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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

MAKE ENDS MEET PARTY; MONTANA LIBERTARIAN PARTY; GERALDINE CUSTER; BEN JOHNSON; NINA AUNE; CARL ANDERSON; RUSS NELSON; SHAYNE MORGAN; and MICHAEL EISENHAUER, *Plaintiffs*, vs. CHRISTI JACOBSEN, in her official capacity as MONTANA SECRETARY OF STATE, *Defendant*.	Cause No. _____ **Complaint**

INTRODUCTION

1. It is taken for granted that our system of politics is one of two parties. But that is not the natural state of politics in Montana. Instead, the two-party system exists because the two most dominant parties have codified their positions of power, stifling the growth of third parties.

2. In the territorial era and the early years of statehood, third parties had a major presence in federal, state, and local politics. The Democratic and Republican parties were themselves relatively new, and they were subject to real competition. Shifting coalitions between the Democrats, Republicans, and Populists, in particular, led to significant worker-focused reforms and shaped the priorities of the major parties. Factions within the Democratic and Republican parties split off to find allies across the political divide. New parties popped up to respond to the challenges of the day. The political landscape was dynamic and responsive to the needs of the moment.

3. Third parties influenced political outcomes and developed their brand by cross-nominating candidates alongside major parties. Cross-nomination fusion ("fusion") enables voters to support a party and its platform without risking a throw-away vote. For example, the second Chief Justice of the Montana Supreme Court, William Y. Pemberton, was elected in 1892 before Montana judicial races became nonpartisan. Both the Democrats and the Populists nominated Pemberton, and during the general election, voters could choose to vote for "Pemberton, Democrat" or "Pemberton, Populist." Pemberton's total vote count easily surpassed 50%, but the Republican candidate would have won in a three-way race. And Pemberton's successor, Theodore Brantley, won as a Republican-Silver Republican-Populist fusion candidate.

4. Fusion played a major role in politics at the state and local levels until the early 1900s. Third parties—not only the Populists—were deeply influential.

5. But, in the early 1900s, following a national trend, Montana banned fusion voting. In Montana, the ban came about in 1907, after Republicans gained control of the Legislature and overrode a veto from the Governor, who had been a fusion candidate. This is not because fusion inherently advantages Democrats. In fact, fusion was used to support Republican candidates, too.

6. Then as now, the ban served no purpose other than to entrench two-party power. Legislation repeatedly has been introduced to repeal the ban. But, despite bipartisan support, the interests of the major parties are too strong.

7. The ban on fusion is unconstitutional because it infringes upon Montanans' rights and furthers no legitimate, let alone compelling, interest. It violates Montanans' right of free speech by preventing candidates and parties from associating. It violates equal protection rights because it is pure political-idea discrimination. And it violates the right of suffrage by disallowing third-party voters to meaningfully influence general election outcomes.

JURISDICTION AND VENUE

8. Plaintiffs bring this action under the Montana Constitution. Article VII, Section 4 of the Montana Constitution and § 3-5-302, MCA provide this Court with original jurisdiction.

9. This Court has jurisdiction to grant declaratory relief pursuant to § 27-8-201 *et seq.*, MCA, and injunctive relief pursuant to § 27-19-101 *et seq.*, MCA.

10. Venue is proper in Lewis & Clark County under § 25-2-126(1), MCA.

PARTIES

A. Make Ends Meet Party

11. The Make Ends Meet Party is a nascent Montana political party centered on affordability. It believes that the two-party system is failing Montanans because it reflects the interests of billionaires and special interests, not voters. Its priorities do not align neatly with either major party, but some candidates within both parties share its values.

12. The Make Ends Meet Party focuses on meeting the basic needs of Montanans. It believes that all Montanans deserve accessible and affordable housing and childcare; reliable, affordable, and accessible healthcare; good jobs with good wages and benefits; and affordable, healthy food that supports farmers, ranchers, and consumers. The party is open to exploring all solutions that would support these goals, without regard to partisanship.

13. The Make Ends Meet Party wants to engage in fusion. The party understands that voters are concerned about wasting their votes, and so votes for third party candidates often register as protest votes. It would gather signatures to support candidates also running in major party primaries if those candidates would have the opportunity to accept the nomination. And if—as the party believes—the party's mission and candidates resonate with voters, the party is likely to qualify as a major party in the future. But, as a result of the fusion ban, a candidate is required to choose only one party affiliation on the ballot, and so any such efforts currently would be futile.

14. The Make Ends Meet Party's leadership reflects a diversity of experience and partisan affiliation. Members of its leadership committee have voted for Republicans, Democrats, Independents, and write-in and third-party candidates. They are renters, manufactured home residents, and single-family homeowners. They work for a living. They recognize that we are living through a time of extreme income inequality and political polarization, and they believe that the Make Ends Meet Party and fusion voting offer solutions to both problems.

B. The Montana Libertarian Party

15. The Montana Libertarian Party has long been the third largest political party in Montana. It qualifies as a major party in Montana due to its vote share in recent elections. It holds a primary, and winning candidates participate in the general election.

16. The Montana Libertarian Party platform does not align with that of either major party. It believes in personal liberty, non-interventionist foreign policy, and free markets. It supports free speech and free association and believes strongly that the government should not interfere with political speech.

17. At times, major party candidates share some or many values with the Montana Libertarian Party. During the 2024 election cycle, the Democratic gubernatorial candidate and the Republican U.S. senatorial candidate both publicly supported Libertarian National Guard legislation, which would prevent National Guard members from active combat overseas absent congressional action.

18. The Montana Libertarian Party currently cannot consider cross-nominating major party candidates—or encouraging Libertarians to run in major party primaries—because of the ban on fusion voting. While two parties technically can nominate the same candidate, the candidate may only run with one party designation. If Montana did not ban fusion voting, the party would continue to nominate and support its own candidates. But it would also consider fusing.

C. Individual Voter Plaintiffs

19. Individual Voter Plaintiffs ("Voters") are qualified, registered voters in the State of Montana who seek the opportunity to support third party candidates in future elections.

20. Geraldine Custer is a registered voter who resides in Forsyth, Montana. Custer has conservative values and has long been a Republican, but the current level of political polarization has led her to question whether the major parties are able and willing to respond to the needs of average Montanans. A longtime public servant, Custer hopes that meaningful third-party participation in politics would increase candidates' responsiveness to voters' needs.

21. Ben Johnson is a registered voter who resides in Philipsburg, Montana. Although he generally votes for Democratic candidates, Johnson has also voted for third party and Republican candidates. Often, where Johnson's political priorities align with those of a majority of voters—such as his support for campaign finance reform—Johnson finds that the two-party system will not respond because politicians do not share voters' incentives.

22. Nina Aune is a registered voter who resides in Clinton, Montana. Aune was once very active in local Democratic politics, but she now focuses on issues more than party politics, especially issues of affordability and democracy. She believes that neither party is sufficiently focused on the issues that matter the most to her today—particularly affordable healthcare and housing.

23. Johnson, Aune, and Custer seek the opportunity to vote for candidates on third-party lines in the future.

D. Candidates

24. Carl Anderson is the current Democratic candidate for Montana Senate District 34. He previously ran as the Democratic candidate for Montana House District 67. Anderson's priorities are not dictated by national politics and include protecting and supporting the rights outlined in the Montana Constitution and advocating for housing and infrastructure.

25. Russ Nelson is the longest-serving mayor of Belgrade, Montana and retired in 2025 after 22 years in the office. After stepping down as mayor, Nelson ran in the Republican primary for House District 67. He ran as a Republican because he is and has long been politically conservative, but leadership within the Montana Republican Party used their influence to tell primary voters that Nelson, along with many other candidates in contested primaries, was not Republican. Nelson lost the primary to a candidate supported by state party leadership. He remains interested in public service and, as a former mayor and banking executive, has expertise to offer.

Unless the system is reformed, however, he will again be boxed out by central party leadership.

26. Shayne Morgan is a current Independent candidate for House District 76. Morgan is not running as a Democrat or a Republican because he is not a Democrat or a Republican, and he believes that the major parties have alienated Montanans. Running as an Independent requires significantly more resources, due to the signature requirements, and also reduces resources flowing in.

27. Michael Eisenhauer is a current Independent candidate for Montana's Second Congressional District. He resides in Great Falls and is a retired Army Colonel and current part-time traveling cardiologist. Dr. Eisenhauer is not running as a Democrat or a Republican because he is not a Democrat or a Republican. To qualify as an Independent candidate, Dr. Eisenhauer was forced to expend extraordinary resources to collect signatures—a burden that major party candidates do not face. Dr. Eisenhauer feels strongly that the major parties are not responsive to the needs of the voters and that meaningful answers to the issues that face Montanans require meaningful opportunities for participation by Independents and minor party candidates.

28. Anderson, Nelson, Morgan, and Dr. Eisenhauer (collectively, "Candidates") seek the opportunity to run on third-party lines in the future.

