BRENNAN CENTER FOR JUSTICE

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Before the Oregon Legislative Assembly, House Committee on Rules
RE: Oregon House Bill 3593

April 6, 2023

On behalf of the Brennan Center for Justice at NYU School of Law,[1] I write to provide testimony on how House Bill 3593, which disaggregates the state's fusion voting system, would strengthen important free speech benefits for Oregon voters.

Fusion allows third party voters to meaningfully participate in the electoral process without sacrificing their political beliefs.

Fusion voting, also referred to as cross-endorsement or open-ballot voting, allows multiple parties to nominate the same candidate for the same office in a general election.[2] Generally, the two major parties nominate different candidates, while third parties may cross-endorse one of the major party candidates, fuse with other minor parties, or run a candidate without any cross-endorsements. Take the Brennan Center's home state of New York, for example; under the state's fusion system, Governor Kathy Hochul appeared on the ballot for both the Democratic Party and the Working Families Party in the 2022 gubernatorial election.[3] Her opponent, Lee Zeldin, appeared on both the Republican Party and Conservative Party ticket.[4]

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[1] The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to strengthen the systems of democracy and justice so that they work for all Americans. I am counsel in the Brennan Center's Democracy Program, which among other issues focuses on voting rights and election administration. My testimony does not purport to convey the views, if any, of the New York University School of Law.

[2] Fusion voting takes place during the general election and does not directly impact the primary process; in a primary election under fusion, the candidate with the most votes on each party's ballot still becomes that party's nominee. J.J. Gass and Adam Morse, *More Choices, More Voices: A Primer on Fusion*, Brennan Center for Justice, October 2, 2006, https://www.brennancenter.org/our-work/research-reports/more-choices-more-voices-primer-fusion. This testimony does not pertain to jurisdictions that use other electoral systems, such as nonpartisan elections or ranked choice voting in general elections.

[3] New York has two prominent third parties: the Working Families Party, which often endorses Democratic candidates, and the Conservative Party, which generally supports Republicans. For more details on New York's rich history of fusion voting, *see* Gass and Morse, *More Choices, More Voices*; Howard A. Scarrow, "Duverger's Law, Fusion, and the Decline of American 'Third' Parties," *The Western Political Quarterly* 39, no. 4 (December 1986): 635, https://doi.org/10.2307/448267; and Melissa R. Michelson and Scott J. Susin, "What's in a Name: The Power of Fusion Politics in a Local Election," *Polity* 36, no. 2 (January 2004): 304, https://doi.org/10.1086/POLv36n2ms3235483.

[4] Kate Lisa, "Surge in support secures ballot lines for Working Families, Conservative parties," Spectrum News 1, November 10, 2022, https://spectrumlocalnews.com/nys/central-ny/politics/2022/11/11/wfp-voters-more-than-double--conservatives-up-20--since-2018.

In fusion systems, the candidate who receives more votes than any other candidate still wins the election. Critically, however, voters who support the policies of a third party can continue to align themselves with that party without "throwing away" their votes on a third-party candidate with no realistic hope of winning or, in a worst case scenario, "spoiling" the results by siphoning votes from a major party nominee they would otherwise support as their second choice candidate. In other words, fusion allows third party voters to cast a meaningful vote for a credible candidate without sacrificing their political beliefs.

Fusion was commonplace throughout the country until the late nineteenth century.

Prior to the adoption of the secret ballot in the late nineteenth century, fusion voting flourished across the United States, particularly in the West and Midwest.[5] Political parties typically printed their own ballots, which voters would cast by dropping them in a literal ballot box.[6] The state played no role in determining which organizations qualified as political parties or who those organizations could nominate, leaving them free to fuse or cross-list candidates without impediment.[7]

Beginning in 1888, states shifted to using the "Australian ballot" — a government-printed ballot listing all eligible candidates, which voters filled out in a private voting booth.[8] While adopted in large part to eliminate vote-buying and voter intimidation, the Australian ballot also gave state governments — and the parties that controlled them — unprecedented control over the electoral process.[9] Post-Reconstruction, for example, the Republican Party controlled the government in many states but faced opposition from coalitions of Democrats fused with Populists, Prohibitionists, or other third parties.[10] To solidify their power in this tumultuous era, the Republican-led governments in question could simply ban fusion voting. This strategy proved popular; ultimately, more than 40 states and the District of Columbia eliminated fusion.[11]

After Oregon followed this trend and banned fusion in 1895,[12] the state legislature restored the practice in 2009.[13] But as it stands now, the state's law stops short of providing the full communicative benefits of fusion voting.

