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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Date Submitted: July 10, 2023

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus relies on its Certification of Amicus filed with this Court.

PRELIMINARY STATEMENT

This amicus brief asserts that the U.S. Supreme Court's interpretation of the U.S. Constitution's freedom of association in Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), lacks persuasive value for this Court in analyzing the freedom of association under New Jersey's Constitution. The decision was grounded in flawed conceptions of what political parties are and what they do in our democracy and rested on assumptions about the benefits of a rigid two-party system that have proven incorrect in the intervening years.

The Timmons majority first erred by failing to identify the precise nature of the constitutional burdens imposed on a minor party and its members by anti-fusion laws. Anti-fusion laws implicate the freedom of association, a right independent and distinct from the freedom of speech. But the Timmons majority focused almost exclusively on the burdens that anti-fusion laws impose on a political party's and its members' political speech rights and correspondingly gave short shrift to a minor political party's strong associational interests in nominating its own standard bearer. In eliding the distinctions between these First Amendment rights, the Court's analysis revealed key misunderstandings about the role of political parties in our democracy; instead of mere vehicles for

political speech, political parties are primarily mechanisms for organizing political activity. And by barring minor political parties from nominating their first-choice candidate, anti-fusion laws deprive minor political parties of an essential party-building mechanism; therefore, in addition to the burdens that anti-fusion laws place on political speech, the laws also place severe burdens on the freedom of association that the Timmons majority failed to appreciate.

A second key error in Timmons was its holding, offered without analysis and with little more than conjecture, that anti-fusion laws are justified by the states' interests in strengthening the two-party system because of the purported political stability that that system creates. That specious conclusion—not argued in the courts below or before the Supreme Court—was wrong. As shown below, anti-fusion laws that systematically marginalize minor parties have failed to deliver political responsiveness and have continued to corrode political stability. This reality undermines the key holdings of Timmons, and itself casts doubt as to whether anti-fusion laws should be permitted by the First Amendment.

For these reasons and for those explained in the Appellants' brief, this Court should strike down New Jersey's anti-fusion laws based on the robust political rights and protections set forth in the New Jersey Constitution.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies on the facts and procedural history provided by the Appellants. (Pb3–28.)

ARGUMENT

In April 1994, a fledgling political party called the Twin Cities Area New Party (the "New Party" or "Party") decided to nominate Andy Dawkins ("Dawkins") in a state representative election. Dawkins, however, was also the candidate of the Democratic-Farmer-Labor Party ("DFL") for the same office. Neither Dawkins nor the DFL objected, but Minnesota election officials rejected the nomination because Minnesota law prohibited "fusion" candidacies.

The New Party then challenged the State's rejection of its nomination under the First and Fourteenth Amendments. The district court granted summary judgment for the state election officials, but the Eighth Circuit reversed. Twin Cities Area New Party v. McKenna, 73 F.3d 196, 200 (8th Cir. 1996). After weighing the fusion ban's impact on the New Party's ability to develop consensual political alliances and broaden the base of public participation in and support for the Party's activities, the Eighth Circuit held that fusion bans were broader than necessary to serve Minnesota's asserted interests and were a severe burden on the Party's constitutional rights. Id. at 199.

The Supreme Court reversed over dissent by Justices Stevens, Ginsburg, and Souter. Timmons, 520 U.S. at 356; id. at 370–82 (Stevens, J. dissenting); id. at 382–84 (Souter, J. dissenting). Writing for the Court, Chief Justice Rehnquist observed that the New Party remained free to endorse Dawkins even though he would not appear on the ballot as the New Party candidate and that Minnesota had not "directly precluded minor political parties from developing and organizing." Id. at 360–61.

