

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

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
Docket No.: A-3542-21T2

On appeal from final agency action  
in the Department of State

Sat below: Hon. Tahesha Way,  
Secretary of State

(CONSOLIDATED)

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**BRIEF OF *AMICI CURIAE* PROFESSORS SETH MASKET, NOLAN  
McCARTY, AND HANS NOEL**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....iii

STATEMENT OF INTEREST OF *AMICI* ..... 1

PRELIMINARY STATEMENT..... 4

PROCEDURAL HISTORY AND STATEMENT OF FACTS ..... 6

ARGUMENT ..... 6

    I. AN UNDERSTANDING OF POLITICAL PARTIES PROVIDES CONTEXT NECESSARY FOR ANY CONSIDERATION OF HOW FUSION VOTING AFFECTS THE CONSTITUTIONAL RIGHTS AT ISSUE. .... 6

    II. THE COURT’S ANALYSIS SHOULD INCLUDE POLITICAL PARTIES BECAUSE PARTIES ARE ESSENTIAL TO A HEALTHY AND RESPONSIVE DEMOCRACY. .... 7

    III. A PROHIBITION ON FUSION VOTING SEVERELY BURDENS THE ASSOCIATIONAL RIGHTS OF PARTIES, AS WELL AS THEIR INDIVIDUAL MEMBERS AND NOMINEES. .... 10

        A. A prohibition on fusion voting meddles in the internal affairs of political parties. .... 11

        B. A prohibition on fusion voting restricts the “core associational activities” of political parties..... 13

        C. A prohibition on fusion voting does in fact keep minor parties off the ballot. .... 15

    IV. OTHER, POLITICALLY NEUTRAL ELIGIBILITY REQUIREMENTS ARE FUNDAMENTALLY UNLIKE THE PROHIBITION ON FUSION VOTING..... 17

A. The indiscriminate analysis of *Timmons* does not control this case because the New Jersey Constitution provides broader guarantees of free association and expression..... 17

B. Politically neutral restrictions are distinct and cannot justify a prohibition on fusion voting..... 18

CONCLUSION ..... 21

## TABLE OF AUTHORITIES

### State Cases

|  |          |
|--|----------|
| <i>Council of Alt. Political Parties v. State, Div. of Elections</i> ,<br>344 N.J. Super. 225 (App. Div. 2001) ..... | 4, 8, 20 |
| <i>Dublirer v. 2000 Linwood Ave. Owners, Inc.</i> ,<br>220 N.J. 71 (2014) .....                                      | 6        |
| <i>Green Party v. Hartz Mt. Indus.</i> ,<br>164 N.J. 127 (2000) .....  | 6        |
| <i>N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.</i> ,<br>138 N.J. 326 (1994) .....                 | 6        |
| <i>State v. Schmid</i> ,<br>84 N.J. 535 (1980) .....   | 7        |
| <i>State v. Williams</i> ,<br>93 N.J. 39 (1983) .....  | 6        |

### Federal Cases

|   |            |
|---|------------|
| <i>Cal. Democratic Party v. Jones</i> ,<br>530 U.S. 567 (2000).....                     | 12, 13     |
| <i>Eu v. S.F. Cty. Democratic Cent. Comm.</i> ,<br>489 U.S. 214 (1989).....             | 13         |
| <i>Sam Party of N.Y. v. Kosinski</i> ,<br>987 F.3d 267 (2d Cir. 2021) .....             | 11         |
| <i>Tashjian v. Republican Party of Conn.</i> ,<br>479 U.S. 208 (1986).....              | 9, 13      |
| <i>Timmons v. Twin Cities Area New Party</i> ,<br>520 U.S. 351 (1997).....              | 14, 16, 17 |
| <i>Wash. State Grange v. Wash. State Republican Party</i> ,<br>552 U.S. 442 (2008)..... | 10         |

## Constitutional Provisions

|                                     |    |
|-------------------------------------|----|
| N.J. Const., Art. I, ¶ 6.....       | 6  |
| N.J. Const., Art. I, ¶ 18.....      | 6  |
| N.J. Const., Art. IV, § I, ¶ 2..... | 19 |
| N.J. Const., Art. V, § I, ¶ 2.....  | 19 |
| U.S. Const., Art. I, § 2.....       | 19 |
| U.S. Const., Art. I, § 3.....       | 19 |
| U.S. Const., Art. II, § 1.....      | 19 |

