New Jersey Judiciary
Superior Court - Appellate Division
NOTICE OF MOTION

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DOCKET NO: **A-003542-21**

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7

Notice of Motion:

MOTION TO APPEAR AS AMICUS CURIAE AND PARTICIPATE IN ORAL ARGUMENT

PLEASE TAKE NOTICE that the undersigned hereby moves before the Superior Court of New Jersey, Appellate Division, for an Order granting the above relief:

In support of this motion, I shall rely on the accompanying brief or certification.

I hereby certify that I am submitting the original of this notice of motion and accompanying brief or certification to the Clerk of the Appellate Division, and submitting same upon my adversary by email notification. If delivery by non-electronic means, two copies of same will be served upon the following:

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Trial Court Judge name:

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	DOCKET NO. A-3542-21T2 CIVIL ACTION On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	DOCKET NO. A-3543-21T2 CIVIL ACTION On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)

CERTIFICATION OF LIZA WEISBERG

I, Liza Weisberg, hereby certify the following:

1. I am an attorney admitted to practice law in the State of New Jersey and I am employed as a Staff Attorney at the American Civil Liberties

Union of New Jersey Foundation, the legal arm of the American Civil Liberties Union of New Jersey ("ACLU-NJ").

2. I make this certification in support of the ACLU-NJ's motion for leave to file a brief and to participate in oral argument in the above-captioned matter in an *amicus curiae* capacity. I have personal knowledge of the facts set forth herein.

3. For over 60 years, the ACLU-NJ has defended liberty and justice, guided by the vision of a fair and equitable New Jersey for all. Our mission is to preserve, advance, and extend the individual rights and liberties guaranteed to every New Jerseyan by the State and Federal Constitutions in courts, in legislative bodies, and in our communities.

4. Founded in 1960 and based in Newark, the ACLU-NJ is a non-partisan organization that operates on several fronts – legal, political, cultural – to bring about systemic change and build a more equitable society. The ACLU-NJ has approximately 41,000 members and tens of thousands of additional supporters in New Jersey and is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of more than 1,750,000 members and supporters nationwide.

5. The ACLU-NJ has participated in a wide variety of cases, directly representing parties or in an *amicus curiae* capacity, involving election law

and voting rights issues. *See, e.g.*, *Correa v. Grossi*, 458 N.J. Super. 571 (App. Div. 2019); *Save Camden Pub. Sch. v. Camden City Bd. of Educ*., 454 N.J. Super. 478 (App. Div. 2018); *Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elections*, 446 N.J. Super. 221 (App. Div. 2016); *Tumpson v. Farina*, 218 N.J. 450 (2014); *In re State Bd. of Educ.'s Denial of Petition to Adopt Reguls. Implementing N.J. High Sch. Voter Registration Law*, 422 N.J. Super. 521 (App. Div. 2011); *In re November 2, 2010 Gen. Election for Off. of Mayor in Borough of S. Amboy, Middlesex Cnty*., 423 N.J. Super. 190 (App. Div. 2011); *In re Att'y Gen.'s "Directive on Exit Polling: Media & Non-Partisan Pub. Interest Groups,"* 200 N.J. 283 (2009); *N.J. State Conference-NAACP v. Harvey*, 381 N.J. Super. 155 (App. Div. 2005); *Petition of Byron*, 170 N.J. Super. 410 (App. Div. 1979).

6. The special interest and the expertise of the ACLU-NJ in this area of the law are substantial. I respectfully submit that the participation of ACLU-NJ as *amicus curiae* will assist the court in the resolution of the significant issues of public importance implicated by this appeal. *R.* 1:13-9.

I hereby certify that the foregoing statements made by me are true. I am aware that is any of the foregoing statements are willfully false, I am subject to punishment.

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	DOCKET NO. A-3542-21T2 CIVIL ACTION On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
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BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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PRELIMINARY STATEMENT

New Jersey's state constitutional tradition has carefully tended the balance of personal freedom against bureaucratic power. Through its attention to evolving needs and notions of citizenship, the New Jersey Supreme Court has shaped a body of rights that command stronger protections than their counterparts in federal law. New Jersey's prohibition on fusion voting is inconsistent with those rights and violates the New Jersey Constitution.

Fusion voting enables a candidate to accept the nomination of more than one political party—typically, the Republican or Democratic Party ("major" parties) and a "minor" party such as the Moderate Party. The candidate then appears on the ballot under the banner of both the major and minor party, and the parties' votes are combined to determine the candidate's count. Thus, voters may register their support for a minor party aligned with their values while influencing the race by voting for a cross-nominated major-party candidate who has a realistic chance of winning. Fusion voting was a successful practice in New Jersey and across the country throughout the late nineteenth and early twentieth centuries, until a wave of fusion bans aimed at entrenching the major-party duopoly swept the states. Fusion voting suffered another blow when the U.S. Supreme Court upheld Minnesota's ban in *Timmons v. Twin Cities Area New Party* in 1997.

But the New Jersey Constitution dictates a different result here. New Jersey's anti-fusion laws violate the right to vote as conceived and secured by the state constitution. New Jersey courts have long recognized that the right to vote encompasses not just the right to mark a ballot, but the right to freely choose for whom to vote and to make one's choice meaningful and effective. Anti-fusion laws impermissibly undermine that right.

Likewise, free speech and association rights enjoy greater protection under the New Jersey Constitution than under the federal constitution. Anti-fusion laws are a direct assault on political expression, which sits at the apex of those rights. The anti-fusion laws inhibit minor parties from nominating their preferred standard-bearers and minor-party voters from conveying support for their party at the polls.

Timmons, decided on First Amendment grounds, offers no safe harbor for New Jersey's fusion ban. The New Jersey Constitution is an independent source of individual liberties. This Court should treat it as the charter of first resort, without regard to the narrower scope of cognate federal constitutional provisions. Relatedly, in decisions like *Timmons*, the U.S. Supreme Court tends to underenforce the federal constitution out of deference to the states; a "primacy" approach to state constitutional interpretation avoids improperly importing that deference into state constitutional doctrine. In short, *Timmons* is

a highly unreliable guide to the resolution of the questions presented here, which turn on the robust protections unique to the rights established by the New Jersey Constitution.

