

STATE OF WISCONSIN
BRANCH 12

CIRCUIT COURT

DANE COUNTY

UNITED WISCONSIN, et al.,

Plaintiffs,

v.

Case No. 2025CV1438

Code: 30701 Declaratory Judgment

WISCONSIN ELECTIONS COMMISSION,

Defendant.

**BRIEF OF AMICI CURIAE LIBERTARIAN PARTY OF WISCONSIN
AND WISCONSIN WORKING FAMILIES PARTY
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Sarah E. Siskind
Miner, Barnhill & Galland, P.C.
25 W. Main St., Ste. 500
Madison, WI 53703
O: 608-255-5200 | F: 608-255-5380
ssiskind@lawmbg.com

*Attorney for Amici Curiae
Libertarian Party of Wisconsin and
Wisconsin Working Families Party*

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INTEREST OF AMICI CURIAE

The *Libertarian Party of Wisconsin* is a recognized political party in this State. Founded in 1972, it advocates for individual liberty, limited government, free markets, and a foreign policy of peaceful trade. It has appeared on Wisconsin ballots in statewide and local elections for more than fifty years; and it has direct, sustained experience organizing as a minor party in a fusion-ban jurisdiction.

The *Wisconsin Working Families Party* is the Wisconsin chapter of the national Working Families Party (WFP) and promotes the party's program. The WFP was founded in New York in 1998 by a coalition of labor unions, community organizations, and progressive civic groups. Its programmatic commitments are to an economy and a democracy that work for the multiracial working class—for higher wages, accessible health care, public investment in schools and infrastructure, and a politics no longer dominated by concentrated wealth. In New York and Connecticut, the two jurisdictions where the WFP and has been able to operate under fusion rules, it has helped enact landmark reforms, including substantial minimum-wage increases, campaign finance reform, and steps toward a clean and just energy transition. In Wisconsin, where the fusion ban remains in force, its influence has been limited.

Amici represent views that sit, on most questions, at opposite ends of the conventional left-right political axis. But they share a clear, immediate, and concrete interest in this case. Both 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 in the State. Both can speak from experience—not from theory—about what Wis. Stat. §§ 8.15(7) and 8.03(1) do and do not do. And both believe that the questions presented in this case have been correctly briefed by Plaintiffs and warrant the relief Plaintiffs seek.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs have shown that Wis. Stat. §§8.15(7) and 8.03(1), enacted in 1897 by a Republican-dominated legislature for the openly partisan purpose of locking minor party competition out of Wisconsin's elections, violate the Wisconsin Constitution in that: fusion was a fundamental feature of Wisconsin political life from statehood through the mid-1890s; Wisconsin's banning it in 1897 was the deliberate product of partisan entrenchment, *not* neutral electoral reform; hence the State's post-hoc justifications cannot survive the scrutiny that article I, sections 1, 3, 4, and 22 of the Wisconsin Constitution require. The ban should be struck down.

Amici, from their perspective as existing Wisconsin minor parties and electoral advocates (i) declare their full agreement with Plaintiffs' argument; (ii) say why the fusion ban is a matter of life or death to minor parties in the U.S.; (iii) describe how and why it has made their work in Wisconsin, as organizations interested in real power, untenable; (iv) show why the historical record shows that enacting a ban on fusion was raw partisan politics, not neutral modernization, and that removing it will produce better democracy, not chaos; (v) show why the premise underpinning the U.S. Supreme Court's *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) decision thirty years ago—that the stability of two-party system warranted the State's ban on fusion—was mistaken then and is now; and (vi) show that Wisconsin's fusion ban is particularly offensive as duopoly-promoting content regulation, as foreseen and pronounced with stark clarity by pre-eminent Court of Appeals judges Ripple, Easterbrook, and Posner in a 1991 dissent concluding: "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." *Swamp v. Kennedy*, 950 F.2d 383, 386-87 (7th Cir. 1991) (Ripple, J., dissenting, joined by Posner and Easterbrook, JJ., from denial of rehearing en banc).

The Seventh Circuit and U.S. Supreme Court having disagreed, the effects of the ban continued, and the two-party system fallen into chaos, Plaintiffs turn to this Court and the Wisconsin Constitution, with Amici's support.

ARGUMENT

I. THE FUSION BAN IS CLEARLY UNCONSTITUTIONAL UNDER ARTICLE I, SECTIONS 1, 3, 4, AND 22 OF THE WISCONSIN CONSTITUTION.

Amici affirm agreement with Plaintiffs' constitutional arguments, each sufficient to require that the ban be struck down.