Thus, instead of carefully weighing the impact of the anti-fusion law on the capacity of minor parties to conduct party-building activities, the Court gave short shrift to the New Party's associational rights, principally analyzed the effect of the anti-fusion law on the Party's ability to "spread its message," and proposed that the Party could exercise its First Amendment rights by staying off the ballot. Id. at 361–63. The Court correspondingly found that Minnesota had advanced "sufficiently weighty" interests justifying its incursion on the New Party's First Amendment rights, id. at 364, and adopted the State's speculative arguments that "a candidate or party could easily exploit fusion as a way of associating his or its name with popular slogans and catchphrases," like the "No New Taxes" or "Conserve Our Environment" parties, id. at 365, and that fusion

would allow a minor political party to "capitalize on the popularity of another party's candidate" in lieu of building the party's own base of support, id. at 366.[1]

The Court then, nostra sponte, asserted that states have "a strong interest in the stability of their political system" and therefore may "enact reasonable election regulations that may, in practice, favor the traditional two-party system." Id. at 366–67. With no support other than a string citation to two dissents and a concurrence, the majority pronounced that protecting the two-party system through anti-fusion laws was of constitutional importance because it "temper[s] the destabilizing effects of party-splintering and excessive factionalism." Id. at 366.

First, this brief discusses the Court's holding regarding the constitutional burdens imposed by anti-fusion laws to show that the Court misapprehended the role of political parties in our democracy and failed to appreciate the full scope of the First Amendment burdens. Instead of mere vehicles for amplifying

[1] These state interests are transparently flimsy. As for the first, this mischief is purely speculative, and reasonably tailored ballot access laws could prevent the creation of sham or slogan parties without going as far as banning fusion. And as for the second, a state permitting fusion could simply list candidates on separate ballot lines for each party and only credit political parties with the votes cast under their party line. See Richard L. Hasen, Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition, 1997 SUP. CT. REV. 331, 339. Indeed, this is done in states that allow fusion candidacies like New York and Connecticut. (Pa88.)

speech, political parties are primarily associational; they are networks of individuals and organizations embedded within the broader electorate. In addition to anti-fusion laws' effect on minor political parties' ability to communicate with candidates and the public, anti-fusion laws frustrate key party-building activities such as processing voter information, mobilizing volunteers, recruiting new members, fundraising, and other core associational activities protected by the First Amendment. The Timmons majority meaningfully failed to consider anti-fusion laws' effect on these associational activities; it therefore misapprehended the nature and severity of the constitutional burdens.

Second, this brief discusses the Court's holding regarding the state's interest in adopting anti-fusion laws. This section focuses on the "true basis for the Court's holding," id. at 377 (Stevens, J., dissenting), to show that the Court's animating assumption—that the two-party system has obvious positive effects on political stability—is empirically wrong and based on a flawed political theory.

I. In Failing to Consider the Role of Political Parties as Political Organizers, the Timmons Majority Failed to Appreciate the Full Scope of the First Amendment Burdens Imposed by Anti-Fusion Laws. (Pa1–2)

The Timmons majority first erred by failing to identify the precise First Amendment rights implicated by anti-fusion laws. Though the majority stated

that it was "uncontroversial" that the New Party "has a right to select its own candidate," the Court ultimately held that it did not severely burden the New Party's associational rights that Dawkins could not appear on the ballot as a New Party candidate because the Party could nominate an alternate candidate or endorse Dawkins and stay off the ballot. Id. at 359–60; cf. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) ("The freedom to associate as a political party, a right we have recognized as fundamental, has diminished practical value if the party can be kept off the ballot."). The Court blithely concluded that the associational harm was not severe because the New Party "retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign." Timmons, U.S. 520 at 363.

But if the Court understood political parties and what they do, it could not have concluded that the mere ability to "communicate ideas to voters" through campaign ads or door-knocking substituted for the New Party's ability to place its first-choice candidate on the ballot. Without this understanding, the Court failed to analyze the anti-fusion law's effect on a political party's ability to engage in party-building activities. These activities, such as processing voter information, mobilizing volunteers, recruiting new members, and fundraising, implicate the right of association and make clear why the Court's proposed

alternatives to ballot access cannot save a minor party from the associational harm imposed by anti-fusion laws.