## Statutes

|                         |    |
|-------------------------|----|
| N.J.S.A. § 19:1-1.....  | 4  |
| N.J.S.A. § 19:13-5..... | 19 |

## Other Authorities

|  |    |
|--|----|
| American Political Science Association, <i>Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties</i> , AMERICAN POLITICAL SCIENCE REVIEW, Sept. 1950.....                                   | 9  |
| David Wildstein, <i>Imperiale Was Only Independent Candidate to Win Beyond Local Level</i> , N.J. GLOBE (Nov. 1, 2018).....  | 16 |
| E.E. Schattschneider, <i>Party Government</i> (1942).....  | 8  |
| John Aldrich, <i>Why Parties? The Origin and Transformation of Political Parties in America</i> (2d ed. 2011).....   | 8  |
| Kathy Bawn, Marty Cohen, David Karol, Seth Masket, Hans Noel and John R. Zaller, <i>A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics</i> , 10 PERSPECTIVES ON POLITICS 571 (2012)..... | 12 |

Marty Cohen, David Karol, Hans Noel and John Zaller, *The Party Decides: Presidential Nominations Before and After Reform* (2008)..... 12

Seth Masket and Hans Noel, *Political Parties* (2021)..... 8

Seth Masket and Hans Noel, *Prioritizing Parties, in MORE THAN RED AND BLUE: POLITICAL PARTIES AND AMERICAN DEMOCRACY* (American Political Science Association and Protect Democracy, 2023)..... 8, 12

## STATEMENT OF INTEREST OF *AMICI*

This case concerns subject matter in which there is a substantial and important public interest. Specifically, the prohibition on fusion voting from which this matter arises directly implicates the broad rights of free association and expression guaranteed by the New Jersey Constitution, particularly with respect to political parties.

*Amici* are distinguished scholars in the academic field of political science, and are familiar with the function and role of political parties in American society. *Amici* write as thought leaders with knowledge of the important issues presented to the Court in this matter. *Amici* respectfully submit this memorandum, with the hope that the Court may find it helpful, in order to place those issues into context and inform the Court's consideration thereof.

Professor Seth Masket is a professor of political science and director of the Center on American Politics at the University of Denver. He is the author of *Learning From Loss: The Democrats 2016-2020* (Cambridge University Press, 2020), *The Inevitable Party: Why Attempts to Kill the Party System Fail and How They Weaken Democracy* (Oxford University Press, 2016), and *No Middle Ground: How Informal Party Organizations Control Nominations and Polarize Legislatures* (University of Michigan Press, 2009). He teaches courses on political parties, campaigns and elections, and congressional procedure. His

research has appeared in the American Journal of Political Science, the Journal of Politics, the British Journal of Political Science, the State Politics and Policy Quarterly, and other publications. Masket also contributes regularly to FiveThirtyEight, the Los Angeles Times, and the Mischiefs of Faction blog, and his work has appeared at the Monkey Cage, on Politico, and in the New York Times. He received his PhD from UCLA in 2004.

Professor Nolan McCarty is the Susan Dod Brown Professor of Politics and Public Affairs and Vice Dean for Strategic Initiatives at the School of Public and International Affairs at Princeton University. From 2011 to 2018, he served as the chair of Princeton Politics Department. He is the author of *Polarization: What Everyone Needs to Know* (Oxford University Press, 2019). He is also the co-author of *Political Game Theory* (Cambridge University Press, 2006, with Adam Meirowitz), *Polarized America: The Dance of Ideology and Unequal Riches* (MIT Press, 2016 second edition with Keith Poole and Howard Rosenthal), and *Political Bubbles: Financial Crises and the Failure of American Democracy* (Princeton University Press, 2013 with Keith Poole and Howard Rosenthal). He is the co-editor of *Can American Govern Itself?* (Cambridge University Press, 2019, with Frances Lee). He teaches course in American Politics, the Political Economy of the United States, legislative and bureaucratic politics, and the politics of regulation. His work has appeared in the *American*



*Political Science Review*, *the American Journal of Political Science*, *the Journal of Politics*, *the Proceedings of the National Academy of Science*, and many other journals. He received his PhD from Carnegie Mellon University in 1993 and was elected to the American Academy of Arts and Sciences in 2010.

