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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AMICUS CURIAE BRIEF OF NEW JERSEY LIBERTARIAN PARTY

PASHMAN STEIN WALDER HAYDEN, P.C.
21 Main Street, Suite 200
Hackensack, New Jersey 07601
Ph: (201) 488-8200; F: (201) 488-5556
CJ Griffin (Attorney ID 031422009)
cgriffin@pashmanstein.com

Attorneys for Proposed Amicus Curiae,
New Jersey Libertarian Party

On the brief:
CJ Griffin, Esq. (#031422009)

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STATEMENT OF INTEREST

The NJ Libertarian Party (NJLP) is New Jersey's third largest political party, founded in 1972. NJLP's vision is for a world in which all individuals have the right to exercise sole control over their own lives and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live as they choose. NJLP's goal is to build a political party that elects Libertarians to public office and moves public policy in a libertarian direction. As a political party dedicated to promoting individual freedom, limited government, and civil liberties, NJLP has a vested interest in ensuring that all political parties and candidates are given a fair and equal opportunity to participate in the electoral system. Despite NJLP's dedication to elect Libertarians to public office to promote libertarian values, obstacles such as anti-fusion voting bans prevent the party from making significant progress by severely limiting NJLP's ability to increase its visibility and influence in the political process.

NJLP's platform has long called for an end to government control of political parties and has advocated that political parties must be allowed to establish their own rules for nomination procedures, primaries, and conventions. As a matter of principle, NJLP believes that the First Amendment guarantees individuals the right to organize, identify, associate, and vote for minor parties

and that minor parties should be free to nominate any qualified candidate of their choosing, even if that candidate is nominated by another political party.

PRELIMINARY STATEMENT

In Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), the United States Supreme Court upheld Minnesota's anti-fusion laws against a challenge alleging they violated the New Party's associational rights under the First and Fourteenth Amendments. Specifically, in 1994 the New Party chose Andy Dawkins as its candidate for State Representative. Because Dawkins already was the nominee of the Minnesota Democratic-Farmer-Labor Party, election officials refused to accept the New Party's nominating petition on the ground that Minnesota's election laws prohibited a candidate from appearing on the ballot as the candidate of more than one party. The New Party filed suit, alleging that Minnesota's anti-fusion law denied the New Party its First Amendment right to nominate its preferred candidate, and deprived its members of the right to vote for Dawkins as the New Party's candidate, instead forcing its members either to support a different candidate or vote for Dawkins as the nominee of a party to which they had no allegiance.

The District Court granted summary judgment to the State. The Eighth Circuit Court of Appeals reversed, concluding that Minnesota's anti-fusion laws were broader than necessary to address the State's asserted interests. The

Supreme Court reversed the Court of Appeals, concluding that Minnesota's anti-fusion laws did not severely burden the New Party's rights, and that the State's interests in ballot integrity and political stability were sufficiently weighty to justify whatever burden was imposed on the New Party by the anti-fusion laws.

This appeal challenging the ruling of New Jersey's Acting Secretary of State that enforced New Jersey's anti-fusion ban raises issues similar to but significantly different from the issue in Timmons – the validity of New Jersey's anti-fusion ban under New Jersey's expansive State constitutional protections of the right to vote, the right of political association, the right to free speech, the right to assemble, and the right of equal protection of the laws. This appeal affords the Appellate Division the opportunity to anticipate the ruling of the New Jersey Supreme Court, which is highly likely not to follow the weakly reasoned opinion in Timmons but rather to invalidate New Jersey's politically motivated anti-fusion laws as violative of our State Constitution.

As we demonstrate below, the historical background of fusion voting, the clear political motivation for anti-fusion laws, and the extremely adverse effect those laws have had on minor parties argue powerfully for their invalidation. Fusion candidacies – nomination of a candidate by more than one party – was commonplace in late nineteenth century politics, and because of fusion voting, minor parties held the balance of power in most states until the early 1890s.

Because Republicans were then the dominant party, fusion candidacies allowed Democrats frequently to combine with minor parties that supported the Democratic candidate. Eventually, in the late 1890s, legislatures in Republican controlled states – including South Dakota, Oregon, Washington, Michigan, Ohio, Illinois, Iowa, North Dakota, Pennsylvania, Wisconsin, Wyoming, Indiana, Nebraska, Kansas, Minnesota, and Montana – passed laws providing that candidates could not appear on the ballot as nominees of more than one political party. Today, states permitting fusion candidacies are rare: New York and Connecticut are two examples of states in which fusion candidacies continue to be significant factors in the politics of those states.

Similarly protective motivations prompted the New Jersey Legislature to pass anti-fusion legislation in 1921. As a result, minor parties in New Jersey cannot nominate either Democratic or Republican backed candidates as the choice of their own party, and other minor parties cannot cross-nominate NJLP-backed candidates. Minor party members face the Hobson's choice of either backing candidates who cannot win or voting for a major party candidate on the Democratic or Republican party line, but not as the candidate of their own party. As a result, minor parties have a weakened status in New Jersey. No minor party candidate has won a statewide election in New Jersey in the past one hundred years. The anti-fusion laws inhibit coalition building among the political parties.

