

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

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3542-21T2

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 AMICI CURIAE, BIPARTISAN FORMER MEMBERS OF
CONGRESS BRUCE BRALEY, RICHARD A. GEPHARDT, PATRICK J.
MURPHY, JOHN J. SCHWARZ, AND DAVID A. TROTT IN SUPPORT OF
APPELLANTS MODERATE PARTY, RICHARD A. WOLFE, MICHAEL
TOMASCO, AND WILLIAM KIBLER**

Ryan Chabot (162262015)
Matthew Wollin*
Wilmer Cutler Pickering Hale and
Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007 USA

**Counsel for Amici Curiae Bruce Braley, Richard A. Gephardt, Patrick J.
Murphy, John J. Schwarz, and David A. Trott**

Brittany Blueitt Amadi*
Wilmer Cutler Pickering Hale and
Dorr LLP
2100 Pennsylvania Ave NW
Washington DC 20037

**Pro hac vice applications pending*

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STATEMENT OF INTEREST BY AMICI CURIAE

Amici curiae are a bipartisan group of former members of the United States Congress, who respectfully refer the Court to their concurrently-filed Application Of Bruce Braley, Richard A. Gephardt, Patrick J. Murphy, John J. Schwarz, and David A. Trott For Leave To Appear As *Amici Curiae* for their complete Statement of Interest.

PRELIMINARY STATEMENT

The health of American democracy depends on the rules that govern it. Among the most important rules are those that govern electoral processes, which can either support democracy, or work to its detriment. Where electoral rules enable candidates to reach across the political aisle and represent a broader range of views, democracy is strengthened. Fusion voting is one such rule.

Fusion voting, which enables cross-party nomination, allows candidates to more freely represent the interests of larger segments of the population. With fusion voting, candidates who secure the nomination of a major political party can also serve as the nominee for smaller political parties, including moderate parties. When a candidate serves as the nominee for both a major party and a smaller party, that dual-association provides voters with additional insight into the values of that candidate—insight that is often lacking when a candidate's

sole possible ballot association is with a single major party and its perceived agenda. This is particularly true where a nominee secures a moderate party's cross-nomination, which sends a clear message to moderate voters—which constitute over one third of the New Jersey electorate—that the candidate is likely to prioritize their needs. That message in turn encourages moderate voters to show up at the polls, leading to the election of more moderate candidates. And election of moderate candidates promotes cross-party dialogue and enhances the health of American democracy.

It has become increasingly difficult to elect moderate candidates when election laws—such as New Jersey's—prohibit candidates from being nominated by more than one party. Moderate nominees for the Democratic and Republican Parties are unable to also serve as a nominee for smaller, more centrist parties, which would enable them to convey additional information to voters as to their priorities. Moderate candidates' exclusive association with either the Democratic or Republican Party on the ballot can often undermine their ability to assemble a coalition of voters who are not associated with either major party, or are associated with the opposing party. Conversely, where a smaller moderate party nominates a candidate different from the major party

nominees, their nominee is all but guaranteed to lose—while simultaneously drawing votes away from the more moderate of the two major party nominees.

Given the challenges moderate candidates face in being elected, American politics have become alarmingly polarized. Recently, the increase in polarized politics has been exacerbated as elected officials move increasingly to the extremes of the two major parties. The net result is that relatively few elections are truly competitive across party lines, with party affiliation increasingly serving as the primary determinant of electability. This creates the perception among many voters—especially those who are not strongly aligned with either the Republican or Democratic Parties—that their votes simply do not matter. Such disillusionment—and the resulting low turnout at the polls—makes it increasingly difficult for moderate legislators to garner significant votes, depriving our government of their contributions.

In short, laws that bar cross-nomination prevent interested voters from obtaining clarifying information about candidates' positions. This makes it extremely difficult for moderate candidates to be elected, thereby exacerbating the cycle of pernicious polarization that now predominates in American politics. Without these restrictions, moderate candidates could exercise their full range of associational rights and provide more information to voters as to their values

and priorities. This goes directly against Respondents' arguments that the current system promotes political stability, *see* Db21-22, cross-nomination would make it harder for voters to understand candidates' positions, *see* Db51-52, and anti-fusion laws do not burden the associational rights of candidates and parties, *see* Db59-62. The opposite is true: permitting fusion voting would constitute a clear step forward toward easing some of the polarization that has become so prevalent in our government in recent years.

