IN RE PETITION FILED BY MODERATE PARTY NOMINATING THE HON. TOM MALINOWSKI FOR CONGRESS IN CONGRESSIONAL DISTRICT 7	BEFORE: THE HON. TAHESHA WAY NEW JERSEY SECRETARY OF STATE DIVISION OF ELECTIONS

MEMORANDUM OF LAW IN SUPPORT OF NOMINATING PETITION

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STATEMENT OF THE CASE

On June 7, 2022, the Moderate Party submitted a petition signed by the requisite number of registered voters in Congressional District 7 nominating Tom Malinowski as the Party's candidate for Congress. The Moderate Party submitted this petition knowing that Malinowski was also nominated by voters of the Democratic Party to run for Congress in CD 7 and also knowing that State law does not permit a candidate to appear on the ballot more than once for the same office, even if that candidate has been nominated in a major party primary and by nominating petition. Many self-identified moderate voters, including Michael Tomasco, signed the petition because they want to support their preferred candidate on a party line that reflects their values and priorities.

It is the position of the Moderate Party, members of the Party and voters like Tomasco, as set forth in detail below, that the New Jersey statutes banning fusion voting violate the State Constitution, specifically, Article I, paragraph 1 (equal protection and substantive and procedural due process), Article I, paragraph 2(a) (the right to vote in order to reform the government), Article I, paragraphs 6 and 18 (free speech, petition, right to make opinions known to representatives, and assembly), and Article II, section 1, paragraph 3(a) (the right to vote). The New Jersey Supreme Court has never directly addressed the constitutionality of the anti-fusion statutes, originally enacted in 1921 and 1922 – and now codified at, among other places, N.J.S.A. 19:13-4 (barring a petition from undertaking to nominate a candidate who has accepted the nomination for a primary nomination for the same office), N.J.S.A. 19:13-8 (preventing a candidate from signing an acceptance of petition nomination if the candidate has signed an acceptance for the primary nomination or any other petition nomination), and N.J.S.A. 19:14-2 and -9 (the name of a candidate shall appear but once upon the ballot for the same office).

A. The Formation of the Moderate Party and the nomination of Tom Malinowski for Congress

The Moderate Party filed a petition to nominate Tom Malinowski for Congress to afford the unaffiliated voters, who comprise a substantial portion of the electorate in CD 7, as well as centrist-minded voters who are registered Republicans or Democrats, the choice of voting for their preferred candidate under the banner of a new Moderate Party, even as Malinowski also appears under the better-known banner of the Democrat Party. Voting is an essential component of democracy and the relationship between parties and voters is a two-way street. Parties serve a crucial "signaling" or "messaging" function to voters. In a healthy democracy, voters likewise use their vote to "send a message" to candidates, to political parties, and to the public at large. As Richard A. Wolfe, a member of the Moderate Party, explains in his certification, he is a "moderately conservative Republican," who, as a result of the increasing polarization of politics sees himself as "politically homeless." (Wolfe Cert. ¶¶6, 18; App. Schedule 1).[1] He is not alone. After proudly being a lifelong member of the Republican Party, Michael Tomasco is now an independent who feels pushed away from both major parties; he wishes there were a way to show candidates "that the middle path is a road to election." (Tomasco Cert. ¶ 10; App. Schedule 2). Indeed, increasingly voters are disenchanted with a political process that for almost four decades has sharply veered away from compromise – a fundamental requirement of effective governance – making meaningful progress on many critical issues functionally impossible. For Wolfe, this growth of extreme partisanship is a true danger to the nation and he seeks to reduce the incentives that produce such extremism. (Wolfe Cert. ¶10). During his time as president of

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[1] "App. Schedule __" denotes the Appendix filed with the Secretary of State on June 7, 2022, together with the materials in the Supplemental Appendix submitted in support of this Amended Memorandum of Law.

his local school board, Tomasco witnessed the "growing division in real-time," as the "rapidly widening divide between neighbors" reflected the bitter, binary conflict that's come to define politics. (Tomasco Cert. ¶7).

As a lifelong, committed Republican, Wolfe has not only consistently supported the candidates of his Party, he has also run for and won local elective office under the banner of the Republican Party. (Wolfe Cert. ¶9). Despite his disillusionment with the trajectory of the national Republican Party, he does not feel at home inside the other major party. Indeed, he strenuously opposes many of the positions advanced by the Democratic Party and views that party as also moving further away from the political center. But he neither wants to abstain from voting nor cast a "protest vote" for a meaningless third party candidate with no chance of winning. (Id. ¶16). Quite reasonably, Wolfe and other supporters of the Moderate Party want to show their support for the candidate they believe is a true moderate by doing so under the banner of their new "Moderate Party." Furthermore, Wolfe and his confreres are confident that there are many other Republicans, unaffiliated voters, and even Democrats in CD 7 who share their centrist political views and reject the extremism adopted by the only other viable candidate in the race, the Republican nominee Tom Kean, Jr. These voters, Wolfe believes, would be attracted to a new Moderate Party that investigates the records of the two major party candidates and nominates the one who is most genuinely in sync with the Moderate Party's values. Based upon his long involvement with electoral politics, Wolfe is of the opinion that there are thousands of voters in the district who are just like him in this regard: they want to support Malinowski, but they resent being forced to vote for him under the Democratic Party banner when it would be simple and more expressively accurate for them to vote under their own party label. Their votes

would be a clear message of support for moderate politics, and a shot across the bow of any major party that abandons common-sense for extremism. (Id. ¶¶30, 36).[2]

As a newly independent voter, Tomasco applies his own criteria when choosing between the two viable candidates in a general election: "Do they respect the rule of law? Are they willing to accept defeat graciously? Are they committed to truly free and fair elections? Do they approach others, especially those with whom they disagree, with common decency and respect? Do they understand the value of, and the need for, compromise? Are they willing to work hard with people who might see the world in a different way in order to make it a better place for our kids? They don't need to like folks on the other side of the aisle, but are they willing to see them as human beings, with dignity and value just like themselves?" (Tomasco Cert. ¶8). Yet, he unregistered from the Republican Party after it "seemingly did everything possible to push me away," and he knows "it's impossible for a vote in the Democratic Party column to suggest anything other than tacit support for that agenda." (Id. ¶9). He believes that neither he nor other like-minded voters "can hope to change our policies, politics, or politicians" "with a ballot that forces us to associate with one of two major parties." On the other hand, if they could "act[] together, joined under a moderate banner on the ballot, who knows the limits of what [they] could accomplish." (Id. ¶9). In Tomasco's view, the stakes couldn't be higher: "hyper-polarization, extremism, and their corrosive effects" are tearing "our government and our society" apart. (Id.)

Notably, New Jersey's CD 7 is one of only a few true "swing" districts in the nation. At present, less than one-fifth of congressional districts in the country are considered competitive. This widespread lack of competitiveness in congressional races is a result of many factors, and

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[2] A recent mailing in support of Tom Kean, Jr. proclaims that "No matter what Trump does, Kean has his back." (Wolfe Cert. ¶25, Ex. C).

contributes to the extreme partisanship that Wolfe, Tomasco, and others consider dangerous. Wolfe and others formed the Moderate Party to give voice to the "exhausted majority" that they believe exists in all districts. (Id. ¶¶20, 36; Drutman Report; App. Schedule 8). Tomasco doesn't think he's alone in wanting to vote "under a separate column bearing the nomination of a minor, pro-compromise, pro-moderation party" in this and future elections. (Tomasco Cert. ¶11).

The ability to vote for a fusion candidate fosters greater participation in the democratic process and allows voters to use the ballot to make their opinions known and obtain more responsive and representative government, in this case by sending a message that rejects the extreme partisanship dominating politics today. And it allows citizens who do not fit neatly into the major party boxes a little bit of political "breathing room" that they surely constitutionally deserve. By making it easier for candidates who reflect the values and interests of a majority of the electorate to win, a process that permits fusion voting makes it more difficult for minority factions to gain power. This is particularly important in the case of anti-democratic (as in, pro-authoritarian) minority factions, who, once they're in power, have clear incentives to subvert the will of the electorate and change the rules to stay in power.

In New Jersey, as in most other states, voting for a "stand-alone," noble-but-doomed third party candidate is typically a fool's errand. It is at best a symbolic gesture and at worst, a vote for a "spoiler" candidate. The Moderate Party does not want to tell its supporters to cast either a "wasted vote" or a "spoiler vote." It seeks to participate constructively in the election. (Id. ¶27). For his part, Tomasco "cannot understand the point of throwing away a vote on a candidate who is guaranteed to lose." (Tomasco Cert. ¶12). "Indeed, if the Moderate Party was nominating a standalone candidate in this race or did so in the future, they wouldn't have my vote," because any such vote "would be counterproductive and would clearly help the less moderate of the two

viable candidates get elected." (Id.) By bolstering the election of more extreme candidates with minority support, spoilers therefore make it harder to form durable governing coalitions committed to majority rule and free and fair elections.

Additionally, permitting fusion voting "is the only realistic path to gaining adherents for the [Moderate] Party" since "New Jersey has chosen to erect impossibly high barriers to groups seeking recognition as a statutory 'political party.'" (Wolfe Cert. ¶38). As Wolfe notes, "there is no viable path to becoming a statutory political party by petitioning or by voter registration cards alone." (Id.). In order to gain statutory party status,[3] a group, such as the Moderate Party, must, at an election held for all 80 members of the General Assembly, win an aggregate of 10% of all of the votes cast in the state in those 80 races. (Id.). This requirement erects an impenetrable barrier to the formation of new parties in the state, and **none** has ever qualified since passage of the fusion ban in 1920. (Winger Report; App. Schedule 11). Because many New Jersey voters join Wolfe and Tomasco in refusing to support non-competitive, standalone minor party candidates, without fusion voting, there is no realistic way for the Moderate Party to gain strength and establish itself as a statutory party in New Jersey. The ban on fusion voting eliminates any meaningful competition from new political parties by limiting them to the "wasted vote/spoiler" box, and thus entrenches the Democratic Party and Republican Party for all time.

B. New Jersey can accommodate fusion voting without impairing any legitimate State interests

Significantly, as the Record before the Secretary establishes, there are no State interests that justify the heavy burden placed by antifusion voting laws on rights protected by the State

[3] A "statutory political party" refers to parties that meet the definition of a political party set forth in N.J.S.A. 19:1-1, and are thus entitled to, among other items, a primary election at public expense and, assuming other statutory thresholds are met, a specific party column appearing in one of the top spots of the ballot.

Constitution. The pretextual justifications for banning fusion offered over the years include, voter confusion, overcrowded ballots, inability to clearly identify an election winner, preserving the integrity of the election process, and maintaining a stable political system. But in New York and Connecticut, fusion voting is legal and has been widely practiced for decades, and none of these concerns has materialized. (See, e.g., Dittus Cert., App. Schedule 19; Waggner Cert., App. Schedule 6; Rapoport Cert., App. Schedule 13; Lander Cert., App. Schedule 20). As the recent ballots from Connecticut make clear, voters are readily able to identify the candidate for whom they wish to cast a ballot and have no difficulty choosing between the party lines on which the candidate's name appears. (Faraji Cert.; App. Schedule 4). In New York and Connecticut, there has been no evidence of voter confusion, over-crowded ballots, or an inability to accurately tally the votes and determine the winner.

In both New York and Connecticut, state law permits electoral fusion on the general election ballot and requires a "disaggregated" method of identifying a candidate's share of votes attributable to each nominating party. Consequently, two or more political parties often cross-endorse the same candidate in an election, "meaning that that candidate's name appears once for each nominating party."[4] (Waggner Cert. ¶5; App. Schedule 6; see also Dittus Cert.; App. Schedule 19). Election administrators in each state handle a substantial volume of calls, emails, letters, and other inquiries from voters, candidates, party officials, and others with questions about election administration, yet a vanishingly small number involve questions about fusion. (Waggner Cert. ¶12; Dittus Cert. ¶¶12-13). The time and resources spent on administrative tasks

[4] Under disaggregated fusion, when a voter casts a vote for a cross-endorsed candidate, the ballot requires that the voter do so on one or the other nominating party's ballot lines; each party's vote tally for that candidate is separately counted, and then each party's sum is combined to calculate the total vote count for the candidate. For additional information on this approach and how it differs from "aggregated" fusion, see infra Point V.

relating to cross-endorsements, if any, are infinitesimally small. One Connecticut official estimates that, each year, his office spends less than $10 (in a $300,000 budget) and approximately 2 hours (out of nearly 6,000 staffing hours) on these tasks. (Waggner Cert. ¶14).