Professor Hans Noel is an associate professor of political science at Georgetown University. His research focuses on political coalitions and political parties and ideology, with a focus on the United States. He teaches courses on political methodology, American politics, political parties, and democratic institutions. He is the author of *Political Ideologies and Political Parties in America* (Cambridge University Press, 2013) and a co-author of *The Party Decides: Presidential Nominations Before and After Reform* (University of Chicago Press, 2008, with Marty Cohen, David Karol and John Zaller). His research has appeared in the *American Political Science Review*, *the Journal of Politics*, *the British Journal of Political Science*, among other journals. From 2008 to 2010, he was a Robert Wood Johnson Scholar in Health Policy Research at the University of Michigan. He was also a fellow in the Center for the Study of Democratic Politics in the Woodrow Wilson School of Public and International Affairs at Princeton University. He received his PhD from UCLA in 2006.

Professor Masket and Professor Noel have also co-authored *Political Parties* (Norton, 2021), a university level textbook for political science and/or American government courses examining the role of political parties in the United States.

Professors Masket, McCarty, and Noel, therefore, are uniquely positioned to provide context and share insight into the background, function, and value of political parties, as well as the function and value of recognizing political parties as part of the democratic process.

### **PRELIMINARY STATEMENT**

This matters concerns “fusion voting.” As described below and in Appellants’ merits brief, fusion voting is a practice in which a candidate running for elected office is nominated by more than one political party, often at least one major party as well as a minor<sup>1</sup> party. The candidate’s overall vote tally is credited with all votes in their favor, regardless of the party line on which the vote is cast.

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<sup>1</sup> Tellingly, only the Democratic Party and Republican Party satisfy New Jersey’s statutory definition of a “political party.” See N.J.S.A. § 19:1-1 (requiring at least ten percent of the total vote of the most recent general election for the General Assembly). *Amici* use the term “minor party” illustratively to refer to the Moderate Party as well as other political parties that serve an identical function but do not meet the draconian statutory definition.

Appellants' directly address the applicable legal analysis and the governing constitutional principles in their merits brief. As a supplement to Appellants' thorough analysis, *Amici* respectfully submit this memorandum in order to provide the Court with additional context by outlining some practical and policy considerations related to political parties and fusion voting.

As explained in detail below, Respondents and Intervenors present a narrow, candidate-centric analysis of the fundamental rights at issue. However, the Court should avoid such a narrow analytical framework. Individual voters exercise their rights of free political association and expression primarily through their relationships with political parties rather than individual candidates. Because parties play such a central role in the political lives of voters, the Court should employ a more comprehensive analysis that also includes consideration of party-centric concerns.

In such a comprehensive view, the rights of association and expression guaranteed by the New Jersey Constitution are clearly incompatible with a prohibition on fusion voting. A prohibition on fusion voting impermissibly burdens the associational and expressive rights of political parties as well as their individual members and nominees. Further, these prohibitions cannot be justified by analogy to politically neutral restrictions like age and residency requirements, which are substantively distinct and serve different purposes.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

*Amici* adopt and join the procedural histories and statements of facts set forth by the parties to this appeal.

## ARGUMENT

### I. AN UNDERSTANDING OF POLITICAL PARTIES PROVIDES CONTEXT NECESSARY FOR ANY CONSIDERATION OF HOW FUSION VOTING AFFECTS THE CONSTITUTIONAL RIGHTS AT ISSUE.

Political parties are critical institutions that serve unique and valuable roles in our democratic system. This premise is well supported by the academic work of *Amici* and their peers. Thus, the Court's must consider the function and importance of political parties themselves rather than constrain its analysis to the rights of individual voters in a candidate-centric framework.

