

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

UNITED WISCONSIN, et al.,

Plaintiffs,

v.

Case No. 2025CV001438

WISCONSIN ELECTIONS COMMISSION,

Defendant.

BRIEF OF *AMICUS CURIAE*
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INTEREST OF AMICUS CURIAE

Amicus curiae Tabatha Abu El-Haj is a Professor of Law at Drexel University, Thomas R. Kline School of Law, in Philadelphia, PA, where her research focuses specifically on the First Amendment's rights of association and assembly. Professor Abu El-Haj has authored multiple leading works in these areas of the law. *See, e.g., Networking the Party: First Amendment Rights & the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225 (2018); *The Associational Rights of Political Parties* in THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW. Most recently, she co-authored *Fusion and the Freedom to Associate to a Better Politics*, 74 KANSAS L. REV 521 (2026). Professor Abu El-Haj has a professional and personal interest in promoting a proper understanding of the constitutional and democratic principles at issue in this case. She files this brief in her personal capacity.

INTRODUCTION

The U.S. Supreme Court's First Amendment analysis in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), lacks persuasive value for properly analyzing the constitutionality of the challenged election rules with respect to either freedom of speech or freedom of association under the Wisconsin Constitution. Focusing on the latter, this *amicus* brief argues that *Timmons* was grounded in flawed conceptions of the role of political parties in our democracy and rested on since-debunked assumptions about the benefits of a rigid two-party system. This *amicus* brief emphasizes two central flaws in the *Timmons* Court's analysis of the associational rights of political parties.

First, the *Timmons* majority misapprehended the constitutional burdens imposed by anti-fusion laws on a minor political party and its members. The *Timmons* Court focused almost exclusively on how anti-fusion laws burden *speech* rights, while giving short shrift to a minor political party's strong *associational* interests in nominating a candidate. Anti-fusion laws, however, implicate the *freedom of association*—a right distinct from freedom of speech. In eliding the distinctions between these First Amendment rights, the Court's analysis misunderstood the role of political parties in our democracy. Instead of mere vehicles for political speech, political parties are primarily mechanisms for organizing political activity. By barring minor political parties from nominating their first-choice candidate, anti-fusion laws deprive minor political parties of an essential party-building mechanism. Anti-fusion laws thus severely burden the freedom of association in ways the *Timmons* majority failed to acknowledge or appreciate.

Second, the Court erred in holding—without meaningful analysis or support—that anti-fusion laws are justified by a state interest in strengthening the two-party system because of the purported political stability that that system creates. That specious conclusion was wrong. Anti-fusion laws, which reinforce a two-party system by systematically marginalizing minor political

parties, have failed to deliver political responsiveness and have continued to corrode political stability. *Amicus curiae* respectfully asks this Court to strike down Wisconsin’s anti-fusion laws based on the robust political rights and protections set forth in the Wisconsin Constitution.

ARGUMENT

I. The *Timmons* Court Failed To Appreciate The Full Scope of First Amendment Burdens Imposed by Anti-Fusion Laws

Timmons arose from the decision by a fledgling political party called the Twin Cities Area New Party (the “New Party”) to nominate Andy Dawkins in a state representative election. Dawkins was also the candidate of the Democratic-Farmer-Labor Party for the same office. Neither Dawkins nor the Democratic-Farmer-Labor Party objected. Minnesota election officials, however, rejected the nomination because Minnesota law prohibited “fusion” candidacies.

The New Party challenged Minnesota’s rejection of its nomination on First and Fourteenth Amendment grounds. The district court granted summary judgment for the state election officials, but the Eighth Circuit reversed. *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 200 (8th Cir. 1996). After weighing the fusion ban’s impact on the New Party’s ability to develop consensual political alliances and broaden the base of public participation in and support for the Party’s activities, the Eighth Circuit held that fusion bans unconstitutionally burdened the Party’s constitutional rights. *Id.* at 199.

The Supreme Court reversed. Writing for a divided Court, Chief Justice Rehnquist observed that the New Party remained free to endorse Dawkins, even though he would not appear on the ballot as the New Party candidate, and Minnesota had not “directly precluded minor political parties from developing and organizing.” *Timmons*, 520 U.S. at 360–61. The Court recognized that it was “uncontroversial” that the New Party “has a right to select its own candidate,” but opined that the Party could nominate an alternate candidate or endorse its candidate of choice while

staying off the ballot. *Id.* at 359–60. In its view, the Party’s associational rights were not unduly burdened if its candidate of choice could not appear on the ballot as its candidate. *Id.* The Court blithely concluded that the associational harm was not severe because the Party could “communicate ideas to voters and candidates through its participation in the campaign.” *Id.* at 363. Three Justices emphatically dissented. *Id.* at 370–82 (Stevens, J., dissenting, joined by Ginsburg, J., and joined in part by Souter, J.); *id.* at 382–84 (Souter, J., dissenting).