To ensure the health of New Jersey's democracy and to honor our state's constitutional tradition, this Court must reject the ban on fusion voting.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus curiae accepts and incorporates the statement of facts and procedural history recited in Appellants' briefing.

ARGUMENT

I. Anti-fusion laws violate the right to vote under the New Jersey Constitution.

A. The New Jersey Constitution confers a positive right to vote that is different in kind from the federal right and warrants stronger protection.

The New Jersey Constitution enshrines an affirmative right to vote. *N.J. Const.* art. II, § 1, ¶ 3(a). Indeed, it devotes an entire article to elections and suffrage. *See generally N.J. Const.* art. II. In contrast to the "exalted position" the right to vote occupies in our state constitution, *In re Att'y Gen.'s "Directive on Exit Polling: Media & Non-Partisan Pub. Int. Grps.," issued July 18, 2007*, 200 N.J. 283, 302 (2009), the federal constitution expresses the

right only by negative implication.[1] These structural differences coincide with divergent standards for the protection of the franchise under state and federal law.

In the absence of an explicit right to vote in the text of the federal constitution, the U.S. Supreme Court has located the right in the Fourteenth Amendment's Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98, 105 (2000); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). In turn, the Court has analyzed limitations on that right according to a balancing test informed by equal protection principles. Broadly, the *Anderson-Burdick* test, as it is known, constrains laws that treat one group of voters differently from others. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202-04 (2008) (approving Indiana's strict photo ID law as "nondiscriminatory" and supported

[1] The federal constitution makes seven references to the right to vote, but nowhere articulates it in affirmative terms. *See U.S. Const.* art. I, § 2 ("Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); *id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years ...."); *id.* amend. XIV (penalizing states with a reduction in representation if they deny or abridge the right of male citizens to vote); *id.* amend. XV (prohibiting denial of the right to vote based on race); *id.* amend. XIX (prohibiting denial of the right to vote based on sex); *id.* amend. XXIV (prohibiting denial of the right to vote based on inability to pay a poll tax); *id.* amend. XXVI (prohibiting denial of the right to vote based on age); *see* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 95–97 (2014).

by "valid neutral justifications"). Courts first ask whether the law imposes a severe burden on voters. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). If so, the court applies strict scrutiny. *Burdick*, 502 U.S. at 433-34. Otherwise, the court balances the burden against the state's interests. *Id.* If the state's interests outweigh the burden on voting, the law is valid. *Id.* Because the *Anderson-Burdick* standard can forgive impediments that stop short of "severely" burdening electoral participation, it underenforces the federal right to vote.

Even if the New Jersey Constitution did not contain a freestanding right to vote, it would strain logic to apply a standard rooted in federal equal protection principles to voting cases under the state constitution. Federalism considerations counsel caution against too harshly applying Fourteenth Amendment principles to disrupt state lawmaking; thus, state regulations that are facially nondiscriminatory and that do not impose a severe burden on a fundamental right survive minimal scrutiny under federal equal protection doctrine, even at the cost of important individual interests. Principles of federalism are irrelevant, however, when a state is applying its own constitution.

Partly for that reason, New Jersey has rejected the rigid tiered scrutiny approach commonly applied in federal equal protection analysis, and instead

uses a more flexible test that weighs three factors: (1) the nature of the right asserted; (2) the extent to which the statute intrudes upon that right; and (3) the public need for the intrusion. *State v. O'Hagen*, 189 N.J. 140, 164 (2007); *Sojourner A. v. N.J. Dep't of Human Servs.*, 177 N.J. 318, 333 (2003). Under this approach, the reach of the state constitution is broader than its federal counterpart. *See Greenberg v. Kimmelman*, 99 N.J. 552, 567 (1985); *Doe v. Poritz*, 142 N.J. 1, 94 (1995).

Thus, in assessing the first factor, where "an important personal right is affected by governmental action, [our] Court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal constitution." *Right to Choose v. Byrne*, 91 N.J. 287, 309 (1982). And in weighing the state's purported justification for impinging on that right, "the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial." *Sojourner A.,* 177 N.J. at 333 (quoting *Robinson v. Cahill*, 62 N.J. 473, 492 (1973)). Under New Jersey's constitutional methodology, it is not enough that the State articulate a plausible justification for the restriction; it must produce concrete evidence that the restriction is necessary. *See, e.g.*, *Lewis v. Harris*, 188 N.J. 415, 457 (2006).

Baked into the *Anderson-Burdick* test are some of the same features that make federal equal protection standards a poor fit for assessing state constitutional equal protection claims and that motivate stronger equal protection safeguards under the New Jersey Constitution.

In addition to its indirect source of constitutional authority, which gives rise to the too-lenient, equal-protection-derived *Anderson-Burdick* framework, the federal right to vote is dimmed by textually and historically compelled deference to state laws and protections. The U.S. Constitution delegates to the states the duty to define voter eligibility. *U.S. Const.* art. I, § 2, cl. 1 (for elections to the House of Representatives, "electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature"); *id.* amend. XVII (adopting the same test for Senate elections). It likewise gives states primary responsibility for determining the times, places, and manner of holding elections. *U.S. Const.* art. I, § 4, cl. 1. And the ratifiers fashioned these provisions decades after state constitutions affirmatively granted the right to vote to their residents. Douglas, *The Right to Vote Under State Constitutions* at 125. Thus, the federal constitution's comparatively reticent relationship with voting rights may stem from the founders' expectation that state courts would be the principal fora for adjudicating the

legality of election rules based on the voting rights emanating from state constitutions.

