how minor parties were shut out of Wisconsin's political process as the intended (and actual) effect of the fusion ban. (Dkt. 95 ¶¶2–3, 44–47, 52–54, 63–66) None addressed a developed historical record demonstrating that fusion voting was an essential mechanism through which Wisconsin's minor parties and political minorities exercised influence. None considered expert evidence showing that modern minor parties lack any realistic path to electoral relevance absent fusion. And none confronted evidence that Wisconsin's ban was enacted precisely because fusion threatened the dominance of the governing party. Even if *Anderson-Burdick* analysis applies, as the State argues (Dkt. 58 at 13), a burden cannot be assessed in the abstract. *Anderson*, 460 U.S. at 789. Courts must evaluate actual burdens imposed on the parties.

Wisconsin's fusion ban imposes severe burdens on Plaintiffs. For United Wisconsin, the fusion ban forecloses the only practical means of translating its political support into electoral influence. Voters have little incentive to join, support, volunteer for, or identify with a minor party that cannot realistically affect electoral outcomes. (Dkt. 95 ¶¶44–47, 52–54, 63–66) The State repeatedly insists that United Wisconsin remains free to nominate anyone other than a major-party candidate, but that response merely restates the burden. The constitutional injury is that the party is forbidden from nominating the candidate who best represents its principles and who would allow it to participate meaningfully in the political process. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). A right to nominate only unelectable candidates is not a meaningful substitute for the right to nominate a party's preferred standard-bearer, and the record here—along with common-sense consideration of Wisconsin's past sixty years—shows it.

The burden is equally severe for voters, deprived of the option to support a candidate on the United Wisconsin ballot line. The fusion ban forces some voters to choose between supporting their preferred candidate and expressing their political identity through their preferred party. (*Cf.* Dkt. 95 ¶¶7–8, 54, 64–65) A voter who wishes to support Candidate A as the nominee of United Wisconsin cannot do so, even if Candidate A welcomes that support and United Wisconsin wishes to provide it. The voter may cast a ballot for the candidate under a major-party label, but that is not the same. The ban thus suppresses the ability of voters to communicate support for both a candidate and the political movement that supports that candidate.

Historical evidence confirms that this burden is not a theoretical abstraction. In the past, fusion voting enabled smaller and emerging parties to build support, influence policy, and remain politically relevant in Wisconsin. (*Id.* ¶¶17–31) Following the ban's enactment, by contrast, minor parties were largely relegated to spoiler status and excluded from meaningful participation in electoral politics. (*Id.* ¶¶52–54, 64–66) Wisconsin's fusion ban does not merely regulate election mechanics; it impairs the ability of minor parties and their supporters to associate, organize, and compete politically. On this record, the burdens imposed on Plaintiffs are severe.

B. The Court has six distinct pathways to strict scrutiny.

The State is desperate to avoid strict scrutiny, which the fusion ban cannot survive. Wisconsin’s blanket ban on electoral fusion is not tailored, much less narrowly, and it operates as a flat prohibition on the only form of third-party political participation demonstrated to effectively grow new, niche, or minor parties’ political power. (*Id.* ¶¶38–54, 64–66) The historical record demonstrates that the law was passed as an attack on minor parties, with the additional effect of depriving the Democratic Party of those same minor-party coalition partners. (*Id.* ¶¶17–18, 24–29, 31, 38–41) And each of the six regulatory interests the State offers to justify the fusion ban is based on speculation about negative effects of allowing fusion voting, is unrelated to the actual effects of the fusion ban, or is not based on a valid State concern. (Dkt. 58 at 16–19) Strict scrutiny is the appropriate standard to apply here. *See infra* Sections IV–VI.

To aid the Court’s analysis, before addressing each specific cause of action below, Plaintiffs provide here an overview of the logical paths that lead to applying strict scrutiny to the fusion ban. **First**, the Court may conclude that Wisconsin Constitution Article I, Section 22, is a standalone cause of action, that claims invoking it are subject to strict scrutiny, and that limits on electoral fusion touch on a “fundamental principle[]” of state government and thereby trigger strict scrutiny. (Dkt. 24 at 14–19) **Second**, the Court may conclude that, under a lockstepped federal equal-protection analysis, the fusion ban triggers strict scrutiny due to its “[s]evere burdens” on minor parties’ fundamental electoral rights. (*Id.* at 33) **Third**, the Court may conclude that a federal equal-protection analysis requires strict scrutiny due to the law’s passage as a form of intentional, invidious discrimination against minor political parties. (*Id.*) **Fourth**, the Court may conclude that, even if Article I, Section 22, does not supply a standalone cause of action, it serves to heighten the scrutiny applied to Plaintiffs’ speech and association claims under Article I, Sections 3–4, to the extent electoral fusion is considered a “fundamental principle[]” of Wisconsin government and political life. (*Id.* at 40–42) For the same reason, under a lockstep approach to equal protection, it would heighten the scrutiny applied by correctly recognizing the fusion ban as a “severe” burden on Plaintiffs. **Fifth**, the Court may conclude that the fusion ban is a content-based restriction on

speech, which automatically draws strict scrutiny. (*Id.* at 43–45) ***Last***, the Court may conclude that the fusion ban operates as a severe burden on Plaintiffs’ associational rights such that strict scrutiny applies. (*Id.* at 45–48) Any one of these paths independently requires applying strict scrutiny.

C. Alternatively, the Court has two potential paths to intermediate scrutiny.

Plaintiffs also note the Court may apply an intermediate level of scrutiny if the Court does not apply the federal approach to equal protection challenges. This is based on their argument that New Jersey’s equal-protection balancing test is most appropriately applied to this case and that Wisconsin courts need not—and often should not—proceed in lockstep with U.S. Supreme Court interpretations of the federal constitution. (Dkt. 24 at 29–31) If the Court looks to the laws of another state—as the Wisconsin Supreme Court has done before (*id.* at 29–30 (collecting cases))—then it should apply New Jersey’s balancing test. (*Id.* at 29–31) This test weighs (1) the “nature of the affected right”; (2) the scope of the government’s “intrus[ion] upon it”; and (3) the greatness of “the public need for the restriction.” *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985).

The State’s brief claims the Court may apply intermediate scrutiny to Plaintiffs’ claim that the fusion ban operates as a content-based speech restriction ***if*** that restriction is also viewpoint neutral. (Dkt. 58 at 36 (citing *Vidal v. Elster*, 602 U.S. 286, 295 (2024))) Plaintiffs reject *Vidal*’s relevance. As that case teaches, “the nature of trademark law informs the applicable constitutional scrutiny” in the context of a content-based, “viewpoint-neutral trademark restriction.” 602 U.S. at 295–300 (explaining how content-based restrictions inherent to trademark protection, reviewing history of trademarks, concluding “we need not evaluate a solely content-based restriction on trademark registration under [strict] scrutiny”). The State does not explain why *Vidal* applies anywhere outside of the trademark context, much less here, and the Court should “not step out of [its] neutral role to develop or construct arguments for parties.” *Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶35, 403 Wis. 2d 369, 976 N.W.2d 584. Further, even if *Vidal* does apply, Plaintiffs’ arguments about the burdens and state interests at play would apply equally to an analysis of the fusion ban as a content-based, viewpoint-neutral restriction.

D. The State’s conception of rational-basis review is incorrect.

Even if the Court determines it must decide this case based on rational-basis review, Plaintiffs still prevail. (Dkt. 24 at 33, 36–39) However, the parties have a significant disagreement about what rational-basis review entails. This requires unpacking, in the event the Court follows this path after determining the fusion ban (i) is an electoral regulation with “[n]on-severe burdens” under a federal equal-protection analysis (*id.* at 33), or (ii) implicates only non-public forum speech that need only be “reasonable” to survive review (*id.* at 36).

In defense of the fusion ban, the State offers an alarmingly cramped vision of the judicial role in reviewing legislative enactments. (Dkt. 58 at 19–20) That is, the State argues a Court applying rational basis review acts as *less* than a rubber stamp. In the State’s view, the government may offer post hoc “speculation unsupported by evidence or empirical data” to justify a law,¹⁴ and, if the State does so, the court *must* assume the Legislature acted on the basis of that post hoc rationalization without even “evaluat[ing] any explicit statement of purpose or legislative history”; and even then, if all else fails, a court *must*, the State says, “search[]” for any justification it can conceive, even if the Legislature did not pass the law based on that justification. (*Id.* at 19) Only “patently arbitrary” laws “bear[ing] no rational relationship to a legitimate government interest” may fall, and again, the State says the Court is not just authorized but *required* to concoct a supporting governmental interest at the outer edge of rationality. (*Id.* at 20 (quoted source omitted))

The State’s formulation is inconsistent with the premise of judicial review: “[t]he people of this state shaped our constitution, and it is [the judiciary’s] solemn responsibility to interpret it.” *State v. Knapp*, 2005 WI 127, ¶60, 285 Wis. 2d 86, 700 N.W.2d 899 (citing *Atty. Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567, 786 (1855)); accord *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). Rational basis review is deferential, but it does not invite courts to invent limitless justifications untethered from the law’s actual operation or the evidentiary record. The Wisconsin

¹⁴ The State cites *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307 (1993), for this point, but that case was limited to how courts assess legislative classifications under an equal-protection analysis. See *VoteAmerica v. Schwab*, 576 F. Supp. 3d 862, 889 n.8 (D. Kan. 2021).

Supreme Court has rejected the notion that any conceivable rationale will suffice, warning that “[i]f the concept of equal protection is to be meaningful, equal protection cannot be interpreted so as to allow the legislature to exercise its will on a minority of citizens anytime it desires so long as there is any rationale to do so, regardless of how remote, fanciful, or speculative the rationale may be.” *Milwaukee Brewers Baseball Club v. Wis. Dep’t of Health & Soc. Servs.*, 130 Wis. 2d 79, 103, 387 N.W.2d 254 (1986). Likewise, the U.S. Supreme Court has held that even under rational-basis review, “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). The State’s theory would collapse these limits entirely and reduce constitutional review to an empty formality. That is incompatible with our Supreme Court’s recognition that the State “will always have a rationale for anything it does[, so t]he test is whether the rationale is rational.” *Milwaukee Brewers*, 130 Wis. 2d at 103.

If the Court holds that neither strict nor intermediate scrutiny applies to any of Plaintiffs’ claims, it should, rather than accept the State’s argument for diminishing the judicial role to that of a subservient yes-man for the Legislature, follow Wisconsin’s established approach to rational-basis review. (See Dkt. 24 at 36) That is, what is “rational” is based on a review of the “language of the statute and [] all the facts bearing on the situation” to assess whether, “from the calm of sea level,” there is a legitimate, articulable, and logical justification for the fusion ban. (*Id.* (quoting *Bonnett v. Vallier*, 136 Wis. 193, 202–04, 116 N.W. 885 (1908)); see also *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶61, 332 Wis. 2d 85, 796 N.W.2d 717)) From there, the law may survive only if there is a “legitimate” and reasonable basis—justified by evidence—for the total ban imposed by Wis. Stat. §§ 8.03(1), 8.15(7). See *A.M.B. v. Cir. Ct. for Ashland Cnty.*, 2024 WI 18, ¶13, 411 Wis. 2d 389, 401, 5 N.W.3d 238, 243 (rational-basis standard).

III. All of the Interests the State Offers in Defense of the Fusion Ban Are Invalid, Unrelated to the Ban’s Effects, or Unsupported by the Factual Record.

Whether assessed under strict scrutiny or a rational-basis standard, none of the six justifications the State broadly offers as regulatory interests supporting the fusion ban (see Dkt. 58

at 16–19) holds up. They variously are invalid as State interests, do not relate to the actual effects of a ban on voluntary fusion, lack evidentiary support, or suffer from some combination of these flaws. The Court should reject the State’s reliance on these interests, or, at minimum, hold that the fusion ban codified in Wis. Stats. §§ 8.03(1), 8.15(7) is insufficiently tailored to these interests.