On article I, section 22, Amici agree that Plaintiffs have shown (and the State experts concede) that fusion was a constitutive practice of Wisconsin politics from statehood through 1897, integral to the operation of democratic self-government in the State. Fusion was "commonplace" in late-nineteenth-century American politics, and especially in the Midwest. Peter H. Argersinger, "*A Place on the Ballot*": *Fusion Politics and Antifusion Laws*, 85 *Am. Hist. Rev.* 287, 289 (1980). Strict scrutiny of the ban is required. *See Mayo v. Wisconsin Injured Patients & Families Compensation Fund*, 2018 WI 78, ¶28, 383 Wis.2d 1, 914 N.W.2d 678. Yet the State has identified no compelling interest, narrowly served, to justify it.

On article I, section 1, Amici also agree with Plaintiffs that the textual, structural, and historical differences between Wisconsin and federal equal protection guarantees warrant Wisconsin-specific analysis. *A.M.B. v. Cir. Ct. for Ashland County*, 2024 WI 18, ¶50, 411 Wis.2d 389, 5 N.W.3d 238 (Dallet, J., concurring, joined by Bradley and Protasiewicz, JJ.). Unlike the Fourteenth Amendment guarantee, article I, section 1's is written "to be broad enough to cover every principle of natural right, of abstract justice." *Id.* ¶55 (citation omitted); *see also id.* ¶59. And on a Wisconsin reading, a statute that locks minor parties out of effective electoral participation imposes a discriminatory burden that no asserted state interest can justify.

On article I, sections 3 and 4, Amici additionally observe that the fusion ban is a *content-based* restriction on party speech and association, of exactly the sort that demands highest scrutiny. The U.S. Supreme Court has recognized for decades that “freedom of association means not only that an individual voter has the right to associate with the political party of her choice” and “to identify the people who constitute the association,” but also the right of the *party* “to select a standard bearer who best represents the party’s ideologies and preferences.” *Eu v. S.F. Cnty. Dem. Cent. Comm.*, 489 U.S. 214, 224 (1989) (internal citations omitted). Wisconsin’s fusion ban regulates content: it dictates who the minor party can and who it cannot select as its nominees. The Wisconsin Constitution’s own broad speech and assembly guarantees must require, especially given the State’s utter failure to offer compelling justification, that it be struck down.

II. WHY FUSION IS A MATTER OF LIFE OR DEATH FOR MINOR PARTIES IN A SINGLE-MEMBER-DISTRICT ELECTION SYSTEM.

Why precisely do the Amici and Plaintiff United Wisconsin feel these restrictions so keenly—a matter of life or death for them as serious political parties? Because the fusion ban denies them opportunity to exercise the power representative democracy says they should have.

To clarify, Amici step back to basics and then say something about the architecture of America’s election system.

First the basics. Politics is about many things; but it’s most basically about “collective action,” *i.e.*, people doing things together.¹ Democracy is also about many things; but its basic idea is that the people rule themselves.² Representative democracy takes many forms, but its basic idea is that a society can satisfy democracy’s defining criterion that the people rule themselves by providing those people, through free and fair and regular elections, the

¹ See *e.g.*, Mancur Olson, *The Logic of Collective Action* 1–3 (1965)..

² See Aristotle, *Politics*, Book III, chs. 7–8 (Benjamin Jowett ed.); Robert A. Dahl *Democracy and Its Critics* 106–31 (1989).

opportunity to choose who will represent them in the government that rules them.³ Electoral competition is most basically about winning or losing elections—power—with those getting the most votes given the powers of government.⁴ (Political parties require influence and without it, they lose an essential reason for being.) And the politics of their competition—the doing things with others in that competition—is about finding the people who can help them win it.⁵

Now the architecture. The national and subnational voting systems of representative democracies have nearly infinite variety.⁶ But one clear line of division among them is between single-member district (SMD) systems—one seat per district, won by whoever gets the most votes—and multi-member proportional systems—with many seats available, won by sponsoring party share of the vote. *See* Maurice Duverger, *Political Parties* 216–28 (1954).⁷ The U.S. is, almost universally, and certainly in Wisconsin, an SMD system.

