

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 OF
NEW JERSEY

No. _____

On appeal from final agency action
in the Department of State

App. Div. Docket No.:
A-3542-21T2

Sat below: Hon. Tahesha Way,
Secretary of State

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(CONSOLIDATED)

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Appellants Moderate Party, Richard Wolfe, Michael Tomasco, and William Kibler move for direct certification of these consolidated cases fully briefed in the Appellate Division. R. 2:12-2(a).

This appeal presents a straightforward and important question: whether New Jersey’s statutory ban on “fusion voting” violates fundamental rights guaranteed under the State Constitution. These laws prohibit a candidate from being cross-nominated—i.e., named on the general election ballot by two parties, generally by a “major” party and a “minor” one. Into the early 20th century, fusion voting flourished here and throughout the country, permitting minor parties and their voters to assume a meaningful role in politics. Voters disaffected with the two major parties could cast an effective vote for a competitive candidate while signaling support for the minor party of their choice. Subsequently, anti-fusion laws were passed expressly to exclude minor parties from the political process.

The effort worked: in the decades since, nearly every vote in every New Jersey election has been on the Democratic or Republican line. No minor party has achieved statutory party status in over a century. (Pb16.)¹ This is despite broad agreement among voters that the two major parties fail to adequately represent them and widespread desire for more electoral choice. (Pb9.)

¹ “Pb_” refers to Appellants’ merits brief; “Pa_” refers to Appellants’ appendix.

The Moderate Party wants to be a home for moderate voters like Wolfe, Tomasco, and Kibler stranded between the polarized major parties. To combat this dangerous division, the Moderate Party seeks to nominate competitive, moderate candidates on both sides of the aisle. (Pb6-7 & n.6.) In June 2022, the Moderate Party and Democratic Party each nominated (with his consent) Tom Malinowski as their candidate in CD7. Secretary Way rejected the Moderate Party's petition, relying on the anti-fusion laws, and excluded it from the November 2022 ballot. (Pa1-2.) Appellants appealed, challenging the legality of the Secretary's rejection under four provisions of the New Jersey Constitution.² Eight *amicus* briefs have been filed in support.

There are at least four reasons why this appeal meets the standard for direct certification under R. 2:12-2 and R. 2:12-4.

1. Prompt and definitive resolution is required to ensure future elections are administered in a constitutional manner. This Court has time and again directly certified appeals to resolve issues in advance of forthcoming elections.³ Direct certification is necessary here to conclusively determine whether the Moderate Party and others, like *Amicus* Libertarian Party of New

² The right to vote (art. II, § 1, ¶ 3); the right to free speech and association (art. I, ¶¶ 6, 18); the right to assemble and make opinions known to representatives (art. I, ¶ 18); and equality and fairness provisions (art. I, ¶ 1).

³ N.J. Dem. Party v. Samson, 175 N.J. 178 (2002); Brady v. N.J. Redistricting Comm'n, 131 N.J. 594 (1992); Alaimo v. Burdige, 63 N.J. 574 (1973).

Jersey, may cross-nominate their preferred candidates in the 2024 election.⁴

On June 4, 2024, major parties will have their primaries and minor parties' nominating petitions will be due—but clarity is needed earlier. Minor parties need ample time to interview and evaluate candidates and to gather signatures for each petition.⁵ Denying direct certification risks delaying the vindication of Appellants' constitutional rights until after the 2024 election cycle, resulting in another election in which Appellants are denied equal and full participation, contrary to “the interest of justice.” R. 2:12-4.⁶

2. This case presents an issue of general public importance. At a time of declining faith in democratic institutions, spiraling polarization, and growing demands for more electoral choices, this appeal asks whether the State Constitution condones the deliberate constraints on political competition at issue here, including the suppression of minor party activity and limits on the ability of like-minded citizens to meaningfully participate in the democratic process.⁷ The outcome may affect the manner in which millions of

⁴ The short time between the Secretary's rejection and deadlines for finalizing ballots prevented consideration of these issues in 2022, and unexpected delays in the merits briefing have thwarted resolution before the 2023 election.