ARGUMENT

I. Election Outcomes and Politics Are Significantly Impacted By The Rules That Govern The Electoral Process, Including Anti-Fusion Laws.

American democracy is significantly impacted by the rules that govern the electoral process—rules that not only influence the processes by which elections are held, but also election outcomes. One prominent example of the powerful impact these rules can have on electoral outcomes is in the gerrymandering of electoral districts by state legislatures—a phenomenon that has become notably more pronounced in recent years. *See* Nicholas Riccardi & David A. Lieb, *Gerrymandering surges as states redraw maps for House seats*, A.P. News (Nov. 10, 2021), <https://perma.cc/72WM-MKG5>. Although ostensibly procedural in nature, redistricting of electoral districts has been used throughout

the history of American democracy to influence the substantive result: namely, ensuring that the party currently in power will remain in power. *See* Julia Kirschenbaum & Michael Li, *Gerrymandering Explained* (Aug. 12, 2021), <https://perma.cc/PTJ6-CUHL>. As the Supreme Court recently observed with respect to racial gerrymandering, “[i]ndividuals ... lack an equal opportunity to participate in the political process when a State’s electoral structure operates in a manner that minimizes or cancels out their voting strength.” *Allen v. Milligan*, 143 S. Ct. 1487 (2023) (citation omitted).

Anti-fusion laws, which prohibit the cross-nomination of candidates for office, are another category of influential electoral rules that can often shape election outcomes. By barring candidates from accepting a second party’s nomination, anti-fusion laws make it particularly challenging for moderate candidates to be elected. As such, election laws that prohibit cross-nomination place moderate candidates in an impossible position. Moderate candidates have two choices. On the one hand, they could seek the nomination of a smaller, more moderate party whose policy views and values closely match their own. But doing so all but guarantees electoral defeat in an environment where many voters perceive it as futile to cast their vote for the nominee of a party other than one of the two major parties. *See How fusion voting played a role in American*

politics, MSNBC (Apr. 2, 2014), <https://perma.cc/CM2H-VHEW> (“Electoral fusion ... allows voters to support the platform of a party, such as the Working Families party in New York, without feeling like their vote will go to waste if they don’t cast it for a Democrat or Republican.”). Indeed, as Appellants point out, candidates from the two major parties have won every federal and state election in New Jersey for the past 50 years. *See* Pb5.

Alternatively, moderate candidates can seek the exclusive nomination of one of the major parties, even though they might disagree with the broader party platform and prominent party figures on key issues. A major party nomination may also suggest to voters that the candidate affiliated with that party would prioritize the same issues championed by that party’s most partisan—and often, most public—figures. *See* Amanda Pampuro, *Independent candidates appealing to voters turned off by two-party bickering*, Courthouse News Service (June 30, 2022), <https://perma.cc/85Y6-2HKM>; Michael Neblo, *Engaging Constituents is Essential to Depolarizing Congress*, Georgetown University McDonough School of Business (Jun 15, 2022), <https://perma.cc/X9AD-SGFZ> (“Disengagement comes from constituents’ sense of being disconnected from the work of their representatives and their beliefs that politics is responsive to organized interests, rather than to the concerns of average voters”). And as the

two major parties grow increasingly polarized, the difficulty of overcoming any negative stigma arising from a major-party nomination only increases for moderate candidates who instead wish to convey to voters information about the full scope of their views.

Further, when a smaller moderate party is precluded from cross-nominating a candidate who also has the support of one of the major parties, it can only get on the ballot by nominating a third candidate. The nomination of a third-party moderate candidate in turn cannibalizes moderate voters from the center, rendering it more difficult for the more moderate of the major party candidates to get elected. These factors combine to produce a perverse incentive for major party nominees, regardless of how moderate they are: rather than appealing to moderate or independent voters, such candidates are instead urged to increase turnout from more partisan voters within the major party base. This is particularly true when, as in the United States currently, “the balance of support for [the major] political parties is close enough for either to gain near-term electoral advantage.” Michael Dimock & Richard Wike, *America is exceptional in the nature of its political divide*, Pew Research Center (Nov. 13, 2020), <https://perma.cc/3A4P-ZLGV>.

