UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2630

EUGENE MAZO, ET AL.,
Plaintiffs-Appellants,

v.

NEW JERSEY SECRETARY OF STATE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY (NO. 3-20-cv-08174-FLW-TJB)

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INTRODUCTION

Seeking to use the slogans of entities that have not consented to associate with them, Appellants, unsuccessful candidates for Congress, challenge a longstanding New Jersey law that requires primary candidates whose ballot slogans use the names of people and/or New Jersey incorporated associations to obtain consent from those entities. But the statutes exist for good reason: absent consent, voters might get the wrong impression about the candidate's associational affiliations—and candidates for office could seek to take advantage of that confusion. This is a perfect illustration. Each of Appellant Eugene Mazo's three proposed slogans consisted *solely* of the names of Democratic county organizations with which he had no affiliation and that had not endorsed him. For her part, Appellant Lisa McCormick first sought to appropriate the campaign slogan of a presidential candidate's 2020 presidential campaign, and then when that failed, proposed a slogan that again expressly named the candidate and again without ever obtaining that campaign's consent.

In placing both minor and reasonable parameters around the slogans printed on official state ballots, these state statutes have long played a role in New Jersey's scheme for structuring and regulating primary elections. These laws balance the pro-democratic interest of increasing the information available to voters when they cast their votes with the recognition that because of the ballot's unique and sensitive location, such speech warrants the state's careful regulation to avoid voter confusion

and manipulation. Thus, for eighty years, New Jersey has permitted candidates in primary elections to include slogans of up to six words to appear alongside their names on the primary ballot for a limited, but salutary, purpose of "indicating either any official act or policy to which he is pledged or committed, or to distinguish him as belonging to a particular faction or wing of his political party." N.J. Stat. Ann. § 19:23-17. That is accompanied by a proviso: "no . . . slogan shall include or refer to the name of any person or any incorporated association of this State" without the "written consent" of that third party. *Id.*; *see* N.J. Stat. Ann. § 19:23-25.1 (reiterating the consent requirement) (together "the Slogan Statutes").

In arguing that ballot slogans should be viewed as unrestricted political speech, Appellant misunderstand the import of elections regulations, as well as the unique constitutional frameworks that govern them. Appellants' view is that their ability to "speak" freely in the narrow confines of the primary ballot is as broad as their general right to political speech on the campaign trail or in the public square. But Appellants ignore that while the Slogan Statutes do regulate the form and content of the ballot, they are unlike ordinary speech restrictions.

The Supreme Court has fashioned a specific standard to govern challenges to election laws, to afford the deference necessary to ensure that States can effectively exercise their constitutional authority and obligation to administer the democratic process.

These laws easily clear that applicable standard. Under the *Anderson-Burdick* test, named for the two cases in which the standard was announced, a court assesses the severity of the burden on constitutional rights imposed by an election law. If that burden is not severe, lesser scrutiny applies, and the state's "'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). That is the test for this case because the Slogan Statutes only speak to information that appears on the ballot itself—the keystone of the democratic process. They do not affect candidates' capacity to speak fully and freely in their campaigns, they do not impose a severe burden on candidates, and they are generally applicable and non-discriminatory—covering every candidate the same. And under this test or any other, these statutes survive: by ensuring no candidate can claim to be part of or endorsed by an organization when they are not, the Slogan Statutes advance the compelling governmental interests of ensuring the integrity of the state's primary contests, guarding against voter confusion and deception, and protecting third-party associational rights. Thus, there is no basis to invalidate this longstanding election regulation.

Accordingly, the district court correctly held that Appellants failed to state a First Amendment claim. Its decision should be affirmed.

COUNTERSTATEMENT OF JURISDICTION

The United States District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Under 28 U.S.C. § 1291, this Court has subject matter jurisdiction over the appeal of the District Court's July 30, 2021 order dismissing all of Plaintiff-Appellants' claims.

COUNTERSTATEMENT OF ISSUES

I. Whether the Slogan Statutes, which permit candidates in New Jersey primary elections to have a six-word ballot slogan displayed alongside their name on the ballot, provided such slogan satisfies certain limited conditions, are election regulations subject to review under the *Anderson-Burdick* balancing test.

II. Whether, under the *Anderson-Burdick* balancing test, the Slogan Statutes are subject to lesser scrutiny because they do not impose a severe burden on primary election candidates, and if so, whether they satisfy such scrutiny.

III. Whether, in the alternative, the Slogan Statutes survive traditional First Amendment means-ends balancing.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before the Court. The Secretary of State is unaware of any related cases.

COUNTERSTATEMENT OF THE CASE

A. The Slogan Statutes And The 2020 Primary

New Jersey has a comprehensive set of laws and regulations that structure and regulate elections. Relevant to this case are those laws which establish myriad rules relating to the ballots used in primary and general elections. *See, e.g.*, N.J. Stat. Ann. §§ 19:14-1 to 19:15-34, 19:23-23 to -37. These statutes—many of which are of longstanding provenance—specify the parameters around the content of ballots in great detail. *See, e.g.*, N.J. Stat. Ann. §§ 19:14-1 to -14, 19:23-25.1.

The Slogan Statutes, which date back to 1930 when the New Jersey Legislature first enacted N.J. Stat. Ann. § 19:23-17, permit candidates in a primary election for "any public office" to "request that there be printed opposite his name on said primary ticket a designation, in not more than six words . . . for the purpose of indicating either any official act or policy to which he is pledged or committed, or to distinguish him as belonging to a particular faction or wing of his political party." 1930 N.J. Laws 798. A proviso was added in 1944 that "*provided, however,* that no such designation or slogan shall include or refer to the name of any person or any incorporated association of this State unless the written consent of such person or incorporated association of this State has been filed with the petition of nomination of such candidate or group of candidates." 1944 N.J. Laws 787 (emphasis in original). The legislature also reinforced the third-party consent

requirement in N.J. Stat. Ann. § 19:23-25.1, which establishes that no ballot slogan "shall be printed" that "includes or refers to the name of any person" without consent. In statewide primary elections, enforcement of such requirements is assigned to the Secretary of State, who reviews candidates' ballot slogan requests together with their petitions for nomination under the relevant statutes. *See, e.g.*, N.J. Stat. Ann. §§ 19:13-3, 19:23-21.[1]