This expectation has been largely realized in New Jersey. Because the New Jersey Constitution provides an express and freestanding right to vote, the New Jersey Supreme Court has not struggled to recognize that restrictions on that right must satisfy strict scrutiny. Adopting the standard "in its broadest aspects," the New Jersey Supreme Court stated in its landmark *Worden v. Mercer County Board of Elections* decision that voting restrictions "must be stricken unless a compelling state interest to justify the restriction is shown." 61 N.J. 325, 346 (1972); *see In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp.*, 331 N.J. Super. 31, 38 (App. Div. 2000) ("As with all fundamental rights, there can be no interference with an individual's right to vote" unless the interference can withstand strict scrutiny review).[2]

[2] The Appellate Division departed from this precedent in an anomalous 2016 decision, choosing to apply an *Anderson-Burdick* balancing test to determine the constitutionality of New Jersey's advance registration requirement under N.J.S.A. 19:31-6.3(b). *Rutgers Univ. Student Assembly (RUSA) v. Middlesex Cnty. Bd. of Elections*, 446 N.J. Super. 221, 234 (App. Div. 2016). The *RUSA* panel reasoned that the balancing test was appropriate because the advance registration requirement is uniform, whereas the challenged regulations in *Worden* treated similarly situated voters differently. *Id.* This distinction is illogical and merits no weight here. As discussed above, *Anderson-Burdick* is rooted in the Equal Protection Clause and equality-oriented claims. Had the Supreme Court seen fit to integrate the test into our state constitutional jurisprudence, *Worden* would have provided a ready fit. What's more, the

In addition to commanding stronger protection than its federal counterpart, the right to vote secured by the New Jersey Constitution is substantively broader. Indeed, its prominent and positive articulation in our state constitution underpins a singularly robust "democracy canon" of statutory construction, which requires courts to construe laws liberally to effectuate the overriding public policy in favor of voter enfranchisement. *See Afran v. Cnty. of Somerset*, 244 N.J. Super. 229, 232-35 (App. Div. 1990) (interpreting durational residency requirements to permit a voter who moves within 30 days of an election to vote provisionally in the last district where they were registered because "the State Constitution speaks to enfranchisement, not disenfranchisement"). "This canon of construction is indeed so critical to the preservation of our democratic institutions that it has been applied to the state constitution itself." *Id.* at 232 (citing *Gangemi v. Berry*, 25 N.J. 1, 12 (1957)). As a result, "the evolution of the organic law of this State has taken an undeviating path towards liberalization of the voting right." *Id.*

Worden Court applied strict scrutiny not because the case concerned the disparate treatment of certain voting groups, but because "the right to vote is a very fundamental one, [and thus] restrictions thereon may be imposed only to the extent necessary to promote 'a compelling state interest.'" *Worden*, 61 N.J. at 334. The *RUSA* panel, in inventing a doctrinal fork where none was suggested or supported, failed to explain why a law burdening all eligible voters should face a less demanding test than a law burdening some. This Court should find no persuasive value in the *RUSA* decision.

B. The right to vote under the New Jersey Constitution encompasses the right to exercise the franchise effectively, and anti-fusion laws contravene that right.

Anti-fusion laws offend the expansive right to vote conferred by the New Jersey Constitution. They do so in two ways: (1) by limiting voters' right to choose for whom to vote and (2) by diminishing the power of a minor-party voter's ballot.

Choice is foundational to the franchise right. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Wurtzel v. Falcey*, 69 N.J. 401, 409 (1976) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)); *see Gangemi v. Rosengard*, 44 N.J. 166, 170 (1965) ("[T]he right to vote would be empty indeed if it did not include the right of choice for whom to vote."); *Alston v. Mays*, 152 N.J. Super. 509, 517-18 (Law. Div. 1977) ("It is not the right to vote which is the underpinning of our democratic process; rather, it is the right of choice for whom to vote."); *Matthews v. City of Atl. City*, 84 N.J. 153, 162 (1980) ("In general, an individual's freedom of choice in exercising his franchise is a fundamentally important interest."); *N.J. Democratic Party v. Samson*, 175 N.J. 178, 187 (2002) ("The right of choice as integral to the franchise itself . . . is grounded in the core values of the democratic system . . . .").

Under a fusion ban, that choice is largely illusory for minor-party voters. In 1913, the old Supreme Court of New Jersey—the trial court of general jurisdiction at the time—recognized as much. Reviewing New Jersey's 1907 anti-fusion law, the Court described the "right of suffrage" as "the right of a man to vote for whom he pleases," and announced that "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." *In re City Clerk of Paterson*, 88 A. 694, 36 N.J.L.J. 298 (N.J. Sup. Ct. 1913) (described in *George v. Gillespie*, 40 N.J. Super. 139, 144-45 (App. Div. 1956)). This *Paterson* case, which remains good law[3] and speaks squarely to the issues in the present appeal, recognized that the right to choose one's representative arises well before one marks a ballot; it emerges first when candidates are arrayed in party lines on that ballot by virtue of nomination, "for, of course, the nominating of a candidate is a mere step in the selection of the officer." *Id*. at 696. The Court expressed "very grave doubts of the power

[3] Courts continued to cite *Paterson* as a source of authority even after the ratification of the 1947 New Jersey Constitution. *See*, e.g., *Wurtzel*, 69 N.J. at 409; *Rosengard*, 44 N.J. at 170; *Stevenson v. Gilfert*, 13 N.J. 496, 503 (1953); *Gansz v. Johnson*, 9 N.J. Super. 565, 568 (Law. Div. 1950); *Brower v. Gray*, 5 N.J. Super. 145, 148 (App. Div. 1949).

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.* at 695.

Relatedly, the right to vote encompasses the right to influence the political process in two key respects: by having a say in the winner of an election and by having a say in how the winner will govern. In other words, elections are not only contests, but also mandates. The New Jersey Constitution affirms that "[a]ll political power is inherent in the people" and grants them "the right at all times to alter or reform" the government. *N.J. Const.* art. I, ¶ 2. New Jersey's anti-fusion laws sap that power by forcing members of minor parties to surrender one of the twin properties that together comprise a meaningful franchise right. Under the fusion ban, minor-party voters may either cast a symbolic vote for a minor-party candidate with no reasonable hope of prevailing or back a major-party candidate and thereby reinforce a political mandate with which the voters may strenuously disagree. Either option—quixotic self-expression or shallow electoral pragmatism—provides voters less than an effective ballot, and less than the right to vote.

C. New Jersey's anti-fusion laws are unsupported by compelling justifications.

Because New Jersey's fusion ban infringes on the state constitution's suffrage right, and because burdens on that right are subject to the most exacting scrutiny, the State must proffer a compelling interest for the ban and

demonstrate that the ban is narrowly tailored to serve it. *See Worden*, 61 N.J. at 346. As the record marshalled by the Petitioners amply proves, the State's justifications for the fusion ban are unconvincing and could be realized by far less restrictive means.