In contrast, if parties are permitted to nominate their preferred candidates, moderate candidates may freely associate with, speak for, and earn the support of the large swath of the electorate hungry for an alternative to political extremism. See Lee Drutman, *New Jersey Voters on Political Extremism, Political Parties, and Reforming the State's Electoral System*, New America (Nov. 22, 2022), <https://perma.cc/7MCU-ZV2B>. Earning nominations from both a major and a minor moderate party provides moderate candidates with a crucial tool to communicate their centrist views to voters, and earn votes from both independent voters and moderate voters affiliated with the opposing party. See J.J. Gass & Adam Morse, *More Choices, More Voices: A Primer on Fusion*, Brennan Center for Justice (Oct. 2, 2006), <https://perma.cc/5868-3G38> (“Fusion offers those voters the best of both worlds: they can cast a meaningful vote for a candidate with a credible chance of victory while still expressing their support for a third party’s agenda.”). Providing a moderate minor party with the ability to nominate its preferred candidate also makes it less likely that the moderate party will split moderate votes by nominating a third candidate, in turn increasing the likelihood that a moderate candidate will actually be elected. See *How fusion voting played a role in American politics*, MSNBC, *supra*, at 5; Jeffrey Mongiello, *Fusion Voting and the New Jersey Constitution: A Reaction*

to New Jersey's Partisan Political Culture, 41 Seton Hall L. Rev. 1111, 1117 (2011) (“A fusion system would likely increase voter participation because more voters’ beliefs would be represented by a candidate with a chance of winning.”).

In short, laws that prohibit political parties from nominating their preferred candidate disproportionately harm moderate candidates, voters, and parties. Given the importance of these actors in the political process, the burdens of the anti-fusion laws are not just borne by them individually—rather, these laws systematically weaken democracy itself.

II. The Decreasing Numbers Of Moderate Lawmakers Elected To Office Destabilizes American Politics.

A. American Politics Are More Polarized Than Ever Before.

It is widely recognized that polarization in American politics has been increasing over the course of the last several decades, reaching levels that have now become, by any standard, extreme. In the lead up to the 2022 midterm elections, an NBC poll found that 81 percent of Democrats said they believed that the Republican Party’s agenda could “destroy America as we know it,” while 79 percent of Republicans believed the same of the Democratic Party’s agenda. Mark Murray, *‘Anger on their minds’: NBC News poll finds sky-high interest and polarization ahead of midterms*, CNBC (Oct. 23, 2022),

<https://perma.cc/HKV6-B9YN>. Similarly, a Fox News poll from the same time period found that only 18 percent of Democrats and 9 percent of Republicans believe that the other party wants “what’s best for the country.” Dana Blanton, *Fox News Poll: Polarization defines the midterm election*, Fox News (Oct. 16, 2022), <https://perma.cc/J4NB-T49U>. And according to polling conducted by Pew Research Center, a nonpartisan research center, negative views of the opposing party and its supporters have risen sharply since the 1990s, with political polarization increasingly spilling over into previously apolitical aspects of everyday life. See Michael Dimock et al., *Political Polarization in the American Public*, Pew Research Center (June 12, 2014), <https://perma.cc/Y55N-39F5>.

Moreover, American polarization is unique as compared to other developed democratic nations. A January 2020 study conducted by researchers at Brown and Stanford on “affective polarization”—a phenomenon in which citizens feel more negatively toward other political parties and its members than toward their own—found that the United States has experienced the largest increase in affective polarization of any of the twelve countries studied. See Levi Boxell et al., *Cross-Country Trends in Affective Polarization*, National Bureau of Economic Research Working Paper Series, Working Paper 26669

(Jan. 2020), <https://www.nber.org/papers/w26669>.¹ Polling by Pew Research Center identified perceptions surrounding the coronavirus pandemic as a particularly stark example of the polarization present in the United States, noting:

Over the summer [of 2020], 76% of Republicans (including independents who lean to the party) felt the U.S. had done a good job dealing with the coronavirus outbreak, compared with just 29% of those who do not identify with the Republican Party. This 47 percentage point gap was the largest gap found between those who support the governing party and those who do not across 14 nations surveyed. Moreover, 77% of Americans said the country was now more divided than before the outbreak, as compared with a median of 47% in the 13 other nations surveyed.²

This is not an abstract concern: polarization has had a significant impact on the democratic system of government in the United States.