This is important for Amici. They know, as minor parties, that SMD systems strongly favor the dominance of two parties over others. These systems do so via several reinforcing mechanisms, most famously summarized as “Duverger’s Law” (Duverger, *supra*, 216-28). The mechanical effect is the most direct. Because only one candidate wins per district, any party consistently finishing below first gets nothing, regardless of how many votes it accumulates in

³ *See* John Stuart Mill *Considerations on Representative Government*, ch. 3 (1861).

⁴ *See* Joseph Schumpeter *Capitalism, Socialism and Democracy* 269 (1942) (“the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”).

⁵ *See* Elmer Eric Schattschneider, *The Semisovereign People*, 60–75 (1960) (politics as the socialization of conflict and the building of winning coalitions); John Aldrich, *Why Parties?* 28–50 (1995) (parties as endogenous solutions to the collective-action and coordination problems facing ambitious politicians).

⁶ *See generally* Arend Lijphart, *Patterns of Democracy*, 143–70 (1999); Douglas W. Rae, *The Political Consequences of Electoral Laws* 19–46 (1967) (cataloguing the principal dimensions of electoral-system variation).

⁷ *See also* Lijphart at 143–50 (1999) (classifying the United States among the few pure SMD-plurality systems among established democracies); Gary W. Cox, *Making Votes Count*, 13–37 (1997) (deriving the strategic implications of the SMD/PR distinction).

total. Vote shares and seat shares decouple sharply, and the decoupling punishes geographically dispersed minorities most severely. *Id.*

The effect on voters, psychological or strategic, is unavoidable. 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. This is the standard wasted-vote logic. It does not require sophistication so much as repeated experience: after a few cycles, voters learn the lesson and the coordination becomes self-enforcing. A parallel elite-coordination effect operates on candidates, donors, activists, and interest groups, who face the same wasted-vote problem in their resource allocations. Rational actors pool into one of two viable coalitions rather than invest—hope, money, time, energy, or votes—in losers. *Id.*

SMD systems thus favor dominance of the two parties; and that makes life very hard for minor parties. Without the fusion option in state elections, any SMD system forces minor parties to offer their supporters only the unattractive options of choice: (a) silence on their values or (b) voting for a candidate with no serious chance of winning, which carries the risk (c) that exercising their voice in this way may “spoil” the elections, electing the candidate even further from their values. No wonder that, without the fusion option, minor parties have trouble attracting election support, or even staying alive. *Id.*

With recovery of the fusion option, however, this changes. *See* Pltfs. Br., Cantor Decl; Joel Rogers, *Two-Party System: Pull the Plug*, 52 Admin. L. Rev. 743, 760-64 (2000). While continuing to work within the third-party-depressing effect of any SMD, minor parties can, by cross nominating a major party candidate on their own ballot line, offer their supporters a way to vote their values (by voting on their minor party line) without wasting their votes or risking spoiling. From the minor party’s point of view, this change is crucial. Not only will they be able

to attract supporters of the party's values while showing their respect for the voters' common sense, but they can also show major-party candidates the real value, in winning elections, of their support. And by demonstrating the importance of that support, the minor party wins some influence in government.

This is not new. Documenting fusion's late 19th-century heyday, historian Peter Argersinger observes that “[b]etween 1878 and 1892 minor parties held the balance of power at least once in every state but Vermont, and from the mid-1880s they held that power in a majority of states in nearly every election.” Argersinger, *supra*, 289. That was real power.

In sum, in an SMD system *with* fusion, minor parties can do what political parties are supposed to do—educate, inspire, and mobilize some citizens around a vision and platform of what they want government to do, and actually gain real power in self-government. Under an SMD system *without* fusion, they are, as political parties, not only minor but marginal, unable to participate meaningfully in the real-world politics of elections. The Libertarian Party of Wisconsin and the Wisconsin Working Families party have both experienced this repeatedly.

That is why, for minor parties like the Amici here, restoring fusion to Wisconsin is a matter of life and death.

III. THE FUSION BAN HAS MADE VIABLE MINOR-PARTY POLITICS IMPOSSIBLE IN WISCONSIN.

Based on nearly four decades building and assisting minor parties in fusion and non-fusion states, former Executive Director of the National Working Families Party Dan Cantor identifies four ingredients that a serious new political party needs if it wants to get off the ground: (1) clarity among founders and member organizations about core values; (2) infrastructure for organizing, communicating, sustained outreach, and volunteer recruitment; (3) at least modest fundraising capacity; and (4) rules that allow the party to nominate viable

candidates. Pltfs. Br., Cantor Decl. ¶¶27-28. Minor parties in non-fusion states like Wisconsin can sometimes secure the first three ingredients; but they cannot, by the operation of state law, secure the fourth. *Id.* ¶¶12-16, 28.

