NO. 21-2630

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EUGENE MAZO, ET AL.,
Plaintiffs - Appellants,

v.

NEW JERSEY SECRETARY OF STATE, ET AL.,
Defendants – Appellees

Appeal from the United States District Court
for the District of New Jersey
Newark Division
No. 20-cv-8174

REPLY BRIEF FOR APPELLANTS EUGENE MAZO and LISA McCORMICK

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SUMMARY OF ARGUMENT

The Secretary's brief does not account for the fact that the Supreme Court holds an expansive view of which speech regulations are content-based and thus subject to strict scrutiny. New Jersey's ballot slogan regulations fall within the Supreme Court's understanding of content-based speech restrictions, and they fail strict scrutiny.

Contrary to the Secretary's suggestion, the motivation for enacting the speech regulations is irrelevant to whether they are content-based. And none of New Jersey's purported interests in restricting candidate speech are compelling. The Secretary's tailoring argument, that candidates have other opportunities to speak, misses the mark. Candidates' ability to speak elsewhere does not diminish the First Amendment injury their speech suffers on the ballot.

The Secretary's argument that free speech challenges to ballot laws must be reviewed under the *Anderson-Burdick* framework is unavailing. Precedent does not suggest that this Court should apply that framework, designed for evaluating ordinary ballot regulations, to candidate speech restrictions. But even if *Anderson-Burdick* applies here, the burden that candidates suffer under these regulations compels

the use of strict scrutiny under that framework. And New Jersey still fails to meet its burden.

ARGUMENT

I. *REED V. TOWN OF GILBERT* CONTROLS THIS CASE.

A. *Reed* expanded the definition of content-based speech regulations.

The Secretary glosses over *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), citing the case only in passing for the definition of content-based speech. But as this Court has realized, *Reed* had "broad implications for First Amendment doctrine." *Free Speech Coal., Inc. v. Att'y Gen. of United States*, 825 F.3d 149, 164 (3d Cir. 2016). Indeed, *Reed* changed the way courts analyze content-based speech regulations, *see id.* at 160 & n.7, and "expanded the types of laws that are facially content based." *Bruni v. City of Pittsburgh*, 941 F.3d 73, 93 (3d Cir. 2019) (Hardiman, J., concurring).

That expansion controls the framework for evaluating this case. Without exception, the Supreme Court ruled courts must consider whether a speech regulation facially "draws distinctions based" on a speaker's message. *Reed*, 576 U.S. at 163.

Regardless of how unbiased a speech regulation appears with respect to viewpoint, "facially content neutral [laws], will be considered content-based regulations of speech" if they "cannot be justified without reference to the content of the regulated speech." *Reed*, 576 U.S. at 164 (internal quotation marks omitted); *see also Bruni*, 941 F.3d at 93 (Hardiman, J., concurring) (more laws are facially content based under *Reed*) (citing *id*. at 163).

B. *Reed* requires strict scrutiny review of the Slogan Statutes.

On their face, New Jersey Statutes §§ 19:23-17 and 19:23-25.1 (the "Slogan Statutes"), target speech that references an individual or a New Jersey corporation. Indeed, the Secretary admits the Slogan Statutes are "speech restrictions" that regulate "content." Appellees' Br. 2. Because the Slogan Statutes "require[ ] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred," the laws are "content based" speech regulations that trigger strict scrutiny. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotation marks omitted).

The Secretary failed to engage this argument seriously and all but ignored *Reed* in her brief. *See* Appellees' Br. 40 (Secretary's one

sentence citation to *Reed*). Instead, she perfunctorily argues the Slogan Statutes are content neutral and subject to intermediate scrutiny. Appellees' Br. 40-41. Specifically, the Secretary argues the Slogan Statutes are content neutral because candidates can mention any person or New Jersey corporation they desire *if* the candidates comply with the laws' authorization requirements. *Id*. And because these laws allegedly serve significant government interests, they survive intermediate scrutiny. *Id*. But this argument ignores *Reed*.

"The [Slogan Statutes are] content based on [their] face." *Reed*, 576 U.S. at 164. "The restrictions in the [Slogan Statutes] that apply to any given [slogan] depend entirely on the communicative content of the [slogan]." *Id*. If a slogan includes the name of a person or a New Jersey corporation, then that slogan "will be treated differently from" a slogan that does not contain the name of an individual or New Jersey business. *Id*. "On [their] face, the [Slogan Statutes are] content-based regulation[s] of speech," and "subject to strict scrutiny." *Id*. 164-65. "Thus, strict scrutiny, not intermediate scrutiny, [is] the appropriate standard." *Free Speech Coal*, 825 F.3d at 159 (citing *Reed*).

