FILED, Clerk of the Appellate Division, June 12, 2023, **A-003542-21**, **AMENDED**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN RE PETITION FILED BY MODERATE PARTY NOMINATING HON. TOM MALINOWSKI FOR CONGRESS IN CONGRESSIONAL DISTRICT 7	DOCKET NO. A-003542-21 A-003543-21 CIVIL ACTION (CONSOLIDATED) ON APPEAL FROM ADMINISTRATIVE ACTIONS OF THE SECRETARY OF STATE DATED JUNE 8, 2022 AND JULY 19, 2022
IN RE PETITION FILED BY MODERATE PARTY NOMINATING HON. TOM MALINOWSKI FOR CONGRESS IN CONGRESSIONAL DISTRICT 7	

BRIEF OF INTERVENOR
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INTRODUCTION

Appellants - and the professional political operatives orchestrating the circumstances of this case - are attempting to manipulate our State's General Election ballot to favor one major party and handicap another under the guise of promoting the rights of "minor parties." In doing so, they challenge several statutes that have been law for more than 100 years and insist that no reading of those statutes could pass constitutional muster. That is plainly wrong and the Appellants' claims should be rejected.

This precise issue has already been decided by the United States Supreme Court and the Appellants have not made the necessary legal showing to allow departure from that Court's decision. While the New Jersey Constitution does offer greater protections to free speech and free association claims in certain contexts, that does not translate to an unrestricted right to free speech and free association when it comes to the State Legislature's right to regulate the mechanics of the election process. Limiting the number of times a candidate can appear on the general election ballot is the quintessential function of the regulation of the mechanics of the election process and that policy determination is entitled to deference. The Appellants' right to engage in expressive conduct on the ballot is entitled to a far lesser degree of constitutional protection under both the U.S. and New Jersey Constitutions. Using

the appropriate standard of review – the burden-balancing test – the Legislature's choice to disallow fusion voting passes constitutional muster.

In short, Appellants ask this Court for an extraordinary pronouncement: a rule that fusion voting is not only permitted, but a constitutional right. To the contrary, the United States Supreme Court has made it abundantly clear that fusion voting is not a constitutional right. Further, fusion voting is prohibited in 45 of the 50 states and has been prohibited in New Jersey for over 100 years. Finally, the New Jersey Constitution does not guarantee the right to fusion voting and the Court should maintain the constitutionality of New Jersey's infinitely reasonable and non-discriminatory election regulations.

PROCEDURAL HISTORY

I. June 7, 2022: Nominating Petition of Moderate Party.

This saga began on June 7, 2022, when a newly formed corporate entity entitled the "Moderate Party" filed a petition nominating former Congressman Tom Malinowski as a candidate for election, even though Malinowski already filed a Certificate of Acceptance for the nomination for that office from the Democratic Party in its Primary Election, which was held on the same date.

II. June 8 & July 19, 2022: Secretary of State Rejection of Petition.

The next day, the Secretary of State correctly rejected that petition. (Pa1). A month later, on July 8, 2022, the Appellants requested what they described as

"reconsideration" of the Secretary of State's decision. On July 19, 2022, the Secretary correctly rejected this request. (Pa2).

III. July 20, 2022: Notices of Appeal.

On July 20, 2022, Appellants filed Notices of Appeal directly with the Appellate Division challenging the Secretary of State's rejection of the petition. (Pa3a, 23a).

IV. August 10, 2022: Motion to Intervene by NJGOP.

On August 10, 2022, the New Jersey Republican State Committee, Inc. ("NJGOP") filed motions to intervene to address the important constitutional issues, procedural issues, and potentially far-reaching effects that a decision in this case could have. (Pa552, Pa555). By Orders dated September 15, 2022, the Court granted NJGOP's motions. (Pa558, Pa559).

Following the entry of an Order consolidating these appeals, an Order removing this case from an expedited track and the granting of several extensions of the initial briefing schedule, Appellants filed a merits brief on December 19, 2022.

V. March 20, 2023: Motions to Dismiss by State and NJGOP.

On March 20, 2023, the State filed a Notice of Motion to dismiss this appeal, or alternatively to transfer the matter to the Law Division to allow a factual record to be developed. On the same date, NJGOP filed a similar Notice of Motion which also sought to strike a portion of Appellants' appendix, as well as a Notice of Motion

permitting an extension of time to file its merits brief in the event either motion was denied. The State later filed a similar Notice of Motion seeking an extension.

VI. May 1, 2023: Denial of Motions to Dismiss by State and NJGOP.

By Orders dated May 1, 2023, the Court denied the Motions to Dismiss filed by the State and NJGOP, holding in pertinent part that the documents submitted in Appellants' appendix "are of little if any assistance to the court in deciding the legal issues relating to appellants' facial constitutional challenge." In an Order of the same date, the Court granted the State and NJGOP the right to file its merits brief no later than June 9, 2023.

STATEMENT OF FACTS

All of the following facts are contained in Appellants' Appendix or are matters of public record of which the Court can take judicial notice. These facts are presented for the purpose of demonstrating to the Court how the circumstances surrounding this case were engineered by professional political operatives, and how fusion voting, if permitted, would likely be misused by political operatives to inappropriately manipulate the election process and confuse voters.

I. June 2-7, 2022: The Creation of the Moderate Party and Nomination of Malinowski.

The facts demonstrate the relative ease and speed with which political operatives affiliated with a major political party can organize and form a new "minor

political party" in an effort to obfuscate the election process and attempt to boost the electoral prospects of that major party.