As described in detail in Appellants' merits brief, the New Jersey Constitution unambiguously provides broad protections for associational and expressive rights. *See* N.J. Const., Art. I, ¶¶ 6, 18. These guarantees are even broader than those provided by the United States Constitution. *See Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 220 N.J. 71, 78-79 (2014); *Green Party v. Hartz Mt. Indus.*, 164 N.J. 127, 145 (2000); *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326, 353 (1994); *State v. Williams*, 93 N.J. 39, 58 (1983).

*Amici* respectfully submit that any analysis of whether these constitutional guarantees are compatible with a prohibition on fusion voting will require a consideration, *inter alia*, of how political parties function and their important role in our democracy. Consideration of these issues will facilitate a full and thorough analysis, thereby serving the Court’s “affirmative obligation to protect ... the freedoms of speech and assembly” that it imposes. *State v. Schmid*, 84 N.J. 535, 559 (1980) (citations omitted).

## **II. THE COURT’S ANALYSIS SHOULD INCLUDE POLITICAL PARTIES BECAUSE PARTIES ARE ESSENTIAL TO A HEALTHY AND RESPONSIVE DEMOCRACY.**

The parties to this appeal have advanced various arguments primarily in a candidate-centric framework: addressing the “freedoms of speech and assembly” (*id.*) of individual New Jerseyans to vote for individual candidates. However, determining whether a prohibition on fusion voting contravenes the “affirmative obligation” (*id.*) to protect associational and expressive rights requires the Court to consider more than just individual or candidate-centric concerns.

Rather, the Court should also consider party-centric concerns: (1) the rights and interests of political parties themselves, and (2) the rights of individuals with respect to their association with a party of their choice in

contrast to their support for a particular candidate. As a practical matter, the keystone features of our democratic system rely upon party association.

Political parties are so central to our democracy that “modern democracy” is “unthinkable” without them. E.E. Schattschneider, *Party Government* 1 (1942). Although political parties are not explicitly required by the United States or New Jersey Constitutions, they emerge naturally out of the political environment created by those documents. John Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* 3-26 (2d ed. 2011).

Once they arise, political parties shape the entire political landscape. Political parties are the institutions that organize Congress, select candidates, mobilize voters, and (perhaps most importantly) tie each of these strands of political activity together. Political institutions that are at odds with political parties tend to fail. Seth Masket and Hans Noel, *Political Parties* (2021). *See also* Seth Masket and Hans Noel, *Prioritizing Parties*, in *MORE THAN RED AND BLUE: POLITICAL PARTIES AND AMERICAN DEMOCRACY* 164-173 (American Political Science Association and Protect Democracy, 2023).

The mechanism by which political parties assume such importance is illuminated by the “responsible party” theory of government. The responsible party government model explains that it is difficult for voters to monitor individual politicians and hold them accountable at the ballot box. It is much

more practicable for voters to follow parties rather than individual politicians. A voter can easily assign parties either credit or blame according to how the voter feels about the state of things. *See* American Political Science Association, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, AMERICAN POLITICAL SCIENCE REVIEW, Sept. 1950, at 37-84.

In this commonsense model, party labels and affiliations carry a tremendous amount of information to voters. This information enables those voters to cast educated votes without a burden of having to conduct candidate research. “To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986). Where fusion voting is permitted, party labels convey even greater information because a fusion candidate is affiliated not only with their major party but also with a minor party that identifies them as a certain type of Democrat or Republican.

As Justice Scalia explained, “[a] political party’s expressive mission” is “principally to promote the election of candidates who will implement [the party’s] views.... That is achieved in large part by marking candidates with the party’s seal of approval” given that “party labels are ... a central consideration

for most voters.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 464-65 (2008) (Scalia, J., dissenting) (citing *Tashjian*, 479 U.S. at 216).

Thus, the constitutionality of the prohibition on fusion voting should not be assessed exclusively through the lens of the relationships between individual voters and individual candidates. Free political association and expression are exercised largely with respect to parties rather than candidates.

Respondents’ arguments are founded on a premise that these rights concern only candidates, not parties. Taking this narrow view, Respondents argue that these rights are not burdened because individual voters may still vote for the specific candidate of their choice. This is a flawed and incomplete analysis. As described below, Respondents ignore significant burdens that the prohibition on fusion voting imposes on parties, voters, and nominees.