Andrew W. Appel, a Professor of Computer Science at Princeton University, who has testified about election technology before the U.S. House of Representatives, the New Jersey Legislature, the Superior Court of New Jersey, and has been qualified as an expert on voting machines in federal and state court, is of the opinion that all of New Jersey's current election equipment can accommodate disaggregated fusion voting, including managing the possibility that voters using paper ballots will try to vote for candidates more than once. (Appel Report, pp 1, 5; App. Schedule 3). Appel concludes:

> First, regarding touchscreen voting machines, there is no problem at all: there are no double votes. Regarding optical scanners (precinct-count and central count), every such machine used in New Jersey is also used in New York or South Carolina, other states that have fusion voting. Therefore, we can expect that the software in those election systems can handle the counting of optical-scan ballots for fusion voting.

Id.

Not only can New Jersey's voting machines accommodate fusion voting, so can New Jersey ballots. Included in the Supplemental Appendix are illustrative sample ballots for a municipality in Hunterdon County, demonstrating how the November 2022 election would look with or without fusion. (Navarro-McKay Cert.; App. Schedule 21). As is self-evident from these visuals, the addition of the Moderate Party's cross-endorsement neither crowds the ballot nor creates confusion. Indeed, if the Moderate Party had instead nominated a standalone candidate in the congressional race, which it could have done under current law, the ballot would look nearly identical to the fusion examples here, apart from a different candidate name appearing on the Moderate Party line. (Navarro-McKay Cert., Exs. B, C, E, F). Each ballot would be equally

uncrowded. Further, closely analogous ballots from New York (where cross-endorsements are routine) confirm how easily cross-endorsements can be incorporated into New Jersey ballots. (Quesenbery Cert. ¶¶9-13; App. Schedule 14). Whitney Quesenbery, the Executive Director for the Center for Civic Design, a non-profit that works with elections offices and advocates across the country to apply good design principles to voter information and forms, ballots and other election materials to help more people vote, explains how New Jersey's ballots can readily be adopted to permit fusion voting. (Id. ¶¶1-2). Attached to Quesenbery's Certification as Exhibit A is a ballot from the 2020 General Election in Sullivan County, New York. Exhibit A is known as a "full face" ballot, in which the entire ballot is laid out on one page, with offices presented in columns, and candidates arrayed in rows below the contest line (or vice versa). (Id. ¶¶9-11). Attached as Exhibit B to the Quesenbery Certification is a ballot from the Flemington Borough, Hunterdon County, New Jersey 2018 General Election, which is similarly designed to the Sullivan County ballot (Exhibit A). The main difference between the two ballots is that the latter permits fusion voting, i.e., voters can vote for candidates endorsed by the Independent Party and listed on the Independent Party line, even while those same candidates are also endorsed by the Conservative and Republican Parties, and listed on their respective lines. (Id. ¶11). As Quesenbery points out, the Hunterdon County ballot (Exhibit B) "could easily adjust for fusion voting akin to the New York model." (Id. ¶13). As Exhibit C attached to the Quesenbery Certification clearly illustrates, existing rows could be used, together with the fusion party's slogan, to allow voters who do not wish to show support for the Republican or Democratic Parties, to vote for a cross-endorsed candidate on another line of the ballot. It is Quesenbery's "professional opinion that fusion voting causes neither voter confusion nor any meaningful disruption to election administration." (Id. ¶2).

Quesenbery's conclusions are bolstered by an illustrative sample of ballots used in recent Connecticut elections. (Faraji Cert. ¶12). Attached as Exhibits A-D to the Faraji Certification are ballots from general elections in 2018 and 2020 from New Haven and Hartford, containing cross-endorsements in the races for Governor, U.S. Senator, U.S. House, and State Representative. As is readily apparent from the face of these ballots, they are neither crowded nor confusing, and as Quesenbery notes in her certification, the ballots in use in New Jersey elections are readily modifiable to accommodate fusion voting.

Further, an examination of New York and Connecticut election records demonstrates that fusion voting does not result in the overcrowding of ballots. Looking back at Connecticut's 33 elections for President, Governor, U.S. Senate, and U.S. House of Representatives since 2012, the arithmetic mean number of candidates for the stated offices per election was 3.03; the median number of candidates for the stated offices per election was 3.0; the arithmetic mean of cross-endorsements per election was 1.14; and the median number of cross-endorsements per election was 1. (Faraji Cert. ¶5). In New York's comparable set of 145 elections over that time period, the arithmetic mean number of candidates for the stated offices per election was 2.52; the median number of candidates for the stated offices per elections was 2.0; the arithmetic mean number of cross-endorsements per election was 2.62; and the median number of cross-endorsements per elections was 3.0. (Id. ¶9). Compare these figures with New Jersey, where the 74 comparable elections since 2012 had an arithmetic mean number for these three offices of 4.60 and a median number of candidates for the offices of 4. (Komuves Cert. ¶5; App. Schedule 13). Thus, in New Jersey, where minor parties and nominating groups aren't allowed to cross-endorse major party candidates, there are **more candidates** on the ballot, than in the two states where those cross-endorsements are permitted and frequently used.

C. Fusion voting encourages participation in the electoral process and strengthens democratic institutions

Importantly, fusion voting strengthens our democracy and encourages greater participation by citizens in the political and electoral processes. It also helps ameliorate extreme political polarization. The certifications of the following individuals underscore the benefits of fusion voting to our representative democracy: Tom Malinowski, the U.S. Representative for New Jersey's 7th Congressional District and a candidate in the June 7, 2022 Democratic Primary for Congress, as well as the nominee by petition of the Moderate Party (Malinowski Cert.; App. Schedule 15); Miles Rapoport, Senior Practice Fellow in American Democracy at the Harvard University School's Ash Center for Democratic Governance and Innovation and former Secretary of State for Connecticut (Rapaport Cert.; App. Schedule 13); Michael Telesca, Chairman of the Independent Party of Connecticut (Telesca Cert.; App., Schedule 16); James Albis, Director of Policy and Planning for the Connecticut Department of Energy and Environmental Protection's Bureau of Materials Management and Compliance Assurance and a former candidate and elected official who benefitted from cross-endorsements (Albis Cert.; App. Schedule 7); Karen Scharff, former Director of Citizen Action of New York (Scharff Cert.; App. Schedule 9; and Joseph Sokolovic, an elected member of the Bridgeport Public Schools Board of Education (Sokolovic Cert.; App. Schedule 10).

In his certification, Congressman Malinowski explains how fusion voting can mitigate the extreme political partisanship and polarization that characterize the current state of politics in America. (Malinowski Cert.; App. Schedule 15). While the United States has some of the oldest and strongest democratic institutions in the world, the Congressman explains that "we cannot take their permanence for granted. Our politics are becoming increasingly polarized and tribal." (Id. ¶4). He points to the attempted insurrection of January 6, 2021 as a warning that "extreme

polarization in the United States can lead to violence." (Id. ¶5). In his view, the majority of Americans, including the majority of voters in New Jersey's 7th District "are dissatisfied with this state of affairs." They want us to "play by the rules and find ways to bridge our differences." (Id.). "The many Americans who feel like they're somewhere in the middle of the political spectrum want to have greater influence and leverage on both major political parties." (Id.). It is in the interest of the nation to design rules and constitutional guarantees that govern the organization and formation of political parties "in a way that empowers that reasonable pragmatic middle ground, and that encourages cross-party cooperation and coalition building." (Id. ¶8). Fusion voting can be a political force that the "homeless political center" can use to depolarize politics. (Id. ¶12). "A centrist fusion party would have something very valuable to offer to both major parties, and thus have the leverage to push them to build broader coalitions form the middle out." (Id. ¶12).

The report of Richard Winger (Winger Report; App. Schedule 11), explains the barriers faced by citizens seeking to form minor parties. It also documents the important historical role that third parties have played in "spur[ring] public awareness of new issues and crises," including efforts by the Liberty Party in the abolition of slavery, the Prohibition Party in opposing the sale and consumption of alcohol, the Workingman's Party in establishing the 10-hour day, the Greenback Party in advocating for railroad regulation and occupational safety and health standards, and the People's Party (aka Populists) in promoting financial regulation. (Id. ¶4).

Rapoport, the former Secretary of State for Connecticut, further debunks arguments advanced in support of antifusion laws and describes the benefits of fusion voting. In his certification, he explains that "as a voter, candidate, legislator, [and] chief election

administrator"—he was Connecticut's Secretary of State from 1995-1999)—"I have had countless opportunities to participate in electoral fusion and understand its effects on politics and government." (Rapoport Cert. ¶2; App. Schedule 13). Based on his more than two decades of experience with fusion voting, Rapoport opines that:

> Fusion is not only simple to understand, use, and administer, but it is a wildly effective tool for empowering voters to meaningfully participate in the political process, encouraging the formation and growth of cross-ideological coalitions, facilitating a constructive (non-spoiler) role for minor political parties, and eroding the corrosive effects of an otherwise rigidly binary political system. I have yet to learn of any legitimate reasons a state government could put forward to justify a prohibition on fusion. Commonly cited concerns, such as ballot overcrowding or party fragmentation, are unwarranted and have never, in my decades of experience with fusion, materialized.

Id. ¶2.

As discussed below, prior to passage of the ban in the 1920s, fusion voting was an important and common practice in elections in every state, including New Jersey. Also known as multiple party nomination, plural nomination, or cross-endorsement, "fusion" refers to an electoral regime in which a candidate may be listed on the general election ballot as the nominee of more than one party. Political scientists sometimes refer to it as the American version of proportional representation in that it allows a political minority (understood arithmetically, not racially or ethnically) to avoid the "wasted vote" or "spoiler" dilemmas that otherwise cripple new or minor parties in the American system. Concretely, fusion balloting permits a voter to select the candidate they prefer under the party label whose values are closest to their own.

Fusion voting enabled parties and groups of petitioners to place their preferred nominated candidates on the ballot even if they were nominated by another party or group of petitioners. It also allowed voters to vote for such candidates bearing the party's or group of petitioner's designation on the ballot. However, the history of fusion voting, particularly related to its virtual

eradication, is a story of control over the ballot and partisan maneuvering for political advantage, rather than one of good government ballot reform. There is nearly unanimous agreement among historians and political scientists as to the reason for the elimination of fusion voting: it cemented the power of the Democrat and Republican parties in each state by precluding the very possibility of a coalition of parties uniting against them. (In the North, the dominant party at the time of the fusion bans was the Republican Party. In the South, it was the Democratic Party.)

D. The Historical and Legal Background of Fusion Voting

1. Fusion Voting in a National Context

Fusion voting in the mid to late 1800s was the rule, not the exception, and indeed in certain areas of the country fusion or partial fusion tickets were on the ballot in almost every election. See Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288 (1980). The ability to have fusion tickets was facilitated by the fact that parties, rather than the state and local governments, printed ballots. See id. at 290. This allowed outside actors to put whatever names they wanted on the ballot and allowed for various alliances to take place in support of candidates. Id. Voters would take a pre-prepared ballot (the party "ticket") with them to vote and simply place those ballots (which already listed the candidates they wanted to support) in the ballot box. Id.

