IN RE TOM MALINOWSKI, PETITION FOR NOMINATION FOR GENERAL ELECTION, NOVEMBER 8, 2022, FOR UNITED STATES HOUSE OF REPRESENTATIVES NEW JERSEY CONGRESSIONAL DISTRICT 7	Supreme Court Docket No. 090515 CIVIL ACTION On Petition for Certification from a Final Judgment of the Superior Court Appellate Division Docket Nos. A-3542-21T2 A-3543-21T2 Sat Below: Hon. Robert J. Gilson, P.J.A.D. Hon. Lisa A. Firko, J.A.D. Hon. Lorraine M. Augostini, J.A.D.

PETITION FOR CERTIFICATION

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[1] Throughout this brief, PCa refers to Petitioners' Petition for Certification Appendix; Pa refers to Petitioners' Appellate Division Appendix; and Psa refers to Petitioners' Supplemental Appellate Division Appendix.

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QUESTION PRESENTED

Whether the State violates political rights guaranteed under the New Jersey Constitution by invalidating and excluding from the ballot a minor party's nomination of a qualified, consenting candidate.

STATEMENT OF THE MATTER INVOLVED

This case asks whether the State Constitution protects a fundamental aspect of the political process—the ability of citizens to nominate and vote for their chosen candidate under their party's banner—even if that candidate is also the choice of another party. At stake are not just the rights of the voters and the party bringing this case, but millions of voters who believe the two major parties ought not to have a monopoly on representing their interests.[2] The Appellate Division ruling diminishes the specific rights at issue and allows restrictions on voting and political speech and association that should not be permitted under the State Constitution, even if they are under its federal counterpart.

At a time when the federal executive is erecting new barriers to political participation and the federal judiciary is chipping away at the Voting Rights

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[2] *E.g.*, N.J. DEP'T OF STATE, *April 2025 Voter Registration by County*, https://www.nj.gov/state/elections/election-information-svrs.shtml (38% of New Jersey voters decline to register with either major party); NEW AMERICA, *New Jersey Voters on Political Extremism, Political Parties, and Reforming the State's Electoral System* (Nov. 2022), https://perma.cc/D7EF-N9KD (noting widespread dissatisfaction with restrictions limiting political association).

Act,[3] full recognition of the political rights enshrined in the State Constitution matters more than ever. Now is not the time for New Jersey courts to abandon their longstanding role as "a leader in the reemergence of state constitutional law." ROBERT WILLIAMS, THE NEW JERSEY STATE CONSTITUTION 52-53 (2012). This case presents this Court with the opportunity to remain a leader, in the context of rights foundational to our democratic republic.

Petitioners, the New Jersey Moderate Party and three of its members, seek to exercise fundamental rights guaranteed by the State Constitution and essential to a healthy democratic system. They want no more than to nominate competent and qualified candidates who share their commitment to political moderation and the rule of law, even if those individuals also earn another party's nomination. In the mid-19th century through the early 20th century, when the state constitutional provisions here at issue were ratified, candidates in New Jersey and elsewhere routinely received nominations from two parties.[4] Indeed, this practice played a prominent role in the movement to abolish slavery, as individual Whigs and Democrats, rejecting their respective party's support for

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[3] Samara Angel et al., *Trump's Executive Order Threatens to Undermine American Elections*, BROOKINGS (Mar. 2025), https://perma.cc/Y2RS-3UKB; Sam Levine, *US Supreme Court Sharply Divided on Louisiana Race-Based Redistricting Case*, GUARDIAN (Mar. 24, 2025), https://perma.cc/LH88-GZF5.

[4] *See* Jeff Berryhill & Ian Gavigan, *Fusion Voting and a Case Study in Restrictive Two-Party Politics*, 76 RUTGERS UNIV. L. REV. 913 (2024).

or acquiescence to slavery, earned the nominations of ascendant, anti-slavery minor parties.[5] The same dynamic was repeated in the early Progressive Era, when select Democratic and Republican candidates earned nominations from new parties promoting basic labor protections and opposing monopoly power.[6]

In June 2022, however, the Secretary of State rejected the Moderate Party's nomination for the upcoming general election because its chosen candidate also earned the support of the Democratic Party. In doing so, she relied upon the "anti-fusion" ban enacted a century ago with the goal of sidelining minor parties and their voters by prohibiting any candidate from earning two nominations.[7] Since the adoption of these restrictions, only the Democratic and Republican Parties—and no others—have attained formal recognition.[8] No other state has demonstrated such a "unique hostility to minor parties." (Pa185-86.)