C. The Slogan Statutes' purpose does not remove them from strict scrutiny.

According to the Secretary, the Slogan Statutes are "classic regulations of the elections process," Appellees' Br. 27, whose "purpose" is "to help voters identify the factions or policy positions of various candidates." *Id*. at 38. More granularly, she explains, the purpose of the authorization requirements within the Slogan Statutes is to protect the integrity of primary elections, prevent voter confusion and deception, and guard third-party associational rights. *Id*. at 3.

But, without reservation, the Supreme Court ruled "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 576 U.S. at 165 (internal quotation marks omitted); *see also Bruni*, 941 F.3d at 93 (Hardman, J., concurring) (explaining how the government's purpose for content-based regulations is irrelevant after *Reed*) (citing *id*.). "In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*, 576 U.S. at 166. What the "legislature intends" to accomplish with the speech regulations is irrelevant. *Id*. at 167-68 (internal quotation marks

and citation omitted).

In other words, New Jersey can enact laws that protect the integrity of their elections, prevent voter confusion, and guard third-party associational rights, but it cannot use facially content-based speech regulations to do so without passing strict scrutiny.

D. The Slogan Statutes fail strict scrutiny.

1. The Slogan Statutes do not serve a compelling interest.

The Secretary claims that all of the state's purported interests in enforcing the Slogan Statutes are compelling. However, the only compelling interest that the Secretary invokes—maintaining election integrity—is not a reason to regulate candidate speech. None of the election integrity cases relied upon by the Secretary concern candidate speech. *See Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (associational rights); *Patriot Party v. Allegheny Cty. Dep't of Elections*, 95 F.3d 253, 264 (3d Cir. 1996) (associational rights); *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973) (voter registration); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 185 (2008) (voter ID); *Greenville Cty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 659 (D.S.C. 2011) (freedom of association and equal

protection challenges). Indeed, the Supreme Court has never recognized the election integrity interest to uphold content-based speech regulations for partisan candidates, much less for regulating their express speech on the ballot or anywhere else.

The Supreme Court has only allowed states to regulate the mechanics of running an election to support its interest in maintaining election integrity. Such mechanical election laws include filing deadline regulations, candidate filing fees, voter eligibility restrictions, requirements that political parties nominate candidates through a primary, limiting voter participation to one primary election, allowing write-in voting, and adopting waiting periods before a voter may change party affiliation. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344 (1995) (collecting cases); *Eu*, 489 U.S. at 231 (collecting cases).

Whether New Jersey has a compelling interest in controlling the content of a candidate's statement on the ballot (as opposed to any other statement a candidate makes during a campaign) to promote election integrity is, at best, an open question.[1] That question should be

[1] The record lacks evidence that the Slogan Statutes actually preserve election integrity.

answered in the negative. It is for the voters, not the state, to determine the value of the candidates' speech.

Otherwise, the Secretary failed to present any compelling state interests for the Slogan Statutes. She claims preventing voter deception and confusion are compelling state interests that justify the Slogan Statutes, in addition to protecting third-party associational rights. Appellees' Br. 35-36. These interests, important though they may be, do not rise to the level required by strict scrutiny.

Indeed, the Secretary fails to cite any case recognizing these interests as "compelling," much less a case involving candidate speech or content-based speech regulations. *See Jenness v. Fortson*, 403 U.S. 431, 432 (1971) (ballot access); *Norman v. Reed*, 502 U.S. 279, 290 (1992) (freedom of association); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 210-11 (1986) (freedom of association); *Anderson v. Celebrezze*, 460 U.S. 780, 786-87, 793, 806 (1983) (ballot access and freedom of association). At best, these interests are "legitimate," *Republican Party*, 479 U.S. at 221 (voter confusion), or "important." *Jenness*, 403 U.S. at 442 (avoiding confusion, deception, and frustration of the democratic process). But no matter how

"legitimate" or "important" these interests are, they are not "compelling" for New Jersey to meet its strict scrutiny burden.

2. The Slogan Statutes are not properly tailored or the least restrictive means.

Even if the Court finds that the Slogan Statutes serve a compelling interest, the regulations still fail. Strict scrutiny also requires "narrowly tailored" laws that are "the least restrictive means" to achieve the state's goals. *Free Speech Coal., Inc. v. Att'y Gen. of United States*, 974 F.3d 408, 420 (3d Cir. 2020) (internal quotation marks omitted).