Fusion thrived under this system. It allowed voters and parties to express their political choices in a manner that more fully captured the range of opinions amongst the citizenry. Crucially, fusion ensured that the dissenting voices of third parties would not be reduced to a mere "protest vote"; instead, the fusion system made it possible that "their leaders could gain office, and that their demands might be heard." See id. at 288-89. It allowed many voters to vote for a candidate that they would not support if they had to vote for that person on the ballot line of

another party, while simultaneously enabling voters to form alliances to put a check on the party in power. See id. at 289-90. Minor parties could sometimes hold the balance of power, such that their votes were of importance for candidates to win elections. See id. at 289.

In the late 1800s (after the 1888 presidential election which was fraught by various forms of corruption) states began to adopt the Australian ballot in order to reduce ballot fraud, partisan trickery, and ballot stuffing. See id. at 290-91. The Australian ballot was a good government ballot reform which instituted secret voting, a blanket ballot with a list of all candidates, and oversight by election officials. See id.

The Australian ballot was largely successful in addressing the concerns it sought to eliminate. But it also ushered in an era of state regulation over elections, and with it some unintended consequences that those early reformers did not foresee. See id. at 291. The dominant party in power in any state legislature now enjoyed greater control over election administration, and the temptation to use that power to ensure continued dominance was hard to resist. Among the new rules enacted was the ban on fusion, state by state, as it was the surest way to prevent any alliances between the minority party and any potential third party allies. In the North, newly confident Gilded Age Republicans were keen to eliminate the Democrat-Populist electoral alliance; in the South, the Jim Crow Democrats saw no reason to allow the Republican-Populist alliance to continue, as that alliance had elected anti-segregationists and even Black Americans to high office during Reconstruction. See id. at 291-92; 291-306; 303 ("By preventing effective fusion, antifusion laws also brought an end to another major characteristic of late nineteenth-century politics–the importance and even existence of significant third parties.").

The prohibition on fusion in the states decreased opposition power and stifled competition. Id. at 291-92. Limiting a candidate to only one party nomination "would either split

the potential fusion vote by causing each party to nominate separate candidates or undermine the efficacy of any fusion that did occur." See id. at 291-92.[5] One might ask why the minor parties did not simply disband and join the major party? The answer is as much cultural as ideological: to be a Democrat in the 19th century often meant being urban, an immigrant, and Catholic. Populists were rural, native-born, and Protestant. Thus, Populists would not vote for a candidate designated solely as Democrat and a Democrat would not vote for a candidate designated solely as Populist, because they were *different* in some crucial cultural respects. Fusion allowed them to ignore their differences and compromise on policy and candidates. Without fusion, tribalism returned and before long the Populists vanished from the scene. See id. at 291-92.

By 1892 the anti-fusion bandwagon was in full swing and more and more states adopted antifusion laws. See id. at 292-98. In state after state, third parties could no longer back their favored candidates if they wanted to appear on the ballot under their own label. They had to forfeit their party identity and status with the voting public and be absorbed fully within the minority party (usually Democratic Party). See generally id. at 298-306. This Hobson's choice led to further weakening of third parties as they splintered: some members wanted to maintain the integrity and identity of the third party (at the expense of having any influence) and some wanted to maximize their influence by supporting the minority party (at the expense of the integrity of their own party). See id. at 303-05. In sum, the antifusion laws weakened attempts to unite behind a candidate and jeopardized the existence of and often destroyed third parties. In doing so it propped up a two-party system that stranded many voters, reducing their ability and

[5] Early commentaries capture the prevailing view of the time that restraints on listing the name of a candidate more than once on the ballot were particularly egregious in the context of states that used a party-column style of ballot. See Arthur Ludington, *Ballot Legislation of 1911*, 6 AM. POL. SCI. REV. 54, 57 (1912) (recognizing that such provisions in the context of party-column ballots have often been characterized as "grossly unfair and discriminatory"). New Jersey currently uses a party-column style of ballot in general elections.

desire to engage in civic life and leaving them with only a choice between two parties from whom they felt distant. See id. Most third parties lost their status with the public and had little hope of gaining it back. See id. at 300 n.36.

2. New Jersey's Fusion Voting History

The earliest record of fusion voting was an 1826 congressional race of George Holcombe. Running as the nominee of both the Republican and Jacksonian Democrat parties, Holcombe served 4 terms in Congress. But fusion really took off after the Civil War with candidates supported by two parties running for local, state and federal election in almost every election between 1877 and 1920. Among the minor parties that show up in the state's history books as fusing with Democrats and Republicans were the Temperance, Greenback, Independent Democrat, National Silver, Prohibition, Populist, and Progressive parties. Some won their elections, others lost. All participated in a vibrant multi-party democracy.[6] See generally Michael J. Dubin, *United States Gubernatorial Elections, 1861-1911: The Official Results by State and County* (McFarland & Company, Inc., Publishers 2010); Michael J. Dubin, *United States Congressional Elections, 1788-1997: The Official Results of the Elections of the 1st though 105th Congress* (McFarland & Company, Inc., Publishers 1998) (hereinafter "Dubin Congressional Results"); Arthur Ludington, *Election Laws: The New Geran Law in New Jersey*, 5 AM. POL. SCI. REV. 579, 584 (1911).[7]

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[6] Included in the Appendix as Schedule 18 is a chart detailing various fusion candidates and information related to such races, along with the corresponding sources for each.

[7] Among a myriad of other examples of fusion in New Jersey generally, there are examples of successful fusion candidacies wherein minor parties fused with the Democrats and where other minor parties elsewhere fused with the Republicans to cross-nominate candidates for United States Congress. For example, two candidates for United States Congress, Isaiah D. Clawson and George R. Robbins, won on fusion tickets in 1856 after receiving the nominations of both the Republican and American Parties. See Dubin Congressional Results, at p. 176. Likewise, a candidate for United States Congress, Hezekiah B. Smith, won on a fusion ticket in 1878 after

3. The Geran Law and New Jersey's Statutory Adoption of the Australian Ballot and Fusion Voting

New Jersey was a late adopter of the Australian ballot, which wasn't codified in the state until passage of the 1911 Geran Law. The Geran Law enjoyed the strong support of Governor Woodrow Wilson, and it expressly authorized fusion voting. See Mongiello, 41 SETON HALL L. REV., at 1121 n.66 & accompanying text.

More generally, the Geran Law initiated a massive overhaul of the state's election system and was rightfully lauded as a "good government measure," ushering in an era of state regulation over the ballot and election process. See id. at 1121-23. Governor Wilson, along with the New Jersey Legislature, found fusion to be of such importance that they expressly provided for fusion voting in the Geran Law at a time when the rest of the country was banning it. See id. at 1122 nn.69-70 & accompanying test.

However, the path to legalized fusion voting was not smooth. A 1907 act required that petitioners only nominate candidates from their own party, which by definition precludes fusion voting, since a candidate cannot be a member of more than one party. When the City Clerk of Paterson attempted to enforce that law, the Supreme Court of New Jersey held that the Geran Law superseded the 1907 act as it explicitly allows for multiple party nominations. See In re City Clerk of Paterson, 88 A. 694, 695 (N.J. Sup. Ct. 1913). Chief Justice Gummere declared that even if the 1911 Geran Law had never passed, the 1907 act would nevertheless be unenforceable because it would infringe on state constitutional rights of voters to select the candidate of their choice, thus violating a true suffrage. See id. at 695-96. The Court cast grave doubts on the

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receiving the nominations of both the Democrat and Greenback Parties. See id. at 245. In 1896, Mahlon Pitney – who later was appointed to the Supreme Court of the United States – won a seat in the United States Congress under the fusion banners of the Republican and National Democrat Parties. See id. at 317.

ability of the Legislature to limit a party in the choice of who they nominate to appear on the general election ballot for public office. See id. Nevertheless, as set forth below, the Legislature eventually changed its mind and chose to ignore the State Supreme Court's view on the constitutionality of fusion voting when they decided to ban it.

4. Subsequent New Jersey Election Laws and Fusion Ban

In 1920, the legislature passed another large-scale reform to the election process. See L. 1920, c. 349. Significantly as it pertains to fusion and third parties, the threshold percentage vote that a party needed to achieve at the prior election for General Assembly in order to obtain recognition as a statutory political party was changed from 5% in the specific district or division under the prior 1903 law to 10% statewide. See Mongiello, 41 SETON HALL L. REV., at 1123 n.73 (comparing 1920 N.J. Sess. Law, c. 349, art. I, sec.1(i), at p. 616, with 1903 N.J. Sess. Law., c. 248, sec. 3, at p. 606). This law made it extremely difficult for any third party to achieve statutory political party status, so much so that in the over-100 years since its passage, no party outside of the Democrats and Republicans has ever reached this threshold. See Council of Alternative Political Parties v. State, Division of Elections, 344 N.J. Super. 225, 246 (App. Div. 2001) (acknowledging via stipulation of the parties that "[t]he Democratic and Republican Parties are the only 'political parties' that have met the current statutory definition [of a political party in N.J.S.A. 19:1-1] since its enactment in 1920").

After having made substantial changes to the election law in 1920, the legislature passed another law in 1921 with further reforms, many of which were antifusion measures. See L. 1921, c. 196. Such measures amounted to prohibiting groups of petitioners from nominating a candidate who has already accepted the nomination of a party and likewise prohibiting a candidate who has already accepted the nomination of a party from signing another. See

Mongiello, 41 SETON HALL L. REV., at 1123 nn. 74-75 (explaining 1921 N.J. Sess. Law, c. 196, sec. 59, at p. 551, and 1921 N.J. Sess. Law, c. 196, sec. 60, at p. 551). In fact, the statement accompanying the bill notes that changes to the prior year's election law include "[r]estricting the appearance of name of person to but once on the ticket for the same office." See Assemb. B. 80 (N.J. 1921) (Statement). In 1922, the legislature passed another law which specifically provided that "[t]he name of any candidate shall appear but once upon the ballot for the same office," thereby prohibiting one party from nominating the nominee of another party and further completing New Jersey's ban on fusion voting. See Mongiello, 41 SETON HALL L. REV., at 1123 nn. 76-77 & accompanying text (citing 1922 N.J. Sess. Law, c. 242, sec. 32, at p. 447).

The substance of these antifusion laws has been codified in statute and remain in Title 19 today. See id. at 1123-24 nn. 79-80 & accompanying text (citing N.J.S.A. 19:14-2; N.J.S.A. 19:14-9; N.J.S.A. 19:13-1; N.J.S.A. 19:13-4; N.J.S.A. 19:13-8; N.J.S.A. 19:23-5; N.J.S.A. 19:23-15).

ARGUMENT

The statutes that categorically prohibit fusion voting in New Jersey violate multiple rights protected by the New Jersey Constitution. These include the right to vote (N.J. CONST., art. I, ¶ 2(a); art. II, § 1, ¶ 3(a)); the right to assemble and make known their opinions to their representatives (N.J. CONST., art. I, ¶ 1); the right to equal protection under the law and substantive due process (N.J. CONST., art. I, ¶ 18); and the rights to free speech and association (N.J. CONST., art. I, ¶ 6). The State Constitution expressly recognizes that "[a]ll political power is inherent in the people" and that "the people . . . have the right at all times to alter or reform the

[government]." N.J. CONST., art. I, ¶ 2(a). New Jersey's anti-fusion statutes are plainly incompatible with these fundamental democratic rights.[8]

I. New Jersey's anti-fusion laws violate the State Constitution's guarantee of the right to assemble

The New Jersey Constitution provides that "The people have the right freely to assemble together, to consult for the common good, to make known their opinion to their representatives, and to petition for redress of grievances." N.J. CONST., art. I, ¶ 18. New Jersey's anti-fusion laws violate the right of the people of New Jersey to "assemble . . . and make known their opinion to their representatives."