Fundamentally, the Timmons majority misapprehended that political parties are primarily associational; beyond their capacity to act as vehicles for aggregating and amplifying perspectives, political parties are networks of individuals and organizations tied to the broader electorate by connections of various strengths. At their best, political parties bridge divides in the electorate between voters, officeholders, volunteers, donors, activists, and operatives at the federal, state, and local level and frequently balance competing priorities of complex networks like unions and chambers of commerce, religious organizations, firefighter and law enforcement organizations, and other political advocacy groups.[2]

Political parties foster opportunities for civic action by leveraging social networks capable of informing and mobilizing citizens beyond election day.[3]

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[2] The term "political party" describes a "kaleidoscopic mass" of constituents in a "collection of political relationships, some legal and some non-legal, among a diverse set of actors and institutions, all of whom perform important work in furtherance of a common [electoral, policy, and ideological] agenda." Michael S. Kang, The Hydraulics and Politics of Party Regulation, 91 IOWA L. REV. 131, 133, 143 (2005).

[3] Tabatha Abu El-Haj, Networking the Party: First Amendment Rights & the Pursuit of Responsive Party Government, 118 COLUM. L. REV. 1225, 1258–63 (2018) ("Relationships and social networks, far more than ideology and belief, drive political recruitment and sustain political activism.").

These dynamic amalgams of individuals, organizations, and social networks often have opposing or conflicting goals and messages but form coalitions under the party banner to win elections and govern. Political parties are crucial to the functioning of our democracy not simply because they are able to spread messages, but because they are uniquely capable of organizing disparate interests within our constitutional order. The primary function of a political party is therefore not "to spread its message to all who will listen," id. at 361, but rather to build coalitions to nominate and elect candidates who will pursue the party members' policy goals, Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223–24 (1989).

Good and responsive governance largely depends on a political party's capacity to build broad coalitions with meaningful ties to the electorate.[4] Because anti-fusion laws prevent minor political parties from building these coalitions, they are severe restrictions on the right of association.

The Timmons majority, however, missed this fundamental point. Instead, it viewed political parties primarily as ideological speakers and concluded that the associational burdens imposed by anti-fusion laws turned largely on their

[4] See Abu El-Haj, Networking, at 1231 ("Viewed as associations, the capacity of political parties to foster a functioning democracy depends less on party leaders defining and enforcing a coherent platform and more on the depth and breadth of the party's political networks.").

degree of interference with the party's message and expressive freedom. See Timmons, 520 U.S. at 363. Using this speaker-centered conception of the burdens, the Timmons majority declared that nothing about the ban on fusion candidacies prevented the New Party from removing itself from the ballot and publicly endorsing its preferred candidate on the major party line. Id. at 360, 363. But in so concluding, the Court failed to appreciate how nominating candidates on the ballot uniquely drives a political party's ability to associate with broad and competing interests within the electorate. It failed, that is, to recognize that anti-fusion laws impair minor political parties' right to "broaden the base of public participation in and support for [their] activities." Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986).

The First Amendment guarantees the right to join with like-minded individuals to accomplish shared political objectives, including by creating and developing new political parties, "thus enlarging the opportunities of all voters to express their own political preferences." Norman v. Reed, 502 U.S. 279, 288 (1992); see NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). And yet the Court dismissed out of hand the New Party's weighty interests by stating that

"Ballots serve primarily to elect candidates, not as forums for political expression." Timmons, 520 U.S. at 363. However, to borrow the Court's phrasing, political parties serve primarily to elect candidates, not (merely) as forums for political expression. Here, the record confirms that the primary democratic function of political parties in the electorate is as political organizers. (Pa47, 49–51, 60, 81, 156–57, 197, 200, 213, 240.)

By preventing a minor party from placing the party's chosen, willing, and otherwise qualified candidate on the ballot, anti-fusion laws interfere with core associational rights—not just speech rights—because they frustrate a party's ability to recruit, keep, and organize members—not just the "party's ability to send a message to the voters and to its preferred candidates." Timmons, 520 U.S. at 363; see Williams v. Rhodes, 393 U.S. 23, 31 (1968) ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.").

