AMENDED

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7 IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NOS. A-3542-21/A-3543-21 Civil Action On Appeal from: A Final Agency Decision of the New Jersey Division of Elections Sat Below: Hon. Tahesha Way, Secretary of State

BRIEF ON BEHALF OF RESPONDENTS TAHESHA WAY AND NEW JERSEY DIVISION OF ELECTIONS

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PRELIMINARY STATEMENT

Appellants wish to relitigate a decision that the New Jersey Legislature, the Framers of the New Jersey Constitution, and the United States Supreme Court have already made. This court should reject their invitation to overturn century-old laws, rewrite constitutional history, and discard federal constitutional precedent.

In the early 1920s, New Jersey and many other States—about 40 in all today—banned fusion voting, which allows one candidate to appear multiple times on a general election ballot as the nominee of multiple parties. Twenty-five years later, the New Jersey Constitutional Convention considered the very question posed in this appeal: whether the Legislature may make the policy choice to ban fusion voting. In rejecting proposals that would have enshrined fusion voting as a constitutional right, the Framers of the 1947 Constitution definitively answered in the affirmative. Declining to enumerate such a right, the new Constitution confirmed that the Legislature was free to maintain its longstanding prohibition on fusion voting.

Seventy-five years later, Appellants launch this novel challenge to the constitutional validity of the Legislature's choice. But their position is impossible to square with the history and intent of the Framers of the 1947 Constitution, which decided the very opposite. And because the United States

Supreme Court has already definitively held in Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), that the federal Constitution does not require states to permit fusion voting, Appellants resort to policy arguments in asking this court to jettison the century-old laws. At bottom, Appellants' argument is that they prefer the policies of only a handful of states to the policies adopted by the Legislature of this State and at least 39 others—but second-guessing policy decisions is outside the province of this court.

Even without this constitutional history, Appellants cannot bear the heavy burden of demonstrating that our duly-enacted statutes are unconstitutional. Because New Jersey's Fusion Statutes apply equally to all parties and nominees, do not limit any voter's ability to vote for the candidate of their choice, and allow candidates who have secured the nominations of multiple parties to communicate those endorsements on the ballot, any intrusion on constitutional rights is nonexistent to minimal. New Jersey's Fusion Statutes merely prohibit a candidate's name from appearing on the ballot twice. Indeed, the ability to communicate multiple-party endorsements on the ballot sets New Jersey's Fusion Statutes on even firmer footing than those upheld by the United States Supreme Court and numerous other state courts, and further undermine Appellants' challenge. New Jersey's statutes simply do not implicate—and at

most, minimally burden—the right to vote, freedoms of speech, association, and assembly, and the right to equal protection.

And because States must always balance individual rights against the State's interests regarding proper and efficient administration of elections, any constitutional impingement must be balanced against state interests. The Fusion Statutes serve numerous compelling state interests, such as preventing ballot manipulation, political gamesmanship, voter confusion, and decreased voter choice; in promoting accountability via maintaining distinctions between parties; and protecting the stability of the political system. And while Appellants suggest that fusion voting would cure numerous ills they ascribe to the difficulty third parties experience in gaining traction, there is little reason to believe their hopes of fusion-as-panacea will materialize. This court should deny these claims.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

This litigation commenced with a nomination petition the Moderate Party submitted to New Jersey Secretary of State Tahesha Way on June 7, 2022 to nominate Tom Malinowski as the Moderate Party Candidate for the 7th Congressional District in the November 2022 General Election. Pa304. Appended to the petition was a legal brief raising a facial challenge to the constitutionality of the Fusion Statutes and a voluminous appendix.

On June 8, Secretary Way denied the petition because Malinowski had previously submitted a petition declaring as a candidate in the June 2022 Democratic Party primary election for the same office. (Pa1). The denial was based on N.J.S.A. 19:13-8, which prevents a candidate from signing an acceptance of a nomination petition if they already accepted a primary nomination for the same office. Secretary Way denied the Moderate Party's request for reconsideration of the denial. (Pa2).

On July 20, 2022, Appellants the Moderate Party and Richard Wolfe appealed the Secretary's decision; Michael Tomasco and William Kibler filed an identical appeal, docketed as A-3542-21 and A-3543-21, respectively. On August 2, this court accelerated the appeals on its own motion. On the same day, at the court's direction, the State filed its Statement of Items Comprising the Record in both appeals.

A series of procedural motions ensued. On August 3, 2022, the court issued identical peremptory scheduling orders in both appeals. A week later, the Republican State Committee moved to intervene in the appeals. On August 15, the State moved to remove the appeals from the accelerated track, while Appellants moved to consolidate the appeals and to file an overlength brief. None of the above applications was opposed; in fact, Appellants filed papers in

support of removing the appeals from the accelerated track. In September 2022, the court granted all four motions.

Appellants obtained (on consent) two thirty-day extensions to file their brief, and ultimately filed a corrected brief on December 16. The State obtained extensions (on consent) to file a response to March 20, 2023. On that date, the State filed a motion to dismiss or, in the alternative, to transfer to the Law Division. The motion contended that, at a minimum, a remand was appropriate to develop a record addressing the issues raised by Appellants' facial constitutional challenges, since the Secretary had no opportunity (or authority) to develop a factual record before deciding the Petition. Otherwise, the appellate record would effectively be limited to Appellants' 545-page appendix, which is comprised of numerous witness certifications and empirical sources. The Republican State Committee filed a similar motion. On March 29, 2023, the State filed a second motion to extend time to file its merits brief.

On May 2, 2023, Judges Messano and Gummer entered an order denying the State's motion to dismiss or transfer, granting its motion to extend, and setting a peremptory deadline for its merits brief of June 9, 2023. In declining to remand to develop a more complete record, the court explained that "issues involved in a facial constitutional challenge are purely legal, and thus appropriate for judicial resolution without developing additional facts." Order,

M-3846-22 at 2 (internal quotation marks omitted). The court noted the State's concern that Appellants' "certifications and other exhibits" in the record "would otherwise go unrebutted," but found that these materials "are of little if any assistance to the court in deciding the legal issues relating to appellants' facial constitutional challenge." This brief follows.

COUNTERSTATEMENT OF FACTS

A. Since The Early 1900s, The Vast Majority Of State Legislatures Have Banned Fusion Voting.

New Jersey's laws prohibiting fusion voting[1] represent the norm across the Nation. Approximately 40 states directly or indirectly prohibit fusion tickets. See Timmons, 520 U.S. at 357 ("[I]n this century, fusion has become the exception, not the rule.").[2] The Attorney General is aware of only four states

[1] New Jersey's prohibition is reflected in several statutes. N.J.S.A. 19:13-8 prohibits a candidate from accepting a nomination petition if they have accepted a primary nomination or any other nomination petition. N.J.S.A. 19:13-4 provides: "No such petition shall undertake to nominate any candidate who has accepted the nomination for the primary for such petition." N.J.S.A 19:14-2 and 19:14-9 limit a candidate to appearing once on the ballot for a given office. N.J.S.A. 19:23-15 bars a candidate from pursuing a nomination in a party primary via nomination petition and then declaring as an independent for the same office at the general election.

[2] Sixteen states (including New Jersey) directly prohibit fusion in at least some elections. See Del. Code Ann. tit. 15, § 4108; Ga. Code Ann. § 21-2-137; Ill. Comp. Stat. Ch. 10, § 5/7-12(9); Ind. Code § 3-10-1-15; Kan. Stat. Ann. § 25-213(c); Ky. Rev. Stat. Ann. § 118.335; La. Rev. Stat. Ann. § 1280.25; Minn. Stat. § 204B.06; Mo. Rev. Stat. § 115.351; Neb. Rev. Stat. § 32-612(2); 25 Pa.

that permit fusion candidacies. See Conn. Gen. Stat. §§ 9-242, 9-453(t); N.Y. Elec. Law §§ 6-120, 6-146, 9-112(4); Or. Rev. Stat. § 254.135; Vt. Stat. Ann. § 2474.

These fusion bans are the national norm deeply rooted in historical efforts to reform the electoral system.[3] Until the late 1800s, there was "no official ballot" or "official list of candidates," and all ballots cast in American elections were either write-in ballots or those printed by political parties themselves with no state oversight. Adam Winkler, Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915, 100 Colum. L. Rev.

Cons. Stat. Ann. § 2870(f); S.C. Code Ann. § 7-11-10(C); Tenn. Code Ann. § 2-5-101(f)(1); Tex. Elec. Code Ann. § 162.015; Wis. Stat. Ann. § 8.15(7).

Four states allow a candidate to accept only one nomination. Iowa Code § 49.39; Mich. Comp. Laws § 168.692; Mont. Code Ann. § 13-10-303; N.D. Cent. Code § 16.1-12-06.

Twenty states and the District of Columbia effectively prohibit fusion tickets by requiring that a candidate be registered in the party from which they seek nomination. See Ala. Code §§ 17-16-21, 17-16-14; Alaska Stat. § 15.25.030(14); Ariz. Rev. Stat. Ann. § 16-311(A); Cal. Elec. Code § 8002.5(a); Colo. Rev. Stat. § 1-4-601(2); D.C. Code Ann. § 1-1001.08; Fla. Stat. § 99.021(1)(b); Haw. Rev. Stat. § 12-3(a)(7); Me. Rev. Stat. tit. 21-A, § 334; Md. Elec. Law § 5-203; Mass. Gen. L. ch. 53, § 48; Nev. Rev. Stat. § 293.177; N.H. Rev. Stat. Ann. § 655:14; N.M. Stat. Ann. §§ 1-8-2, 1-8-3, 1-8-18; N.C. Gen. Stat. § 163-106; Ohio Rev. Code Ann. § 3513.07; Okla. Stat. tit. 26, § 5-105; R.I. Gen. Laws § 17-14-1; W. Va. Code § 3-5-7; Wyo. Stat. § 22-5-204.

[3] Delaware and South Carolina enacted their laws in the past decade. Del. Code Ann. tit. 15, § 4108; S.C. Code Ann. § 7-11-10(C).

873, 876 (2000); see also (Pa373). That meant local party bosses effectively controlled which candidates appeared on party-printed ballots, which facilitated demanding bribes from candidates to be included on the ballot and printing counterfeit ballots of a rival party with substituted names to deceive voters into voting for their opponents. See Winkler, Voters' Rights, at 883. New Jersey was no exception: with few election regulations, party bosses sought to bribe voters and distributed ballots "well designed to assure the casting of only a straight ticket for all the candidates on the slate." John F. Reynolds, Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920 47 (1988).