Though a New Jersey court in 1913 expressed "grave doubt as to the

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[5] *See* Corey Brooks & Beau Tremitiere, *Fusing to Combat Slavery: Third-Party Politics in the Pre-Civil War North*, 98 ST. JOHN'S L. REV. 339 (2024).

[6] *See generally* Peter Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287 (1980) (Pa370-89).

[7] The Secretary invoked N.J.S.A. 19:13-8, which prohibits a candidate from accepting a second nomination. Other statutes also prevent two parties from "fusing" their support behind one candidate. *See* N.J.S.A. 19:13-4 (prohibiting two parties from nominating the same candidate); N.J.S.A. 19:23-15 (prohibiting candidates from accepting multiple nominations); N.J.S.A. 19:14-2, 19:14-9 (prohibiting candidates from appearing more than once on the ballot).

[8] For examples of the state-conferred benefits associated with formal recognition, *see* N.J.S.A. 19:1-1, 19:5-1, 19:14-6, 19:45-1.

power of the Legislature to coerce the members of a political party" to "not select the man that [they] do want" because of his affiliation with a second party, *In re City Clerk of Paterson*, 88 A. 694, 696 (N.J. Sup. Ct. 1913), this action is the first to directly challenge the legality of the "anti-fusion" ban under the State Constitution. Petitioners contend this ban infringes their right to vote (art. II, § 1, ¶ 3), freedom of association (art. I, ¶¶ 6, 18),[9] and guarantee of equal protection (art. I, ¶ 1). In the Appellate Division, a former governor, Members of Congress, and many others joined as *amici curiae* in support of Petitioners.[10]

The Appellate Division concluded that the anti-fusion rule does not violate the State Constitution. Among other errors, the ruling followed the majority opinion in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), where a divided U.S. Supreme Court held that Minnesota's anti-fusion laws did not violate the U.S. Constitution's freedom of association. The Appellate Division acknowledged *State v. Hunt*, 91 N.J. 338 (1982), but failed to analyze the factors compelling a different outcome under state law. Indeed, the opinion conflicts with rulings of this Court in refusing to apply the

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[9] In the briefing below, Petitioners advanced claims under (i) the freedom of association and (ii) the right to assemble, consult for the common good, and make opinions known to representatives. However, since both claims arise from the same text, *see* N.J. CONST. art. I, ¶ 18, they are discussed jointly here.

[10] For a brief summary of the eight briefs filed in support of Petitioners, see Udi Ofer, *'Anti-Fusion Voting' Laws and the Problem With a Two-Party System*, N.J. L. J. (July 17, 2023), https://tinyurl.com/2m4xbfs5.

heightened scrutiny required under *Worden v. Mercer Cty. Bd. of Elections*, 61 N.J. 325 (1972), and instead holding that the State Constitution is *less* protective than the First Amendment. (PCa29-31 [Op. 27-29]; *see infra* p.17-18.)

Petitioners now respectfully ask this Court to take up these critical issues.

I. This Court Should Grant Certification to Perform the Hunt Analysis and Decide Whether the State Constitution Permits the Legislature to Stifle Political Participation Outside of the Major Parties[11]

At a precarious moment for our democracy, voters, organizers, and officials in New Jersey seek to exercise their constitutionally-guaranteed rights to advocate for a new politics. Whether they ultimately persuade their fellow citizens is a question for the court of public opinion. But whether the State can artificially shield the major parties from new competition and prevent upstart efforts from political association and expression is a question this Court must answer. And it is a question that strikes at the heart of the meaning and scope of fundamental rights enshrined in the New Jersey Constitution.

Certification is necessary to faithfully evaluate, under the longstanding *Hunt* framework, whether the anti-fusion ban violates the associational freedom guaranteed by the State Constitution—an essential evaluation that the Appellate

[11] This petition satisfies several of the standards for granting certification under R. 2:12-4. For the sake of efficiency and clarity, Petitioners have integrated the errors complained of and reason why certification should be granted into a single presentation of the issues. Further, unless otherwise noted, internal quotation marks and citations are omitted throughout this document.