Ballot exploitation is a favored bogeyman of fusion opponents. With fusion voting, it is said, candidates will be able to associate with the slogans and catchphrases of any number of dummy parties, rendering the ballot a "billboard for political advertising." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365 (1997). If this came to pass—and there is no evidence that it would—the New Jersey Legislature could easily curb dummy parties by increasing the number of petition signatures required to earn a place on the ballot. As the *Timmons* Court recognized, this solution is an example of narrow tailoring. *Id.* (accepting Minnesota's ballot-exploitation justification for its fusion ban because "the State need not narrowly tailor the means it chooses to promote ballot integrity"). Although the U.S. Supreme Court excused Minnesota from performing any narrow tailoring, New Jersey's constitution does not afford the state that same latitude and, under strict scrutiny, the avoidance of ballot exploitation is an insufficient interest to justify injury to the right to vote.

Preventing voter confusion is another insincere and meritless justification for prohibiting fusion voting. Even the *Timmons* Court refused to credit it. *Id.* at 370 n. 13. Justice Stevens noted in dissent that the paternalistic concern over confusion "severely underestimates the intelligence of the typical voter." *Id*. at 375–76. But if fears about voter confusion were legitimate, considered ballot design and instructions would readily resolve them.

Preserving the two-party system is the dominant interest underlying New Jersey's anti-fusion laws, and while it carried the day in *Timmons,* 520 U.S. at 366–70, it should find no foothold in New Jersey constitutional law. New Jersey courts have viewed with great skepticism the notion that the State may promote a two-party system to encourage compromise and political stability. In *Council of Alternative Political Parties v. State*, the Appellate Division questioned the logic of *Timmons*, which treated minor parties "as synonymous with party splintering and excessive factionalism [leading] to political destabilization." 344 N.J. Super. 225, 236 (App. Div. 2001). "[S]ome students of minor or alternative parties," the panel wrote, "consider such parties an integral part of the political process" and "significant contributors to modern party development by forcing clarification of party platforms and the inevitable realignment of membership." *Id.*

Data and experience bear out the hypothesis that fusion voting is no threat to the two-party system. A two-party system, whether desirable or not, is the effectively inevitable result of "first-past-the-post" or "plurality" elections.[4] See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 Sup. Ct. Rev. 331, 366–68 (1997). As long as this election structure remains in place, the mechanics of voting will create strong pressure for no more than two major candidates to compete in a general election. *Id.*[5] Indeed, during the nineteenth century, when fusion voting was

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[4] In these elections, the winning candidate is the person who receives the most votes; the candidate need not earn a majority to win. Plurality systems normally depend on single-member districts and allow voters to indicate only one vote on their ballot. *See* Roberta A. Yard, *American Democracy and Minority Rule: How the United States Can Reform Its Electoral Process to Ensure "One Person, One Vote.,"* 42 Santa Clara L. Rev. 185, 193 (2001).

[5] The association between first-past-the-post or plurality voting and the two-party system is often referred to as "Duverger's Law," after influential political scientist Maurice Duverger. According to Duverger's Law, a first-past-the-post electoral system will naturally lead to the development of a two-party system by reason of a "mechanical" component and a "psychological" component. Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* 224 (Barbara & Robert North trans., Wiley 2d ed. 1961) (1954). "The mechanical component is the fact that third parties in a first-past-the-post system will be systematically underrepresented in the legislature relative to their proportion of the popular vote." *Id.* at 224-26. The psychological component proposes that "the electors soon realize that their votes are wasted if they continue to give them to the third party: whence their natural tendency to transfer their vote to the less evil of its two adversaries in

widespread, two major parties retained duopolistic political control. *See* Adam Morse & J.J. Gass, Brennan Ctr. for Just., *More Choices, More Voices: A Primer on Fusion* 8 (2006), https://www.brennancenter.org/our-work/research-reports/more-choices-more-voices-primer-fusion. In New York, where fusion voting has long flourished, elections overwhelmingly remain contests between Democrats and Republicans. *Id.*

Far from destabilizing the two-party system, fusion voting likely strengthens it. Minor parties typically choose to cross-endorse major-party candidates under fusion voting rather than fielding alternative candidates. Jeffrey Mongiello, *Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture*, 41 Seton Hall L. Rev. 1111, 1159 (2011). This solves the "spoiler" problem that often distorts the will of the electorate and undermines the major parties in non-fusion elections. *Id.*[6]

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order to prevent the success of the greater evil." *Id.* at 226; s*ee* Thomas Fujiwara, *A Regression Discontinuity Test of Strategic Voting and Duverger's Law*, 6 Q. J. Pol. Sci. 197, 203 (2011) (providing empirical validation for Duverger's Law).

[6] A "spoiler" is a non-winning candidate whose presence on the ballot affects the election outcome. Absent fusion voting, minor-party candidates can become "spoilers," siphoning votes from a major-party candidate with a similar platform and thereby costing that major-party candidate the election. *See* Elissa Berger, *A Party That Won't Spoil Minor Parties, State Constitutions and Fusion Voting*, 70 Brook. L. Rev. 1381, 1417 n. 3 (2005).

Similarly, fusion voting provides an outlet for political dissatisfaction, empowering voters to find expression through effective minor-party affiliation, rather than through spoiler campaigns or major-party in-fighting. *See id.* In other words, stronger minor parties make for stronger major parties.

None of the interests the State may advance in support of the fusion ban are suitably compelling to justify the burden it imposes on the right to vote.

II. Anti-fusion laws violate the rights to free speech and association under the New Jersey Constitution.

New Jersey's anti-fusion laws offend the speech and associational rights guaranteed by the New Jersey Constitution. Principles of judicial federalism counsel in favor of a broader reading of our state constitution. Text, history, precedent, and tradition also compel the conclusion that the New Jersey Constitution's right of free speech and association is stronger than the right against governmental abridgement of expression found in the First Amendment. These varied considerations make the *Timmons* decision, in which the U.S. Supreme Court held that Minnesota's fusion ban did not violate federal speech and associational rights, an unreliable source to inform the Court's analysis here.