E. Defendant

29. Defendant Christi Jacobsen is the Montana Secretary of State and the "chief election officer of [the] state." Section 13-1-201, MCA. Her duties include

receiving declarations for nomination to public office, § 13-10-201, MCA, certifying candidate names for inclusion on general election ballots, § 13-12-201, MCA, and certifying election results, § 2-15-401(1)(f), MCA.

COMMON ALLEGATIONS

30. Montana has a rich history of third-party politics. That history ought to have carried forward without government interference, but the 1907 ban on fusion stifled the further development of third parties and insulated the Democrats and Republicans from meaningful competition.

31. Today, Montana prohibits fusion through two statutes rooted in the 1907 ban. First, candidates are prohibited from seeking the nomination of two or more parties: "For a partisan election, an elector may not file a declaration for more than one party's nomination." Mont. Code Ann. § 13-10-201(5). Second, if two or more political parties nominate the same candidate, the candidate must, "not later than 10 days after the [primary], file written notification with the secretary of state or election administrator indicating the party under which the individual's name is to appear upon the ballot for the general election." Mont. Code Ann. § 13-10-303. These two statutes are collectively referred to as the "fusion ban."

32. The fusion ban intentionally and effectively suppresses third party growth and participation in Montana politics.

33. The fusion ban interferes with association between third parties, third party voters, and third party candidates by forcing Democratic and Republican

candidates to reject third party nominations, even where the third party meets all requirements to appear on the ballot.

34. The fusion ban has the purpose and effect of fencing third parties out of general elections. It does not substantially further any other government interest.

35. The fusion ban prevents third party voters from meaningfully influencing the outcome of general elections, burdening their right of suffrage. Further, by forcing candidates to choose between a third-party nomination and a meaningful opportunity to compete in the general election, the fusion ban nullifies the votes of those who nominate a third-party candidate through the primary process when that candidate is also nominated by a major party.

A. Historical Background

36. Conventional wisdom holds that our system of politics is necessarily a two-party system. History tells a more nuanced story.

37. The Democratic and Republican parties did not exist at the nation's founding. Their continued dominance is neither natural nor inevitable.

38. It is true that, in a winner-takes-all system, two major parties will struggle for power at any given moment. But until governments passed laws to restrict the influence of third parties, the two major parties were subject to replacement and reform as a result of third parties' influence. Fusion was a primary mechanism by which third parties shaped national debates and changed political outcomes.

39. For example, by fusing, third parties played a significant role in defeating slavery, and those third-party coalitions eventually came together to create the Republican Party. During the late antebellum era, "minor parties opposed to slavery used cross-nominations to elevate abolition into the political mainstream, amassing and then leveraging their collective power to found a new major party, the Republican Party." Jeff Berryhill & Ian Gavigan, *Fusion Voting and A Case Study in Restrictive Two-Party Politics*, 76 Rutgers U.L. Rev. 913, 916 (2024).

40. Prior to 1889, Montana's territorial government did not print ballots for voters. Instead, parties printed and distributed their own tickets for the general election, and votes were cast on these tickets or through voice vote. This system was consistent with how elections were run elsewhere in the United States during this time.

41. Under the party ticket system, parties would at times "fuse" by nominating the same candidate for office. When the tickets were collected and the votes counted, all votes for that candidate would count.

42. In 1889, the same year that it achieved statehood, Montana adopted the "Australian ballot," which required the state to print ballots listing all general election candidates. The Australian ballot made it easier for voters to vote in secret and to split their ticket. *See Dickerman v. Gelsthorpe*, 19 Mont. 249, 47 P. 999, 1002 (1897) ("The new system furnishes the latest and most modern safeguards evolved

from practical experience to secure the individual volition and independence of the voter, and prevent fraud and coercion in any form.").

43. Although the logistics of fusion necessarily differed before and after the state adopted the Australian ballot, the fundamentals remained the same. Before the Australian ballot, parties would list the same name on their separate tickets. After the Australian ballot, a cross-nominated candidate would appear twice (or more) on the official ticket, and voters could choose to vote for the candidate as the nominee of one of the parties.

44. The format of the ballot—referred to as "disaggregated" fusion—was the subject of some debate shortly after the adoption of the Australian ballot. The debate, however, was put to rest by an official Attorney General memorandum issued by Montana's first Attorney General, Henri Haskell, who determined that each candidate would appear on a separate line of the ballot for each nominating party.

45. The Democratic and Republican Parties were the two biggest parties at the time. But they saw significant competition from, among many others, the Populist (or "People's") Party, the Labor Party, the Independent Democrats, the Independent Republicans, and the Silver Republicans. Moreover, reform-minded factions of the major parties constantly created new political parties, some of which were temporary or purely local.

46. In Montana and elsewhere, third parties were more likely to support female candidates. For example, Ella Knowles ran as the Populist candidate for Attorney General in 1892. In 1896, she was elected as a delegate to the national

Populist political convention—the first woman in Montana to serve in that capacity. And later, after Jeannette Rankin lost the Republican primary for the Senate in 1918, she was nominated as the National Party candidate.

47. Shifting coalitions between and among major parties and third parties formed to meet the needs of the moment. For example, silver coinage and workers' rights were significant issues in Montana before and after adoption of the Australian ballot, and parties aligned, severed ties, and realigned in support and opposition to policies directed at these issues.

48. Throughout this time, third parties cross-nominated Republican and Democratic candidates. The Populist Party formed as a national party in 1892 and was especially powerful through the mid-1890s in Montana and elsewhere. It often—but not exclusively—fused with the Democratic party.

49. Fusion led to significant political reforms. Across the states, such reforms included the adoption of the Australian ballot, the graduated income tax, women's suffrage, and state initiative and referendum processes. In Montana, candidates' desire for Labor and Populist support led to worker-focused reforms, including the eight-hour workday for miners in Butte.

50. Fusion also contributed to the electoral success of many state and local politicians. For example, the second Chief Justice of the Montana Supreme Court, William Pemberton, ran as a Democrat-Populist fusion candidate.

51. The results of fusion from 1889 (when the Australian ballot was adopted) to 1907 (when fusion was banned) demonstrate its popularity. In 1892,

Montanans elected a fusion candidate for Chief Justice of the Montana Supreme Court. In 1896, Montanans elected fusion candidates for Governor, Lieutenant Governor, Secretary of State, Attorney General, Treasurer, Auditor, Superintendent of Public Instruction, and Associate Justice of the Montana Supreme Court. That same year, fusion presidential candidate Williams Jenning Bryan won in Montana, though he lost the national election. In 1898, Montanans elected a fusion candidate for Chief Justice of the Montana Supreme Court. In 1902, Montanans elected a fusion candidate for Associate Justice of the Montana Supreme Court. In 1904, Montanans elected fusion candidates for Governor and Lieutenant Governor. And in 1906, Montanans elected fusion candidates for the U.S. House and Associate Justice of the Montana Supreme Court.

52. Fusion was also widely used at the local level. For example, 20 fusion candidates were on the ballot in Missoula's 1894 city elections.

53. Fusion has no inherent advantage for one major party or the other. But due to recent alliances between the Populists and the Democrats, which had dominated statewide politics in the 1890s, Republicans sought to restrict fusion after gaining power in the Montana Legislature in the early 1900s. *See* Lynn Adelman, *The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court*, 56 Idaho L. Rev. 107, 110 (2020) (describing similar efforts in other states). Bills to ban fusion were introduced in 1903 and 1905. The 1903 bill failed, and the 1905 bill was vetoed by Governor Joseph Toole, who had been elected as a fusion candidate.

54. A proposed ban was introduced again in 1907, and it passed the Montana legislature on party lines. Governor Toole again vetoed the bill, but Republicans, joined by two Democrats, had sufficient numbers overrode the veto. The ban on fusion went into effect.

55. Like the 1905 bill before it, the 1907 fusion ban was bundled with another, wholly unrelated provision. That provision banned what was described as the "endless chain"—a truly corrupt practice in which employers distributed pre-marked ballots to employees. An employee would cast the ballot reflecting the employers' choices, collect another ballot, and share that ballot with the next employee in line, who would repeat the process. Democrats agreed that the endless chain should be prohibited, but legislators supportive of the fusion ban refused to disentangle the provisions.

56. Most public criticism of fusion at the time reflected partisan and political considerations. Although some described fusion ballots as potentially confusing, such arguments were made to bolster partisan objections. Evidence does not suggest that voters or election officials were confused by fusion voting or its implementation.

57. By the early 1910s, a new third party—Theodore Roosevelt's Progressive ("Bull Moose") Party, a Republican offshoot—gained prominence. Due to near-universal bans on fusion voting, the Progressives and Republicans could not cross-nominate candidates. Woodrow Wilson won the 1912 election, defeating former president Roosevelt (Progressive) and incumbent president Taft (Republican) with less than 42% of the vote.