On clarity of values: both Amici have it. The Libertarian Party of Wisconsin has, for more than fifty years, articulated a clear and consistent platform built around individual liberty, limited government, and free markets. The Wisconsin Working Families Party has an equally clear platform built around economic justice, racial equity, and a politics not dominated by concentrated wealth. Neither party suffers from a shortage of conviction about what it stands for or what it would do for Wisconsin if it had the chance.

On infrastructure: both Amici have built it. They have offices, staff, member rolls, communications operations, and volunteer networks. The Libertarian Party of Wisconsin has run candidates for state and local office for half a century. The Wisconsin Working Families Party has endorsed and run canvasses to support candidates in hundreds of races over the last two decades and helped in much advocacy and other coalition work on issues like raising the minimum wage, criminal justice, and democracy reform.

On fundraising: both Amici do it successfully all the time. Neither is flush, but both have resources to fund staff, materials, and the basic operations of a working political organization. And we both can mount targeted campaigns. Neither of us, to be sure, can fund the kind of high-dollar operations necessary to mount a credible head-to-head challenge to a major-party nominee in a Wisconsin legislative race. But as Cantor explains, no minor party anywhere can do so at scale (Cantor Decl. ¶¶8-11, 30) and in the meantime we are solvent.

The fourth ingredient is where we hit a dead end. The ability to cross-nominate major-party candidates is the *only* mechanism that has *ever*, in the modern American SMD system,

produced viable minor parties anywhere. And Wisconsin bans it. Minor party supporters are not unsophisticated or delusional. So, most of them either vote for a major-party candidate on the ballot line of a party they don't support or don't vote at all. Either way, the minor party loses their votes, and the candidates elected to govern don't get the message the minor party is trying to send. *See, e.g., Cantor Decl.* ¶¶8-11; *see also Dan Cantor, Fusion Voting, Fusion Parties*, 79 *Dem. J.* (2026). Two consequences follow. First, the talented potential candidates who might otherwise accept nomination on the minor party's ballot lines almost never do. Running to win, they run instead as Democrats or Republicans; or, having no chance to win, they do not run at all. Second, the substantial number of Wisconsinites whose political views do not align with either of the major parties'—and whose views are captured by the platform of one or the other of the Amici (or, in this case, Plaintiff United Wisconsin)—are unable to communicate those views at the ballot box without throwing away their votes. So, again, the minor-party platforms and these voters' preferences are literally invisible to the political system.

These are among the many burdens of the fusion ban. It has not killed Amici's aspiration or advocacy. But it has made it impossible for them to operate with credible ambitions for real political effect.

IV. THE FUSION BAN WAS NOT NECESSARY TO BALLOT MODERNIZATION AND ITS REMOVAL WILL NOT FRAGMENT AND POLARIZE OUR POLITICS BUT WILL LIKELY HAVE THE OPPOSITE EFFECT.

Part of the State's strategy to defend the onerous fusion ban appears to be to excuse it as a necessary part of the state's broader modernization of its election system and warn of the dire consequences of its removal. Without repeating relevant portions of Plaintiffs' brief, we here show that neither of these claims is credible.

Modernization, Not—First, nothing about the Australian ballot necessitated the fusion ban. Wisconsin adopted Australian-style ballot reforms in 1889 (*see* Pltfs. Br. at 12) but continued for almost a decade to conduct fusion elections. The 1897 ban was a separate measure, adopted by a different legislative majority, for a separate and self-consciously partisan purpose. Pltfs. Br., Disch Decl. at 33 (quoting *Fusion and the Secret Ballot*, Wis. State J., Aug. 25, 1897, at 2).

Second, the historical record clearly shows that Wisconsin’s and other Republican-dominated Upper Midwest fusions bans, passed rapidly after the GOP’s massive victory in the Presidential election of 1896, were emphatically *not* a neutral reform, part and parcel of ballot modernization, but simply a successful maneuver for further major party dominance.