A. A primacy approach to state constitutional interpretation is consistent with principles of judicial federalism and gives full effect to the New Jersey Constitution's independent free speech and association guarantees.

New Jersey courts sometimes look to a set of non-exhaustive factors first outlined in *State v. Hunt* to determine whether to construe the state constitution as giving rise to broader or stronger rights than the federal constitution. 91 N.J. 338, 358–68 (1982) (Handler, J., concurring); *State v. Williams*, 93 N.J. 39, 58 (1983) (adopting factors outlined by Justice Handler). Resort to the *Hunt* factors reflects an "interstitial" approach to state constitutional interpretation. Under an interstitial approach, courts examine relevant state constitutional provisions to decide if they offer reasons to depart from the presumptively appropriate federal standard. *See* Justin Long, *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41, 48 (2006). In this way, state constitutions operate in the gaps or "interstices" of the federal constitution, serving as a supplementary source of rights.

Although analysis of the *Hunt* factors compels the same result (*see* Point II, B, *infra*), this Court need not apply the *Hunt* factors to adopt a more expansive view of the New Jersey Constitution's free speech and association rights than the First Amendment supplied in *Timmons*. It can and should reach that end by taking a "primacy" approach instead.

Federal constitutional interpretation carries no presumptive validity under a primacy approach, and thus courts need not search for reasons to deviate from federal precedent. "There is no requirement for the New Jersey Supreme Court to ask when to diverge from federal precedent, and there is no need for such a requirement." Hon. Dennis J. Braithwaite*, An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 Rutgers L.J. 1, 25 (2001). Rather, "primacy courts focus on the state constitution as an independent source of rights, rely on it as the fundamental law, and do not address federal constitutional issues unless the state constitution does not provide the protection sought." Robert F. Utter & Sanford E. Pitler, *Speech, Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 Ind. L. Rev. 635, 645 (1987). At the core of the case for primacy are principles of judicial federalism.[7]

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[7] Justice William J. Brennan Jr. is credited with stimulating the "reemergence" of state constitutional law, often called the "New Judicial Federalism." Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of A State Constitutional Consciousness*, 29 Rutgers L.J. 763, 764 (1998). His famous 1977 Harvard Law Review article, *State Constitutions and the Protection of Individual Rights*, criticized the U.S. Supreme Court's willingness to condone violations of civil liberties in the name of "vague, undefined notions of equity, comity and federalism." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977). He commented that "the

Justice Pashman advocated convincingly for primacy in his *Hunt* concurrence. Responding to Justice Handler's separate concurring opinion, which set forth what would come to be known as the *Hunt* factors, Justice Pashman observed that the Court had not previously articulated "any rules, principles or theories explaining when it will go beyond the federal courts in protecting constitutional rights and liberties." *Hunt*, 91 N.J. at 354 (Pashman, J., concurring). The Court had "merely stated [its] undoubted power to construe the New Jersey Constitution in accord with [its] own analysis of the particular right at issue." *Id.* Justice Handler's new framework marked a wrong turn, introducing "a presumption against divergent interpretations of our constitution unless special reasons are shown for New Jersey to take a path different from that chosen at the federal level." *Id.* Justice Pashman "would reverse the presumption." *Id.*

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very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach." *Id.* at 503. Justice Brennan urged that "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." *Id.* at 491. Notably, the 1977 article was the text of a speech Justice Brennan delivered to the New Jersey State Bar Association the year prior. William J. Brennan, *Address to the New Jersey Bar*, 33 Guild Prac. 152 (1976). Justice Stewart G. Pollock, who served on the New Jersey Supreme Court from 1979 to 1999, referred to this article as the "Magna Carta of state constitutional law." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707, 716 (1983).

Reversing the presumption—which is to say, accepting primacy—follows from at least three rationales. First, it accords due respect to the state's highest law and tribunal. Whereas, under an interstitial approach, "a state court is compelled to focus on the [U.S.] Supreme Court's decision, and to explain, in terms of the identified criteria, why it is not following the Supreme Court precedent," a primacy approach puts the state constitution first. Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 Notre Dame L. Rev. 1015, 1023 (1997). State constitutions should speak without "prerequisites," *id.*, so that they may meet their promise as "separate fount[s] of liberty," *Hunt*, 91 N.J. at 356 (Pashman, J., concurring). Emboldened by true independence, state supreme courts "will be naturally led to resist every encroachment upon rights . . . ." Brennan, Jr., 90 Harv. L. Rev. at 504.

Second, primacy fosters healthy constitutional diversity. "State supreme courts, if not discouraged from independent constitutional analysis, can serve, in Justice Brandeis' words, 'as a laboratory' testing competing interpretations of constitutional concepts that may better serve the people of those states." *Hunt*, 91 N.J. at 356–57 (Pashman, J., concurring) (quoting *New State Ice Co. v. Liebmann,* 285 U.S. 262, 310–11 (1931) (Brandeis, J., dissenting)).

Third, the decisions of the U.S. Supreme Court reflect a "federalism discount," which make them unsuitable models for state courts considering similar claims under their state constitutions. The concept of the federalism discount refers to the Court's tendency to narrowly construe constitutional provisions as a matter of deference rather than substance. In other words, the Court risks the underenforcement of some federal constitutional rights to preserve room for state supreme courts to adopt alternative approaches. *See* Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 Md. L. Rev. 309, 336 (2017). Similarly, the Court has refrained "from imposing on the States inflexible constitutional restraints" that may not fit conditions in a particular state. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973). *See* Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959, 975–76 (1985) ("State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate."). When state courts uncritically follow federal constitutional precedents, they inherit and reproduce diluted

protections—and frustrate the U.S. Supreme Court's purpose in carving doctrinal space for constitutional independence at the state level.

