



**New Jersey Judiciary  
Superior Court - Appellate Division  
NOTICE OF MOTION**

DAVID JOHN FIOCCOLA, Esq.  
MORRISON & FOERSTER LLP  
250 W 55TH STREET  
NEW YORK, NY 10019  
212-468-8000  
dfioccola@mofo.com  
docketny@mofo.com  
stice@mofo.com

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  
THE BRENNAN CENTER

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:

TO:

**FLAVIO L KOMUVES, Esq.**  
WEISSMAN & MINTZ, LLC  
220 DAVIDSON AVE  
STE 410  
SOMERSET, NJ 08873

**STEVEN P WEISSMAN, Esq.**  
WEISSMAN & MINTZ, LLC  
220 DAVIDSON AVE  
STE 410  
SOMERSET, NJ 08873

**Yael Bromberg, Esq.**  
BROMBERG LAW LLC  
43 WEST 43RD ST  
STE 32  
NEW YORK, NY 10036-7424

**BRETT M PUGACH, Esq.**  
WEISSMAN & MINTZ, LLC  
220 DAVIDSON AVE  
STE 410  
SOMERSET, NJ 08873

**SUSAN MARIE SCOTT, Esq.**  
ATTORNEY GENERAL LAW  
25 MARKET ST  
PO BOX 112  
TRENTON, NJ 08625

**MELISSA H RAKSA, Esq.**  
ATTORNEY GENERAL LAW  
25 MARKET ST  
PO BOX 112  
TRENTON, NJ 08625

**STEVEN MICHAEL  
GLEESON, Esq.**  
ATTORNEY GENERAL LAW  
25 MARKET ST  
PO BOX 112  
TRENTON, NJ 08625

**LEVI MALCOLM KLINGER-  
CHRISTIANSEN, Esq.**  
ATTORNEY GENERAL LAW  
25 MARKET ST  
PO BOX 112  
TRENTON, NJ 08625

**FLAVIO L KOMUVES, Esq.**  
WEISSMAN & MINTZ, LLC  
220 DAVIDSON AVE  
STE 410  
SOMERSET, NJ 08873

**STEVEN P WEISSMAN, Esq.**  
WEISSMAN & MINTZ, LLC  
220 DAVIDSON AVE  
STE 410  
SOMERSET, NJ 08873

**Yael BROMBERG, Esq.**  
BROMBERG LAW LLC  
43 WEST 43RD ST  
STE 32  
NEW YORK, NY 10036-7424

**BRETT M PUGACH, Esq.**  
WEISSMAN & MINTZ, LLC  
220 DAVIDSON AVE  
STE 410  
SOMERSET, NJ 08873

**SUSAN MARIE SCOTT, Esq.**  
ATTORNEY GENERAL LAW  
25 MARKET ST  
PO BOX 112  
TRENTON, NJ 08625

**MELISSA H RAKSA, Esq.**  
ATTORNEY GENERAL LAW  
25 MARKET ST  
PO BOX 112  
TRENTON, NJ 08625

**STEVEN MICHAEL  
GLEESON, Esq.**  
ATTORNEY GENERAL LAW  
25 MARKET ST  
PO BOX 112  
TRENTON, NJ 08625

**LEVI MALCOLM KLINGER-  
CHRISTIANSEN, Esq.**  
ATTORNEY GENERAL LAW  
25 MARKET ST  
PO BOX 112  
TRENTON, NJ 08625

**JASON N SENA, Esq.**  
ARCHER & GREINER PC  
10 ROUTE 35 RIVER PLAZA  
2ND FL  
RED BANK, NJ 07701

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For: MOVANT,  
THE BRENNAN CENTER  
s/ DAVID JOHN FIOCCOLA, Esq.  
MORRISON & FOERSTER LLP  
BAR ID#: 013022000 Date: 07/05/2023  
EMAIL: dfioccola@mofoc.com; docketny@mofoc.com

David J. Fiocco, Esq. (N.J. Bar No. 013022000)

**MORRISON & FOERSTER LLP**

250 West 55th Street

New York, NY 10019

(212) 468-8000

dfiocco@mofo.com

*Attorney for Amicus Curiae the Brennan Center*

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

SUPERIOR COURT OF NEW  
JERSEY, APPELLATE DIVISION

DOCKET NOS. A-3542-21T2,  
A-3543-21T2

CIVIL ACTION

**MOTION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF**

ON APPEAL FROM:  
FINAL AGENCY ACTION IN THE  
DEPARTMENT OF STATE  
HON. TAHESHA WAY,  
SECRETARY OF STATE

Pursuant to New Jersey Rule 1:13-9, proposed amicus curiae the Brennan Center respectfully moves for leave to file the attached brief. The Brennan Center has a substantial interest in and experience with the questions of general public interest implicated by this appeal, including the scope and meaning of New Jersey's Assembly Clause. In support of this motion, the Brennan Center relies upon the attached Certification of David J. Fiocco, dated June 23, 2023.

Dated: July 5, 2023

MORRISON & FOERSTER LLP

By: /s/ David J. Fioccola  
David J. Fioccola

*Counsel for Amicus Curiae  
the Brennan Center*

David J. Fioccola, Esq. (N.J. Bar No. 013022000)

**MORRISON & FOERSTER LLP**

250 West 55th Street

New York, NY 10019

(212) 468-8000

dfioccola@mofoc.com

*Attorney for Amicus Curiae the Brennan Center*

IN RE TOM MALINOWSKI,  
PETITION FOR NOMINATION FOR  
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SUPERIOR COURT OF NEW  
JERSEY, APPELLATE DIVISION

DOCKET NOS. A-3542-21T2,  
A-3543-21T2

CIVIL ACTION

**CERTIFICATION OF DAVID J.  
FIOCCOLA**

ON APPEAL FROM:  
FINAL AGENCY ACTION IN THE  
DEPARTMENT OF STATE  
HON. TAHESHA WAY,  
SECRETARY OF STATE

I, David J. Fioccola, hereby certify the following:

1. I am an attorney admitted to practice law in the State of New Jersey and am a partner with the law firm Morrison & Foerster LLP. I represent proposed amicus curiae the Brennan Center in the above-captioned matter.