The Secretary claims the laws pass these tailoring requirements. Appellees' Br. 36-38. She argues the Slogan Statutes are properly tailored because they only control the content of speech on the ballot—"allow[ing] candidates to speak freely" "outside" the ballot; argues there is no "ban" on naming individuals or New Jersey businesses on the ballot; claims there is no less restrictive alternative; and contends Plaintiffs' proposed changes create more problems than they solve. *Id.* But the Secretary is wrong.

First, "[t]hat [Plaintiffs] remain free to employ other means to disseminate their ideas does not take their speech through [ballot slogans] outside the bounds of First Amendment protection." *Meyer v.*

Grant, 486 U.S. 414, 424 (1988). "[O]ne 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." *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (internal quotation marks omitted). Arguing that the speech restrictions could be worse by regulating more candidate speech outside the ballot is not a persuasive defense of how the Slogan Statutes are currently tailored. The Secretary must demonstrate that the current content-based ballot speech regulations are least restrictive means of achieving the state's goals, not that New Jersey is benevolent for refraining from regulating more candidate speech outside the ballot.

Nor does *Norman* help the Secretary. Indeed, *Norman* was a freedom of association case where the plaintiffs failed to obtain enough nominating signatures for their candidates to appear "under the name of" their political party on the ballot as a new party at the county election level, even though the same political party was already established at the city election level. 502 U.S. at 282-86, 290. The Court observed that a better tailored law could require "candidates to get formal permission to use the name from the established party they seek to represent." *Id*. at 290.

But while this type of tailoring may be appropriate when a person's freedom of association is at issue, it is inappropriate when the issue is free speech. Mentioning another person or corporation is not always an attempt to associate, and people are ordinarily allowed to speak about others without obtaining their permission. Plaintiffs' proposed alternatives to the Slogan Statutes, such as a ballot disclaimer alerting voters that each slogan is an unverified statement of fact or opinion, represent more narrowly tailored, less restrictive means of respecting a candidate's right to free speech and regulating ballot slogans.

The Secretary claims that the Slogan Statutes are perfect the way they are, and that Plaintiffs' proposals are problematic. Appellees' Br. 37-39. Not so. The laws' facial over-inclusiveness shows they are not properly tailored. If a candidate wants to name a deceased historical figure to establish his political *bona fides*, the Slogan Statutes will prevent him from using the slogan "Lincoln Republican" or "Burke Conservative." The statutes under-inclusiveness is obvious as well. Why can candidates claim an endorsement from *The New York Times* but not New Jersey's *Star-Ledger*?

In contrast, Plaintiffs' proposed alternatives, a disclaimer alerting

voters that each slogan is an unverified statement of fact or opinion, or requiring evidence of third-party endorsements, are appropriately tailored, and offer less restrictive means to achieve New Jersey's purported interests. *See* Appellants' Br. 17-18.

The Secretary argues these proposals are unworkable. First, she argues that publishing a disclaimer alongside candidate slogans will "make the purpose of the Slogan Statutes … a nullity." But as stated above, *supra* § I C, a statute's purpose is irrelevant for strict scrutiny analysis. *See Reed*, 576 U.S. at 165-66, 168.

Next the Secretary states the disclaimer alternative will decrease confidence in "the political process as a whole." Appellees' Br. 38. But the Secretary fails to explain why a candidate's statement made without third-party authorization on the ballot can decrease the public's confidence more than a candidate's statement made without third-party authorization at any other point during a campaign. There is no difference between the two statements, other than the length and location. Because "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office," the Secretary's concerns must submit to the First Amendment. *Eu*, 489 U.S.

at 223 (internal quotation marks omitted). The Supreme Court has "great[] faith in the ability of individual voters to inform themselves about campaign issues." *Anderson* 460 U.S. at 797. Printing "prominent disclaimers" on the "ballot" can "eliminate any real threat of voter confusion." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456 (2008).

Finally, the Secretary argues that Plaintiffs' second tailoring alternative, providing evidence of a third-party endorsement, will create viewpoint discrimination, *see Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995), because only candidates claiming a third-party endorsement will have to comply with the regulations. However, the current versions of the Slogan Statutes effectively codify viewpoint discrimination. Appellants' Br. 31-33.

And the Secretary's argument proves too much. There is a difference between a political endorsement ("Endorsed by Governor Phil Murphy") and a statement of opinion ("I Stand With Governor Phil Murphy" or "I Stand Against Governor Phil Murphy"). Owing to such obvious distinctions, Plaintiffs' proposal will not create viewpoint discrimination.