The need for reform was brought into sharp relief by the 1888 Presidential election, which was marred by "widespread incidents of bribery, intimidation, and fraudulent voting." Pa373-74. That election spurred many states to adopt the Australian ballot, an official state-printed ballot that lists all duly nominated candidates in one place and is distributed only at the polling place, to ensure secret voting and one-vote-per-voter. See John C. Fortier & Norman J. Ornstein, The Absentee Ballot and the Secret Ballot: Challenges for Election Reform, 36 U. Mich. J.L. Reform 483, 487 (2003); Pa374.

New Jersey enacted its own reforms in the 1890s, requiring the use of secret ballots, voting booths, and buffer-zone rules. See Reynolds, Testing

Democracy, at 57-58. And further efforts followed, including when New Jersey passed the first direct-primary law in 1903, and the Geran Act in 1911, which, inter alia, required voter registration and established a single ballot in which voters select a candidate for each office rather than selecting one box to cast an entire partisan slate. See L. 1911, c. 183, §§ 53-54; Reynolds, Testing Democracy, at 63, 132, 142; Pa374 (distinguishing this "office-bloc" format from "party-column" ballot which groups candidates by political party).

With the use of single omnibus ballots, many states saw a further need for reform, including ensuring ballots did not become overcrowded or confusing. James Gray Pope, Fusion, Timmons v. Twin Cities Area New Party, and the Future of Third Parties in the United States, 50 Rutgers L. Rev. 473, 484 (1998); Celia Curtis, Comment, Cross-endorsement by Political Parties: A "Very Pretty Jungle"?, 29 Pace L. Rev. 765, 771 (2009) (Pa376). These restrictions included requiring a minimum number of signatures for nominating petitions, e.g., L. 1898, c. 139, § 41; Minn. Stat. § 204B.08, and granting automatic placement on the general election ballot only to political parties who received a certain percentage of the vote at the prior election, see Winkler, Voters' Rights, at 884.

In that same vein, at the turn of the century, thirteen states and New Jersey passed laws barring a candidate from appearing on the ballot as the candidate of more than one party (or appearing as both a party's candidate and a candidate

via nominating petition). See (Pa385). After briefly permitting "fusion" tickets in 1911, see L. 1911, c. 183, § 54, in 1921, the New Jersey Legislature reversed course and passed two laws barring a candidate who accepts a primary nomination from engaging a nomination petition and barring a candidate from accepting a nomination petition where they already accepted a primary nomination or any other petition. L. 1921, c. 196, §§ 59-60. Both provisions survived a significant revision to the election code in 1930, see L. 1930, c. 187, ¶¶ 117 § 8, 280 § 15, and are codified at N.J.S.A. 19:13-4, -8. This bar on multiple-party nominations was reinforced by a 1922 law requiring a candidate to appear only once on the ballot for a given office. L. 1922, c. 242, § 32 (codified at N.J.S.A. 19:14-2); see also N.J.S.A. 19:14-9 (similar). New Jersey also prohibits candidates from proceeding by direct nomination petition as an independent in the general election after seeking nomination via a party primary. See N.J.S.A. 19:23-15 (collectively, "Fusion Statutes").

A large swath of states followed suit in the ensuing decades with similar bans. See, e.g., Idaho Code § 33-628 (1932); Mont. Rev. Code § 682 (1935); N.D. Rev. Code § 16-0506 (1943); Wash. Rev. Stat. Ann. § 5274(6); Wyo. Comp. Stat. § 31-1404 (1945) (Da1-9). That list continued to grow and, by the end of the twentieth century, "approximately 40" states prohibited fusion. Timmons, 520 U.S. at 370.

B. Courts Nearly Uniformly Rejected Early Constitutional Challenges To Fusion Bans.

In the century-plus since the early enactments against fusion voting, courts have swiftly and almost uniformly upheld these laws, reasoning that voters remain free to vote for any candidate they wish and the laws advance valid state interests in ballot integrity and management, reducing voter confusion, and preventing abuses.

In an illustrative case, the Supreme Court of Wisconsin rejected an early state constitutional challenge to a statute requiring that a candidate nominated by multiple parties for the same office appear on the ballot only under "the party which first nominated him." State v. Anderson, 76 N.W. 482, 483 (Wis. 1898). The Court found this was a reasonable ballot regulation, explaining that without some policing of a candidate's representation on the ballot, "there would be no limit to its size and it would be so complicated and confusing as to certainly materially impair the freedom of the elective franchise." Id. at 486. That the law prevented a political party from nominating its preferred candidate did not render it constitutionally infirm, because the "individual right of the citizen to vote for the candidates of his choice" was "not impaired" and all candidates had a "reasonable opportunity" to appear "on the official ballot under a party designation." Id. at 486-87.

Other states' high courts found that states also have a valid interest in preventing abuses of cross-nominations. In upholding Illinois's fusion ban, the Supreme Court of Illinois explained that "[i]t was well known that minor political parties by exchanges of favors succeeded, by fusions at elections, against a party having a much larger number of voters than either of the parties to the fusion." People ex rel. McCormick v. Czarnecki, 107 N.E. 625, 628 (Ill. 1915). Missouri's highest court likewise emphasized a candidate's ability to manipulate fusion in order to appear to one group of voters to support a particular platform, while appearing to voters of a "different political faith" to support a disparate set of principles. State ex rel. Dunn v. Coburn, 168 S.W. 956, 958 (Mo. 1914). And these courts agreed with the Supreme Court of Wisconsin that a fusion ban pursues those legitimate goals without infringing on voters' or candidates' rights, since it does not preclude "any or all voters voting for [that candidate] at the election" and "permits every voter to vote for whomsoever he pleases." McCormick, 107 N.E. at 627; Dunn, 168 S.W. at 958 (reiterating law leaves voter free to "vot[e] for whom he pleases").

While Appellants identify one state court that invalidated a fusion ban under its state constitution, see (Pb13) (citing New York), the overwhelming majority of courts upheld these laws. See also, e.g., State v. Wileman, 143 P. 565, 566-67 (Mont. 1914) (law did not interfere with right to vote or "right of

naming candidates for public office"); State v. Superior Court, 111 P. 233, 234, 237-38 (Wash. 1910) (law did not violate political parties' or fusion candidate's rights); State ex rel. Fisk v. Porter, 100 N.W. 1080, 1081 (N.D. 1904) (similar); State ex rel. Bateman v. Bode, 45 N.E. 195, 196-97 (Ohio 1896).

C. The Framers Of The 1947 Constitution Specifically Rejected An Amendment Authorizing Fusion Candidacies.

By the time of New Jersey's 1947 Constitutional Convention, its Fusion Statutes had been on the books for over twenty years, and numerous parallel state statutes existed in other states, which the weight of state-court authority endorsed as constitutional. Supra at 9-13. There is ample evidence that the Framers of the 1947 Constitution were aware of the debate over fusion bans, yet they chose not to disturb the Legislature's authority to maintain these laws.

Delegates to the 1947 Convention were specifically urged to enshrine a constitutional right to fusion candidacies, but declined to do so. Delegate Spencer Miller, Jr., of Essex County introduced a proposal referred to the Committee on Rights, Privileges, Amendments and Miscellaneous Provisions, which stated:

> The Right to Nominate Candidates. (A new paragraph to be included in Article IV, Section VII.)
>
> *Resolved*, that the following be agreed upon as part of the proposed new State Constitution:

> The right of any legally qualified group of petitioners or of the voting members of any legally recognized political party to nominate any qualified person for an elective public office shall not be denied or abridged because he is not a member of the party or on account of his nomination by some other party or group.
>
> [2 Proceedings of the New Jersey Constitutional Convention of 1947 1010 (emphasis added).]

And while that proposal—"Proposal 25"—was pending, the Committee discussed whether a constitutional amendment would be needed to prevent the Legislature from maintaining a fusion ban:

> MR. IRVING LEUCHTER: I am here today representing the CIO from Union County, and the purpose of my appearance here is first to secure a Legislature which will be effective and responsible.
>
> . . .
>
> We advocate certain changes which we believe will result in both efficient and responsible legislative action:
> . . .
>
> Four, independent political parties: The course of American history demonstrates that the independent political party is a catalytic agent in the stream of American democracy. New ideas and concepts, which have eventually been adopted and accepted by the whole nation, have with some exceptions (Wilson and Roosevelt) been introduced and spread by independent parties. Accordingly, such parties should be given the fullest reign, and not so restricted that lip service only is paid to their right to exist and function. Such undue restrictions are present in laws which prevent such independent parties from nominating a candidate who

> is also the nominee of another party. The Constitution should specifically provide that the Legislature may enact no law which prohibits a candidate from standing for election as the candidate of more than one political party.
> . . .
>
> [DELEGATE] WESLEY L. LANCE: Is there anything in our present Constitution which prevents legislation authorizing a man to run on both tickets?
>
> MR. LEUCHTER: No, there is not; but I would like to have put in a prohibition from preventing the legislation.
>
> [3 Proceedings of the New Jersey Constitutional Convention of 1947 614-16].

The Legislative Committee rejected Proposal 25. See id. at 650; 2 Proceedings of the New Jersey Constitutional Convention of 1947 1078 (noting proposal "received careful consideration" but was rejected). Additionally, two groups—the New Jersey Committee for Constitutional Revision and New Jersey State Industrial Union Council, CIO—submitted identical proposals that the new constitution "[f]orbid legislation prohibiting a candidate running on more than one party ticket." 3 Proceedings of the New Jersey Constitutional Convention of 1947 872, 888 ("NJCCR/NJIUC Proposals"). Neither was adopted. The 1947 Constitution "carefully considered," but ultimately chose not to, disturb the validity of the pre-existing Fusion Statutes.

D. Subsequent Challenges To Fusion Bans Have Been Rejected.

The Attorney General is not aware of any challenge to New Jersey's Fusion Statutes after 1947, until the instant case. And the near-consensus of state courts continued to reject constitutional challenges to fusion bans. See, e.g., In re Street, 451 A.2d 427, 432 (Pa. 1982) (upholding Pennsylvania anti-fusion statute against federal constitutional challenge); Ray v. State Election Bd., 422 N.E.2d 714, 719 (Ind. Ct. App. 1981) (holding that while particular elements of Indiana's prohibition on cross-filing were unconstitutionally vague, there is no general right to cross-file petitions); Working Families Party v. Commonwealth, 209 A.3d 270 (Pa. 2019) (upholding Pennsylvania anti-fusion statute against state constitutional challenge).