The *Timmons* Court failed to recognize that political parties are primarily associational. Parties are networks of individuals and organizations tied to the broader electorate by connections of various strengths. At their best, parties bridge divides in the electorate between voters, officeholders, volunteers, donors, activists, and operatives at the federal, state, and local level; and they balance competing priorities of complex networks like unions and chambers of commerce, religious organizations, firefighter and law enforcement organizations, and other political advocacy groups. Political parties foster opportunities for civic action by leveraging social networks capable of informing and mobilizing citizens beyond election day.¹ These dynamic amalgams of individuals, organizations, and social networks often have opposing or conflicting goals and messages but form coalitions under the party banner to win elections and govern.

Political parties, in other words, are crucial to the functioning of our democracy not simply because they are able to spread messages, but because they are uniquely capable of organizing disparate interests within our constitutional order. The primary function of a political party is not “to spread its message to all who will listen,” *id.* at 361, as the *Timmons* Court believed, but rather to build coalitions to nominate and elect candidates who will pursue the party members’ policy

¹ Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights & the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1258–63 (2018) (“Relationships and social networks, far more than ideology and belief, drive political recruitment and sustain political activism.”).

goals, *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223–24 (1989). Good and responsive governance largely depends on a political party’s capacity to build broad coalitions with meaningful ties to the electorate.²

Because anti-fusion laws prevent minor political parties from building these coalitions, they severely restrict the right of association. The *Timmons* Court missed this fundamental point. The Court viewed political parties primarily as ideological *speakers* and concluded that the associational burdens imposed by anti-fusion laws turned largely on their degree of interference with the party’s message and expressive freedom. *See Timmons*, 520 U.S. at 363. Using this speaker-centered conception of the burdens, the Court declared that nothing about the ban on fusion candidacies prevented the New Party from publicly endorsing its preferred candidate on the major party line—while removing itself from the ballot. *Id.* at 360, 363.

In so concluding, the Court failed to appreciate the importance of nominating candidates *on the ballot*. Nominating a candidate on a ballot drives a political party’s ability to associate with broad and competing interests within the electorate. *See Timmons*, 520 U.S. at 372 (Stevens, J. dissenting) (noting that “a party’s choice of a candidate is the most effective way in which that party” can “attract voter interest and support”). Candidates possess idiosyncratic backgrounds and characteristics and belong to unique sets of networks and institutions, and their *nominations* uniquely drive a party’s ability to associate with different constituents throughout the electorate.

Parties build membership by giving their voters opportunities to interview and select nominees. Those members are then committed to the party through that candidate, and it is *that candidate’s nomination* that motivates them to knock on the doors of their neighbors or raise

² *See* Abu El-Haj, *Networking*, at 1231 (“Viewed as associations, the capacity of political parties to foster a functioning democracy depends less on party leaders defining and enforcing a coherent platform and more on the depth and breadth of the party’s political networks.”)

money for the candidate. These dynamics are particularly prominent in state and local elections where a small number of votes matter a great deal.

Political parties serve primarily to elect candidates—not (merely) as forums for political expression. By preventing such a nomination, anti-fusion laws severely impair minor political parties’ right to “broaden the base of public participation in and support for [their] activities . . . [.] conduct [that is] undeniably central to the exercise of the right of association.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). By preventing a minor political party from placing the party’s chosen, willing, and otherwise qualified candidate on the ballot, anti-fusion laws thus interfere with core associational rights—not just speech rights—because they frustrate a party’s ability to recruit, keep, and organize members—not just the “party’s ability to send a message to the voters and to its preferred candidates.” *Timmons*, 520 U.S. at 363.

As the Supreme Court itself acknowledged just a few years later, a public endorsement of a candidate “is *simply no substitute* for the party members’ ability to choose their own nominee.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 580 (2000) (emphasis added); see *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (“the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.”); see also *Timmons*, 520 U.S. at 373 (Stevens, J., dissenting) (“[T]he right to be on the election ballot is precisely what separates a political party from any other interest group.”).

Conceiving of political parties narrowly and almost exclusively as ideological speakers, as the *Timmons* Court did, precludes holistic consideration of the diverse interests implicated by anti-fusion laws. This view stands at odds with a perspective on political parties that emphasizes their importance as *organizations* with the unique capacity to mobilize and represent broad coalitions. Among all our civic associations, political parties are the *only* institutions capable of delivering

political responsiveness by enacting legislation. Editorials in the *New York Times* and the *Wall Street Journal* do not get policies enacted; policies are enacted when political parties organize representatives and citizens into coalitions that can deliver votes to turn the levers of government.