58. In Montana, Progressives, Republicans, and Socialists in Granite County attempted to cross-nominate candidates in 1914 despite the fusion ban. They argued that a later statute superseded the 1907 law and that the law was unconstitutional under the 1889 Constitution. The Montana Supreme Court rejected the challenge. *State ex rel. Metcalf v. Wileman*, 49 Mont. 436, 143 P. 565 (1914). The Court was not asked to and did not consider the legal theories presented in this Complaint, which arise under the 1972 Constitution.

B. Ongoing Impacts

59. The two-party system effectively prevents legislation that would reverse the 1907 fusion ban because fusion voting is adverse to the major parties' interests.

60. The history of political parties demonstrates that, absent government interference in the form of a ban on fusion, political parties develop, grow in strength, and die out as voters' priorities change. The ban on fusion suppresses the development of third parties.

61. Since 1907, many attempts have been made to bring fusion voting back to Montana. All have failed, and similar efforts will likely fail again because fusion voting is adverse to the major parties' interests. The two-party system continues to box out meaningful competition.

62. In the last 25 years alone, four bills with bipartisan sponsorship were introduced to legalize fusion voting.

63. In 2003, 2005, 2007 and again in 2011, pro-fusion legislation was introduced. The 2003,[1] 2005,[2] and 2007[3] bills would have directly amended the code to authorize fusion voting, while the 2011 bill[4] would have submitted a referendum to Montana voters. The 2003 bill died on the House floor, and the other three died in committee.

64. Few functional democracies operate with a strict two-party system, but the ban on fusion voting, coupled with single-member electoral districts, intentionally and unnaturally stifles the development of third parties.

65. The limited relevance of third parties in our system carries significant harms for voters. *See generally* Exhibit A, Expert Report of Lee Drutman.

66. When a Democrat and Republican are both on the ballot, a vote for a third-party candidate registers as a protest vote rather than a vote for a viable candidate. If fusion were legal and the third-party cross-nominated a major-party candidate, the voter could support her party without throwing away her vote.

67. The two-party system discounts the views of the political center, where many voters situate themselves. Relatively few voters ultimately select the major-party candidates through partisan primaries, and those voters tend to be the most partisan. If fusion were legal, a party could develop at the center to signal

[1] H.B. 503 (58th Leg. 2003), full text available at https://bills.legmt.gov/#/bill/20031/LC0994?open_tab=bill.
[2] S.B. 230 (59th Leg. 2005), full text available at https://bills.legmt.gov/#/bill/20051/LC1116?open_tab=bill.
[3] S.B. 280 (60th Leg. 2007), full text available at https://bills.legmt.gov/#/bill/20071/LC1105?open_tab=bill.
[4] S.B. 257 (62d Leg. 2011), full text available at https://bills.legmt.gov/#/bill/20111/LC1955?open_tab=bill.

moderatism to voters. Likewise, parties could develop at the ends of the political spectrum, which would help voters better understand candidates' views and determine which candidates' priorities best align with their own.

68. The two-party system is driven by national party politics, and it cannot consider the interests of Montanans, which may differ from those of the nation as a whole. If fusion were legal, home-grown parties—such as the Make Ends Meet Party—could develop, influence electoral outcomes, and maintain ballot status. Such parties will better reflect the needs of Montanans.

69. The two-party system is neither responsive nor stable. It imposes significant burdens on Montanans.

CLAIMS FOR RELIEF

COUNT I
Violation of the Rights of Speech and Assembly
Mont. Const. art. II, § 7

70. Plaintiffs incorporate all foregoing allegations.

71. "No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty. In all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts." Mont. Const. art. II, § 7; *see also* Mont. Const. art. II, § 6 ("The people shall have the right peaceably to assemble, petition for redress or peaceably protest governmental action.").

72. Article II, § 7 was presented to the voters who ratified the Constitution as "enlarging a citizen's freedom to express himself." *See* Proposed 1972 Constitution for the State of Montana: Official Text with Explanation ("Voter Pamphlet").[5]

73. The framers of the Montana Constitution deliberately created additional protections for speech, beyond those afforded by the U.S. Constitution and the 1889 Constitution, by expressly including protection for expression.

74. The fusion ban violates Montanans' fundamental right of free speech by interfering with the associational rights of third parties, third-party voters, and cross-nominated candidates. Montana law requires a candidate to choose to associate with only one party, even where two parties meet all requirements for the ballot.

75. The fusion ban also violates Montanans' free speech rights by prohibiting voters from freely expressing their choice of candidate on the ballot.

76. The fusion ban is subject to strict scrutiny.

77. It serves no compelling interest, and even if it did, it is not narrowly tailored.

COUNT II
Violation of the Right to Equal Protection
Mont. Const. art. II, § 4

78. Plaintiffs incorporate all foregoing allegations.

79. "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation,

[5] Available at https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1049&context=montanaconstitution.

or institution shall discriminate against any person in the exercise of his civil or *political rights* on account of race, color, sex, culture, social origin or condition, or *political* or religious *ideas*." Mont. Const. art. II, § 4 (emphasis added).

80. "Article II, Section 4, of the Montana Constitution provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445. Even a law containing apparently neutral classifications may nonetheless "violate equal protection if in reality it constitutes a device designed to impose different burdens on different classes of persons." *Id.* ¶ 16 (internal quotation marks and brackets omitted).

81. The fusion ban discriminates against third parties and third-party voters on the basis of "political . . . ideas."

82. The discrimination is intentional. The purpose of the 1907 ban—which carries through to the present—is to restrict third-party influence on electoral politics.

83. Because the fusion ban intentionally discriminates on the basis of a protected classification, it is subject to strict scrutiny.

84. The ban is also subject to strict scrutiny because it restricts the exercise of the fundamental rights of free speech and suffrage.

85. The ban serves no compelling interest, and even if it did, it is not narrowly tailored.

COUNT III
Violation of the Right of Suffrage
Mont. Const. art. II, § 13

86. Plaintiffs incorporate all foregoing allegations.

87. "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13. "[T]he Montana Constitution affords greater protection of the right to vote than the United States Constitution." *Mont. Dem. Party v. Jacobsen*, 2024 MT 66, ¶ 17, 416 Mont. 44, 545 P.3d 1074.

88. The fusion ban "impermissibly interferes" with "all electors' right to vote generally" because it deprives all voters of any opportunity to cast an effective vote for a third-party candidate despite compliance with all regulations governing ballot access. *Id.* ¶ 34.

89. Thus, the ban triggers strict scrutiny. It fails strict scrutiny because it serves no compelling interest and because even if it did serve a compelling interest, it is not narrowly tailored to that interest.

90. At minimum, the ban triggers the middle-tier analysis applicable to laws that minimally burden voting rights. *Id.* ¶ 38. Rational basis review has no place "when the right to vote is implicated given the protections afforded by our most basic right under the Montana Constitution." *Id.* ¶ 37.

91. Applying middle-tier scrutiny, the State cannot meet its burden of "show[ing] that the classification is reasonable (i.e., not arbitrary and justified by relevant and legitimate state interests)." *Id.* ¶ 40; *see also id.* ("Given the importance

of the right to vote in our Constitution, we think it improper for us to imagine possible reasons the Legislature has enacted a law that burdens the right to vote."). But even if it could, any potential government interest cannot be "more important than the infringement of the right." *Id.* ¶ 41.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter:

a. A declaration that §§ 13-10-201(5) and 13-10-303, MCA, are unconstitutional;

b. An order permanently enjoining Defendant and all agencies, agents, and employees from enforcing the challenged portions of §§ 13-10-201(5) and 13-10-303, MCA;

c. An order granting any other appropriate relief that may be necessary to enjoin implementation of the challenged portions of §§ 13-10-201(5) and 13-10-303, MCA;

d. An award of attorney's fees and costs incurred in bringing this action; and

e. Any further relief this Court deems just and appropriate.

Plaintiffs respectfully request a decision on the merits in time to participate in the 2028 general election.

Respectfully submitted this 5th day of October, 2026.

/s/ *Constance Van Kley*
Constance Van Kley
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Attorney for Plaintiffs Individual Voters, Candidates, and Make Ends Meet Party

/s/ *Matthew Monforton*
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Attorney for Plaintiff Montana Libertarian Party

Exhibit A
Expert Report of Lee Drutman

Expert Report: Partisan Polarization, Two-Party Systems, and Fusion Voting

Lee Drutman, Ph.D.

Introduction

This case presents a constitutional challenge to Montana's prohibition on fusion voting. Fusion voting permits candidates to accept nominations from more than one political party and appear on the general election ballot under each party's label. Voters supporting that candidate may choose which party line to vote under, with all votes across party lines counted together in the candidate's total. Two states—Connecticut and New York—maintain fusion systems today.

When the Supreme Court upheld Minnesota's fusion ban in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the majority relied heavily on an empirical claim: that two-party systems promote "political stability" and states may therefore restrict fusion to preserve that stability. This rationale reflected conventional wisdom among American politics scholars in the mid-1990s—a period when the discipline viewed the U.S. party system as fundamentally sound, if occasionally prone to partisan excess that would self-correct through electoral competition.