Challenges to fusion bans in federal court fared no better. See, e.g., Swamp v. Kennedy, 950 F.2d 383, 386 (7th Cir. 1991) (rejecting constitutional challenge to Wisconsin's prohibition on multiple party nominations). In 1997, the United States Supreme Court spoke definitively on the constitutionality of fusion bans in Timmons. The Court held that Minnesota's fusion ban was a reasonable ballot regulation that does not violate First Amendment associational freedoms. See infra at 19.

ARGUMENT

POINT I

APPELLANTS' CHALLENGE FAILS BECAUSE THE UNITED STATES CONSTITUTION DOES NOT REQUIRE FUSION VOTING AND THE STATE CONSTITUTION'S PROTECTIONS ARE CO-EXTENSIVE.

Appellants bear a "heavy burden" in asking this court to invalidate the century-old fusion ban as unconstitutional. State v. Buckner, 223 N.J. 1, 14 (2015). Appellants can only overcome the "strong presumption of constitutionality" of the law by showing that "its repugnancy to the constitution is clear beyond reasonable doubt." Ibid. (quoting Gangemi v. Berry, 25 N.J. 1, 10 (1957)) (emphasis in original). Thus, "[e]ven where a statute's constitutionality is 'fairly debatable, courts will uphold' the law." State v. Lenihan, 219 N.J. 251, 266 (2014). And because Appellants bring a facial challenge, they must overcome the additional hurdle of "establish[ing] that no set of circumstances exists under which the Act would be valid." Whirlpool Props., Inc. v. Director, Div. of Taxation, 208 N.J. 141, 175 (2011).

Appellants fail to meet their heavy burden for several reasons. First, the Supreme Court of the United States already rejected Appellants' view that the U.S. Constitution guarantees a right to fusion voting. Second, the Framers of the 1947 Constitution also declined to make fusion voting a protected right under

our State Constitution. These circumstances conclusively preclude any finding that this law's invalidity is "clear beyond reasonable doubt."

A. The Supreme Court Of The United States Already Rejected Appellants' Claims Under the Federal Constitution.

U.S. Supreme Court authority is the first obstacle Appellants face. In Timmons, 520 U.S. 351, a 6-3 Court upheld Minnesota's fusion ban against a constitutional challenge. In Timmons, a third party (New Party) sought to nominate as its candidate in the general election an individual who had already declared his candidacy in the separate Democratic-Farmer-Labor Party's (DFL) primary. Id. at 354. A Minnesota law barred the New Party's nomination, because the statute "prohibit[s] a candidate from appearing on the ballot as the candidate of more than one party," regardless of whether the candidate and other party consented. Ibid. The party sued in federal court, alleging that Minnesota's fusion ban violated its freedom of association under the First and Fourteenth Amendments to the U.S. Constitution. Id. at 355.

The Supreme Court rejected the challenge. The Court first confirmed that such challenges are governed by the Anderson-Burdick interest-balancing standard, since states "inevitably must" enact some reasonable regulations of ballots "to reduce election- and campaign-related disorder," yet every regulation invariably encroaches on a party's rights of association and expression. Id. at 358-59 (citing Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v.

Takushi, 504 U.S. 428 (1992)). Laws imposing "severe burdens" on a plaintiff's rights "must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" Ibid. (quoting Burdick, 504 U.S. at 434).

The Court found that the burdens that the Minnesota statute imposed on associational rights—while "not trivial—are not severe." Id. at 363. A minor party's inability to have its first-choice candidate appear as its nominee on the ballot "does not severely burden [its] associational rights," since the burden is a function of the candidate's choice to accept a different party's nomination. Id. at 359. Indeed, a fusion ban limits the "universe of potential candidates" available to this party "only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party." Id. at 363. But the minor party remains "free to try to convince" its preferred candidate to relinquish his earlier nomination and accept its nomination instead. Id. at 360.[4] And the ban does not restrict the party's or its members' ability "to endorse, support, or vote for anyone they like" or "directly limit the party's access to the ballot." Id. at 363.

[4] The Court thus endorsed the Seventh Circuit's conclusion in Swamp, 950 F.2d, at 385. Id. ("[A] party may nominate any candidate that the party can convince to be its candidate.").

The Court also disagreed that limiting a party's ability to use the ballot as a means of conveying a particularized message to voters about "the nature of its support" for a candidate severely burdens associational rights. Id. at 362-63. As the Court explained, "[b]allots serve primarily to elect candidates, not as forums for political expression"—and meanwhile, nothing in the fusion ban restricts a minor party's ability to use those other avenues of expression to communicate to voters. Ibid. Indeed, a minor party and its members enjoy the same right as all other participants to "campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate." Id. at 363. Accordingly, a fusion ban is constitutional so long as the State's "important regulatory interests" justify the imposition on parties' rights. Id. at 358.

The Court then held that the law survived this lesser scrutiny. First, it noted that the statute advanced the state's valid interest "in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." Id. at 364. The Court found that without the statute, candidates could exploit fusion as a way to attach their names to slogans appealing to various political factions, which "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising." Id. at 365. Relatedly, minor parties may use fusion

to freeride off the "popularity of another party's candidate" to win enough votes to attain "major-party status in the next election," where they may otherwise have lacked the signatures needed to gain access to the ballot via nominating petition. Id. at 366. A state "surely has a valid interest" in ensuring that only minor parties that "are bona fide and actually supported, on their own merits," secure access to the ballot. Ibid.

Further, states have a "strong interest" in preserving political stability by preventing the "unrestrained factionalism" fusion facilitates. Id. at 366, 368. The Court found that given the potential harms in "splintered parties and unrestrained factionalism," states could permissibly conclude "that political stability is best served through a healthy two-party system." Id. at 367, 368. But the Court was explicit that states have no valid interest in preserving the two-party system simply for its own sake, or in enacting "unreasonably exclusionary restrictions" under the guise of "political stability." Id. at 367. Rather, "the States' interest permits them to enact reasonable regulations that may, in practice, favor the traditional two-party system." Ibid. And the Court stressed that it has upheld far more exclusionary laws on this rationale than a fusion ban, including laws banning write-in voting, see Burdick, 504 U.S. at 439, and prohibiting a candidate who was affiliated with a party at any time during the year before the primary election from appearing on the ballot as an

independent or candidate of another party, see Storer v. Brown, 415 U.S. 724, 728 (1974). While those laws "absolutely banned many candidacies," a fusion ban "only prohibits a candidate from being named twice" on the ballot. 520 U.S. at 369. The "weighty" state interests in ballot integrity and political stability thus outweigh the more limited burden imposed by a fusion ban. Id. at 369-70.[5] Thus, the Court concluded, Minnesota's fusion-voting ban did not violate the Constitution.

B. Timmons Is Dispositive Because The New Jersey Constitution Does Not Establish Any Greater Right To Fusion Voting.

Given Timmons's definitive holding, Appellants' only recourse is to argue that the decision's analytical approach should be cast aside, asserting that the State Constitution "warrants greater protection" for free speech and political associational rights than its federal counterpart. (Pb55-56). But this argument falters right out of the gate: the Framers of the 1947 Constitution specifically rejected a constitutional right to fusion voting. And even putting aside that dispositive history, Appellants also fail to show that the State Constitution's protections are broader in any way that is relevant to fusion voting.

[5] The Court also noted that in Swamp, the Seventh Circuit upheld Wisconsin's fusion ban by citing to additional compelling state interests, including "avoiding voter confusion." Timmons, 520 U.S. at 364 (quoting Swamp, 950 F.2d at 386).

1. Appellants face an insurmountable burden in demonstrating the State Constitution establishes any greater right to fusion voting than the federal constitution, because the Framers of New Jersey's 1947 constitution consciously refused to create a right to fusion voting.

As set forth above, by the time of the 1947 Convention, New Jersey—along with many other states—had already long prohibited fusion voting. Supra at 9-10; see Anderson, 76 N.W. at 486-87. The 1947 Constitution's silence itself strongly suggests that our Constitution does not grant a right to fusion voting, because "[w]hen the framers of the constitution intended that a subject should be placed beyond legislative control[,] they said so." Buckner, 223 N.J. at 15. There can be little doubt that the Framers were aware of the existence of both the longstanding legislation and the policy debate over the bar on fusion, ibid.; cf. Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 449 (2012) (presuming "that the Legislature was aware of its own enactments"). And they were aware of the implications of their silence, since "[a] constitutional prohibition against the exercise of a particular power" of the Legislature needs to be explicit. State v. Murzda, 116 N.J.L. 219, 223 (1936). It was "the settled rule of judicial policy" in New Jersey long before the 1947 Constitutional convention "that a legislative enactment will not be declared void unless its repugnancy to the Constitution is so manifest as to leave no room for reasonable doubt." Ibid.

Appellants' position is even weaker, because the historical record shows not acquiescence, but an express repudiation. The Framers rejected multiple proposals to place the specific matter at issue "beyond legislative control." Buckner, 223 N.J. at 15. The NJCCR/NJIUC proposals would have definitively precluded legislation "prohibiting a candidate running on more than one party ticket." See supra at 15. Proposal 25 would have added a constitutional amendment recognizing the "right" to "nominate any qualified person for an elective office," without regard to "his nomination by some other party or group." See supra at 13-14. In declining to adopt any of the three proposals, the Framers of the 1947 Convention chose to preserve the Legislature's authority to maintain a fusion ban in any way. See supra at 13-15.

As this court has recognized, acquiescence to a pre-1947 practice is a heavy thumb on the scale in favor of its constitutionality—even in the absence of the direct-rejection history in this case. In Rutgers University Student Assembly v. Middlesex County Board of Elections, 446 N.J. Super. 221 (App. Div. 2016) ("RUSA II"), this court rejected a claim that New Jersey's 21-day advance-registration requirement (which was first enacted before the 1947 Convention) violated the right to vote under the State Constitution, noting that the Framers of the Convention "were obviously aware of, but did nothing to disturb, this well-established requirement when they adopted" the 1947

Constitution. Id. at 224, 230. Likewise, the Framers' conscious refusal to establish a right to fusion voting is powerful evidence that the Fusion Statutes comport with the State Constitution, even more so given their explicit rejection of Proposal 25.