2. I submit this Certification in support of the Brennan Center's motion for leave to file an amicus brief pursuant to New Jersey Rule 1:13-9. I have

personal knowledge of the facts set forth herein.

3. The Brennan Center for Justice at NYU School of Law was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. The Brennan Center is a not-for-profit, non-partisan think tank and public interest law institute dedicated to improving systems of democracy and justice.

4. *Amicus curiae* participation is especially appropriate in this case because it has “broad implications,” *Taxpayers Association of Weymouth Twp. v. Weymouth Twp.*, 80 N.J. 6, 17 (1976), and is of “general public interest.” *Casey v. Male*, 63 N.J. Super. 255, 259 (N.J. Super. Ct. 1960).

5. This case raises important questions, including regarding the meaning and scope of the right to assembly guaranteed by New Jersey’s Constitution. Since the Assembly Clause’s adoption in 1844, courts have rarely had the opportunity to address its meaning. Its application to the state’s anti-fusion laws is thus an important question of first impression.

6. The Brennan Center’s Democracy Program seeks to bring the ideal of representative self-government closer to reality, including by protecting fundamental rights, democratic values, and the rule of law under state constitutions and the United States Constitution. Recognizing that state courts and constitutions provide critical and distinct sources of protections for civil rights and democratic

institutions, the Brennan Center regularly produces research and resources about state constitutional developments, including in a recently launched publication, State Court Report. The Brennan Center also regularly participates as an amicus on these issues before the U.S. Supreme Court, federal circuit courts, and state appellate courts.

7. The special interest and expertise of the Brennan Center in this area of law are substantial. I respectfully submit that the participation of the Brennan Center will assist the Court in the resolution of the significant issues of public importance implicated by this appeal.

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

Dated: July 5, 2023

MORRISON & FOERSTER LLP

By: /s/ David J. Fioccola  
David J. Fioccola

*Counsel for Amicus Curiae  
the Brennan Center*



Pacer  
IN RE TOM MALINOWSKI,  
PETITION FOR NOMINATION  
FOR GENERAL ELECTION,  
NOVEMBER 8, 2022, FOR UNITED  
STATES HOUSE OF  
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CIVIL ACTION

ON APPEAL FROM:  
FINAL AGENCY ACTION IN THE  
DEPARTMENT OF STATE  
HON. TAHESHA WAY,  
SECRETARY OF STATE

**BRIEF OF AMICUS CURIAE THE BRENNAN CENTER**

Dated: July 5, 2023

Alicia Bannon (NJ ID 041292010)  
Douglas Keith (*pro hac vice pending*)  
Lauren Miller (*pro hac vice pending*)  
**THE BRENNAN CENTER**  
120 Broadway, Suite 1750  
New York, NY 10271  
T: (646) 292-8310  
F: (212) 463-7308  
Emails:  
bannona@brennan.law.nyu.edu  
keithd@brennan.law.nyu.edu  
millerl@brennan.law.nyu.edu

Joseph R. Palmore  
(*pro hac vice pending*)  
**MORRISON & FOERSTER LLP**  
2100 L Street NW, Suite 900  
Washington, DC 20037  
T: (202) 887-1500  
F: (202) 887-0763  
Email: JPalmore@mofocom

\*David J. Fioccola, Esq.  
(NJ ID 013022000)  
**MORRISON & FOERSTER LLP**  
250 West 55<sup>th</sup> Street  
New York, NY 10019  
T: (212) 468-8000  
F: (212) 468-7900  
Email: DFioccola@mofocom

Joel F. Wacks  
(*pro hac vice pending*)  
**MORRISON & FOERSTER LLP**  
425 Market Street  
San Francisco, CA 94105  
T: (415) 268-7000  
F: (415) 268-7522  
Email: JWacks@mofocom

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## **STATEMENT OF THE INTEREST OF AMICUS CURIAE**

The Brennan Center for Justice at NYU School of Law<sup>1</sup> is a not-for-profit, non-partisan think tank and public interest law institute dedicated to improving our systems of democracy and justice. The Brennan Center respectfully refers the Court to the accompanying Certification of David J. Fioccola, which explains its interest in this case.

### **PRELIMINARY STATEMENT**

Almost 180 years ago, New Jersey’s 1844 constitutional convention met to revise the state’s Constitution, which had been written hastily during the Revolutionary War. The convention’s revisions included a new Bill of Rights prominently placed at the beginning of the document. Among those rights was the New Jersey Assembly Clause, which guarantees this state’s residents “the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.” N.J. CONST. art. I, ¶ 18.

Since the Assembly Clause’s adoption, courts have rarely had the opportunity to address its meaning. Its application to the state’s anti-fusion laws is thus an important question of first impression that warrants a closer examination of the clause’s origin, meaning, structure, and purpose. These

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<sup>1</sup> This brief does not purport to convey the position, if any, of NYU School of Law.



considerations all support a broad interpretation of the right to assemble: the Assembly Clause not only operates independently from speech, press, and petition rights, but it also reflects a specific interest in collective action for reasons of political participation and representative government, including support for minor parties.