Crucially, anti-fusion laws frustrate a minor party's ability to calculate the electoral impact of the party's investment in party-building activities. If a minor party is compelled to support its first-choice candidate on a rival party's line, the minor party loses its capacity to assess whether and to what extent its efforts influenced the electoral outcome and whether the electoral outcome is a true mandate on its policy platform (or whether current and prospective party

members strategically voted to avoid spoiling the election for the minor party's preferred candidate); prospective party members and donors similarly lose the ability to assess whether the minor party can deliver responsive policy. Therefore, anti-fusion laws severely impair the two-way street of information between minor parties and the public necessary for coalition and party-building. Cf. Anderson v. Celebrezze, 460 U.S. 780, 792 (1983) ("Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign."). (Pa199, 205–6, 245–46, 283–84.)

Moreover, by restricting minor parties from placing their chosen candidate on the ballot, anti-fusion laws severely burden a minor party in "broaden[ing] the base of public participation in and support for its activities . . . [,] conduct [that is] undeniably central to the exercise of the right of association." Tashjian, 479 U.S. at 214. Contrary to the Timmons majority's analysis, political candidates are not fungible. Candidates possess idiosyncratic backgrounds and characteristics and belong to unique sets of networks and institutions, and their nominations uniquely drive a party's ability to associate with different constituents throughout the electorate. See Timmons, 520 U.S. at 372 (Stevens, J. dissenting) (noting that "a party's choice of a candidate is the most effective way in which that party" can "attract voter interest and support"). As the

Supreme Court itself acknowledged just a few years later, a public endorsement of a candidate is no substitute for nominating that candidate on an election ballot. See Cal. Democratic Party v. Jones, 530 U.S. 567, 580 (2000) ("The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee.") (citing Eu, 489 U.S. at 228 n.18 ("There is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union.")); Timmons, 520 U.S. at 373 (Stevens, J. dissenting) ("[T]he right to be on the election ballot is precisely what separates a political party from any other interest group.").

In light of the full constellation of election laws like first-past-the-post, plurality voting, single-member districts and onerous ballot access rules like New Jersey's 10% statutory party threshold (Pb14–16; Pa183–4), it becomes clear that anti-fusion laws deprive minor parties and their members of core benefits of meaningful participation in election campaigns by blocking access to the ballot unless the party acquiesces to the losing bargain of investing its limited resources in a candidate who risks spoiling the election for the party's preferred standard bearer. Anti-fusion laws have therefore been key in hindering the development of minor parties in states like New Jersey, where it has been more than 100 years since a minor party has become ballot-qualified. (Pb14–16,

43–44; Pa186.) Indeed, the animating purpose of anti-fusion laws was to thwart the development of minor parties and their moderating influence on major parties. (Pb12–13, 77; Pa381–89, 464.)

Conceiving of political parties narrowly and almost exclusively as ideological speakers precludes holistic consideration of the diverse interests implicated by anti-fusion laws. This view stands at odds with a perspective on political parties that emphasizes their importance as organizations with the unique capacity to mobilize and represent broad coalitions. Among all our civic associations within a sea of competing goals and interests, political parties are the only institutions capable of delivering political responsiveness by enacting legislation. (Pa256.) Editorials in the New York Times and the Wall Street Journal do not get policies enacted; policies are enacted when political parties organize political representatives and citizens into coalitions that can deliver votes to turn the levers of government.

Timmons lacks persuasive value here because it failed to acknowledge the severe burdens anti-fusion laws place on a minor political party's ability to identify, appeal to, inform, organize, mobilize, and raise money from party supporters. Lack of access to the ballot with a party's first-choice candidate necessarily impairs a political party's ability to do this work in service of building coalitions and meaningful networks. As the only institutions capable of

political organization at the scale necessary to produce accountability and responsiveness in modern democracies, political parties are key intermediaries between citizens and government. They can only serve in that intermediary function if they have actual ties to broad cross-sections of their constituents; and they do that work through political organizing, not just through political speech.[5] (Pa49–51.) This Court should therefore consider the full scope of the harm and the chilling effect of anti-fusion laws on core associational and speech rights and the ways that anti-fusion laws undermine minor political parties' organizational capacity to build networks with meaningful ties to the electorate. Cf. Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2384 (2021) ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'") (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).