Timmons is a weak decision. In sustaining the Minnesota anti-fusion law, the Supreme Court relied on the State's interest in preserving the two-party system, an interest never even advanced by Minnesota. Because our state's courts have construed our State Constitution's protections much more expansively than the Supreme Court's First Amendment jurisprudence, it is highly unlikely that our Supreme Court would sustain New Jersey's anti-fusion laws. This court's disposition of this appeal should anticipate that result.

ARGUMENT

I. THE NEW JERSEY SUPREME COURT IS HIGHLY UNLIKELY TO FOLLOW TIMMONS WHEN CONSIDERING WHETHER ANTI-FUSION LAWS VIOLATE THE STATE CONSTITUTION

A. New Jersey's Constitutional Protections are More Robust than the Protections Afforded by the First Amendment.

In State v. Schmidt, 84 N.J. 535 (1980), our Supreme Court reversed defendant's conviction for distributing political literature on Princeton's campus. In his opinion for the Court, Justice Handler observed that

> [a] basis for finding exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and assembly is found in part in the language employed. Our Constitution affirmatively recognizes these freedoms, viz:
>
> > Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press…. (N.J. Const. (1947), Art. 1, par. 6.)

> The people have 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. (1947), Art. 1, par. 18.)
>
> The constitutional pronouncements, **more sweeping in scope than the language of the First Amendment**, were incorporated into the organic law of this State with the adoption of the 1844 Constitution. N.J. Const. (1844), Art.1 pars. 5 and 18.

[Schmidt, 84 N.J. at 557 (emphasis added).]

New Jersey political speech enjoys a favored position among our constitutional values: "[P]olitical speech . . . occupies a preferred position in our system of constitutionally-protected interests. State v. Miller, 83 N.J. 402, 411 (1980). "Where political speech is involved, our tradition insists that government 'allow the widest room for discussion, the narrowest range for its restriction.'" Id. at 412.

In New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326 (1994), our Supreme Court affirmed the right of private persons to distribute leaflets in regional shopping centers consisting of political speech "in support of or in opposition to causes, candidates, and parties." Id. at 781. Chief Justice Wilentz's opinion emphasized the preeminent status of our State Constitution's protection of free speech: "Precedent, text, structure and history all compel the conclusion that the New Jersey Constitution's right of free

speech is **broader** than the right against government abridgement of speech found in the First Amendment." Id. at 353 (emphasis added).

B. The Interests Asserted by Minnesota and Relied on by the Timmons Court in Support of Minnesota's Anti-Fusion Law are Insufficient to Sustain New Jersey's Anti-Fusion Statutes.

In Timmons, Minnesota asserted three State interests in support of its anti-fusion law. The first was an interest in avoiding exploitation of fusion by nominating a major party candidate as, in addition, the candidate of the "No New Taxes" or "Stop Crime Now" party. In response, the New Party argued that Minnesota easily could avoid manipulation of that sort by adopting more rigorous ballot access standards. The Timmons Court rejected that response, not because it was ineffective but because the Court held that Minnesota "need not tailor the means it chooses to promote ballot integrity." 520 U.S. at 365.

Significantly, Minnesota's concern about a profusion of parties with titles that also serve as political slogans is less relevant in New Jersey. To qualify as a statutory political party, an aspiring party in New Jersey must receive at least ten percent of all votes cast in a general election for the 80 elections for seats in the General Assembly. N.J.S.A. 19:1-1. If an aspiring party does not qualify for statutory status, then it must submit a signature petition for each candidate it nominates. N.J.S.A. 19:13-1. In the approximately 100 years since the Legislature passed the current restrictive standard for statutory party

qualification, not a single minor party has achieved statutory party status. The legislative restrictions on minor parties in New Jersey significantly diminish any concerns that minor parties, absent an anti-fusion law, would form multiple new parties with politically significant names to increase their vote totals.

The second interest asserted by Minnesota in Timmons was the fear that "fusion would enable minor parties, by nominating a major party's candidate, to bootstrap their way to major-party status in the next election and circumvent the State's nominating petition requirement for minor parties." Id. at 366. Although the Supreme Court acknowledged the validity of that interest asserted by Minnesota, it bears little relevance to New Jersey. As noted, no minor party has achieved statutory status in New Jersey during the past 100 years, and the monopoly on statutory status enjoyed by the Democratic and Republican parties has never been threatened. Without an anti-fusion law, some of New Jersey's minor parties might demonstrate a record of independent election success, since fusion typically contemplates that the minor party's vote for the major party candidate is separately tabulated. But whatever electoral success might be realized by minor parties is extremely unlikely to rise to the level of qualification as a statutory party.