Part I.A of this brief explores the New Jersey Supreme Court’s existing assembly clause jurisprudence, which recognizes the “exceptional vitality” of the state’s assembly right. *State v. Schmid*, 84 N.J. 557, 557 (1980). While the United States Supreme Court treats the First Amendment’s Assembly Clause “as simply a facet of the right of free expression,” Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543, 547 n.10 (2009), the New Jersey Supreme Court has held that New Jersey’s Assembly Clause is “more sweeping in scope than the language of the First Amendment.” *Schmid*, 84 N.J. at 557. Several state courts have come to similar conclusions, as discussed in Part I.B.

Part II examines the “sweeping” scope of New Jersey’s Assembly Clause by looking to its history. Its roots date back to colonial New England, whose rich tradition of local self-government shaped the right to free assembly. In response to British incursions on the colonies’ self-rule, Revolutionary Era thinkers articulated a robust right to participate in

representative government. Those thinkers inspired, and in some cases drafted, the assembly clauses in the earliest state constitutions. New Jersey's assembly right was modeled on those first state assembly clauses—not the federal Bill of Rights.

Part III analyzes the text and placement of New Jersey's Assembly Clause. While the federal Constitution pairs free assembly with the First Amendment's guarantees of free expression, New Jersey—like other state constitutions—couples its Assembly Clause with constitutional provisions specifically designed to facilitate participation in a representative government. The New Jersey Bill of Rights' placement is also telling. Unlike the federal Constitution, New Jersey follows the general state practice of placing its Bill of Rights at the beginning of the Constitution, signaling that the state government's primary priority is protecting the rights of its residents.

Part IV contextualizes New Jersey's Assembly Clause as one example of the democratic values imbued in state constitutions, which have long protected democratic rights beyond those found in the United States Constitution. New Jersey's Constitution, like other states', includes express commitments to popular sovereignty, embraces majority rule as the best approximation of popular will, and contains express commitments to political equality. These

features have provided state courts, including New Jersey's, with a strong and expansive foundation for protecting the democratic rights of their residents.

## **PROCEDURAL HISTORY AND STATEMENT OF THE FACTS**

Amicus adopts Appellants' Procedural History and Statement of Facts.

## **ARGUMENT**

### **I. ASSEMBLY CLAUSES IN STATE CONSTITUTIONS PROTECT AND PRIVILEGE POLITICAL PARTICIPATION AND REPRESENTATIVE GOVERNMENT INDEPENDENT OF THE FEDERAL CONSTITUTION.**

#### **A. The New Jersey Supreme Court Has Already Found The State's Assembly Clause To Be More Expansive Than The First Amendment.**

The New Jersey Supreme Court has recognized the state Assembly Clause's "exceptional vitality," *Schmid*, 84 N.J. at 557, and emphasized that its language is "more sweeping in scope than the language of the First Amendment." *Id.*; see also *State v. Butterworth*, 104 N.J.L. 579, 582 (Ct. Err. & App. 1928) (explaining that the state assembly right "must be given the most liberal and comprehensive construction."). Indeed, the New Jersey Supreme Court has already held that New Jersey's Assembly Clause is more protective than the First Amendment in at least one way: "[T]he rights of free speech and assembly under our constitution are not only secure from interference by governmental or public bodies, but under certain circumstances from the interference by the owner of private property as well." *Committee for*

*a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 192 N.J. 344, 364 (2007).

This treatment is consistent with the Court's well-established status as a "leader" in interpreting its state's Constitution more broadly than its federal counterpart. Robert F. Williams, *The Evolution of State and Federal Constitutional Rights in New Jersey*, 69 Rutgers U.L. Rev. 1417, 1427–29 (2017). In fact, New Jersey's robust view of state constitutional rights dates back to the 1844 constitutional convention. When discussing the new Bill of Rights, the convention specifically declined to omit a declaration that "[a]ll political power is inherent in the people," even though some delegates believed that the federal Constitution already guaranteed this principle. New Jersey Writer's Project, *New Jersey State Constitutional Convention of 1844*, 51, 140–41 (1844). The delegates based that decision in part on the convention's recognition that New Jersey was no "mere appendage to the United States," but rather "a free and sovereign people." *Id.* at 140–41.

In the years following the 1844 convention, the New Jersey Supreme Court, like other state courts, has had few opportunities to consider the state Assembly Clause's application. This brief therefore looks to additional sources to further inform the meaning of the state's assembly right: the limited but compelling assembly clause jurisprudence from other state courts; the

Assembly Clause’s historical context; textual and structural considerations; and democratic principles imbued in state constitutions, including New Jersey’s. These sources all point towards a broad right to assembly that exists separate and apart from speech, press, and petition rights and which protects political participation and representative government.

**B. State Courts Have Interpreted Their Assembly Clauses To Protect Democratic Participation Independently Of The First Amendment.**

Several state high courts have recognized that their state assembly clauses should be construed independently of their federal analog and with an eye toward furthering democratic participation. *See Commonwealth v. Tate*, 495 Pa. 158, 169 (1981) (recognizing, in a case involving the state assembly right’s application to public leafleting, “that a state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution, and that the rights so guaranteed may be more expansive than their federal counterparts”); *Deras v. Myers*, 272 Or. 47, 64 (1975) (en banc) (explaining, in a case involving the state assembly right’s application to limits on campaign expenditures, that the First Amendment “is not controlling where . . . our constitution should provide a larger measure of protection to the citizen”).