“Avoiding risk of voter confusion.” (Dkt. 58 at 16) The State’s lead claim, and the one referenced by every court to address a fusion voting case—albeit without this case’s evidentiary record—is that allowing fusion “could plausibly mislead or at least distract” the kind of “marginal or low-information voter for whom party labels operate as heuristics.” (Dkt. 58 at 16 (citing Atkinson-Tahk rep. at 46)) In plain English, the State argues that many voters are too dumb to identify a political party’s label on a ballot, much less fill out a ballot properly. This is baseless. (Dkt. 24 at 24 (citing *Wash. State Grange*, 552 U.S. at 454 (rejecting state’s “sheer speculation” about voter confusion regarding party labels)); *see also Two Unnamed Pet’rs*, 2015 WI 85, ¶45 (quoting *Citizens United*, 558 U.S. at 339) (“the right of citizens to ... use information to reach consensus is a precondition of enlightened self-government”). (Some of this feigned concern is related to the issue of “sham” parties, which Plaintiffs address on the next page.)

The State has no real response to the substantial body of evidence showing that fusion ballots do not cause voter confusion, nor that showing Wisconsin voters specifically capable of voting under the fusion system without issue. (Dkt. 24 at 24 (citing Dkt. 26 at 10–14 (Burden rep. at 7–11)); Dkt. 26 at 17–20, 27–28 (Burden rebuttal at 2–5, 12–13); Dkt. 28 at 25–27 (Drutman rep. at 22–24); Dkt. 28 at 32–37 (Drutman rebuttal at 2–7); Dkt. 95 ¶¶55–57, 60–61) The State’s experts cite a single national survey measuring impressions of political parties that “d[id] not isolate the views of New York voters,” which calls into question its relevance as voters “in non-fusion states have no reason to know what the Working Families Party stands for.” (Dkt. 28 at 35 (Drutman rebuttal at 5)) Though multiple states have used fusion voting for decades and the practice has existed for far longer, it is telling that the State’s experts could not identify even one example of a problem with voter confusion at any point across American history. (*Id.* at 37 (Drutman rebuttal at 7)) The State’s claim that “marginal or low-information voter[s]” use “party

labels” as “heuristics” to aid in voting is both unsupported speculation and constitutionally irrelevant as a state interest. Thus, the State offers no meaningful evidence that fusion causes confusion, while Plaintiffs provide evidence that voters are capable of reading a ballot in a voluntary fusion regime without issue. Instead, the State is banking on adoption of its audacious form of rational-basis review and blind acceptance of its baseless voter-confusion claim. (*Cf.* Dkt. 58 at 16 (“Plaintiffs say there is no evidence that fusion causes confusion which ... [is] irrelevant to rational basis review[.]”))

“Preventing sham parties.” (Dkt. 58 at 17) The State claims that, absent the fusion ban, “major party candidates [would] have a strong incentive to create ad-hoc ‘Sham Parties.’” (*Id.*) The State’s experts’ claim that “[e]xactly” this “happened in New York” (*id.*) is not borne out by evidence. “*Timmons* hypothesized that fusion could create ‘billboard’ parties cluttering the ballot with sloganeering. The minor parties that have achieved and maintained ballot access in New York ... are genuine organizations with membership structures, policy agendas, and decades of sustained operation. Ephemeral vanity lines have not gained meaningful traction in New York’s century of fusion practice.” (Dkt. 28 at 42 (Drutman rebuttal at 12)) The State’s experts identify no evidence that sham parties pose a problem in any jurisdiction that allows fusion voting.

Regardless, it is unclear why a desire not to let a political party “highlight a campaign slogan on the ballot” is inherently a state interest, outside of the—purely hypothetical—risk of an AstroTurfed party using *involuntary* cross-endorsement to drag down a political opponent.¹⁵ The better view, consistent with free-speech principles, is that preventing this is not a valid state interest in and of itself. Wisconsin already erects significant barriers to minor parties’ participation in the political process, including prior vote percentage thresholds, signature collection requirements, fundraising registration requirements, and more. Wis. Stat. §§ 5.62(b)1., (2)(a); *id.* §§ 8.17, 11.0302, 11.0402. And, importantly, Wisconsin law places no limit on party names, *see* Wis. Stat. § 11.0303(1)(a), and the State does not argue—nor could it without violating Wisconsin

¹⁵ If fusion is voluntary, this would generally not be an issue: a candidate need not worry about being identified on the ballot with, say, a Nazi Party if they have the option to decline the cross-nomination.

Constitution article I, section 3, or the First Amendment—that the State has any interest in ensuring the “Tax Cut Now” Party stays off the ballot just because its name also happens to be a slogan.

“Preventing cross-filing and ‘raiding’.” (Dkt. 58 at 17) The State says that removing the fusion ban would allow the duopoly parties to “raid” minor parties’ primary elections, though it admits in a footnote that this can be managed through appropriate regulation such as New York has employed, or by other means.¹⁶ (*Id.* at 17, 18 n.4) This concern is often cited in fusion voting cases, but it simply does not stand up to scrutiny for several reasons.

First, the concern about raiding primaries is entirely unrelated to the fact that Wisconsin bans voluntary fusion on the **general election** ballot. Wisconsin maintains an open primary system and nonpartisan voter registration, meaning it is already possible for a candidate or a party to mobilize supporters to steer a competing party into endorsing a candidate it otherwise would not. Even so, such efforts have not successfully tilted the outcome of a primary election in Wisconsin.

Second, the most salient fact about “raiding” that the State elides is that there is no evidence it has happened in Wisconsin. Plaintiffs concede that a state need not wait for misconduct to occur before taking steps to combat it, but the absence of any example is glaring. There may be many reasons Wisconsin has no history of raiding—Plaintiffs need not speculate as the State does. The fusion ban is not a means of preventing party raiding under Wisconsin law as it currently exists, and it is nonsensical to reference raiding as a State interest to justify Wisconsin’s fusion ban.

Third, the Atkinson-Tahk report’s discussion of California’s unrestricted primary system of the early- to mid-twentieth century is telling. (*See* Dkt. 58 at 17–18 (citing Atkinson-Tahk rep.

¹⁶ While the State couches this concession in a concern that New York’s so-called “Wilson-Pakula” system has “laid the groundwork for [multiple] instances of political corruption” its expert report relies on a single decade-old example, which did not include **any minor parties** and was immediately detected and prosecuted. (Dkt. 58 at 18 n.4 (discussing Atkinson-Tahk rep. at 14, citing Luca Marzorati, *Former State Senator Malcolm Smith Sentenced to 7 Years*, POLITICO (July 1, 2015))) Likewise, the risk the Atkinson-Tahk report notes of party power becoming “centralize[d] power in the hands of party activists and leaders rather than the rank-and-file electorate” (Dkt. 25 at 53 (Atkinson-Tahk rep. at 14)) is not valid: the U.S. Supreme Court has rejected the argument that a system in which party leaders and activists control the primary-selection process is constitutionally problematic. *See N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202–03, 205 (2008) (“None of our cases establishes an individual’s constitutional right to have a ‘fair shot’ at winning the party’s nomination.”).

at 30)) Citing only three examples, the report concludes that “striking examples of [] capture” were the progressive Earl Warren, the conservative Richard Nixon, and the conservative William Knowland to win both Democratic and Republican primaries for office over a decade-long period. (Dkt. 25 at 69 (Atkinson-Tahk rep. at 30)) But the report provides no example of this tactic being used to take over a minor party (which is the ostensible State interest here). Nor does the report assert that, much less explain how, these anomalous examples left any permanent mark on either of the duopoly parties, presumably because there was none: California Democrats largely continued to vote for Democrats, its Republicans largely voted Republican, and the State’s experts do not say otherwise. The State also does not address that disaggregated fusion voting—even if “largely unused”—for Presidential elections in California has not led to the parade of horrors its experts assert a fusion regime would trigger in Wisconsin. (*Id.* at 69, 72 (Atkinson-Tahk rep. at 30, 33)) What the State and its experts characterize as “raiding” in these limited California examples, a reasonable person might see as exceptional politicians building temporary bipartisan support. (*See* Pls.’ Resp. to Def.’s Proposed Findings of Fact Supp. Mot. Summ. J. ¶¶32–35)

Further, the Atkinson-Tahk report fails to explain why it is inherently bad if a candidate can obtain the nomination of both major parties. Especially in the modern political context where—as Plaintiffs’ evidence demonstrates—the major parties are extremely polarized (Dkt. 95 ¶¶6, 63, 67–70; *see also* Dkt. 28 at 37–40 (Drutman rebuttal at 7–10)), a candidate who could win both Wisconsin’s Democratic *and* Republican primaries, for any office, at any level, would have achieved an extraordinary feat meriting praise, not condemnation as “raiding.” (The State’s experts appear to agree with this, to an extent. (*See* Dkt. 25 at 69 (Atkinson-Tahk rep. at 30 (“In the modern Wisconsin context, it is unlikely that informed Republican voters would vote for a Democrat in their primary and vice versa.”))))

“Preventing sore losers.” (Dkt. 58 at 18) The State claims that Wisconsin’s fusion ban is all that stands between a candidate losing a primary election but still appearing on the general election ballot. (*Id.*) That is incorrect. For one thing, it is easy to adopt disaggregated fusion and prevent this in a narrower way. The State could require either (i) a candidate who voluntarily

chooses to pursue cross-nomination by participating in multiple primaries to win them all, or (ii) a party that wishes to cross-nominate to declare its intention to do so, by filing a form, and then to execute on it. For another thing, the fusion ban does not prevent “sore loser” candidacies in practice; it prohibits minor parties from supporting their candidate of choice only if that candidate has been nominated by a major party. (*See* Dkt. 28 at 41 (Drutman rebuttal at 11); *see also* Dkt. 26 at 26–27 (Burden rebuttal at 11–12))

Moreover, Wisconsin law currently permits a candidate to run as a write-in in a general election even if they have lost a primary, and no “chaos” has followed. (Dkt. 26 at 26–27 (Burden rebuttal at 11–12)) Further, it is highly ironic that the State relies on the Atkinson-Tahk report’s bold statement that sore-loser laws “mitigate the ‘spoiler effect’ that occurs when multiple candidates from the same ideological faction compete in a general election.” (Dkt. 58 at 18 (quoting Atkinson-Tahk rep. at 33)) Neither the State nor its experts’ report has any answer to evidence that, under the current anti-fusion system, “spoiler” is demonstrably the only role minor parties can realistically play in Wisconsin and most other states. (Dkt. 95 ¶64¹⁷)

“Avoiding polarization.” (Dkt. 58 at 18) The best the State and its experts can come up with on this point is that fusion voting “**could conceivably** increase polarization.” (*Id.* (emphasis added)) The State cites no case holding that this is a valid state interest. And the State’s experts concede that they lack “proof that fusion has had a polarizing effect in New York or that the effects would be the same under the conditions in other states.” (Dkt. 25 at 86 (Atkinson-Tahk rep. at 47)) Dr. Drutman, by contrast, easily dismantles the State’s effort to flip United Wisconsin’s hope for a moderate, centrist party on its head, pointing out that “[t]he [h]istorical [r]ecord [c]ontradicts the [c]laim” that fusion aggravates polarization. (Dkt. 28 at 32–34 (Drutman rebuttal at 2–4

¹⁷ The State’s response to Plaintiffs’ Proposed Findings of Fact, ¶64, cites pages 38–45 of the Atkinson-Tahk report for the claim that allowing fusion will not eliminate the spoiler problem, but those pages contain only one paragraph (*see* Dkt. 25 at 84 (Atkinson-Tahk rep. at 45)) addressing how fusion might, hypothetically, incentivize a centrist party (and no others) to run a spoiler candidate. (Dkt. 56 ¶64) This paragraph relies on a series of speculative assumptions (without supporting evidence) and is regardless irrelevant. Plaintiffs do not dispute that a minor party **could** still play the role of spoiler without the fusion ban; their argument is that the fusion ban **consigns** them to this role and no other.