As alleged in the amended complaint, Appellants—Eugene Mazo and Lisa McCormick—were candidates for Congress in New Jersey's June 7, 2020 primary elections. Am. Compl. 14-15, 23 (App. 45). Mazo sought the Democratic Party nomination to compete in the general election for the U.S. House of Representatives seat in Jersey's Tenth Congressional district, and McCormick did the same for the Twelfth Congressional district. *Id.* In his petition for nomination submitted to the New Jersey Division of Elections, within the Department of State, *see* N.J. Stat. Ann. § 52:16A-98, Mazo requested that the following ballot slogans would appear next to his name on the ballots in Essex, Hudson, and Union counties, respectively: "Essex

[1] Because Appellants sought federal office, petitions for nomination are addressed to the Secretary of State pursuant to N.J. Stat. Ann. § 19:23-6. However, "[p]etitions nominating candidates to be voted for by the voters of a political party throughout a county or any county election district or subdivision of a county comprising more than a single municipality, shall be addressed to the clerk of the county." *Id.* And "[a]ll other petitions shall be addressed to the clerks of municipalities." *Id.*

County Democratic Committee, Inc."; "Hudson County Democratic Organization"; and "Regular Democratic Organization of Union County." *Id.* ¶ 37 (App. 48).[2] In accordance with the Slogan Statutes, the Division of Elections informed Mazo that his slogans "referred to the names of New Jersey incorporated associations," and if he did not receive consent from those entities to use their names "his nomination petition would be certified as 'NO SLOGAN.'" *Id.* ¶ 38 (App. 48-49). Mazo "did not obtain the required authorizations" and so Mazo instead decided to "use[] three different slogans with the authorization of three other New Jersey incorporated associations that he created." *Id.* ¶ 39 (App. 49).

In her petition for nomination, McCormick requested the ballot slogan "Not Me. Us." *Id.* ¶ 41 (App. 49).[3] She received a similar response from the Division of Elections as Mazo. *Id.* ¶ 42 (App. 49). McCormick then requested "Bernie Sanders Betrayed the NJ Revolution," and was again told that the slogan would not be printed under the same statutory requirement. *Id.* ¶¶ 43-44 (App. 49). McCormick did not

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[2] Per Fed. R. Evid. 201, the Court may take judicial notice that at the relevant time New Jersey's Tenth Congressional district spanned portions of Essex, Hudson, and Union Counties. *See* Congress.gov, New Jersey, District 10, https://www.congress.gov/member/district/donald-payne/P000604?s=1&r=9 (last visited Feb. 13, 2022).

[3] "Not Me. Us." was a slogan of the 2020 presidential campaign of Bernie Sanders. *See, e.g.*, https://berniesanders.com/ (last visited Feb. 13, 2022).

obtain Bernie Sanders' consent, and instead used "Democrats United for Progress," for which she received the necessary authorization. *Id.* ¶ 45 (App. 49).

Both Mazo and McCormick allege that they plan to run in the same primary races in 2022 and to "use" the ballot slogans each had originally proposed in 2020—in McCormick's case, either of the two rejected slogans.[4] *Id.* ¶¶ 40, 46 (App. 49-50). And neither "will . . . obtain the required authorizations." *Id.*

B. Procedural History

Five days before the primary election, Appellants filed suit in the District of New Jersey against the Secretary and various county clerks. Appellants alleged that the Slogan Statutes' consent requirement is unconstitutional under the First and Fourteenth Amendments, facially and as-applied, and sought declaratory and injunctive relief. App. 52-53.[5] The Secretary and the clerks separately moved to dismiss. For her part, the Secretary sought dismissal under both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

On July 30, 2021, Chief Judge Wolfson granted the clerks' motion and dismissed them from the suit, and agreed with the Secretary that Appellants had

[4] The deadline to petition to get on the ballot for the 2022 Primary Election is April 4, 2022, the 64th day prior to the election. *See* N.J. Stat. Ann. § 19:23-14.

[5] Although Appellants also initially demanded nominal damages, they subsequently abandoned that claim in part and no longer press it on appeal. *See* App. 7.

failed to state a claim and dismissed the suit accordingly. App. 4. At the outset, the court understood that Appellants "primarily raise[d] a facial challenge." App. 23. As for any as-applied claims, she explained that they fail on the grounds that Appellants did "not plead any facts showing that [Secretary] Way enforced the Slogan Statutes against them in an unconstitutional or otherwise irregular manner." *Id.*

Turning to the facial challenge, Chief Judge Wolfson first explained why the constitutional claim must be reviewed under the "sliding scale" framework set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and later refined in *Burdick v. Takushi*, 504 U.S. 428 (1992) ("*Anderson-Burdick*"), despite Appellants' insistence to the contrary. App. 29. The court began by recognizing that pursuant to the U.S. Constitution's Elections Clause, U.S. Const. art. I, § 4, cl. 1, states "have for a long time enacted 'comprehensive, and in many respects complex, election codes regulating in most substantial ways . . . the time, place, and manner of holding primary and general elections.'" App. 24 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Further, the court observed that the Supreme Court applies *Anderson-Burdick* to "'a wide variety of challenges to . . . state-enacted election procedures,' including those implicating First Amendment rights." App. 25 (quoting *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018)). In particular, the court noted that when the Supreme Court employed *Anderson-Burdick* to review (and uphold) a Minnesota law "barr[ing] multiple parties from endorsing the same candidate on the ballot," it

emphasized that "'[b]allots serve primarily to elect candidates, not as forums for political expression,'" which is instead the province of political campaigns. App. 27 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997)). And although the Slogan Statutes, "like all [election] regulations . . . 'inevitably affect'" candidates' constitutional rights, App. 28 (quoting *Anderson*, 460 U.S. at 788), Chief Judge Wolfson reasoned that "they do so in the context of inherently 'limited ballot space,' where there is no fundamental right to . . . substantial declarations of political sentiment," App. 28-29 (quoting *Timmons*, 520 U.S. at 364).[6]

The court next assessed, under the *Anderson-Burdick* standard, the magnitude of the burden imposed by the Slogan Statutes and noted that under hornbook principles, only a "severe" burden warrants strict scrutiny. App. 31. Anything less triggers "lesser scrutiny" under which a state's "important regulatory interests will usually be enough." *Id.* (quoting *Timmons*, 520 U.S. at 351). The court concluded that the burden imposed by the Slogan Statutes is more than "slight" but less than severe, thus triggering lesser scrutiny. App. 33. The burden was not slight because, in the court's view, the Slogan Statutes laws could potentially chill or alter the speech

[6] The district court also rejected Appellants' reliance on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995), which involved prohibitions on anonymous political pamphlets writ large under traditional First Amendment analysis rather than the *Anderson-Burdick* rubric. The court explained that, unlike the activities covered by the Slogan Statutes, "leafletting cannot be construed as an election code provision[] governing the voting process itself." App. 29 (internal citations omitted).

of candidates who are unable to obtain consent of a named third party, or "undercut" candidates' abilities to "signal . . . [their] ideological bona fides" by naming a person or group. *Id.* (citation omitted). Nevertheless, that burden could not be called severe for four reasons: (1) Appellants did "not allege how frequently the Slogan Statutes thwart" candidates' plans; (2) the Slogan Statutes are generally applicable to all primary candidates; (3) as a practical matter, the non-consenting parties more directly burdened candidates' speech than the State did; and (4) candidates retained "many other—and more substantial—opportunities to speak" and "express associations with people or groups throughout the campaign, in other forums, and by other means." App. 33-35.