Most recently, the Massachusetts Supreme Judicial Court gave its assembly clause a broad reading. In *Barron v. Kolenda*, local officials ejected a Southborough resident from a town meeting after she compared them to “drunken sailors” and “Hitler.” 491 Mass 408, 412-13 (2023). The resident brought constitutional claims challenging the town’s public comment policy, which required comments in public meetings to be “respectful and courteous, free of rude, personal or slanderous remarks.” *Id.* at 411 n.5.

The court held that the policy’s restrictions violated Massachusetts’s assembly clause for several reasons. *Id.* at 409-10. First, it noted that the clause’s text “expressly envisions a politically active and engaged, even aggrieved and angry, populace.” *Id.* at 415. Second, it reviewed the clause’s “illustrious past.” *Id.* at 414. The court explained that Massachusetts’s assembly clause, drafted by John Adams and his cousin Samuel, “reflects the lessons and the spirit of the American Revolution.” *Id.* at 416. It arose “out of fierce opposition to governmental authority” and was understood by both Adams cousins as essential to self-government. *Id.* The court thus concluded that even “rude, personal, and disrespectful” conduct was protected and that Southborough’s public comment policy “contradicted . . . the letter and purpose of” Massachusetts’s assembly clause. *Id.* at 416, 419. In other words, the provision’s Revolutionary-era origins led the court to apply the assembly

right broadly to protect democratic participation. The *Barron* court’s decision is particularly persuasive here because New Jersey’s Constitution, like many states’, drew inspiration from Massachusetts’s document. *See* Section II *infra*.

## **II. NEW JERSEY’S ASSEMBLY RIGHT IS ROOTED IN A RICH HISTORY OF POLITICAL PARTICIPATION AND REPRESENTATIVE GOVERNMENT.**

The New Jersey Supreme Court has recognized that “[t]he task of interpreting” many constitutional provisions “is an evolving and on-going process” because certain “‘great ordinances’ are flexible pronouncements constantly evolving responsively to the felt needs of the times.” *Atl. City Racing Ass’n v. Att’y Gen.*, 98 N.J. 535, 545 (1985). Consistent with this view, New Jersey courts generally look beyond constitutional provisions’ original public meaning and their authors’ intent. *See* Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 *Geo. J.L. & Pub. Pol’y* 341, 357-58 (2017) (concluding that originalism is not the primary canon of constitutional interpretation employed by New Jersey courts). Instead, they look to multiple factors when construing the rights guaranteed by the New Jersey Constitution: text, history, preexisting law, structure, state interests, local concerns, tradition, and public attitudes. *See State v. Hunt*, 91 N.J. 338, 363-67 (1982) (Handler, J., concurring).

While not an exclusive factor, history can play a useful role where, as here, courts have had few previous opportunities to interpret a constitutional provision. *Hunt*, 91 N.J. at 365. Historical context can underscore a provision’s significance, challenge long-held interpretive assumptions, and suggest alternative possible meanings. See Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 Yale L.J. 1652, 1724-25 (2021). “[E]ven a legal interpreter who rejects originalism [may] benefit from understanding the historical context surrounding a text, the mischief that the text’s supporters hoped to address, and the alternative interpretations that were once embraced as reasonable possibilities but have not since been followed because of contingent circumstances.” *Id.* at 1725 (internal quotation marks omitted). Recognizing these benefits, New Jersey courts have frequently used historical evidence as an interpretive aid when construing the New Jersey Constitution. See, e.g., *State v. Novembrino*, 105 N.J. 95, 147 (1987) (considering historical evidence from the Constitutional Convention of 1947 to interpret article I, paragraph 7 of the New Jersey Constitution). The rest of this section follows this tradition by exploring the history of New Jersey’s Assembly Clause. Like the Massachusetts assembly clause in *Barron*, the provision’s origins in the Revolutionary-era struggle for representative government point towards a broad application in furtherance of democratic participation.



## **A. The Right To Assemble Is Grounded In The Colonial Tradition Of Local Self-Government.**

New Jersey's Assembly Clause first appeared in the state's 1844 Constitution. Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* 455 (1930); Robert F. Williams, *New Jersey's State Constitutions: From Ridicule to Respect*, 185 N.J. Law 8, 9 (1997). Despite the New Jersey Assembly Clause's relatively late adoption, the New Jersey Supreme Court has recognized that the provision was "directly derived from earlier sources." *Schmid*, 84 N.J. at 557.

Our examination of those sources begins in colonial Massachusetts, where the right to assemble originated and evolved to become the model for future states' assembly clauses. *Barron*, 491 Mass at 414-17; *Lahman v. Grand Aerie of Fraternal Order of Eagles*, 121 P.3d 671, 680 (Or. App. 2005). John Adams, a key drafter of Massachusetts's constitution and early proponent of the right to assemble, believed that the state's "primitive institutions . . . produced a decisive effect . . . by the influence they had on the minds of the other colonies, by giving them an example to adopt more or less the same institutions." Bowie, *supra* at 1663 (quoting Letter from John Adams to the Abbé de Mably (1782) in 5 *The Works of John Adams, Second President of the United States* 492, 494-95 (1851), alteration and first omission in original)). Consistent with Adams' assessment, the delegates to New Jersey's 1844

constitutional convention frequently looked to the Massachusetts constitution (and other existing state constitutions) for inspiration. *See, e.g., New Jersey Writer's Project, supra* at 109, 403, 458, 535.