On June 2, 2022 – five days before the filing deadline for Direct Nominating Petitions in the November 2022 General Election – the Appellant, "Moderate Party Inc.", was formed by the filing of a Certificate of Incorporation with the New Jersey Secretary of State. (Pa55a). The Certificate of Incorporation lists Michele Garay, Craig Schrader, and Jennifer Holdsworth of 2800 South Arlington Ridge Rd., Arlington, Virginia, as the Moderate Party's Board of Trustees. (Pa56a). Ms. Holdsworth is the former Political Director for the New Jersey Democratic State Committee and has served in formal and consulting roles on Democratic political campaigns on the State and federal levels. See Prime Policy Group website, Jennifer Holdsworth biography, https://www.prime-policy.com/our-people/jennifer-c-holdsworth (last visited May 25, 2023, 10:49 PM).

Three days later, on June 5, 2022, the Executive Director of the far-left New Jersey Working Families Party, Susan Altman, served as one of several circulators of a Petition to nominate now-former Congressman Tom Malinowski as the official candidate of the Moderate Party in New Jersey's 7th Congressional District. (Pa352a).[1] Appellants Richard Wolfe, William Kibler, and Michael Tomasco all

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[1] In the time between the entry of the Court's May 2, 2023 Orders and the filing of this brief, Susan Altman declared her intention to run for Congress in New Jersey's 7th Congressional District. See David Wildstein, "Sue Altman announced bid to

signed the same petition sheet circulated by Ms. Altman, which indicates that she physically met with each of them on or around June 5, 2022. (Pa351a).

Two days later, on June 7, 2023, the Nominating Petition was filed with the Secretary of State. (Pa1). It is unknown whether the Moderate Party has any members other than Wolfe, Garay, Shrader, Kibler, and Tomasco; nor has any such information been made part of the record.

On the same day, Mr. Shrader and Ms. Garay filed a Form D-4 with the New Jersey Election Law Enforcement Commission, representing to the State's campaign finance regulatory agency that the Moderate Party was not actually a political party (as had just been represented to the Secretary of State through the filing of the Nominating Petition), but a Continuing Political Committee, the New Jersey State law version of a Political Action Committee. See New Jersey Election Law Enforcement Commission webpage, public search tool https://www.njelecefilesearch.com/SearchPACReports (last visited May 25, 2023, 10:53pm).[2]

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unseat Tom Kean in NJ-7", New Jersey Globe, May 31, 2023 https://newjerseyglobe.com/congress/sue-altman-announces-bid-to-unseat-tom-kean-in-nj-7/ (last visited May 31, 2023, 9:31am)

2 The Moderate Party's filings with the Election Law Enforcement Commission are publicly available and can be viewed by typing "Moderate Party" into the search field found at this link and clicking "search."

On June 8, 2022, the next day, the Secretary of State appropriately rejected the Nominating Petition since Malinowski had already accepted the nomination of the Democratic Party for the same office. (Pa1).

All of these events occurred speedily within the span of just six calendar days. The simplicity of the entire process – payment of nominal fees to the State and filing a few forms – illustrates how easily a few people can form a "political party" which they now claim entitles them a place on the General Election ballot.

II. August 8, 2022: NJGOP's Warning of Manipulative Behavior has Already Proven True.

This case was initiated with the filing of Notices of Appeal by the Appellants on July 20, 2022. The Appellants ask the Court to force the State to allow "disaggregated fusion voting," which allows a single candidate to appear on the general election ballot an unlimited number of times so long as a "political party" nominates that candidate to run under their banner. (Pa1, 11). The limitless potential for abuse that such a system would permit in New Jersey's unique political environment, where there are either federal or State elections every year, was foreshadowed in NJGOP's August 10, 2022 Motion to Intervene. Unknown at that time was the fact that the abuse had already begun to occur.

By August 8, 2022 – before NJGOP even sought to intervene in this case – the handlers of the "Moderate Party" were already at work. On that date, a Statement of Organization was filed with the Federal Election Commission ("FEC")

establishing the Super PAC coincidently named the "Moderate Party Independent Fund", which has an address of P.O. Box 15320, Washington, D.C. See Federal Election Commission website, Moderate Party Independent Fund Statement of Organization https://docquery.fec.gov/pdf/760/202208089525138760/202208089525138760.pdf (last visited May 25, 2023, 10:15pm).[3] One only needs to note who is funding this group to understand who is engineering the circumstances of this case: the *sole* donor to the "Moderate Party Independent Fund" was the House Majority PAC, which donated $500,000.00 on September 8, 2022. See Federal Election Commission website, Moderate Party Independent Fund Statement of Receipts, https://www.fec.gov/data/receipts/?committee_id=C00822379&two_year_transaction_period=2022&data_type=processed (last visited May 25, 2023, 11:21pm). The House Majority PAC describes its mission as follows: "protect and expand the Democratic House Majority." See House Majority PAC website, https://www.thehousemajoritypac.com/(last visited May 25, 2023, 11:23pm).

Inclusion of the words "Moderate Party" in the name of an allegedly non-connected Super PAC from Washington, D.C., was not an accident. According to Google's voluntary disclosure of spending on digital advertising through its

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3 The public documents filed with the Federal Election Commission found at the links contained in this brief are self-authenticating documents under New Jersey Rule of Evidence 902.

platform, the Moderate Party Independent Fund spent $231,000 running digital ads in New Jersey in October and November 2022 See Google Ad Transparency, Moderate Party Independent Fund, https://adstransparency.google.com/advertiser/AR00299376743997767681?region =US&topic=political (last visited May 25, 2023, 11:26pm). Those ads supported former Congressman Malinowski's candidacy and prominently featured Appellant Rick Wolfe and Michele Garay, who identified herself in the ad as the "Chairperson of the New Jersey Moderate Party." It took less than 60 days from the start of this case for the Democratic Party to use the Moderate Party as a front to attempt to manipulate the election process to benefit its own candidate, all of which was predicted by NJGOP in the August 10, 2022 Certification of NJGOP Executive Director Thomas Szymanski, supporting the NJGOP's Motion to Intervene.