Nearly three decades later, that scholarly consensus has collapsed. My investigation examines three core questions: (1) Does the American two-party system continue to generate the stability that *Timmons* presumed? (2) What does comparative evidence reveal about the relationship between party systems and democratic stability? (3) Would fusion voting exacerbate partisan conflict or provide a mechanism for reducing it?

My conclusions can be stated directly. The two-party system no longer functions as a stabilizing force in American democracy. By every standard measure of polarization—roll-call voting patterns, geographic sorting, affective partisan hostility—the current system has produced unprecedented levels of dysfunction. Far from moderating conflict, the pure binary competition between two internally homogeneous parties has created what I have termed a "doom loop" of escalating partisan warfare, in which each round of hardball politics justifies the next, with no obvious resolution.

The comparative evidence is equally clear: democracies with more than two parties consistently outperform two-party systems on measures of stability, voter satisfaction, minority representation, and policy responsiveness. The United States is a global outlier, not a model.

Finally, both historical evidence from fusion's widespread use in the late nineteenth century and contemporary experience in Connecticut and New York demonstrate that fusion voting serves as a coalition-building mechanism that moderates rather than intensifies partisan conflict. By allowing voters to signal preferences beyond the binary choice and creating incentives for major-party candidates to build broader coalitions, fusion voting offers precisely the kind of cross-cutting dynamic that our current system desperately lacks.

The transformation of American politics since 1997 fundamentally undermines the empirical foundations of *Timmons*. Whatever stability arguments might have been plausible when that case was decided, they cannot withstand scrutiny today.

Qualifications

I am a Senior Fellow in the Political Reform program at New America, where I have conducted research and analysis on American political institutions, democratic reform, and electoral systems since October 2014.

I earned my Ph.D. in Political Science from the University of California, Berkeley in 2010, and my M.A. in Political Science from the same institution in 2005. My undergraduate degree is a B.A. in English and American Literature from Brown University, which I received in 1999.

My expertise centers on American political parties, partisan polarization, electoral systems, and democratic reform. I am the author of *Breaking the Two-Party Doom Loop: The Case for Multiparty Democracy in America* (Oxford University Press, 2020), which examines the structural causes of hyper-partisan polarization and makes the case for multiparty democracy as a solution. I am also the author of *The Business of America is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* (Oxford University Press, 2015), which won the 2016 Robert A. Dahl Award from the American Political Science Association for outstanding scholarship on democracy.

I have published extensively in peer-reviewed academic journals including *Political Research Quarterly*, *The ANNALS of the American Academy of Political and Social Science*, *Legislative Studies Quarterly*, and *Interest Groups & Advocacy*. I have also contributed a law review article on multiracial democracy to the *New York University Law Review* (2021) and written numerous chapters in edited volumes on electoral reform, polarization, and democratic governance published by leading university presses.

I have served on multiple expert committees addressing democratic reform and electoral systems. I recently served as a member of the American Academy of Arts and Sciences Committee on Multimember Districts (2024) and previously chaired the AAAS Committee on the Size of the United States House of Representatives (2021). I served as a member and Chair of the Subcommittee on Proportional Representation for the Electoral Reform Task Force, a committee chaired by Larry Diamond, Ned Foley, and Rick Pildes. I also served as Subcommittee Chair for the American Political Science Association Task Force on the Modernization of Congress (2019).

I have authored or co-authored major research reports on electoral reform, including "What We Know About Ranked-Choice Voting" (with Maresa Strano, 2021), "More Parties, Better Parties" (2023), "The Case for Multiparty Presidentialism in the US" (with Scott Mainwaring, 2023), and "How Democracies Revive" (2022). My research has been cited widely in academic and policy discussions of democratic reform.

I am a lecturer at The Johns Hopkins University, where I have taught courses on lobbying, policymaking, and governmental processes since Spring 2012.

My analysis and commentary on American politics and democratic reform appears regularly in major national publications including *The New York Times*, *The Washington Post*, *The Atlantic*, *Foreign Policy*, *Vox*, *Politico*, and *FiveThirtyEight*. I also author a newsletter on Substack titled "Undercurrent Events" with more than 6,000 subscribers.

I have been invited to present my research at leading universities and conferences, including Princeton, Harvard, Stanford, Northwestern, Yale, Cornell, UC Berkeley, UC San Diego, and the University of Notre Dame. My work on democratic reform has led *Washingtonian* magazine to

recognize me as one of Washington's Most Influential People from 2021 through 2025. In 2026, the Washington Post named me to its Next 50, recognizing fifty people who are reshaping our society.

My opinions in this case draw directly on my extensive research into partisan polarization, party systems, fusion voting, and comparative electoral institutions—topics I have studied intensively over many years and on which I have published widely.

The Threats to American Democracy

A substantial body of scholarly work indicates that American democracy faces serious challenges, with considerable evidence of governmental dysfunction and declining public trust. While multiple factors contribute to these challenges, extensive expert analysis identifies hyper-partisan polarization as a central driver.

The reasons why hyper-partisan polarization threatens democratic stability are straightforward. Democracy depends on a shared foundation of fairness around elections. Winning parties must win graciously and not use their newly-acquired powers to prevent their opposition from effectively challenging them in the next election. Losing parties must acknowledge that they have lost and acknowledge the legitimacy of the election. When this shared sense of fairness breaks down, violence or the threat of violence becomes the alternative. One pithy definition of democracy is that it is a system in which parties can lose elections.[1] Democracies die when one side believes that winning the next election is so important that it is willing to use extra-democratic means to achieve its goal.[2]

A core problem with hyper-partisan polarization is that it has a reinforcing feedback quality, what I've called "the two-party doom loop."[3] As the parties move further apart, they engage in more aggressive hardball tactics and rhetoric. These aggressive tactics further push them away from each other. This occurs both at the elite level and the mass level, both of which feed back on each other. The more partisan elites demonize their opponents to win elections, the more partisan voters punish leaders who compromise with "the enemy." The less compromise, the more the trust and goodwill and cooperation necessary for governing break down. All of these processes feed on one another in an escalating spiral of tit-for-tat.

Measuring Polarization in American Politics

The most common way political scientists measure polarization is through analysis of roll-call votes. Specifically, scholars measure how far apart parties have moved through a statistical scaling technique called DW-NOMINATE.[4]

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[1] Adam Przeworski, *Democracy and the Market*, (Cambridge; New York: Cambridge University Press, 1991), 1.

[2] Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018).

[3] Lee Drutman, *Breaking the Two-Party Doom Loop: The Case for Multiparty Democracy in America* (New York: Oxford University Press, 2020).

[4] https://voteview.com/about

By this measure, polarization in the U.S. Congress has increased steadily since the 1980s, reaching levels in the 2020s that are unprecedented in U.S. history.[5]

This method has also been applied to state-level roll-call voting. States have also become more polarized.[6]

Polarization is widely associated with instability in politics, because it makes necessary compromise more difficult, particularly in closely-divided polities along lines of geography, race, culture or other "formative rifts."[7]

Two-Party Systems and Stability

The United States is a two-party system. It has not been very stable in recent years.

However, in earlier eras, the United States was a relatively stable two-party system.

What made the U.S. more stable in earlier periods was not the two-party system per se, but rather the extent to which it contained overlapping, cross-cutting coalitions.

From the mid-1950s through the mid-1990s, the national two-party system operated more like a hidden four-party system, with liberal Democrats and liberal Republicans concentrated in the culturally liberal Northeast and Upper Midwest, the West Coast, and major cities, alongside conservative Democrats and conservative Republicans based in rural, traditional regions and the South.[8] Each faction represented distinct voting coalitions. None commanded a majority on its own. Bipartisan relationship-building emerged from the practical necessity of assembling cross-party coalitions on an issue-by-issue basis.[9]

The crucial insight here is that when the "two-party system" worked, it functioned as a multiparty system disguised within a two-party framework. When it became a genuine two-party system, this stabilizing dynamic collapsed.

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[5] Christopher Hare and Keith T. Poole, "The Polarization of Contemporary American Politics," *Polity* 46, no. 3 (2014): 411-29; Anthony Fowler, "Partisan Constituencies and Congressional Polarization," *Journal of Political Institutions and Political Economy* 5, no. 3 (2024): 335-61; Nolan McCarty, *Polarization: What Everyone Needs to Know* (Oxford University Press, 2019).

[6] Boris Shor and Nolan McCarty, "Two Decades of Polarization in American State Legislatures," *Journal of Political Institutions and Political Economy* 3, nos. 3-4 (2022): 343-70.

[7] Jennifer McCoy, Tahmina Rahman, and Murat Somer, "Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities," *American Behavioral Scientist* 62, no. 1 (2018): 16-42; Barbara F. Walter, *How Civil Wars Start: And How to Stop Them* (Crown Publishing Group, 2022).