(discussing success of moderate Liberal Party of New York for nearly sixty years, as well as the centrist A Connecticut Party in the 1990s under that state’s fusion regime, as well as the Alliance Party of South Carolina, which cross-nominated candidates from both parties until the legislature banned the practice in 2023))) Indeed, the “Shor-McCarty state legislative polarization dataset—the standard measure in political science—reveals the opposite pattern[.]” showing that ***fusion does not contribute to polarization*** and that ideological leanings tend to be guided more by other factors, such as regional dispositions. (*Id.* at 37–40 (Drutman rebuttal at 7–10 (citation omitted))) Even assuming *arguendo* that preventing polarization is a valid State interest, a fair review of the evidence suggests that fusion does not enhance polarizations—and may mitigate its effects.

Additionally, the State’s experts cite no examples of polarization problems in Mississippi or Connecticut, which allow fusion. That is because this argument is a red herring: “concurrent efforts [occurring today] across multiple states demonstrate that political entrepreneurs continue to view minor-party formation under fusion as a viable mechanism for centrist political expression[.]” (*Id.* at 34 (Drutman rebuttal at 4 (footnote omitted))) Instead, what the State’s experts describe as a polarization problem inherent to fusion voting, using New York as the sole example, “conflates correlation with causation” in a world in which “the major parties [have] sorted ideologically—a phenomenon driven by national forces unrelated to fusion” and the local “party system adapted” accordingly. (*Id.*) Put more plainly, if New York’s major parties grew more conservative or liberal than expected—a claim contradicted by evidence, to be sure (*id.* at 38–39 (Drutman rebuttal at 8–9 (data shows less polarization in New York than anticipated)))—that reflects New York voters having grown more conservative and liberal, independent of fusion.

“Maintaining party strength.” (Dkt. 58 at 19) Finally, the State argues that the fusion ban helps to maintain party strength, once more citing no cases to establish this as a valid State interest. For the sake of argument, Plaintiffs assume without conceding that this is a valid State interest. (*Cf.* Dkt. 80 at 2, 9) The State’s experts say that fusion “risk[s] turning parties into fluid brands or transactional coalitions rather than coherent governing organizations,” which “***could*** ‘weaken parties’ gatekeeping capacity and exacerbate[e] candidate-centered, polarized politics.” (Dkt. 58

at 19 (quoting Atkinson-Tahk rep. at 47 (emphasis added))) This displays an odd misunderstanding of (if not willful blindness to) how major political parties work today, and the State’s arguments that a fusion ban enhances party coherence should be dismissed.

As Dr. Drutman explains, “[c]ontemporary major parties encompass starkly incompatible positions” and the “premise that major parties maintain coherent platforms is” demonstrably untrue. (Dkt. 28 at 41 (Drutman rebuttal at 11)) Further, political parties already likewise represent transactional coalitions: why else would the modern Republican Party be a home to both “Trump impeachment supporters and [2020] election denialists[,]” and the Democratic Party “include[] democratic socialists and anti-abortion moderates”? (*Id.*) The answer is that political parties are inherently coalitional and transactional by nature.

Neither the State’s brief nor its experts’ report even attempts to explain *how* fusion would weaken the parties’ gatekeeping role or exacerbate candidate-centric politics. Fusion does not eliminate parties’ ability to screen candidates, develop platforms, or determine whom to support. And in a voluntary fusion regime, parties may still “gatekeep” party identity to the same extent as current law allows, both in terms of who may participate in party politics and who may endorse the party’s candidates. To the contrary, fusion voting enhances the ability of parties—particularly smaller parties—to exercise meaningful influence by allowing them to condition endorsements on adherence to specific policy priorities. Indeed, fusion encourages candidates to build broader coalitions and engage with a wider range of constituencies rather than simply appealing to a narrow partisan base, which *strengthens* parties as independent political actors. (*See* Dkt. 80 at 6–7)

* * *

All of the State’s asserted interests are speculative, unsupported by evidence, and insufficient to justify the severe burdens imposed by the fusion ban.

IV. Article I, Section 22, Applies as an Independent Claim.

Plaintiffs’ opening brief argues—using text, history, and precedent—that Article I, Section 22, of the Wisconsin Constitution entitles them to relief. (Dkt. 24 at 14–21) The State’s response is jaw-dropping: the Court should hold that clause “doesn’t create judicially enforceable rights”

(Dkt. 58 at 22), essentially writing the Free Government guarantee out of the Constitution.¹⁸ Worse yet, the State seeks to discard Article I, Section 22, without acknowledging, much less applying, the framework Wisconsin courts utilize to interpret constitutional text. This Court has a duty to reject the State’s invitation and properly construe Article I, Section 22. As our Supreme Court has recognized, “[t]he people of this state shaped our constitution, and it is [the judiciary’s] solemn responsibility to interpret it.” *Knapp*, 2005 WI 127, ¶60 (citing *Bashford*, 4 Wis. at 786).

Constitutional provisions “are to be construed so as to promote the objects for which they were framed and adopted.” *State v. Cole*, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328 (quoting *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 729–30, 150 N.W.2d 447 (1967), quoting in turn *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 184, 204 N.W. 803 (1925)). Courts “focus[] on the constitutional text, reading it reasonably, in context, and with a view of the provision’s place within the constitutional structure.” *LeMieux v. Evers*, 2025 WI 12, ¶9, 415 Wis. 2d 422, 19 N.W.3d 76 (quoted source omitted). For context, “courts may examine ‘the history of the times,’ meaning not only the legislative history (including word changes in the drafts of [provisions]) but also ‘the state of society at the time,’ with special emphasis on the ‘practices and usages’ then in existence, so as to identify the concerns the provision sought to address.” *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶117, 295 Wis. 2d 1, 719 N.W.2d 408 (Prosser, J., concurring in part and dissenting in part) (quoted sources omitted). Judges can no more “allow an atextual approach ... to supersede the Constitution’s text” than they can “pretend that some constitutional provisions are more important than others.” *Johnson v. WEC*, 2021 WI 87, ¶100, 399 Wis. 2d 623, 967 N.W.2d 469 (Dallet, J. dissenting). This reflects courts’ fundamental aversion to “reading a constitutional provision in such a manner as to render any portion of its language surplusage.” *Jacobs v. Major*, 132 Wis. 2d 82, 97–98, 390 N.W.2d 86 (Ct. App. 1986), *aff’d in part, modified in part, and rev’d in part*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987); *accord*, e.g., *State v. M.L.J.N.L.*, 2024 WI App 11, ¶26, 411 Wis. 2d 174, 4 N.W.3d 633.

¹⁸ If Article I, Section 22, does create rights, the State says, those rights are not “independent from a traditional substantive due process claim.” (Dkt. 58 at 25)

The State’s rejection of Article I, Section 22, violates these settled principles. The State makes no effort to apply, or even consider, the provision’s text or its place within the Declaration of Rights. Nor does the State give any consideration to the context in which the framers adopted this provision. Instead, mere pages after insisting (erroneously) that Plaintiffs’ entire case is foreclosed by an 1898 court decision, the State derides Plaintiffs’ reliance on cases “decided over a hundred years ago”—every one of which is more recent than *Runge*—and sniffs that prior cases do not address Article I, Section 22, in isolation or on its own terms. (Dkt. 58 at 22)

This is ironic several times over. For one, the cases upon which Plaintiffs rely are hardly fossils; all but one of the eighteen cases referenced in Section I of Plaintiffs’ opening brief has been cited by Wisconsin appellate courts in the past 20 years. (The outlier was cited as recently as the 1990s.)¹⁹ For another, the State’s brief fails to promote any contrary case law and says nothing at all about Article I, Section 22’s words; instead, the State turns its back on “[t]he text of the constitution[, which] reflects the policy choices of the people.” *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶¶28, 393 Wis. 2d 38, 946 N.W.2d 35. The State has nothing affirmative to say—whether about the wording of Article I, Section 22, why the provision was adopted, how it was understood by the framers, or what purpose it serves. The State’s sole argument is that this piece of the Constitution should be paid no heed. That approach cannot be correct, and this Court should repudiate it.

Admittedly, Article I, Section 22, has not been a lightning rod for litigation since its adoption, but it remains part of our Constitution and more specifically part of our Declaration of Rights. It cannot be dismissed as meaningless, and courts are duty bound to vindicate the guarantee

¹⁹ The same is true for three cases the State introduces. (Dkt. 58 at 23 n.5) These are cases Plaintiffs did not cite, and they shed little light on Article I, Section 22. In one, a prior federal-court adjudication precluded all constitutional claims. *Graney v. Bd. of Regents of Univ. of Wis. Sys.*, 92 Wis. 2d 745, 751, 286 N.W.2d 138 (Ct. App. 1979). In another, the glancing mentions of Article I, Section 22, as a buttress for due process and equal protection serve primarily to underscore that Article I, Section 22, was not invoked there as a standalone claim. *Chicago & N.W. Ry. Co. v. La Follette*, 43 Wis. 2d 631, 635, 642, 169 N.W.2d 441 (1969). The third case, *Peppies Courtesy Cab Co. v. City of Kenosha*, establishes only that Article I, Section 22, establishes one of several “liberty interests guaranteed under the Wisconsin and United States Constitutions.” 165 Wis. 2d 397, 398–99 & n.1, 475 N.W.2d 156 (1991). The Court had no occasion to delineate the scope of Article I, Section 22, because it struck down the ordinance at issue as a violation of due process that could not withstand rational-basis review. As such, the *Peppies* Court never considered whether other constitutional provisions referenced would trigger heightened scrutiny. *Id.* at 400.

it embodies. Using the prescribed framework of text, context, and precedent, Plaintiffs have demonstrated that Article I, Section 22, is independently enforceable when State action tramples on a fundamental principle of free government in Wisconsin. (*See* Dkt. 24 at 14–19) Where—as here—such a fundamental principle is at issue, strict scrutiny applies. (*Id.* at 19–21) In the alternative, Article I, Section 22, magnifies companion constitutional claims, as has happened in prior cases. (*Id.* at 17 & n.5) (The State acknowledges that those cases mention Article I, Section 22. (*See* Dkt. 58 at 22–23)) Where—again, as here—a fundamental principle is at issue and a related constitutional claim has been alleged, strict scrutiny applies, even if, in the absence of Article I, Section 22, a less exacting standard might govern. (Dkt. 24 at 19–21)

The State also seizes upon an ahistorical and artificially narrow definition of “fusion voting” to insist that Wisconsin’s fusion ban cannot implicate fundamental rights and is therefore insulated from strict scrutiny, regardless of Article I, Section 22. As addressed above, actual state history, as illuminated through Professor Disch’s expert reports (Dkt. 27), as well as the historians’ amicus (Dkt. 81), establishes that the principle of cross-nomination, in whatever form it was available under the reigning ballot regime of the day, was a key aspect of Wisconsin democracy, from statehood right up until the fusion ban squashed it. *See supra* Section I.

Properly construed, Article I, Section 22—“that admonition so full of meaning,” *State v. Redmon*, 134 Wis. 89, 102, 114 N.W. 137 (1907)—“establishes limitations or restrictions on state action,” *Jacobs*, 139 Wis. 2d at 507. Measured by plain text, historical context, or precedent, provisions in the Declaration of Rights cannot be shunted aside as “mere embellishments,” “meaningless, glittering generalities,” or “high-sounding phrases, signifying nothing in particular.” *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 Wis. 468, 520, 107 N.W. 500 (1906) (internal quotation marks omitted). Article I, Section 22, promises the “maintenance of free government” and instructs that this be accomplished “by frequent recurrence to fundamental principles.” Wis. Const. art. I, § 22. Plaintiffs’ detailed record establishes fusion voting as among Wisconsin’s “fundamental principles” (Dkt. 95 ¶¶17–31) and thereby renders Wisconsin’s fusion ban incompatible with Article I, Section 22.

