SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	DOCKET NO. A-3542-21T2 CIVIL ACTION On appeal from final agency action in the Department of State Sat below: Hon. Tahesha Way, Secretary of State (CONSOLIDATED)
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BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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PRELIMINARY STATEMENT

New Jersey's state constitutional tradition has carefully tended the balance of personal freedom against bureaucratic power. Through its attention to evolving needs and notions of citizenship, the New Jersey Supreme Court has shaped a body of rights that command stronger protections than their counterparts in federal law. New Jersey's prohibition on fusion voting is inconsistent with those rights and violates the New Jersey Constitution.

Fusion voting enables a candidate to accept the nomination of more than one political party—typically, the Republican or Democratic Party ("major" parties) and a "minor" party such as the Moderate Party. The candidate then appears on the ballot under the banner of both the major and minor party, and the parties' votes are combined to determine the candidate's count. Thus, voters may register their support for a minor party aligned with their values while influencing the race by voting for a cross-nominated major-party candidate who has a realistic chance of winning. Fusion voting was a successful practice in New Jersey and across the country throughout the late nineteenth and early twentieth centuries, until a wave of fusion bans aimed at entrenching the major-party duopoly swept the states. Fusion voting suffered another blow when the U.S. Supreme Court upheld Minnesota's ban in *Timmons v. Twin Cities Area New Party* in 1997.

But the New Jersey Constitution dictates a different result here. New Jersey's anti-fusion laws violate the right to vote as conceived and secured by the state constitution. New Jersey courts have long recognized that the right to vote encompasses not just the right to mark a ballot, but the right to freely choose for whom to vote and to make one's choice meaningful and effective. Anti-fusion laws impermissibly undermine that right.

Likewise, free speech and association rights enjoy greater protection under the New Jersey Constitution than under the federal constitution. Anti-fusion laws are a direct assault on political expression, which sits at the apex of those rights. The anti-fusion laws inhibit minor parties from nominating their preferred standard-bearers and minor-party voters from conveying support for their party at the polls.

Timmons, decided on First Amendment grounds, offers no safe harbor for New Jersey's fusion ban. The New Jersey Constitution is an independent source of individual liberties. This Court should treat it as the charter of first resort, without regard to the narrower scope of cognate federal constitutional provisions. Relatedly, in decisions like *Timmons*, the U.S. Supreme Court tends to underenforce the federal constitution out of deference to the states; a "primacy" approach to state constitutional interpretation avoids improperly importing that deference into state constitutional doctrine. In short, *Timmons* is

a highly unreliable guide to the resolution of the questions presented here, which turn on the robust protections unique to the rights established by the New Jersey Constitution.

To ensure the health of New Jersey's democracy and to honor our state's constitutional tradition, this Court must reject the ban on fusion voting.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus curiae accepts and incorporates the statement of facts and procedural history recited in Appellants' briefing.

ARGUMENT

I. Anti-fusion laws violate the right to vote under the New Jersey Constitution.

To conform to the fifteen-page limit imposed by the Court on *amici* briefs, *amicus curiae* has removed this section. *Amicus* refers the Court to its original filing for context and elaboration.

II. Anti-fusion laws violate the rights to free speech and association under the New Jersey Constitution.

A. A primacy approach to state constitutional interpretation is consistent with principles of judicial federalism and gives full effect to the New Jersey Constitution's independent free speech and association guarantees.

New Jersey courts sometimes look to a set of non-exhaustive factors first outlined in *State v. Hunt* to determine whether to construe the state constitution as giving rise to broader or stronger rights than the federal constitution. 91 N.J.

338, 358–68 (1982) (Handler, J., concurring); *State v. Williams*, 93 N.J. 39, 58 (1983) (adopting factors outlined by Justice Handler). Resort to the *Hunt* factors reflects an "interstitial" approach to state constitutional interpretation. Under an interstitial approach, courts examine relevant state constitutional provisions to decide if they offer reasons to depart from the presumptively appropriate federal standard. *See* Justin Long, *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41, 48 (2006). In this way, state constitutions operate in the gaps or "interstices" of the federal constitution, serving as a supplementary source of rights.

Although analysis of the *Hunt* factors compels the same result, this Court need not apply the *Hunt* factors to adopt a more expansive view of the New Jersey Constitution's free speech and association rights than the First Amendment supplied in *Timmons*. It can and should reach that end by taking a "primacy" approach instead.

