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 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 AMICUS CURIAE

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Rainey Center, Cato Institute, and former Governor of New Jersey Christine Todd Whitman respectfully appear here as Amici Curiae for the Appellants. Amici Curiae share a common belief that New Jersey's Anti-Fusion Laws ought not persist because they represent undue government interference with voters' and political parties' rights of free expression and association. Amici Curiae respectfully refer the court to their Certification of Counsel for a fulsome statement of interest on behalf of each signatory.

INTRODUCTION

New Jersey's prohibitions of fusion voting, codified at N.J.S.A. 19:13-4, 19:13-8, 19:14-2, 19:14-9, and 19:23-15 (together, the "Anti-Fusion Laws"), violate fundamental principles of liberty and democracy that New Jersey and federal courts alike have vigorously defended and enforced. New Jersey's protection of free expression is rooted in respect for a free market of ideas, in which dynamic, open debate promotes truth. *See Green Party v. Hartz Mountain Indus.*, 164 N.J. 127, 150 (2000) (internal citation omitted) ("Our description of the theory of freedom of speech is based on an analogy to the economic market. . . . [It] is based on the assumption that the truth will always win in a free and open encounter with falsehood.").

These foundational free market principles underly the protections for free

speech and free association provided under federal law and extended under the New Jersey Constitution. *See, e.g.*, *id.*; *McIntyre v. Ohio Elections Comm'ns*, 514 U.S. 334, 357 (1995) (citing J. Stuart Mill, *On Liberty and Considerations on Representative Government* 1, 3–4 (R. McCallum ed. 1947) and noting that "our society accords greater weight to the value of free speech than to the dangers of its misuse"). Indeed, the Framers "designed" the federal First Amendment "to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (internal citation and quotation marks omitted). Both New Jersey and federal courts have applied exacting scrutiny where government restrictions have interfered with the free market exchange of political ideas and viewpoints. Justices have long noted that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Green Party*, 164 N.J. at 150 ("the exchange of discordant views perpetuates the classical model of freedom that we pursue").[1]

[1] *See also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (explaining that "the ultimate good desired is better reached by a free trade in ideas" where the "truth" can be ascertained through "the competition of the market").

New Jersey's Anti-Fusion Laws unacceptably encumber this free-market exchange of ideas by, among other things, restraining candidate nominations. The candidate nomination process is an important medium of political expression by which political parties (and, importantly, the voters that comprise those parties) voice their views for the electoral marketplace to evaluate. Nominations therefore contribute to the free exchange of ideas that is venerated in a healthy democracy and respected in New Jersey's jurisprudence. As a result, any laws—including New Jersey's Anti-Fusion Laws—that restrict parties' ability to nominate otherwise qualified candidates to the ballot must be subject to rigorous scrutiny. Here, the Anti-Fusion Laws cannot withstand such examination.

New Jersey's Anti-Fusion Laws should be invalidated because they: (I) violate the New Jersey Constitution's guarantee of free expression and association for its citizens and political parties; and (II) conflict with New Jersey courts' principled curtailment of government intrusion into its citizens' exercise of their individual rights. Amici respectfully request that this Court grant Appellants' petition and declare the Anti-Fusion Laws unconstitutional.

ARGUMENT

I. NEW JERSEY'S PROHIBITION OF FUSION NOMINATIONS VIOLATES ITS CITIZENS' RIGHTS OF FREE EXPRESSION AND ASSOCIATION PROTECTED BY NEW JERSEY'S CONSTITUTION.

The Anti-Fusion Laws are in sharp disharmony with New Jersey's broad protections for its citizens'[2] rights of free expression and association and should be overturned because: (A) free speech and association are fundamental rights under New Jersey law; (B) candidate nominations implicate these fundamental rights; (C) the Anti-Fusion Laws unduly constrain candidate nominations and therefore violate the New Jersey Constitution; and (D) federal constitutional law further supports a finding of unconstitutionality.

A. Free Expression and Association Are Sacrosanct Under New Jersey Law.

The Anti-Fusion Laws are in tension with New Jersey citizens' rights of free speech and association, which are fundamental under New Jersey law. *See, e.g.*, *Senna v. Florimont*, 196 N.J. 469, 480 (2008) ("New Jersey's 1844 Constitution enshrined free speech as a fundamental right."); *Friedland v. State*, 149 N.J. Super. 483, 490 (Law Div. 1977) ("The right to associate with others for the common advancement of political beliefs and ideas is a fundamental one."). As New Jersey courts have recognized, "[t]he New Jersey Constitution

[2] We use "citizens" broadly to embrace voters, candidates, and the political parties they comprise.

guarantees a broad affirmative right to free speech," one "of the broadest in the nation," and one that "affords greater protection than the First Amendment." *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 220 N.J. 71, 78–79 (2014). New Jersey's Constitution "affirmatively guarantees to individuals the rights of speech and assembly" and "expressly prohibits government itself . . . from unlawfully restraining or abridging 'the liberty of speech.'" *State v. Schmid*, 84 N.J. 535, 560 (1980) (quoting N.J. Const. art. I, ¶ 6).