B. Hyper-Polarization And A Shrinking Center In Congress Pose A Significant Threat To American Democracy.

The deleterious effects of increasing polarization are readily apparent at the national level. Passing routine legislation has become a gargantuan task and

¹ The 12 nations studied were the U.S., Switzerland, France, Denmark, Canada, New Zealand, Japan, Australia, Britain, Norway, Sweden, and Germany.

² The 14 nations surveyed were Canada, the U.S., Denmark, Sweden, the U.K., Italy, the Netherlands, Belgium, France, Germany, Spain, South Korea, Australia, and Japan. See Michael Dimock & Richard Wike, *supra*, at 7.

attempts to pass forward-thinking legislative initiatives have become all but futile. Issues that previously were able to gather bipartisan support from lawmakers have become mired in partisan warfare, even in instances where the public overwhelmingly agrees on the need for action. Such partisanship in turn may have the effect of eroding public trust in government and convincing more and more people that our democratic institutions are simply not up to the task of addressing the most urgent public challenges. These dangerous trends in turn only lead to further polarization. This is a self-perpetuating cycle with disastrous consequences for the future of our democracy. *See* Roberto Stefan Foa & Yascha Mounk, *The Democratic Discontent*, 27 J. DEM 3, 7 (July 2016), <https://perma.cc/C4YR-65VX> (“Citizens ... have also become more cynical about the value of democracy as a political system, less hopeful that anything they do might influence public policy, and more willing to express support for authoritarian alternatives.”).

This problem has not gone unrecognized by either legislators or voters. Many of our former colleagues have commented on Congress’ inability to get things done, with Republican Senator Richard M. Burr, who retired in 2023 after serving in Congress for nearly three decades, asking, “Can we be a visionary body versus a crisis management institution?” Emily Cochrane, *Retiring*

Congress Members See Rough Roads Ahead. They Won't Miss the Gridlock., N.Y. Times (Jan. 1, 2023), <https://perma.cc/6NKK-FBTB>. Representative John Yarmuth of Kentucky, the former Democratic chairman of the House Budget Committee, similarly observed: “There are far more members here who are engaged in performance art and performance art only now, and they really have no interest in governing.” *Id.* When reflecting on the 118th Congress, Yarmouth warned: “The next two years are really going to be brutally painful, and they’re going to be painful for the country.” *Id.* The electorate has become significantly discouraged by these trends as well—a February 2023 joint poll by Gallup and Newsweek puts the approval rating for Congress at 18 percent. *Congress and the Public*, Gallup, <https://news.gallup.com/poll/1600/congress-public.aspx>.

The tribulations early this year associated with the election of Representative McCarthy to Speaker demonstrate these difficulties in a nutshell, as the entire House was held hostage by a small handful of the most extreme Republican members. *See, e.g.*, David Morgan et al., *Kevin McCarthy elected House speaker, but at a cost*, Reuters (Jan. 7, 2023), <https://perma.cc/3SS6-K35Z> (observing that concessions Representative McCarthy made in the election turmoil “mean [he] will hold considerably less power than his

predecessor” and “will give hardliners extraordinary leverage”). The crisis is hardly over: a small cadre of legislators at the most extreme ends of the party continue to exercise extraordinary leverage over the Speaker and the entire legislative agenda. *See, e.g.,* Richard Cowan & Gram Slattery, *US House conservatives revolt against leadership, block gas stove bill*, Reuters (June 6, 2023), <https://perma.cc/V9AV-EBHA> (“A small group of Republicans in the House of Representatives on Tuesday stopped their leaders' drive to protect gas-fueled stoves from regulation, raising questions about the party’s ability to advance other legislation this year. The revolt had nothing to do with the kitchen appliances, stemming instead from lingering bitterness over a deal to raise the U.S. debt ceiling.”).

The legislative costs of a polarized Congress with few moderate lawmakers are substantial: historically, and to this day, moderates have been dealmakers willing to work across the aisle. *See, e.g.,* Niels Lesniewski, *Bipartisan ADA celebration clouded by current climate*, Roll Call (July 26, 2021), <https://perma.cc/T8LD-4WQ5>; Martin Tolchin, *Social Security: Compromise at Long Last*, N.Y. Times (Jan. 20, 1983), <https://perma.cc/73M9-7AKY>; Robert Pear, *Compromise Likely on Voting Rights*, N.Y. Times (May 1, 1982), <https://perma.cc/2LAF-XD88>. They set aside partisan talking points and