Federal constitutional interpretation carries no presumptive validity under a primacy approach, and thus courts need not search for reasons to deviate from federal precedent. "There is no requirement for the New Jersey Supreme Court to ask when to diverge from federal precedent, and there is no need for such a requirement." Hon. Dennis J. Braithwaite*, An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure*

Jurisprudence Under the New Jersey Constitution, 33 Rutgers L.J. 1, 25 (2001). Rather, "primacy courts focus on the state constitution as an independent source of rights, rely on it as the fundamental law, and do not address federal constitutional issues unless the state constitution does not provide the protection sought." Robert F. Utter & Sanford E. Pitler, *Speech, Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 Ind. L. Rev. 635, 645 (1987). At the core of the case for primacy are principles of judicial federalism.[1]

[1] Justice William J. Brennan Jr. is credited with stimulating the "reemergence" of state constitutional law, often called the "New Judicial Federalism." Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of A State Constitutional Consciousness*, 29 Rutgers L.J. 763, 764 (1998). His famous 1977 Harvard Law Review article, *State Constitutions and the Protection of Individual Rights*, criticized the U.S. Supreme Court's willingness to condone violations of civil liberties in the name of "vague, undefined notions of equity, comity and federalism." William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977). He commented that "the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach." *Id.* at 503. Justice Brennan urged that "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." *Id.* at 491. Notably, the 1977 article was the text of a speech Justice Brennan delivered to the New Jersey State Bar Association the year prior. William J. Brennan Jr., *Address to the New Jersey Bar*, 33 Guild Prac. 152 (1976). Justice Stewart G. Pollock, who served on the New Jersey Supreme Court from 1979 to 1999, referred to this article as the "Magna Carta of state constitutional law." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707, 716 (1983).

Justice Pashman advocated convincingly for primacy in his *Hunt* concurrence. Responding to Justice Handler's separate concurring opinion, which set forth what would come to be known as the *Hunt* factors, Justice Pashman observed that the Court had not previously articulated "any rules, principles or theories explaining when it will go beyond the federal courts in protecting constitutional rights and liberties." *Hunt*, 91 N.J. at 354 (Pashman, J., concurring). The Court had "merely stated [its] undoubted power to construe the New Jersey Constitution in accord with [its] own analysis of the particular right at issue." *Id.* Justice Handler's new framework marked a wrong turn, introducing "a presumption against divergent interpretations of our constitution unless special reasons are shown for New Jersey to take a path different from that chosen at the federal level." *Id.* Justice Pashman "would reverse the presumption." *Id.*

Reversing the presumption—that is, accepting primacy—follows from at least three rationales. First, it accords due respect to the state's highest law and tribunal. Whereas, under an interstitial approach, "a state court is compelled to focus on the [U.S.] Supreme Court's decision, and to explain, in terms of the identified criteria, why it is not following the Supreme Court precedent," a primacy approach puts the state constitution first. Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy*

Problems in Independent State Constitutional Rights Adjudication, 72 Notre Dame L. Rev. 1015, 1023 (1997). State constitutions should speak without "prerequisites," *id.*, so that they may meet their promise as "separate fount[s] of liberty," *Hunt*, 91 N.J. at 356 (Pashman, J., concurring). Emboldened by true independence, state supreme courts "will be naturally led to resist every encroachment upon rights . . . ." Brennan Jr., 90 Harv. L. Rev. at 504.

Second, primacy fosters healthy constitutional diversity. "State supreme courts, if not discouraged from independent constitutional analysis, can serve, in Justice Brandeis' words, 'as a laboratory' testing competing interpretations of constitutional concepts that may better serve the people of those states." *Hunt*, 91 N.J. at 356–57 (Pashman, J., concurring) (quoting *New State Ice Co. v. Liebmann,* 285 U.S. 262, 310–11 (1931) (Brandeis, J., dissenting)).

Third, the decisions of the U.S. Supreme Court reflect a "federalism discount," which make them unsuitable models for state courts considering similar claims under their state constitutions. The concept of the federalism discount refers to the Court's tendency to narrowly construe constitutional provisions as a matter of deference rather than substance. In other words, the Court risks the underenforcement of some federal constitutional rights to preserve room for state supreme courts to adopt alternative approaches. *See* Richard Boldt & Dan Friedman, *Constitutional Incorporation: A*

Consideration of the Judicial Function in State and Federal Constitutional Interpretation, 76 Md. L. Rev. 309, 336 (2017). Similarly, the Court has refrained "from imposing on the States inflexible constitutional restraints" that may not fit conditions in a particular state. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973). *See* Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 Tex. L. Rev. 959, 975–76 (1985) ("State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate."). When state courts uncritically follow federal constitutional precedents, they inherit and reproduce diluted protections—and frustrate the U.S. Supreme Court's purpose in carving doctrinal space for constitutional independence at the state level.