[8] Lee Drutman, *Breaking the Two-Party Doom Loop*.

[9] On how bipartisan coalitions emerged from the internal diversity of both parties and decentralized committee-driven legislative processes during this period, see Lee Drutman, *Breaking the Two-Party Doom Loop*, 85-87; see also American Political Science Association, Committee on Political Parties, *Toward a More Responsible Two-Party System: A Report* (New York: Rinehart, 1950).

This transformation fundamentally reshaped American partisan competition. Since the 1990s, America has experienced a genuinely binary two-party system in which the two parties represent distinct, non-overlapping coalitions offering starkly different alternatives to voters.[10] This represents the purest expression of two-party competition—and the most dysfunctional.

Pure Two-Party Systems Generate Instability

Over the last two decades, American politics has fallen into a self-reinforcing dynamic of escalating partisan warfare. Binary zero-sum politics triggers ancient mental circuits of us-versus-them thinking. A fully divided two-party system without overlap fundamentally alters how citizens perceive one another—transforming political opponents who merit respectful disagreement into enemies requiring delegitimization and destruction.[11]

This polarization proves especially dangerous when the partisan balance of power remains narrow. The close national balance combined with repeated pendulum swings of partisan control creates perverse incentives for party leaders: During divided government, do not compromise; Hold out for unified control. During unified government, accomplish as much as possible by whatever means necessary, knowing that control could be temporary.[12]

Three features of the current political environment, filtered through the system of single-winner two-party elections, have undermined the ability of our political system to self-correct:

Geographic Sorting

The geographic sorting of American political parties represents a fundamental transformation from the overlapping coalitions of the mid-twentieth century. In 1960, Democrats and Republicans competed in most places because both parties contained liberal and conservative factions. The civil rights revolution of the 1960s set this realignment in motion, and by the 1990s, as "culture war" politics became central to national political debate, ideological liberals and conservatives sorted themselves into political parties.[13]

Nationalization

The nationalization of American politics represents the second major transformation. Starting in the 1960s, the growth of federal social and economic regulation made control of Washington far more

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[10] On the transformation to distinct, non-overlapping party coalitions, see Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* (Cambridge, MA: MIT Press, 2006); Matthew Levendusky, *The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans* (Chicago: University of Chicago Press, 2009).

[11] Lilliana Mason, *Uncivil Agreement: How Politics Became Our Identity* (Chicago: University of Chicago Press, 2018); Marilynn B. Brewer, "The Social Self: On Being the Same and Different at the Same Time," *Personality and Social Psychology Bulletin* 17, no. 5 (1991): 475-82.

[12] Lee Drutman, *Breaking the Two-Party Doom Loop*, 103; Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* (Chicago: University of Chicago Press, 2016).

[13] Lee Drutman, *Breaking the Two-Party Doom Loop*, 120-145; Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized America* (MIT Press, 2006).

consequential. By the 2010s, even state and local candidates emphasized national issues, and voting at all levels tracked sentiment toward the party in the White House.[14]

Culture War Dominance

The shift from economic to cultural conflict transformed American partisan competition from bargaining over "how much" questions (tax rates, spending levels) to zero-sum battles over "who are we" questions of national identity.[15]

Testing the Assumptions of *Timmons*

In the *Timmons* case, the majority held that states could ban fusion voting to protect the "political stability" provided by the two-party system.[16]

In 1997, when the justices heard the case, the assumption that a two-party system offers stability was consistent with the then-prevailing perspective among political scientists who studied American politics.

However, the scholarship on American political systems has evolved considerably since that time, and the political reality has changed even more dramatically. Many scholars who study American politics have historically had limited engagement with comparative political systems, potentially limiting cross-national perspectives that might have provided important context.

The dominant view in American political science during the 2000s regarded the American political system as reasonably functional. The median voter theory, sometimes called the "master theory"[17] of the discipline, remained influential, and while polarization was recognized as a trend, many anticipated it would naturally self-correct. They were wrong.

Starting in the 2010s, scholars began to express more serious concerns about partisan polarization in American politics. But it was not until the 2020s that American political scientists began to question the two-party system more fundamentally.

In 2024, more than 100 leading scholars, including myself, signed a public letter in support of fusion voting, noting:

"Today that two-party system is clearly under strain… Political parties are the essential institution of modern mass democracy because they uniquely organize representation for large groups of citizens and connect them to their government. When so many citizens are disengaged, parties struggle to provide their crucial representation and mediation functions. But while parties are necessary to

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[14] Drutman, *Breaking the Two-Party Doom Loop*, 146-162; Frances E. Lee, *Insecure Majorities* (2016).

[15] Drutman, *Breaking the Two-Party Doom Loop*, Chapter 4; Lilliana Mason, "A Cross-Cutting Calm: How Social Sorting Drives Affective Polarization," *Public Opinion Quarterly* 80, no. S1 (2016): 351-377.

[16] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997).

[17] Jacob S. Hacker and Paul Pierson, "After the 'Master Theory': Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis," *Perspectives on Politics* 12, no. 3 (2014): 643-62.

democracy, in a society as diverse as the U.S., no two parties can together manage to represent everyone."[18]

This changing scholarly consensus reflects a necessary response to the dramatically changed reality of U.S. politics. The political environment of 2025 is fundamentally different from that of 1997. Starting in the 1980s and especially since the 1990s, legislative voting patterns have shown increasing alignment along a single left-right dimension, with recent analyses suggesting that approximately 97 percent of congressional roll-call votes now divide along party lines.[19] Party unity scores have reached record levels in both chambers over the same period.[20] Partisan animosity has increased to significantly higher levels through processes of partisan sorting and affective polarization.[21] The last significant burst of landmark bipartisan lawmaking took place in 1990, when a Democratic Congress and Republican President George H. W. Bush signed the Clean Air Act Amendments of 1990, the Americans with Disabilities Act, the Immigration Act of 1990, and the Budget Enforcement Act of 1990—all reflecting serious, bipartisan, evidence-based, committee-driven processes.[22] The rest of the 1990s into the early 2000s produced only a dwindling handful of major bipartisan bills: welfare reform in 1996, telecommunications reform in 1996, the Children's Health Insurance Program in 1997, and No Child Left Behind in 2001.[23] But since Republicans achieved unified government control in 2003, all major legislation has been effectively partisan legislation.[24] Cross-partisan governance capacity has collapsed as Congress has become dysfunctional and weak,[25] with gridlock

[18] https://medium.com/@scholarsforrelegalizingfusion/scholars-letter-in-support-of-re-legalizing-fusion-voting-72d405442720

[19] Christopher Hare and Keith T. Poole, "The Polarization of Contemporary American Politics," *Polity* 46, no. 3 (2014): 411-29, at 416 (finding that 97 percent of roll-call votes divide along party lines); see also Lee Drutman, *Breaking the Two-Party Doom Loop*, 87; Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Polarized America* (MIT Press, 2006).

[20] Niels Lesniewski and Ryan Kelly, "Vote Studies 2024: House GOP Unity Inched Up as Senate Democrats Set Record," *CQ Roll Call*, February 18, 2025 (reporting record party unity scores in both chambers).

[21] Shanto Iyengar and Sean J. Westwood, "Fear and Loathing across Party Lines: New Evidence on Group Polarization," *American Journal of Political Science* 59, no. 3 (2015): 690-707; Alan I. Abramowitz and Steven W. Webster, "Negative Partisanship: Why Americans Dislike Parties but Behave Like Rabid Partisans," *Political Psychology* 39 (2018): 119-35.

[22] Drutman, *Breaking the Two-Party Doom Loop*, 95-96.

[23] *Id.* at 96.

[24] *Id.*

[25] Sarah Binder, "The Dysfunctional Congress," *Annual Review of Political Science* 18, no. 1 (2015): 96; Frances E. Lee, "How Party Polarization Affects Governance," *Annual Review of Political Science* 18, no. 1 (2015): 261-82.

and centralized partisan leadership replacing flexible and fluid bipartisan, compromise-oriented legislating.[26]

Whatever stability the two-party system may have provided up through the mid-1990s has diminished substantially in the 21st century. And as a two-party system, the United States represents an outlier among advanced democracies.

As Downs himself cautioned, "A two-party democracy cannot provide stable and effective government unless there is a large measure of ideological consensus among its citizens."[27] That prediction is now proving accurate.

The assumption in *Timmons* that two-party systems are necessary for political stability finds no support in comparative evidence. Most of the world's stable democracies feature multiparty systems. Among OECD countries, the United States has an "effective number of parties" of just two, placing it at the lower end of the distribution.[28] Many well-functioning democracies operate with more than two parties, suggesting that in a society as diverse as the United States, multiparty competition promotes democratic stability.[29]

When *Timmons* was decided, many candidates and elected officials touted their bipartisanship and praised their colleagues across the aisle, and voters followed the cues of elites. This has changed dramatically. Today's political incentives revolve around majority control rather than bipartisan cooperation. Party leaders actively discourage compromise because it "muddies the partisan brand." The old system is not returning on its own.

