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-3542-21
A-3543-21

Sat Below:

Hon. Robert J. Gilson, P.J.A.D.
Hon. Lisa A. Firko, J.A.D.
Hon. Lorraine M. Augostini, J.A.D.

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR CERTIFICATION

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INTRODUCTION

The Moderate Party, like all ballot-qualified New Jersey parties, should have its qualified nominees of choice appear on the Party's own ballot line. Moderate Party voters, like all other New Jersey voters, should be permitted to cast ballots showing support for both their Party's preferred candidates and their Party. The anti-fusion laws deny Petitioners this equality of political opportunity. In troubled times of deep public disillusionment with our democratic institutions and distrust of the entrenched major-party duopoly,[2] emerging parties seeking to inject new vigor into the political process should not have such arbitrary and unconstitutional roadblocks strewn in their path.

Yet the decision below, if undisturbed, would set a precedent enfeebling the protection of fundamental political rights assured to all New Jersey citizens, the exercise of which is essential to the well-being of our democratic order. This Court's review is imperative to reinforce those constitutional guarantees.

The State's response is to erroneously maintain (as did the court below) that New Jersey's anti-fusion laws inflict only minimal burdens on rights of suffrage, speech, and association, and thus the panel's languid scrutiny of those

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[2] According to a recent survey, nearly two thirds of New Jersey voters believe the major parties do not represent the electorate's interests, and half have wished they could vote for a viable third-party candidate (Pb9, n. 7), while nearly 40 percent have opted not to register with either major party (Pa49, nn.1&2).

laws conflicts with no precedent of this Court or the federal courts. St. Opp. 1. But the Appellate Division's analysis brims with infidelity to precedent: to *Worden*, which demands heightened, not fleeting scrutiny of laws that infringe fundamental political rights; to countless decisions of this Court demanding that "full effect" be given to rights protected by our State Constitution, when the federal charter does not accord them the dignity they require, *see* Pet. 6-8; and to *Hunt*, which sets guideposts for fulfilling that constitutional duty, guidance the Appellate Division did not meaningfully consider.

The panel's analysis is also in tension with numerous U.S. Supreme Court and federal appellate precedents applying the *Anderson-Burdick* framework that the panel purported to apply. Even at such an intermediate level of scrutiny (all the more so utilizing strict scrutiny), that framework requires a court to disregard speculative assertions of state interest and to consider less restrictive means for addressing even genuine state concerns. Here, the panel did neither.

This Court should grant certification, and reverse, to prevent the panel's misguided analysis from embedding within New Jersey's fundamental law.

ARGUMENT

I. The Court Should Grant Certification to Perform the Necessary *Hunt* Analysis.

A. Underlying the Appellate Division's many unfounded departures from precedent, in particular its failure to perform a meaningful *Hunt* analysis, was

its dismissal of the burdens on Petitioners' fundamental rights as "minima[l]" (PCa 29 [Op. 27]), a description echoed by the State, St. Opp. 16. But New Jersey's fusion ban acutely interferes with foundational rights of free association, expression, and suffrage, all protected with "exceptional vitality" by our State Constitution. *See State v. Schmid*, 84 N.J. 535, 556-57 (1980). Contrary to the State's view, St. Opp. 16, revoking Moderate Party nominations imposes a "severe" burden on Petitioners' associational freedom, by depriving the Party of its "ability to perform the basic function of choosing [its] own leaders." *California Democratic Party v. Jones*, 530 U.S. 567, 580, 586 (2000). Instead, the Party is forced to make do with, at best, second-choice candidates having little prospect of achieving electoral success for themselves, or the Party.