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[5] Lynn Adelman, "The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court," *Idaho Law Review* 56, no. 2 (April 2021): 109, *https*://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1162&context=idaho-law-review; and Gass and Morse, *More Choices, More Voices.*

[6] Gass and Morse, *More Choices, More Voices*; and Scarrow, "Duverger's Law, Fusion, and the Decline of American 'Third' Parties," 637.

[7] Gass and Morse, *More Choices, More Voices*; Scarrow, "Duverger's Law, Fusion, and the Decline of American 'Third' Parties," 637-39; and Adelman, "The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court," 110.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Gass and Morse, *More Choices, More Voices*.

[12] Adelman, "The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court," 110.

[13] S.B. 326, Reg. Sess. (Oregon 2009), https://olis.oregonlegislature.gov/liz/2009R1/Measures/Overview/SB326.

Disaggregated, or "full" fusion provides voters with greater communicative power than aggregated, or "partial" fusion.

Within the states that permit fusion — Connecticut, Idaho, Mississippi, New York, Oregon, and Vermont[14] — two versions exist. States like Connecticut and New York use a "disaggregated," or "full" version of fusion.[15] Under this system, the ballot lists a candidate multiple times, once per party, if the candidate received multiple nominations.[16] This setup provides voters with the choice of voting for a candidate like Hochul under two scenarios: as a Democrat or as a Working Families candidate. This option, in turn, serves an important communicative function. If a candidate wins an election with a significant portion of votes from the third-party line, those voters will have sent a clear message about their priorities that they could not have otherwise sent if faced with the choice of voting for a major party candidate or a "spoiler" candidate.

Other fusion states, including Oregon, use an "aggregated," or "partial" version of fusion.[17] In these states, candidates nominated by multiple parties appear only once, but with the names of all the parties that nominated the candidate listed.[18] With this setup, voters could vote for Hochul under only one scenario: as both a Democrat *and* Working Families candidate.

Like the disaggregated system, aggregated fusion still allows third-party voters to choose their own standard bearer and avoid "throwing away" their vote on an unrealistic candidate. But unlike full fusion, the ballots in these states deprive third-party voters of a valuable communicative opportunity. When voting for a cross-nominated candidate, they cannot indicate which of the parties that nominated her they support, leaving them with no ability to signal their specific policy preferences.

Oregon House Bill 3593 would upgrade the state to a disaggregated system and provide the full communicative benefits of fusion.

Oregon House Bill 3593 would upgrade the state to a full fusion system in which a candidate nominated by more than one party would be listed separately on the ballot along with the name of each party.[19] While this change is incremental in form, available evidence suggests that it would drive many substantial, positive benefits, including but not limited to encouraging turnout, motivating blocs of voters to influence high-importance issues, and increasing coalition-building

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[14] In Idaho and Mississippi, fusion is permitted but does not occur in practice. Terrance Adams, *Cross-Endorsing Candidates*, Connecticut General Assembly Office of Legislative Research, January 16, 2013, https://www.cga.ct.gov/2013/rpt/2013-R-0046 htm; and 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 (June 2022), https://doi.org/10.1089/elj.2021.0037.

[15] C.G.S. § 9-243t(b), https://www.cga.ct.gov/current/pub/chap_153.htm#sec_9-453t; and N.Y. Elec. Law § 9-112(4), https://www.nysenate.gov/legislation/laws/ELN/9-112.