Given that history, Justice Handler's concurrence in State v. Hunt, 91 N.J. 338 (1982) undermines, not supports, Appellants' effort to source the right rejected by Timmons in the State Constitution. See (Pb55); Hunt, 91 N.J. at 363-68 (offering criteria for identifying when State Constitution should deviate from U.S. Constitution's protection of individual rights to prevent "erosion or dilution of constitutional doctrine"). The Hunt factors—in particular, the "legislative history" of the constitutional provision, the "preexisting state law," and the state's "history and traditions"—weigh against Appellants. 91 N.J. at 365, 366-67 (Handler, J., concurring). Here, the Legislature's longstanding endorsement of a fusion ban, reinforced by the history of the 1947 Constitution, make clear that New Jersey in particular did not write a constitution that forbids the longstanding state practice against fusion bans. Appellants' reliance on the Geran Act—which briefly authorized fusion—underscores the point, see (Pb58), as that short-lived law was repealed in 1921 and replaced by a fusion ban which has been the law of the land for over 100 years. Moreover, the national trend in both legislative sentiment and judicial review—both of which overwhelmingly

support fusion bans—indicate that the issue is not one of "particular State Interest or Local Concern," another Hunt analysis factor. 91 N.J. at 366; see Timmons, 520 U.S. at 370 (noting that "approximately 40 other states . . . do not permit fusion"). In short, nothing in Hunt supports the novel, ahistorical expansion of state constitutional law Appellants seek, when the legislative history of our state constitution directly contradicts that position.

2. Even without that remarkably dispositive constitutional history, Appellants are wrong to suggest that New Jersey courts have construed State constitutional rights in the elections context as farther-reaching than their federal counterparts. See N.J. Const. art. I, ¶¶ 6, 18. Appellants invoke general language about the State constitution without citing to a single case that reaches that holding. And they ignore this court's caselaw interpreting the federal and state constitutions coextensively in the elections context in particular.

Appellants' main argument is that New Jersey's free speech provision stretches beyond the First Amendment—and the constitutions of nearly every other state—to uniquely protect the right to fusion voting. But our "State Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment." E & J Equities, LLC v. Bd. of Adjustment of Twp. of Franklin, 226 N.J. 549, 568 (2016) (emphasis added) (applying same substantive standards in reviewing free-speech challenge to billboard ordinance under

Federal and State Constitutions). State courts thus "rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution." Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264-65 (1998) (reviewing free-speech challenge to sign regulation under Federal and State Constitutions) (citation omitted). Appellants cite cases about the right to free speech in wholly inapposite contexts. (Pb56-60).

There are only two recognized contexts in which the "State constitutional provision has been construed more broadly in scope than the First Amendment," and neither apply here. Horizon Health Ctr. v. Felicissimo, 263 N.J. Super 200, 213-14 (App. Div. 1993); E & J Equities, 226 N.J. at 568. First, the State clause lacks the U.S. Constitution's "state action" requirement, and is thus enforceable against certain private actors. See, e.g. Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 79 (2014); State v. Schmid, 84 N.J. 535, 559 (1980). But that says nothing about the substantive reach of the clause in the elections context where the question of state action is not at issue. The second exception involves defamation, and is equally inapposite: New Jersey requires "proof of actual malice to statements regarding private citizens in matters of public concern,"

whereas the First Amendment does not. W.J.A. v. D.A., 210 N.J. 299, 242 (2012); Senna v. Florimont, 196 N.J. 469, 484 (2008).[6]

As for the right to associate, Appellants cite no case suggesting that the freedom of association enjoys greater protection under the State Constitution. Schundler v. Donovan, 377 N.J. Super. 339, 347-49 (App. Div. 2005) (cited at Pb60) analyzes only the U.S. Constitution's freedom of association, and says nothing about whether the State and Federal rights are co-extensive.

Appellant's reliance on Worden v. Mercer County Bd. of Elections, 61 N.J. 325 (1972) for the proposition that the right to vote in New Jersey is more expansive than its federal counterpart, is unavailing. Worden reviewed a ruling by election officials that prohibited college and graduate students in Mercer County from registering to vote where they actually resided, instead requiring them to register to vote where their parents resided. Id. at 327-30. Worden extensively analyzed federal constitutional law, including the passage of the Twenty-Sixth Amendment and United States Supreme Court precedents adopting the "compelling state interest test" in cases where states "impose[d]

[6] Appellants' other cases are even farther afield. State v. Williams, 93 N.J. 39, 57-59 (1983) determined that *both* the federal and State constitutions protect a public right of access to criminal pretrial hearings. See id. at 59 ("[T]hese rights as recognized under the State Constitution are fully consistent with those that are found under and protected by the First Amendment."). And Quaremba v. Allan, 67 N.J. 1 (1975) did not compare the State and federal rights.

restrictions beyond ordinary resi[d]ence requirements." Id. at 334-38. The Court then confirmed that it read the state and federal constitutional rights to vote in harmony by adopting the federal "compelling state interest test" for both analyses. Id. at 346.

While Appellants insist that Worden stands for the proposition that all right-to-vote claims under the State Constitution must be evaluated under the strict scrutiny test, it does not. Worden applied the compelling state interest test precisely because it was the federal standard for evaluating a restriction that completely prohibited students from registering to vote where they resided. Id. at 334, 346. Worden does not hold that such a standard applies to state constitutional claims when the federal constitutional analysis demands a lower level of scrutiny for less severe burdens on the right to vote. Instead, its repeated references to the parallelism between federal and state right-to-vote doctrine suggests that the two are coterminous. See id.; see also Hunt, 91 N.J. at 363 (Handler, J., concurring) ("We have recently recognized the importance of federal sources of constitutional doctrine. The opinions of the [United States] Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address." (citation omitted)).

In fact, this court has applied the federal constitutional framework to resolve state constitutional challenges to election laws. In RUSA II, this court specifically evaluated the advance-registration requirement under N.J. Const. art. II, § 1, ¶ 3(a). 446 N.J. Super. at 224-25. In an earlier iteration of the challenge, this court first concluded that Worden's application of strict scrutiny was not an indication that all right-to-vote claims under the state constitution automatically trigger that analysis (a departure from the sliding scale Anderson-Burdick federal framework). Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elections, 438 N.J. Super. 93, 103 (App. Div. 2014) ("RUSA I"); see infra at 39-40. Rather, Worden applied strict scrutiny because the challenged policy "prevented the students from voting under any circumstances." Ibid. Thus, both panels of this court in RUSA I and II confirmed that there was no daylight between the federal and state constitutional analyses for a right-to-vote challenge.[7]

[7] Likewise, In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital, 331 N.J. Super. 31 (App. Div. 2000), concerned five residents of a psychiatric hospital who had their ballots challenged, segregated, and at risk of not being counted because of the voters' alleged incompetence to vote. 331 N.J. Super. at 34-35. Thus, those voters risked having their right to vote denied entirely and were being treated differently than non-residents of the psychiatric hospital. No member of the Moderate Party or any other voter faces a comparable risk of total disenfranchisement by the Fusion Statutes.

To the extent Appellants suggest that the State Constitution's assembly clause is broader than the federal one, see (Pb76), that is unsupported by any evidence. Our courts have always discussed the state and federal rights coterminously. See Kovacs v. Cooper, 135 N.J.L. 64, 66 (Sup. Ct. 1946) (discussing "the freedoms of speech and assembly" as "enunciated and preserved by the New Jersey and United States Constitutions"), aff'd, 135 N.J.L. 584 (1947), aff'd, 336 U.S. 77 (1949). And the proceedings of the 1947 Constitutional Convention make clear the Framers viewed the assembly right as identical to the federal right. See 2 Proceedings of the New Jersey Constitutional Convention of 1947 1357 (Prof. Willard Heckel's analysis for Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention stating: "This paragraph is similar to the restriction placed on Congress by the Federal Constitution"); (Da13). And in submitting an amendment to the Committee on Rights opposing the addition of language regarding labor organizing, delegate Robert Carey described the original provision as a "verbatim copy of the Article on this subject in our Federal and State Constitutions for over a century." Id. at 1038. The Constitution ultimately

retained a labor organization provision, but in a separate paragraph. N.J. Const. art. I, ¶ 19.[8]

Finally, Appellants have not shown that equal protection under the State Constitution encompasses a broader right to fusion than the U.S. Constitution. In analyzing whether a statute violates equal protection under the State Constitution, our courts "apply a flexible balancing test that weighs the nature of the right, the extent of the governmental restriction on the right, and whether the restriction is in the public interest." Caviglia v. Royal Tours of Am., 178 N.J. 460, 479 (2004). Although this balancing test is not identical to the three-tiered approach used under the U.S. Constitution, "[t]o a large extent, the considerations guiding our equal protection analysis under the New Jersey Constitution are implicit in the three tier approach applied by the Supreme Court under the Federal Constitution" and "the two tests will often yield the same result." Barone v. Dept. of Human Servs., Div. of Medical Assistance and Health Servs., 107 N.J. 355, 368 (1987) (emphasis added).

[8] Appellants' citation to Founding-era evidence sheds no light on their premise that there is a right to convey support for a candidate in a particular way on the ballot via fusion voting. The article Appellants cite suggests early state constitutions' assembly clauses encompassed the right of local governments to enact popular-sovereignty measures without explicit permission of state or federal governments. See Nicholas Bowie, The Constitutional Right of Self-Government, 130 Yale L.J. 1652, 1662-63 (2021). That issue is not implicated in this challenge regarding fusion voting.

Because Appellants fail to establish that the State Constitution's protections are different or greater in any way that informs the constitutionality of a fusion ban, Timmons controls the outcome of this case. Fusion voting does not violate either the Federal or State Constitutions.[9]

C. Appellants' Claim That Their Record Makes This Case Different Also Fails.[10]

While Appellants also argue that their factual record requires departing from Timmons, see (Pb18, 68, 70 n.65, 71), this court already made clear that Appellants' record has no bearing on this facial challenge, which is all that is at issue here. See Order, M-3846-22 at 2 (noting that record is "of little if any assistance to the court in deciding the legal issues relating to appellants' facial constitutional challenge"). And Appellants provide little analysis of what the Timmons respondents lacked in record evidence that Appellants now attempt to

[9] The "Democracy Canon" is farther afield, see (Pb60), as this is merely a canon of statutory interpretation, and there is no dispute here as to the meaning of the Fusion Statutes. See N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 190 (2002).