A third interest advanced by Minnesota was that of avoiding voter confusion, an interest that the Timmons Court expressly declined to rely on. 520

U.S. at 369, n.13. The Timmons Court, however, was not content to rely on the three interests asserted by Minnesota. Instead, the Court elected to rely primarily on an interest that Minnesota did not advance: the interest of a state in enacting "reasonable election regulations that may, in practice, favor the traditional two-party system." Id. at 367. The Court observed that "[t]he Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system." Ibid.

Dissenting, Justice Stevens contended that the Court impermissibly had relied on the State's interest in preserving the two-party system, noting that Minnesota had not relied on that interest in its briefs and had expressly rejected it during oral argument. Justice Stevens also observed:

> Even if the State had put forward this interest to support its laws, it would not be sufficient to justify the fusion ban. In most States, perhaps in all, there are two and only two major political parties. It is not surprising, therefore, that most States have enacted election laws that impose burdens on the development and growth of third parties. The law at issue in this case is undeniably such a law. The fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality.
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> [Id. at 378.]

See also, Richard L. Hason, 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 (1997):

> Supreme Court imprimatur of the two-party system is unjustifiable and dangerous. Responsible party government adherents have not shown that the two-party system promotes either political stability or antifactionalism. Nor can duopoly be premised on preserving of the voting cue, assuming that such a cue retains vitality. The Supreme Court need not uphold laws like the antifusion law in Timmons in order to preserve either the voting cue or the two-party system. When First Amendment interests are involved, a state seeking to shield Democrats and Republicans from competition should have a better reason than protection of the two-party system.
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> [Id. at 337.]

II. WELL REASONED STATE AND FEDERAL CASELAW DEMONSTRATE THAT TIMMONS IS AN OUTLIER THAT IS INCONSISTENT WITH PREVAILING PRECEDENT AND IGNORES THE POWERFUL POLITICAL AND PARTISAN MOTIVATION FOR ANTI-FUSION LAWS.

As was noted in our Preliminary Statement, there is no dispute that the consistent and dominant motivation for the numerous anti-fusion laws passed throughout the country was the desire of the Republican Party to prevent minor parties from nominating and supporting candidates that already had been designated as candidates of the Democratic party. The historical background for the embrace by the Republican state legislatures of anti-fusion laws is detailed in a landmark article, A Place on the Ballot: Fusion Politics and Anti-Fusion Laws, 85 AM. Hist. Rev. 287 (1980), authored by Peter H. Argersinger, History Professor Emeritus at Southern Illinois University.

> Fusion was a particularly appropriate tactic given the period's political culture. Voter turnout was at a historic high, rigid party allegiance was standard, and straight-ticket voting was the norm.

> Partisanship was intense, rooted not only in shared values but in hatreds engendered by cultural and sectional conflict. Changes in party control resulted less from voter conversion than from differential rates of partisan turnout or from the effect of third parties. Although the Republicans continued to win most elections, moreover, the era of Republican dominance had ended in the older Northwest by 1874 and had been considerably eroded in the states farther west by the 1880s, so that elections were bitterly contested campaigns in which neither major party consistently attracted a majority of the voters. Minor parties regularly captured a significant share of the popular vote and received at least 20 percent in one or more elections from 1874 to 1892 in more than half of the non-Southern states. Even where their share was smaller, it represented a critically important proportion of that electorate. Between 1878 and 1892 minor parties held the balance of power at least once in every state but Vermont, and from the mid-1880s they held that power in a majority of states in nearly every election, culminating in 1892 when neither major party secured a majority of the electorate in nearly three-quarters of the states. By offering additional votes in a closely divided electorate, fusion became a continuing objective not only of third party leaders seeking personal advancement or limited, tangible goals but also of Democratic politicians interested in immediate partisan advantage. The tactic of fusion enabled Democrats to secure the votes of independents or disaffected Republicans who never considered voting directly for the Democracy they hated; it permitted such voters to register their discontent effectively without directly supporting a party that represented negative reference groups and rarely offered acceptable policy alternatives.
>
> [Id. at 289-90.]

Professor Argersinger explains that as states began to abandon party ballots in favor of a system of public control over ballots – the so-called Australian system – that change gave Republican legislatures the opportunity to

undermine fusion voting by passing laws that prohibited a candidate's name from appearing more than once on the official ballot.