Under the second step of *Anderson-Burdick*, Chief Judge Wolfson then held that the Slogan Statutes survived lesser scrutiny because New Jersey's "legitimate interests . . . outweigh[ed]" the burden the laws imposed. App. 26 (quoting *Burdick*, 504 U.S. at 440); *see* App. 38-39. The court agreed with the Secretary that the consent requirement: (1) preserves the integrity of, and "safeguard[s] public confidence" in, the nomination process, which in turn "encourages citizen participation," App. 36 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008)); and (2) prevents voter confusion and deception by minimizing the risk that ballot slogans referencing a third party without consent would suggest an association that does not exist. *See* App. 36-37, 39. In "assur[ing] voters" of the

accuracy of any suggested association in any ballot slogan, the consent requirement also "[p]rotect[s] the associational rights of third parties." App. 37. In the court's view, then, each of these interests were "sufficiently weighty," and the Slogan Statutes advanced them "in a practical, and not purely theoretical, manner." App. 35, 38. Therefore, Chief Judge Wolfson rejected Appellants' facial challenge and granted the Secretary's motion to dismiss under Rule 12(b)(6). App. 39, 41.

This appeal followed.

SUMMARY OF ARGUMENT

I. The district court correctly upheld the Slogan Statutes under the *Anderson-Burdick* framework.

A. The well-established *Anderson-Burdick* framework applies to this case. Appellants' cramped view of *Anderson-Burdick* as applicable only to freedom of association claims and not free speech claims is at odds with all of the applicable decisions of this Court and several other courts of appeal. As these courts have held, while ballots do contain speech and associational interests, they nevertheless remain instrumentalities of the State-run elections process, principally designed to facilitate casting and counting votes. Thus, the flexible test is required to ensure a proper balance between any burden on rights and deference to the State's important role in administering free and fair elections.

B. Under the "practical assessment" required by *Anderson-Burdick*, the burden imposed by the Slogan Statutes is not severe, and therefore strict scrutiny is categorically inapplicable. As Chief Judge Wolfson explained, (1) nothing in the allegations speaks to how often, as a practical matter, the state laws actually affect candidates' proposed slogans; (2) the statutes are generally applicable to all primary candidates; (3) the third parties who withhold consent, rather than the laws, are the proximate cause of a candidate altering their slogan; and (4) nothing in the Slogan Statutes affects the candidates' abilities to speak to voters and exercise their First Amendment rights throughout a political campaign. Individually and together, these considerations disprove Appellants' claims of a severe burden.

C. The Slogan Statutes survive whatever level of scrutiny they receive. If this Court correctly applies the lower scrutiny applicable when the burden imposed is not severe, then the case is at an end, because Appellants *acknowledge* that the challenged Slogan Statutes advance important state interests. But even were this Court to apply strict scrutiny—and there is no reason to do so—the Slogan Statutes survive. They advance interests that are not only legitimate and non-discriminatory, but compelling by: (1) safeguarding the integrity of primary races; (2) mitigating any voter confusion and deception; and (3) protecting third-party associational rights. And they are narrowly tailored to advance those interests, a point made clear by the fact that neither of Appellants' proposed alternatives work. First, requiring

the State to place a disclaimer stating that the slogans may include false information would undermine the public's trust, and would do nothing to advance the second and third public interests of preventing confusion and protecting associational rights. Second, requiring consent for only positive slogans using a covered entity's name, but not for negative slogans, would run into viewpoint discrimination problems.

II. Even if this court rejects *Anderson-Burdick* in favor of a traditional First Amendment analysis, the Slogan Statutes survive for similar reasons. The Slogan Statutes trigger intermediate scrutiny because they are content-neutral, are generally applicable and do not discriminate on the basis of the speaker's identity or viewpoint. But whether under intermediate or strict scrutiny, as explained in Part I.C above, the statutes are appropriate tailored to the interests they serve.

STANDARD OF REVIEW

This Court exercises plenary review over a district court's decision to grant a motion to dismiss under Rule 12(b)(6). *See Marathon Petroleum Corp. v. Sec'y of Finance for Del.*, 876 F.3d 481, 488 n.9 (3d Cir. 2017). This Court may affirm "on any ground apparent from the record, even if the district court did not reach it." *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 761 (3d Cir. 2010).

The gravamen of Appellants' appeal is their facial challenge to the Slogan Statutes. "A facial challenge 'seeks to vindicate not only [a plaintiff's] own rights,' as in an as-applied challenge, but also 'those of others who may . . . be adversely

impacted by the statute in question.'" *Bruni v. City of Pittsburgh*, 941 F.3d 73, 83 (3d Cir. 2019) (alteration in original) (citation omitted). A "facial challenge [under the First Amendment] must fail where the statute has a plainly legitimate sweep." *Id.* (alteration in original) (quoting *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 449 (2008)). Proponents of a facial challenge "bear a heavy burden of persuasion." *Crawford*, 553 U.S. at 200.

ARGUMENT

I. THE DISTRICT COURT APPROPRIATELY UPHELD THE SLOGAN STATUTES UNDER THE *ANDERSON-BURDICK* FRAMEWORK.

The district court adopted the proper legal standard, and applied it correctly to this case. First, the district court appropriately found that *Anderson-Burdick* governs this constitutional challenge to a ballot law. Second, the district court correctly found that, under *Anderson-Burdick*, the burden imposed by the law is not severe. Finally, the district court properly held that the Slogan Statutes withstands scrutiny because they advance important interests in safeguarding the integrity of primary races; mitigating voter confusion and deception; and protecting third-party associational rights in the balloting process.