[10] The State respectfully reiterates its objection to resolving this facial challenge based on Appellants' one-sided record for the reasons it stated in its motion to dismiss. Moreover, before the May 2, 2023 order, the State did not anticipate a peremptory timeline cutting off a record-building period, as the appeals had recently been removed from the accelerated track and its prior extension requests were based on consent. Thus, the State did not have an adequate opportunity to develop a factual record, or to cross-examine or otherwise test Appellants' proffered evidence.

remediate. Indeed, Appellants' record covers substantially the same terrain as what the Timmons Court considered: the Timmons respondents also presented evidence regarding how fusion voting could be administered, see No. 95-1608, Br. of Respondents, 1996 WL 501955, at *26-30 (U.S. Aug. 30, 1996); the purported absence of practical difficulties in states allowing fusion, specifically including whether voter confusion was a problem in Connecticut and New York, see id. at *22, 34-39; and whether fusion bans stymied the development of third parties, see id. at *9, 28-29 (discussing need for vote disaggregation), 32-33. Appellants' record thus says little about why the result should be different here.

And to the degree this court agrees with Appellants that their record provides any basis to distinguish Timmons, then the one-sided opportunity to develop a record precludes that approach; instead, further record development would be necessary. In either event, whatever evidential value Appellants' record has, that cannot overcome the "strong presumption of validity" the Fusion Statutes enjoy where the Framers specifically refused to grant a right to fusion voting in the 1947 Constitution.

POINT II

EVEN IF THE NEW JERSEY CONSTITUTION AFFORDED BROADER RIGHTS, APPELLANTS HAVE NOT MET THEIR BURDEN TO INVALIDATE THE FUSION STATUTES.

The above analysis makes amply clear that there is no basis for this court to depart from the United States Supreme Court's holding in Timmons that fusion ban statutes are constitutional. But even if this court conducts its review of New Jersey's Fusion Statutes on a clean slate, the same result is warranted. As a threshold matter, the familiar Anderson-Burdick standard governs these state constitutional challenges to a ballot regulation.

Under that standard, the burden imposed by the law is not severe—whether the focus is on the right to vote, the rights to association and speech, right to assembly, or right to equal protection—and therefore strict scrutiny is categorically inapplicable. In fact, compared to the fusion bans upheld by the United States Supreme Court, the Pennsylvania Supreme Court, and numerous other state courts, New Jersey's Fusion Statutes impose an even lower burden on rights because our State laws allow candidates to communicate their endorsement by a different party via a slogan on the ballot. Moreover, the Fusion Statutes are supported by compelling state interests because they advance important interests in ballot integrity, promoting political stability, and mitigating voter confusion, without drawing discriminatory lines.

A. Anderson-Burdick Interest-Balancing Governs These Challenges.

This court should follow its prior precedents and employ the Anderson-Burdick test to evaluate challenges to elections statutes sounding in right-to-vote or freedom of speech, association, and assembly theories pursuant to the State Constitution. This court's continued application of the test is warranted because it ensures that individual rights and the government's interest in administering free and fair elections are appropriately balanced. Appellants offer no valid reason for why this court should jettison that approach.

It is well-settled that "government must play an active role in structuring elections." Burdick, 504 U.S. at 433. As the United States Supreme Court explained, "[a]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Timmons, 520 U.S. at 358 (quoting Burdick, 504 U.S. at 433); see also Gangemi v. Rosengard, 44 N.J. 166, 172-73 (1965) (recognizing the need for "regulatory machinery" to prevent "confusion at the polls" and "fraudulent ballots [that] might jeopardize the election process."). Such regulation "inevitably affects[,] at least to some degree," individual liberties such as the "individual's right to vote" or constitutional rights to free association or free speech. Anderson, 460 U.S. at 788.

Since competition between these twin interests is inevitable in a well-ordered democratic election system, courts adopt a test that is "more flexible than the rigid tiers of scrutiny under a traditional First Amendment analysis." Mazo v. N.J. Sec'y of State, 54 F.4th 124, 137 (3d Cir. 2022) (citations omitted); see also Burdick, 504 U.S. at 433 (noting rigid application of strict scrutiny to every ballot regulation "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."); Timmons, 520 U.S. at 358-59; RUSA II, 446 N.J. Super. at 231. Under that test, named after the Supreme Court decisions in Anderson and Burdick, courts must:

> [W]eigh the "character and magnitude" of the burden the State's rule imposes on [constitutional] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary . . . . Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions."
>
> [Timmons, 520 U.S. at 358 (quoting Burdick, 504 U.S. at 434).]

As Timmons confirms, Anderson-Burdick's balancing approach is tailormade for the competing interests inherent in a constitutional challenge to fusion bans. Any burden that the state law imposes on individual rights is weighed against the State's interests regarding administration of elections, and the State may

only pursue its goals to "the extent . . . the State's concerns make the burden necessary." Id. at 358.

This court has both explicitly and implicitly adopted the well-reasoned underpinnings of the Anderson-Burdick test in assessing the constitutionality of state elections regulations. In RUSA II, this court explicitly adopted the Anderson-Burdick test to evaluate the validity of a state advance-registration requirement for voters, citing the test's "flexible analytical approach" as appropriate for elections challenges. 446 N.J. Super. at 231. And this court has repeatedly endorsed applying Anderson-Burdick in other elections challenges. For example, in Schundler v. Donovan, 377 N.J. Super. 339 (App. Div.), aff'd, 183 N.J. 383 (2005), a case about New Jersey's ballot design statute, this court confirmed that the approach in Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 222 (1989), which applied the Anderson-Burdick test, was the appropriate framework for evaluating challenges to elections statutes. 377 N.J. Super. at 347 (quoting Eu and assessing whether the "regulation ... is necessary to the integrity of the electoral process"). Likewise, in Council of Alternative Political Parties v. State Division of Elections, 344 N.J. Super. 225, 236 (App. Div. 2001) ("CAPP"), this court employed the Anderson-Burdick test to strike down a statute that precluded registered voters from declaring a party affiliation other than Republican, Democrat, or Independent. See also Gusciora

v. Christie, No. A-5608-10, 2013 WL 5015499, at *10 (N.J. Super. Ct. App. Div. Sept. 16, 2013) ("[T]he proper analysis to apply is the flexible approach set forth in Burdick.").[11]

While our Supreme Court has not considered whether to adopt the Anderson-Burdick test to review election laws, the Court has long endorsed a balancing approach and rejected a strict-scrutiny-for-all method. In In re Contest of November 8, 2011 General Election, 210 N.J. 29 (2012), for example, the Court applied intermediate scrutiny in an equal protection challenge to a durational residency requirement to run for legislative office, reasoning that such a rule does "not 'directly interfere with the exercise of the fundamental right to vote'" and specifically rejecting a strict scrutiny standard. Id. at 49, 55. And in Wene v. Meyner, 13 N.J. 185, 192 (1953), in construing a primary-election statute, the Court remarked that [t]he Legislature may invoke measures reasonably appropriate to secure the integrity of the nominating process in the service of the community welfare." Id. at 192.

[11] While unpublished opinions do not constitute precedent and are not binding on any court, the Attorney General cites to one here to illustrate the consistent approach taken by this court. See Pressler & Verniero, Current N.J. Court Rules, cmt. 2 to R. 1:36-3 (2023). The Attorney General is not aware of any contrary unpublished opinions.[12] And unbounded use of cross-nominations is not a hypothetical scenario. In the absence of anti-fusion laws in New York, former New York City Mayor Fiorello LaGuardia ran under nine different party labels during his political career and, in 1941 alone, was cross-nominated by four separate parties. See Curtis, Cross-Endorsement, at 791-92.

Appellants offer no principled reason why this court should abandon this approach, other than to insist that because the Fusion Statutes "infringe" on fundamental rights, strict scrutiny must apply. (Pb30, 31, 32, 39). But that assertion merely begs the question, since nearly all challenges to election regulations—including those underlying Anderson, Burdick, Timmons, and RUSA II—implicate some fundamental rights. Instead, Appellants only rely on Worden, arguing that because that court applied strict scrutiny, it must do so in every voting rights case under the State Constitution. But that reliance is misplaced for the reasons the RUSA II court explained. Noting that Worden reviewed regulations that treated "similarly situated citizens … differently" and led to the wholesale "exclusion of a large number of otherwise eligible voters" from being able to vote at all, RUSA II found that nothing in Worden foreclosed a flexible approach whereby particularly severe burdens on constitutional rights merit a heightened showing of state interest, while lesser burdens could be justified by sufficiently "important regulatory interests." Id. at 232, 234; see supra at 28-30. After all, Worden's application of strict scrutiny is consistent with Anderson-Burdick's framework, which itself requires that "severe burdens" on constitutional rights satisfy strict scrutiny. Timmons, 520 U.S. at 358. More fundamentally, Appellants overlook that Worden predates Anderson and Burdick, and that this court has since adopted Anderson-Burdick's

balancing approach. See RUSA II, 446 N.J. Super. at 234; CAPP, 344 N.J. Super. at 235 (cited at Pb46, 63). This court should follow those precedents.

B. The Fusion Statutes Do Not Violate The Right To Vote.

Merely prohibiting a candidate from appearing multiple times on a ballot for the same office under the nomination of multiple parties does not burden the rights of voters to cast ballots for their preferred candidates. Any alleged impact of fusion ban statutes on voting rights is indirect or minimal at best and is justified by the State's important regulatory interests in preventing ballot manipulation, political gamesmanship, voter confusion, and decreased voter choice, maintaining voter confidence in party accountability, and maintaining the stability of the political system.

Without doubt, our State Constitution protects citizens' rights to vote. N.J. Const. art. II, § 1, ¶ 3(a); In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 331 N.J. Super. 31, 37 (App. Div. 2000). But like all fundamental rights, the right to vote is subject to reasonable regulations enacted by the Legislature. See, e.g., Wene, 13 N.J. at 192; Sadloch v. Allan, 25 N.J. 118, 122 (1957) ("[T]here can be no doubt about the authority of the Legislature to adopt reasonable regulations for the conduct of primary and general elections. Such regulations, of course, may control the manner of preparation of the ballot, so long as they do not prevent a qualified elector from

exercising his constitutional right to vote for any person he chooses."); Gangemi v. Berry, 25 N.J. at 12; Rose v. Parker, 91 N.J.L. 84, 86-87 (1917).