The assembly clause adopted in the 1844 New Jersey Constitution was copied, with one helpful revision, from the clause adopted in the 1780 Massachusetts Constitution, not the clause later incorporated into the First Amendment to the U.S. Constitution. Niko Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1733-34 (2021). To interpret the scope and meaning of a state constitutional clause, courts will often look to the legislative histories of the states whose constitutional provisions were copied. Id. at 1734; see e.g., Lahmann v. Grand Aerie of Fraternal Order of Eagles, 121 P.3d 671, 679 (Or. Ct. App. 2005) (noting that the most "useful starting point for appreciating the right of assembly is eighteenth-century Massachusetts"). In this case, New Jersey courts should interpret the meaning, scope, and effect of the assembly clause in the New Jersey Constitution by reference to the history of the assembly clauses adopted in Massachusetts and in other early state constitutions. Doing so

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[8] Courts possess broad power and discretion to issue appropriate orders as remedies for constitutional violations. See, e.g., Garden State Equality v. Dow, 434 N.J. Super. 163, 217-18 (Law Div.), stay denied, 216 N.J. 314 (2013). These inherent powers are cumulative to those found in the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) and (f), including an award of counsel fees, damages, and "injunctive or other appropriate relief."

will give effect to the right to assembly, and demonstrate that New Jersey's anti-fusion laws violate a fundamental right protected by the state constitution.

Looking to the history of the adoption of the assembly clause in the constitution of Massachusetts, as well as North Carolina and Pennsylvania (which adopted their clauses even earlier) reveals that the New Jersey assembly clause does not simply protect the right to expression, but vindicates the right of the people to self-government. Bowie, supra, at 1727. The right of the people to participate in legislation by making their opinions known to their representatives is central to the right to assemble. This right, originally phrased as the right to "instruct" representatives, emerged from the tradition of town meetings in colonial New England as a form of direct democracy, as well as local meetings held in opposition to royal tax policy. Id. at 1663-84. Samuel Adams, John Adams, and their supporters asserted this right of assembly after British officials tried to dissolve the general and local assemblies in Massachusetts, forcing them to establish informal conventions "on the theory that they had an inalienable right 'to convene and consult together, on the most prudent and constitutional measures for the redress of their grievances,' regardless of what formal institutions were available." See id. at 1728-29 (citation omitted). They further repeatedly asserted "that they understood the right to assemble as the right to use government to solve their problems." See id. at 1729.

The right to assemble and use government to solve problems, however, was not and should not be understood to be limited only to the context of direct democracy and New England town meetings. It also protects the right of the people to make their opinions known to their representatives through the institutions of representative democracy. Even before Massachusetts adopted its assembly clause in 1780, in 1776 North Carolina and Pennsylvania each incorporated

the right to assemble in their respective constitutions—each in a context where there had been no local tradition of direct democracy in the form of town meetings. Id. at 1701-02, 1732.

The writings of people who participated in the drafting of state assembly clauses also shed light on how they envisioned the right would materialize in the context of representative government. John Adams was among the leading proponents of the right to assemble in early America, and among the small group of people who participated in drafting assembly clauses in the first state constitutions. Id. at 1660. His writings help reveal the purpose of the clause in the context of representative government. In the view of Adams, representative government was an extension of the right of the people to assemble and govern themselves. Id. at 1699. As he wrote, the best representative government should be "in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them." Id. (quoting John Adams, *Thoughts on Government: Applicable to the Present State of the American Colonies* (1776) in 4 *Papers of John Adams* 87 (1979)). Even in the context where legislative assemblies were composed of elected representatives and instructions came in the form of electoral outcomes rather than written voting instructions drafted during town meetings, the assembly clauses were understood to vindicate the "right to meaningfully participate in enacting needed legislation, whether directly [or] by representative." See id. at 1727 (emphasis in original).

New Jersey's anti-fusion laws have always and continue to infringe on the right of the people of New Jersey to make their opinions known to their representatives through the ballot—perhaps the single most essential institution of a representative democracy. Cf. id. at 1733-34 (explaining that New Jersey led a group of states in modifying state constitutional assembly clauses by including in its 1844 Constitution a provision that explicitly acknowledged a right "to make known their opinion to their representatives") (internal quotation marks and citation

omitted). The blame falls squarely and equally on the shoulders of the Democratic Party and Republican Party—their representatives ushered in the early 1920s ban and have prevented any corrective reform since. They may not agree on much—but the two major parties both agree on preventing minor parties from playing a meaningful role in our politics. As hyper-polarization pulls the two major parties even further apart, the substantial moderate share of the electorate has no way to take corrective action. Without fusion, these voters have no way to ensure that their representatives "think, fell, reason, and act like" them. Textually, Art. I, section 18 includes both the right of the people to "assemble," and their right "to make known their opinions to their representatives." Fusion bans impair the right of assembly because a voter's choice for a candidate, coupled with the party under which the voter supported the candidate, constitutes a communicative expression of opinion by the voter to the candidate. (E.g., Tomasco Cert.; Sokolovic Cert.; Albis Cert.). Without fusion voting, the people's full right to make their opinions known to officeholders is fundamentally impaired.

New Jersey courts should give full effect to the right to assemble, including the right of the people to make their opinions known to their elected representatives. They can do so first by interpreting the assembly clause in the light of the history of early state assembly clauses from which the New Jersey's clause was modeled. They can then apply the standard test in which a law that severely infringes on a fundamental constitutional right will be struck down unless it is narrowly tailored to serve a compelling state interest. Here history indicates both that the right to assemble is fundamental, and that there was no compelling interest justifying New Jersey's anti-fusion laws, either at time they were enacted or today.[9]

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[9] Alternatively, the Court can vindicate the right of the people of New Jersey to assemble and make their opinions known by applying standard fiduciary principles. See D. Theodore Rave, *Politicians as Fiduciaries,* 126 HARV. L. REV. 671 (2013) (analyzing self-dealing by elected

II. New Jersey's anti-fusion laws violate the New Jersey Constitution's guarantee of the rights to free speech and association

The New Jersey Constitution protects the rights of the people to free speech and association. Art. I, ¶¶ 6, 18. The laws that categorically prohibit disaggregated fusion voting infringe on these fundamental rights without serving any legitimate state interest.

This case asks New Jersey courts to interpret the State Constitution to protect these basic political rights. The fact that the U.S. Supreme Court in Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), previously interpreted the Federal Constitution in a manner that failed to protect the right to fusion voting under the First and Fourteenth Amendments is not binding on New Jersey courts interpreting the New Jersey Constitution. In Timmons, the U.S. Supreme Court – on a record much different in kind from the one presented here – upheld Minnesota's anti-fusion voting laws against a federal constitutional challenge. For reasons we explain below, the broad rights to speech and political association guaranteed by the New Jersey Constitution should be interpreted to protect the right of a non-statutory political party to nominate a candidate of its choice and the ability of voters to vote for that candidate on that party's own line of the general election ballot.

Moreover, as we also explain below in Point II.B infra, the New Jersey courts should reject the analysis of the Supreme Court's majority in Timmons, which was out of step with other federal jurisprudence concerning these fundamental political rights, has remained an outlier from later federal jurisprudence on rights to speech and association, and was flawed on its own

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representatives by reference to fiduciary principles, and proposing remedies politicians' breach of their duty to loyalty). In the context of that framework, the court would ask whether elected representatives breached their duty of loyalty by enacting laws that constituted self-dealing. In that light, history indicates that party leaders enacted anti-fusion laws to serve their own partisan interests and by structuring ballots and elections so as to entrench their partisan advantage infringed the right of the people of New Jersey to make their opinions known to their elected representatives and meaningfully participate in self-government.

analysis in certain crucial respects. The New Jersey courts should not treat the analysis of the U.S. Constitution by the majority in Timmons as useful guidance for interpreting the scope of rights protected by the New Jersey Constitution.

A. New Jersey's anti-fusion laws violate the free speech and associational rights clauses of the N.J. Constitution

The New Jersey Supreme Court's expansive interpretation of the free speech and associational rights provisions of the New Jersey Constitution, beyond the scope of those rights as protected by the Federal Constitution, should be applied to secure the right of the Moderate Party to nominate Malinowski as its candidate for Congress in CD 7.

The relevant provisions of the New Jersey Constitution require an independent analysis, which warrants departure from the Supreme Court's decision in Timmons. Specifically, the burdens placed by anti-fusion laws on associational and free speech rights should be deemed severe under the New Jersey Constitution, or at least sufficiently burdensome so as to outweigh any asserted state interests. In other contexts, the Supreme Court of New Jersey has interpreted the New Jersey Constitution's free speech and associational rights more expansively than its federal counterparts and that expansive interpretation should similarly applied to the matter at hand here.

The Supreme Court has set forth a number of factors which can be considered in determining when and why courts should interpret the State Constitution in a particular matter more broadly than the provisions of its federal counterpart. See generally State v. Hunt, 91 N.J. 338, 363-68 (1982) (Handler, J., concurring). To summarize, this non-exhaustive list of factors includes the following:

1. Textual Language: either through distinctive provisions found in the New Jersey Constitution or by different phrasing of provisions as compared to the Federal Constitution;

2. Legislative History: if the legislative history reveals an intent that supports an interpretation that is different from federal law;

3. Preexisting State Law: based on a body of state law that previously existed;

4. Structural Differences: if there is a difference in structure between the two constitutions, such as the difference between the Federal Constitution's grant to the federal government of enumerated powers as compared to the State Constitution which "serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives" such that an affirmative fundamental right in the New Jersey Constitution "can be seen as a guarantee of those rights and not as a restriction upon them";

5. Matters of Particular State Interest or Local Concern: based on whether a particular issue is local such that one uniform national policy may not be sufficient;

6. State Traditions: based on history and traditions of a state which would support an independent analysis of the State Constitution, such as "New Jersey's strong tradition of protecting individual expressional and associational rights"; and

7. Public Attitudes: based on "[d]istinctive attitudes of a state's citizenry" which may be relevant to the court's deliberations.

See id. (internal citations omitted).

Here, many of the factors militate in favor of reading the free speech and associational provisions of the New Jersey Constitution to protect fusion voting.

i. Text, structure, and historical context of free speech and association in the New Jersey Constitution

To begin with, the text of the applicable provisions of the New Jersey Constitution differs from that of the Federal Constitution. The First Amendment to the United States Constitution provides in relevant part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

By contrast, the New Jersey Constitution has separate provisions protecting the rights of free speech and association, which provide, in relevant part, as follows:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

N.J. Const., art. I, ¶ 6.

> The people have the right freely to assemble together, to consult for the common good, to make known their opinion to their representatives, and to petition for redress of grievances.

N.J. Const., art. I, ¶ 18.

As recognized by the Supreme Court of New Jersey in State v. Schmid, 84 N.J. 535 (1980), the New Jersey Constitution affirmatively recognizes these freedoms of speech and association, which are "more sweeping in scope than the language of the First Amendment," and "were incorporated into the organic law of this State with the adoption of the 1844 Constitution." Id. at 557. The Court in Schmid further noted that these concepts were actually derived from even earlier sources, such as the free speech provisions set forth in New York's State Constitution of 1821. Id. The Court further noted various cases recognizing the importance of such rights under the New Jersey Constitution, including, among other examples, State v. Miller, 83 N.J. 402 (1980), where the Court noted in the context of political speech that "our tradition insists that government 'allow the widest room for discussion, the narrowest range for its restriction.'" See Schmid, 84 N.J. at 558 (quoting Miller, 83 N.J. at 412). It further observed that "the State Constitution serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives." Id. (citing Smith v. Penta, 81 N.J. 65, 74 (1979)). Thus, the Court explained, "the explicit affirmation of these fundamental rights in our Constitution can be seen as a guarantee of those rights and not as a restriction upon them." Id.

(citing 16A Am.Jur.2d, Constitutional Law, § 439 at 208 (1979)). The Schmid Court found that "the State Constitution imposes upon the State government an affirmative obligation to protect fundamental individual rights," and that such requirement was "applicable to the freedoms of speech and assembly," which "comports with the presumed intent of those who framed our present Constitution." Id. at 559 (citation omitted). Based on these factors, the Court in Schmid concluded that the New Jersey Constitution provided for the freedom of speech and freedom of association, and "protects the reasonable exercise of those rights." See id. at 560.