The *Timmons* Court failed to acknowledge the severe burdens anti-fusion laws place on a minor political party's ability to identify, appeal to, inform, organize, mobilize, and raise money from party supporters. Lack of access to the ballot with a party's first-choice candidate necessarily impairs a political party's ability to do this work in service of building coalitions and meaningful networks. As the only institutions capable of political organization at the scale necessary to produce accountability and responsiveness in modern democracies, political parties are key intermediaries between citizens and government. They can serve in that intermediary function only if they have actual ties to broad cross-sections of their constituents; and they do that work through political organizing, not just through political speech.³

Learning from the U.S. Supreme Court's error, this Court should consider the full scope of the harm and chilling effect of anti-fusion laws on core speech *and associational* rights and the ways that anti-fusion laws undermine minor political parties' organizational capacity to build networks with meaningful ties to the electorate.

II. Developments Since *Timmons* Show That the Two-Party Duopoly Has Failed To Deliver Political Responsiveness or Stability

The *Timmons* Court's suggestion that a state has a legitimate interest in protecting the dominance of the two major political parties not only defied the First Amendment's basic commitment to political neutrality, *see Williams*, 393 U.S. at 31-32, but also depended on the unsupported presumption that an exclusionary two-party system facilitates "political stability."

³ See generally Tabatha Abu El-Haj & Didi Kou, *Associational Party Building: A Path to Rebuilding Democracy*, 122 Colum. L. Rev. Forum 127 (2022).

There was no empirical evidence for that proposition in 1997, and nor have the intervening twenty-six years produced any such support. The two-party duopoly has not resulted in “political stability” or good governance. Instead, it has contributed to political *instability* and fanned the flames of extremism on both sides of the political spectrum. It is beyond cavil that neither major party today responds to the preferences of the median voter.⁴

The *Timmons* Court believed the two-party duopoly brought political stability by forcing together coalitions that encompass diverse groups and negotiate compromises between competing interests. Thus, to win the competition for as broad a share of the electorate as possible, the two parties are discouraged from adopting extreme or insular viewpoints and influence officials to moderate toward the views of the median voters in the electorate.

While an attractive theory, the intervening years have demonstrated the limitations of its prescriptions. Through much of the twentieth century, the Democratic and Republican Parties competed in a “multiparty system within a two-party system” involving overlapping coalitions and broad factions. Today by contrast, the two-party system’s electoral incentives pull the major parties and their candidates into narrow social networks comprised of unrepresentative donors and activists and a variety of factors from partisan gerrymandering to partisan geographic sorting have converged to suppress competition in election districts.⁵

For a variety of reasons, however, competitive elections are missing in contemporary American elections, including in most Wisconsin elections.⁶ Vote totals from Wisconsin for the

⁴ Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* 287 (1st ed. 2008) (“Whatever elections may be doing, they are not forcing elected officials to cater to the policy preferences of the ‘median voter.’”); Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* 163 (2012) (“Whatever empirical validity median voter models may hold with regard to the professed positions of parties and candidates, the findings . . . clearly show that actual government policy does not respond to the preferences of the median voter.”); Seth E. Maskett, *No Middle Ground: How Informal Party Organizations Control Nominations and Polarize Legislatures* 24–25 (2009) (“[c]andidates no longer converge on the median voter”).

⁵ See Abu El-Haj, *Networking*, at 1264.

⁶ A standard measure of a competitive race is a margin of victory that is less than 5%.

2024 general election show that there were *only three* competitive federal races (*i.e.*, President, one Senate seat, and one House seat—the WI 3rd) and only 13 of the 99 races for the Wisconsin State Assembly were competitive.⁷ This lack of competition and thereby electoral accountability has had a plethora of corrosive effects to democratic governance and makes it far less likely that the major parties need to appeal to the median voter in order to win elections. Instead, the two major political parties can insulate themselves from popular scrutiny and influence while fostering an environment openly hostile to democracy itself.⁸ This reality undermines the theory that the two-party duopoly promotes political stability; that theory only works if elections are competitive.

Given its promised benefit to political accountability, one important measure of the success of the two-party duopoly is voter confidence in the government. Contemporary voters, however, lack of confidence in the government, nullifying the conclusion that the two-party system represents, channels, and rationalizes diverse and conflicting interests in American society.