Division eschewed.[12] Indeed, this is the first case to require interpretation of our Assembly Clause's unique text promising that "[t]he people have the right . . . to consult for the common good [and] to make known their opinions to their representatives"—a critical step also missing from the decision below.

Instead, the Appellate Division based its formulation of the state constitutional freedom of association by simply adopting the flawed reasoning in the U.S. Supreme Court's majority opinion in *Timmons*, even as it placed dispositive weight on observations about the 1947 New Jersey Constitutional Convention that are both legally irrelevant and contradicted by the historical record. For the reasons set forth below, certification should be granted to resolve the critical questions that arise as a result.

A. Courts Must Apply the Hunt Framework to Identify the Proper Scope of Rights Guaranteed in the State Constitution

The threshold issue here is the extent to which, if at all, our courts should follow the U.S. Supreme Court's treatment of federal associational freedom nearly 30 years ago in *Timmons* when interpreting the State Constitution. Our courts have long heeded Justice Brennan's warning that "state courts cannot rest

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[12] In the interest of economy, this petition focuses mostly on associational freedom. However, the Appellate Division's reliance on *Timmons* to permit infringements on the state rights to vote and equal protection was especially problematic given that federal voting or equal protection claims were not raised in *Timmons*. Further, this Court has held that heightened scrutiny applies to burdens placed by the state on the right to vote. *See Worden*, 61 N.J. at 346.

when they have afforded their citizens the full protections of the [U.S.] Constitution," as federal law "must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed." Hon. William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

To implement this command, our courts look to the factors set forth in Justice Handler's concurrence in *Hunt*: (1) textual differences between the constitutions; (2) legislative history of the state provision; (3) existing bodies of state statutory and case law; (4) structural differences between the constitutions; (5) subject matter of particular state interest; (6) particular state history or traditions; and (7) public attitudes in the state. *Hunt*, 91 N.J. at 363–68 (Handler, J., concurring). In assessing these factors, courts must not "uncritically adopt federal constitutional interpretations for the New Jersey Constitution," *State v. Novembrino*, 105 N.J. 95, 101-02 (1987), or view "federal interpretation of the [U.S.] Constitution . . . as requiring lockstep" at the expense of "greater protections for [New Jersey] citizens," *State v. Handy*, 206 N.J. 39, 51 (2011).

To the contrary, when "important personal right[s] [are] affected by governmental action," our courts often "require[ ] the public authority to demonstrate a greater public need than is traditionally required in construing the federal constitution." *Right to Choose v. Byrne*, 91 N.J. 287, 309 (1982). It is

not enough that the State merely articulate a plausible justification to infringe individual rights—it must substantiate the public need. *See, e.g., Lewis v. Harris*, 188 N.J. 422, 457 (2006). Scrutiny must be especially rigorous where the challenged action constrains core aspects of political participation, as here. *State v. Miller*, 83 N.J. 402, 411-12 (1980); *Worden*, 61 N.J. at 346-48.

Accordingly, this Court has admonished that "[w]hen the [U.S.] Constitution affords" the citizens of our state "less protection than does the New Jersey Constitution," New Jersey courts "have not merely the authority to give full effect to the State protection, [they] have the duty to do so." *State v. McAllister*, 184 N.J. 17, 29 (2005) (quoting *State v. Hempele*, 120 N.J. 182, 196 (1990)). This principle is particularly important in the First Amendment context. *See, e.g., N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326, 353-78 (1994); *State v. Schmid*, 84 N.J. 535, 553-64 (1980).

B. A *Hunt* Analysis Here Would Provide Critical Guidance on the Meaning and Breadth of Core Political Rights in New Jersey

Certification is essential in this case to clarify the scope and manner of interpreting core political rights under the New Jersey Constitution.[13] While this case centers on nominations and their implications for voters, candidates, and

[13] For a discussion of the principles that guide this state constitutional analysis, *see* Robert Williams, *State Constitutional Fusion Voting Claims: Textbook New Judicial Federalism in New Jersey*, 75 RUTGERS L.J. 1093 (2023).

political parties, the impact of the Appellate Division's ruling reaches much further. Unless this Court grants review in order to require application of the *Hunt* framework, lower courts may conclude that onerous restrictions on political participation need only be evaluated under the U.S. Constitution—ignoring entirely New Jersey's more expansive protections.