New Jersey courts have recognized that the State Constitution provides robust protections against *private* assaults on free speech, even in the absence of state action. *See Dublirer*, 220 N.J. at 78–79 ("Federal law requires 'state action' to invoke the First Amendment. The State Constitution does not.") (internal citations omitted). Applying these rigorous protections, New Jersey courts have consistently struck down instances of both state and private curtailment of free expression in the electoral context.[3] Since New Jersey courts

[3] Intervenors stress that the Anti-Fusion Laws, adopted in 1921, "survived the 1947 adoption of the current New Jersey Constitution," and continue to remain in force under that same Constitution today. Br. of Intervenor N.J. Republican State Comm., Inc., *In re Tom Malinowski, Petition for Nomination For Gen. Election, Nov. 8, 2022, for U.S. House of Representatives N.J. Congressional Dist. 7*, at 30. But they ignore that in those same intervening years the State Constitution's meaning *has evolved*, becoming more protective of its citizens' free expression rights in the electoral marketplace. For example, in *State v. Schmid*, the New Jersey Supreme Court held that Princeton University's arrest of a member of a minor political party "for distributing political literature" on its premises "did in fact violate [the individual's] State constitutional rights of expression," extending protection in the electoral marketplace to quasi-private spaces. 84 N.J. at 633. Similarly, in *Green Party v. Hartz Mountain Industries*, the court held that a shopping mall's requirement that members of a minor political party obtain an insurance policy to gather campaign signatures at the mall unduly constrained the members' "expressive rights." 164 N.J. at 158. The 1947 Constitution on which Intervenors attempt to hang their hats is not the same as the New Jersey Constitution today. Intervenors ignore this to their detriment.

circumscribe *private* interference with political expression, they must apply equal or even greater scrutiny to *governmental* interference with political expression. Here, such heightened scrutiny should be applied to the Anti-Fusion Laws.

When assessing restrictions upon fundamental state constitutional rights, New Jersey courts "balance the competing interests, giving proper weight to the constitutional values." *Green Party*, 164 N.J. at 148–49. "The more important the constitutional right sought to be exercised, the greater the [State's] need must be to justify interference with the exercise of that right." *Id*. This scrutiny is especially rigorous if the law constrains political speech, which "occupies a preferred position in our system of constitutionally-protected interests." *State v. Miller*, 83 N.J. 402, 411–12 (1980). Accordingly, "[w]here political speech is involved, [New Jersey's] tradition insists that government allow the widest room for discussion, the narrowest range for its restriction." *Id.* (internal quotation marks omitted).

As discussed below, the Anti-Fusion Laws cannot be squared with New Jersey's legal tradition, which has placed tremendous value on debate in the marketplace of ideas. *See Green Party*, 164 N.J. at 150. As evidenced by the broad protection New Jersey has historically afforded to freedom of expression and association, including in the realm of political speech and

elections, New Jersey courts have held these rights sacrosanct and should continue to do so in evaluating the Anti-Fusion Laws.

B. New Jersey Courts Have Recognized That Candidate Nominations Implicate Both Voters' and Political Parties' Speech and Association Rights, Which the Anti-Fusion Laws Unduly Constrain.

The Anti-Fusion Laws impose improper restraints on the candidate nomination process, interfering with the exercise of individual rights that New Jersey courts have zealously protected for decades. Applying New Jersey's broad conception of free speech and association, New Jersey courts have recognized that candidate nominations reflect pure political expression by voters and political parties alike. As a result, New Jersey courts have struck down instances of government interference with the candidate nomination process to ensure the "widest" protection for political expression.[4] *Miller*, 83 N.J. at 411-12. Indeed, New Jersey caselaw recognizes two distinct fundamental interests implicated by restrictions on candidate nominations: (1) voters' expression of their political choice; and (2) political parties' association with

[4] Despite this established precedent in New Jersey, the State and Intervenors insist that they must impede the nomination process—and the political expression of parties and voters—with the Anti-Fusion laws to protect voters from their own imminent confusion. *See* Br. on Behalf of Resp'ts Tashea Way and N.J. Div. of Elections, *In re Tom Malinowski, Petition for Nomination For Gen. Election, Nov. 8, 2022, for U.S. House of Representatives N.J. Congressional Dist. 7*, at 49–52. The Court should reject this paternalistic justification. Indeed, the Supreme Court has emphasized that its "cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *See Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 454 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983)). Moreover, such paternalism is at odds with New Jersey courts' consistent rejection of government interference with various individual rights. *See infra* Part III.