### **III. A PROHIBITION ON FUSION VOTING SEVERELY BURDENS THE ASSOCIATIONAL RIGHTS OF PARTIES, AS WELL AS THEIR INDIVIDUAL MEMBERS AND NOMINEES.**

A prohibition on fusion voting – that is, a restriction on the ability of a political party to nominate their preferred candidate – imposes a significant burden on the associational and expressive freedoms of political parties. These burdens on the parties, in turn, result in burdens on their individual members and nominees.



Quite appropriately, Intervenors cite the Second Circuit case of *Sam Party of N.Y. v. Kosinski*, 987 F.3d 267 (2d Cir. 2021), in discussing the relevant burdens to be considered. In that case, the Court of Appeals observed that “[c]ourts have identified three types of severe burdens on the right of individuals to associate as a political party.” *Id.* at 275. These are: (1) “regulations meddling in a political party’s internal affairs,” (2) “regulations restricting the ‘core associational activities’ of the party or its members,” and (3) regulations that ‘make it virtually impossible’ for minor parties to qualify for the ballot.” *Id.* (citations omitted).

The prohibition on fusion voting inflicts all three of these burdens upon New Jersey political parties, their members, and their nominees. Respondents’ narrow, candidate-centric approach turns a willfully blind eye to these burdens. A complete analysis, however, reveals that they cannot be ignored.

**A. A prohibition on fusion voting meddles in the internal affairs of political parties.**

First, it is unquestionable that the prohibition on fusion voting constitutes “meddling in a political party’s internal affairs.” The prohibition has but one purpose and one function: to limit who a party can choose to nominate as its preferred candidate. In this way, the prohibition acts as a statutory, external veto on the quintessential “internal affair” of the party: the nomination of a candidate for office. This is precisely the sort of “meddling” the burdens the ability of a

political party – and, by extension, its members and nominees – to associate freely.

The nomination of a chosen candidate is a political party’s most important act. See Kathy Bawn, Marty Cohen, David Karol, Seth Masket, Hans Noel and John R. Zaller, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSPECTIVES ON POLITICS 571-597 (2012). See also Marty Cohen, David Karol, Hans Noel and John Zaller, *The Party Decides: Presidential Nominations Before and After Reform* (2008), E.E. Schattschneider, *Party Government* 64 (1942); Seth Masket and Hans Noel, *Prioritizing Parties*, in MORE THAN RED AND BLUE: POLITICAL PARTIES AND AMERICAN DEMOCRACY 164-173 (The American Political Science Association and Protect Democracy, 2023).

The United States Supreme Court, acknowledging the associational rights of parties, observed that “[i]n no area is the political association’s right to exclude more important than in the process of selecting its nominee.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). The Court explained that, “[the nomination] process often determines the party’s positions on the most significant public policy issues of the day” and that “even when those positions are predetermined it is the nominee who becomes the party’s ambassador to the general electorate in winning it over to the party’s views.” *Id.* (adding that some

minor parties are “virtually inseparable from their nominees.”). “The moment of choosing the party’s nominee ... 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.’” *Id.* (quoting *Tashjian*, 479 U.S. at 216).

**B. A prohibition on fusion voting restricts the “core associational activities” of political parties.**

Likewise, the prohibition on fusion voting also “restrict[s] the ‘core associational activities’ of the party [and] its members.” “Freedom of association also encompasses a political party’s decisions about the identity of, and the process for electing, its leaders.” *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989). *See also Tashjian*, 479 U.S. at 235-36 (Scalia, J., dissenting) (“The ability of the members of the Republican Party to select their own candidate, on the other hand, unquestionably implicates an associational freedom.”).

Nomination of the preferred candidate is not merely one of several “core associational activities” that a party performs. Rather, the nomination of a candidate is the central function of a party and is the ultimate manifestation of its associational purpose. Indeed, all other functions of a political party are secondary to its fundamental act – the nomination of a chosen candidate to stand for a public election. This, more than any other activity, is how parties

participate in the political process and how its members engage in political association.