II. In Treating the Benefits to Political Stability of the Two-Party Duopoly as Self-Evident, the Timmons Majority Failed to Consider the Ways That the Two-Party Duopoly Has Failed to Deliver Political Responsiveness or Stability. (Pa1–2)

Central to the majority ruling in Timmons was the empirical presumption (without any supporting evidence) that an exclusionary two-party system has facilitated "political stability" in the United States. But in the twenty-five years

[5] See generally Tabatha Abu El-Haj & Didi Kou, Associational Party Building: A Path to Rebuilding Democracy, 122 COLUM. L. REV. FORUM 127 (2022).

since Timmons, the two-party duopoly has not produced "political stability" or good governance. Instead, it has contributed to political instability and fanned the flames of extremism. As reviewed below, the Court's flawed presumptions regarding the two-party duopoly—rooted in a mid-twentieth-century school of thought called Responsible Party Government theory—have proven incorrect in the intervening years. This error in the Court's reasoning undermines arguments that a state's interests in upholding the two-party duopoly by means of anti-fusion laws can or should be rooted in concerns about "political stability."

A. What Is Responsible Party Government Theory?

Chief Justice Rehnquist's flawed conception of political parties is consistent with a mid-twentieth-century school of American political science called "Responsible Party Government."[6] In the seminal statement of the theory, a working group of the American Political Science Association declared, "The fundamental requirement of such accountability is a two-party system in which the opposition party acts as the critic of the party in power, developing, defining and presenting the policy alternatives . . . ."[7] The electorate then chooses

[6] See Abu El-Haj, Networking, at 1235–43.

[7] AM. POLITICAL SCI. ASS'N, Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties of the American Political Science Association, 44 AM. POL. SCI. REV. 1, 18 (1950).

between these policy alternatives on Election Day like consumers purchase goods at a store.

But crucially, the theory posits that consumers' choices must be limited. Voters must have a clear choice between two, and only two, ideologically coherent parties on election day.[8] Thus, in Responsible Party Government theory, the limited choice of two parties putatively moderates extreme views by forcing diverse coalitions within the electorate to share a banner and by disciplining political parties and candidates in a perpetual competition for support of the median voter. But these feedback loops and accountability mechanisms only work if markets (elections) are competitive because competition provides sellers (political parties and officials) with an incentive to respond to the demands of consumers (voters).[9]

The Timmons majority's specious conclusion that a "healthy two party system" would "temper the destabilizing effects of party-splintering and excessive factionalism" reflected Responsible Party Government theory's

[8] Id. at 1–2.

[9] Nancy L. Rosenblum, Primus Inter Pares: Political Parties and Civil Society, 75 CHI.-KENT L. REV. 493, 496 (2000) (explaining that mainstream political science views "electoral parties as cadres of candidates, professional organizers, and hired consultants, and of citizens as consumers of their products"); Michael W. McConnell, Moderation and Coherence in American Democracy, 99 CALIF. L. REV. 373, 379 (2011).

hostility to third parties. Timmons, U.S. 520 at 367; see also id. at 364 (reciting approvingly the state's purported interest in "promoting candidate competition" by "reserving limited ballot space for opposing candidates"). But to the extent the Timmons majority rested its conclusions on the stabilizing effects of the two-party system, Timmons was a fatally flawed decision: political stability and responsive governance have not emerged from our commitment to the two-party duopoly. It is beyond cavil that neither major party today—though arguably as polarized as in any other era—responds to the preferences of the median voter.[10]

B. The Two-Party Duopoly Has Failed to Deliver Political Stability or Democratic Accountability.

The central perceived benefit of the two-party duopoly is political stability, a benefit that Timmons cited specifically as flowing from a strong two-party system. According to the theory, competition between the two parties

[10] LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 287 (1st ed. 2008) ("Whatever elections may be doing, they are not forcing elected officials to cater to the policy preferences of the 'median voter.'"); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 163 (2012) ("Whatever empirical validity median voter models may hold with regard to the professed positions of parties and candidates, the findings . . . clearly show that actual government policy does not respond to the preferences of the median voter."); SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 24–25 (2009) (noting a "virtual consensus" that "[c]andidates no longer converge on the median voter" but rather "represent[] the ideologically extreme elements within their parties, despite the electoral risk that this strategy carries").

promotes political stability by forcing together coalitions that encompass diverse groups and negotiate compromises between competing interests. To win the competition for as broad a share of the electorate as possible, the two parties are theoretically discouraged from adopting extreme or insular viewpoints and influence officials to moderate toward the views of the median voters in the electorate.