Local media has extensively reported on the thinly veiled efforts of the Democratic Party and Working Families Party to "stand behind the curtain" while using the Moderate Party as a front in the political arena. After her involvement with this case was exposed, New Jersey Working Families Party Executive Director Susan Altman was not shy about her efforts and goals: "'For New Jersey, this is a one-two punch to make our democracy stronger,' said Altman, whose role with the

Moderate Party has not previously been reported."[4] See Matt Friedman, "Progressive activist Altman helping to organize 'Moderate Party' efforts", Politico (June 13, 2022) https://www.politico.com/news/2022/06/13/progressive-activist-altman-organize-moderate-party-efforts-00039150 (last visited May 26, 2023, 11:01pm)[5] The media continued to take note of the puppet-string-pulling by the Democratic and Working Families parties throughout the 2022 election season. See Matt Friedman, "The Democratic, I mean, 'Moderate Party'", Politico (October 14, 2022) https://www.politico.com/newsletters/new-jersey-playbook/2022/10/14/the-democratic-i-mean-moderate-party-00061806 (last visited May 26, 2023, 11:16pm) ("While the face of the Moderate Party is a Republican committeeman from Malinowski's hometown, I and my fellow New Jersey reporters have long made clear that it's in large part pushed by the left, if not the New Jersey Democratic establishment. So the fact that it's funded by Democrats shouldn't be a surprise"); David Wildstein, "N.J. Moderate Party Funded by Pelosi Super PAC", New Jersey Globe (October 13, 2022) https://newjerseyglobe.com/congress/n-j-moderate-party-funded-by-pelosi-super-pac/ (last visited May 26, 2023, 11:17pm) ("The New Jersey Moderate Party, which sought to run Rep. Tom Malinowski (D-Ringoes) as their

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4 The "one-two punch" to which Altman refers is (1) this case which challenges the way New Jersey conducts General Elections, and (2) another case which she is orchestrating to challenge the way New Jersey conducts Primary Elections.

5 The online articles found at the links contained in this brief are self-authenticating documents under New Jersey Rule of Evidence 902.

candidate in order to let the two-term congressman's name appears twice on the general election ballot, was funded by national Democrats, records show").

It is no secret that if this case is successful, the Working Families Party, the Moderate Party, and any couple of people who manage to get together and fill out forms and pay a nominal fee to the State to form a corporation will also have the ability to manipulate general election ballots by "cross-nominating" candidates of other political parties and, using Washington, D.C. Super PACs to fund their operations all the while.

ARGUMENT

New Jersey lawfully has prohibited fusion voting for over a century. New Jersey's fusion voting prohibition was duly enacted by the Legislature and is a valid exercise of its authority to regulate the time, place, and manner of elections pursuant to the Elections Clause, Article I, Section 4 of the United States Constitution and r Article II of the New Jersey Constitution. The prohibition on fusion voting does not impose any burden whatsoever, much less a severe burden, on voting rights, and so it is entitled to higher deference, lesser scrutiny, and a presumption of validity. Supporting the prohibition's validity are important policy rationales including discouraging factionalism, discouraging political gamesmanship, and ensuring ballot fairness.

Accordingly, New Jersey's statutory prohibition on fusion voting is lawful and constitutional. Appellants' arguments to the contrary defy logic, New Jersey law, and the practices of the majority of other States.

I. UNDER THE FEDERAL CONSTITUTION, PROHIBITING FUSION VOTING IS A VALID EXERCISE OF THE LEGISLATURE'S AUTHORITY TO REGULATE THE TIME, PLACE AND MANNER OF ELECTIONS.

For over a century, the New Jersey Legislature has expressly banned all forms of fusion voting, and for good reason. The practice of "disaggregated fusion voting" that Appellants advocate for allows the same candidate to appear on the general election ballot multiple times; once for each "party" nomination that they receive. If a candidate is nominated by ten political parties, regardless of how many members those "parties" have according to Appellants' logic, the same candidate appears on the general election ballot ten times on ten separate columns. If the documents submitted in Appellants' Appendix are to be believed, some form of fusion voting occurred in New Jersey from the early 19th Century until it was banned in 1921.[6] In

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[6] In support of the proposition that New Jersey political parties "fues[ed] routinely in local, state and federal elections" until fusion voting was banned by the Legislature in the 1920's, Appellants cite to a document entitled "Chart of NJ Fusion Candidates." (Pa272a – 274a.) It is unclear who prepared this document or when. Like many that were submitted in Appellants' Appendix, this document is textbook hearsay in that it is submitted for the truth of its contents without meeting the requirements of the New Jersey Rules of Evidence and thus cannot be relied upon for the truth of the matters asserted therein. See N.J.R.E. 802. Nonetheless, the purpose of referencing the document in this brief does not depend on the veracity of its contents.

truth, however, the Legislature only expressly allowed fusion voting for a period of 10 years between 1911 and 1921. See Jeffrey Monginello, Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture, 41 Seton Hall L. Rev. 1111, 1121 (2011). In 1921, the Legislature made the legitimate policy decision to "restrict[] the appearance of name of person to but once on the ticket for the same office" by disallowing candidates who had already accepted a primary nomination from being nominated by petition, 1921 N.J. Sess. Law, c. 196, sec. 59, at 551, and prohibiting candidates from accepting petition nominations if they had already accepted a primary nomination. 1921 N.J. Sess. Law, c. 196, sec. 60, at 551.