Moreover, the State fails to address the serious burden on Petitioners' "fundamental" right of suffrage. *Worden v. Mercer Cnty. Bd. of Elections*, 61 N.J. 325, 346 (1972); St. Opp. 16. To support their party's preferred candidates, Moderate Party voters are compelled to cast ballots on the lines of other parties, whose principles and policies they may not share.[3] Their expressive freedom is

[3] Thus they are also compelled to further marginalize their party by depriving it of votes needed to obtain "political party" status, N.J.S.A. 19:1-1, and the critical state-conferred, competitive advantages that accrue thereto, such as state-financed primaries (*id.* 19:5-1, 45-1) and favorable general-election ballot position (*id.* 19:14-6). Manifesting New Jersey's "unique hostility to minor parties," in the more than 100 years since the enactment of the State's current anti-fusion laws, no New Jersey third party has succeeded in achieving such favored status. (Pa 185-86.)

also directly infringed, again contrary to the State's view, St. Opp. 16. When voters mark their ballots for a candidate, they signal support not only for that candidate but also for his or her nominating party. A party's aggregate share of the votes cast is therefore a collective public expression of support from its adherents. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (recognizing that voters "express their views in the voting booth"); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 195 (2010) (acknowledging the protected "expressive component" of electoral activity). Forcing Moderate Party voters to choose between signaling support for their candidate or for their party deprives them of that critical "opportunity ... to be heard." *Swamp v. Kennedy*, 950 F.2d 383, 389 (7th Cir. 1991) (Ripple, J., dissenting from denial of en banc rehearing).

The State also overlooks that, by imposing burdens that "fall[ ] unequally on new [and] small political parties," the anti-fusion laws also "discriminate[ ] against ... voters whose political preferences lie outside the existing political parties," *Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983), and are thus repugnant to equal protection guarantees. Pet. 20 (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). The State remarks that the anti-fusion laws do not prevent Moderate Party candidates "from appearing on the ballot" (so long as the Party forsakes its candidates of choice). St. Opp. 16. But as the Third Circuit recently explained, when assessing the burdensomeness of a ballot rule, federal courts

"don't just ask whether a candidate's name physically appears on the ballot," but also assess whether "the discriminatory nature" of the rule "unfairly or unnecessarily burdens the availability of political opportunity." *Kim v. Hanlon*, 99 F.4th 140, 157 (3d Cir. 2024). That is the case here.

B. Given the manifest infringements on Petitioners' constitutionally protected interests, it was incumbent on the panel to inquire whether the New Jersey Constitution independently furnishes a greater degree of protection for these interests than the Federal Constitution was held to provide in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). The State essentially agrees that this is the threshold question requiring decision here. St. Opp. 1. As discussed in the Petition, resolving that question in a manner faithful to the duty of New Jersey Courts to give full effect to rights protected by the State Constitution, *see* Pet. 8, requires a thorough and searching examination of the *Hunt* factors—to clarify the nature and scope of the political rights protected by our Constitution, *id.* 9-14, and, based on that analysis, to determine the degree of scrutiny demanded by the restrictions the fusion ban imposes on the free exercise of those rights, *see id.* 4-5. As the Petition also explains, the Appellate Division failed to undertake that essential task.

The State asserts in response that the Appellate Division "conducted a comprehensive review of the *Hunt* factors." St. Opp. 11. But the panel's

conclusory, two-paragraph discussion of *Hunt* (PCa 23-24 [Op. 21-22]) does not come close to meeting that description. Instead, as its principal basis for upholding the fusion ban, the panel looked to the 1947 New Jersey Constitutional Convention (PCa 19-20, 23 (Op. 17-18, 21]), during which a proposal to allow fusion voting was considered in committee, but rejected there without explanation, and never considered by the full body. (Da 10, Psa 17-18.) On this basis the panel concluded that the Convention delegates as a whole were "clearly aware" of the State's fusion ban and affirmatively rejected the fusion voting proposal. (PCa 19 [Op. 17].) But those conclusions, echoed by the State, St. Opp. 8, are clearly unwarranted on the meager Convention record on point, and furnish no justification for dispensing with a genuine *Hunt* analysis.

The State nonetheless contends that the panel's reliance on Convention history is consistent with *State v. Buckner*, 223 N.J. 1 (2015). St. Opp. 9-10. In *Buckner*, though, this Court had a wealth of textual evidence on which to base interpretation of the Constitution's judicial retirement rule, including numerous drafts and proposed revisions thereto. 223 N.J. at 20-24. But even more to the point, the constitutional question in *Buckner* (whether retired state judges may be recalled into service, *id.* at 4) did not require, as here, a comparative *Hunt* analysis of the State and Federal Constitutions. In this context, no matter how extensive the pertinent Convention record, the court below erred in giving it

dispositive interpretive weight. *See State v. Novembrino*, 105 N.J. 95, 147, 157-58 (1987) (holding the State Constitution provides greater protection against use of unlawfully seized evidence than the Fourth Amendment, despite debate and rejection of the exclusionary rule at the 1947 Convention).