Such a precedent would erode the foundational principle affirmed in *Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985), that New Jersey courts bear the "ultimate responsibility for interpreting the New Jersey Constitution." And it would undercut the holdings of *Schmid* and *J.M.B.* that the State Constitution provides broader protections than the First Amendment and "surpasses the guarantees of the federal Constitution." 84 N.J. at 553, 557-58; 138 N.J. at 391. In fact, the Appellate Division ruling stands for the opposite principle: by refusing to apply the heightened scrutiny required under *Worden*, it affords *less* protection to political rights under the State Constitution than under the federal one. *Infra* p.17-18; *see Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 220 N.J. 71, 78-79 (2014) (State Constitution "affords greater protection than the First Amendment"). But a proper assessment of the *Hunt* factors compels the conclusion that the State Constitution guarantees more than the limited protections recognized in *Timmons*. *See Hunt*, 91 N.J. at 364-66.

Textual and Structural Differences: The First Amendment's text does not

grant rights, but instead prohibits "Congress" to "make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." The State Constitution's text, by contrast, affirmatively establishes positive rights: "Every person may freely speak, write and publish his sentiments on all subjects";[14] and "[t]he people have the right freely to assemble together, to consult for the common good, [and] to make known their opinions to their representatives." N.J. CONST. art. I, ¶¶ 6, 18. These final two provisions—which bear no resemblance to anything in the U.S. Constitution—establish a textual basis for the more robust protection of collective, expressive action in the political process, including with regard to the nomination of a chosen candidate.

History, Traditions, and State Law: Because Article I, Paragraphs 6 and 18 were "directly derived from earlier sources," courts must look to those sources to interpret them. *Schmid*, 84 N.J. at 557. Both paragraphs remain unchanged since their adoption in 1844. But neither was based upon the First Amendment: Paragraph 6 was based on the New York Constitution, *Schmid*, 84 N.J. at 557, which has been interpreted to prohibit anti-fusion restrictions. *Hopper v. Britt*, 96 N.E. 371 (N.Y. 1911); *Matter of Callahan*, 93 N.E. 262 (N.Y. 1910). And Paragraph 18 was based on the revolutionary-era Massachusetts

[14] *Green Party v. Hartz Mt. Indus.*, 164 N.J. 127, 145 (2000) ("the New Jersey[ ] Constitution's free speech provision is . . . broader than practically all others").

Constitution, where the Crown's suppression of colonial "assemblies" and other collective political activity led to clear expressive and associational protections to ensure the new government would remain representative and responsive. Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1663-94, 1703-08, 1733–34 (2021). We embraced this expansive vision of participatory politics by adopting similar language in 1844.[15]

By then, political parties were well-established as the principal vehicles for collective political action. Carl E. Prince, *New Jersey's Jeffersonian Republicans: The Genesis of an Early Political Machine* 41-68 (1967). And a party's nomination was its associational function, bringing together voters, their party, and their candidate on the ballot, at the "most crucial stage in the electoral process—the instant before the vote is cast." *Anderson v. Martin*, 375 U.S. 399, 402 (1964). It would have been unfathomable for the State to prohibit a party and its voters from exercising their associational right to nominate a qualified candidate—regardless of whether he was also supported by another party. Accordingly, for decades thereafter, New Jersey elections continued to reflect this commitment to free association and participation. Candidates routinely earned nominations from two parties, and as result, new parties gave voters

[15] New Jersey replaced the Massachusetts "right . . . to . . . give instructions" with the "right to make their opinions known to their representatives." MASS. CONST. OF 1780, art. XIX (Pa465-67); Bowie, *supra* at 1707, 1733-34.

disillusioned with the major parties opportunities for effective political association and expression. *See* Berryhill & Gavigan, *supra*.