> By providing for public rather than partisan control over the ballots and by featuring a blanket ballot, the Australian system opened to Republicans, given their dominance in state governments, the opportunity to use the power of the state to eliminate fusion politics and thereby alter political behavior. The Republicans' modifications of the Australian ballot were designed to take advantage of the attitudes and prejudices of their opponents and were based on a simple prohibition against listing a candidate's name more than once on the official ballot. This stipulation, Republicans believed, would either split the potential fusion vote by causing each party to nominate separate candidates or undermine the efficacy of any fusion that did occur, for in this time of intense partisanship many Democrats would refuse to vote for a fusion candidate designated 'Populist' and many Populists would feel equally reluctant to vote for a 'Democrat.' Related regulations could restrict straight-ticket voting by fusionists or even eliminate one of the fusing parties, antagonizing its partisans and causing them either to oppose the fusion arrangements or to drop out of the electorate altogether. Given the closely balanced elections of the late nineteenth century, the elimination of even a small faction of their political opponents because of ideology, partisanship, or social prejudice would help guarantee Republican ascendancy. Although other ballot adjustments increased its effectiveness, this simple prohibition against double listing became the basic feature of what the Nebraska supreme court described as a Republican effort to use the Australian ballot as a 'scheme to put the voters in a straight jacket.'
>
> [Id. at 291-92]

Professor Argersinger also quoted with approval, id. at 292, from the dissenting opinion of Justice Winslow of the Wisconsin Supreme Court in State Ex. Rel. Runge v. Anderson, 76 N.W. 482 (Wis. 1898), a case in which the

Wisconsin Supreme Court declined to invalidate Wisconsin's anti-fusion law.

Dissenting from that holding, Justice Winslow observed:

> I regard the provision of the election law which is attacked in this case as an unwarrantable interference with the freedom of election, and hence void. Its only purpose is to prevent fusion between two parties. This is plain to the most casual reader. That it will quite effectively accomplish this purpose seems equally plain; that it is a laudable, or even lawful, purpose, I deny. If one party has named a worthy ticket, there is no reason, in law or morals, why another should be debarred from indorsing that ticket except on pain of surrendering its existence. It is easy to say that the rights of the elector are not infringed; that he may still vote for the men of his choice, because their names are on the official ballot; and that the party designation makes no difference in the result. This argument is, in my opinion, unsatisfactory. Political rights are universally exercised through party organizations, and such organizations are recognized by this very law. When the law interferes with the freedom of action of the party, it necessarily interferes with the freedom of action of the citizens who compose that party. This law says to the party, and through the party to the electors composing it: 'You shall not indorse candidates of any other party, except on condition that you surrender your existence as a party and lose your right of representation upon the official ballot in the future.' Knowing, as we do, the strength of party ties, and the practical necessity of party organizations, it seems to me that this threat is neither necessary nor reasonable. It cannot be claimed that this provision is aimed at any evil practices or wrongful act. It will prevent no illegal vote from being cast, nor will it stop any corrupt practice, nor in any way preserve the purity of the ballot. There is, in my judgment, no reason, in good morals or in the principles of republican government, for any such device. It is well to surround the ballot with reasonable regulations, and to adopt all precautions that will prevent corruption and illegal voting; but it is not well to make the ballot difficult for the honest voter, nor to adopt devices which tend only to hinder the full exercise of political rights.
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> [Id. at 487.]

New York's highest Court addressed the validity of New York's anti-fusion laws contemporaneously with the Wisconsin Supreme Court's decision in Anderson, 76 N.W. 482. In In re Callahan, 93 N.E. 262 (N.Y. 1910), the New York Court of Appeals invalidated New York's anti-fusion law as arbitrary and an unauthorized exercise of legislative power. Chief Justice Cullen observed:

> It is true that the Legislature may prescribe qualifications for office where there is no constitutional provision on the subject, but it has been settled law from the earliest period in the history of our state that it cannot enact arbitrary exclusions from office. If it cannot enact arbitrary exclusion from office, equally it cannot enact arbitrary exclusions from candidacy for office. What exclusion could be more arbitrary than that one party or organization should not be permitted to nominate the candidate of another.
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> * * * *
>
> The fact is plain that the legislative provision is solely intended to prevent political combinations and fusions, and this is the very thing that I insist there is no right to prevent or hamper as long as our theory of government prevails, that the source of all power is the people, as represented by the electors.
>
> [Id. at 61, 63.]

Concurring, Justice Gray noted:

> As a majority of my Associates, however, desire, also, to concur with the Chief Judge in the views expressed by him, I shall join with them in holding that the provisions of section 136 are unconstitutional and, therefore, invalid, in forbidding the committee of a political party, authorized to make nominations, to nominate as a candidate for an office on the party ticket a person who is the candidate of another party for the same office. The power of the Legislature to regulate may not, validly, be stretched so far as to restrict a body, authorized to make nominations for a political party,

> in its right to select any duly qualified person as a candidate for public office. It cannot deprive the electors of the right to vote for any person for a public office not disqualified under out laws.
>
> [Id. at 66-67.]

The issue returned to the New York Court of Appeals one year later after the Legislature again passed a law barring fusion candidacies. Again, the Court of Appeals invalidated the law. Matter of Hopper v. Britt, 96 N.E. 371 (N.Y. 1911). In a unanimous opinion, Chief Justice Cullen observed:

> The Legislature might make combinations effected by bribery or illegal considerations criminal and punish the actors. On proof that an organization was effected and nominations made in pursuance of such criminal bargain the courts might be authorized to strike such nominations from the ballot. But because many coalitions between various bodies of electors are corrupt and criminal [the Legislature] cannot forbid coalition nominations or indirectly effect the same thing by rendering it more difficult to vote for a coalition nominee.
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> [Id. at 156.]