The State concedes that fusion nominations were “common” during the mid-19th century, “typically involving cooperation between a minor party and a major party but occasionally involving cooperation between the major parties. (*Id.* ¶19) While the State quibbles with the meaning of “fusion candidacies” versus “fusion voting,” the State concedes that fusion candidates were nominated in Wisconsin in at least 1850, 1851, 1853, 1873, 1878, 1886, 1887, 1894, 1895, and 1896. (*Id.* ¶22) Though the State’s brief contends that the fusion ban is an unavoidable feature of the Australian-style ballot, it does not dispute Professor Disch’s statement that the fusion ban “became *possible* as state legislatures implemented Australian electoral reform but was not practically *necessary* to accomplish that task.” (*Id.* ¶37 (emphasis added)) The record shows beyond dispute that Professor Disch’s statement is correct (and the State’s argument is not), including because several jurisdictions allow fusion voting, without issue, today. (*Id.* ¶¶10, 57) Wisconsin’s own history is even clearer on this point: as the state concedes, *after* adopting a state-printed ballot, Wisconsin enacted the nation’s only statute *expressly protecting* fusion voting. (*Id.* ¶56) The record also shows that this statute was used in practice, as fusion nominations continued to thrive after, and to coexist with, Wisconsin’s adoption of state-printed ballots. (*Id.* ¶55) This period of active fusion—the heyday of fusion voting in Wisconsin—disposes of the State’s speculative parade of horrors. And the record shows that, in 1897, Wisconsin Republicans (who dominated both chambers of the Legislature and held the Governor’s office) reversed State policy and, without any documented discussion, banned fusion voting to protect their partisan interests. (*Id.* ¶¶31, 33–36, 38, 45–46, 53) Against these damning facts, the State offers only speculations and distractions, neither of which can salvage the fusion ban.

Every tool of constitutional construction leads to the same inexorable conclusion here: Wisconsin’s fusion voting ban violates Article I, Section 22. It must be struck down.

V. Equal Protection Principles under the Wisconsin Constitution Protect Minor Parties like United Wisconsin and Are Best Applied through New Jersey’s Approach.

The State’s response to Plaintiffs’ equal protection arguments confirms why heightened scrutiny is appropriate. The State does not engage with Plaintiffs’ framework, Wisconsin’s unique

history of fusion politics, or the evidence demonstrating the fusion ban’s real-world effects. Instead, the State declares the fusion ban as facially neutral and, on that basis, insists the ban is immune from meaningful equal-protection review. But where, as here, a law burdens fundamental rights, creates classifications, or operates to the detriment of a politically unpopular group, equal-protection analysis does not end with facial neutrality. *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (quoting *Moreno*, 413 U.S. at 534 (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”)); *de la Fuente Díaz v. González Colón*, 786 F. Supp. 3d 453, 464 (D.P.R. 2025), *appeal pending*, No. 25-1638 (1st Cir., filed July 13, 2025) (quoting *Romer*, 517 U.S. at 634) (collecting cases for proposition that “when state action cannot be explained by a legitimate state interest, it rais[es] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected”).

Courts may examine the actual operation, historical context, and discriminatory effects of statutory provisions, and such an inquiry is warranted here. As the record establishes, Wisconsin’s fusion ban was enacted in a political environment where fusion served as a critical mechanism for Democrats and smaller parties to compete against Republican dominance. (Dkt. 95 ¶¶18–31, 33, 35) The ban’s practical effect—both historically and today—falls primarily on minor parties and voters who want to support them. (Dkt. 78 at 7–13) Minor parties depend on fusion to build influence, maintain organizational relevance, and participate meaningfully in governance without surrendering their identities. (Dkt. 30 at 3 (Andrews Decl. ¶¶12–15)) It follows that Wisconsin’s fusion ban, though framed in neutral terms, systemically disadvantages minor parties and reinforces the electoral advantages of the duopoly parties. Wisconsin’s equal-protection guarantee does not abide such unequal treatment without meaningful justification.

A. The State ignores Plaintiffs’ articulated standard for equal protection.

The State does not respond to the merits of Plaintiffs’ argument that Wisconsin’s equal-protection guarantee, given its special place within state history, is best construed not to lockstep with federal jurisprudence. (Dkt. 24 at 27–32) The State offers no response to textual comparison

of the equal-protection guarantees in the Wisconsin and U.S. Constitutions (*id.* at 27–28); no rebuttal to the history of cross-party coalition building offered by Plaintiffs’ experts (*id.* at 28–29); and no alternative to Plaintiffs’ proposal that Wisconsin courts should adopt New Jersey’s approach to equal-protection analysis (*id.* at 29–32). The State has forfeited any further arguments on this topic. *See, e.g., Bilda v. Cnty. of Milwaukee*, 2006 WI App. 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 (citing *N.W. Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995)) (“It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.”). Accordingly, if the Court construes the equal protection analysis as Plaintiffs propose, Wisconsin’s fusion ban fails.

B. Wisconsin’s fusion ban cannot survive strict scrutiny.

1. The fusion ban creates two facial classes: first- and later-nominators.

The State argues that the fusion ban is, on its face, not amenable to equal-protection analysis because it does not create two differently treated classes. (Dkt. 58 at 27) Plaintiffs acknowledge that litigants in other fusion cases failed to precisely articulate the classification created by fusion bans, but the State errs in presenting this as dispositive. (*Id.* at 27–28) Failures by earlier litigants to frame the precise claim Plaintiffs make here cannot preclude relief in this case. In practice, Wisconsin’s fusion ban disadvantages minor parties, and it does so on the basis of a facial classification: first-nominators versus later-nominators.

The ban’s essential principle is that “[n]o filing official may accept nomination papers for the same person in the same election for more than one party.” Wis. Stat. § 8.15(7). A separate provision details the practical mechanics: “[t]he 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.” Wis. Stat. § 8.03(1). These mechanics reveal that the ban discriminates against would-be cross-endorsing parties by treating them as a separate class. One class (the first-nominators) has the right to nominate whomever it wants, but the other class (the later-nominators) is constrained by law, forbidden from cross-nominating that same candidate.

2. *The fusion ban results in invidious discrimination against and a burden upon a distinct class.*

From here, the history of Wisconsin’s fusion ban becomes relevant. The statutory classification burdens only minor parties and impairs fundamental rights of political association and voting; accordingly, it triggers strict scrutiny. In evaluating a discriminatory classification, a Court may look beyond statutory text to assess the impact of and the impetus for enactment, all to help determine whether the law operates as a form of invidious discrimination against—and severe burden on the rights of—a statutory class. *Metro. Assocs.*, 2011 WI 20, ¶68 (assessing actual characteristics to determine whether classes created were so “inherently different” as to justify disparate treatment); *Milwaukee Brewers*, 130 Wis. 2d at 103 (“If the concept of equal protection is to be meaningful, equal protection cannot be interpreted so as to allow the legislature to exercise its will on a minority of citizens anytime it desires so long as there is any rationale to do so, regardless of how remote, fanciful, or speculative the rationale may be.”). This is especially so where the viability of a new political party, such as United Wisconsin, is at stake. *See, e.g., Williams*, 393 U.S. at 30–31 (recognizing that “[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot” and applying strict scrutiny because of the substantially unequal burdens imposed by a law); *Norman*, 502 U.S. at 288–89, 293 (emphasizing that restrictions burdening new political parties implicate First and Fourteenth Amendment rights).

In this case, looking behind the statutory text reveals that the classification created by the fusion ban applies unequally to minor and major parties. Understating matters, the State concedes that “the anti-fusion law does impose some burden on small parties.” (Dkt. 58 at 12) What the State calls “some burden” is, more accurately, the consignment of minor parties to permanent, virtual irrelevance in Wisconsin politics. The record shows that, prior to the ban, fusion was the principal mechanism through which minor parties exercised political influence, secured representation, and advanced their policy goals; that Wisconsin’s minor parties generally found electoral success only through fusion arrangements; that the ban was enacted after Democrats and

their minor-party allies had successfully used fusion; and that minor parties today remain incapable of competing effectively without fusion. (Dkt. 95 ¶¶17–29, 38–54, 64–66; *see also* Dkt. 80 at 8 (Under Wisconsin’s fusion ban, “minor parties have been intentionally, successfully relegated to almost a century of failure.”)) Although the statute is nominally neutral, in practice, its brunt falls exclusively on minor parties like United Wisconsin and voters like the individual Plaintiffs.

The State’s invocation of the Green Party in this context is spurious. While the State says “prominent minor parties” oppose fusion and highlight the Greens as an exemplar (Dkt. 58 at 29 & n.8), the Greens are the only minor party with this opinion. (Dkt. 69) The Libertarian Party and the Working Families Party, far more successful entities occupying opposite ends of the ideological spectrum, jointly filed a brief supporting Plaintiffs’ position (Dkt. 55), as did leading scholars of political parties (Dkt. 80). Plaintiffs address the Green Party brief in detail below, *see infra* Section VIII.A.1, but for now a broader point suffices: the State chooses to highlight the Green Party, which is the poster child for Plaintiffs’ underlying point about the failure of minor parties under anti-fusion regimes. After forty years of organizing in the United States (and almost as many in Wisconsin), the Green Party has not broken through—as of today, it has never won a federal or statewide election and holds no seats in any state or territorial legislative body.²⁰ The reality is that the Greens—in Wisconsin and nationwide—exemplify the spoiler role to which minor parties are consigned without the opportunity to cross-endorse candidates.²¹

For the foregoing reasons, the fusion ban cannot survive strict scrutiny. It imposes a burden, unsupported and unsupportable, upon a distinct class of later-endorsing political parties, which the

²⁰ *See, e.g.,* Per Urlaub, *Why Is the U.S. Green Party So Irrelevant?*, NEW REPUBLIC (Oct. 19, 2016), available at <https://newrepublic.com/article/137924/us-green-party-irrelevant>; Calder McHugh, *‘It Smells Like a Rat’: The Nasty Feud That Could Flip Wisconsin*, POLITICO (Oct. 3, 2024), available at <https://www.politico.com/news/magazine/2024/10/03/wisconsin-green-party-00180283> (In Wisconsin, “the Green Party, which bills itself as an independent political party that has the best interests of self-described leftists at heart, is nowhere to be found. It has no storefronts, no candidates running for local office, no relationship with the politically active UW-Madison campus, which has almost 50,000 students.”).

²¹ The Green Party’s amicus brief criticizes Plaintiffs for “disregard[ing] that the ability to run a ‘spoiler’ gives minor parties influence.” (Dkt. 69 at 10) While such a marginal (not to mention cynical) approach may satisfy the Greens, it is not enough for United Wisconsin (nor for the Libertarians or the Working Families Party), who seek full participation in Wisconsin elections, as is their state constitution right.

evidence establishes is limited in practice to minor political parties—a class deserving protection. The ban likewise impairs those parties’ fundamental rights. And for the reasons explained in Plaintiffs’ opening brief and throughout this response, none of the State’s purported interests in the fusion ban are valid, much less supported by the factual record. *See supra* Section III.

C. Wisconsin’s fusion ban also fails rational-basis review.

Even the application of rational-basis review would require invalidating Wisconsin’s fusion ban. In the past half-century, there have been at least seven occasions in which a Wisconsin court has, under rational-basis review, issued a precedential decision striking a discriminatory classification for failing to meet at least one of that standard’s five criteria.²² Applying the appropriate level of review to Wis. Stat. §§ 8.03(1), 8.15(7), shows that the ban cannot withstand even this lowest degree of scrutiny, because the ban fails to draw justifiable distinctions based on legitimate State interests rationally connected—based on evidence—to the statute’s effects.