“[A] party’s choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 372 (1997) (Stevens, J., dissenting). A restriction on a party’s “right to nominate its first-choice candidate, by limiting [its] ability to convey through its nominee what the Party represents, risks impinging on another core element of any political party’s associational rights – the right to ‘broaden the base of public participation in and support for its activities.’” *Id.* at 372 n.1 (Stevens, J., dissenting) (quoting *Tashjian*, 479 U.S. at 208).

Any other activities that a political party might engage in – *e.g.*, activism, fundraising, public relations – are rendered largely irrelevant if the party cannot choose who it nominates to run for public office. If the nomination of the candidate of its choice is not a “core associational activity,” then there is no such “core” activity. If an external, statutory veto does not “restrict” this core activity, then there is no such restriction.

Respondents’ “no harm” argument actually illustrates the concrete effect of this burden. When a party’s nomination is restricted by a prohibition on fusion voting, that party is precluded from effectively conveying what it represents.

Additionally, the party is forced to choose between advancing a “spoiler” candidate or sitting out, thereby reinforcing the existing duopoly on ballot access. The party’s members, meanwhile, are coerced into supporting a competing party in order to vote for their preferred candidate. It is of little value to point out that an individual voter may still vote for the candidate of their choice – such a vote requires the voter to dissociate from their preferred party and associate with a different party instead. In doing so, the voter is compelled to endorse the entire platform of a party with which they have chosen not to associate.

**C. A prohibition on fusion voting does in fact keep minor parties off the ballot.**

Last, the prohibition on fusion voting “make[s] it virtually impossible’ for minor parties to qualify for the ballot.” This point does not require any stretch of the imagination. It is exactly what happened in this very case. The Moderate Party was excluded from the ballot because of their (otherwise qualified) choice of candidate.

Nor is such a scenario unique to the particular facts of this case. Inevitably, minor parties will be excluded from the ballot any time they wish to support a competitive candidate. The law limits minor parties to nominate only candidates who have not been nominated by a major party. This has the practical effect of ensuring that the minor party will only ever appear on the ballot if it

has no chance to win and that it must, unwillingly, field a “spoiler” candidate. *See Timmons*, 520 U.S. at 372 n.1 (Stevens, J., dissenting) (“A fusion ban burdens the right of a minor party to broaden its base of support because of the political reality that the dominance of the major parties frequently makes a vote for a minor party or independent candidate a ‘wasted’ vote.”).

This is not empty hyperbole. As described in Appellants’ brief, the historical record speaks unambiguously as to the inevitable outcomes for minor parties. Under the current statutory regime, minor parties have been (intentionally and successfully) relegated to a century of structural failure. They have been shut out of electoral victory: every federal and state election in New Jersey has been won by either the Democratic or Republican candidate for the past *fifty* years.<sup>2</sup> At the same time, they have been denied access to the ballot. For over *one hundred* years, not one minor party has received the requisite ten percent of all votes to attain recognition as a “political party” in New Jersey.

This century of statutorily-imposed marginalization provides a stark – and not accidental – disincentive. The message to minor parties is loud and clear: the only way to participate is as a “wasted vote” spoiler, not a competitor.

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<sup>2</sup> David Wildstein, *Imperiale Was Only Independent Candidate to Win Beyond Local Level*, N.J. GLOBE (Nov. 1, 2018).

#### **IV. OTHER, POLITICALLY NEUTRAL ELIGIBILITY REQUIREMENTS ARE FUNDAMENTALLY UNLIKE THE PROHIBITION ON FUSION VOTING.**

Finally, the prohibition on fusion voting must be distinguished from other limitations on ballot access.

There are several facially neutral, generally applicable, non-political eligibility requirements for candidates that are not the subject of any genuine controversy. These eligibility restrictions – such age, residency, consent, and petition signature requirements – are minimally burdensome and serve practical (not political) considerations. They are different in kind and cannot justify a prohibition on fusion voting.