1. The Fusion Statutes Do Not Burden Appellants' Right To Vote.

The threshold problem with Appellants' right-to-vote claim is that the Fusion Statutes do not materially impinge on the right to vote or establish any barriers for any citizen to vote for the candidate of their choice. Candidates like Malinowski still appear on the ballot, and voters may vote for him (or any other candidate). See, e.g., Working Families Party, 209 A.3d at 281-82 (finding challengers "had the opportunity to support and vote for the candidate of their choice" under Pennsylvania fusion ban); McCormick, 107 N.E. at 629 ("Each candidate has the opportunity to have his name appear upon the ballot once, and every voter has the opportunity to vote for him, which secures to both every right guaranteed by the Constitution."); Bateman, 45 N.E. at 196 ("[I]f an opportunity is given them to vote for the candidates of their choice, by placing the names once, in plain print, upon the ballots, it is all that can in fairness be required."); Fisk, 100 N.W. at 1081; Superior Court, 111 P. at 237; Wileman, 143 P. at 566. See also Timmons, 560 U.S. at 363 (Minnesota's fusion statutes did not impinge on the New Party or its members' ability to "endorse, support, or vote for anyone they like"). And there is no question that the voters' preference of candidate is "counted." (Pb35) (quoting League of Women Voters

of Mich. v. Sec'y of State, 959 N.W.2d 1, 27 (Mich. Ct. App. 2020)). That every voter has an opportunity to vote for their preferred candidate under New Jersey's Fusion Statutes ends the right-to-vote inquiry.

Appellants instead conflate a separate claim—the alleged speech and associational right of the Moderate Party to indicate their preference for Malinowski as their standard-bearer on the ballot, and the same speech and associational right of a voter to indicate their support for the Moderate Party on the ballot—with the right to vote. (Pb35). But nothing in their cited cases suggests that there is a standalone right to use the ballot not only to vote for a candidate, but to also vote for a political party. See Anderson, 76 N.W. at 486 ("Mere party fealty and party sentiment . . . are not the subjects of constitutional care."). And a right-to-vote theory based on a right to choose not only a candidate, but a political party, would invalidate numerous other statutes. After all, many states, including New Jersey, operate nonpartisan elections for certain positions. See, e.g., N.J.S.A. 40:45-5 et seq. (providing for certain nonpartisan municipal elections). In those cases, no voter may use the ballot as a means to select their preferred party, but there is little question that such nonpartisan elections do not violate the right to vote. Even in partisan elections, an elected candidate may later choose to disaffiliate with the party that nominated him, or to affiliate with another party.

Thus, while the Fusion Statutes might minimally burden Appellants' right to speak and associate, see infra at 59-63, they do not burden their right to vote—which protects the right to select a candidate, not a party. Cf. Smith v. Penta, 81 N.J. 65, 73 (1979) (holding that registered members of one political party have no right to participate in primary elections of another, because art. II, § 3 of our Constitution could not "possibly be read as encompassing the right to participate in a particular party's candidate selection process").

In any event, even if the Fusion Statutes did implicate the right to vote, they work "no more than a minimal burden upon plaintiffs' right to vote." RUSA II, 446 N.J. Super. at 234. That is because voters can still select their preferred candidate. In fact, they can select their preferred candidate whose name is accompanied by an endorsement slogan linking the candidate to the voter's preferred party. Thus, the right to vote for a preferred candidate and the party he has affiliated with are left undisturbed. While Appellants insist that they would prefer to vote for Malinowski under a different ballot configuration, it is Malinowski who chose to appear on the ballot under the Democratic Party instead of the Moderate Party. See Timmons, 520 U.S. at 363 (observing that candidates affected by fusion bans are "individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party"). And the difference between the voter's ideal ballot

configuration and the status quo imposes at most a minimal burden on the right to vote, since the underlying act of selecting a candidate or party affiliation in the form of a slogan is still available to Appellants.

2. The Fusion Statutes Promote Compelling State Interests.

Regardless of the precise degree of burden—if any—that the Fusion Statutes place on the right to vote, a variety of important regulatory interests shield them against a constitutional challenge.

First, the State has a compelling interest in ensuring that the ballot remains free from manipulation. Allowing cross-nominations would "undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising," Timmons, 520 U.S. at 365, a practice that the State has more than legitimate reason to prevent. Fusion voting—allowing candidates to appear multiple times on the ballot as the nominee of different parties—incentivizes candidates to use cross-nominations as a means of using the ballot for political advertising and advantage. For example, a candidate could create or seek the nomination of multiple minor parties and obtain those parties' nominations by petition by obtaining a relatively low number of signatures, see N.J.S.A. 19:13-5 (requiring no more than 100 signatures, except for statewide positions, which require 800), something that a major-party candidate could easily accomplish. That candidate could then leverage the

repetition of his name on the ballot and the names and slogans of the minor parties as a series of campaign advertisements on the ballot itself (i.e., "No New Taxes Party" or "Stop Crime Now Party," each accompanied by a slogan).

Employed by major party candidates, such an approach may allow them to monopolize ballot real estate by working up multiple cross-nominations to promote their preferred message. See McCormick, 107 N.E. at 629 ("If the relator can be the candidate of two parties, he can be the candidate of all six parties of the state; and if he has that right every other candidate has the same right[.]"). And fringe candidates may be incentivized to rack up multiple nominations from minor parties by obtaining the bare minimum of signature petitions with modest to little support from the general electorate. That approach could convince voters that the candidate has wider support than he does, because he appears on the ballot so many times.[12] And although Timmons and other courts have long identified this problem, Appellants conspicuously give it short shrift in their otherwise lengthy discussion about state interests. (Pb43-52).

Second, the State has an interest in preventing political gamesmanship through the cross-nomination process. Fusion voting effectively turns the ballot

[12] And unbounded use of cross-nominations is not a hypothetical scenario. In the absence of anti-fusion laws in New York, former New York City Mayor Fiorello LaGuardia ran under nine different party labels during his political career and, in 1941 alone, was cross-nominated by four separate parties. See Curtis, Cross-Endorsement, at 791-92.

into precious real estate, for candidates and parties to capitalize instead of an apolitical utilitarian vehicle for voting. For example, a minor party that advances a single issue ("Self-Service Gas Pumps" or "Save the Dolphins") could leverage its precious ballot real estate by trading the opportunity to repeat a major candidate's name under its banner for the major party's adoption of the single issue. Moreover, a minor party that may not have received sufficient support otherwise could inflate their support by signaling their intention to nominate a major party candidate. Thus, "voters who might not sign a minor party's nominating petition based on the party's own views and candidates might do so if they viewed the minor party as just another way of nominating the same person nominated by one of the major parties." Timmons, 520 U.S. at 366.

While Appellants' response is to assert that the Moderate Party was not trying to "capitalize on Malinowski's status as someone else's candidate" in this case, (Pb51-52), that is hardly assurance against the risk of such effects in the future. The State has a legitimate interest in ensuring that political parties establish true support on the merits of their positions, instead of leveraging cross-nominations as a political carrot for their own benefit. See Dunn, 168 S.W. at 958 (noting that fusion incentivizes candidates who are "not of the political faith indicated by the ticket upon which he permits his name to go, yet the unsuspecting masses are deceived"). And such practices undermine the public's

confidence that "minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support." Id.; see also, e.g., State ex rel. Dunn, 168 S.W. at 957; People ex rel. McCormick, 107 N.E. at 628.

Third, fusion policies can lead to decreased voter choice. Although Appellants tout the strengthening of third parties as a benefit of fusion voting, (Pb21-25), they acknowledge that their preferred approach is to repeat the selection of other parties. Appellants' own arguments show that fusion voting disincentivizes minor parties from identifying new standard-bearers who best represent that party, and instead incentivizes nominating candidates who already have the backing of a major political party. Allowing minority parties to simply select already-popular candidates of major parties "decreases real competition; forcing parties to cho[o]se their own candidates promotes competition." Swamp, 950 F.2d at 385. And as the Timmons Court noted, when California allowed cross-filing, "Earl Warren was the nominee of both major parties, and was therefore able to run unopposed in California's general election. It appears to be widely accepted that California's cross-filing system stifled electoral competition and undermined the role of distinctive political parties." 520 U.S. at 368, n.13 (citing historical sources).

This very case demonstrates the point. Appellants claim that fusion voting will create "avenues for new ideas and new faces to enter the democratic marketplace," (Pb4), but the Moderate Party's admitted objective is selecting existing popular candidates who are already likely to win elections (Pb4-6). After all, the Moderate Party's desire to engage in fusion voting arises from a desire not to introduce "new faces," since they express concern that "standalone candidates could be spoilers and pull votes away from competitive, moderate candidates." (Pb6). Indeed, the Moderate Party "assessed the two leading candidates" from existing major parties "in the 7th Congressional District" when choosing their nominee. Ibid. Other minor parties may be well-inclined to adopt similar practices, decreasing the candidate choices available to voters.

Fourth, the Fusion Statutes promote distinctions between parties, which has negative impacts for voter confidence and accountability. As Judge Fairchild explained in his Swamp concurrence, prohibitions on cross-filing petitions promote this additional, narrower interest "in maintaining the distinct identity of parties": "People may rationally believe that in a party system, each party should have a distinct ideology, platform, and the like, and it seems arguable that the distinct identity of parties will be blurred if persons are permitted to present themselves as the candidate of more than one party." Swamp, 950 F.2d at 387 (Fairchild, J., concurring). In short, voters are likely to

believe that a candidate who is the representative of one distinct party ideology is more likely to represent those interests fully than a candidate who is the nominal standard-bearer for multiple parties, and rightly doubt that "one candidate is unlikely to be able, conscientiously and effectively, to represent more than one party in the same election." Ibid.