their members.[5]

First, with regard to voters, "[t]he general rule applied to the interpretation of our elections laws is that . . . statutes providing requirements for a candidate's name to appear on the ballot will not be construed so as to deprive the voters of the opportunity to make a choice." *Catania v. Haberle*, 123 N.J. 438, 442–43 (1990). New Jersey courts recognize, therefore, that without meaningful choice in candidate nomination, voters cannot engage with the electoral marketplace and properly express their political views. In *Lesniak v. Budzash*, for example, the New Jersey Supreme Court rejected the state's efforts to prevent unaffiliated voters from signing nominating petitions. 133 N.J. 1, 17 (1993). The court recognized the important connection between an individual voter's speech and association rights, holding that signing a nominating petition for a specific candidate "demonstrates a voter's intent to affiliate with [a specific party]" of their choosing and support a specific set of "shared political ideals." *Id.* at 15, 17. Here, to strike down the Anti-Fusion Laws would follow *Lesniak*'s example and ensure that state laws do not unjustifiably limit voters' choices for candidate nomination.

Similarly, in *Council of Alternative Political Parties v. State, Division of*

[5] While we focus on voters and political parties here, it bears acknowledging that candidates' expressive and associational rights are also unduly constrained by the Anti-Fusion Laws.

Elections, the Appellate Division held that a law limiting voters' ability to declare a party affiliation beyond Republican, Democrat, Independent, or Unaffiliated was unconstitutional. 344 N.J. Super. 225, 238 (App. Div. 2001) (reasoning that, under such a restriction, "a voter is prevented from publicly expressing a party preference even in the preliminary stages of the electoral process"). Because the law limited voters to a discrete set of options predetermined by the state, instead of allowing a voter to affiliate with the party and candidate that best represented his or her beliefs, the law "transgress[ed] . . . voters['] . . . First Amendment rights of free speech and association." *Id.* In so holding, the court recognized that the law "marginalize[d] voters . . . who depart from or disagree with the status quo." *Id.* The Anti-Fusion Laws have the same chilling effect on the electoral marketplace. By restricting which candidates parties can nominate, the Anti-Fusion Laws limit voters' ability to align with the party and candidate that best represents their political views.[6] New Jersey courts have consistently rejected such restrictions on voter choice and should again do so here.

Second, beyond voters' individual rights, New Jersey courts have further recognized that candidate nominations are an integral exercise of political

[6] Fusion voting, therefore, "provide[s] a refuge for those dissatisfied with the politics and policies of the two major parties." Jeffrey Mongiello, Comment, *Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture*, 41 SETON HALL L. REV. 1111, 1125 (2011).

parties' distinct rights of free expression and association. For example, the New Jersey Supreme Court found a statutory provision requiring a candidate to certify that he was not a member of any other political party to be "unconstitutional" and thus "invalid." *See Gansz v. Johnson*, 9 N.J. Super. 565, 567–68 (Law Div. 1950). The court reasoned that government action should not interfere with a party's ability to choose its desired candidate: the legislature "cannot limit the right of the convention, committee, or other body to nominate as its candidate any person who is qualified for the office." *Id.* New Jersey courts have thus intervened when necessary to protect political parties' choice of standard bearer. *See, e.g.*, *id.* Here, the Anti-Fusion Laws impede political parties' right to choose their standard bearers and, in turn, attract and identify voters who wish to affiliate with those parties.

Thus, the Anti-Fusion Laws inappropriately constrain both voters' and political parties' speech and association rights and for the reasons set forth below, cannot survive state constitutional scrutiny.

C. New Jersey's Anti-Fusion Laws Violate the New Jersey Constitution, as the New Jersey Supreme Court Foreshadowed in *Paterson*.

The Anti-Fusion Laws violate the New Jersey Constitution and the democratic principles for which it stands. Indeed, New Jersey precedent from over 100 years ago foreshadowed as much. Even before the current Anti-Fusion

Laws were enacted, the New Jersey Supreme Court recognized that any ban on fusion voting would raise democratic and constitutional concerns. *See In re City Clerk of Paterson*, 88 A. 694, 696 (N.J. 1913). In *Paterson*, the New Jersey Supreme Court reviewed a challenge to an anti-fusion law that prevented a political party from nominating a candidate already nominated by a different party. *See id.* at 695. *Paterson* was ultimately decided on statutory grounds: the original 1907 anti-fusion law at issue in *Paterson* had been abrogated by then-Governor Woodrow Wilson's 1911 Election Law, which permitted such nominations. *See id.* Nonetheless, the court reasoned beyond the statute when rendering its decision and provided insight that informs interpretation of the Anti-Fusion Laws in the instant case.