##### **A. The indiscriminate analysis of *Timmons* does not control this case because the New Jersey Constitution provides broader guarantees of free association and expression.**

The United States Supreme Court has conflated these distinct kinds of restrictions, painting a prohibition on fusion voting with the same broad brush as eligibility requirements based on age and residency. *See Timmons*, 520 U.S. at 359 n.8. Of course, a footnote from *Timmons* does not determine the outcome in this case because it was decided within the context of the United States Constitution. As noted above, the rights of association and expression guaranteed by the New Jersey Constitution are significantly broader.

Nevertheless, *Amici* address this issue in the interest of avoiding confusion and drawing a critical distinction.

**B. Politically neutral restrictions are distinct and cannot justify a prohibition on fusion voting.**

A prohibition on fusion voting serves only one purpose: the consolidation of political power within the two existing major parties. This cannot withstand any level of scrutiny. Such a prohibition places an immense and undue burden upon minor parties, limits the associational and expressive rights of voters, and serves no legitimate governmental interest.

In stark contrast, politically neutral restrictions – such as age, residency, consent, and petition signature requirements – impose no substantively disparate impact. They affect all parties equally. They have no impact on the systemic competitiveness or relevance of minor parties. They do not reflect any partisan effect or any partisan motivations for their adoption.

Most importantly, these neutral restrictions have legitimate, politically neutral, and immediately apparent policy justifications.

For example, age restrictions serve a compelling interest in ensuring that candidates for positions of public trust possess the maturity and development required by the important office they seek. For this goal, a minimum age is a sensible, easily verifiable, and neutral proxy. Age requirements have long been recognized as appropriate for various offices at the State and Federal levels. In



fact, age requirements are often enshrined in plain constitutional text, rendering any analogy to anti-fusion *statutes* absurd. *See, e.g.*, N.J. Const., Art. IV, § I, ¶ 2; N.J. Const., Art. V, § I, ¶ 2; U.S. Const., Art. I, § 2; U.S. Const., Art. I, § 3; U.S. Const., Art. II, § 1.

Likewise, residency restrictions serve obvious and compelling interests in ensuring that elected officials have some relationship and interest in the area they represent and serve, and promoting a familiarity with their constituents and the issues that matter to them.

Consent requirements are self-evidently reasonable. A person should not be compelled, over their objection, to serve as a party nominee, just as they should not be compelled to vote for a party, against their will. Respect for associational and expressive freedoms easily justifies prohibitions on non-consensual nominations.

Similarly, requiring a reasonable minimum number of petition signatures for a candidate nomination serves the State's legitimate interest in preventing ballot overcrowding and excluding frivolous nominations of candidates lacking *de minimis* public support. The signature requirements under current law are not onerous. *See* N.J.S.A. § 19:13-5 (requiring 100 signatures for most races, 800 signatures for statewide contests, and 50 signatures for new election districts). These low bars ensure that the requirements serve their legitimate purpose

without a politically disparate impact. In fact, any concerns that cross-nominations would risk ballot overcrowding could easily be addressed through increasing these signature requirements.

Anti-fusion laws have none of these characteristics. They are not neutral and do not affect all parties equally. By their very definition, the restrictions of anti-fusion laws are borne exclusively by minor parties. The benefits accrue exclusively to major parties. These protectionist measures are inherently partisan. By design, they directly affect the substance of elections by regulating the competitive balance between minor and major parties. At the same time, these measures provide no corresponding benefits to the State, the collective electorate, or any individual voters.

Thus, a prohibition on fusion voting is completely distinct from neutral eligibility restrictions such as age and residency requirements. The latter (which apply generally and without partisan impact) cannot be used to justify the former (which is partisan in nature and intentionally disparate in its impact). Although the State surely “has a valid interest in ... assur[ing] the fair, honest and efficient administration of the primary and general election process,” it “does not have an unconditional license to insure the preservation of the present political order.” *Council of Alt. Political Parties v. State, Div. of Elections*, 344 N.J. Super. 225, 242-43 (App. Div. 2001) (citing *Timmons*, 520 U.S. at 366).

## CONCLUSION

For the reasons stated herein, Professors Masket, McCarty, and Noel respectfully request that this Court grant their motion to appear, submit this brief, and participate in oral argument in this matter as amici curiae.

Further, *Amici* respectfully submit that this Court should find for Appellants and reverse the decision below.

Respectfully submitted,

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