find common ground on key principles in order to address urgent societal problems. And the ability to secure bipartisan support for legislation can insulate it from future attacks—unlike party-line laws which often invite efforts at repeal when legislative majorities change hands. *See, e.g.,* Emily Brooks & Michael Schnell, *House GOP passes repeal of IRS funding boost as its first bill in the majority*, The Hill (Jan. 9, 2023), <https://perma.cc/34GS-9ZWR>. A study conducted by researchers at the University of Maryland’s School of Public Policy found that in each of 18 categories of public policy ranging from healthcare to police reform to international trade, there were over 100 policy proposals that garnered support of more than two-thirds of Americans overall—the vast majority of which have not been enacted. Program for Public Consultation, *Common Ground of the American People: Policy Positions Supported By Both Democrats & Republicans*, School of Public Policy, University of Maryland (Aug. 7, 2020), https://vop.org/wp-content/uploads/2021/07/CGOAP_0721.pdf. In the coming year, it is not hard to envision a world in which Congress struggles to reach consensus on must-pass spending bills, let alone legislative efforts that attempt to tackle far-reaching and pervasive problems.

Another notable recent example of Congress' difficulty in passing even routine legislation is the raising of the debt ceiling. The debt ceiling has been lifted 78 times since 1960: 49 times under Republican presidents and 29 times under Democratic presidents. *See Debt Limit*, U.S. Department of the Treasury, <https://perma.cc/VQ42-NEL7>. Because of the (previously) universally-accepted importance of ensuring that the United States can meet its financial obligations, raising the debt ceiling was once a relatively unexceptional action in Congress. Noah Berman, *What Happens When the U.S. Hits Its Debt Ceiling?*, Council on Foreign Relations (last updated June 27, 2023), <https://perma.cc/XD84-PGGT>. But in 2011, a deadlock between President Obama and congressional Republicans resulted in the debt ceiling being raised just two days before the Treasury estimated it would run out of money; the resulting (and unprecedented) credit rating downgrade increased U.S. borrowing costs by \$1.3 billion in that year alone. Government Accountability Office, *Debt Limit: Analysis of 2011-2012 Actions Taken and Effect of Delayed Increase on Borrowing Costs*, Report to the Congress (July 2012), <https://www.gao.gov/assets/gao-12-701.pdf>. This year, that crisis repeated itself, with a debt limit bill being signed into law just two days before the Treasury estimated it would run out of money—after months of acrimonious

debate and bitter brinkmanship. Moneywatch, *Biden signs debt ceiling bill that pulls U.S. back from brink of unprecedented default*, CBS News (June 3, 2023), <https://perma.cc/44JP-5RKQ>.

In short, increasingly deep political divides, exacerbated by anti-fusion laws that artificially deprive the moderate center of the political power its popular support would otherwise provide, pose significant challenges to the proper functioning of government.

C. Polarization Has Made It Increasingly Challenging For Moderate Lawmakers To Be Elected To Office Despite Public Eagerness For Moderate Solutions.

The effects of anti-fusion laws and the increased levels of polarization have been exacerbated by other trends such as gerrymandering to shrink the number of legislative elections that are truly competitive. As a result, in an increasing number of congressional districts, the winner of the dominant major party primary is all but assured election. An analysis conducted by the Cook Political Report, a nonpartisan newsletter, found that while in 1999, there were 164 swing districts (districts in which the margin in the presidential race was within 5 percentage points of the national result), there were only 82 such districts remaining in 2023. See David Wasserman, *Realignment, More Than Redistricting, Has Decimated Swing House Seats*, The Cook Political Report

(Apr. 5, 2023), <https://perma.cc/74AF-AWX3>. And for “hyper-swing” seats (districts in which the margin in the presidential race was within 3 percentage points of the national result), the decline is even more drastic, going from 107 districts in 1999 to just 45 in 2023. *Id.*

Though gerrymandering has contributed to this phenomenon, “urban/rural polarization has driven most of the competitive decline.” *Id.* The result of this is that only 16 percent of all U.S. House races are anticipated to be competitive in 2024, and just 5 percent will be considered “tossups.” *The Cook Political Report: 2024 House Race Ratings*, The Cook Political Report (June 8, 2023), <https://perma.cc/GT52-K4WG>. But cross-nomination provides an antidote to this trend, by providing voters with the ability to vote for a major party *candidate* who best aligns with their values without having to cast their vote for the major *party* itself—rendering many more districts competitive by increasing the number of moderate voters who show up to the polls, and by enabling those voters to vote on a moderate party line. For instance, in one poll of New Jersey residents, 57 percent of respondents said that they would likely vote on a third party’s line cross-nominating a competitive candidate. *See* Drutman, *New Jersey Voters on Political Extremism*, *supra*, at 8.