Adams viewed the town meeting as one of Massachusetts' most important "institutions." Bowie, *supra* at 1663. At these meetings, town residents exercised their right to assemble "to make such Laws and Constitutions as may concern the welfare of their Town." *Id.* at 1664. Town meetings had the authority to make "Prudential" rules governing a variety of local issues. *Id.* at 1665. They could also formally direct the agenda of the colonial General Assembly by "draft[ing] for their representatives binding orders, or 'instructions,' to vote particular ways." *Id.* at 1665-66; *see also* Luce, *supra* at 448-50. Together, "these powers . . . made town meetings one of the most powerful political institutions in colonial Massachusetts." Bowie, *supra* at 1666. The power wielded in town meetings demonstrates that from the earliest days of the American colonies, the right to assemble encompassed meaningful participation in passing legislation and influencing the decisions of other legislative bodies.

Notably, parts of New Jersey also adopted this model of local government. *State Commission on County and Municipal Government, Modern Forms of Municipal Government 2* (1992) (Puritan influence "resulted

in the introduction of New England town organization” in New Jersey). New Jersey’s Township Act of 1798 incorporated the state’s 104 townships, resulting in a system that “closely resembled the New England town meeting and [which] was considered a direct democracy.” *Id.* at 9.

**B. Colonists Developed A Broad Conception Of The Right To Assemble In Direct Response To British Restrictions.**

***1. Massachusetts’ model of powerful town meetings informed the colonists’ resistance to British rule.***

The features that made town meetings powerful political institutions also made them effective venues for protesting British intrusions into colonial affairs. Bowie, *supra* at 1666. In the years leading up to the Revolutionary War, town meetings voiced resistance against British policies through instructions to their colonial assemblies. In 1764, for example, colonists became alarmed after rumors of a potential sugar tax began circulating. *Id.* at 1668-69. Acting on town meeting instructions, the Massachusetts General Assembly led several other states in protesting Parliament’s power to tax the colonies. *Id.* New Jersey’s House of Assembly similarly issued resolutions protesting the Stamp Act, *see* The Stamp Act Resolves of the New Jersey Assembly (1765) in Larry R. Gerlach, *New Jersey in the American Revolution 1763-1783 A Documentary History* 22-24 (1975), and supporting a boycott of British goods to oppose the Townshend duties, *see* *The Resolution of the New*

*Jersey Assembly Supporting the Boycott to Oppose Townshend Duties (1769)*  
in Gerlach, *supra* at 48.

Informal assemblies proved equally significant. “[O]ver the summer of 1765, thousands of individuals . . . began organizing clubs, gatherings, and other informal assemblies” to strategize resistance to British taxation. Bowie, *supra* at 1669. Again, New Jersey was no exception. The state boasted multiple chapters of the Sons of Liberty, Gerlach, *supra* at 27, a group founded in Boston to oppose the Stamp Act, Bowie, *supra* at 1669.

As time went on, these extralegal assemblies increasingly came to resemble formal legislatures. The Stamp Act Congress was composed of delegates from throughout the colonies and asserted its right “to petition the King, or either House of Parliament.” *Id.* at 1669-70. In New Jersey, the colony-wide New Brunswick Convention of 1774 “assumed temporary direction of the resistance movement” and “appoint[ed] delegates to the First Continental Congress.” Gerlach, *supra* at 76-77. Assemblies like these “greatly advanced the notion that legitimate political authority derived . . . from the people at large.” Gerlach, *supra* at 97.

Predictably, British authorities attempted to stifle colonial resistance by undermining assemblies’ legislative powers or banning assembly altogether. When New York’s General Assembly refused to appropriate tax revenue for

quartering British soldiers, Parliament passed the Restraining Act to prohibit the General Assembly from enacting other legislation until it made appropriations “for furnishing his Majesty’s Troops.” *Id.* The Massachusetts General Assembly, and Massachusetts’s town meetings, faced even harsher treatment. The colony’s governor prorogued the General Assembly in 1772 after a dispute over its authority to control the colonial governor’s salary. *Id.* at 1680-81. After the Boston Tea Party, Parliament punished Massachusetts by prohibiting most town meetings without the governor’s consent. *Id.* at 1686-87. New Jersey’s legislature was not spared—Royal Governor William Franklin prorogued it after a dispute “over the supplying of . . . barracks [for British soldiers] came to a head.” Gerlach, *supra* at 61.

**2. *The colonists’ response to British restrictions shaped the right to assemble.***

British interference with colonial assemblies prompted the colonists to assert a natural right to assemble. In the face of the ban on town meetings, Massachusetts residents continued to meet in county conventions of towns, insisting that “we have, within ourselves, the exclusive right of originating each and every law respecting ourselves.” Bowie, *supra* at 1689. Committees of correspondence throughout the colonies “organized themselves into meetings like the Boston town meeting” and asserted an inherent right to assemble. *Id.* at 1690-91. New Jersey had its own committee of

correspondence, which expressed its alarm at Boston's treatment and its willingness "to attend a Congress, Petition[] the King or . . . adopt[] any other legal mode for obtaining redress." *Letter of the Committee of Correspondence of the New Jersey Assembly to the Boston Committee of Correspondence* (1774) in Gerlach, *supra* at 68.

American writers also began to articulate the basis and scope of the assembly right. Enraged by the Restraining Act, Pennsylvania lawyer John Dickinson wrote a widely republished essay arguing that Parliament's action threatened to annihilate the colonies' right to self-government. Bowie, *supra* at 1672. Dickinson contended that the purpose of an assembly was "to obtain redress of grievances," but that this was impossible if an assembly "had no other method of engaging attention, than by complaining." *Id.* at 1672-73. Samuel Adams agreed, writing that a similar restriction imposed "throughout the colonies . . . would be a short and easy method of annihilating the legislative powers in America, and by consequence of depriving the people of a fundamental right of the constitution, namely, that every man shall be present in the body which legislates for him." *Id.* at 1674. The colonists thus described a right to assemble that included the right to complain effectively through collective political action. *Id.* at 1672, 1676.