Argersinger, *supra*. In particular, these bans aimed to extinguish the fusion alliances between the Democrats and minor parties that had been working too well to constrain Republican dominance. The drafters of the bans said as much on the record at the time. Argersinger quotes the Republican sponsor of Michigan’s ban explaining its purpose to his colleagues in plain terms:

We don’t propose to allow the Democrats to make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. *We can whip them single-handed, but don’t intend to fight all creation.*

Id. at 296 (emphasis added).

System Collapse, Not—The historical record also reveals the State’s worries—that restoration of fusion will shatter the two-party dominated system, or birth untold numbers of new minor parties—as baseless. When fusion was legal in Wisconsin, two-party dominance was undisturbed. There was no descent into warring multi-party chaos. There were never more than a few active minor parties. Pltfs. Br., Disch Decl. The same experience was replicated elsewhere. *Id.* But pride of place in the historical record goes to New York and Connecticut, where fusion has been practiced, nearly continuously, for nearly two hundred years. There have never been

more than a few minor parties vying for contention. The major parties remain dominant. And their politics have not fragmented. Pltfs. Br., Cantor Decl. ¶¶19-21, 34-38.

What the New York and Connecticut SMD-with-fusion systems show, at least sometimes, is minor-party vitality. For example, as the WFP has had success in New York or Connecticut, the fusion option attracts more voters to them and, as a result, more major-party candidates look for WFP's support. This dynamic helps minor parties grow into durable, issue-focused political organizations, showing in constructive ways the support their values have in the voting public. This is the opposite of fragmentation. It is the inclusive calming of a political conversation that the existing Republican-Democratic dominance has so badly splintered. Restoring fusion will allow Wisconsin's winner-take-all system to register, and learn from, the diversity that already exists in this State but that, by force of statute, has no current way to make itself seen (on the ballot) or heard.

V. ANY STABILITY THE TWO-PARTY SYSTEM HAD THIRTY YEARS AGO HAS LONG SINCE DISAPPEARED.

The State will point to *Timmons* for upholding Minnesota's fusion ban to protect the two parties because, according to *Timmons*, a two-party system promoted political stability. *Id.* at 520 U.S. at 366-67. Of course, as Plaintiffs explain, the Wisconsin Constitution controls here, not *Timmons*. But Amici add that *Timmons* ought not be viewed as even *persuasive* because its premise about political stability has simply not held up.

Indeed, the premise was dubious from the start, as Minnesota had never asserted it in the litigation as justification for the ban. *See id.* at 379 (Stevens, J., dissenting) ("It is impermissible for the Court to consider this rationale" because the State "did not argue in its briefs that the preservation of the two-party system supported the fusion ban, and indeed, when pressed at oral

argument on the matter, the State expressly rejected this rationale”); *id.* at 384 (Souter, J., dissenting).

Minnesota’s reticence was no surprise, as it was settled law until *Timmons* that any such justification would have been unconstitutional. See Justice Black writing to strike down Ohio’s restrictive election and ballot access laws in *Williams v. Rhodes*:

[T]he Ohio system does not merely favor a ‘two-party system’; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.

393 U.S. 23, 31-32 (1968). See also *Norman v. Reed*, 502 U.S. 279 (1992) (striking down ballot access rules restricting new minor party’s use of its chosen name, the Harold Washington Party, on the ballot); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down Ohio’s early filing deadline for independent candidates as an unjustified burden on the associational rights of minor parties and their supporters); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (striking down Connecticut’s closed-primary statute as violating a party’s First Amendment right to define its own associations and select its standard-bearers). *Timmons* was an abrupt departure.

But the deeper problem for *Timmons*’ continued influence is empirical. Whether or not the Court believed two-party system needed protection in 1997, the three decades since *Timmons*, without fusion, decisively show that “stable” is not the word anyone might use to describe today’s two-party politics. To the contrary, partisan polarization has steadily deepened since the mid-1990s (with fusion banned nearly everywhere). Cross-party legislative cooperation has collapsed. Governing crises—debt ceilings, government shutdowns, contested election results—have become routine. Public confidence in nearly every major democratic institution

has steeply declined. And presidential politics is defined by personalist appeals that the two-party system has proved structurally incapable of containing.