In particular, the court expressed its unease about the potential antidemocratic consequences of such fusion-voting prohibitions—namely, that "a political party shall not select a good man for its candidate, perhaps a better man than they have in their own ranks, because he does not wear its style of political garment." *Id.* at 696. The court reasoned that prohibitions on candidate cross-nominations could impair "free and untrammeled expression" by voters and political parties and, thereby, run afoul of constitutional protections.[7] *Id.*

[7] *See id.* ("[I]t may at least be well doubted whether it has not infringed a constitutional right of the voters to have a free and untrammeled expression of their choice of who shall be the officer to serve them . . . for, of course, the nominating of a candidate is a mere step in the selection of the officer.").

Over 100 years later, the court is now confronted directly with the circumstances foreshadowed in *Paterson*'s prophetic analysis.[8] The practical effects of the Anti-Fusion Laws are exactly as the *Paterson* court feared: a candidate must wear a certain "style of political garment" (i.e., declare a single party affiliation) to be nominated, and other parties are left disempowered and without voice, with a less-preferred candidate or no candidate at all.

The *Paterson* Court's reasoning still stands after a century and counsels that this Court should hold New Jersey's Anti-Fusion Laws unconstitutional. The Anti-Fusion Laws interfere with both the content of the political speech at issue (i.e., the affiliation with the nominee) and the medium of expression (i.e., the ballot nomination); both ought to be scrupulously protected, as they have otherwise been under New Jersey's caselaw and Constitution.[9] The Court should afford "proper weight to the constitutional values" at stake—free speech and expression made manifest through the electoral process—and it should

[8] The *Paterson* Court's view is not just archaic reasoning from a bygone era. In fact, *Paterson*'s logic commands considerable public support today. Commentators have noted broad public support in favor of repealing the New Jersey's Anti-Fusion Laws. *See, e.g.*, Star-Ledger Editorial Board, *Op-Ed: Want to Encourage Centrists? Tell the Party Bosses to Back Off*, THE STAR-LEDGER, Apr. 27, 2023 (noting that "81% of New Jerseyans believe that the 'two-party system is not working as it should'" and that "56% of New Jerseyans from across the spectrum support fusion voting, while only 32% oppose it"). What is more, New Jersey political leaders with varying ideologies, former Governor Christine Todd Whitman and former Senator Robert Torricelli, have offered praise for fusion voting, advocated for the Anti-Fusion Laws' reversal, and observed that "[f]usion voting means that a candidate can be nominated by more than one party, and voters then choose not just the candidate they prefer but also the party that is closest to their values." Christine Todd Whitman & Robert Torricelli, *Op-Ed: Why We Need a 3rd Political Party in New Jersey*, THE STAR-LEDGER, Apr. 23, 2023.

[9] *See, e.g., In re Contest of Nov. 8, 2011 Gen. Election of Off. of N.J. Gen. Assembly, Fourth Legis. Dist.*, 427 N.J. Super. 410, 431 (Law Div. 2012) (stating that government interference with fundamental individual and collective rights of political expression must pass exacting scrutiny); *Green Party*, 164 N.J. at 148–49 (same).

proscribe interference with these rights where, as here, the state has not justified its "need" to do so. *See Green Party*, 164 N.J. at 148–49. In accordance with the New Jersey Constitution, the Court should afford dispositive weight to voters' and political parties' rights and strike down the Anti-Fusion Laws.

D. Federal Constitutional Law Further Counsels in Favor of Finding New Jersey's Anti-Fusion Laws Unconstitutional.

As noted above, New Jersey's Constitution goes even further than the federal Constitution (and further than many of its sister states) in its protections for free speech and free association. *See Dublirer*, 220 N.J. at 78–79 ("The New Jersey Constitution guarantees a broad affirmative right to free speech," one "of the broadest in the nation" and one that "affords greater protection than the First Amendment."). The New Jersey Supreme Court has recognized that "state constitutions may be distinct repositories of fundamental rights independent of the federal Constitution," although "there nonetheless exist meaningful parallels." *Schmid*, 84 N.J. at 560. One such parallel is apparent here: federal constitutional law similarly and heartily safeguards free expression and association in the electoral marketplace from governmental overreach. Foundational principles of federal First Amendment interpretation and Supreme Court jurisprudence together offer considerable authority in favor of finding New Jersey's Anti-Fusion Laws unconstitutional.

First, as the plain language of its text indicates, the federal First

Amendment was designed to protect certain fundamental rights—including the freedoms of speech and association—from governmental intrusions like the Anti-Fusion Laws.[10] The United States Supreme Court has emphasized that the First Amendment "has its fullest and most urgent application" where, as here, it is applied to protect speech associated with "campaigns for political office."[11] *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). The Supreme Court has also pronounced that "effective [self-]expression" in the electoral marketplace is "undeniably enhanced by group association."[12] *NAACP v. Alabama*, 357 U.S. 449, 459–60 (1958). The Court has therefore held that the individual voter's self-expression is promoted if the speech and association rights of both voters *and* political parties are rigorously protected.[13] Because the rights to self-expression and to free association "overlap and blend[,] . . . to limit the right of association places an impermissible restraint on the right of expression" and vice versa. *Citizens Against Rent Control Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 300 (1981). Thus, New Jersey's Anti-Fusion Laws

[10] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble.").