The Wisconsin Supreme Court has held that “a statute must meet five criteria in order to have a rational basis” for creating a discriminatory classification. The five criteria are:

- (1) All classification[s] must be based upon substantial distinctions which make one class really different from another;
- (2) The classification adopted must be germane to the purpose of the law;
- (3) The classification must not be based upon existing circumstances only[—i.e.,]it must not be so constituted as to preclude addition to the numbers included within the class];
- (4) To whatever class a law may apply, it must apply equally to each member thereof; [and]
- (5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

²² These include the cases discussed above—*Metro. Assocs.*, 2011 WI 20, and *Milwaukee Brewers*, 130 Wis. 2d 79—as well as *Nankin v. Vill. of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141; *GTE Sprint Commc’ns Corp. v. Wis. Bell Inc.*, 155 Wis. 2d 184, 454 N.W.2d 797 (1990); *Funk v. Wollin Silo & Equip., Inc.*, 148 Wis. 2d 59, 435 N.W.2d 244 (1989); *State ex rel. Grand Bazaar Liquors v. City of Milwaukee*, 105 Wis. 2d 203, 313 N.W.2d 805 (1982); and *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

Metro. Assocs., 2011 WI 20, ¶64. These criteria require the State to show that the fusion ban is based on a legitimate, rational governmental interest supported by evidence. *A.M.B.*, 2024 WI 18, ¶13 (rational-basis standard). The fusion ban cannot clear the bar.

Wisconsin’s fusion ban does not satisfy factors (1), (4), and (5). It creates and enforces an unequal distinction between two classes of political parties: the first-endorsers and all others who would cross-endorse. With regard to factor (1), no inherent, “substantial” difference separates first- and later-endorsers. *Metro. Assocs.*, 2011 WI 20, ¶65. The difference is created by the fusion ban. A candidate nominated for office by two parties—whether minor and major, or major and major, or minor and minor—has no inherent reason to care which party endorses them first. The only difference between the first- and later-endorser is timing, which could be a matter minutes. The timing is a *de minimis* characteristic, insufficient as a rational distinction. *Cf. id.* ¶¶68–69 (holding there is “nothing inherently different about taxpayers” whose municipalities “opted out” of *de novo* review of property tax assessments and those whose municipalities did not).

As to factor (4), the evidentiary record shows that Wisconsin’s fusion ban does not “apply equally to each member” of the two classes. *Id.* ¶64. This follows from inherent structural disparities between the duopoly parties and minor parties like United Wisconsin. In practice, the two major parties almost always occupy the first-nominator position because they possess the resources, ballot access, voter support, and institutional infrastructure to identify and nominate viable candidates before smaller parties. By contrast, minor parties are uniquely dependent on the ability to cross-endorse candidates who already possess a realistic chance of election. The result is that the class of “later-endorsers” maps almost entirely onto minor parties, meaning the fusion ban imposes its burdens overwhelmingly on one group while conferring its benefits only on the other group. (Just as the 1897 Legislature intended.) A classification operating so asymmetrically cannot be said to “apply equally to each member thereof.” *Id.*

Factor (5) is likewise unsatisfied. This factor is based on the long-held principle that “[t]he true practical limitation of the legislative power to classify is that the classification shall be based upon some apparent natural reason,—some reason suggested by necessity” to justify the “propriety

of different legislation with respect to them.” *Nankin*, 2001 WI 92, ¶43 (quoting *State ex rel. Risch v. Bd. of Trs. of Policemen’s Pension Fund*, 121 Wis. 44, 54, 98 N.W. 954 (1904)). Here, the “characteristics of each class” are not “so far different from those of other classes as to reasonably suggest [] the propriety, having regard to the public good,” of differential treatment. *Metro. Assocs.*, 2011 WI 20, ¶64. That means Wisconsin’s fusion ban is overbroad. A candidate who wishes to **voluntarily** accept the nomination of two political parties for the same office is forbidden, though the only difference between the first- and later-endorsing parties is timing. There is no reason for the fusion ban to draw this distinction other than to diminish the would-be later-endorsing party, which the record establishes is a role only minor parties would play.

Fundamentally, the ban fails to satisfy rational-basis review because the State has not identified any legitimate governmental interest that is advanced by Wisconsin’s categorical prohibition on voluntary fusion nominations. The State proffers several interests, but the record undermines each one. *See supra* Section III. Plaintiffs have submitted extensive evidence demonstrating that fusion was successfully used in Wisconsin and elsewhere; that it does not create meaningful ballot-administration problems; that it does not threaten electoral integrity; and that it serves as the only viable mechanism through which minor parties can meaningfully participate in Wisconsin politics while retaining their independent identities. Rather than rebut that evidence, the State relies on broad, *ipse dixit* assertions that fusion bans promote stability, prevent confusion, or preserve the existing party structure. But rational-basis review demands more than abstract governmental interests bereft of evidentiary support. A classification must rationally relate to a legitimate objective, and the Court must evaluate that relationship in light of the facts.

The State’s brief tiptoes up to admitting that the fusion ban exists to preserve the dominance of the current duopoly parties by denying minor parties—would-be competitors—access to a political tool available in the first fifty years of Wisconsin’s history and recognized as beneficial to emerging political movements. (Dkt. 58 at 19) But favoring entrenched political actors over competitors is not a legitimate governmental objective. A law with no practical effect other than

burdening minor parties, suppressing coalition-building, and reducing voters' political choices is arbitrary. On this record, the fusion ban fails even the deferential standard of rational-basis review.

VI. Wisconsin's Fusion Ban Is a Viewpoint-Specific, Content-Based Speech Restriction that Uniquely, Severely Burdens Minor Parties' Associational Rights.

Plaintiffs' free-speech and associational-rights claims present another, independent basis for invalidating Wisconsin's fusion ban. Here, as elsewhere, the State sidesteps the merits, relying instead on misread precedent, undeveloped theories of government speech and nonpublic forums, and repeated assertions that prior decisions foreclose claims never adjudicated. (Dkt. 58 at 34–37)²³ Likewise, the State fails to engage with Plaintiffs' evidence that the fusion ban suppresses core political expression by parties and voters alike, burdens the ability of citizens to associate around shared political goals, and targets a form of political advocacy used almost exclusively by minor parties. This presents a matter of first impression in Wisconsin. Evaluated under state constitutional protections for speech and association, Wis. Const. art. I, §§ 3–4, and in light of the factual record before the Court (rather than the sparse records underlying prior fusion cases), the ban cannot survive constitutional scrutiny.

A. The fusion ban limits private, not governmental speech.

At the outset, the State attempts to evade scrutiny by arguing that the fusion ban does not limit speech implicating constitutional protections at all. Without citing any Wisconsin authority, the State argues that “this case involves government speech on a ballot, not private speech that triggers free speech protections.” (Dkt. 58 at 34–35) The State fails to develop this argument, leaving unclear how a political party's speech, a putative voter's vote as an expressive act, or either's attempt to associate with another political party qualifies as speech *by the government*. This underdeveloped argument should be rejected if not dismissed as meritless. *See, e.g., Doe I*, 2022 WI 65, ¶35.

The State cites two cases to support its argument (*see* Dkt. 58 at 35), but neither stands for what the State suggests. In *Pleasant Grove City v. Summum*, the U.S. Supreme Court held that

²³ Contrary to the State's brief (Dkt. 58 at 34), *Runge* did not address these issues, much less “consider[] and reject[] a speech and associational rights challenge under the state constitution.” *See supra* nn. 6–9.

“[p]ermanent monuments displayed on public property typically represent government speech,” whether the statues were built by a municipality, donated, or privately financed. 555 U.S. 460, 470–72 (2009). The State offers no analogy to bridge the difference between a statue erected in a public park and a paper ballot listing candidates for office, likely because there is no connection. Whether a paper ballot is used to vote for the candidate of one’s choice, to associate across major-minor party lines, or to be listed on the ballot as the cross-endorsed candidate of two parties, the ballot does not implicate government speech because—unlike in *Pleasant Grove*—the ballot does not reflect the government choosing to speak, but private voters and political parties doing so.

Colorado v. Griswold, 99 F.4th 1234 (10th Cir. 2024), a non-binding case from the Tenth Circuit Court of Appeals, is likewise of little help to the State. The Tenth Circuit upheld a Colorado law mandating that the state use certain words in assigning titles to citizen-initiated ballot measures. *Id.* at 1236. Under the Act, ballot measures that would affect state or local revenues had to be titled to reflect the “impact on state and district funding priorities.” *Id.* The decision explains why these titles constitute government speech: even for voter-led ballot initiatives, government officials long had written the titles. *Id.* at 1241. With respect to *Griswold*, like with *Pleasant Grove*, the State’s brief draws no analogy. And here, too, that makes sense because, unlike in *Griswold*, this case does not implicate **government speech** describing anything on the ballot. Wisconsin’s fusion ban is instead a straightforward restriction on parties’ ability to speak to and through their preferred candidates, as well as voters’ ability to cast their vote on a ballot line reflecting their party affiliation.

This case more closely resembles *Matal v. Tam*, 582 U. S. 218 (2017), where the U.S. Supreme Court held that government approval of trademark applications for words or symbols generated by private registrants did not transform the registrants’ speech into government speech. Though the U.S. Patent and Trademark Office had to approve each proposed mark, it did not exercise sufficient control over the nature and content of those marks for approval to convey a governmental message. *Id.* at 239. As the Court aptly observed: “if private speech could be passed off as government speech by simply affixing a government seal of approval, government could

silence or muffle the expression of disfavored viewpoints.” *Id.* at 235. So, too, here. The ballot may be processed by government officials, but that does not make it government speech.

This case is also similar to *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). There, the U.S. Supreme Court concluded that the City of Boston’s “lack of meaningful involvement in the selection of flags [that private groups would raise outside of City Hall] or the crafting of their messages leads us to classify the flag raisings as private, not government, speech.” *Id.* at 258. Here, as in *Shurtleff*, the State has no role in selecting which candidates political parties will endorse, which endorsements candidates will accept, or the relevant message the candidate listings will convey. As such, the ballot on which that information is printed is not government speech.

B. The fusion ban does not implicate public forum doctrines.

The State likewise raises another undeveloped argument that a ballot is a nonpublic forum evaluated under a separate line of First Amendment doctrine. (Dkt. 58 at 35) A nonpublic forum is a type of “government property” that “is not by tradition or design a forum for public communication.” *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 864 (7th Cir. 2008) (cleaned up). The nature of a nonpublic forum means that some speech has less protection there than in a public forum; “[r]estrictions on speech within a nonpublic forum must not discriminate on the basis of viewpoint and ‘must be reasonable in light of the forum’s purpose.’” *Id.* (quoted source omitted) Here, too, the State cites two non-binding cases and offers little to link them to this dispute. (Dkt. 58 at 35) The Court should not consider this underdeveloped argument. *Doe I*, 2022 WI 65, ¶35.

Regardless, this argument bolsters Plaintiffs’ case by emphasizing that the fusion ban is a form of content-based, viewpoint discrimination. “Within a nonpublic forum, the Supreme Court has recognized ‘a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of th[e] limited forum, and on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.’” *Choose Life Ill.*, 547 F.3d at 865 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995)). This departs from Wisconsin law on content-based speech limits, discussed in Plaintiffs’ opening brief (Dkt. 24 at 40–42) and below.

Even if the Court were to agree that the ballot is a nonpublic forum under the Wisconsin Constitution, the fusion ban must still fall, because the “distinctions drawn” by the ban are not “reasonable in light of the purpose served by the forum.” *Cornelius v. NAACP*, 473 U.S. 788, 806 (1985). The government may restrict access to a nonpublic forum only if “the restrictions are ‘reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view.’” *Id.* at 800 (quoted source omitted).²⁴ Plaintiffs’ opening brief explains why the fusion ban imposes viewpoint discrimination in the modern era, where only minor parties need to pursue fusion as a viable means of coalition building. (Dkt. 24 at 33–35) In practice, this means their viewpoint—*i.e.*, their wish to endorse an already-endorsed candidate and have the candidate’s name listed on their ballot line—is both targeted and foreclosed by the fusion ban.