The decrease in competitive districts has unsurprisingly corresponded with a decrease in moderate lawmakers elected to Congress. Analysis by the Pew Research Center that examined national lawmakers' ideological positions based on their roll-call votes found that today, there are just under 30 moderate lawmakers left on Capitol Hill from both parties combined, compared to the more than 160 such lawmakers in the early 1970s. Drew Desilver, *The polarization in today's Congress has roots that go back decades*, Pew Research Center (Mar. 10, 2022), <https://perma.cc/T9A6-TCSU>. That same analysis also found that in the same time period, both the Democratic and Republican members in the House and Senate have shifted further from the center and more toward the poles of their own parties. *Id.* As a result, there is increasingly little space for moderate lawmakers from either party to find common ground with other lawmakers.

The dearth of moderate lawmakers is particularly problematic given that fewer Americans identify with either major party than at any other time in the last three decades. Gallup recently found that only 28 percent of Americans identify as Democrats and only 28 percent identify as Republicans, while 41 percent identify as independents—the highest percentage of Americans identifying as independents since at least 1988. Jeffrey M. Jones, *U.S. Party*

Preferences Evenly Split in 2022 After Shift to GOP, Gallup (Jan. 12, 2023), <https://perma.cc/WW7G-K5SA>. This pattern is borne out by voter registration trends, with researchers from the University of Virginia Center for Politics finding that nearly one third of the states that have registration by party had more voters registering as independents than as Democrats or Republicans as of July 2018, which represents a roughly 50% increase in the number of voters registering as independents since the beginning of the century. See Rhodes Cook, *Registering By Party: Where the Democrats and Republicans Are Ahead*, UVA Center for Politics (July 12, 2018), <https://perma.cc/DT3K-HL5T> (identifying New Jersey, Connecticut, Rhode Island, New Hampshire, Massachusetts, Maine, Colorado, Arkansas, Indiana, and Alaska). And in its polling leading up to the 2020 election, the Pew Research Center found that overwhelming majorities of the supporters of both Donald Trump and Joe Biden said that their candidate should focus on the needs of all Americans, “even if it means disappointing some of his supporters.” Dimock & Wike, *supra*, at 7.

The frustration many voters feel at this disconnect between the views of the electorate and the officials who purportedly represent them is further exacerbated by the rise of “pernicious polarization”—a political division so extreme that political identity becomes a social identity. Murat Somer et al.,

Pernicious polarization, autocratization and opposition strategies, 28:5 Democratization 929 (Jan. 12, 2021). This extreme form of political polarization has been “directly linked with democratic erosion” by researchers at the Carnegie Endowment for International Peace. Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, Carnegie Endowment for International Peace (Jan. 18, 2022), <https://perma.cc/S5PY-U4K8>. This erosion has already begun: in polling conducted by The Hill around the 2022 midterm election, 57 percent of Americans agreed that “America is heading toward the end of democracy, where free and fair elections will no longer occur[.]” Yphtach Lelkes & Sean J. Westwood, *We study political polarization. The midterm election results make us hopeful.*, The Hill (Nov. 19, 2022), <https://perma.cc/BPB3-GHN9>. This type of polarization has the potential to create an environment where voters view those with opposing views as “an existential threat to [their] own way of life or the nation as a whole.” See Jennifer McCoy et al., *Reducing Pernicious Polarization: A Comparative Historical Analysis of Depolarization*, Carnegie Endowment for International Peace (May 5, 2022), <https://perma.cc/6JAG-B6VR>. This in turn makes it harder for politicians to make good-faith efforts at

tackling urgent societal problems. In short, the way our democracy is currently functioning is undermining the very base of that democracy.