In sum, this is not a matter of mere disagreement with the outcome of the panel's *Hunt* analysis. St. Opp. 1. Rather, the error requiring this Court's intervention is the panel's failure to perform an actual *Hunt* analysis at all.

C. This Court's review is also needed to make clear that a proper *Hunt* analysis—taking into account our constitutional text and history; state laws, traditions, and interests; and public attitudes, *see* Pet. 9-14, coupled with a grasp of the severe burdens at issue—would point to *Worden*, not *Timmons*, as the lodestar for determining the level of scrutiny required. *Worden* teaches that, in New Jersey, laws infringing on fundamental political rights trigger heightened scrutiny, and in that case applied strict scrutiny, 61 N.J. at 346-48, even though the issue in *Worden* was not *whether* people could vote, but *where*, *id.* at 330-31. The burdens on the right to vote in this case, and on free speech and association, are at least as grievous. Thus, the Appellate Division was required to closely examine whether the state interests served by the fusion ban are "compelling" and whether less restrictive means are available to meet the State's objectives. *See id.* at 346-48.

The anti-fusion laws could not withstand such scrutiny. The asserted state interest in preventing ballot "manipula[tion]," St. Opp. 16-17, is entirely theoretical, with no support in "actual experience[ ]," *Worden*, 61 N.J. at 348 (*see* Pr 26), and easily addressed (if ever needed) through less restrictive means, such as reasonably elevating signature thresholds for minor-party nominations, *see SAM Party of New York v. Kosinski*, 987 F.3d 267, 276 (2d Cir. 2021), or reasonably limiting the number of nominations a candidate may accept, *see* Or. Rev. Stat. Ann. § 254.135(3)(a). The interest in promoting "voter choice" by forcing minor parties "to choose their own candidates" (and not another party's), St. Opp. 17, is a "circumlocution" for compelling parties to "produc[e] nominees ... other than those the parties would choose if left to their own devices," *Jones*, 530 U.S. at 582, "a stark repudiation of freedom of political association," *id.*[4]

The State also suggests that applying strict scrutiny to the anti-fusion laws "would cast doubt on a range" of laws "essential to the routine administration of elections." St. Opp. 15. The objection is not well taken. In future cases New Jersey courts would remain entirely capable of applying this Court's established

[4] It is also doubtful the anti-fusion laws promote true voter choice. Dark-horse candidates the laws force third parties to run do not, as a practical matter, offer voters viable alternatives to major-party nominees. And the laws deprive voters of choice by throttling the growth of new parties that otherwise might emerge as competitive alternatives to the two-party duopoly. *See Jones*, 530 U.S. at 584 (rejecting voter choice interest where the challenged law "*reduce[d]* the scope of choice").

jurisprudence, under which New Jersey courts considering state constitutional claims assess "the nature of the affected right, the extent to which the [challenged] governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg v. Kimmelman,* 99 N.J. 552, 567 (1985).[5] "The more important the constitutional right ..., the greater the ... need must be to justify interference with ... that right." *Green Party of N.J. v. Hartz Mountain Indus., Inc.*, 164 N.J. 127, 149 (2000). But the Appellate Division failed to engage in that analysis, because it refused to apply New Jersey law at all. Its decision cannot stand.

II. Certification is Necessary Because the Decision Below Gives License to Severe and Unjustified Burdens on Essential Political Rights.

Even under the *Anderson-Burdick* framework favored by the court below, and the State, St. Opp. 16, by parroting the reasoning of *Timmons* the Appellate Division's analysis still clashes with precedent, in two separate respects, with serious consequences if the decision below is not corrected by this Court.