[16] Gass and Morse, *More Choices, More Voices*.

[17] O.R.S. §§ 254.135, 254.145, https://www.oregonlegislature.gov/bills_laws/ors/ors254.html; and 17 V.S.A. § 2474, https://legislature.vermont.gov/statutes/section/17/051/02474.

[18] Gass and Morse, *More Choices, More Voices*.

[19] H.B. 3593, Reg. Sess. (Oregon 2023), https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB3593.

in periods of intense polarization.[20] The Brennan Center chronicled many of these outcomes as early as 2006.[21]

This testimony focuses specifically on the communicative benefits that flow from disaggregating fusion. First, by breaking down how many votes a candidate received from a third party, full fusion allows voters to send candidates strong messages about why they support them and what policies they hope to see that candidate work towards once in office.[22] Just last year, for example, the Working Families Party communicated valuable policy insights to Governor Hochul after the party garnered nearly 250,000 of her 325,000-plus vote advantage.[23]

Second, this expressive power also provides a mechanism for voters to advance new, creative ideas that major parties ignore. In fact, third parties throughout history have played an important role in bringing neglected political ideas into the mainstream, from the abolitionist movement and women's suffrage to the Greenback Party's economic agenda and even Prohibition.[24] While innovative policies may need a major party champion to get them across the finish line, third parties can play a significant role in kickstarting that process by signaling their strength and popularity at the ballot box. Relatedly, once an elected official has won on a third party's cross-nomination, they possess greater freedom to depart from the major party's platform and leverage their third-party support to shape new and innovative policy agendas.

Third, full fusion allows candidates and elected officials to better understand their voters' preferences. When major-party candidates receive a substantial number of votes on a third-party's ballot line, they know that the party's concerns and priorities reflect a sizable portion of the electorate and warrant a response.[25] Once in office, elected officials can act accordingly and adjust their legislative goals consistent with this better understanding of their voters' preferences. In New York, for example, the Working Families Party has attributed their successful 2004 effort to raise the state's minimum wage to this phenomenon.[26]

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[20] Gass and Morse, *More Choices, More Voices*; Seth E. Masket, *No Middle Ground: How Informal Party Organizations Control Nominations and Polarize Legislatures* (University of Michigan Press, 2009), 74-75 (finding that California's legislators were less polarized when candidates could cross-list under more than one party); and Michelson and Susin, "What's in a Name," 318-19 (suggesting that New York's full fusion system helps increase voter turnout).

[21] Gass and Morse, *More Choices, More Voices.*

[22] *Id.*

[23] Sally Goldenberg, Joe Anuta and Anna Gronewold, "Behind the scenes of Working Families Party's push for Hochul victory," *Politico*, November 11, 2022, https://www.politico.com/news/2022/11/11/working-families-party-hochul-midterm-elections-00066601.

[24] Gass and Morse, *More Choices, More Voices*; Scarrow, "Duverger's Law, Fusion, and the Decline of American 'Third' Parties," 635; and Adelman, "The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court," 107.

[25] Gass and Morse, *More Choices, More Voices*; and Cassidy Reller, "Learning from Fusing Party Independence, Informative Electoral Signals and Legislative Adaptation," presented at American Political Science Association, September 2022, https://perma.cc/FPY8-LETY (explaining how cross-nominations shape legislative conduct).

[26] Al Baker, "Over Pataki Veto, Minimum Wage to Rise to $7.15," *New York Times*, December 7, 2004, https://www.nytimes.com/2004/12/07/nyregion/over-pataki-veto-minimum-wage-to-rise-to-715.html.

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Without full fusion, Oregon voters and elected officials miss out on these valuable communicative benefits. Third party voters cannot effectively leverage their voice to advocate for their agenda, candidates remain in the dark on the size and strength of their third-party electorate, and the electoral system does not benefit from the introduction of new and creative policy solutions. With just one incremental change, House Bill 3593 is therefore poised to have an immense impact on Oregon voters. The Brennan Center is grateful for the opportunity to testify on such an important measure.