In fact, the New Jersey Supreme Court found these rights under the State Constitution to be more expansive than the Federal Constitution, even in the context of certain private entities, because the State Constitution "serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof." Id.; see also id. (extending New Jersey Constitution's free speech and associational rights to be enforced against certain owners of private property, allowing for entry onto the Princeton University campus and the distribution of leaflets); N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 138 N.J. 326 (1994) (applying the New Jersey Constitution's affirmative right of free speech to require that "regional and community shopping centers [] permit leafletting on societal issues"); Green Party v. Hartz Mt. Indus., 164 N.J. 127, 145 (2000) (extending protection of such rights under the State Constitution to shopping malls for the purpose of collecting signatures on behalf of a candidate for public office and recognizing that "the New Jersey Constitution's free speech provision is an affirmative right, broader than practically all others in the nation"). Indeed, in setting forth the various factors to be considered, Justice Handler explicitly stated that "in Schmid, we emphasized New Jersey's strong tradition of protecting individual expressional and associational

rights in holding that the New Jersey Constitution provided greater protections for the right to free speech than those found in the federal Constitution." Hunt, 91 N.J. at 366-67.

ii. Free speech and associational rights on the ballot

In addition to these textual, structural, and historical contexts, New Jersey's history and tradition further demonstrates what is, perhaps, the strongest protection of free speech and associational rights as it pertains to the ballot. For example, even in the context of primary elections, New Jersey law allows for candidates to affiliate with one another on the ballot under a common slogan. See N.J.S.A. 19:49-2. In fact, New Jersey courts have found that free speech and associational provisions protect the "right[] of every candidate in a primary election to declare a ballot affiliation with any other candidate or cause," which is required "as a matter of constitutional imperative." See Schundler v. Donovan, 377 N.J. Super. 339, 348 (App. Div. 2005), aff'd by 183 N.J. 383 (2005); see also id. at 349 (finding "the right to bracketing" to be "fundamental as an expressive exercise").

In fact, a 1981 law which prevented candidates for United States Senator or Governor from bracketing with candidates for other offices by prohibiting them from appearing in the same column or row with candidates for such other offices, codified at N.J.S.A. 19:23-26.1, was struck down as unconstitutional. See Lautenberg v. Kelly, 280 N.J. Super. 76 (Law Div. 1994), overruled on other grounds by Schundler, 377 N.J. Super. 339.[10] In Lautenberg, the court found that this law violated plaintiffs' free speech and associational rights because it prohibited candidates from being placed in a party's ballot column and prohibited the party from including

[10] While the Appellate Division in Schundler overruled the court's decision in Lautenberg to strike down the remaining provisions of N.J.S.A. 19:23-26.1, it nevertheless agreed that the provisions which prevented candidates for United States Senator and Governor from bracketing with and appearing on the same line of the ballot as other candidates were in fact unconstitutional. See Schundler, 377 N.J. Super. at 348-49.

their candidate on the party's ballot column, which the court described as "the ultimate form of endorsement given by a political party." Id. at 83. The court further held that "banning a candidate from associating with and advancing the views of a political party *on the ballot* is clearly a restraint on the right of association." See id. (emphasis added).

Indeed, the unique importance of bracketing to free speech and associational rights in New Jersey has been recognized in numerous cases spanning back many decades. New Jersey state courts have recognized the importance of the right "of candidates having the same party faction label or designation and desiring to have this fact brought to the attention of the voter in a primary election with the additional effectiveness produced by alignment of their names on the machine ballot." See e.g., Harrison v. Jones, 44 N.J. Super. 456, 461 (App. Div. 1957) (citing Bado v. Gilfert, 13 N.J. Super. 363, 365 (App. Div. 1951)); Quaremba v. Allan, 67 N.J. 1, 13 (1975) (citation omitted).

a. Effectuating endorsements of candidates on the ballot

These cases speak to the general ability of parties to have the candidates that they endorse appear on the ballot under the party's column (in the case of general election ballots) or the party faction's column (in the case of primary election ballots). The free speech and associational rights discussed therein go beyond the mere ability of a candidate to have their name on the ballot and instead extend to having that association with the party and with other candidates identified for voters directly on the ballot. In fact, New Jersey courts have in many instances tied together the concept of party endorsement with the ability to express and communicate such endorsement through the ballot itself. For example, prior to the Supreme Court's decision in Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 266 (1989), which struck down as unconstitutional a California law which banned political parties from endorsing

candidates prior to a primary election, New Jersey had a similar law, N.J.S.A. 19:34-52, which provided that "[n]o state, county or municipal committee of any political party shall prior to any primary election indorse the candidacy of any candidate for a party nomination or position." However, after the similar California law was struck down in Eu, the issue of New Jersey's primary endorsement ban went before the Appellate Division, which struck down the New Jersey primary endorsement ban as unconstitutional. See Batko v. Sayreville Democratic Org., 373 N.J. Super. 93 (App. Div. 2004).

As a result of the Batko decision, which struck down New Jersey's primary endorsement ban, parties were permitted to have their endorsed candidates' names appear on the party organization's official column on the ballot. Parties were not merely permitted to endorse candidates ahead of the primary, but to effectuate the expression of that endorsement and communicate it to the voters via a designated column on the ballot itself. In fact, New Jersey courts have recognized that the ability of a party to place its candidates on the party's ballot column "is the ultimate form of endorsement," such that prohibiting the parties from including the names of some of their candidates on a party's column of the ballot would violate free speech and associational rights. See Lautenberg, 280 N.J. Super. at 83. Therefore, there is more than ample precedent and history in New Jersey to depart from the federal constitutional analysis in Timmons, which found a lesser burden than is warranted under the New Jersey State Constitution, in part because "[t]he New Party remain[ed] free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen." See Timmons, 520 U.S. at 361 (citation omitted). The associational rights enjoyed by New Jerseyans under its state constitution have never been understood to be limited to the alternatives listed by the Timmons court.

b. General disapproval of restrictions on party nominations and candidate associations

Furthermore, in other contexts, New Jersey courts have generally disapproved of laws which restrict which candidates a party can nominate, place on the ballot, and elect as its leaders. In the wake of the Supreme Court's decision in Eu, a challenge was brought to the constitutionality of certain provisions of N.J.S.A. 19:5-3, which required that the Chair and Vice Chair of the county committees of the political parties had to be of the "opposite sex." See Hartman v. Covert, 303 N.J. Super. 326 (Law Div. 1997). In Hartman, the court held that this provision of the statute was unconstitutional on free speech and associational grounds, finding that "the State simply does not now have, if it ever did, such a compelling interest in the internal affairs of the County Committees of the political parties as to warrant legislating the gender of candidates for leadership positions of those parties." Id. at 330. The court noted that in Eu, a provision of a California law which required that the state party chair of the political parties be rotated between northern and southern residents of California, was found to be unconstitutional. See id. at 332-33. The court further noted that in Eu, the Court recognized "that freedom of association 'encompasses a political party's decisions out [sic] the identify of, and the process for, electing its leaders.'" Id. at 332 (citing Eu, 489 U.S. at 229).

Turning to the New Jersey restriction based on gender, the court held that the law would violate associational rights of the party and its members "to join together in a political party and to govern that party free of the interference of the State." Id. at 334. Thus, the court concluded that the law "limits New Jersey political parties' discretion in how to organize themselves and select their leaders, thus burdening the associational rights of the parties and their members." Id. The court noted that "the associational rights at stake are particularly strong as they implicate the right of an entirely voluntary group of persons who are seeking to associate with one another for

specific political goals and objectives central to the democratic process." Id. Thus, because it served as a direct regulation of the selection of party leaders, the burden was such that the court required, but did not find, "a compelling state interest sufficient to sustain the burdens." See id. at 334-35.[11] The court in Hartman did not hesitate to reach such conclusion based on free speech and associational rights, notwithstanding its acknowledgement that the opposite gender rule was a far-reaching practice which had "become thoroughly imbedded in the daily warp and woof of the political process in New Jersey," and which arguably was responsible at one time for securing "the place of women in the political process." See id. at 329-30.

New Jersey courts have extended this disapproval of laws that restrict intra-party disputes and candidates' rights of association to the ballot design context. In Central Jersey Progressive Democrats v. Flynn, MER-L-732-19 (Law Div. Sept. 2, 2020) (slip op. at 6), The Honorable Mary C. Jacobson, A.J.S.C., further found N.J.S.A. 19:5-3 unconstitutional insofar as it mandated a ballot design for the election of one party committeeman and one party committeewoman on the ballot, rather than for the election of two committeepersons, independent of sex or gender. Judge Jacobson looked to Eu and adopted the reasoning in Hartman in concluding that the Defendant County Clerk failed to demonstrate a compelling state interest to support her proposed ballot design and that "[t]he statute burdens the freedom of association by preventing candidates of the same sex from running on the same slate or from

[11] While the text of the decision in Hartman itself appeared to extend such ruling to the gender quota requirements in N.J.S.A. 19:5-3 related to both the selection of the party's chair and vice chair and to the requirement that the county committee members elected from each unit of representation be one male and one female, see Hartman, 303 N.J. Super. at 331 (acknowledging that the statute "not only provides that the Chair and Vice-Chair be of the opposite sex, but that each pair of County Committee people be of the opposite sex"), any doubt that the male/female requirement of elected county committee members was similarly unconstitutional was recently dispelled by the court in Central Jersey Progressive Democrats v. Flynn, MER-L-732-19 (Law Div. Sept. 2, 2020).

obtaining office within the same election district." Notably, the associational rights of the candidates therein were recognized in securing fair ballot design although they ran independent of the main party nomination and column.

c. Liberal construction of election laws

Moreover, New Jersey courts generally have gone out of their way to construe elections laws liberally to ensure the greatest amount of choice and participation, including with respect to the ballot itself. N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 190 (2002) ("We have understood our Legislature, in establishing the mechanism by which elections are conducted in this State, to intend that the law will be interpreted 'to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day.'") (quoting Catania v. Haberle, 123 N.J. 438, 448 (1990)).

d. Stifling competition and hampering ability to organize, associate, and demonstrate support

New Jersey Courts have recognized that free speech and associational rights protect the ability "of citizens to associate and form political parties." Council of Alternative Political Parties v. State, Division of Elections, 344 N.J. Super. 225, 236 (App. Div. 2001) [hereinafter "CAPP"] (citing Timmons, 520 U.S. at 357). As set forth by the Appellate Division in CAPP, "[t]his includes the right to create and advance new parties which enhances the constitutional interests of like-minded voters to gather to pursue common ends." Id. (citing Norman v. Reed, 502 U.S. 279, 288 (1992)). The court in CAPP recognized that "[t]he right of an alternative party to organize and disseminate its message cannot be minimized." Id. In CAPP, the court considered the ability of voters to declare a party affiliation only with the statutory political parties (only Democrats and Republicans) and the fact that the statutory political parties, but not

plaintiff organizations, were granted access to such lists without any cost. Id. at 237. The court noted that the plaintiff organizations had the same interest as the statutory political parties "in identifying those who declare an affinity for the platform or the candidates presented by the party," which would enable them to "build[] their party through attraction of other voters and the identification of those who may make contributions to the party beyond a vote." Id. at 238. This prevented voters from indicating a party preference at the beginning of the electoral process and also hindered the organizations from associating with voters who had similar views, effectively "marginaliz[ing] voters and political organizations who depart from or disagree with the status quo," thereby violating their free speech and associational rights. Id.

In CAPP, the court was particularly concerned with the extent to which state election laws "had the effect of 'help[ing] to entrench the decided organizational advantage that the major parties hold over new parties struggling for existence.'" See id. at 241 (quoting Reform Party of Allegheny County v. Allegheny County Dep't of Elections, 174 F.3d 305 (3d Cir. 1999)) (internal quotation marks and citation omitted). The court then found that New Jersey's rules regarding voter affiliation imposed a considerable burden on constitutional "rights to express political ideas and to associate to exchange these ideas to further their political goals." Id. at 241-42. The New Jersey rules "impose[d] a significant handicap on the alternative parties' ability to organize while reinforcing the position of the established statutory parties," so as "to enhance or subsidize the party-building activities of the statutorily recognized parties by stifling political discussion and association of alternative political parties." Id. at 242.