In In re city Clerk of Paterson, 88 A. 694 (1913), the Supreme Court of New Jersey (then an intermediate court), addressed the validity of an application to the Paterson City Clerk to place the name of candidate Fordyce on the official primary ballot of both the Republican and Progressive parties. The court noted that a statute passed by the Legislature in 1911 makes clear that a political party has the right to nominate a candidate of another party, and that that statute superseded a 1907 law that required a party to nominate only candidates who were members of that party.

Ruling that Fordyce could be placed on the ballots of both the Republican and Progressive parties, the court nevertheless expressed grave doubt about the constitutionality of the 1907 law, which had the practical effect of banning fusion candidacies:

> But if this act of 1911 had never been passed, and it was clear that the provision of the act of 1907 was mandatory, I should nevertheless be inclined to think that the refusal of the clerk in this instance was not legally justifiable.
>
> The right of suffrage is a constitutional right. The Legislature may deal with it so far as it is necessary to protect it; may pass laws to insure the security of the ballot and the rights of the voters. But I conceive that the Legislature has no right to pass a law which in any way infringes upon the right of voters to select as their candidate for office any person who is qualified to hold that office. A few years ago every candidate for every office was nominated by a political party at a convention held for that purpose. I do not suppose there is a lawyer in the state of New Jersey, or any other thinking citizen, who, while that earlier system of nominating candidates was in existence, would have thought for a moment that the Legislature had power to limit the choice of the convention to membership in its own party. I do not suppose it would have been thought for a moment that the Legislature could say that the Democratic convention should nominate for office no man who was not a Democrat, and who was not at the time of nomination a Democrat in good standing in his party; or the same thing with relation to a Republican convention. The fact that nominations for office are now made not at party conventions but directly by the voters at primary elections cannot, it seems to me, be material in considering the right of voters to be untrammeled in the selection of their candidates for office. The Legislature may change the method of selection; but it cannot abridge the right of selection.
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> [Id. at 694.]

State courts' skepticism about the soundness of Timmons is fortified by the United States Supreme Court's consistently emphatic support of the First Amendment rights of political parties. In a series of significant First Amendment cases, the Court steadfastly underscored the importance it attached to preventing Legislative regulations from encroaching on the free speech and assembly rights of parties. See, e.g., Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 224 (1989) (invalidating California election law that prohibited parties from endorsing candidates in their own party primaries and stating that

> [f]reedom of association means not only that an individual voter has the right to associate with the political party of her choice . . . , but also that a political party has a right to 'identify the people who constitute the association,' . . . and to select a 'standard bearer who best represents the party's ideologies and preferences.') (citations omitted);

Anderson v. Calabrezze, 460 U.S. 780, 793-94 (1983) (invalidating Ohio law requiring independent candidate for President John Anderson to file his nominating petition in Ohio by March 29, 1980, weeks before Anderson had announced his intention to run for President, and stating

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and – of particular importance – against those voters whose political preferences lie outside the existing political parties. By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of

> ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. In short, the primary values protected by the First Amendment – 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' – are served when election campaigns are not monopolized by the existing political parties.) (citations omitted);

Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 215-16 (1986) (invalidating Connecticut statute that prohibited Connecticut Republican Party from allowing independent voters to participate in Party's primary elections, and stating

> Were the State to restrict by statute financial support of the Party's candidates to Party members, or to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals. As we have said, ' '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' ' The statute here places limits upon the group of registered voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concreted action, and hence to political power in the community.) (citations omitted);

Williams v. Rhodes, 393 U.S. 23,31 (1968) (invalidating Ohio election statute requiring so many signatures on petitions for nominations for President and Vice-President as to preclude new political parties and old parties with limited membership to nominate candidates and stating

> No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. 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. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulations of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote and to associate.) (citation omitted);

Norman v. Reed, 502 U.S. 279, 288-89 (1993) (invalidating as unconstitutional Illinois statute prohibiting use of a political party's name in Cook County because of prior use of party name in City of Chicago and stating

> For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences. To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, see Anderson, supra. 460 U.S. at 789,103 S.Ct., at 1570, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance. By such lights we now look to whether §10-2 and §10-5, as construed by the Supreme Court of Illinois, violate petitioner's right of access to the Cook County ballot.) (citation omitted);

California Democratic Party v. Jones, 530 U.S. 567, 575-76 (2000) (invalidating California open primary law that compelled parties to open their primary elections to voters who were not party members, quoting with approval from Justice Stevens's dissent in Timmons, and stating

> Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.' Eu, supra, at 224 (internal quotation marks omitted). The moment of choosing the party's nominee, we have said, is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.' Tashjian, 479 U.S., at 216; see also Id. at 235-236 (Scalia, J., dissenting) ('The ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom'); Timmons, 520 U.S. at 359 ('[T]he New Party, and not someone else, has the right to select the New Party's standard bearer' (internal quotation marks omitted)); Id. at 371 (Stevens, J., dissenting) ('The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office').)