The U.S. Supreme Court's hesitance to impose a one-size-fits-all constitutional solution on the fifty states is especially pronounced in cases concerning federal elections. As discussed *supra* I, A, the Elections Clause of the federal constitution gives state legislatures principal authority to administer federal elections by prescribing their "Times, Places and Manner." *U.S. Const.* art. I, § 4. Although the Elections Clause also permits Congress to "make or alter" those rules "at any time," skepticism toward congressional power to regulate elections and a corresponding deference to states has animated the Supreme Court's election law jurisprudence in recent decades. *See* Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 Wash. U.L. Rev. 553, 587–94 (2015). As Justice Scalia observed, "detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States." *Crawford*, 553 U.S. at 208 (Scalia, J., concurring).

The New Jersey Supreme Court has recognized the hazards of importing protections diluted by the federalism discount and the attendant necessity of interpreting the New Jersey Constitution with autonomy and without constraint. In *Robinson v. Cahill*, for example, the New Jersey Supreme Court affirmed that the "State Constitution could be more demanding" because "there

is "absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances." 62 N.J. 473, 490 (1973), *on reargument*, 63 N.J. 196 (1973), *and on reh'g*, 69 N.J. 133 (1975). Likewise, in *State v. Hempele*, the New Jersey Supreme Court recognized that the U.S. Supreme Court, "[c]ognizant of the diversity of laws, customs, and mores within its jurisdiction," is "necessarily 'hesitant to impose on a national level far-reaching constitutional rules binding on each and every state.'" 120 N.J. 182, 197 (1990) (quoting *Hunt*, 91 N.J. at 358 (Pashman, J., concurring)) (holding that the warrantless search of a defendant's garbage violated Article 1, paragraph 7 of the New Jersey Constitution, despite the U.S. Supreme Court's contrary decision under the federal constitution in *California v. Greenwood*, 486 U.S. 35, 108 (1988)).

Timmons is precisely the type of U.S. Supreme Court precedent that state courts should hesitate to adopt. Indeed, the very first line of the *Timmons* decision acknowledges its federalism implications. "*Most States* prohibit multiple-party, or 'fusion,' candidacies for elected office," the Court wrote. 520 U.S. at 353 (emphasis added). Had the *Timmons* Court deemed Minnesota's anti-fusion laws unconstitutional, thereby setting the federal floor, it would have effectively toppled fusion bans nationwide without the benefit of

a fifty-state record.[8] But the Court here need not consider what "*most states*" do. It need not subordinate its unique constitutional tradition to a "homogenized, abstracted, national vision." Sager, 63 Tex. L. Rev. at 976. The

[8] In its recent Order denying Respondent's motion to dismiss this appeal or, alternatively, transfer it to the Law Division, the Appellate Division indicated that it would find little assistance in Appellants' factual record because facial constitutional challenges raise "purely legal" issues. Order at 2, May 2, 2023 (quoting *Comm. to Recall Menendez v. Wells*, 204 N.J. 79, 99 (2010)). But the Appellate Division should not hesitate to turn to the record for support in resolving this case; even where legal questions predominate, facts matter.

The Appellant Division's reasoning relies on two unfounded assumptions: first, that this case is properly or necessarily characterized as a "facial" challenge, and second, that facial challenges, as a categorical matter, should be adjudicated without reference to underlying facts.

To begin, whether constitutional challenges are accurately deemed facial challenges is the subject of active debate. *See* Catherine Gage O'Grady, *The Role of Speculation in Facial Challenges*, 53 Ariz. L. Rev. 867, 871–72 (2011). Professor Richard H. Fallon, Jr., for example, argues that all constitutional challenges are "in an important sense as-applied" challenges. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 Harv. L. Rev. 1321, 1326 (2000). "In order to raise a constitutional objection to a statute," he observes, "a litigant must always assert that the statute's application to her case violates the Constitution." *Id.* at 1327. Thus, "determinations that statutes are facially invalid properly occur only as logical outgrowths of rulings on whether statutes may be applied to particular litigants on particular facts." *Id.* at 1328.

But even if this case were accurately labeled a facial challenge, factual evidence is relevant. "Whether the constitutional issues are framed as facial challenges to statutes or regulations, or asserted deprivations of the claimant's rights in the manner in which such provisions have been applied . . . the factual background of the matter must be developed either through stipulated facts or in a litigation process." *Jones v. Dep't of Cmty. Affs.*, 395 N.J. Super. 632, 635–36 (App. Div. 2007). The record here contains sufficient facts to inform the adjudication of this appeal, and the Court should freely consult them.

reasoning in *Timmons* should be substantially "discounted for federalism" concerns. Williams, 72 Notre Dame L. Rev. at 1023.

State courts have the duty to adopt reasoned interpretations of the state's supreme law, regardless of how the U.S. Supreme Court interprets a different constitution under different practical and institutional circumstances. *Id.* A primacy approach effectuates this duty.

B. Applying the *Hunt* factors compels divergence from federal constitutional free speech and association analyses of anti-fusion laws.

The New Jersey Supreme Court has applied the *Hunt* factors, also known as "divergence factors," only sporadically, frequently opting instead to cite its inherent and independent authority to grant greater protection to New Jerseyans. *See* Hon. Dennis J. Braithwaite, 33 Rutgers L.J. at 1, 4. As discussed, there is sound reason to prefer this "primacy" approach. Nevertheless, the *Hunt* factors usefully illustrate the expansive scope of New Jersey's state constitutional free speech and association rights.

The *Hunt* factors include: (1) textual differences between the constitutions; (2) legislative history of the state provision; (3) state law predating the federal decision; (4) structural differences between the constitutions; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state. *Hunt*,

91 N.J. at 358–68 (Handler, J., concurring); *see, e.g., State v. Muhammad*, 145 N.J. 23, 41 (1996).

The text, history, and structure of the free speech and association rights in the New Jersey Constitution (factors 1, 2, and 4) weigh decisively in favor of protecting fusion voting. Because these factors overlap, they are considered together.

Under the New Jersey Constitution, "[e]very 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. This affirmative provision is "broader than practically all others in the nation," *Green Party v. Hartz Mountain Indus., Inc.,* 164 N.J. 127, 145, 752 *A.*2d 315 (2000), and easily "more sweeping in scope than the language of the First Amendment," *State v. Schmid*, 84 N.J. 535, 557 (1980). It is fortified and enhanced by a sister provision protecting the right of New Jerseyans "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.