Amici do not argue that the ban on fusion *caused* this. But they do argue that, far from achieving stability, the two-party system has produced a “doom loop” held together by “negative partisanship” in which “many Americans don’t care if *they* win as long as *you* lose.” Pltfs. Br., Drutman Decl. at 5 (on the “two-party doom loop” framework) and Cantor Decl. ¶18. *See also* Cantor, *Fusion Voting, Fusion Parties, supra*. These are not features of a stable political order. They are features of a system that has lost the capacity for principled bargaining, compromise, and policy responsiveness on which democratic stability depends. Political bargaining has been replaced by political rigidity. And rigidity is what brittle systems exhibit just before they break. *See* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 Sup. Ct. Rev. 331, 342-62; Rogers, *supra*, 52 Admin. L. Rev. at 760-64 (2000).

In short, the *Timmons* Court’s belief that the two-party duopoly would deliver stability has not been observed—and certainly not in Wisconsin. *See* Drutman’s conclusions, after tracking Wisconsin history since 2000, that Wisconsin has been in the top 20-25% of most polarized state legislatures, above the national median and continues to rise (Drutman Decl. at 6) with on-the-ground consequences no court could have hoped for: the 2018 lame-duck transfer of executive powers to the legislature, the entrenchment of legislative maps under which Democratic candidates won 54% of Assembly votes but secured only 36% of seats, and the transformation of Wisconsin Supreme Court elections into nine-figure partisan contests. *Id.* at 8-11. And all this while the two states operating under fusion systems—New York and Connecticut—exhibit *lower* legislative polarization than Wisconsin and the national median,

with the moderating effect driven by moderate Republican caucuses. *Id.* This is the opposite of what defenders of fusion bans predict.

Of course, this Court cannot overrule *Timmons*. But it can see, when the State invokes *Timmons*' "political stability" premise in defense of the ban, that that premise cannot do the work the State claims, and that Wisconsin's constitutional analysis should not be tethered to it.

VI. REGARDLESS, A STATE'S INTEREST IN "POLITICAL STABILITY" DOES NOT ENTITLE IT "TO FRUSTRATE FREELY MADE POLITICAL ALLIANCES SIMPLY TO PROTECT ARTIFICIALLY THE POLITICAL STATUS QUO."

Finally, and simply, Amici urge this Court to recall how base were the origins of the Wisconsin ban and how fundamental an affront it is to traditional, and constitutionally protected, democratic values. The ban was produced secretly by legislators of the dominant party (Republican) to turn the law to their advantage, and it was eventually embraced by legislators of the other major party to guarantee a duopoly on power from which they also benefitted. It is content regulation at its most oppressive, compelling the strictest scrutiny by a reviewing court. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (the government may not regulate speech based on its message, ideas, or content); *cf. Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (restrictions on speech allowed on the time, manner, and place only when content neutral); *State v. C.G. (In the Interest of C.G.)*, 2021 WI App 11, 396 Wis.2d 105, 955 N.W.2d 443, *aff'd*, 2022 WI 60, 403 Wis.2d 229, 976 N.W.2d 318 (citing *State v. Baron*, 318 Wis. 2d 60 at ¶ 14, 769 N.W.2d 34 (2009) (If a court determines that speech or expressive conduct is being regulated, then it must decide whether the statute's regulation is content based or content neutral; a content-based statute must survive strict scrutiny)).

Nor will the Court's striking down the fusion ban impel otherwise rewriting the basic rules of Wisconsin's SMD elections. As shown, fusion does not disturb SMD in the least. But

fusion bans, originating from partisan intent, do deprive such systems of important information. And they are the straw that breaks the backs of any minor parties within it. *See* Joshua Cohen & Laurence Gold, *The Case for Ballot Fusion*, *Legal Times*, Jan. 13, 1997.

Judges Ripple, Easterbrook, and Posner understood all this clearly years ago in *Swamp*, *supra*. They were *dissenting* from their court’s decision to deny rehearing *en banc*; but the force and clarity of their analysis show how severely the ban regulates the *content* of political speech (not its time, place or manner), hence warrants this Court’s attention today. The dissent stated:

The Supreme Court has recognized that the right of a party to nominate a candidate of its choice is a vital aspect of the party’s role in our political structure. *See Eu*, 489 U.S. at 224. The ability to choose the same person as another party is an important aspect of that right. It allows a party to form significant political alliances.

And:

When a minor party nominates a candidate also nominated by a major party ... it may—and often does—offer the voters a very real and important choice and sends an important message to the candidate. If a person standing as the candidate of a major party prevails only because of the votes cast for him or her as the candidate of a minor party, an important message has been sent by the voters to both the candidate and to the major party. If a majority of the members of both major parties believe the same person is the best candidate, that alliance is of major significance in our political life. Such information is of immense value to the electorate, and it would indeed be salutary for the candidate to know which platform the majority of the voters favor. In short, permitting people to vote for a candidate on one party line rather than another increases the opportunity of both voter and party to be heard and for workable political alliances to be formed.