Against this backdrop, the Continental Congress—itsself an extralegal assembly—included the following grievance in its Declaration of Rights: “[A]ssemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal, & reasonable petitions to the crown for redress, have been repeatedly treated with contempt.” *Id.* at 1693. This declaration “almost certainly” inspired the first state assembly clauses. *Id.* at 1701.

**C. Early State Constitutions Drew On The Colonial Understanding Of The Right To Assemble As A Right To Representative Government.**

On the advice of the Continental Congress, the colonies began to adopt written constitutions. *Id.* at 1697-98. On August 16, 1776, Pennsylvania became the first state to adopt a constitutional right to assembly. *Id.* at 1701. The Pennsylvania constitution declared “[t]hat the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.” Luce, *supra* at 453.

Pennsylvania’s assembly clause surely drew from the similarly-worded grievance in the Declaration of Rights. Bowie, *supra* at 1701. But it also contained a notable addition: An explicit right to instruct representatives. *See id.* at 1702; *see also* Luce, *supra* at 453. This innovation “betrays the

influence of [Samuel] Adams or someone else from New England, because Pennsylvania had no similar tradition of assembling in town meetings to instruct representatives to the legislature.” Bowie, *supra* at 1702. Just as the colonies mimicked the town meeting structure when resisting British incursions, Bowie, *supra* at 1732, many states followed Pennsylvania and drew upon the Massachusetts tradition by including a right to instruct in their constitutions, *see* Luce, *supra* at 454-55; *see also* Bowie, *supra* at 1732-34. This history shows that the colonial understanding of the assembly right informed the earliest assembly clauses.

That understanding is equally relevant when interpreting the subsequent assembly clauses (including New Jersey’s) that were modeled on those early state constitutions. “[W]hen new states joined the Union and existing states amended their original constitutions, they often copied the first state assembly clauses word for word.” Bowie, *supra* at 1732; *see also* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 866 (2021) (“From the eighteenth century until the present, drafters of state constitutional provisions have consulted and copied other states’ foundational texts.”). Massachusetts, for example, adopted an assembly clause substantially identical to Pennsylvania’s, other than a specification that the rights it announced must be exercised “in an orderly and peaceable



manner.” Bowie, *supra* at 1733; *see also* MASS. CONST. OF 1780, pt. 1. art. XIX. Today, 42 state constitutions contain assembly clauses following the structure first adopted by Pennsylvania. Bowie, *supra* at 1657, 1727.

New Jersey’s 1844 Constitution was no exception. It employed language similar to the Pennsylvania and Massachusetts assembly clauses, although it omitted any explicit requirement of peaceable assembly. N.J. CONST. OF 1844, Art. I, ¶ 18. It also introduced a new formulation of the right to instruction, declaring that the people have a right “to make known their opinions to their representatives.” *Id.*, *see* Luce, *supra* at 455. The language adopted by the 1844 convention was carried over, unamended, into New Jersey’s current Constitution. N.J. CONST. art. I, ¶ 18.

#### **D. New Jersey Has A Rich Tradition Of Assembly.**

Samuel Adams believed that it was “the indisputable Right of all or any of his Majesty’s subjects . . . regularly and orderly to meet together to state the Grievances they labor under; and to propose and unite in such constitutional Measures as they shall judge necessary or proper to obtain Redress.” Bowie, *supra* at 1683. John Adams believed that this type of popular participation should serve as the bedrock for any government. “The ideal government, Adams explained, was one in which everyone could participate, like a town meeting.” Bowie, *supra* at 1698. Of course, Adams understood that “[i]n a

Community consisting of large Numbers . . . it is not possible that the whole Should assemble, to make Laws.” *Id.* (quoting Letter from John Adams to John Penn (Mar. 27, 1776) in 4 *Papers of John Adams* 80 (1979)). The next best option was a representative government that would operate “as an extension of the right of people to assemble and govern themselves.” *Id.* at 1698-99.

The people of New Jersey have repeatedly taken up the Adams cousins’ call by exercising their assembly right to obtain redress for their grievances and representation in the government. Abolitionists assembled to petition for the end of slavery in New Jersey. Giles R. Wright, *Afro-Americans in New Jersey: A Short History* 25-27 (1988). Suffragists assembled to advocate for restoration of women’s voting rights. New Jersey State Library, *New Jersey Suffrage Timeline*, <https://libguides.njstatelib.org/votesforwomen> (last accessed June 6, 2023). Black New Jerseyans used their assembly rights to fight for equality throughout the state’s history, forming groups to oppose slavery in the American South, organizing statewide conventions to petition for voting rights, and organizing chapters of civil rights organizations such as the NAACP. Giles, *supra*, at 32, 34, 62, 73. And since the Federation of Trades and Labor Unions of New Jersey was founded in 1879, unions have exercised their assembly rights to fight for laws benefiting workers. New Jersey State

AFL-CIO, *History*, <https://njafclcio.org/history> (last accessed June 6, 2023).

The rich tradition of assembly in New Jersey is yet another reason to interpret the state Assembly Clause to protect collective political action and representative government. *See Hunt*, 91 N.J. at 366 (“A state’s history and traditions may also provide a basis for the independent application of its constitution.”) (Handler, J., concurring).