Indeed, the Wisconsin Supreme Court recognized a similar compelling state interest in evaluating the state's fusion ban 125 years ago, noting: "when the candidates of one party are identical with those of another it is supposed, and not unreasonably, that for the time being at least, though there be two organizations there is but one platform of principles, and that one party designation on the official ballot will satisfy all legitimate requirements of both." Anderson, 76 N.W. at 487 (concluding State has legitimate interest in avoiding such erosion of party distinction and resulting confusion). And our Supreme Court, considering related "sore loser" provisions that prevent a candidate who did not receive the nomination of one party from submitting a nominating petition for another, expressed similar concerns:

> Manifest also is the legislative design to protect the integrity of the nominating process at primary elections and to withhold the privilege of inclusion on the ballot printed at public expense of the name of a person who assumes the cloak of an independent candidate after professing membership in a particular party, adherence to its general principles, and on that basis seeking the

> designation as a standard bearer of the party for elective office.
>
> [Sadloch, 25 N.J. at 124].

The fusion ban statutes promote a similar legislative design to protect the integrity of the nomination process by preventing a candidate from accepting nominations from multiple parties that may have competing, if not contradictory, platforms. While a candidate may benefit from drawing on another party's base or using the cross-nominations to promote the breadth of that candidate's principles, the Legislature and the courts have noted that it would come at the expense of voters' confidence in their knowledge of the candidate's stances on the issues or the political parties' platforms.

Next, and relatedly, the State has a compelling interest in preventing voter confusion. As the Seventh Circuit recognized in Swamp, avoiding voter confusion was a "compelling state interest" that justified a prohibition on fusion voting. Without a fusion ban, "an unlimited number of minority parties could nominate the candidate of a major party for the same office, causing serious confusion for voters. Because the candidate would be presented by the different parties as representing the particular views and preferences of each party, it would be difficult for voters to distinguish between the parties." Ibid; Anderson, 76 N.W. at 486-87. While Appellants fault the State for not identifying empirical evidence of voters not knowing how to vote on a fusion ballot, the

State need not provide empiric evidence of voter confusion prior to legislating against it. See Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986) ("To require States to prove actual voter confusion . . . as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate."). And although Appellants submitted declarations from New York and Connecticut witnesses proclaiming their personal opinions that there is no voter confusion, the State had no opportunity to cross examine the basis for those opinions, or to submit its own record evidence. See supra at 33, n.10. Moreover, the State's interest in preventing voter confusion are separate from the concerns addressed in Appellants' appendix, as the impact is not limited to confusion regarding how to cast a ballot or why a name appears twice on the ballot. Rather, voters may be confused by what issues and positions a party and candidate actually stand for, and whether the cross-nominated candidate will more faithfully hew to the issues and positions of one party or another.

In addition, "[s]tates have a strong interest in the stability of their political systems," in the form of an overall two-party system, so long as third parties have opportunities to develop and flourish. Timmons, 520 U.S. at 366-67. A state may not enact "unreasonably exclusionary restrictions" against minor and

third parties, but it "need not remove all of the many hurdles third parties face in the American political arena today." Ibid. As our Supreme Court has recognized, "[a]lthough the participation of third-party candidates supports a robust democracy, we recognize the present reality of the two-party system as an organizing principle of the political process in this country." Samson, 175 N.J. at 198; see also Friends of Governor Tom Kean v. New Jersey Election Law Enf't Comm'n, 114 N.J. 33, 35 (1989); Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 367-68 (App. Div. 2012); Libertarian Party of Va. v. Alcorn, 826 F.3d 708, 720 (4th Cir. 2016), cert. denied, 137 S. Ct. 1093 (2017). While Appellants insist the State cannot endorse any interest in the stability of a two-party system, that argument proves too much. Numerous foundational elections policies across the nation—including single-member districts, winner-take-all vote-counting, and tying ballot access and public funding to past-election performance—all serve that goal. As the Timmons Court explained, as "[m]any features of our political system … make it difficult for third parties to succeed in American politics." 520 U.S. at 362. But the U.S. Constitution "does not require" states to level the playing field by permitting fusion "any more than it requires them to move to proportional-representation elections or public financing of campaigns." Ibid.

Fusion bans strike the proper balance between promoting the State's legitimate interest in political stability while still allowing third parties ample room to develop. For that reason, Appellants' reliance on CAPP is unpersuasive. That case involved a statute that prohibited voters from declaring a party affiliation of anything but one of the two major parties and Independent. 344 N.J. Super. at 228-29. That policy worked a directly discriminatory rule against third parties, something that cannot be said for the instant laws, which not only allow minor parties to appear on the ballot and select their own candidates, but also allow a candidate of a major party to affiliate himself with the minor party via a slogan. Moreover, as discussed infra, at 66-67, fusion bans treat major and minor parties equally.

Finally, Appellants read too much into stray dicta in a single-judge oral decision, In re City Clerk of Paterson, 88 A. 694 (N.J. Sup. Ct. 1913); see also Rosengard, 44 N.J. at 170 (noting Paterson was "not officially reported"); Stevenson v. Gilfert, 13 N.J. 496, 503-04 (1953) (expressing skepticism about the holding and reasoning in Paterson). In Paterson, the former intermediate appeals court ordered the city clerk to place a candidate on the ballot as the nominee of both the Republican and Progressive Parties. 88 A. at 695. The court's holding is statutory: it determined that the operative 1911 Geran Act did not forbid the cross-nomination, and rejected an argument that it should instead

apply a superseded 1907 law which stated that "petitioners shall nominate for office one of their own party." Ibid. Even though its decision was based on an application of the 1911 Act, the court then strayed into dicta, questioning whether the 1907 law would have contravened the right to vote, since it barred voters from nominating a candidate at the primary who was not a member of that party. Ibid. But that discussion makes evident that the non-binding dicta in Paterson has no bearing here: the 1907 law was not a fusion ban, but rather directly barred voters from voting for certain candidates if they were not members of the same party. By contrast, the Fusion Statutes do not preclude any voter from voting for their preferred candidate, but rather only prohibit a candidate from appearing twice on the ballot.

3. Appellants Overstate The Benefit To Third Parties

Appellants tout fusion voting as the solution to the lackluster success of third parties in American politics. But their own proffered evidence hardly shows that striking down the Fusion Statutes would solve the problems they identify. Fusion voting is simply not the panacea Appellants proclaim.

First, Appellants blame fusion bans for the lack of success of minor parties in New Jersey in particular (Pb16), but New Jersey is not alone in prohibiting fusion voting. Appellants overlook the tension that their own submissions highlight: some of the very states they identify as places where minor parties

have succeeded also prohibit fusion voting. After all, Appellants acknowledge that "minor parties routinely qualify [for statutory party status] in nearly every state," (Pb16 n.3), but nearly every state also bans fusion voting. Appellants also ignore historical evidence of third parties flourishing even in states that prohibited fusion voting. And as the Timmons Court explained, "[b]etween the First and Second World Wars, for example, various radical, agrarian, and labor-oriented parties thrived, without fusion, in the Midwest." 520 U.S. at 361 n.9. As an illustrative example, "[t]he strongest state-level third parties of the twentieth century – North Dakota's Nonpartisan League, Minnesota's Farmer-Labor Party, and Wisconsin's Progressive Party – all rose to power despite anti-fusion laws." Pope, Future of Third Parties, at 489.[13]

Second, Appellants acknowledge that simply allowing fusion voting will not accomplish their ultimate their goal of minor party success by reaching the vote thresholds: instead, they require a mandate that votes for a particular candidate be tallied according to which party designation accompanied each vote. (Pb89-90). That, Appellants say, is the only way for the Moderate Party to potentially reach the vote threshold required to attain statutory-party status.

[13] Indeed, just a year after the United States Supreme Court upheld Minnesota's ban on fusion voting, the state elected as governor the Reform Party candidate, Jesse Ventura.

But the only relief that this court could offer in this challenge—striking down existing statutes—cannot accomplish that goal. And to the extent that Appellants are asking this court to effectively legislate a new vote-tally process, that is far outside the scope of the court's authority. After all, states that permit fusion voting have separate statutes that govern how to allocate the votes cast for a fusion candidate, and not all choose to proportionally allocate those votes in the manner Appellants suggest. The decision of how to tally votes cast in a fusion-voting scenario is a separate legislative determination. Compare Vt. Stat. Ann. § 2474(b)(1) (requiring a fusion candidate to designate "for which party the votes cast for him or her shall be counted for the purposes of determining whether his or her designated party shall be a major political party. The party so designated shall be the first party to be printed immediately after the candidate's name on the ballot"), with Conn. Gen. Stat. § 9-242(b) (setting a mathematical formula that allocates to each nominating party its proportional share of the total number of votes for that fusion candidate). This court cannot legislate policy, and Appellants' argument about the benefits of vote disaggregation simply will not be realized from any judicial decision. See N.J. Const. art. III, ¶ 1; Texter v. Dep't of Human Servs., 88 N.J. 376, 382-83 (1982) (courts are prevented from "usurping policy decisions from other branches of government.").

Finally, while Appellants blame nearly all ills of the modern-day political system (including "delegitimiz[ation] of the 2020 presidential election" and political extremism) on century-old prohibitions on fusion voting, (Pb19-21), those ascriptions are poorly-conceived. Indeed, in New Jersey, it seems that the decline in political participation and the proliferation of third parties preceded the State's adoption of its first fusion ban. See Reynolds, Testing Democracy, at 164 (explaining that by 1920, "[p]opular participation waned in what had become one-on-one contests between the Democratic and Republican nominees"). And numerous other factors besides fusion contribute to the lack of traction of third parties in today's political system, such as "the prominence of single member districts; the electoral college and presidential system; the state of the economy; the high cost of political campaigns; the rise of candidate-centered politics; and the centralization of economic and political power at the national level." Hirano and Snyderjr, The Decline of Third-Party Voting in the United States, Journal of Politics Vol. 69, No. 1 (2007), 2-3; see also Curtis 781-82 ("[T]he burden of petition requirements and other ballot-access laws which impose, for example, unrealistic filing deadlines and fees for minor third parties overshadows any inability to appear more than once on a ballot.").

* * * * *

New Jersey's Fusion Statutes do not prevent anyone from voting for a candidate of their choice. To the extent that there is any burden on the right to vote, it is indirect and minimal, and supported by compelling state interests.

C. The Fusion Statutes Do Not Violate The Rights To Free Speech Or Political Association.

New Jersey's Fusion Statutes impose at most a minimal burden on the right to free speech and association, and do nothing to prevent a party from associating with a candidate through endorsement or other channels of support. See Timmons, 520 U.S. at 363; Working Families Party, 209 A.3d at 285-86.