This sweeping language represents an affirmative grant of rights, in contrast to the negative structure of the First Amendment. *See U.S. Const.*

amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."). "Hence, 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." *Schmid*, 84 N.J. at 558 (deviating from federal constitutional state-action doctrine to recognize protections against encroachment on free speech rights by certain private entities based on the unique language of the New Jersey Constitution).

Even if the language and structure of New Jersey's speech and association protections were identical to their federal cognates, history would invite differing interpretations. "It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse." *Id.* at 558 n. 8 (quoting *People v. Brisendine*, 13 Cal. 3d 528, 550 (1975)). The provisions of the New Jersey Constitution granting expressional freedoms predate the application of the First Amendment to the states. *Williams*, 93 N.J. at 58. And, though introduced with New Jersey's 1844 Constitution, they were modeled after earlier

constitutional texts, including Massachusetts's Constitution of 1780 and New York's Constitution of 1821.[9]

Relevant state law, interests, traditions, and attitudes (factors 3, 5, 6, and 7) also advise greater speech and association protections under the New Jersey Constitution than are available under the federal constitution.

The "exceptional vitality" of free speech and association protections has been "frequently voiced" in our common law. *Schmid*, 84 N.J. at 557–58. They are, of course, at their zenith where political speech is involved.[10]

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[9] New Jersey's assembly clause is modeled after Massachusetts's, which predated the federal analog. Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale L.J. 1652, 1657, 1733-34 (2021). New Jersey's free speech clause is modeled after New York's, which "itself has been recognized as constituting an independent source of protectable individual rights." *Schmid*, 84 N.J. at 557.

[10] In cases involving commercial—as opposed to political—speech, the New Jersey Supreme Court has taken a different tack, treating the state constitutional free speech clause as coextensive with the First Amendment. *See Hamilton Amusement Ctr. v. Verniero*, 156 N.J. 254, 264–65 (1998); *E&J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin*, 226 N.J. 549, 568 (2016). This interpretative methodology has no application outside the commercial speech context and thus no relevance here. *See E&J Equities, LLC*, 226 N.J. at 567-69 (distinguishing cases involving commercial speech, which "is granted less protection than other constitutionally-guaranteed expression" from cases involving political speech on private property and defamation, in which "the State Constitution provides greater protection" than the First Amendment). Nevertheless, a note of caution about "coextension" and its close cousin, "prospective lockstepping," is warranted.

When state courts seek absolute harmony with federal precedents, they stifle the development of state constitutional doctrine. *See* James A. Gardner, *The*

New Jersey courts and lawmakers have long recognized the ballot as a key means and site of political expression for voters, candidates, and parties. For instance, since 1930, statutory law has authorized a candidate running in a primary election to "request that there be printed opposite his name on the primary ticket a designation, in not more than six words . . . for the purpose of indicating either any official act or policy to which he is pledged or committed, or to distinguish him as belonging to a particular faction or wing of

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Failed Discourse of State Constitutionalism, 90 Mich. L. Rev. 761, 804 (1992). They also generate significant confusion.

The use of terms like "coextensive" risk deciding "*too much.*" Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499, 1521 (2005). In other words, courts appear to "prejudge future cases" when they announce that federal constitutional principles are dispositive of state constitutional questions. *Id.* This phenomenon is known as "prospective lockstepping." As the late Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court warned, "[s]ome states appear to be adopting, apparently in perpetuity, all existing or future United States Supreme Court interpretations of a federal constitutional provision as the governing interpretation of the parallel state constitutional provision." Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1166 (1985). But it is "beyond the state judicial power to *incorporate* the Federal Constitution and its future interpretations into the state constitution." Williams, 46 Wm. & Mary L. Rev. at 1521; *see* Ronald K. L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 Tex. L. Rev. 1095, 1116 (1985) (referring to prospective lockstepping as "The Problem of Amending Without Amendments"). Treating New Jersey constitutional free speech protections as coextensive with the First Amendment is inappropriate in this case principally because it is not doctrinally supported; it should also be avoided for its potential to sanction or encourage prospective lockstepping.

his political party." N.J.S.A. 19:23-17. Primary candidates may join with other candidates in a common column under that slogan. N.J.S.A. 19:49-2. Likewise, candidates in general elections may supply "designations of party or principles" to appear with their names on the general ticket. N.J.S.A. 19:13-4. Our jurisprudence has fiercely guarded these expressive and associational ballot features. *See Lautenberg v. Kelly*, 280 N.J. Super 76, 83 (Law Div. 1994), *rev'd in part on other grounds by Schundler v. Donovan*, 377 N.J. Super. 339, 348-49 (App. Div. 2005) ("[B]anning 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.").

New Jersey has embraced liberal ballot access laws in the same spirit. *See Council of Alt. Pol. Parties*, 344 N.J. Super. at 244. The State has not increased the number of signatures required for petition nominations since the late nineteenth century. Mongiello, 41 Seton Hall L. Rev. 1111 at 1168 n. 151. Today, as in 1898, petition candidates for statewide office need only secure 800 signatures and petition candidates for non-statewide office a mere 100 signatures. *Id.*; N.J.S.A. 19:13-5.

In general, New Jersey courts have deployed the state's peerless "democracy canon" to ensure that our laws function "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." *Samson*, 175 N.J. at 190 (quoting *Catania v. Haberle*, 123 N.J. 438, 448 (1990).

Whether by cause or effect, New Jersey's legislative and doctrinal tradition prizing expansive speech and association freedoms in the elections context accompanies a culture of political independence. More than a third of registered New Jersey voters are not affiliated with a political party. N.J. Dep't of State, Div. of Elections, *Statewide Voter Registration Statistics Archive, May 2023 Voter Registration by Congressional Voting District* (2023), https://www.nj.gov/state/elections/assets/pdf/svrs-reports/2023/2023-05-voter-registration-by-congressional-district.pdf. Unaffiliated voters substantially outnumber registered Republicans and trail registered Democrats by only two percentage points. *Id.* And yet, because of New Jersey's anti-fusion laws, these independent voters find no effective vehicle for expressing their alternative policy preferences at the polls. They are forced to vote on the Democratic or Republican party lines, lest they waste their vote on a non-viable minor-party candidate.