Moreover, as detailed in Plaintiffs’ opening brief, without any response by the State, the expression of political views is core First Amendment activity for voters and parties alike. (Dkt. 24 at 35–36) The purpose of the ballot—if it can be considered a forum under the doctrine the State invokes—is singular: to facilitate participation in the political process, leading to outcomes that “give effect to the will of the elector[ate].” Wis. Stat. § 5.01(1). Wisconsin’s fusion ban suppresses, rather than facilitates, the very political expression and association that elections exist to channel. The statutes challenged here do not regulate the mechanics of voting, ballot access deadlines, or any other administrative feature necessary to ensure an orderly election. Instead, they prohibit

²⁴ Notably, this clear limitation on government regulation undermines the State’s citations to *Choose Life Illinois* and to *Oettle v. Guthrie*, 189 N.E.3d 22 (Ill. App. Ct. 2020). *Choose Life Illinois* was not about ballots, but instead about specialty license plates, which the Seventh Circuit held “implicate the speech rights of private speakers, not the government-speech doctrine.” 547 F.3d at 855. Moreover, because Illinois’s “rejection of a ‘Choose Life’ license plate was [] content based but viewpoint neutral, and because it was also reasonable, there is no First Amendment violation.” *Id.* at 855–56. Wisconsin’s fusion ban by contrast is a viewpoint restriction, and it is neither neutral nor reasonable.

For its part, *Oettle* involved ballots, but not government efforts to control the content of those ballots. Instead, *Oettle* addressed ballot selfies (photos some voters wish to take with their completed ballots). *See* 189 N.E.3d 22, ¶3. The Illinois Court of Appeals “[f]ound the statute to be a reasonable restriction, as it neither limits a voter’s access to a ballot, nor limits a voter’s choice in voting.” *Id.* ¶14. That alone distinguishes it from this case, which involves the content of the ballot and indisputably “limits a voter’s choice in voting.” *Id.* Moreover, other courts have reached the opposite outcome on the constitutionality of ballot selfies. *See, e.g., Rideout v. Gardner*, 838 F.3d 65, 68 (1st Cir. 2016), *cert. denied*, 581 U.S. 904 (2017) (New Hampshire prohibition on ballot selfies violates First Amendment).

specific forms of core political expression: a political party's communication to voters—at the moment and in the venue where it matters—of endorsement for a candidate who has also been nominated by another party, and the corresponding ability of voters to express support for that candidate under the banner of their preferred party.

A restriction that reduces the amount of political information available to voters, limits the expressive choices available to parties, and narrows the means by which citizens may participate in the political process is not a reasonable regulation of a nonpublic forum devoted to democratic participation. Because the fusion ban bears no reasonable relationship to the ballot's purpose and instead undermines that purpose by restricting truthful political expression and association, it fails even the deferential standard applicable to nonpublic forums.

C. The State makes no effort to address Wisconsin's separate constitutional approach to free speech and association.

The State once again waves away the historical evidence Plaintiffs marshal and offers none of its own, dismissing without argument "Plaintiffs' evidence" that the Wisconsin Constitution takes a different approach to free speech and association. (*See* Dkt. 58 at 35 (discussing Dkt. 24 at 40–42)) The State's entire argument boils down to 'we disagree.' Moreover, on Article I, Sections 3 and 4, as on other topics, the State distorts key precedent. It argues that "the Wisconsin Supreme Court has already determined that the state and federal guarantees of free speech and association are 'coextensive.'" (*Id.* (quoting *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶23 n.9, 358 Wis. 2d 1, 851 N.W.2d 337)) But the *Madison Teachers* Court did not so hold; to the contrary, it left the question open, because the plaintiffs in that case "fail[ed] to present a developed argument to support their suggestion that Article I, Sections 3 and 4 of the Wisconsin Constitution should confer more expansive protection than its federal counterpart under the particular facts in this case." 2014 WI 99, ¶23 n.9.²⁵ For that reason, the *Madison Teachers* Court opted to "treat the

²⁵ *Madison Teachers* cites two earlier cases that also address the issue. 2014 WI 99, ¶23 n.9 (citing *Lawson v. Hous. Auth. of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955), and *Cnty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 388, 588 N.W.2d 236 (1999)). But the openness of the *Madison Teachers* Court to the exact type of argument made here establishes that these earlier cases do not foreclose a more

rights protected under the Wisconsin and United States Constitutions to be coextensive” *id.*, but neither made a broad pronouncement nor closed the door to future arguments like those made here.

Plaintiffs’ argument on this point remains the same as in their opening brief: protections for speech and association in the specific context of fusion merit heightened scrutiny under Wisconsin Constitution Article I, Sections 3 and 4. This is true both on the merits of those provisions alone and in conjunction with Article I, Section 22. *See supra* Section IV.

D. Wisconsin’s fusion ban is a content-based speech restriction—and the State comes close to admitting it.

Acknowledging that a content-based restriction is one that regulates speech “based on the message it conveys” and cannot be “justified without reference to the content of the regulated speech[,]” the State nevertheless claims the fusion ban is not content-based because “the restriction is based on whether the candidate has already been nominated by another party.” (Dkt. 58 at 36 (quoting *Kindschy v. Aish*, 2024 WI 27, ¶11, 412 Wis. 2d 319, 8 N.W.3d 1, and then *State v. Jackson*, 2020 WI App 4, ¶6 n.4, 390 Wis. 2d 402, 938 N.W.2d 639)) This seemingly gives up the game: the State’s brief specifically justifies Wisconsin banning parties from cross-nominating a candidate on the ballot based *on a particular quality of the speech at issue*. That is, according to the State, the speech at issue here—a minor party’s endorsement of a candidate—is forbidden solely because another speaker has already said it.

Allowing all speech (*i.e.*, the nomination of any other qualified candidate) unless it expresses a certain message is the definition of a content-based restriction, since it has been banned based exclusively on the message that it conveys, *i.e.*, ‘we nominate Candidate XYZ for this office, too.’ As the U.S. Supreme Court has explained, “[a] regulation of speech is facially content based ... if it applies to particular speech because of the topic discussed or the idea or message expressed.” *City of Austin v. Reagan Nat’l Adver. of Austin, LLC*, 596 U.S. 61, 69 (2022) (cleaned up).

expansive construction of Article I, Sections 3 and 4, where the proper factual circumstances are established.

Otherwise, the State clams up on this point. The State fails to address case law Plaintiffs cite to establish that this kind of ballot speech is at the core of First Amendment protection and political parties' speech rights. (Dkt. 24 at 41–45) It is silent on Wisconsin and federal precedents invalidating asymmetric, content-based speech restrictions. (*Id.* at 44) And it does not respond to the argument that the fusion ban is a content-based speech restriction *as to the individual Plaintiffs* (*id.*), focusing solely on the ballot-access component of the case specific to United Wisconsin (Dkt. 58 at 33). By failing to address these arguments, the State has forfeited the right to respond further.

Without further discussion, the State cites two other speech-related cases in passing to supply the standard for addressing a content-based restriction on speech. Both indirectly support Plaintiffs' position. *Interest of C. G.* upheld a state law prohibiting a transgender sex offender from legally changing her name because the limitation was not based on the "topic discussed" or the "message expressed." 2021 WI App 11, ¶34, 396 Wis. 2d 105, 955 N.W.2d 443. The Court of Appeals held the law was "content neutral because it does not determine such matters as what name a person must use." *Id.* ¶35. The fusion ban, in contrast, determines which candidate may or may not be endorsed by a later-endorsing party like United Wisconsin. (Dkt. 24 at 41–45) The same is true for *Reed v. Town of Gilbert*, which subjected a municipal signage ordinance to strict scrutiny because, "on its face," the ordinance applied different restrictions to different types of signs based on whether they either directed people to a temporary event, communicated an electoral preference, or communicated some other "[i]deological" message. 576 U.S. 155, 164 (2015). Just as the *Reed* Court easily found the town's sign restrictions content-based, the fusion ban likewise applies based "entirely on the communicative content of the" ballot listing, because the ban applies only if a party wishes to nominate (that is, speak on a ballot in support of) an already-nominated candidate. *Id.*

E. *Timmons* is distinguishable.

Finally, the State argues that Plaintiffs' freedom of association claim is doomed by the U.S. Supreme Court's decision in *Timmons* (Dkt. 58 at 36–37), an argument Plaintiffs addressed in part above. *See supra* Section I. The State's approach alternately ignores and misstates the evidence

and Plaintiffs' argument. The relevant evidence shows that Wisconsin's fusion ban was enacted for partisan purposes—not out of “mixed motive[s]” as the State says (Dkt. 58 at 37). This inferentially supports the point that the fusion ban unconstitutionally relegates minor parties to irrelevance. Further, the State ignores Plaintiffs' evidence that the fusion ban has indeed imposed a severe, insurmountable burden on minor parties' ability to associate and thereby grow political power. (Dkt. 29 at 2–4, 10–11 (Cantor Decl. ¶¶8–13, 37, 41)) The State has no option but to ignore this evidence, because it is beyond reasonable dispute that third parties in modern Wisconsin have no influence or more than minor, fleeting success limited to rare local elections. Wisconsin's fusion ban has perpetuated the duopoly and deepened polarization in our state by insulating the two-party system from competition. (Dkt. 28 at 11–15, 17–21 (Drutman rep. at 8–12, 14–18)) Regardless of the *Timmons* Court's application of a distinct federal legal standard to adjudicate a Minnesota statute on a near-empty record, rejecting Wisconsin's fusion ban under Wisconsin law does not run afoul of *Timmons*.

Notably, the State fails to respond to Plaintiffs' argument that the assumptions on which *Timmons* stands wilt under scrutiny in light of a complete evidentiary record. *Timmons* noted (a) that parties are free to nominate whomever they want, even if that candidate will not appear on a ballot, (b) that Minnesota's law did not preclude minor parties from developing and organizing, and (c) that the “predictive judgment” that “without fusion-based alliances, minor parties cannot thrive” is “by no means self-evident.” 520 U.S. at 360–61. But this Court need not reply on predictive judgments. The evidentiary record shows that (a) parties like United Wisconsin have no reason to nominate candidates who will not appear on their ballot (Dkt. 30 at 3 (Andrews Decl. ¶¶12, 15); Dkt. 29 at 2–3 (Cantor Decl. ¶9)), (b) the “inability” to cross-endorse “preferred candidate[s] *does* preclude minor parties from developing and organizing, because voters have no incentive to associate with them” (Dkt. 95 ¶65), and (c) the “predictive judgment,” *Timmons*, 520 U.S. at 361, that minor parties will not thrive without fusion is all but confirmed by the state of “minor parties today”[, as] virtually irrelevant in elections” (Dkt. 95 ¶66). A result different from the one in *Timmons* is compelled, both in the applicable legal standard and in the result.

VII. The State’s Concerns about Implementing a Verdict for Plaintiffs Are Overstated, Irrelevant to Summary Judgment, and Premature.

In a last-ditch effort, the State argues that this Court cannot declare the fusion ban invalid because the Legislature would then need to consider statutory amendments and Defendant Wisconsin Elections Commission (WEC) might need to promulgate new rules. (Dkt. 58 at 37–41)²⁶ These observations have no bearing on the constitutional claims before the Court, and the State cites no cases to support the concept that the judiciary may abandon its “solemn responsibility” to interpret and enforce the Wisconsin Constitution that “[t]he people of this state shaped” just because the resulting judgment would create a little work for other government actors. *Knapp*, 2005 WI 127, ¶60 (citing *Bashford*, 4 Wis. at 786).