⁵ The Secretary deems all candidates filing petitions for a major party primary—which must occur by March 25, 2024—ineligible for a minor party's nominating petition. (Pa1-2 (citing N.J.S.A. 19:13-8.)

⁶ Denying direct certification risks an outcome where this Court decides that the claims are meritorious, but is unable to grant timely and effective relief.

⁷ It has never been more important than it is today to reaffirm the fundamental

eligible New Jerseyans cast their votes. Weighty constitutional issues like this have routinely warranted direct certification.⁸ The eight *amicus* briefs reflect the “general public importance” of this appeal. R. 2:12-4. Former Gov. Christine Todd Whitman, former House Majority Leader Richard Gephardt, the ACLU of NJ, the Cato Institute, and renowned New Jersey scholars Robert Williams, Ronald Chen, and Nolan McCarty are among those providing their perspective on these issues, which have “not been but should be settled by the Supreme Court.” Id.⁹

3. The Secretary’s rejection ignored a contrary state court ruling.

Despite extensive briefing and record evidence explaining why denial of the Moderate Party’s cross-nomination would be unconstitutional, the Secretary summarily rejected the petition. (Pa1-2.) Yet, In re Clerk of Paterson, 88 A. 694, 695 (N.J. Sup. Ct. 1913), considered the central issue here—whether a state statute could constitutionally prohibit cross-nominations—and concluded

political rights guaranteed under the State Constitution.

⁸ E.g., State v. Vega-Larregui, 246 N.J. 94 (2021); N.J. Republican State Comm. v. Murphy, 243 N.J. 574 (2020); Freedom From Religion Found. v. Morris Cnty. Bd. of Freeholders, 232 N.J. 543 (2018); Burgos v. State, 222 N.J. 175 (2015); Garden State Equality v. Dow, 216 N.J. 314 (2013); DePascale v. State, 211 N.J. 40 (2012).

⁹ For an overview of the *amicus* briefs, 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>. *Amicus* are represented by renowned advocates like C.J. Griffin, Jay Lefkowitz, and Jerry Goldfeder, and acclaimed firms including Gibbons PC, Pashman Stein, Kirkland & Ellis, Wachtell Lipton, and WilmerHale.

that “the Legislature has no right to pass a law which in any way infringes upon the right of voters to select as their candidate for office any person who is qualified to hold that office.”¹⁰ Direct certification is warranted given that the Secretary’s “decision . . . is in conflict with” this ruling. R. 2:12-4.

4. This Court’s supervision is required to ensure application of the proper standard of review. In Worden v. Mercer Cnty. Bd. of Elections, this Court held that strict scrutiny applies to state constitutional claims like those here. 61 N.J. 325, 346 (1972). The other side urges the Appellate Division to ignore precedent and apply a less rigorous standard created by federal courts to evaluate federal claims. Just as other state high courts have reaffirmed the application of strict scrutiny under their respective state constitutions (Pb40-41), this Court has long been a bulwark against efforts to diminish fundamental rights guaranteed in the New Jersey Constitution. This appeal “calls for an exercise of the Supreme Court’s supervision” to ensure faithful and timely application of precedent on this important question. R. 2:12-4.

Thus, the Court should grant Appellants’ motion for direct certification.

¹⁰ Then-recent statutory changes meant Paterson “did not need to take the formal step of striking down the [previous anti-fusion] law as unconstitutional” (Pb36 n.33), but the court expressed “grave doubt as to the power of the Legislature to coerce the members of a political party or a group of citizens of a certain political faith into selecting for their nominee a man whom they do not want . . . or to say to them, ‘you shall not select the man that you do want.’” 88 A. at 696.

Respectfully submitted,

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Dated: July 20, 2023