New Jersey's statutory prohibition of fusion voting is within the Legislature's authority to regulate elections and is valid under the Elections Clause of the United States Constitution.[7] The Elections Clause of the U.S. Constitution vests the primary authority to regulate the time, place, and manner of federal elections with State legislatures. U.S. Const., Art. I, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the

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[7] The fusion voting prohibition is also valid under the New Jersey Constitution. The same analysis conducted under the United States Constitution in heading I of the Argument section in this brief is applicable under the New Jersey Constitution. See heading II of the Argument section in this brief, supra at 23.

legislature thereof"). Laws duly enacted by State legislatures are presumed valid. See Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 81 (1988).

The Legislature's choice to regulate the mechanics of the election process by limiting the number of times the same candidate can appear on the general election ballots is reviewed using the burden-balancing standard, not strict scrutiny as the Appellants claim. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997); Mazo v. New Jersey Sec. of State, 54 F.4th 124, 140-141 (3d Cir. 2022). Under the burden-balancing standard of review, the Legislature's policy decision easily passes muster by advancing the important State interests of basic ballot fairness and prohibiting political gamesmanship and deceptive tactics, which public documents show has already begun to occur in this case. The U.S. Supreme Court has already addressed the very same issue and held that there is no constitutional right to engage in fusion voting, and the outcome here should be no different.

The analysis conducted and conclusion reached under the New Jersey Constitution should be the same. Under State v. Hunt, 91 N.J. 338 (1982), New Jersey courts may depart from the guidance of U.S. Supreme Court opinions on constitutional issues only where a number of factors are met; such as whether the rights existing under the New Jersey Constitution are different than the rights under the U.S. Constitution. Appellants fail to satisfy the Hunt factors, which in turn requires that the U.S. Supreme Court's opinion in Timmons be followed. Even when

these issues are analyzed under the New Jersey Constitution, Appellants' claims still fail.

A. As a matter of federal law, Plaintiffs' constitutional challenge should be analyzed under the burden-balancing standard, not strict scrutiny.

"The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." Timmons, 520 U.S. at 357 (citing Colorado Republican Federal Campaign Comm. v. Federal Election Comm., 518 U.S. 604, 616 (1996) (citations omitted)). However, "it is also clear that States may, and inevitably *must*, enact reasonable regulations of parties, elections, and ballots to reduce election-and campaign-related disorder." Id. at 358 (emphasis added) (citing Burdick v. Takushi, 504 U.S. 428, 433 (1992). This is because, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." Burdick, 504 U.S. at 433 (emphasis added).

When analyzing whether State election law violates First and Fourteenth Amendment associational rights, courts measure the "character and magnitude" of the "burden the State's rule imposes on those rights against the interests the State contends justify the burden, and consider the extent to which the State's concerns make the burden necessary." Id. If the State election law imposes "severe burdens"

on plaintiffs' rights then it (1) must be narrowly tailored and (2) advance a compelling State interest. Id.

"Courts have identified three types of severe burdens on the right of individuals to associate as a political party." Sam Party of N.Y. v. Kosinski, 987 F.3d 267, 274 (2nd Cir. 2021). "First are regulations meddling in a political party's internal affairs." Id. "Second are regulations restricting 'core associational activities' of the party or its members." Id. "Third are regulations that 'make it virtually impossible' for minor parties to qualify for the ballot." Id.

If the State election law imposes "lesser burdens", the State's "important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." Timmons, 520 U.S. at 358. (citations omitted) (internal quotation marks omitted). However, the lesser scrutiny warranted by "lesser burdens" is not "pure rational basis review." Sam Party of N.Y., 987 F.3d 267, 274 (2d Cir. 2021) (citing Price v. N.Y. State Bd. of Elections, 540 F.3d 101, 108 (2d Cir. 2008)). "Rather, the court must actually weigh the burdens imposed on the plaintiff against the precise interests put forward by the State, and the court must take into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." Id. (citations omitted) (internal quotation marks omitted). "Review under this balancing test is "quite deferential," and no "elaborate, empirical verification" is required." Id. (quoting Timmons, 520 U.S. at 364). Accordingly,

the Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 452 (2008) (emphasis added) (citing Burdick, 504 U.S. at 438).

Less than a month before Appellants' merits brief was filed, the Third Circuit Court of Appeals decided the Mazo case and upheld a New Jersey statute which regulates use of slogans on primary election ballots following a challenge on First Amendment grounds using the same burden-balancing standard that applies to this case. In Mazo, the plaintiff challenged the State's requirement that a candidate obtain prior consent from a third party whose name was sought to be used in that candidate's slogan on the primary election ballot. Mazo, 54 F.4th at 144. The Court applied the burden-balancing standard to analyze the plaintiff's First Amendment claims because while the regulation burdened a fundamental right, it primarily regulated the mechanics of the election process, rather than political speech. Id. The Court's reasoning in applying the burden-balancing standard is on point in this case:

> For ballots to be effective tools for selecting candidates and conveying the will of voters, they must be short, clear, and free from confusing or fraudulent content. **This necessarily limits the degree to which the ballot may—or should—be used as a means of political communication**. See Burdick, 504 U.S. at 438, 112 S.Ct. 2059 ("[T]he function of the election process is to 'winnow out and finally reject all but the chosen candidates[.]'") (quoting Storer, 415 U.S. at 735, 94 S.Ct. 1274); id. ("Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."); Timmons, 520 U.S. at 365, 117 S.Ct.