The court noted that while states may have a valid interest in ensuring fair and honest elections, this does not give them "an unconditional license to insure the preservation of the present political order." Id. at 242-43; see also id. at 243 (citing Timmons, 520 U.S. at 366

("This interest does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence, nor is it a paternalistic license for States to protect political parties from the consequences of their own internal disagreements.")). The court in CAPP ultimately held that the party declaration advantages enjoyed by the statutory political parties had to be extended to the plaintiff organizations who had exhibited an indicia of party status by (1) having a defined organization and officers; (2) having a steering committee and dues-paying members; and (3) adopting nominating procedures for candidates running for office. See id. at 244.

Similarly, New Jersey's fusion and related laws, when read together, amount to a system which, in practice, benefits the two statutory political parties by stifling competition from non-statutory political organizations, hampering their party-building efforts, and limiting their ability to associate. In particular, New Jersey's fusion ban laws exist alongside N.J.S.A. 19:1-1, which ties the definition of a "political party" to those parties which poll at least 10% of the total statewide vote cast for members of the General Assembly at the last preceding election where all members of the Generally Assembly are on the ballot, and alongside N.J.S.A. 19:5-1, which provides that if a political party does not obtain, at a primary election, at least 10% of the votes cast in the state at a general election where all members of the General Assembly are on the ballot, then that party is not entitled to have a party column on the general election ballot.

The court in CAPP acknowledged, via a stipulation of the facts by the parties, that "[t]he Democratic and Republican Parties are the only 'political parties' that have met the current statutory definition [of a political party in N.J.S.A. 19:1-1] since its enactment in 1920." See CAPP, 344 N.J. Super. at 246. Thus, the ability to associate via an official party column is tied to meeting a statutory threshold that has **never** been met in the over-100-year history of the

existence of the statute. When combined with the fusion ban, candidates are forced to associate with either a statutory political party or a political organization that must put candidates on the ballot via direct nominating petition. Therefore, even if a candidate aligns more-closely with an alternative party, they are incentivized to seek the nomination of the statutory political party due to the inherent ballot and party label advantages. From the alternative party's perspective, they are forced to choose between (1) finding a candidate that is not their first choice to run against the candidate who is their first choice and who would like to associate with them but for New Jersey's fusion ban laws; or (2) forfeit the ability to run a candidate in that race, in which case they would simultaneously forfeit any votes from that race that could otherwise be counted toward the 10% statutory threshold. In this manner, New Jersey's fusion ban and the 10% threshold law pit an alternative party's associational rights against their ability to achieve statutory political party status. The impact of the anti-fusion laws on voters, candidates, and alternative parties perpetuates a self-fulfilling prophecy, resulting in the dominance of the two statutory political parties and the suppression of alternative parties. This is made readily apparent by the fact that for various periods of time in this State's history, including as recently as 2020, the plurality of voters in New Jersey are registered as unaffiliated.[12] In this manner, the fusion ban imposes an unconstitutional burden on the ability of third parties to organize, associate with one another, and demonstrate support. Cf. Tashjian v. Republican Party, 479 U.S. 208, 215-16 (1986) (finding the selection of a party's candidates, as it relates to associational rights, to be "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community").

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[12] This further suggests that, in addition to the support for alternative parties being suppressed and undermined by New Jersey's fusion ban and the 10% threshold law, the combination of such laws further obfuscates and overinflates actual support for the statutory political parties.

Leaving aside the rationale for the 10% threshold requirement to establish statutory party status, there are simply no legitimate reasons for preventing a party from nominating by petition a candidate nominated by another party. As the Record in this case establishes and as discussed herein, fusion voting does not result in voter confusion, overcrowding of ballots, the inability to identify the winning candidate, party splintering, factionalism, or instability of the two-party system. The New Jersey courts should find that this State's statutes banning fusion violate Article I, paragraphs 6 and 18 of the New Jersey Constitution.

B. Timmons is not binding on New Jersey Courts

The "sole issue is whether the [statute] offends the New Jersey Constitution." Joye v. Hunterdon Cent. Regional High School Bd. of Educ., 176 N.J. 568, 583 (2003). New Jersey courts are not bound by federal decisions, but "federal decisional law may serve to guide us in our resolution of New Jersey issues." Id. (citation omitted). While the State courts will "look to both the federal courts and other state courts for assistance in constitutional analysis," they recognize that "[t]he ultimate responsibility for interpreting the New Jersey Constitution . . . is ours." Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985). Developing "an interpretation of the New Jersey Constitution that is not irrevocably bound by federal analysis," both meets that responsibility and prevents "the necessity of adjusting our construction of the state constitution to accommodate every change in federal analysis of the United States Constitution." Id.

For the reasons detailed below, Timmons is not helpful in interpreting the New Jersey Constitution and the State's anti-fusion statutes. The analysis in Timmons is problematic on its own terms: it misapprehended the severity of the infringement on the right to association posed by fusion bans; gave undue credence to the asserted state interests in infringing on that right; and departed in striking manner from prior U.S. Supreme Court cases on the rights of voters and third

parties to association and political speech. It has remained an outlier, with subsequent federal cases adopting a quite different approach to regulating political freedoms in the context of elections. Recent history has also demonstrated the flaws in certain crucial assumptions Chief Justice Rehnquist made about the value of a stable two-party duopoly.

The New Jersey courts should reject Timmons as guidance and look instead to the New Jersey Supreme Court's expansive reading of its constitutional provisions enshrining the fundamental rights of free speech, association, assembly, equal protection, and suffrage.[13]

C. New Jersey courts should decline to treat the analysis of the majority in Timmons as guidance for interpreting the New Jersey Constitution.

In determining the constitutionality of the State statutes banning fusion voting, New Jersey's courts should reject the reasoning of the Timmons Court majority for, *inter alia*, the following reasons:

1. The majority in Timmons dramatically broke from prior U.S. Supreme Court jurisprudence on rights to speech and association;

2. The majority in Timmons relied upon asserted state interests that lacked any evidentiary support, and failed to justify any degree of burden on fundamental rights;

3. U.S. Supreme Court decisions concerning political speech and association decided over the past 25 years underscore that the analysis in Timmons has remained an outlier; and

4. Timmons assumed a state interest in supposed benefits of a two-party political system that have proven to be illusory in the context of a hyper-polarized political environment.

[13] Importantly, Timmons only addressed associational rights under the Federal Constitution and thus does not inform the analysis of other fundamental rights implicated under the New Jersey State Constitution. Cf. Reform Party of Allegheny County v. Allegheny County Dep't of Elections, 174 F.3d 305, 312 (3d Cir. 1999) (holding that Timmons does not affect analysis of equal protection claim because Timmons only analyzed associational rights).

The following subsections address each reason that Timmons does not merit being treated as useful guidance in interpreting the New Jersey Constitution.

1. Timmons broke dramatically with prior jurisprudence on the right to association

Timmons ended a multi-year national New Party challenge to state anti-fusion laws, based on the U.S. Constitution's First and Fourteenth Amendments. The New Party argued that the bevy of core associational rights the Court had, over the previous generation, clarified as possessed by political parties required Federal courts to strike down anti-fusion laws. These rights might be categorized as any minor political party's presumptive right to *autonomy* in its electoral strategy.

The Court announced these associational rights in a series of cases. E.g., Tashjian v. Republican Party, 479 U.S. 208 (1986) (vindicating a political party's right to set the procedures by which its nominees were chosen); Eu, supra, (protecting a party's right to choose the standard bearer of its choice). These cases also vindicated a system of fair—or at least not abusively unfair—competition. In Anderson, supra, and Norman, supra, the Court built on Williams v. Rhodes, 393 U.S. 23 (1968), by defending a new or minor party's right to be free of major parties using their duopoly on state legislative power to deliberately impose burdens that fall more heavily on new or minor parties than themselves, or that otherwise invidiously discriminate against them.

The historical record before the Timmons Court was clear. The presence of fusion permitted minor parties to contribute more meaningfully to public life, improved the quality of information offered to and from voters, and healed the mischiefs of faction by encouraging more cooperative alliance—all *within* the minor-party-constraining frame of America's distinctive plurality-voting-single-member-district (PV-SMD) system. Equally, the absence of the fusion

option condemned minor parties to electoral oblivion, and sometimes resulted in those parties playing the unfortunate role of "spoiler" in elections. Since fusion bans burden core party freedoms (e.g., selecting their own standard bearer) and in the absence of any evidence that fusion results in increased factionalism—fusion's essence is about alliance, not splintering—or minor party proliferation, much less voter confusion or grave problems in election administration, the Timmons majority wrongly concluded that Minnesota's law passed constitutional muster.

Two Circuit Courts of Appeal agreed with this argument. Twin Cities Area New Party v. McKenna, 73 F.3d 196 (8th Cir. 1996); Patriot Party of Allegheny County v. Allegheny County Department of Elections, 95 F.3d 253 (3d Cir. 1996). So did a trio of distinguished judges (Posner, Easterbrook, and Ripple) from the Seventh Circuit.[14]

2. **Timmons misapprehended the severity of the burden on the right to association, and misanalysed the asserted state interests**

Chief Justice Rehnquist's opinion in Timmons touches many issues, but essentially rests on the characterization that Minnesota's anti-fusion law only trivially infringes on the associational rights of the New Party:

> Minnesota's laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the Party's access to the ballot. They are silent on parties' internal structure, governance, and policymaking. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the Party's nominee 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. They also limit, slightly, the Party's ability to send a message to the voters and to its preferred candidates.

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[14] The New Party lost in Swamp v. Kennedy, 950 F.2d 383 (7th Cir. 1991), but Judges Posner, Easterbrook, and Ripple offered a sharp and powerful dissent to a petition for rehearing en banc. See Swamp, 950 F.2d at 388-89.

Timmons, 520 U.S. at 363.[15]

The Timmons Court found at least three regulatory interests "sufficiently weighty" to justify the ban: (1) an interest in preventing "a candidate or party . . . [from] exploit[ing] fusion as a way of associating his or its name with popular slogans and catchphrases," id. at 365; (2) an interest in preventing "minor parties [from] . . . capitaliz[ing] on the popularity of another party's candidate, rather than on their own appeal to voters, in order to secure access to the ballot," id.; and (3) "a strong interest to the stability of their political system" which justifies their enacting "reasonable election administration that may, in practice, favor the traditional two-party system," id. at 367.[16]

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[15] Justice Stevens, joined in dissent by Justices Souter and Ginsburg, disagreed that Minnesota's statute imposed only a minor burden on associational rights, that the statute served a significant interest in avoiding ballot manipulation and factionalism, and that the interest in preserving the two-party system justified the imposition of the burden. Id. at 371. Justice Stevens unequivocally declared that the members of a political party "have a constitutional right to select their nominee for public office, and to communicate the identity of their nominees to the voting public. Both the right to choose and the right to advise voters of that choice are entitled to the highest respect." Id.

After observing that "Fiorello LaGuardia, Earl Warren, Ronald Reagan, and Franklin D. Roosevelt are names that come readily to mind as candidates whose reputations and political careers were enhanced because they appeared on election ballots as fusion candidates," Justice Stevens noted:

> [E]ven accepting the majority's view that the burdens imposed by the law are not weighty, the State's asserted interests must at least bear some plausible relationship to the burdens it places on political parties. See Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). Although the Court today suggests that the State does not have to support its asserted justifications for the fusion ban with evidence that they have any empirical validity, *ante*, at [364], we have previously required more than a bare assertion that some particular state interest is served by a burdensome election requirement. See, e.g., Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 266 (1989).

Id. at 375 (emphasis added).