New Jersey retained the ability of candidates to earn a second nomination when the state first adopted a government-printed ballot in the early 1890s. L. 1890, c.231. Years after many other states, New Jersey adopted its first anti-fusion ban in 1907, L. 1907, c.278, § 2, but then it quickly restored the distinctive commitment to associational freedom by repealing that ban. L. 1911, c.183. This was a radical departure from the national trend of tightening anti-fusion restrictions. *See* Argersinger, *supra*. A New Jersey court several years later expressed "at least very grave doubts" that the 1907 ban would survive constitutional scrutiny. *Paterson*, 88 A. at 695-96.

At this time, New Jersey was also one of the first in the nation to require direct primaries, reflecting the importance of party nominations in the democratic process and of ensuring that voters could express their views at the ballot. (Pa391-95.) New Jersey has, unlike most other states, also codified other mechanisms for candidates and groups of voters to express their political principles and associations on the ballot. *E.g.*, N.J.S.A. 19:13-4, 19:14-8, 19:23-17, 19:49-2.[16] On the whole, our statutory and decisional law reflects a long

[16] As Petitioners noted in a R. 2:6-11(d)(1) letter below, the Legislature recently revised one of these provisions to increase the petition requirements for minor

tradition of robust "individual expressional and associational rights," *Schmid*, 84 N.J. at 556, which must figure prominently in the *Hunt* analysis. This included the decision of this Court in *Worden*, which (although the Appellate Division ignored it) required that the infringement of a core political right under the State Constitution be subject to heightened judicial scrutiny. 61 N.J. at 346.

Public Attitudes: Various signs point to a broad desire throughout the electorate to associate outside of the two major parties, with 38% of voters statewide refusing to register with either of them. *See supra* n.2. Yet, these two parties receive nearly all votes in every election, while legacy minor parties—barred from nominating qualified, credible candidates who also secure a major party nomination—receive *de minimis* support. Because public attitudes are clearly at odds with the limited opportunities permitted under the ban, this factor also supports a robust conception of associational freedom. *Hunt*, 91 N.J. at 367.

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Evaluation of the *Hunt* factors leads to two clear conclusions. First, this case presents important questions of first impression about whether New Jersey's constitutional protections for political association are implicated by the anti-fusion laws, questions which deserve a full airing before this Court. And

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parties to place nominations on the general election ballot, P.L. 2025, c.20, proving that there are ample means to mitigate potential ballot overcrowding and other such concerns without a sweeping anti-fusion ban.

second, the Appellate Division erred in accepting *Timmons* as the law of this state because that federal ruling is incompatible with our Constitution and our enduring commitment to robust political freedoms.

C. The Appellate Division Failed to Evaluate the *Hunt* Factors—And Instead Followed a Widely-Criticized Federal Case Condoning Deliberate Restrictions on Electoral Competition

The Appellate Division, however, failed to apply the *Hunt* factors. It did not analyze the textual differences between the State and U.S. Constitutions; it overlooked structural distinctions; it ignored relevant state statutes and case law; it failed to recognize that the anti-fusion laws in this case were enacted to stifle political competition;[17] and it gave no consideration to state history, traditions, or prevailing public attitudes. Instead, the Appellate Division deferred to the U.S. Supreme Court's decision in *Timmons*—a federal precedent that has been widely criticized by voting rights scholars[18] and construes associational rights

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[17] *See* Richard Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition*, 1997 SUP. CT. REV. 331; *Timmons*, 520 U.S. at 378 n.6 (Stevens, J., dissenting) ("antifusion laws . . . , characterized by the majority as 'reforms,' were passed by the parties in power in state legislatures . . . to squelch the threat posed by the opposition's combined voting force").

[18] *E.g.*, Nate Ela, *A Path to Multiparty Democracy*, OHIO ST. L.J. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4986682; Justin Levitt, *Antebellum Fusion*, ELECTION LAW BLOG (Feb. 25, 2025), https://perma.cc/L8JQ-7UZ7; Lauren Miller, *New Jersey Considers Challenge to its Ban on Fusion Voting*, BRENNAN CENTER FOR JUSTICE (Dec. 3, 2024), https://perma.cc/XMT7-YQFE; Hon. Lynn Adelman, *The Misguided Rejection*

far more narrowly than New Jersey's Constitution permits.