As the Pennsylvania Supreme Court explained in rejecting a state-constitution speech and associational challenge to that state's fusion ban, "Appellants and like-minded members of the Working Families Party were able to meet and decide that the candidate who best represented their values was Rabb. They then had [the] opportunity to participate fully in the political process, culminating in casting their votes for the candidate of their choice." Working Families Party, 209 A.3d at 285-86. The Timmons Court similarly concluded that even a ballot that completely prevents a party from "using the ballot to communicate to the public that it supports a particular candidate who is already another party's candidate" did not impose a major burden on speech and associational rights. 520 U.S. at 362-63; see also Street, 499 Pa. at 38 ("Nor is there any basis for appellants' assertion that [the minor-party candidate's]

ineligibility as a candidate of the Republican Party impairs the Republican Party's First Amendment right to support [his] candidacy."); Swamp, 950 F.2d at 385 (concluding "the right of party members to associate is only limited to the extent that they are prevented from placing on their primary ballot the name of a candidate who has previously been placed on the primary ballot of another party," which does "not substantially burden" the party's associational interests). In short, a party may choose to affiliate with whatever candidate it wants, endorse that candidate on the ballot itself, and support that candidate in myriad other ways. The Fusion Statutes only prohibit the candidate from appearing on the ballot twice.

In fact, New Jersey's statutory scheme imposes an even lesser burden on speech and associational rights because it does allow the ballot to be used to express the Moderate Party's views. New Jersey allows candidates to express association with another party on the ballot itself. N.J.S.A. 19:14-9 provides:

> A candidate who receives more than one nomination for the same office, either from more than one political party or from more than one group of petitioners, or from one or more political parties and one or more groups of petitioners, shall have his name printed on the official general election ballot in only one column to be selected by him from among the columns to which his nominations entitle him, and shall have such designations after his name as he shall select, consisting of the names of the political parties nominating him, with the words "Indorsed By", if he so desires, and the several designations to which he is entitled by the other

> nominations, if any, and printed in such order as he shall select.
>
> [N.J.S.A. 19:14-9.]

For example, in this case, Malinowski was permitted to indicate his affiliation with the Moderate Party on the ballot. (Pa295). Thus, the Moderate Party was fully "able to use the ballot to communicate information about itself" and its eligible candidates. Timmons, 520 U.S. at 363.

Appellants' arguments about freedom of expression and association boil down to the notion that a ballot that lists Malinowski with an endorsement by the Moderate Party does not capture the Moderate Party's message in the precise form it prefers: a separate listing that has no overlap with the Democratic Party's affiliation with Malinowksi. (Pb64). But "[b]allots serve primarily to elect candidates, not as forums for political expression." Timmons, 520 U.S. at 363. To the extent the Moderate Party prefers a slightly different format for expressing its association with Malinowski, the burden on First Amendment freedoms is slight. Because the Moderate Party has "every other possible avenue" to align itself with Malinowski, including on the ballot itself, the mere prohibition on Malinowski's name appearing on both the Democratic and Moderate Party columns cannot reasonably be considered a "severe" burden on speech or association. Mazo, 54 F.4th at 151-52 ("[W]hether a particular

restriction on speech violates the First Amendment depends in part on whether alternative channels exist.").

New Jersey's Fusion Statutes also do not implicate a political party's internal affairs or associational activities. Appellants' reference to California Democratic Party v. Jones, 530 U.S. 567 (2000) entirely misses the mark. The law at issue in Jones allowed unaffiliated voters to vote in a party's primary election against the party's wishes. Id. at 570-71. The United States Supreme Court held that the law meddled in a political party's internal affairs and associational choices. Id. at 577; see also Tashjian v. Republican Party of Conn., 479 U.S. 208, 215-16 (1986) (striking down a law prohibiting a political party from choosing to allow unaffiliated and independent voters to participate in its primary). But fusion ban laws do not restrict who a party may associate with, and by no means require the Moderate Party to accept interference from unaffiliated voters.

Because the alleged burdens on speech and association are not severe, the State's interest "need only be 'sufficiently weighty to justify the limitation' imposed." Timmons, 520 U.S. at 364; RUSA II, 446 N.J. Super. at 234. As discussed above, supra at 46-56, the State's numerous compelling state interests justify the minimal incursions on speech and associational rights.

D. The Fusion Statutes Do Not Violate The Right To Assemble.

It is unclear how Appellants' claim based on the assembly clause of the New Jersey Constitution, N.J. Const. art. I, ¶ 19, is distinct from their claims based on speech and association. Appellants argue that fusion bans implicate the assembly clause because they "prevent voters outside of the two major parties from taking collective political action that would effectively express their shared views to their representatives." (Pb74-75) (emphasis added). But that is indistinct from their argument as to freedom of expression and association.

Appellants likewise cite no New Jersey law distinguishing between the right to assemble and the rights to speech or association. Cf., e.g., Schmid, 84 N.J. 535 (evaluating right to distribute political literature on private university campus under unified "speech and assembly" analysis).[14] And in other cases, the right to assembly was discussed in the context of a physical assembly, such as gathering for worship. See Allendale Congregation of Jehovah's Witnesses v. Grosman, 30 N.J. 273, 278 (1959); see also Jay M. Zitter, State Constitutional Right of Freedom to Assembly Provisions, 41 A.L.R. 7th Art. 7 (2023) (discussing cases focused on gatherings in public spaces for expressive

[14] As discussed above, supra at 27, Schmid found that the New Jersey constitution's protections—unlike the federal First Amendment—lack a state action requirement.

purposes). The Attorney General is not aware of any New Jersey precedent tying the right to assembly to a particular method of casting one's vote on the ballot. In short, Appellants failed to demonstrate that the framers of the State Constitution intended the right to assemble to exist beyond rights to free expression already discussed in Part II.C, supra at 59-63.

Regardless of whether the right to assembly is merely a restatement of Appellants' claims regarding speech and association, or is a separate variant, the Fusion Statutes do not impose a severe burden on the right. It is difficult to see how the Moderate Party or its voters have been deprived of the ability to "send[] a 'clear message' to their nominee . . . that their support was earned by the nominee's commitment to" Moderate Party values, (Pb75), when it is the Moderate Party that nominated Malinowski in the first place and whose endorsement he garnered on the ballot. The Fusion Statutes do not restrict members of the Moderate Party from gathering anywhere to discuss their party's business, nominations, platforms, or any other subject. Nor do they prohibit members from any expressive activity, including by casting a ballot for their preferred candidate regardless of whether that candidate is the Moderate Party's nominee or not.

Further, Appellants ignore the alternative means for the Moderate Party to come together to express their support for a specific candidate. As discussed

above, supra at 61, a candidate has the ability to list on the ballot itself the endorsement of another party. N.J.S.A. 19:14-9. As such, the Moderate Party can send a "clear message" that they align themselves with a specific nominee due to their platform. Therefore, New Jersey's Fusion Statutes do not implicate a severe burden on the people's right to assemble or make their opinion known to their representatives under Article 1, Paragraph 18, of the State Constitution. To the extent it imposes any burden on that right at all, it is amply justified by the State's compelling interests discussed supra in Part II.B, at 46-56.

E. The Fusion Statutes Do Not Violate Equal Protection.

Appellants' equal protection claim parrots the same arguments as their right to vote and rights to speech and association claims. See (Pb81-83). But their equal protection claim fails for the simple reason that New Jersey's Fusion Statutes are facially neutral and do not discriminate between major and minor parties. The fusion ban prevents cross-nomination by the Republican and Democratic Parties, the Moderate Party, and every other political party.

Equal protection requires that statutes "apply evenhandedly to similarly situated people." Lewis v. Harris, 188 N.J. 415, 443 (2006); see also Greenberg v. Kimmelman, 99 N.J. 552, 562 (1985) ("[W]hen a court declares a statute invalid on equal protection grounds, it is not saying that the legislative means are forbidden, but that the Legislature must write evenhandedly." (quoting

Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)); Nelson v. South Brunswick Planning Bd., 84 N.J. Super. 265, 277 (App. Div. 1964) ("[Equal protection] is infringed only where persons who are situated alike are not treated alike."). Where a law "is completely general and neutral in its terms," there is no violation of equal protection even though some parties "may incidentally benefit from basically nondiscriminatory legislation." Nelson, 84 N.J. Super. at 277-78.

New Jersey's Fusion Statutes are facially neutral and do not differentiate between major and minor political parties. All parties—major and minor—are prohibited from cross-nominating. In this case, had the Moderate Party been the first to nominate Malinowski, and had Malinowski accepted, the Democratic Party would have likewise been prohibited from nominating him. In other words, the statutes create no suspect classifications among political parties, and work no disparate impact in their application to different political parties.

The Pennsylvania Supreme Court rejected a similar claim in Working Families Party, 209 A.3d at 282-84. Addressing appellants' equal protection claim under the Federal Constitution, the court noted that Pennsylvania's "anti-fusion statutes are facially neutral." Id. at 282. It distinguished the challenged statutes from the fusion ban struck down by Reform Party of Allegheny County v. Allegheny County Department of Elections, 174 F.3d 305 (3d Cir. 1999) (en

banc), because that statute discriminated between major parties and minor parties by permitting cross-nomination for the former but prohibiting it for the latter. Id. at 282-83. The court also repeated the Third Circuit's suggestion that "the Commonwealth's reasons for supporting the statutes might justify a general ban on cross-nomination." Id. at 283. The Pennsylvania Supreme Court further explained that even if the Pennsylvania system "create[d] a disparate impact on political bodies, the justification for the anti-fusion provisions raised by the Commonwealth is substantially related to an important governmental interest and therefore survives intermediate scrutiny." Id. at 283-84.

The same is true here. Even if this court finds reason to apply an equal protection analysis, New Jersey's Fusion Statutes pass muster. As discussed, whether a statute violates equal protection under the State Constitution turns on "a flexible balancing test that weighs the nature of the right, the extent of the governmental restriction on the right, and whether the restriction is in the public interest." Caviglia, 178 N.J. at 479. Here, the Fusion Statutes inflict little to no intrusion on any constitutional right. Moreover, the State has thoroughly articulated the compelling state interests in prohibiting cross-nomination. See Point II.B., supra. Appellants have failed to demonstrate that the Fusion Statutes violate principles of equal protection under the State Constitution.

CONCLUSION

This court should dismiss Appellants' appeal.

Respectfully submitted,

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