A. *Timmons* held that Minnesota's anti-fusion laws should be analyzed under intermediate *Anderson-Burdick* scrutiny (rather than strict scrutiny) because it viewed the associational burdens imposed by Minnesota's anti-fusion laws, "though not trivial," as "not severe." 520 U.S. at 363. *Timmons* reached that conclusion by reasoning that the New Party and its members remained free

[5] *See also, e.g., Trautmann ex rel. Trautmann v. Christie,* 211 N.J. 300, 305 (2012); *Lewis v. Harris,* 188 N.J. 415, 442-43 (2006).

to communicate their ideas and engage in other types of political activity such as "campaign[ing] for, endors[ing], and vot[ing] for their preferred candidate." *Id.* But more recent U.S. Supreme Court decisions undermine that conclusion.

First, *Jones* could not be clearer that it is not the legitimate business of the state to intrude upon "the special place the First Amendment reserves for," or to erode "the special protection it accords," a party's right to select its standard-bearers. 530 U.S. at 575. Anti-fusion laws "severe[ly]" burden that right, *id.* at 586, by denying parties like the Moderate Party their preferred nominees and leaving them with a Hobson's choice of running second-choice, improbable protest candidates or sitting out an election altogether.

Second, since *Timmons*, the U.S. Supreme Court has repudiated the idea that courts may "overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *Jones*, 530 U.S. at 581. *See also Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (reaffirming that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"). Courts should not, then, "permit the government to silence" associational expression simply because parties and their supporters "have other opportunities for speech." *Cath. Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 430-31 (5th Cir. 2014).

That is especially so because a party's nomination is its "most effective way" of communicating what it represents to voters and thereby attracting their support. *Jones*, 530 U.S. at 575 (quoting *Timmons*, 520 U.S. at 372 (Stevens, J., dissenting)). "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Id.* at 580. *See also FEC v. Wis. Right to Life*, 551 U.S. 449, 477 n.9 (2007) (plurality); *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 228 n.18 (1989). Similarly, anti-fusion laws saddle Moderate Party supporters with unsatisfactory alternatives when they alone are denied the expressive opportunity of voting for both their preferred candidate and their party. *Swamp*, 950 F.2d at 388–89 (Ripple, J., dissenting from denial of en banc rehearing).

Because of the critical fault in *Timmons*' burden analysis, the *Timmons* Court did not scrutinize Minnesota's anti-fusion laws with the rigor demanded by the true extent of the incursions made on associational freedoms. The Appellate Division failed to recognize this deficiency when it embraced the *Timmons* approach. This Court's review is therefore needed to prevent this flawed mode of analysis from taking root in New Jersey constitutional law, even if the Court otherwise follows the *Anderson-Burdick* framework.[6]

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[6] The Intervenor argues that strict *Anderson-Burdick* scrutiny does not apply here because, in its view, none of the three types of burdens on political association that federal courts have identified as "severe" is implicated here. Intervenor Op. 13-14

B. The Appellate Division's disregard of precedent did not end there. Even if the fusion ban's restrictions on foundational rights triggered only mid-level review, the panel still failed to scrutinize the ban in the manner that *Anderson-Burdick* (and New Jersey constitutional jurisprudence) demand. *Anderson-Burdick* scrutiny requires a court to "evaluate" "the legitimacy and strength" of the state's interests and to "consider the extent to which those interests make it necessary to burden [complainants'] rights." *Anderson*, 460 U.S. at 789; *see also Burdick*, 504 U.S. at 434 and *Norman v. Reed*, 502 U.S. 279, 288–89 (1992) (state laws "limiting the access of new parties to the ballot ... call[ ] for [a] demonstration of a corresponding interest sufficiently weighty to justify the limitation").

That evaluation is two-fold. First, a state may not rely on "sheer speculation" and "imagine[d]" threats to justify even less-than-severe burdens on First Amendment rights, *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 454-55(2008); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377,

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(citing *Kosinski*, 987 F.3d at 274). To the contrary, all three are present. It is difficult to imagine greater interference with a party's "internal affairs," or a greater "restric[tion] [on] core associational activities," *Kosinski*, 987 F.3d at 274, than prohibiting the nomination of a party's chosen standard-bearer. And while New Jersey's fusion ban does not preclude all ballot access, it does make it "virtually impossible," *id.*, for minor parties to amass the vote totals needed to obtain "political party" status under N.J.S.A. 19:1-1, and the material state benefits that would allow them to compete with the major parties on a more equal footing, *see supra* at 3 n. 3.