And further:

While there is a state interest in avoiding “voter confusion,” *Swamp*, slip op. at 5, there are less restrictive alternatives to achieving that goal than by decreeing that, no matter how many members of a particular party want a particular candidate, he or she may not be their candidate simply because members of another party believe that the candidate also would best deliver the principles of their platform.

And:

States also have an interest in the integrity of the election process, but the panel does not suggest any particular evil that necessitates this broad and severe regulation. *Id.* at 6. As the concurring opinion points out, it is not at all clear that Wisconsin, which permits cross-over votes, has an important interest in preventing the sort of “raiding” that the panel foresees. *Swamp*, slip op. at 9 (Fairchild, J., concurring). “Involuntary fusion,” *Swamp*, slip op. at 6, of political parties sounds ominous.

And in conclusion:

... [I]f two parties end up with the same candidate because the voters in each party voted for that result, the resulting alliance can hardly be termed “involuntary.” A significant part of the electorate has expressed its desire for a political alliance. 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.

Id. at 386-87.

Three points about this *Swamp* dissent are worth emphasis. *First*, the dissent identifies the feature of the Wisconsin fusion ban that takes it out of the ordinary run of (permissible) content-*neutral* electoral regulation and puts it squarely within the category of (impermissible) content-based restriction on association. That is, it tells parties *whom they may and may not nominate* (not merely when, how, or by what process), and it does this based on the political alliance the nomination would express. A statute that tells a political party it cannot nominate the same candidate another party has nominated regulates the *content* of political association just as directly as a statute that tells a political party it may not share planks with another party’s platform. *Compare* Cohen & Gold, *supra*, at 24, 27 (“Content restriction pure and simple, anti-fusion laws demand the strictest scrutiny.”). The *Swamp* dissent recognizes this at the level of doctrinal first principles.

Second, the dissent demolishes each of the justifications asserted by Wisconsin back in 1991. The voter-confusion rationale fails because less restrictive means are available. The election-integrity rationale fails because the panel could identify “no particular evil” the

regulation was needed to address. The “raiding” concern fails because Wisconsin already permits cross-over voting, so the supposed evil is one Wisconsin has already chosen not to prevent. And the “involuntary fusion” framing fails because, when voters in two parties voluntarily choose the same candidate, “the resulting alliance can hardly be termed ‘involuntary.’” *Swamp*, 950 F.2d at 387 (Ripple, J., dissenting).

Third, and most directly relevant to the *Timmons* Court’s “two-party stability” concern, the dissent closes forcefully with the principle that “[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.” *Id.*

Here, in this Court, the Wisconsin Constitution’s guarantees of free speech, free assembly, and equal protection cannot mean less. The State may not freeze in place an electoral arrangement by prohibiting the one form of political association that voters and parties had historically used and might use today to alter it.

Judges Posner, Easterbrook, and Ripple are not commonly accused of being soft on legislative prerogatives or quick to second-guess state electoral policy. They understood in 1991 what the highest Court mistook in *Timmons*. This Court has opportunity in 2026 to put it right.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs’ brief in support of their motion for summary judgment, Amici Curiae Libertarian Party of Wisconsin and Wisconsin Working Families Party respectfully urge the Court to grant Plaintiffs’ motion and to declare Wis. Stat. §§8.15(7) and 8.03(1), with the exception of its final sentence, unconstitutional under article I, sections 1, 3, 4, and 22 of the Wisconsin Constitution.

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Respectfully submitted,⁸

By: /s/ Sarah E. Siskind
Sarah E. Siskind
One of the Attorneys for Amici
Sarah E. Siskind (SBN 1004902)
Miner, Barnhill & Galland, P.C.
25 W. Main St., Suite 500
Madison, WI 53703
O: 608-255-5200 | F:608-255-5380
ssiskind@lawmbg.com

*Attorney for Amici Curiae Libertarian
Party of Wisconsin and Wisconsin
Working Families Party*

⁸ The filer gratefully acknowledges the substantial contribution of Joel Rogers (Professor of Law and Sociology, University of Wisconsin) to the preparation of this brief. Prof. Joel Rogers is admitted to practice law only in New York, and not admitted to practice in Wisconsin.