The Appellate Division's unquestioning acceptance of *Timmons* cannot help but leave litigants and lower courts questioning whether, in fact, the State Constitution is "more sweeping in scope than the language of the First Amendment" and "surpasses the guarantees of the federal Constitution." *Schmid,* 84 N.J. at 553, 557-58; *see J.M.B.*, 138 N.J. at 353-78. That uncertainty threatens to erode the rights that our State Constitution separately provides. But rather than evaluating the *Hunt* factors, the Appellate Division merely paid lip service to them: it failed to evaluate the New Jersey Constitution's significantly more expansive language, denominating the important textual difference "slight" variations. (PCa23 [Op. 21].) And it summarily concluded that "New Jersey's legislative history, preexisting state law, structural differences, matters of local concern, state tradition, and public attitudes do not support a departure from the federal interpretation" without actually analyzing any of these factors, each of which support the opposite conclusion. (PCa23 [Op. 21.]) The important

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of Fusion Voting by State Legislatures and the Supreme Court, 56 IDAHO L. REV. 108 (2019); Hasen, *supra* at 331-32; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 673-74 (1998); Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 121-25; *see also Open Letter from Scholars in Support of Re-Legalizing Fusion Voting*, MEDIUM (July 2024), https://perma.cc/YR8Z-NUUK (more than 130 signatories, including Nikolas Bowie, Guy-Uriel Charles, Aziz Huq, Daniel P. Tokaji, and Larry Tribe).

political rights at issue here deserve much more consideration.[19]

In sum, the Appellate Division's uncritical reliance on *Timmons* is deeply flawed: it treats federal constitutional floors as ceilings; ignores our distinct constitutional text, history, and jurisprudence; and fails to apply the *Hunt* factors, abdicating its responsibility to interpret the State Constitution. This Court should grant certification to correct these errors, clarify the scope of New Jersey's constitutional protections, and ensure that outdated federal precedent does not define the rights of New Jersey voters for generations to come.

II. Certification Should Granted Because the Challenged Laws Impose Severe, Unequal, and Unjustified Burdens on Voters, Candidates, and New Political Parties

The need for certification is heightened by the serious constitutional consequences of the Appellate Division's decision, which permits far-reaching restrictions on the political rights of voters, parties, and candidates—restrictions that burden core constitutional freedoms and distort the democratic process. The

[19] The Appellate Division erroneously relied upon the proceedings of the 1947 Convention, misreading history to conclude that the drafters afforded a permanent safe harbor for anti-fusion restrictions. (PCa19 [Op. 17].) But history shows that a proposal to create an affirmative right to fusion was, along with other ideas, rejected in committee without explanation or reaching the Convention floor. (Psa1-18.) Attributing decisive constitutional meaning to this fleeting and opaque committee action amounts to finding an "elephant[] in [a] mousehole." *See Perez v. Zagami, LLC*, 218 N.J. 202, 216 (2014). Nonetheless, the Appellate Division came to the alarming conclusion that a failed proposal to amend a different part of the Constitution during the 1947 Convention justifies *narrowing* fundamental rights ratified in 1844 and unamended since that time.

Appellate Division first ignored this Court by refusing to follow *Worden*'s holding that heightened scrutiny applies to the infringement of a core political right protected by the State Constitution. 61 N.J. at 346. In this regard, though the decision purports to align state law with federal standards, in fact it weakens the state protections. The decision deemed the constitutional burdens here "minimal" because the Moderate Party "candidate's name . . . will still appear on the official ballot next to [another] political party" and "voters remain free to vote for that candidate." (PCa29 [Op. 27].) Yet, *Timmons* expressly held that the federal burden was "not trivial." 520 U.S. at 363. And the Third Circuit confirmed that federal courts "don't just ask whether a candidate's name physically appears on the ballot," but instead assess whether "the discriminatory nature" of a ballot rule "unfairly or unnecessarily burdens the availability of political opportunity." *Kim v. Hanlon*, 99 F.4th 140, 157 (3d Cir. 2024).