[11] The Court has "aggressively" protected diverse political speech in elections and recognized that "individuals have a constitutionally protected interest in *effective* self-expression." Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 101–02 (1992).

[12] This association most naturally takes the form of political parties, which "have a unique role in" advancing "their members' shared political beliefs." *Colorado Republican Fed. Campaign Comm'n v. FEC*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring).

[13] *See Colorado Republican Fed. Campaign Comm'n*, 518 U.S. at 616 ("The independent expression of a political party's views is 'core' First Amendment activity"); *Eu v. San Francisco Cnty. Dem. Cent. Comm.*, 489 U.S. 214, 224 (1989) ("It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments.").

implicate and transgress the core purpose of the federal First Amendment, since they interfere with both individual expression and group association in the political arena.

Second, when confronted with government interference with political speech and expression, the Supreme Court, like New Jersey courts, has applied stringent scrutiny. Laws interfering with *what* voters or political parties are saying, as well as laws interfering with *how* they choose to say it, are not abided absent a most compelling justification. In particular, the Supreme Court has recognized that to preserve and promote an "uninhibited, robust, and wide-open debate" in the electoral marketplace, the law must extend protection not only to political speech but also to the media used to disseminate and diffuse such political speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the Supreme Court has closely scrutinized and ultimately invalidated restrictions on voters' and political parties' media of expression, including (1) election spending;[14] (2) primary nomination processes;[15] and (3) candidate

[14] *See Buckley*, 424 U.S. at 15–16, 58–59 (rejecting the idea that the media or tools used to share political speech were simply "conduct" and finding expenditure limits unconstitutional); *Citizens Against Rent Control*, 454 U.S. at 296 (rejecting a ban on associational spending and noting that such a ban interferes directly with voters' ability to pool their collective resources and effectively voice their opinions in the electoral marketplace, an obvious interference with voters' free speech and associational rights); *Colorado Republican Fed. Campaign Comm.*, 518 U.S. at 615–17 (holding that expenditure restrictions on political parties "impair the ability of individuals and groups to engage in direct political advocacy and represent substantial . . . restraints on the quantity and diversity of political speech" and impinge upon the members' ability to share their "philosophical and governmental" views to "convince others to join [them] in [the] practical democratic task" of shaping a government responsive to those views).

[15] *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214, 216 (1986) (striking down a law that interfered with primary voter eligibility because it "limit[ed] the Party's associational opportunities" and restricted the rights of like-minded voters to "determine for themselves with whom they will associate, and whose support they will seek, in their

endorsements.[16] In each of these instances, the Court recognized the importance of such means to share, promote, and amplify political speech and found the laws that limited them to be unconstitutional. The Anti-Fusion Laws should be treated the same.

Third, the Supreme Court has observed that "[t]o place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views . . . is clearly a restraint on the right of association." *Citizens Against Rent Control*, 454 U.S. at 296. Likewise, the Court has rejected laws like the Anti-Fusion Laws, which interfere with voters' and political parties' rights "to select a standard bearer who best represents the party's ideology and preferences." *See Eu*, 489 U.S. at 224 (internal quotation marks omitted). As the Supreme Court has articulated, such interference "directly hampers the ability of a party to spread its message and hamstring[s] voters seeking to inform themselves about the candidates and the campaign issues." *Id.* at 223. The same is true of the Anti-Fusion Laws. Candidate nominations represent "a means of disseminating ideas" in the electoral marketplace. *Id.* Candidates provide competing platforms that capture their political views and objectives, as well as

quest for political success" as they "participate in the basic function of selecting the Party's candidates").

[16] *See Eu*, 489 U.S. at 222–24 (rejecting a law that prohibited political parties from engaging in pre-primary endorsements of any candidates; noting that endorsements serve as an essential medium for political parties and their members to express "whether a candidate adheres to the tenets of the party;" observing that candidates represent "a means of disseminating ideas" in the electoral marketplace; and concluding that the law "directly affects speech" in violation of the First Amendment).

the views of the voters that choose them. This function is "integral to the operation of the system of government established by our [federal] Constitution." *Id.* The more candidates with nuanced views are represented in the electoral marketplace, the more accurately political parties and voters can "debate" and ultimately express their political views for all to understand. *Id.* Anti-Fusion Laws restrict the vocabulary of that debate. By choosing to nominate a candidate, a voter or a political party expresses to the electoral marketplace who among their choices most closely resembles their political views. The Supreme Court described voting in support of a candidate as a "crucial juncture"—i.e., an expressive medium—by which voters transform their common views into "concerted action." *Id.* at 224. Anti-Fusion Laws hinder this concerted political action.[17]