Constitutional adjudication routinely spurs the political branches to revise statutes, regulations, and administrative procedures. The need for updates to legislation or agency rules is a consequence of constitutional compliance, not a defense that can shield a constitutional violation. *See, e.g., Milwaukee Brewers*, 130 Wis. 2d at 120–21 (rejecting point that other parts of state law could be constitutionally questionable and thus in need of revision based on logic of decision, as “a hypothetical question which we do not answer”); *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis. 2d 646, 659, 292 N.W.2d 807 (1980) (holding that statute violating obscenity law would not be “judicially modif[ied]” by the Court to save it and collecting comparable cases); *cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 404 (2024) (“To stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations....”). Once a court concludes that a statute violates the Declaration of Rights, the State must bring its laws into conformity with the Wisconsin Constitution. The State identifies no authority holding that a court may uphold an otherwise unconstitutional statute on the basis that doing otherwise would require amending related laws or regulations. The opposite must be true—otherwise, legislatures could insulate unconstitutional laws from review simply by embedding them within highly reticulated statutory schemes.

²⁶ The record shows that such changes would not need to be significant. (Dkt. 95 ¶¶57–61)

The Supreme Court has long recognized this principle in the election law context. In *Reynolds v. Sims*, after holding Alabama’s legislative apportionment unconstitutional, the Court explained that “once a State’s legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan,” while acknowledging that courts may consider the practical timing of relief to avoid unnecessary disruption. 377 U.S. 533, 585 (1964). The Court distinguished the existence of implementation concerns from the antecedent constitutional determination: practical difficulties may influence the remedy’s *timing*, but they do not justify leaving an unconstitutional law in force. *Id.*

That same principle governs here. Plaintiffs do not ask this Court to rewrite the Election Code, promulgate rules, or draft ballot forms. Those responsibilities belong, respectively, to the Legislature, WEC, and County Clerks. If Wis. Stat. §§ 8.03(1) and 8.15(7) are held unconstitutional, those actors retain ample authority to adopt whatever statutory amendments, administrative rules, ballot formats, nomination procedures, or other implementing measures are necessary to accommodate voluntary, disaggregated fusion voting while maintaining orderly elections. (*See also* McDonell Decl., ¶¶7, 9–11, 13–20) In the unlikely event that they fail to do so, this Court has the authority to impose injunctive relief as a stop-gap measure. But that is far down the road and need not be resolved at this liability stage of the case. *See, e.g., Clarke v. WEC*, 2023 WI 79, ¶¶51, 77, 410 Wis. 2d 1, 998 N.W.2d 370 (provisions “of the Wisconsin Constitution mean what they say,” and “it is necessary to enjoin” unconstitutional laws to avoid use in “all future elections”; while “hopeful” that the Legislature will address the problem, “should that fail to happen, this court is prepared to adopt” remedy).

VIII. Response to Additional Arguments of *Amici Curiae*.

This case has drawn an unusual volume and quality of *amicus curiae* briefs, especially for a matter in the circuit court. Plaintiffs do not address every point made by each such brief, and failure to address any point should not be seen as a tacit endorsement or opposition of it. However, a few key points raised by *amici* warrant mention.

A. Opponents of Fusion Voting.

Only two briefs (out of eight) oppose Plaintiffs' claims. Neither one makes points that will assist this Court in adjudicating the state constitutional issues presented by this case.

1. *The Wisconsin Green Party.*

The Green Party's brief emits far more heat than light. It parrots the State's mischaracterization of *Runge* as "a nearly identical challenge" to this one. (Dkt. 69 at 3); *see also supra* nn. 6–9. And it raises a passel of policy objections, all of which are inaccurate, irrelevant, or premature. Since the Greens do not support fusion voting, they will not have to use it.²⁷

The Green Party strategically sows confusion about aggregated and disaggregated fusion, while quoting Plaintiffs' argument for *disaggregated* fusion. (Dkt. 69 at 6 (quoting Dkt. 24 at 21)) Though the Green Party feints that "why [the remedy here] would be disaggregated fusion is unclear" (*id.* at 7), the answer is plain. Aggregated fusion does not allow minor parties to ascertain how many votes their ballot line attracted; this not only hobbles the efficacy of fusion but also undermines the associational rights Plaintiffs assert. Adopting aggregated fusion would entrench fatal constitutional infirmities. (*See* Dkt. 81 at 15 ("aggregated ballot design apparently suppressed approximately 5,000 Democrat and Populist votes" in Oregon's 1892 presidential election))

The Greens' fearmongering about New York and manipulation of third parties (Dkt. 69 at 7–8) is both speculative and misguided. Dr. Burden addressed these concerns in detail, concluding "it is a mistake to imply or assume that problematic occurrences [in New York] will also happen in Wisconsin, especially when they do not appear to occur in other states that allow or have allowed fusion." (Dkt. 26 at 21 (Burden rebuttal at 6); *see also id.* at 22–24 (Burden rebuttal at 7–9) (addressing purported concerns about political corruption, sham parties, and billboard parties))

The Greens also favor ranked-choice voting over fusion. They are entitled to that opinion, but it is nothing more than a policy preference, irrelevant to the constitutional arguments at hand. Moreover, the purported "collision between fusion voting and ranked-choice voting" (Dkt. 69 at

²⁷ The Greens' brief suggests that candidates could be cross-nominated without consent. (Dkt. 69 at 10) But the same associational freedom arguments made in Section V above would, as a matter of constitutional law, preclude placing a candidate on the ballot line of a party against that candidate's will.

10) is illusory. New York City, for example, uses both, demonstrating that they are not mutually exclusive. (McDonnell Decl. ¶10); NYC Charter § 1057-g. The Greens’ ethereal “hopes” that long-proposed and consistently unsuccessful ranked-choice voting proposals “will pass” in Wisconsin (Dkt. 69 at 11) do not rebut Plaintiffs’ concrete constitutional arguments in this case. (Besides, the bills the Greens cite have not made significant legislative progress; none of the three proposals introduced in the current legislative session even got a committee hearing. (*See id.* at 11 n.35)) Ranked-choice voting would not extinguish Plaintiffs’ constitutional claims, and the Greens’ speculation that it could amounts to nothing more than wishful thinking.²⁸

All that remains is the Greens’ rehash of the State’s attacks on this Court’s authority and competence to adjudicate Plaintiffs’ constitutional claims. (*Id.* at 9–10) That argument fails for the same reasons addressed in Section VII above.

2. *The Honest Elections Project (HEP).*

Given its self-description as “devoted to defending the right of every lawful voter to participate in free and honest elections” and “oppos[ing] efforts to ... manipulate election rules for partisan gain” (Dkt. 89 at 1), HEP’s objections to fusion voting are surprising. Indeed, the brief never connects HEP’s principles to the position staked out, nor does HEP’s claimed “comparative, multi-jurisdictional perspective” (*id.*) shed any further light.

The brief starts by defending “bipartisan efforts that continue in the 21st century to prohibit fusion voting.” (*Id.* at 3) HEP declares these efforts—which are too limited to constitute a trend—“irreconcilable with the theory that [anti-fusion] laws serve only a partisan interest to maintain control.” (*Id.*) But they are entirely consistent with Plaintiffs’ theory that fusion bans, Wisconsin’s included, were adopted to, and did, cement duopoly control by the two major parties.

²⁸ Nor are the Greens correct that “the Wisconsin Constitution is *very* hard to amend.” (Dkt. 69 at 11 (emphasis in original)) The Wisconsin Constitution “has been amended 151 times, resulting in more than 200 textual modifications.” *Tracking Wisconsin’s Constitution*, STATE DEMOCRACY RSCH. INITIATIVE, UNIV. OF WIS. L. SCH., <http://50constitutions.org/wi> (last visited July 18, 2026); accord *Wis. Just. Initiative, Inc. v. WEC*, 2023 WI 38, ¶1, 407 Wis. 2d 87, 990 N.W.2d 122.

Next, HEP offers four newspaper articles “not yet in the record”²⁹ to buttress those interests that the State asserts to support the fusion ban, even as HEP insists that it “takes no position on” the experts’ differing historical conclusions. (*Id.* at 5) According to HEP and contrary to the positions of actual historians—like Plaintiffs’ expert Professor Disch and *amici* Peter Argersinger, *et al.*—these articles “suggest that concerns involving fusion voting were shared by the broader public and not just by the Wisconsin Legislature.” (*Id.*) But that concludes too much from three articles in known Republican Party newspapers, all written after the ban’s passage.³⁰ Nothing here refutes the broad historical context considered in Professor Disch’s expert reports, which conclude that Wisconsin’s fusion ban was an exercise of partisan power, and the inclusion of post hoc commentary in Republican Party papers bolsters the partisanship argument. (Dkt. 27 at 7, 33–37 (Disch rep. at 4, 30–34), 66–70 (Disch rebuttal at 21–25); *accord* Dkt. 81 at 13–14)

Finally, HEP addresses rational-basis review under the *Anderson-Burdick* framework and declares Wisconsin’s fusion ban constitutional. (Dkt. 89 at 6–10) But that analysis makes no effort

²⁹ One of the four articles HEP cites is not only already cited in the record, but Professor Disch quotes the exact language that HEP claims to reveal. (*Compare* Dkt. 89 at 5 (quoting *Fusion and the Secret Ballot*, WIS. STATE J. (June 26, 1897), with Dkt. 27 at 36, n.186 (Disch rep. at 33) (same))

³⁰ Before and during the late-nineteenth-century, newspapers were identified by their political allegiances, and their leanings were well understood by the public. *See* Carolyn Stewart Dyer, *Political Patronage of the Wisconsin Press, 1849–1860* at 4 (1989) (“All but 10 percent of the newspapers operating between 1833 and 1860 were at one time or another identified as organs of the Democrats, Whigs, Republicans, Free-Soilers, Abolitionists, or other political parties.”). Each of the specific papers at issue here was, at that time, a known organ of the Republican Party.

- For the *Wisconsin State Journal*, *see id.* at 29 (referencing “the Republican *Wisconsin State Journal*”); *see also* Mark Gajewski, *David Atwood*, HIST. MADISON, INC., <https://www.historicmadison.org/davidatwood> (last visited Aug. 6, 2026) (“One of the leaders ... of the Republican Party,” Atwood “founded the *Wisconsin State Journal*,” and served as editor while in public office as a Republican).
- For *The Sheboygan Telegram*, *see* Carl Zillier, *History of Sheboygan County, Wisconsin, Past and Present* at 235 (1912), available at: <https://archive.org/details/historysheboyga00compgoog/page/234/mode/2up?q=telegram> (“Founded by R. W. Billett in September, 1887 ... Republican.”);
- For the *Milwaukee Sentinel* (now the *Milwaukee Journal-Sentinel*), *see* David Paul Thelen, *The New Citizenship: Origins of Progressivism in Wisconsin, 1885–1900* at 44 (1972), available at: <https://archive.org/details/newcitizenshipor0000thel/page/n9/mode/2up?q=sentinel> (“A former chairman of the Republican state central committee, and still an important party spokesman, Rublee wielded further influence because his *Milwaukee Sentinel* was the most widely read newspaper in the state and Republican legislators frequently consulted the *Sentinel* to decide what laws to support.”).

to address the Wisconsin Constitution, in which Plaintiffs root their claims. The only mention of Wisconsin law is a decision emphasizing the importance of “insur[ing] that the will of the electorate is accurately ascertained.” (*Id.* at 7 (citing *Fine v. Elections Bd. of Wis.*, 95 Wis. 2d 162, 172, 289 N.W.2d 823 (1980))) Such accuracy, of course, favors disaggregating voters’ support for a candidate, as fusion allows—and as the fusion ban precludes. HEP’s lengthy discussion of *In re Malinowski*, 481 N.J. Super. 128 (2025), has little relevance, as Plaintiffs have explained. (*See* Dkt. 24 at 30 n.14 (distinguishing *In re Malinowski*))

B. The Libertarian Party and the Working Families Party.

There are few issues on which anyone would expect the Libertarian Party and the Working Families Party (WFP) to agree—much less to also accord with the views of centrist Plaintiff United Wisconsin. But they all recognize that in Wisconsin, minor parties “have been forced to operate under a statutory regime that, by design and effect, makes it impossible for a serious minor party to grow into an electoral force[.]” (Dkt. 55 at 6) The Libertarian/WFP brief endorses Plaintiffs’ position in its entirety while adding additional information worthy of the Court’s attention.