### **III. THE TEXT AND STRUCTURE OF NEW JERSEY’S ASSEMBLY CLAUSE COMPEL AN INDEPENDENT INTERPRETATION OF NEW JERSEY’S ASSEMBLY RIGHT THAT BROADLY PROTECTS DEMOCRATIC PARTICIPATION.**

The United States Supreme Court has treated the federal right of assembly as an adjunct of the rights to free speech and press in part because of its structure, which couples the Assembly Clause with the Establishment, Free Exercise, Free Speech, and Press Clauses. El-Haj, *supra* at 547 n.10; *Thomas v. Collins*, 323 U.S. 516, 530 (1945). But New Jersey’s Constitution, like most state constitutions, separates its Assembly Clause from these other rights.

As explained above, New Jersey follows the lead of the earliest state assembly clauses. Bowie, *supra* at 1732. Those provisions paired the assembly right not with rights of free expression, but instead with “provisions declaratory of the general principles of republican government.” *Id.* at 1727 (internal quotation marks omitted). So, in New Jersey, the people’s right of free assembly keeps company with their rights “to consult for the common

good, to make known their opinions to their representatives, and to petition for redress of grievances.” N.J. CONST. art. I, ¶ 18. In further contrast to the federal Constitution, the right to free expression is located in a separate paragraph. *See* N.J. CONST. art. I, ¶ 6.

These distinctions are significant. New Jersey courts recognize that “the phrasing of a particular provision in our charter may be so significantly different from the language used to address the same subject in the federal Constitution that we can feel free to interpret our provision on an independent basis.” *Hunt*, 91 N.J. at 364 (Handler, J., concurring). Here, one of the United States Supreme Court’s reasons for treating “the [federal] right of assembly as simply a facet of the right of free expression” does not apply to its New Jersey counterpart. *El-Haj*, *supra* at 547 n.10.

Another critical distinction is the placement of the Bill of Rights. While the federal Constitution places the Bill of Rights’ guarantees at the end of the document, the states, including New Jersey, generally place their bill of rights at the beginning of the constitution—a decision “intended to announce that the protection of rights is the first task of government, indeed, its *raison d’etre*.” Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 *Publius* 11, 15 (Winter 1982). As a drafter of Iowa’s constitution explained, the bill of rights “stands there in the beginning like a sentinel

guarding the gates of a city; and it is a warning to all who come there that unless they give the sign-manuel, they cannot enter.” 1 *The Debates of the Constitutional Convention; of the State of Iowa* 168-69 (W. Blair Lord rep.) (Davenport, Luse, Lane & Co. 1857).

#### **IV. THE DEMOCRATIC CHARACTER OF STATE CONSTITUTIONS INFORMS THE INTERPRETATION OF PROVISIONS LIKE NEW JERSEY’S ASSEMBLY CLAUSE.**

State constitutions—including New Jersey’s—privilege democratic rights to a far greater extent than their federal counterpart. Jessica Bulman-Pozen, *supra* at 863-64. This commitment is evident in three features common to state constitutions. First, most state constitutions, like New Jersey’s, “include[] an express commitment to popular sovereignty.” *Id.* at 869-70; *see* N.J. CONST. art. I, ¶ 2a (“All political power is inherent in the people.”).

“Second, state constitutions embrace majority rule as the best approximation of popular will.” *Id.* at 880. Several features of New Jersey’s Constitution privilege majority rule, including the provision for adoption of constitutional amendments by a majority of legally qualified voters. N.J. CONST. art. IX, ¶ 6.

Third, “state constitutions also embrace a commitment to political equality.” Bulman-Pozen, *supra* at 890. That commitment is evidenced both in provisions intended to guarantee “equal access to political institutions by

members of the political community,” and those that ensure “equal treatment of members of the political community by those institutions.” *Id.* Tellingly, every state constitution, unlike the United States Constitution, explicitly guarantees the right to vote. Joshua A. Douglas, *The Right to Vote under State Constitutions*, 67 *Vanderbilt L. Rev.* 89, 101 (2014); *see also* N.J. CONST. art. II, section I, ¶ 3 (guaranteeing the right to vote).

Accordingly, New Jersey and other state courts have found violations of democratic rights under their own constitutions even in the absence of an equivalent federal remedy. In *Schmid*, for example, the New Jersey Supreme Court held that Princeton University violated New Jersey’s guarantees of free speech and assembly by prohibiting the distribution of political literature, while declining to decide whether the First Amendment applied to the actions of a private university. *Schmid*, 84 N.J. at 538, 553, 569. Similarly, the Pennsylvania Supreme Court has held that a partisan gerrymander violated Pennsylvania’s Free Elections Clause, while noting that “our Court entertains as distinct claims brought under the Free and Equal Elections Clause of our Constitution and the federal Equal Protection Clause.” *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 96–97, 114 (2018); *see also In the Matter of the 2021 Redistricting Cases*, 528 P.3d 40, 92 (Alaska 2023) (declining to “follow the [U.S.] Supreme Court’s lead” in “holding that

political gerrymandering claims are non-justiciable,” and instead “expressly recogniz[ing] that partisan gerrymandering is unconstitutional under the Alaska Constitution”); *Weinschenk v. State*, 203 S.W.3d 201, 212, 221–22 (Mo. 2006) (en banc) (striking down a voter ID law and stating that “[d]ue to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart.”).

Grounded within early forms of direct democracy, and originally intended to safeguard meaningful, popular participation in representative government, New Jersey’s Assembly Clause compels a similarly pro-democratic interpretation. The history, structure, and text of the New Jersey Assembly Clause demonstrate that it not only operates independently from speech, press, and petition rights, but also exists to protect those who gather together for reasons of political participation and representative government, including those who wish to utilize fusion voting to support a political candidate on a minor party line.