Fusion as a Mechanism for Stability and Moderation

Historical evidence demonstrates that in the latter nineteenth century fusion voting served as an effective mechanism for coalition-building dynamics that contributed to political flexibility.[30] By enabling cross-party endorsements and coalition politics, fusion enabled and promoted cross-cutting alliances, allowing voters to express more nuanced political preferences without the strategic dilemma of "wasting" their votes on minor parties.[31] While fusion operated within a different political and media environment, the core dynamics it enabled remain relevant to contemporary concerns about polarization.

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[26] William Bendix, "Bypassing Congressional Committees: Parties, Panel Rosters, and Deliberative Processes," *Legislative Studies Quarterly* 41, no. 3 (2016): 687-714; James M. Curry, *Legislating in the Dark: Information and Power in the House of Representatives* (Chicago: University of Chicago Press, 2015).

[27] Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957), 114.

[28] Drutman, *Breaking the Two-Party Doom Loop*, 209.

[29] Lee Drutman, "Proportional Representation," in *Electoral Reform in the United States*, edited by Larry Diamond, Edward B. Foley, and Richard Pildes (Lynne Rienner Publishers, 2024).

[30] Lisa Jane Disch, *The Tyranny of the Two-Party System* (Columbia University Press, 2002).

[31] Peter H. Argersinger, "'A Place on the Ballot': Fusion Politics and Antifusion Laws," *The American Historical Review* 85, no. 2 (1980): 290.

As Peter Argersinger documented in his foundational historical analysis, fusion "enabled Democrats to secure the votes of independents or disaffected Republicans who never considered voting directly for the Democracy they hated; it permitted such voters to register their discontent effectively without directly supporting a party that represented negative reference groups and rarely offered acceptable policy alternatives."[32] The use of separate party ballots in the nineteenth century facilitated this dynamic: "This election system allowed partisans of fusing parties to cast their votes without explicitly acknowledging their shared behavior or its significance, and it enabled a party to pursue fusion with an unwilling partner."[33]

This coalition-building mechanism provided third-party movements a pathway to electoral influence, and encouraged major party candidates to expand their coalitions beyond their traditional base to capture cross-nominated support.[34] Early twentieth-century political scientists recognized fusion as essential to third-party viability and increased effectiveness, with James Bryce observing that fusion "helps to keep a minor party going, and gives to its vote a practical result otherwise unattainable."[35]

Contemporary analysis indicates that fusion balloting offers a promising approach to address the current polarization crisis. It gives voters a clear way to signal: 'stop the hyper-partisan fighting.' It also provides partisans unhappy with their own party's extremism a way to signal that displeasure without fully defecting to the opposition.

Most importantly, fusion can re-empower the political center, which currently lacks institutional representation.

Empirical evidence from the Shor-McCarty state legislative ideology dataset confirms this expectation. In New York and Connecticut—the two states with active fusion systems—Republican legislators are dramatically more moderate than the national median, while Democratic legislators are only somewhat more liberal. The low polarization in fusion states derives primarily from moderate Republicans, the opposite of the pattern predicted by critics who argue fusion empowers only ideological flank parties.[36]

When there are only two sides, dissenters on each side have limited options. Partisans uncomfortable with aspects of their party's direction face an impossible choice: support the opposition or vote for a third party (which would effectively help their opponents). This dynamic leads many partisans to rationalize alignment with positions they might otherwise have questioned.

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[32] Argersinger, "'A Place on the Ballot,'" 290.

[33] *Id.*

[34] Disch, *The Tyranny of the Two-Party System*; Oscar Pocasangre and Maresa Strano, "What We Know About Fusion Voting," New America (July 2024), 33.

[35] Disch, *The Tyranny of the Two-Party System*, 97.

[36] Boris Shor and Nolan McCarty, "Aggregate State Legislator Shor-McCarty Ideology Data," January 2025 release; author's calculations. For 2022, the most recent year in the series, the mean ideology score of the New York House Republican caucus was 0.13 and of the Connecticut House Republican caucus 0.26, against a national median of 0.88 computed across the 49 states with comparable lower-chamber data—placing New York nearly two standard deviations toward moderation.

With fusion voting, pro-democracy conservatives would not have to choose between their democratic principles and their conservative policy preferences. Partisans would not need to justify voting for the lesser of two evils by convincing themselves the other side is irredeemably dangerous.

Fusion voting provides an effective mechanism for breaking the binary that has made contemporary American politics so dysfunctional. It allows candidates to be nominated by more than one party, which in turn allows voters to cast more meaningful and informative votes.

A voter who supports a moderate Democrat for Congress over an extreme Republican candidate, or a moderate Republican over an extreme Democrat, can signal that preference clearly. The vote counts for a viable major party candidate while also registering support for moderation by being cast on the fusion party line.

By creating institutional space for the political center, fusion voting can generate a centripetal force to counteract the centrifugal forces driving polarization.

Fusion voting thus serves a dual function. It moderates political conflict by creating incentives for coalition-building and enabling voters to signal preferences for compromise. But it also sustains the third parties that make this moderation possible. Without fusion, minor parties cannot participate in winning coalitions, cannot demonstrate their electoral contribution, and cannot maintain the voter support necessary to survive as ongoing organizations. The moderating effects of fusion depend on the viability of the third parties that practice it—and that viability depends on fusion. Montana is not without its third parties. In the 2024 Senate election, both the Libertarian Party and the Green Party fielded candidates. The candidates received 1.2 percent and 0.7 percent of the vote respectively. To the extent either of these parties contributes to electoral outcomes, it is in the rare case that they act as a spoiler.

Fusion voting has been proposed as a practical approach to these challenges. By allowing citizens to vote their values while supporting viable candidates, it creates institutional space for new political alignments and allows dissenting voices to exercise electoral influence. The evidence from New York and Connecticut demonstrates that fusion can establish a meaningful centrist force in civic and political life.

Third Parties and the Expression of Political Preferences

Beyond its moderating effects, fusion voting serves a distinct constitutional value: enabling citizens to express political preferences through meaningful party affiliation. This expressive function operates independently of—and in addition to—fusion's stabilizing effects.

The Essential Democratic Functions of Political Parties

Political parties are not merely electoral machinery. As E.E. Schattschneider observed, "Political parties created democracy and modern democracy is unthinkable save in terms of the parties."[37] Parties perform functions no other institution can replicate: they organize political conflict into manageable coalitions, aggregate and articulate citizen preferences, recruit and nominate candidates,

[37] E.E. Schattschneider, *Party Government* (New York: Rinehart, 1942), 1.

and mobilize voters.[38] As Nancy Rosenblum argues, "Without parties, deliberation is disorganized and impossible within legislatures, much less on a public national scale."[39]

When citizens cannot find a party that represents their preferences, they are structurally excluded from the primary mode of democratic participation. As more than 100 leading scholars observed in a 2024 letter supporting fusion voting: "Political parties are the essential institution of modern mass democracy because they uniquely organize representation for large groups of citizens and connect them to their government. When so many citizens are disengaged, parties struggle to provide their crucial representation and mediation functions. But while parties are necessary to democracy, in a society as diverse as the U.S., no two parties can together manage to represent everyone."[40]

The share of Americans identifying as political independents has reached a record 45 percent, with equal shares of 27 percent identifying as Democrats and as Republicans.[41] A large majority of Americans—62 percent—say the two major parties do such a poor job of representing the American people that a third major party is needed, a level of support essentially tied with the highest Gallup has recorded.[42] Yet third-party activity remains negligible, leaving both Montanans and Americans who want more options the same two choices, election after election.

The Structural Impossibility of New Party Formation Under Current Rules

Citizens who do not find their preferences represented by either major party face a structural impossibility, not merely a practical difficulty. The American electoral system contains multiple reinforcing mechanisms that make meaningful third-party participation effectively impossible absent fusion voting.

Why Ballot Access Reform Alone Is Insufficient

One might assume that the difficulty of forming new parties could be addressed by loosening ballot access requirements. The empirical evidence demonstrates otherwise. Political scientists have conducted numerous studies examining the relationship between ballot access rules and third-party performance. The findings are consistent: ballot access laws have minimal to null effects on third-party electoral success.

In a study of U.S. House elections, Stephen Ansolabehere and Alan Gerber found that while "laws governing access to the ballot stunted competition in U.S. House races," the effects were primarily

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[38] John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* (Chicago: University of Chicago Press, 1995).

[39] Nancy L. Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton: Princeton University Press, 2008), 160.

[40] Scholars Letter in Support of Re-Legalizing Fusion Voting (2024), *supra* note 18.

[41] Gallup, "New High of 45% in U.S. Identify as Political Independents," January 2026 (reporting 2025 annual averages, based on interviews with more than 13,000 U.S. adults).