First, the Libertarian/WFP brief adds further color to an argument of Plaintiffs’ that the State’s brief mocks: Wisconsin’s fusion ban is a “matter of life or death” for them as political parties and denies them any meaningful opportunity to participate in electoral politics. (*Id.* at 7; *accord* Dkt. 80 at 8) There are multiple reasons, which build on each other. Politics is about collective action, *amici* correctly note, in the service of obtaining power by winning elections in coalition with others. Yet, within Wisconsin’s system of single-member districts, there is no way to obtain power without finishing first in an election, “punish[ing] geographically disperse minorities most severely.” (Dkt. 55 at 11) Voters thus experience an “unavoidable” funneling into “wasted-vote logic”: “anticipating that any third-party votes will be wasted and not wanting to spoil, voters defect from their sincere first preference to whichever of the top two contenders they least dislike.” (*Id.*) In this way, Wisconsin’s political system has been erected to hobble minor parties out of the gate, a disadvantage exacerbated when those parties cannot “educate, inspire, and mobilize some citizens” to “gain real power in self-government.” (*Id.* at 12)

Second, the Libertarian/WFP brief completely dismantles the State’s suggestion—and the evidence-free assertion of courts to previously assess fusion bans—that Wisconsin’s fusion ban is an insignificant burden on minor parties, which fail to succeed in politics due only to other structural deficits in the American political system. Not so, as *amici* point out. The Libertarians and WFP have (1) clear values and leadership, (2) organization, communications, outreach, and volunteer infrastructure, and (3) fundraising capacity. (*Id.* at 12–13) The only element missing is (4) rules that allow the party to nominate viable candidates and avoid the “spoiler effect” that, because of the structural-psychological barriers to voting third-party discussed in the prior paragraph, all voters inherently understand. “The ability to cross-nominate major-party candidates is the **only** mechanism that has **ever**, in the modern American [] system, produced viable minor parties anywhere. And Wisconsin bans it.” (*Id.* at 13–14 (emphases in original))

Third, the Libertarian/WFP brief undercuts the State’s alleged interest in “maintaining party strength.” (Dkt. 58 at 19) As the brief points out, a fundamental premise of *Timmons*—that the two-party system helps promote political stability, an attitude that even the State of Minnesota disclaimed during oral arguments—has “simply not held up” across time. (Dkt. 55 at 16 (quoting 520 U.S. at 384 (Souter, J., dissenting))) *Timmons* was an “abrupt departure” from a long line of cases disallowing special treatment for the Democratic and Republican parties, true, but far worse is the “empirical” evidence that stability has not followed this improper privileging of the duopoly. (*Id.* at 17–18) Even if the fusion ban did not cause this, the point is simply that maintaining party strength within a duopoly system cannot be a valid state interest when all contemporary evidence shows that this system has not promoted stability, but instead has promoted a “collapse” in cross-partisan cooperation, “[g]overning crises” that are “routine,” and a “steep[] decline” in “public confidence in nearly every major democratic institution.” (*Id.* at 17; *see also id.* at 21 (quoting *Swamp*, 950 F.2d at 389 (Ripple, J., dissenting from denial of rehearing en banc, joined by Posner and Easterbrook, JJ.) (“A state’s interest in political stability does not give it the right to frustrate freely made political alliances simply to protect artificially the political status quo.”)))

C. Academic amici.

Three briefs apply academic expertise to the questions presented here. One is from eminent historians (Dkt. 81), one from political scientists who study political parties (Dkt. 80), and one from a legal scholar (Dkt. 78). All three support Plaintiffs' claims.

The historians' brief demonstrates that fusion voting was a longstanding and successful feature of American democracy and that anti-fusion laws arose not as neutral election regulations but as partisan efforts to entrench the dominant duopoly. It explains that fusion enabled independent parties such as the Populists to build durable political coalitions, influence governance, and enact significant legislative reforms. (Dkt. 81 at 10–11) The historians note that, although Australian-style ballot reform addressed genuine concerns about election administration, “the two major parties controlled the implementing state legislatures” and used ballot reforms to “structure the system in their own behalf” by adopting anti-fusion laws that “bestowed benefits on the major parties” and placed minor-party voters “in a straightjacket.” (*Id.* at 12 (quoted sources omitted)) The brief documents the process by which anti-fusion laws were enacted to prevent major-party candidates from forming alliances with minor parties, quoting a Michigan legislator's admission that “[w]e don't propose to let the Democrats make allies of the Populists, Prohibitionists, or any other party.” (*Id.* at 13) This, along with evidence that “[a]nti-fusion laws suppress votes and entrench the less representative two-party system” to “[s]erious [a]nti-[d]emocratic [e]ffect[.]” (*id.* at 14), strongly supports Plaintiffs' contention that Wisconsin's fusion ban burdens political association while serving to entrench the duopoly rather than advance legitimate state interests.

The political scientists' brief explains how “[i]ndividuals engage in political association and expression primarily through their relationships with political parties rather than candidates,” making a “party-centric” analysis essential because the fusion ban directly burdens parties' associational rights. (Dkt. 80 at 2) The brief recognizes political parties as “critical institutions” that mobilize voters and provide informational cues to them, and thus, fusion allows party labels to communicate even more information by identifying candidates as “a certain type of Democrat

or Republican.” (*Id.* at 2, 4) The political scientist *amici* conclude that Wisconsin’s ban “has one purpose and one function: to limit whom a party can choose as its candidate” and forces minor parties to choose between “advancing a spoiler candidate or sitting out,” thereby coercing their members to abandon their preferred party in order to support their preferred candidate. (*Id.* at 5, 7) These conclusions reinforce Plaintiffs’ evidence that fusion is a core mechanism of party-building and political association, and that prohibiting it imposes substantial burdens on both parties and their members, such that “minor parties have been intentionally, successfully relegated to almost a century of failure” that “provides a stark (and not accidental) disincentive.” (*Id.* at 8)

Finally, Professor Abu El-Haj’s brief gives additional reasons why *Timmons* should not control this case. She argues that, in treating political parties principally as speakers rather than as organizations whose primary function is to build political coalitions and organize citizens, *Timmons* “misapprehended the constitutional burdens imposed by anti-fusion laws.” (Dkt. 78 at 4) She details how anti-fusion laws deprive minor parties of “an essential party-building mechanism” because “[p]olitical parties serve primarily to elect candidates—not (merely) as forums for political expression”; therefore, preventing a party from nominating its preferred candidate “frustrate[s its] ability to recruit, keep, and organize members.” (*Id.* at 4, 8) And she further notes that fusion promotes democratic stability by giving dissatisfied voters “meaningful avenues and incentives to constructively associate outside of the two major parties while decreasing the likelihood of a spoiler candidate” and enabling minor parties to “show [they] can deliver votes,” increasing their potential influence over candidates and policymaking. (*Id.* at 12–13 (emphasis omitted)) Her analysis bolsters Plaintiffs’ claims that fusion advances core associational rights, reduces the spoiler effect, and strengthens minor-party organization; it also undermines the State’s asserted justifications for Wisconsin’s fusion ban.

D. Former Members of Congress.

Retired members of the U.S. House of Representatives favor Plaintiffs’ position. (Dkt. 72) The authors weigh in from an important and insightful perspective. Two of them—Steven C. Gunderson and Reid J. Ribble—represented Wisconsin in Congress. The other two—Richard A.

Gephardt and David A. Trott—are from other midwestern states. From opposite sides of the aisle, Representatives Gephardt and Gunderson both served in leadership roles for their party caucuses. (*Id.* at 2) All four recognize “the present crisis and instability in American democracy” and, based on their extensive collective political experience, believe that “fusion voting would allow moderates” to “elect[] more moderate candidates, reduce extreme political polarization and partisan gridlock, increase moderate participation in government, and enhance the health and stability of American democracy.” (*Id.* at 2–3) As they note, “[b]y forbidding third parties from associating with candidates of their choosing, and instead forcing them to run their own candidates, fusion-voting bans prevent even the most well-funded moderate third parties from amassing the support their platforms would otherwise garner and from exerting any political influence.” (*Id.* at 7 (citing Beau Tremiere, *Without Fusion Voting, It’s an Uphill Climb for Independents Like Missouri’s John Wood*, REAL CLEAR POL’Y (July 14, 2022), and Anna Kristoff, *Third parties on Wisconsin presidential ballot could divert Trump, Biden votes*, BADGER HERALD (Apr. 19, 2024)³¹) These *amici* assert that striking down Wisconsin’s fusion ban “would allow the approximately 33% of Wisconsin’s registered voters who identify as politically moderate to express their policy preferences without wasting their ballots on a third-party candidate who faces little to no odds of success.” (*Id.* at 8 (citing Lee Drutman, *More Parties, Better Parties: The Case for Pro-Parties Democracy Reform* 80–84, NEW AMERICA (July 7, 2023)³²) This is not mere theory for these *amici*, who have significant knowledge and experience. Both Representatives Gunderson and Ribble ran and governed as moderate Wisconsin Republicans of the type largely eradicated by polarization.

³¹ Available at https://www.realclearpolicy.com/articles/2022/07/14/without_fusion_voting_its_an_uphill_climb_for_independents_like_missouris_john_wood_842365.html and <https://badgerherald.com/news/wisconsin/2024/04/19/third-parties-on-wisconsin-presidential-ballotcould-divert-trump-biden-votes/> (both last visited July 18, 2026).

³² Available at https://d1y8sb8igg2f8e.cloudfront.net/documents/More_Parties_Better_Parties_2023.pdf (last visited July 18, 2026).

E. Wisconsin Business Leaders for Democracy.

The amicus brief of Wisconsin Business Leaders for Democracy (WBLD), a “non-partisan association of business leaders in Wisconsin dedicated to helping ensure equitable access to voting,” provides another vital gloss on “[t]he fusion ban’s particular circumvention of constitutional confines” that is “self-serving for those in power” by “successfully [] inhibit[ing] competition” in a manner that “artificially prop[s] up the [two-party] duopoly.” (Dkt. 94 at 2) In particular, WBLD identifies a contradiction in the State’s ostensible interest in maintaining strong political parties. That is because, WBLD argues, based on modern political science literature, the duopoly party system artificially propped up by the fusion ban dissuades competition and disincentivizes political parties from being responsive to their constituents (*Id.* at 3–4) Far from being “stronger” due to the fusion ban’s hamstringing of third parties like United Wisconsin, WBLD points out that political parties are weaker when it comes to assembling governing coalitions, because the major parties do not feel obligated to offer anything of value to those who would otherwise vote third-party. (*Id.* at 6)

In addition, WBLD highlights the emptiness of the State’s claim that the fusion ban serves its purported interest in avoiding polarization. Rather, the fusion ban has enhanced this problem, leading to “[e]ntrenched hyper-partisanship” that “not only hobbles our democracy but also risks both short- and long-term harm to the State’s economy.” (*Id.* at 7–8) This shows up in public policy, WBLD points out, where a wide variety of broadly popular, bipartisan issues “too often get caught up in partisan gridlock” and fail to advance (*Id.* at 7) Even if the State is correct that this is a valid interest supporting the fusion ban, which is far from established, the facts and WBLD’s brief support Plaintiffs’ position.

CONCLUSION

For the foregoing reasons, the Court should reject the State’s arguments, deny the State’s motion for summary judgment, grant summary judgment for the Plaintiffs, and hold that Wis. Stat. § 8.03(1) and all but the last sentence of Wis. Stat. § 8.15(7) are unconstitutional under Article I, Sections 1, 3, 4, and 22, of the Wisconsin Constitution. To the extent that the Court finds any

material facts remain in dispute, the parties' competing evidence should be addressed at an evidentiary hearing.

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Respectfully submitted,

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