> 1364 (**treating ballots as forums for political expression "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising"**); Caruso v. Yamhill Cnty. ex rel. Cnty. Comm'r, 422 F.3d 848, 851, 856 (9th Cir. 2005) (**"[T]he fact that the ballot is 'crucial' to an election does not imply that [initiative proponent] therefore has a First Amendment right to communicate a specific message through it."**); Rosen v. Brown, 970 F.2d 169, 175 (6th Cir. 1992) (ballots are "State-devised form[s]" that are "necessarily short" and thus not suitable "for narrative statements by candidates").

Mazo, 54 F.4th at 154 (emphasis added).

The Third Circuit reasoned that the burden-balancing standard has always been applied to a wide range of electoral process regulations:

> The Courts of Appeals have followed suit, scrutinizing under Anderson-Burdick laws regulating, e.g., the order in which candidates' names appear on the ballot, whether the ballot is electronic, the form and content of ballot initiatives, absentee voting, early voting, nomination of candidates, voter registration, the counting of ballots, polling hours, voter identification and proof-of-citizenship requirements, regulation of voter data, the appointment and qualifications of election workers, the use of primaries or caucuses, the use of straight-ticket voting, the use of ranked choice voting, the cancellation of an uncontested primary, the use of district-level or at-large election systems, and the composition of Independent Redistricting Commissions. Even beyond laws governing the voting process itself, the appellate courts regularly apply Anderson-Burdick to regulations affecting candidates, including the qualifications of elected and appointed officers, the filling of vacancies and special elections, term limits, and even the expulsion of elected officials. **Though each of these regulations necessarily implicated speech and association to some degree, each was nonetheless primarily directed at regulating specific mechanics of the electoral process.**

Mazo, 54 F.4th at 140-141 (internal citations omitted) (emphasis added).

The Court further noted that "the Supreme Court has been skeptical of efforts to assert an unqualified right to speech via the ballot, but it has nonetheless applied the Anderson-Burdick balancing test to laws that regulate ballot speech." Mazo, 54 F.4th at 143.

In analyzing "[t]he distinction between 'pure speech' and the mechanics of the electoral process [there are] two distinguishing factors to consider: the location and timing (the 'where and when') and the nature and character (the 'how and what') of the regulated speech." Mazo, 54 F.4th at 142. The plaintiffs in Mazo argued, as the Appellants do here, that the ballot itself was not an electoral mechanic, but a forum for parties to engage in expressive conduct. Mazo, 54 F.4th at 144. In rejecting that proposition, the Third Circuit noted that "speech that occurs on the ballot or within the voting process will typically trigger application of the Anderson-Burdick balancing test" whereas "speech that relates to an election but occurs nowhere near the ballot or any other electoral mechanism is treated as core political speech entitled to the fullest First Amendment protection." Mazo, 54 F.4th at 142.

As to the nature and character of the speech being regulated, the Court noted that "distinguishing between laws directed to the mechanics of the electoral process and those aimed at core political speech is the nature and the character of the regulated speech: what is being said and how it is communicated." Mazo, 54 F.4th at 142. The Court "characterized the lodestar for 'core political speech' as the

involvement of 'interactive communication concerning political change.'" Mazo, 54 F.4th at 142 (internal citations omitted). In considering the level of protection afforded to conduct, the Court focused on whether the conduct had "the potential to spark direct interaction and conversation." Mazo, 54 F.4th at 143. The Mazo Court ultimately rejected the plaintiff's claims that the consent requirement severely burdened an expressive right, holding that

> the consent requirement imposes only a minimal burden because (a) the requirement is nondiscriminatory and applies equally to all candidates and slogans; (b) the requirement leaves open ample and adequate alternatives for expression and association; and (c) Appellants have failed to provide evidence of any specific burden on either themselves or any other candidate.

Mazo, 54 F.4th at 146.

Here, based on these precedents, it is abundantly clear that New Jersey's prohibition of fusion voting is within its authority to regulate elections and is valid under the United States Constitution. Disallowing fusion voting in New Jersey does not impose any, much less even remotely, severe burdens on the associational rights of the "Moderate Party." Therefore, the proper standard is a burden-balancing test instead of strict scrutiny.

Under that standard, New Jersey's numerous and legitimate policy rationales supporting its fusion voting prohibition outweigh the lesser burdens, if any, imposed on the "Moderate Party" by such prohibition. New Jersey's prohibition of fusion voting regulates merely the mechanics of the electoral process. See Mazo, 54 F.4th

at 143. The prohibition is not regulating political speech, the "Moderate Party's" internal affairs, or "core associational activities." Neither has the prohibition done anything to make it "virtually impossible" for the "Moderate Party" to get on the ballot. See Sam Party of N.Y., 987 F.3d at 274. New Jersey is not dictating who the party nominates, but has simply set forth rules for nominating a candidate, which all political parties must follow. See Council of Alternative Political Parties v. State, Div. of Elections, 344 N.J.Super. 225, 237 (App.Div. 2001) ("Notably, the ban applied to all parties, major and minor alike") (citing Timmons, 520 U.S. at 360).

It is not controversial that the "Moderate Party" should be able to select their own candidate. "It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate." Timmons, 520 U.S. 351 at 359. "A particular candidate might be ineligible for office, unwilling to serve, or, as here, another party's candidate." Id.

A particular candidate being disallowed from appearing on the ballot as a particular party's candidate "does not severely burden that party's association rights." Id. (citing Burdick, 504 U.S. at 440 n.10 ("It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation, that while it affects the right to vote, is eminently reasonable"); Anderson, 460 U.S. at 792 n.12 ("Although a disaffiliation provision may preclude ... voters from supporting a particular

ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements")). New Jersey's regulations serve merely to "reduce the universe of potential candidates who may appear on the ballot as the Party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer the other party." Timmons, 520 U.S. at 363.