Amici note that the Supreme Court also considered and upheld a prohibition of fusion nominations in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). However, as the other briefs in this case make evident, *Timmons*' two-party protectionism cannot be squared with the Court's consistent endorsement of the democratic marketplace of ideas and candidates. *See* Br. of

[17] Fusion voting allows voters and political parties to inject more nuanced views on certain issues into the electoral marketplace beyond the constraints of the two-party system. Voter choice therefore *increases* when the debate captures these perspectives, contrary to the State's assertion that preserving the Anti-Fusion Laws will lead to "decreased voter choice." Br. on Behalf of Resp'ts Tashea Way and N.J. Div. of Elections, *In re Tom Malinowski, Petition for Nomination For Gen. Election, Nov. 8, 2022, for U.S. House of Representatives N.J. Congressional Dist. 7*, at 48.

Appellants, *In re Tom Malinowski, Petition for Nomination For Gen. Election, Nov. 8, 2022, for U.S. House of Representatives N.J. Congressional Dist. 7*, at 64-70. The Supreme Court's inconsistent decision in *Timmons* should not undermine the Supreme Court's otherwise rigorous protection of federal First Amendment freedoms.[18]

Since the Anti-Fusion Laws cannot survive federal constitutional scrutiny, as described above, they certainly cannot satisfy New Jersey's much more rigorous state constitutional standard. Accordingly, under both federal and New Jersey law, the Court should find New Jersey's Anti-Fusion Laws unconstitutional.

II. NEW JERSEY'S ANTI-FUSION LAWS ARE CONTRARY TO NEW JERSEY COURTS' PRINCIPLED REJECTION OF GOVERNMENT INTRUSION.

Beyond free expression and voting rights jurisprudence, New Jersey courts have been principled in their rejection of government overreach, especially where that overreach interferes with individual rights. Because the Anti-Fusion Laws constitute governmental distortion of the political process and

[18] The Court in *Timmons* failed to recognize the burden Anti-Fusion bans impose on the expressive and associational rights of both voters and political parties. *See* Br. of Appellant, *In re Tom Malinowski, Petition for Nomination For Gen. Election, Nov. 8, 2022, for U.S. House of Representatives N.J. Congressional Dist. 7*, at 64–70. *Timmons* also applied the faulty premise that any burden was outweighed by the State's interest in maintaining a two-party system. 520 U.S. at 366–67. In doing so, the Supreme Court endorsed the view that the government can interfere with, control, and limit debate in the electoral marketplace, which runs contrary to settled Supreme Court precedent discussed above. *See e.g.*, Andy Craig, *The First Amendment and Fusion Voting*, Cato Institute (Sept. 26, 2022, 1:42 PM), https://www.cato.org/blog/first-amendment-fusion-voting. ("To uphold a ban on fusion on this basis is endorsing the idea that the government can pick one side of [the] debate [between a two-party and multi-party system], favoring [two-party system] proponents and imposing restrictions on the speech and association rights of its opponents."). Therefore, *Timmons* ought not persuade here.

implicate fundamental rights of free expression and free association, to allow them to persist would be inconsistent with New Jersey's jurisprudence.

A. New Jersey Law Recognizes Certain Cherished Spheres into Which Government Intrusion Is Proscribed.

As articulated in the sections above, citizens' free expression and free association are among our most cherished and ardently guarded rights. Both New Jersey's Constitution and jurisprudence protect certain other important rights from government intrusion across diverse legal contexts, including: (1) family rights; (2) protection from unreasonable searches and seizures; (3) medical, employment, and marital privacy; and (4) education and labor law. In each instance, the court has articulated that these rights are held dear (as free expression and association are) and has curtailed government interference with these rights. We take each example in turn.

First, judicial protection of family rights exemplifies New Jersey courts' skepticism for state intrusion into individual and collective activity. New Jersey case law "recognizes the family as a bastion of autonomous privacy in which parents, presumed to act in the best interests of their children, are afforded self-determination over how those children are raised." *In re D.C.*, 203 N.J. 545, 551 (2010). Accordingly, "[t]he right of parents to raise their children without undue state interference is well established" under New Jersey law. *Dempsey v. Alston*, 405 N.J. Super. 499, 511 (App. Div. 2009) (citing *Gruenke v. Seip*, 225

F.3d 290, 303 (3d Cir. 2000)).[19] Given the fundamental nature of this right and the undesirability of state intrusion into family matters, New Jersey courts have reviewed such government action with strict scrutiny.[20] New Jersey's family rights jurisprudence demonstrates that the state must meet a high burden before it may impair the exercise of a fundamental right, as the Anti-Fusion Laws do here.