A. The Slogan Statutes Are Elections Regulations Properly Reviewed Under *Anderson-Burdick*.

Because the Slogan Statutes are part of a comprehensive state law scheme regulating the manner in which ballots are cast in New Jersey's elections, the well-settled *Anderson-Burdick* balancing test applies to this challenge.

Elections laws occupy a special place in our democracy. The Elections Clause of the Constitution vests states with "broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,'" which extends to elections for state offices. *Wash. St. Grange*, 552 U.S. at 451 (quoting Art. I, §4, cl. 1) (cleaned up). This broad power, which Appellants do not dispute, enables states "to provide a complete code for . . . elections," which entails power over balloting as well as "matters like . . . 'protection of voters [and] prevention of fraud and corrupt practices,'" among others. *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). States' "active role in structuring elections" is not only grounded in the Elections Clause, but is also "compel[led]" by "[c]ommon sense." *Burdick*, 504 U.S. at 433. As the Supreme Court has observed, "'[a]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 433) (cleaned up).

Whenever a state exercises its "broad power to . . . comprehensively regulate the electoral process," *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 70 (3d Cir. 1999), it "inevitably affects[,] at least to some degree," individual liberties, such as the "individual's right to vote" or First Amendment rights to free association or free speech. *Anderson*, 460 U.S. at 788. Recognizing that inevitability, the Supreme Court has fashioned a unique standard "to resolve the tension between the deference that the courts owe to legislatures in areas meriting careful regulation"—namely, election law—"and the need to protect 'fundamental' First Amendment rights." *Fusaro v. Cogan*, 930 F.3d 241, 258 (4th Cir. 2019) (quoting *Anderson*, 460 U.S. at 788). Thus, challenges to election regulations,, such as this one, are analyzed under the *Anderson-Burdick* balancing approach. *Wash. St. Grange*, 552 U.S. at 451; *Crawford*, 553 U.S. at 190.

In *Anderson*, 460 U.S. at 789, the Court instructed that "[c]onstitutional challenges to specific provisions of a State's election laws," including those arising under the First Amendment, "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." (quoting *Storer*, 415 U.S. at 730). Rather, the Court adopted "a more flexible standard," *Burdick*, 504 U.S. at 434, which it further developed in *Burdick* and later cases. Under the *Anderson-Burdick* test, a court must:

> [W]eigh the "character and magnitude" of the burden the State's rule imposes on [constitutional] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. . . . Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions."

Timmons, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434) (cleaned up). In short, the validity of a state election regulation "depends on 'a practical assessment of the challenged scheme's justifications and effects.'" *Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (Barrett, J.) (citation omitted). In other words, because "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms," *Anderson-Burdick* balancing becomes necessary to render "'the hard judgments'" required in constitutional challenges to state laws' administration of the democratic process. *Timmons*, 520 U.S. at 359 (quoting *Storer*, 415 U.S. at 730).

Despite the weight and clarity of doctrine, Appellants (at 19-23) and amici (at 13) assert that *Anderson-Burdick* only applies to cases about associational rights and not to cases that implicate speech rights. They find no legal support for this proposition, and precedent is squarely against them. The *Anderson-Burdick* test sweeps broadly within the sphere of election law. *See* App. 25 (citing *Soltysik*, 910 F.3d at 444, for the proposition that *Anderson-Burdick* applies to "a wide variety of

challenges to ballot regulations and other state-enacted election procedures"). As then-Judge Barrett put it, *Burdick* "emphasized that this test applies to *all* First and Fourteenth Amendment challenges to state election laws." *Acevedo*, 925 F.3d at 948 (Barrett, J.) (emphasis in original). After all, *Burdick* concerned a ban on write-in ballots, which a voter challenged as a violation of his "First Amendment right of *expression* and association." *Burdick*, 504 U.S. at 430 (emphasis added). And *Anderson* described the rights to free speech and free association, respectively, as "'inseparable aspect[s]'" of the First Amendment and "of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." 460 U.S. at 787 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)); *see also NAACP*, 357 U.S. at 460 ("[T]his Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."). Hence, the *Anderson-Burdick* test is applicable to various provisions of state elections laws, "whether [they] govern[] the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself." *Anderson*, 460 U.S. at 788.

This Court has understood that *Anderson-Burdick* applies to First Amendment claims against elections regulations, no matter whether they sound in free speech rights, associational rights, or both. *Democratic-Republican Organization of New Jersey v. Guadagno*, 700 F.3d 130 (3d Cir. 2012), is instructive. In that case, the plaintiffs challenged an analogous election law, N.J. Stat. Ann. § 19:13-4, which

"prohibits the use of a political party name, or part thereof" in the three-word party slogans on *general* election ballots for unaffiliated candidates, on free speech and associational rights grounds.[7] *Democratic-Republican Org. of New Jersey v. Guadagno*, 900 F. Supp. 2d 447, 461 (D.N.J. 2012). Just as Appellants' challenge to New Jersey's rules for ballot slogans in primary elections sound in both association and speech rights, so too did the challenge to N.J. Stat. Ann. § 19:13-4's rules for ballot slogans in the State's general elections. But employing the *Anderson-Burdick* test, Judge Wolfson rejected the idea that plaintiffs have an "unqualified right to dictate what appears next to their name on the general election ballot." *Id.* And on appeal, this Court held that the district court "correctly applied the balancing test set forth by the Supreme Court in *Anderson*" to the claim. *Democratic-Republican Org.*, 700 F.3d at 131; *see id.* ("[W]e affirm substantially for the reasons set forth by the District Court in its thorough and well-reasoned opinion."). Given this Court's affirmation of the *Anderson* balancing standard in *Democratic-Republican Organization*, it is difficult to see how Appellants could press for a different test in this analogous case.

[7] Appellants incorrectly state that the plaintiffs in that case "framed the issue as a freedom of association case—not speech." Br. 24 n.1. But as the district court in that case noted, the plaintiffs pressed the claim that "N.J.S.A. 19:13–4, both facially and as applied to Plaintiffs, violates the Fourteenth Amendment and the First Amendment's guarantees of freedom of association *and speech*." *Democratic-Republican Org.*, 900 F. Supp. 2d at 452 (emphasis added).