New Jersey's ban of fusion voting also does not limit the "Moderate Party" and its members' ability to "endorse, support, or vote for anyone they like." Plaintiffs are free to support and vote for whoever they want in the upcoming election. They have already done so by appearing in ads funded by the Super PAC, the "Moderate Party Independent Fund" in the 2022 General Election. The "Moderate Party" is free to nominate any *eligible* candidate they desire. Tom Malinowski could have accepted the "Moderate Party" nomination or the Democratic Party nomination, but not both. The burdens on Appellants resulting from New Jersey's prohibition of fusion voting are not existent and certainly "not severe" – at all. See id. Appellants still had the chance to vote for the candidate of their choosing. Therefore, strict scrutiny should not apply; rather, the Court should utilize the burden-balancing test discussed above.

New Jersey's prohibition on fusion voting is not some radical law that is an outlier among state laws regulating election administration. Indeed, like New Jersey,

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"[m]ost states prohibit multiple-party, or 'fusion,' candidacies for elected office." Timmons, 520 U.S. at 353. Currently 45 States prohibit fusion voting in one form or another. See Ballotpedia, Fusion Voting, https://ballotpedia.org/Fusion_voting (last visited May 25, 2023, 10:11am). Appellants' handlers employ a tortured interpretation of the New Jersey Constitution to force the acceptance of a seldom used voting practice purely to obtain a political advantage, which should not be allowed.

B. As a matter of federal law, New Jersey's prohibition of fusion voting is a valid use of its power to regulate elections.

Under the burden-balancing analytical framework, New Jersey's prohibition of fusion voting is valid under the United States Constitution. States are permitted to enact reasonable election laws and it is indisputable that States "have a strong interest in the stability of their political systems." Timmons, 520 U.S. at 366. Moreover, States are not obligated to "remove all of the many hurdles third parties face in the American political arena today." Timmons, 520 U.S. at 367.

The burdens imposed upon the "Moderate Party" as a result of New Jersey's prohibition on fusion voting are nonexistent. Id. On the other hand, numerous policy reasons exist to support New Jersey's ban on fusion voting. New Jersey has a legitimate interest in discouraging political gamesmanship such as party raiding and party jumping.

There is already evidence that political gamesmanship is occurring via the Moderate Party. Just after the Moderate Party was formed, a Super-PAC named "The Moderate Party Independent Fund" was formed and has spent at least $231,000 in television ads on behalf of the "Moderate Party of New Jersey" in the 2022 General Election See Google Ad Transparency, Moderate Party Independent Fund, https://adstransparency.google.com/advertiser/AR00299376743997767681?region =US&topic=political (last visited May 25, 2023, 11:26 pm). The sole donor to the Super-PAC was the House Majority PAC, which is affiliated with Congresswoman Nancy Pelosi and describes its mission as follows: "protect and expand the Democratic House Majority." See House Majority PAC website, https://www.thehousemajoritypac.com/(last visited May 25, 2023, 11:23 PM). None of this was an accident or a coincidence. One of the largest Democratic Super PACs in the nation did not fund the Moderate Party's political communications because they were seeking to support groups with diverse political views; it did so because the Moderate Party is being used as a vehicle to support Democratic candidates. Permitting the Moderate Party to engage in cross nomination — contrary to duly longstanding New Jersey law — will only increase political gamesmanship like this in New Jersey, like what has already occurred in the 2022 election cycle

There are multiple other concerns with fusion voting. First, allowing numerous minor parties to form and cross-nominate major party candidates creates the risk of factionalism. The Legislature "apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government." See Storer v. Brown, 415 U.S. 724, 736 (1974) (citing The Federalist, No. 10 (Madison)). The Legislature's policy judgment in disallowing fusion voting to avoid the type of unrestrained factionalism that has been demonstrated in the context of this case – where adherents of a major party form front groups to cross-nominate and fund that major party's candidate – is a perfectly legitimate policy determination. These deceptive tactics further no public interest and the attempt to disguise them as an issue of individual rights is disingenuous at best.

Also, it is in New Jersey's interest to ensure ballot fairness and ensure majority support for electoral victors. The U.S. Supreme Court has established that regulating the number of candidates that appear on the general election ballot is a legitimate State interest. Bullock v. Carter, 405 U.S. 134, 145 (1972). The same policy interest supports regulating the number of times the same candidate can appear on the ballot. New Jersey "understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and

burden of runoff elections." See id. The prohibition on fusion voting is one method by which New Jersey regulates the number of candidates that appear on the ballot, or the number of times the same candidate can appear on the ballot, and reduces voter confusion.

New Jersey has "important regulatory interests" in regulating elections in the State, and thus the burden on the Moderate Party as a result of those regulations is minimal, at best. See Wash. State Grange, 552 U.S. at 452. New Jersey has passed "reasonable, politically neutral regulations" to effectively regulate their elections. See ibid. Therefore, the Court should uphold New Jersey's regulations as a valid exercise of the State Legislature's authority to regulate the time, place and manner of federal elections under Article I, section 4 of the U.S. Constitution.

II. UNDER THE STATE CONSTITUTION, THE CENTURY-OLD BAN ON FUSION VOTING IS A VALID EXERCISE OF THE LEGISLATURE'S RIGHT TO REGULATE ELECTIONS.

Appellants have failed to show that the specific rights at issue here under the New Jersey Constitution are fundamentally different than the same rights under the United States Constitution. Indeed, the rights implicated are essentially identical. Because the specific rights at issue are essentially the same under both the New Jersey Constitution and the United States Constitution, the analytical framework laid out in Timmons should govern, and Appellants' challenge should fail.