The false dichotomy produced by anti-fusion laws—where candidates and voters who take politics seriously are forced to align exclusively with one or the other major party—and the corresponding dearth of competitive elections contributes to the dangerous but common perception that voting—the cornerstone of the American democratic system—is simply ineffective. Many voters have come to believe that their votes do not matter, in large part because elections are not perceived as being genuinely competitive. See Catherine Clifford, *‘I don’t plan to vote ever again’: The psychology of why so many people don’t vote, even in 2020*, CNBC (Oct. 30, 2020), <https://perma.cc/34PW-34E9>. And when voters believe that their votes do not matter, they are less inclined to vote. For instance, a study conducted in 2016 by the Pew Research Center found that nearly 40 percent of Americans did not believe their vote would have a significant impact on how the government functions. Elisa Shearer & Jeffrey Gottfried, *Half of those who aren’t learning about the election feel their vote doesn’t matter*, Pew Research Center (Mar. 4, 2016), <https://perma.cc/S6GD-EYPY>. This is particularly true for voters who identify as moderate or do not affiliate with any particular party, with research from the

Pew Research Center indicating that independents both feel more negatively about candidates affiliated with the major parties than either Democrats or Republicans do, and are less likely to vote. John LaLoggia, *6 facts about U.S. political independents*, Pew Research Center (May 15, 2019), <https://perma.cc/GT5A-8AD3>. The net result is a reduction in the number of voters willing to show up at the polls due to a perception that their votes do not matter in such a polarized environment. That phenomenon directly undermines a fundamental tenet of our democracy.

New Jersey is not exempt from these worrisome trends: the policy center New America conducted a 2022 survey that revealed widespread political dissatisfaction among New Jersey voters, particularly when it comes to the rigid two-party system. Drutman, *New Jersey Voters on Political Extremism, supra*, at 8. More specifically, 81 percent of respondents agreed that “the two-party system in the United States is not working because of all the fighting and gridlock, with both sides unable to solve important public problems,” and 76 percent of respondents agreed that “‘political polarization’ between the two parties is a ‘big problem’ affecting the nation’s ability to solve collective problems.” *Id.* These opinions cut across party lines, as “[l]arge majorities of Democrats, Republicans, and Independents [in New Jersey] consider the divide

between the two major parties as a major obstacle in solving the nation’s public problems and collective issues.” *Id.* New Jersey voters have also recognized the potential positive impact on politics and governance that would result from doing away with anti-fusion laws. In a recent survey of New Jersey voters, 58 percent of respondents supported New Jersey reinstating fusion voting, and 68 percent agreed that “by allowing voters to choose both the candidate they prefer and the party label closest to their values, a fusion system can better express the citizenry’s views.” *Id.* In fact, 57 percent of respondents agreed that fusion voting would “help reduce extreme partisanship and polarization.” *Id.* But despite majority support for reinstating fusion voting across Democrats, Republicans, and Independents, the state legislature has not taken any action to repeal the anti-fusion laws and correct the error it made a century ago in passing them. That failure is unsurprising: as a result of the anti-fusion laws, the state legislature itself is largely partisan, *see Our Legislature*, “Party Influence,” N.J. Legislature, <https://perma.cc/JQ8S-ASPS>, with its members largely benefiting from maintaining the status quo.

CONCLUSION

In Congress, we witnessed firsthand the dangers posed by an increasingly polarized political climate. Yet despite a clear public appetite for a middle path

forward, the difficulties in electing moderate lawmakers and enacting moderate solutions have only increased. Laws that prevent parties from nominating their preferred candidates exacerbate these difficulties by curtailing candidates' ability to freely associate and to convey to voters important information about their positions and values. It is essential that these burdens on democracy be removed to enable a better path forward to moderate solutions. Thus, this Court should reverse the denial of the Moderate Party's petition to nominate Tom Malinowski as the party's candidate in the 7th Congressional District, and hold that the anti-fusion voting laws may not be enforced in New Jersey elections.

Respectfully submitted,

/s/ Ryan Chabot

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Ryan Chabot (162262015)

Matthew Wollin*

Wilmer Cutler Pickering Hale and Dorr LLP

7 World Trade Center

250 Greenwich Street

New York, NY 10007 USA

(212) 230-8800

ryan.chabot@wilmerhale.com

matthew.wollin@wilmerhale.com

Brittany Blueitt Amadi*

Wilmer Cutler Pickering Hale and Dorr LLP

2100 Pennsylvania Ave NW
Washington DC 20037
(202) 663-6000
brittany.amadi@wilmerhale.com

**Counsel for Amici Curiae Bruce Braley,
Richard A. Gephardt, Patrick J. Murphy,
John J. Schwarz, and David A. Trott**
**Pro hac vice applications pending*