Indeed, even under intermediate *Anderson-Burdick* scrutiny, federal courts "assess[ ] whether alternative methods would advance the proffered governmental interests" in a "less burdensome" manner. *Soltysik v. Padilla*, 910 F.3d 438, 444-45, 448 (9th Cir. 2018); *Burdick v. Takushi*, 504 U.S. 428, 434, 437 (1992) (assessing "the extent to which those interests make it necessary to burden the plaintiff's rights" even when the burden was "very limited"). The Appellate Division purported to use this level of scrutiny—but skipped this

inquiry altogether, ignoring the numerous alternatives available to the State.[20] Its failure to do so was particularly striking, given the extensive and unrebutted record, which the State itself accepted (Pa32-39), showing the burdens imposed by the anti-fusion ban on voter rights; the illegitimacy of the State interests asserted; and the possibility of tailoring bans on voter rights more narrowly to advance the state interests asserted. (*See* Pa40-464.) In uncritically accepting the State's asserted interests, the Appellate Division not only ignored the holding of *Worden*, but did not even perform the kind of meaningful analysis that *Anderson-Burdick* requires. This published decision is dangerous: it teaches that the uncritical acceptance of asserted state interests, even where there is contrary evidence, is an acceptable method of adjudicating voting rights cases.

Proper judicial review, by contrast, would find severe and unjustified obstacles to political participation in precluding parties from nominating candidates who best reflect their views—a core function of political association; in barring candidates from aligning themselves with parties and voters who share their values; and in hindering *some* voters from casting ballots for their

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[20] The Appellate Division accepted the proposed interest in preventing "voter confusion" that *Timmons* deemed "paternalistic" and refused to credit. PCa30 [Op. 28]; 520 U.S. at 370 n.13. While *Kim* confirmed that "evidence is key" in scrutinizing state interests, 99 F.4th at 155, 158 n.13, the Appellate Division ignored uncontroverted facts in the record refuting the proposed justifications and instead held that the State met its burden simply because "the Secretary has *articulated* valid interests." (PCa31 [Op. 29]) (emphasis added).

candidates on their party's ballot line while allowing others to do so.

This associational burden is substantial. A central function of a party is to nominate candidates who can advocate its values and policies to the electorate. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) ("Freedom of association means . . . that a political party has a right to identify the people who constitute the association, and to select a standard bearer who best represents the party's ideologies and preferences."). Blocking a party's nomination severs its connection to its candidate, "directly hamper[ing]" the Party's ability "to spread [its] message"—especially where it matters most: the ballot. *Id.*; *Martin*, 375 U.S. at 402 (restrictions at the ballot "most crucial[ly]" burden political expression). Members must either (i) cast ballots for a different party to support their party's candidate or (ii) support a lesser candidate to register a vote for their own party. *See Burdick*, 504 U.S. at 438 (state may not "require voters to espouse positions that they do not support" when they "express their views in the voting booth").

The result is a profound burdening of the State Constitution's right to vote: Moderate Party members cannot vote for their party's preferred candidate on their party's legally entitled ballot line—while Democratic and Republican voters do so freely. To support their chosen candidate, Petitioners must instead cast a vote under the banner of a rival party, one whose values they do not share

and may even fundamentally oppose. This forced political realignment infringes the voter's right "to select as their candidate for office any person who is qualified to hold that office." *Paterson*, 88 A. at 695.

Finally, these burdens are not only severe—they are discriminatory. Moderate Party members lack the same opportunities that supporters of major parties enjoy: to nominate candidates of their choice and to vote in a way that reflects their candidate preference *and* party affiliation. This unequal treatment offends the State Constitution's guarantee of equal protection. *See* N.J. CONST. art. I, ¶ 1; *Caviglia v. Royal Tours of Am.*, 178 N.J. 460, 472 (2004). It also violates fundamental principles of electoral fairness, which guarantee all voters the right to participate in the political process on equal terms. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305, 314 (3d Cir. 1999) (en banc). In this way too, if left uncorrected, the decision below will allow significant, constitutionally suspect restrictions on participation to stand unchecked—making it all the more vital that this Court grant certification.

CONCLUSION

For the reasons set forth above, the Court should grant certification and set this matter for the full briefing, argument, and consideration it demands.

Respectfully submitted,

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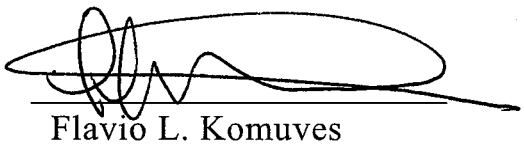
Dated: April 4, 2025

CERTIFICATION

I hereby certify that this petition presents a substantial question and is filed in good faith and not for the purpose of delay.



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Dated: April 4, 2025