A. In the context of regulating election mechanics, the New Jersey Constitution does not grant greater protections for free speech than the U.S. Constitution.

"The opinions of the Supreme Court, while not controlling on state courts construing their own constitutions, are nevertheless important guides on the subjects which they squarely address." State v. Hunt, 91 N.J. 338, 363 (1982) (Handler, J., concurring). In Hunt, Justice Handler outlined "certain considerations for determining when to rely on the State Constitution as an independent source of individual rights." State v. Roach, 219 N.J. 58, 73-74 (2014). Those factors include: (1) textual language; (2) legislative history; (3) preexisting State law; (4) structural differences; (5) matters of particular state interest or local concern; (6) State traditions; and (7) public attitudes. Hunt, 91 N.J. at 364–68 (Handler, J., concurring).

Here, the factors laid out in Hunt do not support the proposition that the New Jersey Constitution grants greater protection for free speech and political association than the United States Constitution in the context of regulation of election mechanics. First, the Court should look to the text of both documents. The United States Constitution states that Congress shall make no law abridging "the freedom of speech or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I. The New Jersey Constitution states: "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. I, Para. 6.

There is no distinct language in the New Jersey Constitution – or elsewhere, including any of the seven Hunt factors – that suggests the State right to "freely speak" is more expansive than the United States Constitution in this specific context of regulating election mechanics. And the phrasing of the right does not appear to be so different that it would warrant a different result under these circumstances.

Plaintiffs make much out of the structure of both Constitutions, arguing that the New Jersey Constitution grants the right to "freely speak" whereas the U.S. Constitution restricts Congress's ability to make any law that abridges people's rights to freedom of speech. See Appellants' Br. at 56-57. However, in this context, this is a distinction without a difference. The right to freedom of speech in New Jersey could be broader in certain contexts as our Courts have held in very specific instances, but Appellants have not provided sufficient evidence that illustrates why the State Constitution provides a broader protection in this context of simply regulating election mechanics. There is nothing in the language itself or any related authorities that suggests the right is substantially more expansive or would somehow be expansive enough to encompass a constitutional right to fusion voting.

To the contrary, courts have repeatedly agreed, holding that the New Jersey "Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment [and therefore] federal constitutional principles guide the Court's analysis." Twp. of Pennsauken v. Schad, 160 N.J. 156, 176 (1999) (citing Hamilton Amusement Center v. Verniero, 156 N.J. 254, 264-65 (1998)). See also Hamilton Amusement Center, 156 N.J. 264-65 ("Because we ordinarily interpret our State Constitution's free speech clause to be no more restrictive than the federal free speech clause, ... "[w]e rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution" (internal citations omitted)). Accord Borden v. Sch. Dist., 523 F.3d 153, 168 n.7 (3d Cir. 2008).

Next, the Court should look to the history of New Jersey law to determine whether fusion voting is a constitutional right. Nothing in the legislative history, in preexisting State law, or in the history and traditions of New Jersey support the proposition that fusion voting is a New Jersey State constitutional right. To the contrary, New Jersey has a long history of prohibiting manipulative legal practices in the context of elections. See, e.g., N.J.S.A. 19:14-9 (sore loser law prohibiting candidate who seeks but loses a major party nomination from being nominated by petition in the general election); N.J.S.A. 19:23-25.1 (requiring prior written consent of a person whose name is included in a candidate's ballot slogan); N.J.S.A. 19:23-45 (prohibiting "party raiding" by requiring association with a political party 55 days

in advance of a primary); N.J.S.A. 19:34-65 ("No person shall perform any function in the campaign of a candidate for public office or party position for the purpose of impeding the campaign of such candidate while concealing that he is actually acting under the instructions of, or on behalf of, another candidate or such other candidate's paid or volunteer campaign staff."); N.J.S.A. 19:34-66 (prohibiting the initiation of any communication "which purports to or appears to originate from, or be on behalf of, the campaign of a candidate for public office or party position, for the purpose of impeding the campaign of such candidate while failing to reveal specifically in such communication that he is acting under the instructions of, or on behalf of, another candidate or such other candidate's paid or volunteer campaign staff.").

Today, fusion voting is statutorily prohibited in New Jersey. See N.J.S.A. 19:3-5.1; N.J.S.A. 19:13-8. And it has been prohibited in New Jersey for over a century since 1921. 1921 N.J. Sess. Laws, c. 196, sec. 59 & 60, at 551. In fact, that prohibition survived the 1947 adoption of the current New Jersey Constitution, 26 years after the 1921 statutory enactment; further, it has remained in force under that same 1947 New Jersey Constitution for 76 years. Plaintiffs make much of the fact that fusion voting was permitted "[f]or much of the 19th century" and into the 20th century. (Appellants' Br. 58.) This argument ignores that the relic of fusion voting has been prohibited in New Jersey for over 100 years – a longer duration of time than it was ever in practice by Appellants' own admission, and significantly longer

than the 10 years that it was expressly permitted by statute. The proposition that a voting practice that occurred in ancient history of New Jersey somehow supports the proposition that fusion voting is a right protected under the State constitution, when that same practice has been disallowed for a period of more than 100 years – during which our current New Jersey Constitution was adopted in 1947 – is thoroughly unconvincing.

Lastly, election mechanics and their regulation are not a "particular state interest or local concern" under Hunt. States across the Union have been granted the sole authority to regulate the time, place, and manner of elections under the U.S. Const., Art. I, §4, cl. 1. And there is nothing to suggest that the people of New Jersey in particular are clamoring for fusion voting. Appellants' attempt to insert the results of an alleged poll, which was taken during the pendency of this litigation for the apparent purpose of being used in this litigation to support Appellants' position, falls flat. This "poll", which was conducted by persons unknown asking unknown questions to unidentified respondents, is the definition of hearsay, is just as unreliable, and is akin to fabricating a document for purposes of litigation. Indeed, as discussed above, prohibiting fusion voting is the majority rule across the country, including New Jersey. In all but a handful of States fusion voting is prohibited.