[42] Gallup, "Americans See Need for Third Party, but Offer Soft Support," survey conducted September 2-16, 2025.

on whether candidates appeared on the ballot—not on their vote shares once they did.[43] Signature requirements and filing fees significantly deter minor-party entry, yet the electoral impact on vote shares proves elusive.[44]

Even in states with the most permissive ballot access rules, third parties rarely command support higher than the low single digits.[45] As Bernard Tamas and Matthew Hindman documented, "restrictions to the entry of minor party and independent candidates have been systematically adjusted to changing degrees of electoral competition"—major parties tighten restrictions when third parties become threatening—but even when restrictions are loosened, third-party performance remains marginal.[46]

The binding constraint is not ballot access but rather the structural logic of single-member plurality elections. Under "Duverger's Law," single-winner plurality elections systematically channel all political energy into two parties because votes for third-party candidates are either "wasted" (if the candidate cannot win) or serve as "spoilers" (if they draw votes from a preferred major-party candidate).[47]

Howard Scarrow's foundational analysis demonstrated that fusion bans in the 1890s—not merely the Australian ballot or other ballot access restrictions—were the decisive factor in third-party decline. Scarrow showed that fusion bans "achieved their intended effect" of eliminating third parties as meaningful electoral actors, and that "Duverger's Law, with its emphasis on the structure of the electoral system as the major determinant of the party system, may need modification to take into account additional rules."[48]

New parties can certainly form if they can clear ballot access and party recognition rules, which are not prohibitive on their own in Montana and many other states. But under single-member plurality rules without fusion, they face an impossible strategic bind: every vote cast on their line is either "wasted" on a candidate who cannot win or functions as a "spoiler" that aids the candidate their supporters most oppose. There is no mechanism through which a minor party can participate in a winning coalition while retaining its distinct identity. This futility suppresses not merely third-party success but third-party existence. Rational citizens who might otherwise organize a new party decline to invest the considerable resources required when the electoral system guarantees that their effort cannot translate into meaningful electoral participation. The result is a diminished universe of political organizations available to citizens as vehicles for representation.

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[43] Stephen Ansolabehere and Alan Gerber, "The Effects of Filing Fees and Petition Requirements on U.S. House Elections," *Legislative Studies Quarterly* 21, no. 2 (1996): 249-264.

[44] *Id.* at 252-259.

[45] Bernard Tamas and Matthew J. Hindman, "Ballot Access Laws and the Decline of American Third Parties," *Election Law Journal* 13, no. 2 (2014): 260-276.

[46] *Id.* at 267.

[47] Maurice Duverger, *Political Parties* (London: Methuen, 1954).

[48] Howard A. Scarrow, "Duverger's Law, Fusion, and the Decline of American 'Third' Parties," *Western Political Quarterly* 39, no. 4 (1986): 634-647, at 646-647.

Without fusion voting, a qualified minor party faces an unrelenting structural logic: every vote cast on its line is a vote that cannot also support a viable candidate. Potential supporters, aware that their votes will be wasted or will function as spoilers, rationally withhold their support. The party's vote share remains marginal; if it falls below the threshold a state sets for retaining ballot status, it loses its ballot line; and the cycle begins again. Fusion voting permits minor-party votes to count toward a viable candidate's total, giving citizens a reason to affiliate with and sustain third parties over time. As Lisa Disch has argued, fusion bans did not merely contribute to a trend that would have occurred anyway; they "extended state regulation into a previously lawless domain of competition and strategy," and their prohibition was "consequential" for the elimination of third parties from twentieth-century electoral politics.[49] The absence of viable third is a consequence of the structural environment the fusion ban itself creates.

The Democratic Value of Third Parties

Third-party marginalization deprives the democratic system of functions that major parties cannot replicate.

Voice for Protest and Dissent

For citizens who feel neither major party represents them, the absence of viable third-party options means choosing between the lesser of two evils, disengaging from electoral participation, or casting a vote they know to be wasted. New parties have served as "critics of mainstream politicians and major parties," offering dissatisfied citizens a productive avenue for participation.[50] The Populist Party of the 1890s elevated concerns about agricultural hardship and excessive bank power, giving those most affected by the depression years a political voice they would otherwise have lacked.[51]

Platform for Under-Represented Groups

Third parties have served as entry points for constituencies marginalized by major-party gatekeepers. From 1912 to 1964, when major parties were dismissive of female candidates, smaller parties offered women opportunities for electoral participation. "Nearly all of the early women who ran for U.S. House did so under third-party labels," and "the proportion of female nominees within third parties has been greater than the major parties for much of the time period" studied.[52] Third parties have similarly provided opportunities for poor and economically powerless citizens, and for younger citizens whose concerns major parties ignored.[53]

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[49] Disch, *The Tyranny of the Two-Party System*, 100-102.

[50] Immanuel Ness and James Ciment, eds., *The Encyclopedia of Third Parties in America* (Armonk, NY: Sharpe Reference, 2000), xix.

[51] Steven J. Rosenstone, Roy L. Behr, and Edward H. Lazarus, *Third Parties in America*, 2nd ed. (Princeton University Press, 1996), 70.

[52] Dennis Simon and Barbara Palmer, "The Trail Blazers: Women as Third-Party Candidates in Elections to the U.S. House of Representatives, 1912–2012," *Politics, Groups, and Identities* 5, no. 4 (2017): 660-78.

[53] Rosenstone, Behr, and Lazarus, *Third Parties in America*, 145.

Policy Innovation

Major parties, as big-tent coalitions seeking to maintain existing alliances, are structurally resistant to policy innovation. Third parties have been the "forerunners" of political change, "representing new groups, and offering new ideas for public policy."[54]

> "Successful third party campaigns have typically been far more about substantive issues than major party campaigns, largely because third party candidacies have been fueled far more by particular issues. This issue focus emerges for two reasons: First, third parties typically form around issues or issue positions that are being ignored by the two major parties. Second, to attract attention, third party candidacies must give voters a strong and clear reason to break with one of the major parties."[55]

Third parties have been innovators in numerous policy areas: abolition of slavery (Liberty Party, Free Soil Party), women's suffrage, the progressive income tax, direct election of Senators, railroad regulation, and occupational safety standards.[56]

Forcing Major-Party Responsiveness

By organizing under-represented groups and demonstrating consequential voting blocs, minor parties have forced major parties to adapt. "Let a third party once demonstrate that votes are to be made by adopting a certain demand, then one or the other of the [major] parties can be trusted to absorb the new doctrine."[57] The Republican Party emerged in the 1850s as an offshoot of previous third-party efforts—the Free Soil Party and Liberty Party—which first elevated the anti-slavery cause when both major parties tried to suppress it.[58]

Fusion Enables Expressive Voting

Without fusion voting, third parties cannot perform these democratic functions under single-member plurality elections. "Spoiler" and "wasted vote" dynamics ensure third parties remain marginal regardless of ballot access.

Fusion allows third parties to retain their independence while exerting real influence on elections and policy.[59] It provides a way of "establishing independent political capacity and power that enables

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[54] Christian Collet, "Third Parties and the Two-Party System," *Public Opinion Quarterly* 60, no. 3 (1996): 431.

[55] Peter L. Francia and Paul S. Herrnson, in *Multiparty Politics in America*, 2nd ed., eds. Paul S. Herrnson and John C. Green (Lanham, MD: Rowman & Littlefield, 2002), 95-96.

[56] Elissa Berger, "A Party That Won't Spoil," *Brooklyn Law Review* 70 (2005): 1381, 1386.

[57] John D. Hicks, *The Populist Revolt* (1931), 26-27.

[58] Rosenstone, Behr, and Lazarus, *Third Parties in America*, 55-57.

[59] Pocasangre and Strano, "What We Know About Fusion Voting," 33.

[minor parties] to exert significant influence on one or the other of the major parties without succumbing to the spoiler problem."[60]

By enabling third parties to cross-endorse major-party candidates, fusion allows citizens to cast a constructive, expressive vote—one that simultaneously supports a viable candidate and signals the values motivating that support. Antifusion laws eliminate this expressive capacity, reducing the ballot to a binary choice.

As Justice Stevens observed in his *Timmons* dissent, "The right to be on the election ballot is precisely what separates a political party from any other interest group."[61] Antifusion laws strip third parties of this distinguishing feature, reducing them to advocacy organizations that may "spread [their] message to all who will listen" but cannot translate that message into electoral influence.[62]

Channeling Dissent Within the System

There is a final consideration that bears on democratic stability: it is safer for democracy to channel political dissent *into* the electoral system than to exclude it.

When citizens feel unrepresented by both major parties, they do not simply disappear. Their political energy must go somewhere. If the electoral system offers no productive outlet—no way to register dissent while still participating in elections—that energy flows into extra-electoral channels: protest movements, anti-system rhetoric, or worse.