The decisions from other circuits have likewise employed *Anderson-Burdick* to evaluate free speech challenges to state statutory regulations of ballot content, including information about a candidate displayed alongside his or her name on the ballot. For instance, in *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1013 (9th Cir. 2002), a candidate brought a free speech challenge to state laws that "prevent[ed] him from designating himself a 'peace activist' on the election ballot." The relevant statute permitted candidates to choose a "'ballot designation'" that identified their "'principal professions, vocations, or occupations'" in "'[n]o more than three words,'" but forbade "'mislead[ing]'" designations. *Id.* at 1011 (citation omitted). And a subsidiary regulation expressly stated that "activist," among other terms, was an "'unacceptable'" designation. *Id.* at 1012 (citation omitted). The Ninth Circuit analyzed (and rejected) the candidate's free speech challenges to this set of laws under *Anderson-Burdick*, reasoning that it was "applying Supreme Court election law" to the "election regulations" at issue, and noting that the Supreme Court has applied *Anderson-Burdick* to laws that "have the effect of channeling expressive activities at the polls." *Id.* at 1014 (quoting *Timmons*, 520 U.S. at 369); *see also, e.g.*, *Chamness v. Bowen*, 722 F.3d 1110, 1114, 16-17 (9th Cir. 2013) (applying *Anderson-Burdick* to a challenge to state rule that imposed a "speech restriction" on how a candidate can designate his "party preference" and upholding law); *Caruso v. Yamhill Cnty. ex rel. Cnty. Comm'r*, 422 F.3d 848, 851 (9th Cir. 2005) (rejecting,

under *Anderson-Burdick*, a free speech attack on a state statute mandating that any ballot initiative "proposing local option taxes include a statement" that the "'measure may cause property taxes to increase'").

The Fourth Circuit likewise concluded that free speech claims—even those that "entangle[] with political speech" and come with "content- and speaker-based restrictions" that "implicate[] the concern at the heart of the Free Speech Clause"—are subject to the *Anderson-Burdick* balancing test when they are "part of a complex election code." *Fusaro*, 930 F.3d at 256-57 (cleaned up). That suit challenged the validity of restrictions on who may receive the list of Maryland registered voters and how the list may be used. The Fourth Circuit found that although *Anderson-Burdick* "has generally been applied" to ballot access claims, it was still the appropriate standard for the free-speech challenge to Maryland's non-disclosure of the voter rolls because the test was designed to balance constitutional rights with "judicial deference to [states'] policy judgments" regarding elections. *Id.* at 258, 263.

Appellants cannot overcome these precedents or first principles. Appellants proffer no support in case law or in logic for a rule that would subject free expression and associational rights to such widely different standards in the very same context of election law challenges. And as this case shows, Appellants' position is unworkable because associational interests and speech rights are often intertwined. *See, e.g.*, *NAACP*, 357 U.S. at 460; *cf. Rogers v. Corbett*, 468 F.3d 188, 193 (3d Cir.

2006) (holding the "*Anderson* test is the proper method for analyzing such equal protection claims due to their relationship to the associational rights found in the First Amendment"). The Slogan Statutes do regulate a narrow, six-word form of speech, but the very existence of a ballot slogan assists voters in expressing their own *associational* interests by casting a ballot.

Appellants' reliance on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), does not help them because *McIntyre* concerned prohibitions on political speech writ large, not a specific election regulation. *See* Br.18-29; Amicus Br. 1-5. In *McIntyre*, an Ohio resident distributed anonymous "leaflets," or "handbills," to "persons attending a public meeting," expressing her opposition to a "proposed school tax levy" at issue in an upcoming referendum. 514 U.S. at 337. After a school official filed a complaint, she was sanctioned by the Ohio Elections Commission for violating a state statute that prohibited the "'writ[ing], print[ing], post[ing], or distribut[ion]'" of anonymous political literature. *Id.* at 338 & n.3. Beyond barring handbills of the type McIntyre handed out, the law established a ban on a vast universe of political speech: any anonymous "notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election." *Id.* at 338 n.3.

The question before the Supreme Court was whether "the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process." *Id.* at 344. The Court rejected Ohio's contention that *Anderson-Burdick* supplied the applicable standard, distinguishing the state's expansive ban on anonymity from the kinds of laws that tend to warrant *Anderson-Burdick*—*i.e.*, "election code provisions governing the voting process itself" and "the mechanics of the electoral process." *Id.* at 344-45. Instead, *McIntyre* concerned the kind of "'limitation on political expression'"—that is, on "pure speech" writ large—that triggered strict scrutiny. *Id.* at 345-46 (quoting *Meyer v. Grant,* 486 U.S. 414, 420 (1988)).[8]

By contrast, at issue here are not prohibitions on general advocacy, but rather "election code provisions governing the voting process itself"—*i.e.*, they exclusively govern how candidates identify themselves to voters on the ballot, not what

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[8] The same goes for Appellants' citation to *Meyer* (at 21-22), which applied "exacting scrutiny" to review a prohibition on paying circulators of "initiative petitions": mechanisms for obtaining signatures necessary to establish a ballot question. 484 U.S. at 419-20. The Court was concerned with whether the state action had the "inevitable effect of reducing the total quantum of speech on a public issue"—a clear view that what was being regulated was political discussion and not the election process. *Id.* at 423. The Slogan Statutes are thus simply not comparable to the ban on anonymous written advocacy, or on pre-election efforts to gather grassroots signatures. Although Appellants' first choices of slogans were not permitted to appear on the ballot, they had every opportunity to disseminate their views off the ballot.

candidates may say or do in any other context. *See Caruso*, 422 F.3d at 856 (characterizing the *McIntyre* law as a regulation of "political speech," not "the political process"). After all, Ohio's ban in *McIntyre* went far beyond the electoral process, restricting not only "the activities of candidates and their organized supporters, but also . . . individuals acting independently," and not only "leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also . . . those distributed months in advance." *Id.* at 351-52. That "blunderbuss approach" to policing political discourse, *id.* at 357, meant that the Court was "not faced with an ordinary election restriction" governed by *Anderson-Burdick*, *id.* at 346. But nothing in the Slogan Statutes precluded Appellants from widely promoting the ideas underlying those slogans—or using precisely the same slogans—throughout their campaigns. Compared to the *McIntyre* ban, the Slogan Statutes' effect on "the total quantum of speech on a public issue" is slight. *Meyer*, 486 U.S. at 423; *see Caruso*, 422 F.3d at 857 (rejecting an analogy to *McIntyre* and *Meyer* on similar grounds).