Appellants fail to satisfy the Hunt factors to warrant conducting a separate analysis and departing from the holding in Timmons.

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B. In the context of regulating election mechanics, the New Jersey Constitution does not grant greater protections for the right to assemble than the U.S. Constitution.

Much of the analysis above as to Appellants' free speech claims is also applicable to Appellants' right to assemble claim. The United States Constitution states Congress shall make no law abridging "the freedom of speech or the press; or *the right of the people peaceably to assemble*, and to petition the Government for a redress of grievances." U.S. Const., Amend. I (emphasis added). The New Jersey Constitution states: "The people have the right freely to assemble together, to consult for the common good, to make known their opinion to their representatives, and to petition for redress of grievances." N.J. Const. (1947), Art. I, Para. 18.

There is nothing in the language of the New Jersey Constitution that suggests the State right to "freely assemble together" is more expansive than the federal "right of the people peaceably to assemble" in the context of prohibiting fusion voting. See Hunt, 91 N.J. at 364–68 (Handler, J., concurring). Both constitutions clearly establish the right of the people to assemble. Under any of the seven Hunt factors, there is nothing that suggests the State right to "freely assemble" is expansive enough to include fusion voting. See id. And Appellants have offered nothing to the contrary. Again, fusion voting has been prohibited in New Jersey for over a century and has been banned for longer than it was ever allowed. Neither is there

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any State or local peculiar interest in election law and no distinctive desire of the New Jersey citizenry for fusion voting. See id.

Appellants have failed to show that the specific rights at issue here under the New Jersey Constitution are fundamentally different than the same rights under the United States Constitution. As a result, the analytical framework laid out in Timmons should govern, and Appellants' challenges should fail.

Even if the analysis in this case somehow fundamentally differs from federal law—which it does not—the result is the same. It is not clear that any party has ever couched a ballot access claim under N.J. Const. (1947), Art. I, Para. 18, nor has any court ever invalidated duly enacted and widely practiced election administration procedures such as the fusion voting prohibition at issue in this case under N.J. Const. (1947), Art. I, Para. 18. Appellants freedom of association claims are truly over-reaching and facially inapplicable. New Jersey is not prohibiting the Moderate Party from associating with any of its members, nor is New Jersey prohibiting the Moderate Party from associating with its candidates of choice. Appellants themselves have demonstrated this in the 2022 General Election by broadcasting videos supporting their chosen candidate all over the Internet. New Jersey is simply prohibiting candidates from engaging in political gamesmanship by appearing on the ballot multiple times; something 45 other states presently prohibit. This Court

should reject Appellants novel claims and protect New Jersey's authority to regulate the administration of its elections.

III. APPELLANTS' DEMAND THAT THE COURT PREDETERMINE THAT ONLY DISAGGREGATED FUSION VOTING IS PERMISSIBLE UNDER THE STATE CONSTITUTION SEEKS AN ADVISORY OPINION

Appellants' request that the Court predetermine that only disaggregated fusion voting can pass muster under the State Constitution, when the Legislature has disallowed all forms of fusion voting, constitutes an impermissible request for an advisory opinion and should be rejected. Appellants ask that the Court order that if the ban on fusion voting is found to be unconstitutional, only "disaggregated fusion voting" – where each political party is given its own column on the ballot – can possibly be legal. It is evidently Appellants' position that "aggregated fusion voting" – where endorsements from multiple political parties are aggregated and listed underneath a candidate's name on a single column on the ballot – cannot survive constitutional review even though the Legislature has not permitted either aggregated or disaggregated fusion voting at all. Put another way, Appellants ask the Court to decide in advance what the Legislature can or cannot do if the Court decides that it cannot disallow fusion voting altogether.

Appellants' request unlawfully seeks an advisory opinion and should be rejected. To maintain an action in New Jersey courts, there must be a "justiciable controversy between adverse parties." Chamber of Commerce v. State, 89 N.J. 131,

140 (1982). The Court should not rule "upon a state of facts which are future, contingent and uncertain." Id.

Even if this Court holds that the Legislature cannot ban all forms of fusion voting as it has for over 100 years, it is inappropriate for Appellants to seek what would amount to an advisory opinion as to what regulations the Legislature might impose in the future if the fusion voting ban were nullified. As of today, the Legislature has not chosen one form of fusion voting over another; it has disallowed all forms of fusion voting. Here, Appellants request the Court "put the cart before the horse" and disallow the Legislature from allowing "aggregated fusion voting" if it holds that anti-fusion laws are unconstitutional. (Appellants' Br. at 88.) Appellants ask this Court to make a constitutional ruling on a future, hypothetical set of facts, and command the Legislature as to what laws it can pass before it passes them. Since there are currently no laws permitting any form of fusion voting in New Jersey, and hence no "justiciable controversy between adverse parties" on what types of fusion voting can be allowed, this request improperly seeks an advisory opinion. See Chamber of Commerce, 89 N.J. at 140. This Court should reject this request and allow the legislative process to play out as to what forms of fusion voting should be allowed if New Jersey's fusion voting ban is held to be unconstitutional (which it should not be).

CONCLUSION

For all of the foregoing reasons, this Court should deny Plaintiff's appeal and affirm the decision of the Secretary of State.

Respectfully submitted,

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By:________________________
Jason N. Sena, Esq.

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