Similarly, other federal and New Jersey decisions have emphasized the high priority accorded to the autonomy and critical role of minor political parties. In Patriot Party of Allegheny County v. Allegheny County Department of Elections, 95 F.3d 253 (3d. Cir. 1996), plaintiff Patriot Party challenged the validity of Pennsylvania statutes that prohibited the Patriot Party, and other minor political parties, from "'cross-nominating' a candidate for political office when that candidate already has been nominated for the same office by another

political party." Id. at 255. At issue was the attempt by the Patriot Party to nominate for School Director of North Allegheny School District Michael Eshenbaugh, who already had been nominated by the Democratic Party but was unsuccessful in his effort to be nominated by the Republican Party. Pennsylvania law prohibited joint nomination by a minor party, but not by the Democratic and Republican parties. The Director of the Allegheny Department of Elections rejected the Patriot Party's nomination of Eshenbaugh, even though he had consented to be the nominee of both parties. The District Court granted the State's Motion for Summary Judgment. Id. at 256-57.

Before the Third Circuit, Pennsylvania contended that four important State interests supported the State's anti-fusion law: (1) preventing "sore loser" candidacies; (2) preventing fusion candidates from 'monopolizing' the ballot and causing voter confusion; (3) preventing a candidate from 'bleed[ing]' off votes of independent voters to bolster his or her major party endorsement; and (4) encouraging new candidates to run as independents. Id. at 264. The Third Circuit rejected as "unpersuasive" each of the interests asserted in support of the law, and invalidated the anti-fusion ban on minor parties:

> We therefore find unpersuasive each interest that the Department has offered to justify its ban on cross-nomination by minor parties. The Department bears the burden of demonstrating that the challenged election laws are narrowly tailored to protect a compelling state interest. Because a more narrowly tailored law would prevent sore-loser candidacies, this case falls outside the

> ambit of *Storer*. The Department's other asserted interests are either unsupported by the record or insufficient to justify an outright ban on cross-nomination by minor parties. State regulation of cross-nomination might be appropriate in some circumstances, but the Department has not carried its burden in this case. Thus, we hold that Pennsylvania's prohibition of cross-nomination by minor political parties violates the Patriot Party's right of free association.
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>
> The challenged election laws burden the Patriot Party's right of free association by preventing the Party from nominating the candidate of its choice. They also prevent the Party from fusing its votes with those of the major parties in order to maximize its appeal to voters and to build its political organization. Appellees assert no compelling state interest to justify the election laws as applied in this case, and Pennsylvania could easily achieve its asserted goal of preventing 'sore-loser' candidacies with a more narrowly tailored law. Pennsylvania's ban on cross-nomination by minor political parties therefore violates the Patriot Party's First and Fourteenth Amendment rights of free association.
>
> The laws also violate the Fourteenth Amendment's guarantee of equal protection of the laws. They discriminate against minor parties and the voters who wish to support them without supporting a compelling or even a significant state interest.
>
> [Id. at 267-68; 270.]

In Council of State Alternative Political Parties v. State, Division of Elections, 344 N.J. Super. 225 (App. Div. 2001), this court addressed a constitutional challenge to two New Jersey statutes, one that prohibited a voter from declaring a party affiliation other than Democrat or Republican, and the other requiring all county clerks to provide five free copies of the registry lists

to State-recognized political parties, namely the Democratic and Republican parties. By statute, only political parties that received, in the last election for members of the General Assembly, at least 10 percent of the total vote cast are recognized as a "political party" by the State. Voters are permitted to affiliate with either of those recognized parties when registering for the primary election, or they can declare themselves as "Independent." All other voters are considered "Unaffiliated." As of June 2, 1998, 19.18 percent of registered voters were Republicans, 25.38 percent were declared Democrats, .24 percent were declared Independents, and 55.20 percent were classified Unaffiliated.

Plaintiff, Council of Alternative Political Parties (CAPP), advocated for a more open and responsive political system in New Jersey. Its members included the Green Party of New Jersey, the Natural Law Party, the Libertarian Party, the Reform Party, and the U. S. Taxpayers Party. Plaintiff contended that the inability of the members of their constituent parties to declare their party affiliation when registering to vote, and for those parties to obtain affiliation lists of their members from election officials, severely burdens their rights of political affiliation and is discriminatory. The trial court agreed, holding that those minor parties were "substantially similar" to the Democratic and Republican parties and therefore were entitled to inclusion on party declaration forms and to access to the state-compiled voter registration lists.