The U.S. Supreme Court's hesitance to impose a one-size-fits-all constitutional solution on the fifty states is especially pronounced in cases concerning federal elections. The Elections Clause of the federal constitution gives state legislatures principal authority to administer federal elections by prescribing their "Times, Places and Manner." *U.S. Const.* art. I, § 4. Although Congress may "make or alter" those rules, skepticism toward congressional power to regulate elections and a corresponding deference to

states has animated the Supreme Court's election law jurisprudence in recent decades. *See* Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 Wash. U.L. Rev. 553, 587–94 (2015). As Justice Scalia observed, "detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States." *Crawford v. Marion Cnty. Election Bd*., 553 U.S. 181, 208 (2008) (Scalia, J., concurring).

The New Jersey Supreme Court has recognized the hazards of importing protections diluted by the federalism discount and the attendant necessity of interpreting the New Jersey Constitution with autonomy. In *Robinson v. Cahill*, for example, the New Jersey Supreme Court affirmed that the "State Constitution could be more demanding" because "there is "absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances." 62 N.J. 473, 490 (1973), *on reargument*, 63 N.J. 196 (1973), *and on reh'g*, 69 N.J. 133 (1975). Likewise, in *State v. Hempele*, the New Jersey Supreme Court recognized that the U.S. Supreme Court, "[c]ognizant of the diversity of laws, customs, and mores within its jurisdiction," is "necessarily 'hesitant to impose on a national level far-reaching constitutional rules binding on each and every state.'" 120 N.J. 182, 197 (1990) (quoting *Hunt*, 91 N.J. at 358 (Pashman, J.,

concurring)) (holding that the warrantless search of a defendant's garbage violated Article 1, paragraph 7 of the New Jersey Constitution, despite the U.S. Supreme Court's contrary decision under the federal constitution).

Timmons is precisely the type of U.S. Supreme Court precedent that state courts should hesitate to adopt. Indeed, the very first line of the *Timmons* decision acknowledges its federalism implications. "*Most States* prohibit multiple-party, or 'fusion,' candidacies for elected office," the Court wrote. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353 (1997) (emphasis added). Had the *Timmons* Court deemed Minnesota's anti-fusion laws unconstitutional, thereby setting a federal floor, it would have effectively toppled fusion bans nationwide without the benefit of a fifty-state record. But the Court here need not consider what "*most states*" do. It need not subordinate its unique constitutional tradition to a "homogenized, abstracted, national vision." Sager, 63 Tex. L. Rev. at 976.

State courts have the duty to adopt reasoned interpretations of the state's supreme law, regardless of how the U.S. Supreme Court interprets a different constitution under different practical and institutional circumstances. *Id.* A primacy approach effectuates this duty.

B. Applying the *Hunt* factors compels divergence from federal constitutional free speech and association analyses of anti-fusion laws.

To conform to the fifteen-page limit imposed by the Court on *amici* briefs, *amicus curiae* has removed this section. *Amicus* refers the Court to its original filing for context and elaboration.

C. New Jersey's anti-fusion laws severely burden the rights of minor parties, candidates, and voters to freely speak and associate.

New Jersey's fusion ban unconstitutionally impairs the expressional and associational rights of minor parties and their voters. Whether assessed under strict scrutiny, consistent with the uncompromising protection for fundamental political rights established in *Worden v. Mercer Cnty. Bd. of Elections*, 61 N.J. 325 (1972), or a traditional burden-interest analysis,[2] the fusion ban must yield to New Jerseyans' constitutionally protected prerogatives to associate together in political parties, to choose their party's standard bearer, and to support that standard bearer on the ballot.

The "exceptional vitality" of New Jersey's free speech and association protections has been "frequently voiced" in our common law. *State v. Schmid*,

[2] With certain exceptions, the New Jersey Supreme Court applies a balancing test to resolve constitutional claims, weighing "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).

84 N.J. 535, 557–58 (1980). They are, of course, at their zenith where political speech is involved.[3]

[3] In cases involving commercial—as opposed to political—speech, the New Jersey Supreme Court has treated the state constitutional free speech clause as coextensive with the First Amendment. *See Hamilton Amusement Ctr. v. Verniero*, 156 N.J. 254, 264–65 (1998); *E&J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin*, 226 N.J. 549, 568 (2016). This interpretative methodology has no application outside the commercial speech context and thus no relevance here. *See E&J Equities, LLC*, 226 N.J. at 567-69 (distinguishing cases involving commercial speech, which "is granted less protection than other constitutionally-guaranteed expression" from cases involving political speech on private property and defamation, in which "the State Constitution provides greater protection" than the First Amendment). Nevertheless, a note of caution about "coextension" and its close cousin, "prospective lockstepping," is warranted.