Thus, unsurprisingly, the same "[d]istinctive attitudes of [New Jersey's] citizenry," *Hunt*, 91 N.J. at 367 (Handler, J., concurring), that foster political independence also manifest in support for fusion voting. Indeed, recent polls

show that most New Jersey voters would like to see New Jersey's laws changed to permit it. A Fairleigh Dickinson University poll conducted in February 2023 found that fifty-six percent of voters support fusion voting. Press Release, Fairleigh Dickinson University, *FDU Poll: Majority in New Jersey Support Fusion Ticket Laws* (Feb. 16, 2023), https://www.fdu.edu/news/fdu-poll-majority-in-new-jersey-support-fusion-ticket-laws. A poll by Braun Research on behalf of the New America Foundation found that sixty-eight percent of respondents felt that fusion voting would better reflect their views. Terrence T. McDonald, *Push for Fusion Voting in New Jersey Didn't End with Rep. Tom Malinowski's Loss*, N.J. Monitor (Nov. 22, 2022), https://newjerseymonitor.com/2022/11/22/push-for-fusion-voting-in-new-jersey-didnt-end-with-rep-tom-malinowskis-loss.

Because "public attitudes" may partly form the basis of constitutional protections against State encroachment, it cannot be the role of the State in crafting its election laws to coerce those public attitudes, particularly with regard to the so-called advantages of the traditional two-party system. Whether the two-party system is serving the needs of our democratic society is a decision that voters should make without governmental interference.

The text, history, and structure of the New Jersey Constitution's free speech and association rights, as well as local interests, laws, traditions, and

attitudes concerning political expression generally and fusion voting specifically "provide a basis for rejecting the constraints of federal doctrine" through "the independent application of [the state] constitution." *Hunt*, 91 N.J. at 365-67 (Handler, J., concurring).

C. New Jersey's anti-fusion laws severely burden the rights of minor parties, candidates, and voters to freely speak and associate.

New Jersey's fusion ban unconstitutionally impairs the expressional and associational rights of minor parties and their voters. Whether assessed under strict scrutiny, consistent with the uncompromising protection for fundamental political rights established in *Worden*, 61 N.J. at 346, or a traditional burden-interest analysis,[11] the fusion ban must yield to New Jerseyans' constitutionally protected prerogatives to associate together in political parties, to choose their party's standard bearer, and to support that standard bearer on the ballot.

Nominating a candidate is a political party's core associational function and the mechanism by which the party affirms its principles, declares its

[11] With certain exceptions, the New Jersey Supreme Court applies a balancing test to resolve constitutional claims, weighing "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg*, 99 N.J. at 567. As discussed *supra* I.C., the State's interests in maintaining its anti-fusion laws—that is, the purported public need for the laws—are weak and inadequate to justify the severe burdens on the affected rights.

positions, and appeals to potential members. *See Smith v. Penta*, 81 N.J. 65, 77 (1979) (describing the "associational values" of a primary election "insofar as it affords an opportunity to adherents of some political philosophy to advance their goals, proselytize their beliefs and seek to acquire or perpetuate their power"). Under New Jersey's anti-fusion laws, a minor party's "rights to express political ideas and to associate to exchange these ideas to further their political goals" are constrained the moment any candidate accepts a major-party nomination; from that point forward, the minor party can no longer freely associate with that nominee, who may be the best (or only) representative of the party's political message. *Council of Alt. Pol. Parties*, 344 N.J. Super. at 242; *see also Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 214 (1989) (recognizing a "party's protected freedom of association rights to identify the people who constitute the association and to select a standard-bearer who best represents the party's ideology and preferences").

A corresponding burden simultaneously falls on the associational rights of candidates. A candidate who becomes a major-party nominee may not thereafter affiliate with a minor party on the ballot. The state thus confiscates the most powerful communicative tool available to political aspirants. *See*

Lautenberg, 280 N.J. at 83 (inclusion in a party's column is "the ultimate form of endorsement").

And perhaps no burden is heavier than the one the fusion ban imposes on voters' free expression. Under New Jersey's fusion ban, voters are substantially limited in their ability to use the ballot to express support for a minor party's platform. The expressive function that fusion enables is powerful and distinctive; fusion allows voters to offer electoral support to a preferred cross-endorsed candidate while communicating that they would like the candidate to govern more progressively or conservatively or to advance a policy championed by the minor party. The fusion ban blunts the ballot's expressive force.

It is no answer to this restraint that a voter may express minor-party support by voting for a candidate on the minor-party line—which is to say, by backing a "protest" or "spoiler" candidate. Nor, for that matter, is it any consolation that a voter may instead preserve their electoral influence by voting for a major-party candidate. In fact, this dilemma highlights the interlocking rights the fusion ban impairs.

Not only do the anti-fusion laws violate New Jerseyans' right to freely speak and to vote, but they pit those fundamental rights against one another. They ensure that the exercise of one is penalized with the forfeiture of the

other. These are "rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity v. State of N.J.*, 385 U.S. 493, 500 (1967); *see Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (striking down a durational residence law that unconstitutionally "burden[ed] the right to travel" by forcing individuals to "choose between travel and the basic right to vote"). For a minor-party voter, the decision to cast a ballot for the candidate of one's choice means forgoing the chance to convey electoral support for one's party; conveying electoral support for one's party means abandoning the opportunity to exercise the franchise meaningfully and effectively. This coercive bind is intrinsic to New Jersey's fusion ban and anathema to democratic norms.

CONCLUSION

This Court should strike down New Jersey's anti-fusion laws as violative of the robust and independent rights to vote and to freely speak and associate enshrined in our state constitution.

Respectfully submitted,

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Before Appellate Division,
Superior Court of New Jersey
DOCKET NO. **A-003542-21**

STATE AGENCY

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7

PROOF OF SERVICE

I hereby certify that an original of the following documents, **MOTION TO APPEAR AS AMICUS CURIAE, PROOF OF SERVICE, MOTION- BRIEF, MOTION CERTIFICATION/SUPPORTING DOCUMENT** were submitted and transmitted to the parties listed below in the following format:

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I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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Dated: **07/10/2023**

By: **S/ LIZA F WEISBERG, Esq.**