The intervening years have demonstrated the limitations of the theory's prescriptions. Through much of the twentieth century, the Democratic and Republican Parties competed in a "multiparty system within a two-party system" involving overlapping coalitions and broad factions. (Pa148.) Today by contrast, the two-party system's electoral incentives pull the major parties and their candidates into narrow social networks comprised of unrepresentative donors and activists and a variety of factors from partisan gerrymandering to partisan geographic sorting have converged to suppress competition in election districts.[11]

As a result, a fundamental pillar of the theory—competitive elections—is missing in contemporary American elections, including in the vast majority of

[11] See Abu El-Haj, Networking, at 1264.

New Jersey elections.[12] This lack of competition and thereby electoral accountability has had a plethora of corrosive effects to democratic governance and makes it far less likely that the major parties can achieve success by appealing to the median voter. Instead, the two major political parties can insulate themselves from popular scrutiny and influence while fostering an environment openly hostile to democracy itself.[13]

i. Americans' frustrations with the two major political parties threatens political stability and has eroded trust in democracy itself.

Putting aside the Responsible Party Government theory's conceptual difficulties, the empirical reality is that contemporary voters' lack of confidence

[12] A standard measure of competitiveness is +/- five percent. By this measure, two-of-twelve congressional districts and four-of-forty state districts in New Jersey were competitive as recently as the 2020 election. See New Jersey, Statewide Voter Registration Summary (Feb. 1, 2023), https://perma.cc/2MNT-ZNYH; Chris Leaverton & Michael Li, Gerrymandering Competitive Districts to Near Extinction (Aug. 11, 2022), BRENNAN, https://perma.cc/C6C9-YNUB (noting that "there are now fewer competitive districts than at any point in the last 52 years").

[13] See JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY 12 (2022) ("By endowing states with authority over election administration and other key levers of democracy, national parties can use the states that they control to rig the game in their favor by limiting the ability of their political enemies to participate."); Michael J. Klarman, Foreword: The Degradation of American Democracy — And the Court, 134 HARV. L. REV. 1, 42–66 (2020) (noting various assaults on democracy, including political violence, "aggressively gerrymandered legislative districts; purged [] voter rolls; [] countless impediments to registration and turnout, especially for the poor, the young, and people of color; circumvented and obstructed voter initiatives; and undermined [election] results").

in the government tends to nullify the conclusion that the two-party system represents, channels, and rationalizes diverse and conflicting interests in American society. Indeed, given its promised benefit to political accountability, one important measure of the success of the two-party duopoly is voter confidence in the government.

The clearest indication that the two-party duopoly has failed is the long-standing erosion of voter confidence in our government and electoral systems. In the 1950s, when the American Political Science Association wrote the Responsible Party Government report that influenced the Timmons majority's hostility to third parties, Americans generally trusted the federal government. According to Pew Research Center analysis, "In 1958, about three-quarters of Americans trusted the federal government to do the right thing almost always or most of the time."[14] By sharp contrast, today only one-in-five Americans report trusting the government, and the share of Americans who express unfavorable opinions of both major parties has only grown in the last several decades from just six percent in 1994 to over twenty-seven percent.[15]

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[14] PEW RESEARCH CENTER, Public Trust in Government: 1958-2022 (June 6, 2022), https://perma.cc/L25C-GV4P.

[15] PEW RESEARCH CENTER, As Partisan Hostility Grows, Signs of Frustration With the Two-Party System (Aug. 9, 2022), https://perma.cc/AS2R-5XDA.

An NPR/Marist Poll found that sixty-two percent of respondents had little or no confidence in the Democratic Party, while sixty-eight percent had little or no confidence in the Republican Party.[16] Only twenty-five percent of those polled had confidence in Congress, and "almost two-thirds of Republicans expressed little confidence in Congress," despite the fact that their party controlled it.