Second, New Jersey's criminal jurisprudence applying the guarantee of the Fourth Amendment likewise reflect the state courts' curtailment of government intrusion into individual rights. Article I, Paragraph 7 of the New Jersey Constitution, the state analogue to the federal Fourth Amendment, for example, "generally protects a person's reasonable expectation of privacy from untoward government intrusion." *State v. Manning*, 240 N.J. 308, 328 (2020). Indeed, the New Jersey Supreme Court has recognized that "[c]ompliance with the warrant requirement is not a mere formality but—as intended by the nation's founders—an essential check on arbitrary government intrusions into the most private sanctums of people's lives." *Id.* (citing *Katz v.*

[19] *See also Fawzy v. Fawzy*, 199 N.J. 456, 476 (2009) ("the entitlement to autonomous family privacy includes the fundamental right of parents to make decisions regarding custody, parenting time, health, education, and other child-welfare issues between themselves, without state interference").

[20] *See Moriarty v. Bradt*, 177 N.J. 84, 109 (2003) (applying "strict scrutiny review" that "focuses on whether a compelling state interest warrants state intrusion into family life"); *New Jersey Div. of Youth & Fam. Servs. v. A.W.*, 103 N.J. 591, 603 (1986) (quoting *Doe v. G. D.*, 146 N.J. Super. 419, 431 (App. Div. 1976)) (refusing to "sanction state intrusion into the personal relationship between parent and child to an intolerable degree and [] impermissibly impair the normal prerogatives of parenthood").

United States, 389 U.S. 347, 356–57 (1967); then citing *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)). Put simply, the protection against unreasonable searches and seizures reflects both the sanctity of individual privacy and the recognition that government overreach must be restricted when fundamental rights are implicated.[21] The rights to free expression and association, impaired by the Anti-Fusion Laws, are similarly fundamental and ought to receive similarly comprehensive protection from government interference.

Third, New Jersey's privacy rights jurisprudence affords broad privacy protections to medical decisions, employment applications, and martial and sexual relations, among other areas.[22] In fact, in New Jersey, "governmental intrusion into privacy rights may require [a] more persuasive showing of a public interest under [the] State Constitution than under the federal Constitution." *In*

[21] Indeed, New Jersey courts have extended Fourth Amendment rights broadly, vigilantly protecting against undue governmental intrusion. *See, e.g.*, *N.J. Dep't of Env't Prot. v. Huber*, 213 N.J. 338, 359 (2013) ("there is no doubt that the Fourth Amendment's constitutional prohibition against warrantless searches applies to civil, as well as criminal, governmental intrusions"); *State v. McAllister*, 184 N.J. 17, 32 (2005) (finding reasonable expectation of privacy in bank records under the state Constitution because "account holders repose trust and confidence in their banks, a relationship that is eroded by unwarranted government interference").

[22] *See, e.g.*, *In re Grady*, 85 N.J. 235, 249–50 (1981) ("the right to be sterilized [voluntarily] comes within the privacy rights protected from undue governmental interference by our State Constitution"); *In re Quinlan*, 70 N.J. 10, 41 (1976) (refusal of medical treatment by patient in persistent vegetative state is a "valuable incident of her right of privacy"), *cert. denied*, 429 U.S. 922; *In re Martin*, 90 N.J. 295, 318–19 (1982) ("the invasion of the fundamental right of privacy must be minimized" even where disclosure of confidential personal information in employment applications is justified by the government's need for information); *Greenberg v. Kimmelman*, 99 N.J. 552, 572 (1985) ("As one of life's most intimate choices, the decision to marry invokes a privacy interest safeguarded by the New Jersey Constitution."); *State v. Saunders*, 75 N.J. 200, 213–14 (1977) (consensual adult sexual relations involve "a fundamental personal choice . . . necessarily encompassed [by] the concept of personal autonomy which our Constitution seeks to safeguard" through the right to privacy).

re Grady, 85 N.J. at 249. This is because New Jersey law recognizes both a constitutional right to privacy and the gravity of government interference with privacy rights.[23] Indeed, as the New Jersey court has noted, "the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy." *Saunders*, 75 N.J. at 220. The rights of privacy and personal autonomy are carefully protected from government interference much in the same way New Jersey citizens' free expression and association rights have been.

Fourth, New Jersey courts have scrutinized government overreach into collective action by its citizens, including in education and labor law. For example, New Jersey courts have prevented the government from exercising improper control over local education policy and elections.[24] Further, New Jersey law protects labor and employment rights from excessive government intrusion, reflecting the shared values of autonomy and freedom

[23] Namely, New Jersey courts have interpreted Article I, Paragraph 1 of New Jersey's Constitution to "incorporate[] within its terms the right of privacy and its concomitant rights." *Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609, 629 (2000).