Finally, the Court should reject amici's suggestion (at 5) that regulations of speech on the ballot should be treated like regulations of speech at polling places. Amici identifies no precedent supporting the notion that regardless of whether speech "appear[s] on a leaflet, a T-shirt a voter wears to the polling place, or on the ballot itself," the same standard should apply. Amicus Br. 9. To the contrary,

"[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons*, 520 U.S. at 363. Ballots are thus not "designed to advance [Appellants'] campaign-adjacent speech." App. 27-28; *see Timmons*, 520 U.S. at 365. The primary ballot is not designed or intended to be "a billboard for political advertising," or a makeshift ad to be shown to the voter at the eleventh hour. *Timmons*, 520 U.S. at 365. Accordingly, "'candidates themselves have no First Amendment right to use the ballot as a forum for political expression.'" App. 27 (quoting *Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169, 176 (4th Cir. 2017) (cleaned up)). By contrast, polling places are where "[m]embers of the public are brought together" at one place. *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1887–88 (2018). But even polling places are deemed non-public forums where strict scrutiny does not apply. *See id.* at 1888 (holding there is "no requirement of narrow tailoring in a nonpublic forum" and that the State must only be "able to articulate some sensible basis for distinguishing what may come in from what must stay out"). Thus, a lesser level of scrutiny necessarily applies to ballots, which have an even more limited purpose than polling places. In short, general political expression by voters at polling places is not the same as candidates expressing themselves on a ballot. And that is why *Anderson-Burdick* remains the applicable standard for this case. *See, e.g.*, *Rubin*, 308 F.3d at 1013-14 (rejecting public forum doctrine in favor of *Anderson-Burdick*); *see*

also Soltysik, 910 F.3d at 443 (9th Cir. 2018) (noting the district court did the same, which was not challenged on appeal).

Because they are classic regulations of the elections process and not a general regulation of political discourse, the Slogan Statutes should be analyzed under *Anderson-Burdick.*

B. <u>The District Court Correctly Determined Under *Anderson-Burdick* That The Burden Imposed By The Slogan Statutes Is Not Severe.</u>

The *Anderson-Burdick* framework calls for a "two-track approach." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring). On one track, "[s[trict scrutiny is appropriate only if the burden is severe." *Id.* (internal citation omitted). The "hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 177 (2d Cir. 2020) (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)). On the other, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).[9] Requiring candidates

[9] This Court and others have explained that the tiers of scrutiny employed within the *Anderson-Burdick* framework operate in a similar, but not identical, manner to tiers of scrutiny elsewhere in constitutional law:

to obtain consent before using the names of third-party entities in their slogans does not severely burden speech.

As part of the analysis, this Court examines "the character and magnitude of the burden on the plaintiff." *Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 95 F.3d 253, 258 (3d Cir. 1996). As the district court recognized, there are in theory three "likely consequences" the Slogan Statutes have "on '[candidates] generally.'" App. 32 (quoting *Crawford*, 553 U.S. at 206 (Scalia, J., concurring)). They may: (1) "chill speech if candidates suspect that they will never be able to obtain consent from someone they wish to name," (2) "force Plaintiffs to change what they say altogether if a named entity withholds consent (for whatever reason), or only consents if the message is sufficiently favorable to it," and (3) "undercut 'the potential power of [naming a person or group] as a signal to voters of

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> Although . . . strict scrutiny, intermediate scrutiny, and rational basis . . . represent a convenient and familiar linguistic device by which courts . . . have characterized their review under *Anderson* . . . ballot access cases should not be pegged into the three aforementioned categories. Rather, following *Anderson*, our scrutiny is a weighing process: We consider what burden is placed on the rights which plaintiffs seek to assert and then we balance that burden against the precise interests identified by the state and the extent to which these interests require that plaintiffs' rights be burdened.

Rogers, 468 F.3d at 194; *see also Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020) ("It is when cases fall between these two extremes" –strict scrutiny and rational basis review—"that the *Anderson-Burdick* framework departs from the traditional tiers of scrutiny and creates its own test.").

a candidate's ideological bona fides,'" which may impact a candidate "'at the climactic moment of choice' in the voting booth." App. 32-33 (quoting *Soltysik*, 910 F.3d at 442).

Although the district court found that the burdens are "more than slight," the court concluded that they are not severe for essentially four reasons: (1) Appellants included no allegations in their pleadings about how often New Jersey's Slogan Statutes actually "thwart" candidates' desired slogans, App. 33; (2) the statutes are generally applicable to all New Jersey primary candidates; (3) the third parties who withhold consent from candidates burden candidates' speech more than the State does; and, perhaps most important, (4) every candidate retains "many other—and more substantial—opportunities to speak" and to "express associations with people or groups throughout the campaign, in other forums, and by other means." App. 34-35. Appellants provide nothing in their briefing to refute any of the district court's four conclusions.

There is a good reason why—Chief Judge Wolfson was correct. As to the final and most important point, nothing in the Slogan Statutes in any way affects primary candidates' ability to speak fully and freely with the electorate in the course of the campaign. These statutes "regulate just one speech opportunity in the scheme of a primary season with many other—and more substantial—opportunities to speak, and they have no impact on what candidates may say outside the confines of the ballot."

App. 34. Indeed, campaigns, not ballot slogans, serve primarily as "a means of disseminating ideas." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979); *see also Anderson*, 460 U.S. at 788 ("[A]n election campaign is an effective platform for the expression of views on the issues of the day."); *Timmons*, 520 U.S. at 361 ("The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen."); App. 34 (collecting other cases regarding the primacy of political campaigns as vehicles for candidates' political speech). Said another way, nothing in the state's election laws prevents Appellants from using the same messages anywhere *but* on the ballot itself: "on billboards, in newsletters, on the internet," through direct mail, or a myriad of other means of communication employed by campaigns. *Fusaro*, 930 F.3d at 260; *see Miller v. Brown*, 503 F.3d 360, 368 (4th Cir. 2007) (holding that a political party's First Amendment associational rights were not severely burdened where the state "makes available to political parties multiple options" to exercise those rights). Because Appellants have "full constitutional flexibility" to express their message in any other way they wish, the burden on their speech on the ballot itself is not a severe one. App. 35 (citing *Timmons*, 520 U.S. at 363-64).

Not only that, but Appellants overlook that even the candidates who wish to include provocative or critical speech in their ballot slogan—and who fail to obtain

the desired third-party authorization—can deliver provocative or critical speech on the ballot (and anywhere aside from the ballot). Br. 31-32. Nothing in the Slogan Statutes forecloses Appellants from choosing a slogan that criticizes or endorses policy positions or political commitments. All these laws do is preclude them from expressly naming a person or incorporated entity without their consent. And as the district court noted, the Slogan Statutes are narrow in scope: they apply only to associations incorporated in New Jersey and individuals, and critically, they "do not outright prohibit any speech." App. 34.