[16] The majority in Timmons noted that the "supposed interest" in avoiding voter confusion played a role in decisions by lower federal courts, but "it plays no part in our analysis." Id. at 370

Shortly after Timmons was announced, Richard Hasen, the distinguished election law expert, observed:

> It is difficult to accept the first or second of these arguments as "sufficiently" weighty to overcome even a minor burden on the New Party's associational right. As for the first interest, reasonable ballot access laws can prevent the formation of many sham parties, and the Court expressly denied that it was relying on any "alleged paternalistic interest in 'avoiding voter confusion.'" The second argument quickly disappears upon understanding that the state could simply list candidates on the ballots once under each party and then count only the votes cast for the candidate under the minor party label to meet that minor party's ballot access requirements.

Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Competition*, 1997 S. CT. REV. 331, 339 (1997).[17]

This left only the Court's manufactured interest in banning fusion to "favor the traditional two-party system" and thereby guard "the stability of their political system." We use the term "manufactured" because Minnesota never in fact asserted this interest. In its briefs to the Court, it made no reference to the "two-party system" or "political stability," proffered no argument that the former promotes the latter, and never suggested that preserving the system offered a rationale for its anti-fusion ban. When pressed on the matter at oral argument, the State explicitly and

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n. 13. In the present case, the record before the Secretary affirmatively establishes that none of the interests asserted by various states in prior cases as a justification for laws banning fusion is supported by any empirical evidence. As ample evidence from New York and Connecticut demonstrates, where fusion is permitted and widely used, fusion voting does not result in voter confusion, overcrowded ballots, electoral distortions, ballot manipulations, reduced candidate competition, or political instability. (See, e.g., Faraji Cert.; Waggner Cert.; Albis Cert.; Sokolovic Cert.; Rapoport Cert.; Lander Cert.; Telesca Cert.; Lipton Cert; Dittus Cert.). Indeed, it is clear that New York and Connecticut have robust and stable two-party systems while embracing fusion voting for decades—which, by creating space for the functioning of minor parties in the electoral process, enhance the respective democracies in both states.

[17] Note that Professor Hasen's suggested solution to the second concern raised by the Court is precisely what happens in New Jersey's neighboring state of New York, where fusion has had a long and successful history.

rightly disavowed this as an impermissible rationale. Timmons, Tr. of Oral Arg. at 26. The majority, without calling attention to this fact, simply invented this supposed state interest.

This was, to be sure, anomalous behavior from the Court. As Justice Stevens observed in dissent:

> Our opinions have been explicit in their willingness to consider only the particular interests put forward by a State to support laws that impose any sort of burden on First Amendment rights. See Anderson [v. Celebrezze], 460 U.S., at 789 (the Court will "identify and evaluate the precise interests put forward by the State as justifications for the burden impose by the rule"); *id.*, at 817 (Rehnquist, J., dissenting) (state laws that burden First Amendment right are upheld when they are "'tied to a particularized legitimate purpose'") (quoting Rosario v. Rockefeller, 410 U.S. 752, 762 (1973); Burdick [v. Takushi], 504 U.S., at 434.

Timmons, 520 U.S. at 378.

This was not the only way Timmons departed from both norms of the Court and its prior decisions—the Court required *zero* evidence supporting state interests in burdening a fundamental right and in the process ignored a half-century of cases that clarified the associational rights of minor parties and required federal courts to make a searching inquiry into state rationales for burdening those rights.

For the first time, the Court held that a state law burdening core First Amendment freedoms can be successfully defended simply by pointing to its alleged promotion of the two-party system. The Chief Justice made no detailed argument for any part of this extraordinary proposition. He merely asserted it, citing as authority similar assertions by colleagues past and present in concurrences and dissents that never garnered a majority of the Court:

> The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system. See Rutan v. Republican Party of Ill., 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) ("The stabilizing effects of such a [two-party] system are obvious"); Davis v. Bandemer, 478 U.S. 109, 144-145 (1986) (O'Connor, J., concurring) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and

> effective government."); Branti v. Finkel, 445 U.S. 507, 532 (1980) (Powell, J., dissenting) ("Broad-based political parties supply an essential coherence and flexibility to the American political scene."). And while an interest in securing the perceived benefits of a stable two-party system will not justify unreasonably exclusionary restrictions, see Williams, 393 U.S. at 31-32, States need not remove all of the many hurdles third parties face in the American political arena today.

Timmons, 520 U.S. at 367. As we explain below, these vague references to purported salutary effects of two-party system do not withstand meaningful scrutiny. Not in 1997, and even less so today. (See Wolfe Cert.; Drutman Cert.; Malinowski Cert.).

Moreover, Chief Justice Rehnquist ignored the distinction, made famous by Williams v. Rhodes, 393 U.S. 23 (1968), between a two-party system, with two parties holding effective duopoly over government power, and the present two parties and their member officeholders, who might reasonably be assumed to have more particular and self-serving interests. In Williams, the Court struck down, on the eve of the tumultuous national election, a raft of burdensome Ohio ballot access requirements, which the state had justified on the exact grounds that the Timmons majority would later endorse—that such requirements would "promote a two-party system in order to encourage compromise and political stability." Id. at 31-32. Writing for the Court, and responding directly to the adequacy of those grounds, Justice Black brought a real-world perspective to bear on this system, and the motives of the actors within it, that would be entirely lacking from the analysis in Timmons:

> The fact is, however, that the Ohio system does not merely favor a "two-party system"; it favors two particular parties -- the Republicans and the Democrats -- and in effect tends to give them a complete monopoly. *There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms*. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.

Id. at 32 (emphasis added).

In the context of Timmons, Minnesota's fusion ban, or like bans elsewhere, are not an assertion that two-party systems are desirable, but instead that a particular Democratic, or Republican, or Democratic-Republican system *should forever be protected* from the threat some other party or parties will replace them. Under the Court's pre-Timmons analysis of the U.S. Constitution, such an assertion would have been quickly rejected.

3. Cases since Timmons have prioritized political speech and association rights

In the quarter-century since it decided Timmons, the Supreme Court's analysis of political speech rights and association casts doubt the viability of Timmons. Just a few years after Timmons declared that depriving a political party of the right to choose its standard-bearer was not a severe infringement on the right to association, the Court in California Democratic Party v. Jones (CDP), 530 U.S. 567 (2000), struck down California's Proposition 198. The Court held that the Proposition's requirement that parties conduct a blanket primary deprived parties of the "ability to perform the 'basic function' of choosing their own leaders." Id. at 580. Justice Scalia concluded in his opinion for the Court that the burden placed on the right of political association "is both severe and unnecessary." Id. at 586. It is difficult to square Timmons with the principle announced in CDP.

McCutcheon v. FEC, 572 U.S. 185 (2014), while a different context, is also indicative of how the Court considers these issues. There, the Court observed that the burden under the First Amendment requires a pragmatic and contextual understanding of the degree to which alternative means of effective participation are available. Id. at 205 ("The First Amendment burden is especially great for individuals who do not have ready access to alternative avenues for supporting their preferred politicians and policies."). Given that, it certainly cannot be a

legitimate objective to *unlevel* the playing field or *unlevel* electoral opportunities, especially by preventing the possibility of new political coalitions.

Randall v. Sorrell, 548 U.S. 230 (2006), suggests a fusion ban goes too far and actually *undermines* the interest in preserving a stable democratic system. There, the Court recognized that upholding limits on the electoral process intended to promote the integrity of the electoral process—in that case, contribution limits—could in fact "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders." Id. at 232. In contrast with Timmons, the Court in Randall recognized that "a statute that seeks to regulate campaign contributions could itself prove an obstacle to the very electoral fairness it seeks to promote." Id. at 249.

Over the past 25 years the Court has mapped a distinctly different approach than Timmons in cases concerning compelled speech. Repeatedly, the Court has taken a firm stance that the government may not compel individuals to speak a prescribed message, whether directly or as a condition to other protected conduct. See Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 47, 61 (2006) (underscoring that "First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say"); Janus v. AFSCME, 138 S. Ct. 2448, 2464 (2018) (among the ends of free speech is that it "is essential to our democratic form of government . . . . Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends."); National Institute of Family and Life Advocates v. Becerra, 585 U.S. __ (2018) (requirement that pregnancy center providers read a script written by the state constitutes is compelled speech in violation of the First Amendment). The principle announced by these cases—that the

Constitution prohibits the government from telling people what to say—is distinctly at odds from the conclusion in Timmons that a state may compel voters to support a major party in order to vote for their preferred candidate, or compel a political party to nominate a candidate who is its second or potentially even third preference.

In sum, Timmons not only broke radically from the Court's prior jurisprudence, but also remains entirely out of step with later decisions concerning political speech and association. As Chief Justice Roberts observed when concurring in Citizens United v. FEC, 558 U.S. 310, 378-79 (2010), "[a]brogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects."[18]

4. The insulation of a two-party system from competition by minor parties does not justify the burdens placed on associational and free speech rights by a ban on fusion voting

In Timmons, Chief Justice Rehnquist recognized that a State is not permitted to completely insulate the two-party system from minor party competition and influence. Nevertheless, he relied, in part, on the state's interest in enacting "reasonable election regulations, that may, in practice, favor the traditional two-party system . . . and that temper the destabilizing effects of party-splintering and excessive factionalism." Timmons, 520 U.S. at 367.

[18] In Working Families Party v. Commonwealth, the Supreme Court of Pennsylvania (in a 4-3 ruling) relied on Timmons in interpreting the right to association under the Pennsylvania Constitution. 653 Pa. 41, 65-69 (2019). The majority opinion failed to compare the relevant text of the Pennsylvania Constitution with that of the U.S. Constitution, or assess in any meaningful way whether the analysis of the U.S. Constitution by the majority in Timmons merited being treated as guidance in interpreting the state constitution. Id. Three justices dissented and persuasively explained why the state constitution prohibited the legislature from banning fusion, notwithstanding Timmons.

Significantly, as the Record in this case shows, fusion voting results in a *more* vibrant democratic electoral system and does not result in party-splintering or factionalism.[19]

Further, as the respected political scientist Lee Drutman makes clear in his Report (Drutman, Report; App. Schedule 8), the supposed Republican-Democratic two-party system held up by Justice Rehnquist was never really a system of two parties. Instead, for decades it had hidden within it a four-party system, including liberal Democrats, conservative Democrats, liberal Republicans, and conservative Republicans. During this time, each major party was in general neither particularly interested in, nor capable of delivering on, a coherent policy program. They thus lacked what the American Political Science Association's special Committee on Political Parties defined as requirements of an effective party system: "first, that the parties are able to bring forth programs to which they commit themselves and, second, that the parties possess sufficient internal cohesion to carry out these programs."[20] During this period, the two major parties didn't have much internal ideological cohesion, were constituency-based rather than programmatic, and were both big tents that covered members with a wildly heterogeneous and often very geographically specific set of cultural values and economic interests.

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[19] Rejecting the assertion that a fusion candidacy threatens to divide the legislature and create significant risks of factionalism, Justice Stevens' dissent in Timmons pointed to the benefits of fusion in strengthening democratic principles: "it . . . provide[s] a means by which voters with viewpoints not adequately represented by the platforms of the two major parties can indicate to a particular candidate that—in addition to his support for the major party views—he should be responsive to the views of the minor party whose support for him was demonstrated where political parties demonstrate support—on the ballot." 520 U.S. at 381 (Stevens, J., dissenting). See also Williams, 393 U.S. at 32.

[20] Committee on Political Parties, American Political Science Association, *Toward a More Responsible Two-Party System*," 44 AM. POL. SCI. REV. 1 (1950).

Together, these shared features served to blur sharp national differences between the parties and encourage all manner of joint ventures between and among different members and blocs. In prosperous postwar era free of major war, with the fruits of that prosperity relatively widely shared, the openness and activity of the hidden four-party system did maintain a certain hope and political peace, and thus institutional stability.