The clearest indication that the two-party duopoly has failed is the long-standing erosion of voter confidence in our government and electoral systems. Polling suggests that, in the late 1950s, “about three-quarters of Americans trusted the federal government to do the right thing almost always or most of the time.”⁹ By sharp contrast, today only one-in-five Americans report trusting the government, and the share of Americans who express unfavorable opinions of both

⁷ See Politico, “Wisconsin House Election Results,” available at <https://www.politico.com/2024-election/results/wisconsin/house/>; Wisconsin Public Radio, “Election Results 2024: Wisconsin State Assembly,” available at <https://www.wpr.org/election-results-2024-state-assembly> (showing a greater than 5% margin only in districts 21, 26, 43, 46, 51, 53, 61, 88, 89, 91, 94, 95, and 96 – a total of 13 districts out of 99 districts up for election).

⁸ See Jacob M. Grumbach, *Laboratories Against Democracy* 12 (2022) (“By endowing states with authority over election administration and other key levers of democracy, national parties can use the states that they control to rig the game in their favor by limiting the ability of their political enemies to participate.”); Michael J. Klarman, *Foreword: The Degradation of American Democracy — And the Court*, 134 Harv. L. Rev. 1, 42–66 (2020) (noting various assaults on democracy, including political violence, “aggressively gerrymandered legislative districts; purged [] voter rolls; [] countless impediments to registration and turnout, especially for the poor, the young, and people of color; circumvented and obstructed voter initiatives; and undermined [election] results”).

⁹ Pew Research Center, *Public Trust in Government: 1958-2022* (June 6, 2022), <https://perma.cc/L25C-GV4P>.

major parties has only grown in the last several decades from just six percent in 1994 to over twenty-seven percent.¹⁰

An NPR/Marist Poll prior to the last presidential election found that sixty-two percent of respondents had little or no confidence in the Democratic Party, while sixty-eight percent had little or no confidence in the Republican Party.¹¹ Only twenty-five percent of those polled had confidence in Congress, and “almost two-thirds of Republicans expressed little confidence in Congress,” despite the fact that their party controlled it.¹² Political stability suffers when critical masses of the population lose faith that the fundamental mechanisms of democratic accountability can work. This empirical reality casts doubt on the claim that the two-party duopoly delivers political responsiveness and stability.

Fusion would benefit the stability of our democracy by productively channeling Wisconsinites’ frustration with the two major parties. Pluralities of Americans have rejected the two-party duopoly and, lacking clear or meaningful alternatives, now identify as Independents. In Wisconsin, more than 31% of voters either identify as unaffiliated independent voters or have voted in party primaries for multiple parties.¹³ These voters lack the stabilizing influence of a political home where they can channel their political energy and exercise their constitutional rights.

Fusion provides alternative avenues for these residents to meaningfully associate outside of the two major parties. Instead of spending resources on fielding spoiler candidates, fusion empowers minor political parties to engage broader swaths of the electorate in party-building activities and meaningfully contribute to election outcomes and policymaking. When a minor

¹⁰ Pew Research Center, *As Partisan Hostility Grows, Signs of Frustration With the Two-Party System* (Aug. 9, 2022), <https://perma.cc/AS2R-5XDA>.

¹¹ Marist, *Americans Lack Confidence in New Congress’ Ability to Reach Bipartisan Agreement* (Dec. 15, 2022), <https://perma.cc/Q2U3-G4SP>.

¹² *Id.*

¹³ Independent Voter Project, “*Wisconsin Voter Registration & Party Affiliation Statistics*,” available at <https://independentvoterproject.org/voter-stats/wi>.

political party can show that it can deliver votes, the party increases the likelihood that the candidates will aim to satisfy the interests of a more representative electorate.¹⁴ Officials within the two major parties then also benefit from association with a broader cross-section of constituents as fusion empowers these officials to better represent the will of the electorate, providing benefits to democratic accountability and the stability of the broader political system.

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

Fusion gives those disaffected by the major parties meaningful avenues and incentives to constructively associate outside of the two major parties while *decreasing* the likelihood of a spoiler candidate and *increasing* the likelihood that the winning candidate attracts broad majority support. Fusion also allows voters who have rejected the platforms of the two major political parties to participate constructively in our democracy by voting for a candidate on a party line that most aligns with their policy goals.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to hold that the challenged anti-fusion laws violate the Wisconsin Constitution and that future elections should permit cross-nominations on the ballot.

¹⁴ Tabatha Abu El-Haj, [A Model for Associational Party Building](#), In Depth Report, New America Foundation (May 7, 2026).

Dated this 17th day of July, 2026.

Respectfully submitted,

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