\* \* \*

This case presents this Court with a unique opportunity to clarify the content and scope of New Jersey’s Assembly Clause. The clause’s text and history, as well as the expansive precedents that do exist, all support a broad

assembly right consistent with the right to representative government and political participation envisioned by the drafters of New Jersey's Constitution.

### **CONCLUSION**

Secretary Way's decision should be reversed.

Dated: July 5, 2023

MORRISON & FOERSTER LLP

By:  /s/ David J. Fioccola

Alicia Bannon (NJ ID 041292010)  
Douglas Keith (*pro hac vice pending*)  
Lauren Miller (*pro hac vice pending*)  
**THE BRENNAN CENTER**  
120 Broadway, Suite 1750  
New York, NY 10271  
T: (646) 292-8310  
F: (212) 463-7308  
Emails: [bannona@brennan.law.nyu.edu](mailto:bannona@brennan.law.nyu.edu)  
[keithd@brennan.law.nyu.edu](mailto:keithd@brennan.law.nyu.edu)  
[millerl@brennan.law.nyu.edu](mailto:millerl@brennan.law.nyu.edu)

Joseph R. Palmore  
(*pro hac vice pending*)  
**MORRISON & FOERSTER LLP**  
2100 L Street NW, Suite 900  
Washington, DC 20037  
T: (202) 887-1500  
F: (202) 887-0763  
Email: [JPalmore@mofoc.com](mailto:JPalmore@mofoc.com)

David J. Fioccola, Esq.  
(NJ ID 013022000)  
**MORRISON & FOERSTER LLP**  
250 West 55<sup>th</sup> Street  
New York, NY 10019  
T: (212) 468-8000  
F: (212) 468-7900  
Email: [DFioccola@mofoc.com](mailto:DFioccola@mofoc.com)

Joel F. Wacks  
(*pro hac vice pending*)  
**MORRISON & FOERSTER LLP**  
425 Market Street  
San Francisco, CA 94105  
T: (415) 268-7000  
F: (415) 268-7522  
Email: [JWacks@mofoc.com](mailto:JWacks@mofoc.com)

*Attorneys for Amicus Curiae the Brennan Center*



DAVID JOHN FIOCCOLA, Esq.  
MORRISON & FOERSTER LLP  
250 W 55TH STREET  
NEW YORK, NY 10019  
212-468-8000  
dfioccola@mofo.com  
docketny@mofo.com  
stice@mofo.com

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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

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submitted and transmitted to the parties listed below in the following format:

ELECTRONICALLY TO:

**ATTORNEY NAME: FLAVIO L KOMUVES, Esq.  
FKOMUVES@WEISSMANMINTZ.COM; KMARRERO@WEISSMANMINTZ.COM**

**ATTORNEY NAME: STEVEN P WEISSMAN, Esq.  
SWEISSMAN@WEISSMANMINTZ.COM**

**ATTORNEY NAME: YAEL BROMBERG, Esq.  
YBROMBERG@BROMBERGLAWLLC.COM**

**ATTORNEY NAME: BRETT M PUGACH, Esq.  
BPUGACH@WEISSMANMINTZ.COM; BMPUGACH@GMAIL.COM**

**ATTORNEY NAME: SUSAN MARIE SCOTT, Esq.  
SUSAN.SCOTT@LAW.NJOAG.GOV**

**ATTORNEY NAME: MELISSA H RAKSA, Esq.  
DOL.APPEALS@LAW.NJOAG.GOV**

**ATTORNEY NAME: STEVEN MICHAEL GLEESON, Esq.  
STEVEN.GLEESON@LAW.NJOAG.GOV**

**ATTORNEY NAME: LEVI MALCOLM KLINGER-CHRISTIANSEN, Esq.  
LEVI.KLINGERCHRISTIANSEN@LAW.NJOAG.GOV**

**ATTORNEY NAME: FLAVIO L KOMUVES, Esq.  
FKOMUVES@WEISSMANMINTZ.COM; KMARRERO@WEISSMANMINTZ.COM**

**ATTORNEY NAME: STEVEN P WEISSMAN, Esq.  
SWEISSMAN@WEISSMANMINTZ.COM**

**ATTORNEY NAME: YAEL BROMBERG, Esq.  
YBROMBERG@BROMBERGLAWLLC.COM**

**ATTORNEY NAME: BRETT M PUGACH, Esq.  
BPUGACH@WEISSMANMINTZ.COM; BMPUGACH@GMAIL.COM**

**ATTORNEY NAME: SUSAN MARIE SCOTT, Esq.  
SUSAN.SCOTT@LAW.NJOAG.GOV**

**ATTORNEY NAME: MELISSA H RAKSA, Esq.  
DOL.APPEALS@LAW.NJOAG.GOV**

**ATTORNEY NAME: STEVEN MICHAEL GLEESON, Esq.**

**STEVEN.GLEESON@LAW.NJOAG.GOV**  
**ATTORNEY NAME: LEVI MALCOLM KLINGER-CHRISTIANSEN, Esq.**  
**LEVI.KLINGERCHRISTIANSEN@LAW.NJOAG.GOV**  
**ATTORNEY NAME: JASON N SENA, Esq.**  
**JSENA@ARCHERLAW.COM; LROSMARIN@ARCHERLAW.COM**

BY MAIL:

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.

**Attorney for MOVANT**  
**THE BRENNAN CENTER**

Dated: **07/05/2023**

By: **S/ DAVID JOHN FIOCCOLA, Esq.**