New Jersey citizens share the country's overwhelmingly negative views of the two major political parties. A December 2022 Fairleigh Dickinson University poll of young New Jersey voters found that seventy-eight percent of respondents agreed that "the current political parties are too corrupt and ineffective to actually get anything done," with forty-two percent "strongly" agreeing.[17] This cynicism extends to views of democracy as an institution: only fifty-six percent of respondents—and only thirty-six percent of Independents—agreed that "democracy is still the best way to run a government."

Political stability suffers when critical masses of the population lose faith that the fundamental mechanisms of democratic accountability can work. This

[16] MARIST, Americans Lack Confidence in New Congress' Ability to Reach Bipartisan Agreement (Dec. 15, 2022), https://perma.cc/Q2U3-G4SP.

[17] FAIRLEIGH DICKINSON UNIVERSITY, NJ Residents Under 30 more Progressive but not more Democratic (Dec. 16, 2022), https://perma.cc/V7ES-EG3K.

empirical reality casts doubt on the claim that the two-party duopoly delivers political responsiveness and stability.

ii. Fusion benefits the stability of our democracy by productively channeling frustration with the two major parties.

Pluralities of Americans have rejected the two-party duopoly and, lacking clear or meaningful alternatives, now identify as Independents. In New Jersey's 7th Congressional District, one of only two competitive congressional districts in New Jersey, unaffiliated and minor party voters compose a larger share of the electorate (35.9 percent) than those registered with either of the two major political parties (33.7 percent Republican to 30.7 percent Democrat).[18] These voters lack the stabilizing influence of a political home where like-minded people can channel their political energy and exercise their constitutional rights. (Pa44–45.)

Fusion provides alternative avenues for these residents to meaningfully associate outside of the two major parties. Instead of spending resources on fielding spoiler candidates, fusion empowers minor political parties to contribute to election outcomes, participate in policymaking, and engage broader swaths of the electorate in party-building activities. (Pa240.) And if a minor political party shows that it can deliver votes, the party increases the

[18] POLITICO, Democrats Have Won Nine of New Jersey's 12 U.S. House Seats (Jan. 12, 2023), https://perma.cc/TJ6B-NCZR.

likelihood that the candidates will aim to satisfy the interests of a more representative electorate. (Pa199–200.) Officials within the two major parties then also benefit from association with a broader cross-section of constituents as fusion empowers these officials to better represent the will of the electorate, providing benefits to democratic accountability and the stability of the broader political system. (Pa204–06.)

The point is not that fusion is constitutional because it is good for democracy, but rather that the Timmons majority turned on its head how banning fusion relates to political stability. Timmons, U.S. 520 at 367. If one is concerned with factionalism and neutralizing the threat of minor parties causing the election of radical candidates with narrow support, anti-fusion laws undermine that objective by increasing the likelihood that disaffected interests will channel political frustration by running and voting for a spoiler candidate.

Fusion gives those disaffected by the major parties meaningful avenues and incentives to constructively associate outside of the two major parties while decreasing the likelihood of a spoiler candidate and increasing the likelihood that the winning candidate attracts broad majority support. Indeed, fusion allows voters who have rejected the platforms of the two major political parties to participate constructively in our democracy by voting for a candidate on a party line that most aligns with their policy goals. (Pa47, 81, 156–57, 197, 213, 240.)

Fusion can materially influence the outcomes of winner-take-all elections, but fusion is unlikely to meaningfully undermine the two-party system. New Jersey and dozens of other states had a predominantly two-party system when fusion was practiced throughout the nineteenth and early twentieth centuries; the same is true in states like New York and Connecticut. But a minor party's cross-nomination can engage voters alienated by the two-party system and provide levers of access to citizens and groups who have been locked out of or alienated by the political process. Indeed, channeling political conflict through representative government is the only means by which our system can survive.

CONCLUSION

The Court should reject Timmons' rationales, rule that the challenged anti-fusion laws violate the New Jersey Constitution and that future elections should permit cross-nominations on the ballot.

Respectfully submitted,

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Dated: 7/10/2023

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