[24]Although it was ultimately decided on statutory grounds, the Appellate Division rejected the state's argument that voter decisions regarding school board elections would compromise the state's oversight of a school district subject to intervention. *See Save Camden Pub. Sch. v. Camden City Bd. of Educ.*, 454 N.J. Super. 478, 494 (App. Div. 2018) ("There will be no interference with the State's full intervention in the Camden school district by allowing the voters to decide whether Board members should be elected or appointed by the mayor."); 2A Ordinance Law Annotations Elections, *Municipal Voting Regulations, Generally* § 1 (interpreting *Save Camden Pub. Sch.* as supporting the proposition that "[s]tatutes should be construed to allow the greatest scope for public participation in the electoral process"). Similarly, though the court ultimately found no such overreach, the Appellate Division closely scrutinized the impact of the Comprehensive Education Improvement and Financing Act ("CEIFA") on school district autonomy. *Stubaus v. Whitman*, 339 N.J. Super. 38, 58 (App. Div. 2001) (affirming dismissal of plaintiffs' complaint that "CEIFA's all encompassing State intrusion significantly alters the local districts' abilities to run their school systems").

from unwarranted government interference that are woven through New Jersey's jurisprudence.[25] Thus, even where fundamental rights like voting are not at stake, the government must meet a high burden to justify its intervention in New Jersey citizens' exercise of their individual and collective rights.

Although these examples are illustrative and not exhaustive, a guiding principle becomes clear: in New Jersey, government intrusion into fundamental individual and collective rights must satisfy an exacting standard or otherwise desist. New Jersey has recognized that "voting is a fundamental right" subject to the most exacting scrutiny. *See, e.g.*, *In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp.*, 331 N.J. Super 31, 37–38 (App. Div. 2000) (citing *Worden v. Mercer Cnty. Bd. of Elections*, 61 N.J. 325, 346 (1972)). As explained below, the Anti-Fusion Laws, which implicate fundamental rights and distort the democratic process, cannot meet this burden.

[25] For example, the New Jersey Supreme Court recognized that "employees have a right to be protected from intrusions of privacy" under the state Constitution, though those intrusions may be justified when the public interest outweighs an employee's privacy interest. *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 100 (1992); *see also, e.g.*, *Chamber of Com. of U.S. v. State*, 89 N.J. 131, 143 (1982) (internal citations omitted) (holding that the National Labor Relations Act's preemption "safeguards" the rights of employees "to form and join labor organizations and to bargain collectively . . . against intrusion by the states").

B. Government Intrusion into the Electoral Process Should Be Similarly Circumscribed, and the Anti-Fusion Laws Cannot Survive.

As discussed above, the Anti-Fusion Laws run contrary to the principles reflected in New Jersey law and tradition: government interference must be proscribed where the intrusion into individual and collective activity is unjustifiable. Just like the rights surveyed above, the freedoms of expression and association are part of the cultural fabric of our country (and New Jersey) and are among our most precious rights. As established in Part I, *supra*, the Anti-Fusion Laws implicate the fundamental rights of expression and association and should thus be subject to rigorous scrutiny, which they cannot withstand. What is more, even if the Anti-Fusion Laws did not implicate fundamental rights, these laws conflict with New Jersey courts' established tradition of skepticism toward government overreach.

Like the individual rights discussed above, for which New Jersey courts have erected protections, candidate nominations implicate "self-determination," *In re D.C.*, 203 N.J. at 551, and "the liberty which is the birthright of every individual," *Saunders*, 75 N.J. at 220, as manifest through their freedom of expression. Moreover, just as citizens associate through families, educational boards, and labor organizations, political parties implicate associational rights which must be "safeguard[ed] . . . against intrusion by the state[]." *Chamber of*

Com., 89 N.J. at 143. New Jersey citizens' exercise of their rights of free expression and association are "eroded by unwarranted government interference," *McAllister*, 184 N.J. at 32, where, as here, parties are prevented from nominating their preferred candidates by the Anti-Fusion Laws. Accordingly, as with the constitutional and judicial protections examined above, the Court here must enforce an "essential check on [this] arbitrary government intrusion[]" into the electoral process by striking down the Anti-Fusion Laws. *Manning*, 240 N.J. at 328.

CONCLUSION

While the State and Intervenors suggest that New Jersey voters and political parties must be protected from potential confusion, New Jersey and federal courts alike have long recognized that citizen can be trusted to exercise their own individual rights. This includes their rights to effectively convey support for the candidate of their choice. For the foregoing reasons, this Court should reject the State's unwarranted paternalism and rule in favor of Appellants by holding New Jersey's Anti-Fusion Laws unconstitutional and restore fulsome political expression to New Jersey's electoral marketplace.

July 10, 2023

Respectfully submitted,

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