When state courts seek absolute harmony with federal precedents, they stifle the development of state constitutional doctrine. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 804 (1992). They also generate significant confusion.

The use of terms like "coextensive" risk deciding "*too much.*" Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499, 1521 (2005). In other words, courts appear to "prejudge future cases" when they announce that federal constitutional principles are dispositive of state constitutional questions. *Id.* This phenomenon is known as "prospective lockstepping." As the late Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court warned, "[s]ome states appear to be adopting, apparently in perpetuity, all existing or future United States Supreme Court interpretations of a federal constitutional provision as the governing interpretation of the parallel state constitutional provision." Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1166 (1985). But it is "beyond the state judicial power to *incorporate* the Federal Constitution and its future interpretations into the state constitution." Williams, 46 Wm. & Mary L. Rev. at 1521; *see* Ronald K. L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 Tex. L.

Nominating a candidate is a political party's core associational function and the mechanism by which the party affirms its principles, declares its positions, and appeals to potential members. *See Smith v. Penta*, 81 N.J. 65, 77 (1979) (describing the "associational values" of primary elections, which allow "adherents of some political philosophy to advance their goals, proselytize their beliefs and seek to acquire or perpetuate their power"). Under New Jersey's anti-fusion laws, a minor party's "rights to express political ideas and to associate to exchange these ideas to further their political goals" are constrained the moment any candidate accepts a major-party nomination; from that point forward, the minor party can no longer freely associate with that nominee, who may be the best (or only) representative of the party's political message. *Council of Alt. Pol. Parties v. State*, 344 N.J. Super. 225, 242 (App. Div. 2001); *see also Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 214 (1989) (recognizing a "party's protected freedom of association rights to identify the people who constitute the association and to select a standard-bearer who best represents the party's ideology and preferences").

Rev. 1095, 1116 (1985) (referring to prospective lockstepping as "The Problem of Amending Without Amendments"). Treating New Jersey constitutional free speech protections as coextensive with the First Amendment is inappropriate in this case principally because it is not doctrinally supported; it should also be avoided for its potential to sanction or encourage prospective lockstepping.

A corresponding burden simultaneously falls on the associational rights of candidates. A candidate who becomes a major-party nominee may not thereafter affiliate with a minor party on the ballot. The state thus confiscates the most powerful communicative tool available to political aspirants. *See Lautenberg v. Kelly*, 280 N.J. 76, 83 (Law Div. 1994) (inclusion in a party's column is "the ultimate form of endorsement"), *rev'd in part on other grounds by Schundler v. Donovan*, 377 N.J. Super. 339 (App. Div. 2005).

And perhaps no burden is heavier than the one the fusion ban imposes on voters' free expression. Under the fusion ban, voters are substantially limited in their ability to use the ballot to express support for a minor party's platform. The expressive function that fusion enables is powerful and distinctive; fusion allows voters to offer electoral support to a preferred cross-endorsed candidate while communicating that they would like the candidate to govern more progressively or conservatively or to advance a policy championed by the minor party. The fusion ban blunts the ballot's expressive force.

It is no answer to this restraint that a voter may express minor-party support by voting for a candidate on the minor-party line—which is to say, by backing a "protest" or "spoiler" candidate. Nor, for that matter, is it any consolation that a voter may instead preserve their electoral influence by

voting for a major-party candidate. In fact, this dilemma highlights the interlocking rights the fusion ban impairs.

Not only do the anti-fusion laws violate New Jerseyans' right to freely speak and to vote, but they pit those fundamental rights against one another. They ensure that the exercise of one is penalized with the forfeiture of the other. These are "rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity v. State of N.J.*, 385 U.S. 493, 500 (1967); *see Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (striking down a durational residence law that unconstitutionally "burden[ed] the right to travel" by forcing individuals to "choose between travel and the basic right to vote"). For a minor-party voter, the decision to cast a ballot for the candidate of one's choice means forgoing the chance to convey electoral support for one's party; conveying electoral support for one's party means abandoning the opportunity to exercise the franchise meaningfully and effectively. This coercive bind is intrinsic to New Jersey's fusion ban and anathema to democratic norms.

CONCLUSION

This Court should strike down New Jersey's anti-fusion laws as violative of the robust and independent rights to vote and to freely speak and associate enshrined in our state constitution.

Respectfully submitted,

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