392 (2000), else the intermediate scrutiny called for by *Anderson-Burdick* would in practice amount to no more than "ordinary rational-basis review," *Soltysik v. Padilla*, 910 F.3d 438, 449 (9th Cir. 2018). Second, to determine whether the state's interests, even if legitimate, "make it necessary to burden the plaintiff's rights," *Burdick*, 504 U.S. at 434, courts must "assess[ ] whether alternative methods would advance the proffered governmental interests," *id.* at 448, in a "less burdensome" manner, *Soltysik*, 910 F.3d at 444-45, 448; *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015) (a court must consider "the state's asserted interest *and chosen means of pursuing it*") (emphasis added).

Although the State asserts that the Appellate Division conducted an appropriate *Anderson-Burdick* analysis, St. Opp. 16, the court did not engage in either of these essential inquiries. Rather, it uncritically accepted at face value both the weight of the State's asserted interests and the necessity of a fusion ban to protect them. (PCa 29-31 [Op. 27-29].) The State ventures no argument to the contrary. St. Opp. 16-17.

Timmons is in tension with more recent federal decisions and does not furnish the robust protection of New Jerseyans' political liberties that our State Constitution demands. The prospect—in this and future cases—of licensing far-reaching intrusions on New Jerseyans' essential rights, without requiring any more of the State than the mere "articula[tion]" (PCa 31 [Op. 29]) of post-hoc

rationalizations for laws restricting political freedoms, should concern this Court and demands its plenary review of the Appellate Division's decision.

C. All else failing, the State suggests that the question of permitting fusion voting should be left to the Legislature. St. Opp. 10; *see* Intervenor Op. 8-9. But the power to "regulate ... elections" does not carry with it the power to "abridge[e] ... fundamental rights." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). Nor should the Court place confidence in a body dominated by the major parties to repeal the very "restrictions" on the "political process[ ]" that reinforce their dominance. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-153 n. 4 (1938). Instead, what should alarm this Court is the diminished regard for rights occupying "an exalted position in our State Constitution," *In re Att'y Gen.'s "Directive on Exit Polling: Media and Non–Partisan Public Interest Groups," Issued July 18, 2007 (A–47–08)*, 200 N.J. 283, 302 (2009), that the Appellate Division's decision would sow into our constitutional landscape if left undisturbed.

III. This Case Presents an Appropriate Vehicle for Addressing the Issues Requiring This Court's Resolution.

Finally, the State asserts that this case is a "poor vehicle" for review because the Appellate Division denied the State's request for a remand to further

develop the factual record. St. Opp. 18-19.[7] But the reason the court gave for refusing that request—that the issues on appeal were "purely legal," App. Div. Order on Motion (May 2, 2023)—underscores why this Court's review is necessary: even at the less vigorous, intermediate degree of scrutiny for which the State argues, it is not possible to rule in the State's favor, as the Appellate Division did, without substantiation of both the existence and weight of the State's asserted interests, and the lack of viable alternatives for advancing them.

In any event, the questions this Court must decide concern the degree to which the State Constitution accords greater protection to rights of political participation than the U.S. Constitution was held to do in *Timmons*, and, in light thereof, the level of constitutional scrutiny the anti-fusion laws must face. Whether New Jersey's fusion ban withstands the applicable degree of scrutiny is a separate question that could be addressed on remand, with the benefit of this Court's guidance, and, if necessary, the submission of additional evidence.

CONCLUSION

For the reasons set forth above and in the Petition, certification should be granted.

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[7] The State's dilemma is one of its own making, as it waited until eight months after Petitioners filed their appeal, until the *twice*-extended deadline to file its opposition brief, to request a remand to the Law Division. *See* App. Div. Order on Motion (May 2, 2023). The Appellate Division acted well within its discretion to deny that untimely request.

Respectfully submitted,

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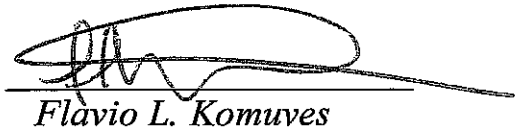
By: 
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