Affirming the trial court, the Appellate Division concluded that the burdens imposed by the State statutes outweighed any of the State interests advanced to support the preferred treatment of the major parties. The court concluded that the state statutes impermissibly burdened the First Amendment rights of the minor parties and denied those parties their constitutional right to equal protection of the law:

> The State suggests that the scheme simply denies the alternative parties a benefit. It also suggests that any burden is minimized by the availability of the voter registration lists at a nominal cost. As to the latter argument, the simple answer is that the voter registration lists provide little, if any, useful information to plaintiffs because their followers are unable to declare their party affiliation. Furthermore, the Supreme Court has recently reminded us that even nominal fees may amount to an impermissible condition on the exercise of First Amendment rights. See Green Party of New Jersey v. Hartz Mountain Indus., Inc., 164 N.J. 127, 157, 752 A.2d 315 (2000).
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> As to the benefit argument, we, like Judge Parrillo, are not persuaded that plaintiffs' arguments can be dismissed so easily. Having decided not only to maintain the information but also to disseminate the information, the State has joined in the efforts by the established parties to maintain the status quo.
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> Having identified the burdens imposed on plaintiffs' rights of free expression and association and having characterized the severity of the burdens imposed by the challenged scheme, we must consider the interests advanced by the State in justification for the burdens. The State identifies three interests: maintenance of ballot integrity, avoidance of voter confusion, and ensuring electoral fairness. These interests have been recognized as valid interests in cases involving questions of ballot access. See Munro [v. Socialist Workers Party],

> 479 U.S. 189 [(1986)]; American Party of Tex. v. White, 415 U.S. 767, 94 (1974); Jenness v. Fortson, 403 U.S. 431 (1971). We fail to see, however, how any or all of these interests justify the burdens imposed on plaintiffs. Indeed, in the context of voter declaration of affiliation and maintenance of lists of registered voters by affiliation, these interests are irrelevant.
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> Thus, when we balance the nature of the burdens imposed on plaintiffs, the severity of the burdens, and the State's justification of these burdens, we are persuaded that the failure of the Legislature to recognize that alternative parties are entitled to the same opportunity to have their followers declare their affiliation and to have the county registrars maintain and disseminate this information to alternative parties on the same terms as the DSC and RSC constitutes an impermissible burden on their First Amendment rights and denies to plaintiffs the equal protection of the laws.
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> [Id. at 244.]

A. The State's Interests Cannot Justify the Burdens Imposed on Minor Parties and Their Members.

Although Appellant, relying on Worden v. Mercer Cty. Bd. of Elections, 61 N.J. 325, 346 (1972), persuasively asserts that New Jersey courts apply "strict scrutiny" to state laws that infringe on constitutionally protected voting rights, Amicus contends that New Jersey's anti-fusion laws also are constitutionally infirm under the burden/balancing test that originated in Anderson v. Calabrezze, 460 U.S. at 789. Under that more flexible standard,

> [a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the

> State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'
>
> [Id. at 789.]

See also Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson, 460 U.S. at 789.) That was the standard applied by this court in Council of State Alternative Political Parties v. State, 344 N.J. Super. at 244.

As noted, the Timmons Court expressly disclaimed any reliance on Minnesota's alleged interest in preventing voter confusion. Timmons, 520 U.S. at 369 n.13. Two other interests asserted by Minnesota – preventing the use of minor party names as electioneering slogans (No New Taxes Party), and a concern that fusion would enable minor parties to "bootstrap" their way to major party status, have been discussed earlier in this brief and demonstrated to be of limited relevance in New Jersey. The State interest primarily relied on by the Supreme Court – protection of the two-party system – is similarly irrelevant and inapplicable in New Jersey. Since the enactment of anti-fusion laws and the enhanced party qualification law in the 1920s, no minor party in New Jersey has attained the statutory status of a "political party," nor during that same period has any candidate of a minor party been elected to a major public office. Any suggestion by the State that New Jersey's anti-fusion laws are required "to protect the two-party system in New Jersey" would be specious.

In contrast, the burden on minor parties imposed by New Jersey's anti-fusion laws is enormous. As noted, if the Libertarian Party chooses to support a Democratic or Republican candidate for a specific office, the anti-fusion law prohibits that candidate from appearing on the ballot as a candidate of the Libertarian Party, and Libertarian Party members can vote for that candidate only on the Democratic or Republican party line. So Libertarian Party members are forced to choose between voting for their preferred candidate as the candidate of a party they neither support nor belong to, or waste their vote on another candidate that is not their preferred choice. That result clearly imposes a severe burden on both the Libertarian Party's constitutional right to support the candidate of its choice as a candidate of the Libertarian Party, and on the constitutional rights of its party members to vote for the Party's preferred candidate as a Libertarian Party candidate, and not as a Democratic or Republican Party candidate. Undoubtedly, those burdens clearly outweigh any conceivable state interest asserted in support of the anti-fusion laws.