The only responses Appellants do provide are unavailing. While Appellants contend (at 31-32) that obtaining third-party consent for a ballot slogan requires "more than a nominal effort," and that "[a]lmost no one can demand a meeting with an individual, much less a prominent one, to obtain authorization," the Amended Complaint is conspicuously bereft of any allegations that support that contention. The pleading does not indicate whether either plaintiff *attempted* to obtain consent from the relevant third parties. The Amended Complaint merely states that McCormick desired to use the slogans "Not Me. Us" and "Bernie Sanders Betrayed the NJ Revolution," that she "did not obtain the required authorizations," and that she used the slogan "Democrats United for Progress." Am. Compl. ¶¶ 39, 42-45 (App. 49). Accordingly, Appellants' argument that the Slogan Statutes' consent requirement is "so burdensome that it is virtually impossible for a candidate to

comply" (at 32 (quotation omitted)) does not appear on the face of the Amended Complaint and cannot be reasonably inferred from the allegations. As the court noted below, Appellants "do not allege . . . how common it is for individuals or incorporated associations to withhold consent." App. 33. This omission counsels against Appellants' position: because "[c]laims of facial invalidity" that "rest on speculation . . . raise the risk of premature interpretation of statutes on the basis of factually barebones records," they are heavily "disfavored." *Wash. St. Grange*, 552 U.S. at 452 (internal quotation marks omitted).

Appellants' claim (at 33) that Slogan Statutes "effectively codify viewpoint discrimination" fares no better. The Slogan Statutes are uniformly applicable to all New Jersey primary candidates who seek to name a third party in a ballot slogan. The statutes do not draw distinctions or classifications based on the viewpoint of a slogan or the identity of the candidate. App. 33. In other words, "[c]andidates may . . . say whatever they want about a person or group" so long as they obtain authorization, "and whatever else if they avoid using certain names. App. 34 And contrary to Appellants' assertion (at 31-32) that slogans criticizing a third party will be unduly burdened, the statute applies equally to *any* slogan using the name of a covered third party, regardless of viewpoint. This is borne out by Appellant McCormick's own case: both her proposed slogan seeking to appropriate the Sanders campaign slogan "Not Me. Us" and her proposed slogan criticizing Sanders,

"Bernie Sanders Betrayed The NJ Revolution" were rejected because she did not obtain consent. The Slogan Statutes are patently neutral as to viewpoint.

The burdens the Slogan Statutes impose, while "non-trivial," are nevertheless not so restrictive that they may be categorized as "severe" for purposes of *Anderson-Burdick*. App. 32, 35.

C. The District Court Correctly Determined Under *Anderson-Burdick* That The Slogan Statutes Survive Scrutiny.

Because the burden imposed by the Slogan Statutes is not severe, the State's interest need only be "relevant and legitimate" or "sufficiently weighty" for the Slogan Statutes to survive lesser scrutiny. App. 35 (citing *Crawford*, 553 U.S. at 191); *see also Timmons*, 520 U.S. at 363, 365 (characterizing burden on rights as "not trivial" but "not severe" and thus requires that the burden be "justified by correspondingly weighty valid state interests in ballot integrity and political stability" (internal quotation marks omitted).

This Court can make quick work of that question because Appellants already *concede* that "New Jersey's interests" in the Slogan Statutes are "important." Br. 11-12. Admitting that their only argument is that the interests are not "compelling" under strict scrutiny analysis, Appellants acknowledge the Slogan Statutes meet the lower scrutiny under *Anderson-Burdick*. *See Wilmoth v. Sec'y of New Jersey*, 731 F. App'x 97, 102 (3d Cir. 2018) ("[I]f we find that the challenged 'provision imposes

only "reasonable, nondiscriminatory restrictions'" upon the plaintiff's rights, then 'the State need not establish a compelling interest to tip the constitutional scales in its direction.'") (quoting *Burdick*, 504 U.S. at 434, 439)). That is enough for this Court to affirm.

But even if the Court were to determine that the Slogan Statutes impose a severe burden, the Slogan Statutes still survive strict scrutiny. As the district court explained, the State's interests are "not just [] important … but … compelling." App. 35. Specifically, the State has interests of "preserving the integrity of the nomination process; preventing voter deception; preventing voter confusion; and protecting the associational rights of third parties who might be named in a slogan." App. 35. The Slogan Statutes are narrowly tailored to achieve those interests.

First, it is hornbook law that a "State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989); *see Patriot Party*, 95 F.3d at 264 (3d Cir. 1996) (same). "It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal," *Rosario v. Rockefeller*, 410 U.S. 753, 761 (1973), and "a State may impose restrictions that promote the integrity of primary elections," *Eu*, 489 U.S. at 231. Put another way, the State's interest in the integrity of primaries is in "safeguarding public confidence *in* the nomination process" itself, which "has independent significance, because it encourages citizen participation." App. 36

(quoting *Crawford*, 553 U.S. at 197); *see also Greenville v. Cnty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 671 (D.S.C. 2011) (finding that "promoting voter participation in the electoral process" to be an important state interest). Appellants' position would make the ballot a free-for-all where candidates can place whatever six-word slogan they like and would surely erode trust in the elections process itself.

Second, the State has a compelling interest in preventing voter deception and voter confusion. App. 36. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("There is surely an important state interest . . . in avoiding . . . deception, and even frustration of the democratic process."); *Norman v. Reed*, 502 U.S. 279, 290 (1992) (noting an interest in preventing "misrepresentation and electoral confusion" in the elections process would justify a rule prohibiting "candidates running for office in one subdivision from adopting the name of a party established in another if they are not in any way affiliated with the party"); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 221 (1986) (acknowledging the State's "legitimate interests in preventing vote confusion and providing for educated and responsible voters"); *Anderson*, 460 U.S. at 796 ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will."). And this case demonstrates why this interest is so compelling.

For example, when Appellant Mazo petitioned to use slogans like "Essex County Democratic Committee," approving such a slogan would create a misleading impression among voters that Mazo and the Committee are associated. That impression would have been wrong: the Committee did not approve Mazo's use of their slogan. If the Slogan Statutes were to allow a candidate to claim a false association on a ticket, voters who intended to cast votes for individuals associated with a particular organization may mistakenly cast a ballot for someone who is not. If the slogan "creat[es] misleading or false impressions in voters' minds," that "could sway an election outcome at the last minute or throw a result into doubt with allegations of deception." App. 39. The State undoubtedly has a compelling interest in preventing such subversion of the democratic will.