During the 25 years since the Court decided Timmons, circumstances have changed. Now, for the reasons Drutman indicates—sorting of voters by geography, demographics, and values; nationalization of media and politics; and extremely narrow overall partisan margins—the two major parties are much more internally homogenous and mutually distinct. This has rendered America's political culture hyper-partisan, and anything but stable. It is, of course, not good for government performance, national wellbeing and progress, or ordinary citizen life and happiness. Most Americans recognize this. And yet neither of the two major parties has any incentive to break the doom loop that their mutual distrust and ambition has put them in. See Lee Drutman, *Breaking the Two-Party Doom Loop: The Case for Multiparty Democracy in America* (2020).

New Jersey courts addressing anti-fusion laws in this hyper-polarized political environment should be reticent to rely on the supposed benefit of an exclusive two-party system to uphold the constitutionality of statutes that render the existence and growth of minor parties virtually impossible – particularly where no party other than the Democratic or Republican Party has obtained ballot status in New Jersey in the century since the anti-fusion laws were. New Jersey's current electoral system, having been crafted by two parties precisely to extinguish their rivals, has produced a dynamic that, aside from increasing hyper-partisanship to toxic levels, chiefly serves the interests of those parties, rather than the interests of the State's residents in a

democratic system that permits them to associate with political parties of their choosing and that affords those parties the "constitutional right to select their nominee for public office, and to communicate the identity of their nominees to the voting public," Timmons, 520 U.S. at 371 (Stevens, J., dissenting), even if that nominee is also the nominee of another party.

III. New Jersey's anti-fusion laws violate the State Constitution's guarantee of the right to vote

Unlike the Federal Constitution, New Jersey's State Constitution affirmatively grants the right to vote to qualified electors. See N.J. CONST., art. II, § 1, ¶ 3(a) ("Every citizen of the United States and of the county in which he claims his vote 30 days, next before the election, *shall be entitled to vote* for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people.") (emphasis added). Indeed, the New Jersey Supreme Court has recently affirmed that "[t]he right to vote holds an exalted position in our State Constitution." *In re Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," issued July 18, 2007*, 200 N.J. 283, 302 (N.J. 2009) (citing N.J. CONST., art. I, ¶ 2(a)). As discussed *supra*, voting is a powerfully expressive political act, and expressive political conduct is broadly protected under New Jersey law. But the New Jersey Constitution goes a step further by recognizing the *functional* dimension of political rights: the "political power . . . inherent in the people" includes the "right at all times to alter or reform the [government]." N.J. CONST., art. I, ¶ 2(a). It is difficult to conceive of a more patently violative example than the anti-fusion statutes, which enshrine the Democratic and Republican duopoly and make it impossible, in practice, for any other party to weaken (let alone dislodge) this hegemony. That a standalone minor party candidate can get on the ballot does not allow the people to "alter or reform" this two-party system, as proven by a century of elections in New Jersey and dozens of other states without fusion.

Moreover, early decisions issued by the Supreme Court of New Jersey in the wake of New Jersey's adoption of the Australian ballot provide persuasive authority as to why New Jersey's current prohibition on fusion voting violates the right of suffrage under the New Jersey Constitution. In 1911, the New Jersey Legislature passed the Geran Law, which was an expansive overhaul of New Jersey's election laws signed by Governor Woodrow Wilson. See L., 1911, c. 183. The Geran Law expressly provided for fusion voting, acknowledging that candidates could receive the nominations of multiple parties or groups of petitioners, and could appear on the ballot with such multiple designations. See Mongiello, at 1122 n.71 & accompanying text.

Shortly after passage of the Geran Law, the Supreme Court of New Jersey, then the intermediate appellate court in the state, had occasion to opine on the constitutionality of prohibiting candidates from appearing on the ballot as the nominee of multiple parties or groups of petitioners, in what is perhaps one of the most direct cases in New Jersey addressing fusion and concomitant rights under the New Jersey State Constitution. See In re City Clerk of Paterson, 36 N.J.L.J. 298, 88 A. 694 (N.J. Sup. Ct. 1913). In that case, the Court was presented with a 1907 law which prohibited petitioners from nominating a candidate that was not a member of their own party. Id. at 694-95. At the same time, the Court acknowledged that the 1911 Geran Law provided for the ability of parties or groups of petitioners to nominate candidates who might be nominated by another party or group of petitioners. Id. at 695. Thus, to the extent that the 1907 law was incompatible with the 1911 Geran Law, the Court held that the later-enacted Geran Law superseded the 1907 law. Id.

Chief Justice Gummere then proceeded to opine that even if the Geran Law was never passed and the 1907 law were to still be in effect, its provisions still could not be implemented.

Id. The court stated that "[t]he right of suffrage is a constitutional right," and while the Legislature generally could pass laws to ensure ballot integrity, "the Legislature has no right to pass a law which in any way infringes upon the right of voters to select as their candidate for office any person who is qualified to hold that office." Id. The Court recognized that a few years prior, when candidates were nominated by convention, rather than through a direct primary by the voters, it would have been unthinkable that the Legislature had the power to limit the choice to members of its own party, and the fact that New Jersey now has a direct primary where candidates are nominated directly by voters should not change anything related to "the right of voters to be untrammeled in the selection of their candidates for office." Id. Indeed, Chief Justice Gummere held that "[t]he Legislature may change the method of selection; but it cannot abridge the right of selection." Id.

Thus, the Court expressed "at least very grave doubts of the power of the Legislature to dictate to the people of the state who shall be their choice, either as a candidate for nomination or as a candidate for election." Id. In further expressing his doubts, Chief Justice Gummere clarified that what was at stake was an "infringe[ment of] a constitutional right of the voters to have a free and untrammeled expression of their choice of who shall be the officer to serve them in the capacity for which they elect such officer, for, of course, the nominating of a candidate is a mere step in the selection of the officer." Id. at 696. Having acknowledged the beneficial election reforms of the Geran Law, the Court stated that if it accepted the position of the City Clerk, "it certainly would be a step backward to say that a political party shall not select a good man for its

candidate, perhaps a better man than they have in their own ranks, because he does not wear its style of political garment." Id.[21]

Recalling further the tests of State v. Hunt, 91 N.J. 338, 363-68 (1982) (Handler, J. concurring), for deviating from interpretations of the federal constitution to find rights under the State constitution, New Jersey jurisprudence and history in tutelage of the right to vote has continued well after City Clerk of Paterson. To the voting cases previously discussed in this brief, other cases likewise show an unbroken and robust series of decisions announcing broad constitutional voting rights or construing election statutes in a way that promotes voter choice. E.g., Gangemi v. Rosengard, 44 N.J. 166, 168, 170 (1965) ("right to vote [is] assured by our State Constitution," is "among our great values," and holds an "exalted position"); Worden v. Mercer Cnty. Bd. of Elections, 61 N.J. 325, 346 (1972) (using "compelling state interest" to assess state law restrictions on college students registering and voting in light of the newly passed 26th Amendment); Smith v. Penta, 81 N.J. 65, 73 (1979) (noting the "State constitutional right to vote, secured by Article II, s 3"); New Jersey Democratic Party, Inc. v. Samson, 175 N.J. 178, 186 (2002) (stating that a voter has "fundamental right to exercise the franchise" and construing candidate-replacement statutes to promote voter choice).

Considering that New Jersey has a textual right to vote, reinforced structurally in several different provisions of the State Constitution, state traditions of interpreting constitutional and

[21] Unlike cases such as Stevenson v. Gilfert, 13 N.J. 496 (1953) and its progeny, Paterson was an early, robust indication of the Court's awareness of the implications of a ban on fusion voting as it related to the right of suffrage protected by the New Jersey State Constitution. In asserting that constraints on the ability of citizens (and their chosen political party) to advance their preferred standard-bearer strike at the very heart of the right of suffrage, the Court recognized that the right of suffrage included an untrammeled right of a party to select the candidate of its choice to appear on the ballot. Its reasoning should carry persuasive weight and is directly applicable to the matter at hand.

election law in furtherance of voters' rights, and public attitudes manifesting a continuing dissatisfaction with the existing laws regulating parties, the anti-fusion statutes cannot be permitted to stand.

IV. New Jersey's anti-fusion laws violate the State Constitution's guarantee of equal protection

The right of a non-statutory political party to nominate a candidate of its choice and the ability of voters to vote for that candidate on that party's own line of the general election ballot find further support in other provisions of the New Jersey Constitution and thus warrants even further protection when considered alongside the broad free speech and associational rights protected therein. Among others, the rights of equal protection, substantive due process and procedural due process implicit in Article I, ¶ 1, particularly in the voting and election context, are often construed alongside free speech and associational rights and further protect the right to equal treatment among those who are similarly situated. New Jersey's anti-fusion "regulations . . . plainly impose asymmetrical burdens on voters and parties based upon nothing more than numerosity and relative popularity—which in part are determined by a self-reinforcing system in which political power begets more political power to the manifest exclusion of marginal and minority political coalitions and dissenting perspectives." Commonwealth, supra, at 305 (Wecht, J., dissenting); cf. Mongiello, supra, at 1125 n.85 (noting that on Election Day in 2009, a plurality of 45% of registered voters registered as unaffiliated, as compared with 34% and 20% who registered with the Democratic and Republican Parties, respectively). Equal protection is incompatible with "statutes that so entrench power in major parties to the exclusion of minor parties." Id.; see also Reform Party, supra at 312-18. Indeed, it was precisely for this reason that New York has enjoyed legalized fusion for over a hundred years; in 1911, New

York's highest court struck down the legislature's fusion ban for violating the state constitutional guarantee of equal protection. Matter of Hopper v. Britt, 203 N.Y. 144 (N.Y. 1911).

V. New Jersey must permit "disaggregated" fusion voting to comply with the State Constitution

In both New York and Connecticut, fusion voting is "disaggregated," meaning that when a voter casts a vote for a cross-endorsed candidate, the ballot requires that the voter do so on one or the other nominating party's ballot lines; each party's vote tally for that candidate is separately tallied, and then each party's sum is combined to calculate the total vote count for the candidate. This process permits voters to unambiguously specify which nominating party they want to support and allows for a clear understanding of how each nominating party contributed to a candidate's overall importance. New Jersey's existing anti-fusion framework must be replaced with a disaggregated regime.

Why? Because the alternative, known as "aggregated" fusion, would itself violate the State Constitution. Aggregated fusion is where more than one political party is permitted to nominate the candidate on the ballot, but the nominating parties are simply listed next to the candidate's name, preventing a voter from specifying which of the nominating parties warranted the vote. Without any ability to specify which nominating party on the ballot they support, a voter is barred from meaningfully associating with his political party and is at the same time *compelled* to associate with *all* nominating parties in order to cast a vote for the candidate, in clear violation of associational freedoms. Further, because aggregated fusion makes it impossible to separately count the votes received by each party, a minor party cross-endorsing candidates could *never* achieve ballot qualified status in New Jersey, given that the only way to do so is by meeting the 10% threshold in assembly elections. By forcing minor parties to instead run

(doomed) standalone candidates to pursue ballot qualified status, any right to cross-endorse would be illusory.

Any remedial order by the New Jersey courts should specify that the re-introduction of fusion into New Jersey elections must be in the disaggregated form. If not, there is a substantial risk that the state legislature would adopt an aggregated system, precisely because it would largely perpetuate the status quo while superficially complying with a command to adopt "fusion." This concern isn't speculative—the Minnesota state legislature took precisely this step after the Seventh Circuit struck down Minnesota's anti-fusion statutes with an opinion that did not expressly require a disaggregated remedy. See LISA JANE DISCH, THE TYRANNY OF THE TWO-PARTY SYSTEM, 23-24 (2002).

CONCLUSION

For the reasons stated in this Memorandum of Law the New Jersey courts should find that State's anti-fusion statutes violate the New Jersey Constitution.

Respectfully submitted,

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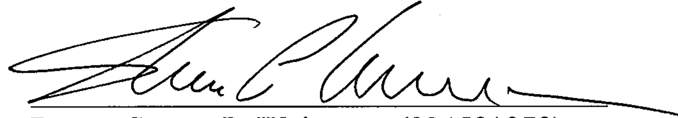

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