B. New Jersey's Anti-Fusion Laws Violate the Equal Protection Rights of Minor Parties Under the New Jersey Constitution.

The New Jersey Constitution does not expressly include the words "equal protection." Nevertheless, this and other courts have recognized that the expansive language of Article 1, Sec. 1, of our Constitution "guarantees the

fundamental constitutional right to equal protection of the law. New Jersey State Bar Ass'n. v. State, 387 N.J. Super. 24, 40 (App. Div. 2006).

In determining whether or not New Jersey's anti-fusion laws violate the equal protection rights of the Libertarian Party and other minor political parties, our courts apply a balancing test consistent with the benefit-burden test applied by this court in its opinion in Council of State Alternative Political Parties v. State, 344 N.J. Super. at 244. In adjudicating equal protection claims, our courts have "considered the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985). Accord, Green Party of New Jersey v. Hartz Mountain Industries, 264 N.J. 127, 149 (2000). That analytical balance compels the conclusion that the State's anti-fusion laws infringe on the equal protection rights of minor political parties.

Undeniably, the rights at stake in this litigation are fundamental rights. "The right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . ." Reynolds v. Simms, 377 U.S. 533, 562 (1964). Incontrovertibly, "[t]he right to vote holds an exalted position in our State Constitution." In re Atty. General's Directive on Exit Polling, 200 N.J. 283, 303 (2009).

Clearly, a law that bars political parties from nominating the candidate of their choice is a law that directly interferes with the most basic function of a political party. Similarly, a law that effectively compels a political party member who wants to vote for her party's preferred candidate to cast that vote on the line of a different political party to which she does not belong is an intolerable interference with the right to vote. Furthermore, anti-fusion laws inhibit political coalition building and stifle the ability of minority parties to grow. Accordingly, the governmental interference with the core constitutional rights of political parties and their members could not be more intrusive.

Finally, the alleged governmental interests are illusory. No legitimate governmental interest is enhanced by the anti-fusion laws. Ballot confusion is not reduced. Minor parties would gain no unfair advantage if they were allowed to nominate a major party candidate and their members allowed to vote for that candidate on the Party's line. And the two major political parties' effective monopoly on party status and electoral success can hardly be considered fragile. No minor party has achieved official "political party" status or won a major election in the past century. The Democratic and Republican parties' duopoly is at no conceivable risk in New Jersey.

The inescapable conclusion is that New Jersey's anti-fusion laws violate the constitutionally guaranteed equal protection rights of the State's minor political parties and their members.

CONCLUSION

The significance of this case is self-evident. In our contemporary society, it is no overstatement to observe that the policies, principles and identity of one of our two major parties – the Republican Party – have significantly been transformed in the years following the 2016 presidential election. Although there may be disagreement over whether that transformation is in that Party's best interests, there can be no disagreement that the profound changes in the Republican Party have been destabilizing for the country.

In that context, the importance to our political dialogue of the minor parties, and the innovative principles and ideals they promulgate and support, is clear and compelling. Especially at a time when instability and uncertainty appears to be altering and affecting the core principles of one of our two major parties, the admonition of the late Justice Stevens in his Opinion for the Court in Anderson v. Calabrezze, 460 U.S. at 793-94, bears repeating:

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and – of particular importance – against those voters whose political preferences lie outside the existing political parties. Clements v. Fashing, 457 U.S.

> [957 (1982)] (plurality opinion). By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. In short, the primary values protected by the First Amendment – 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' – are served when election campaigns are not monopolized by the existing political parties. (citations omitted).

Even Chief Justice Rehnquist, in his majority opinion in Timmons, acknowledged the vital role of minor parties, especially when one of the major parties is experiencing discord:

> States have a strong interest in the stability of their political systems. This interest does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence, nor is it a paternalistic license for States to protect political parties from the consequences of their own internal disagreements.
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> [Timmons, 520 U.S. at 366-67. (citations omitted).]

The year 2023, approximately a century after New Jersey's anti-fusion ban was enacted to protect the major parties from the threat of fusion candidates, would be a relevant and propitious occasion for New Jersey's courts to assess and evaluate the constitutionality of those laws in the context of contemporary political tensions. As this brief demonstrates, it is a heavy lift for the State and the dominant parties to demonstrate that the amorphous and imprecise interests

advanced to support these outmoded laws outweigh the significant and unjustifiable burdens that they impose on minor political parties and their members. Our state's precedents clearly demonstrate that the guarantees and protections afforded to the expressive and associational rights of our political parties and their members exceed those afforded by the First Amendment.

Timmons is not a barrier to the invalidation of New Jersey's anti-fusion laws, and our Supreme Court is not likely to be deterred by the Timmons Court's deference to the two major parties as the interest supporting Minnesota's anti-fusion law. This court should anticipate our Supreme Court's rejection of Timmons' rationale and strike down New Jersey's repressive and anti-democratic laws that prohibit fusion candidacies.

Respectfully submitted,

Pashman Stein Walder Hayden, PC

By: /s/ CJ Griffin, Esq.

Dated: July 10, 2023