The third justification for the Slogan Statutes' consent requirement—protection of associational rights of third parties—"closely correlates" with the State's interests in preventing voter confusion and deception because the requirement "effectively assures voters that candidates have accurately portrayed information." App. 37. Accordingly, all of the State's interests are compelling.

The Slogan Statutes are also narrowly tailored to achieve these compelling state interests. As discussed above, the rules allow candidates to speak freely—and to even employ the very words at issue—in communications outside the narrow

confines of the ballot. And even in the context of the ballot itself, the law does not *ban* naming individuals or associations incorporated in New Jersey.

Norman v. Reed illustrates why this indicates the law is narrowly tailored. *Norman* involved a challenge to an Illinois election statute directing that "new political part[ies] . . . shall not bear the same name as, nor include the name of any established political party." *Norman*, 502 U.S. at 284. The Court observed that this flat prohibition was too broad, and that a narrower solution could be adopted. To avoid the ills of "misrepresentation and voter confusion," Illinois could simply "requir[e] the candidates to get formal permission to use the name from the established party they seek to represent." *Id.* at 290. This is precisely the tailoring the Slogan Statutes follow. By requiring the candidates on a primary ballot to first obtain permission to use the name of an individual or an association incorporated in New Jersey, the State took an affirmative step towards preventing voter confusion and misrepresentation on the ballot without overly restricting the candidate's ability to use the slogan.

Finally, there is no operation of law which would establish a less restrictive measure to achieve the State's compelling interests. While Appellants assert two alternatives that they claim would be "neutral, less restrictive, and allow candidates to communicate with voters without violating the First Amendment," Br. 18, that is wrong. First, Appellants' proposal that "New Jersey could place a disclaimer on the

ballot to alert voters that each slogan is an unverified statement of fact or opinion," Br. 17, undermines the purpose of the Slogan Statutes themselves and the public's trust. The district court correctly rejected this alternative, noting that "while a general disclaimer may better serve [Appellants'] political strategies, '[t]he Constitution does not require that [New Jersey] compromise the policy choices embodied in its ballot-access requirements'" in this way. App. 38 (quoting *Timmons*, 520 U.S. at 365). After all, by openly declaring the ballot is a free-for-all for false or misleading claims, such a disclaimer would make the purpose of the Slogan Statutes—to help voters identify the factions or policy positions of various candidates—a nullity. And if voters come to see the ballot as a source of misinformation, that in turn "breeds distrust in our government" and the political process as a whole. *Doe v. Reed*, 561 U.S. 186, 197 (2010). That hardly advances the State's interests in preserving the integrity of elections and voter confidence.

Second, Appellants suggest a policy where the bulk of the Slogan Statutes remain the same: candidates claiming an association with a covered third party would still have to show proof of consent, but candidates whose slogans criticize those same parties need not make any showing to place that slogan on the ballot. Br. 17. But this risks the very problem that Appellants themselves say is impermissible: viewpoint discrimination. Under Appellants' suggestion, McCormick could use the slogan "I Stand Against Bernie Sanders," but could not use the slogan "I Stand With

Bernie Sanders." But this categorization of speech based on the viewpoint it expresses and imposing restrictions on one viewpoint but not another is classic viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."). By contrast, the law's current operation is entirely neutral as to what opinion is expressed about the third-party entity.

The Slogan Statutes are a narrowly tailored way for primary candidates to distinguish themselves from others while advancing the State's compelling interests in preserving the integrity of its elections process, preventing voter confusion and deception, and preserving the legitimate associations between candidates and third-parties. Accordingly, the Slogan Statutes should be upheld on either lesser scrutiny or strict scrutiny review.

II. EVEN IF *ANDERSON-BURDICK* DOES NOT CONTROL, THE SLOGAN STATUTES WOULD SATISFY TRADITIONAL FIRST AMENDMENT ANALYSIS.

Even if this Court evaluates the law outside the *Anderson-Burdick* framework, the Slogan Statutes survive both intermediate and strict scrutiny.

As a threshold matter, strict scrutiny would still be inappropriate because the law is not a content-based restriction. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Hill v. Colorado*, 530 U.S. 703, 719

(2000) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))). To determine whether a regulation of speech is "content based," a court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564 (2011)). A statute is content-neutral if it "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." *Free Speech Coal., Inc. v. Att'y Gen. United States*, 825 F.3d 149, 156 (3d Cir. 2016) (quoting *Ward*, 491 U.S. at 791). And if a statute is content-neutral, this court "appl[ies] intermediate scrutiny and ask[s] whether [the law] is 'narrowly tailored to serve a significant governmental interest.'" *Bruni*, 941 F.3d at 84. Stated differently, if a law "'directly advances' the government's interest . . . and is 'not more extensive than necessary to serve that interest,'" it will survive. *King v. Governor of N.J.*, 767 F.3d 216 237 (3d Cir. 2014).

The Slogan Statutes are content-neutral because they apply equally to ballot slogans that use the names of any individual or association incorporated in New Jersey regardless of the identity of the subject of the slogan or the candidate on the ballot. In other words, the statutes do not discriminate on the basis of what the message is. Candidates *can* use the names of other entities. The slogans are not regulated based on their political message. All primary candidates must follow the

same rule. As the district court explained, "Candidates may, in short, say whatever they want about a person or group if they get consent, and whatever else if they avoid using certain names." App. 34.

"[W]hen a content-neutral regulation does not entirely foreclose *any means of communication*, it may satisfy the tailoring requirement even through it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, 530 U.S. at 726 (emphasis added). For the reasons discussed above, *supra* at 33-39, the Slogan Statutes meet that requirement. Thus, this Court could also affirm the district court's decision on the basis that the Slogan Statutes do not discriminate based on content and survive intermediate scrutiny.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

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Dated: February 14, 2022

CERTIFICATION OF BAR MEMBERSHIP

I certify that I am an attorney in good standing of the bar of the Third Circuit.

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CERTIFICATION OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word 2016, in Times New Roman, 14 point, type style. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,457 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I certify that the text of the paper copies of this brief and the text of the PDF version of this brief filed electronically with the Court today are identical. I further certify that prior to electronically filing this brief with the Court today it was scanned by McAfee VirusScan Enterprise 10.7.0.2687, a virus detection software, and found to be free from computer viruses.

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CERTIFICATION OF SERVICE

On February 14, 2022, the undersigned caused this brief to be filed with the Clerk of the United States Court of Appeals for the Third Circuit via electronic filing. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system with hardcopies to be sent via overnight mail when directed by the Court.

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