The historical record confirms this dynamic. Third parties have traditionally served as "safety valves" for democratic discontent, providing citizens frustrated with major-party options a way to participate constructively rather than withdraw into alienation or turn toward anti-democratic alternatives.[63] Certainly, some third-party movements have attracted cranks and extremists. But as a matter of democratic practice, it is safer to give such individuals a home in minor parties than in major parties. If opportunities for third-party advancement are cut off, those seeking political influence will instead seek the nominations of major parties, where winning such nominations guarantees them much broader built-in support in a general election.[64]

Fusion voting thus serves a democratic safety function. By allowing minor parties to participate meaningfully in elections, it channels political dissent into the electoral process rather than outside it. Citizens who might otherwise conclude that "the system is rigged" against their concerns can instead

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[60] *Id.*

[61] *Timmons*, 520 U.S. at 373 (Stevens, J., dissenting).

[62] *Id.*

[63] Rosenstone, Behr, and Lazarus, *Third Parties in America*, 4-8 (discussing third parties as vehicles for protest and dissent); Arthur M. Schlesinger Jr., "Introduction" to *History of U.S. Political Parties*, ed. Arthur M. Schlesinger Jr. (New York: Chelsea House, 1973) (noting third parties' role as "safety valves" for democratic discontent).

[64] Lee Drutman, *Breaking the Two-Party Doom Loop* (2020), 67-68; see also Hans-Georg Betz, *Radical Right-Wing Populism in Western Europe* (New York: St. Martin's Press, 1994) (analyzing how exclusion from mainstream politics can radicalize political movements).

see their votes count toward candidates who share their values—even if those candidates also bear major-party labels.

The alternative—a rigid two-party duopoly that offers no meaningful third-party participation—risks alienating precisely those citizens most dissatisfied with the status quo. In an era of declining trust in institutions and rising anti-system sentiment, fusion voting offers a mechanism for re-integrating disaffected citizens into democratic participation.

Fusion and Distinct Party Identities

Another concern sometimes raised is that fusion voting would undermine the distinct identities of the two parties. Historical evidence demonstrates the opposite.

In the 1880s and 1890s, when fusion was widely legal and most commonly used throughout the country across several states, the two major parties maintained intensely distinct identities. Partisanship during this era was, as Peter Argersinger documents, "intense, rooted not only in shared values but in hatreds engendered by cultural and sectional conflict."[65] Party loyalty ran so deep that changes in party control resulted less from voter conversion than from differential rates of partisan turnout or from the effect of third parties.[66]

Yet despite—or perhaps because of—these strong partisan identities, minor parties flourished and regularly captured significant shares of the popular vote. Between 1874 and 1892, minor parties held the balance of power at least once in every state but Vermont, and from the mid-1880s they held that power in a majority of states in nearly every election.[67] In the 1892 election cycle, neither major party secured a majority of the electorate in nearly three-quarters of the states.[68]

Fusion enabled these minor parties to exercise real political influence without requiring voters to abandon their fundamental party allegiances. Crucially, "this election system allowed partisans of fusing parties to cast their votes without explicitly acknowledging their shared behavior or its significance, and it enabled a party to pursue fusion with an unwilling partner."[69]

The Populists exemplified how fusion allowed minor parties to maintain distinct identities while building effective coalitions. As Argersinger notes, Populists and Democrats named separate state tickets in order to maintain their parties' organization and independence, though each party conceded that such separation would lead to a Republican victory. The weaker Democrats, in particular, feared that under antifusion laws cooperation with Populists would be "not fusion but absorption."[70]

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[65] Argersinger, "'A Place on the Ballot,'" 289.

[66] *Id.*

[67] *Id.* at 289.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 297.

This dynamic fostered political innovation and realignment. Minor parties introduced new cross-cutting conflicts, including many progressive reforms, which coincided with an era of significant policy innovation. The fusion era ultimately drove a political realignment at the end of the 1890s that reshaped American politics.[71]

By contrast, in the mid-twentieth century, when fusion was banned across most states, the two major parties were least distinct from each other. They overlapped to such a degree that voters often struggled to tell them apart. This was the era of what I've called the four-party system, when liberal Republicans and conservative Democrats served alongside conservative Republicans and liberal Democrats. Ideology and partisanship were often cross-cutting. Without fusion, there was no mechanism through which new political identities could gain traction and force major parties to differentiate themselves on emerging issues.

Addressing the "Billboard" Concern

Critics of fusion voting sometimes argue that if fusion voting were widely legal, ballots would become cluttered with minor parties using fusion as "a billboard for political advertising."[72]

If this were the case, we would expect to see a proliferation of tiny political parties in New York State, where fusion has been legal for more than a century. In practice, nothing close to this hypothetical scenario has happened. Besides the dominant Democratic and Republican Parties, New York State has a left-oriented Working Families Party and a right-oriented Conservative Party. Some other parties have come and gone over the years. Ballots in the Empire State are far from billboards. Nor are they billboards in neighboring Connecticut, also a fusion-legal state.

There are three main reasons why ballots do not become billboards.

First, candidates must consent to be listed under a party label. A candidate might be wary of accepting a label from an unknown party or a single-issue party (gun rights, abortion rights). A ballot commitment to such a party does not help in a competitive election and is worthless in a non-competitive one.

Second, organizing parties requires real work and genuine support in the electorate. Convincing voters to vote on a fusion party line requires a significant organization. Fly-by-night one-off parties simply cannot generate the credibility that candidates want to associate with. Voter education and communication is costly work.

Third, states regulate party formation and ballot access. All states maintain some regulations around ballot access. Parties must demonstrate some level of support (usually signatures) to gain ballot access. They must maintain consistent support (usually vote shares) to maintain ballot access. Sensible regulations around ballot access can prevent both abuse and exclusion.

Additionally, third parties that exist primarily to secure patronage fail. The Liberal Party in New York is a good example. Once a genuine party, it became corrupt and used its ballot line to bargain

[71] Argersinger, "'A Place on the Ballot,'" 287-306.

[72] *Timmons*, 520 U.S. at 365.

with the major parties for patronage and campaign contributions. As a result, it lost support and ultimately its ballot line.[73]

Addressing the Voter Confusion Concern

Another common argument against fusion voting is that it leads to voter confusion. The evidence does not support this claim. Rather, research indicates the opposite.[74]

As a recent report summarizing research on fusion voting noted, rather than confuse voters, the additional party labels help inform voters, by giving them more information about the candidates.[75]

As the report notes, "Voters who do not follow politics or do not have the bandwidth to research all the candidates that appear on the ballot may use the fused ballot as a heuristic, choosing to vote for those candidates that have been endorsed by their preferred minor party."[76]

Of course, these information cues only help if parties establish meaningful identities—another reason why pop-up parties do not proliferate. Organizing and sustaining a political party takes resources.

As the report notes, "For fusion ballots to provide additional information to voters, minor parties need to develop a strong and recognizable brand. The experience of parties using independent-related labels illustrates the power of a strong brand."[77]

Conclusion

American democracy faces serious challenges. The processes of hyper-partisan polarization have been driven by fundamental changes in the party system, geographic realignment, the nationalization of American politics, and intensely close competition for control of government. These developments have transformed the American system from a multi-dimensional, compromise-oriented political environment to a polarized, binary system characterized by zero-sum partisan competition.

Fusion voting offers a realistic and practical mechanism for addressing these challenges. It serves two distinct functions, each independently valuable.

By making centrist and other third parties capable of participating in winning coalitions, demonstrating their electoral contribution, and sustaining themselves across election cycles, fusion voting would give representation to voters who are currently underserved by both major parties.

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[73] Lynn Adelman, "The Misguided Rejection of Fusion Voting," *Idaho Law Review* 56 (2020): 112.

[74] Eric Loepp and Benjamin Melusky, "Why Is This Candidate Listed Twice? The Behavioral and Electoral Consequences of Fusion Voting," *Election Law Journal* 21, no. 2 (2022): 105-23.

[75] *Id.*

[76] Pocasangre and Strano, "What We Know About Fusion Voting," 16.

[77] *Id.*

This expressive function requires viable third parties, which cannot thrive under single-member plurality rules without fusion. With fusion, third parties can persist as durable vehicles for democratic participation, channeling dissent into the electoral system rather than outside it.

When *Timmons* was decided in 1997, the Court accepted the claim that two-party systems promote political stability. The intervening decades have refuted that assumption. The two-party system has not produced stability; it has produced escalating dysfunction. The comparative evidence confirms what American experience now demonstrates: rigid two-party competition without cross-cutting mechanisms generates polarization, not stability. Fusion voting is precisely such a cross-cutting mechanism—one with deep roots in American democratic practice.

Fusion voting represents a proven reform with deep historical precedent in American democracy. It reduces polarization by enabling coalition-building. It enables political expression by making third parties viable. And it channels democratic discontent productively by giving citizens who feel unrepresented a reason to participate rather than withdraw. These are precisely the outcomes that *Timmons* hoped the two-party system would provide on its own. It did not. Fusion voting can.

I verify that this report was prepared by me, Lee Drutman