There may be other properly tailored ways to achieve New Jersey's purported interests. Even so, it is New Jersey's burden to withstand strict scrutiny by enacting laws that are narrowly tailored to achieve its interests with the least restrictive means, *Free Speech Coal.*, 974 F.3d at 420, and New Jersey has failed to carry that burden.

II. *ANDERSON-BURDICK* DOES NOT CONTROL THIS CASE.

The Secretary overreads *Anderson* in claiming that it sanctions New Jersey's regulation of "individual liberties," like the right to vote, freely associate with others, or engage in "free speech," pursuant to its power to regulate elections. Appellees' Br. 17. The case provides only that a state's election code will affect an "individual's right to vote and his right to associate with others for political ends." *Id.* Neither *Anderson* nor its progeny allow states to regulate speech through the election code.

The Secretary's assertion that the Supreme Court's decisions in *Wash. State Grange* and *Crawford* allow states to regulate the content of political speech with laws like the Slogan Statutes is false. Appellees' Br. 17. *Wash. State Grange* concerned freedom of association—not speech—specifically, political parties' concern that candidates could

associate with them on the ballot even if the candidate was not that party's nominee. 552 U.S. at 444, 451, 454. *Crawford* concerned the use of voter identification—not speech. 553 U.S. at 185. The Supreme Court has never allowed states to regulate candidate speech in the *Anderson-Burdick* framework.

Even so, the Secretary presses her argument that *Anderson-Burdick* is the proper standard by citing a litany of opinions from various courts applying that framework. None of these cases prove helpful.

First, the Secretary cites then-Judge Barrett's opinion that "all First Amendment [ ] challenges to state election laws" are analyzed under the *Anderson-Burdick* framework. *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (citing *Burdick v. Takushi*, 504 U.S. 428, 432-34 (1992)). Indeed, in *Burdick*, the Supreme Court stated, "[a] court considering a [First Amendment] challenge to a state election law must" apply the *Anderson-Burdick* framework. 504 U.S. at 434.

But since *Burdick*, the Supreme Court decided *Reed*, which holds that laws like the Slogan Statutes "that [are] content based on [their] face [are] subject to strict scrutiny regardless of" their purpose. 576 U.S. at 165 (internal quotation marks omitted); *see also Bruni*, 941 F.3d at

93 (Hardman, J., concurring) (the purpose of a content-based regulation is irrelevant after *Reed*) (citing *id.*). "In other words … facially content-based law[s]," like the Slogan Statutes, cannot avoid strict scrutiny simply because they are part of a state's election code. *Reed*, 576 U.S. at 166. What the "legislature intends" to accomplish with the speech regulations is irrelevant. *Id.* at 167-68 (internal quotation marks and citation omitted).

These Supreme Court decisions are not in conflict. *Burdick* considered whether a state is required to allow write-in voting where none previously existed. 504 U.S. at 430, 432. This type of election regulation controls "the mechanics of the electoral process" and is considered an "'ordinary'" election law subject to *Anderson-Burdick* analysis. *McIntyre*, 514 U.S. at 344-45 (citing *Burdick*). Because *Burdick* delt with an ordinary election law, its edict to apply the *Anderson-Burdick* framework in First Amendment challenges only applies to ordinary election regulations.

In contrast, the Slogan Statutes "do[ ] not control the mechanics of the electoral process," but are, instead, "regulation[s] of pure speech." *Id.* at 345. Because the Slogan Statutes are "direct regulation[s] of the

content of speech," Speech Clause jurisprudence directs the analysis, *id*., *Reed* controls, 576 U.S. at 165, and strict scrutiny applies. *Id*. at 164.[2]

The Secretary argues that freedom of expression was at stake in *Burdick*, which means *Anderson-Burdick* applies to this free speech case. Appellees' Br. 19. But the *Burdick* Court explained it "evaluat[ed] a claim that a state law [was] burden[ing] the right to vote"—not speech—and concluded that the "ban on write-in voting" had "a limited burden on voters' rights to make free choices and to associate politically through the vote." 504 U.S. at 438-39; *see also id*. at 445 (Kennedy, J., dissenting) ("I agree with the first premise in the majority's legal analysis. The right at stake here is the right to cast a meaningful vote for the candidate of one's choice. Petitioner's right to freedom of expression is not implicated.").

Furthermore, despite the Secretary's assertions, Appellees' Br. 19, *Anderson* focused on ballot access and observed that the freedom to

[2] Alternatively, as long as strict scrutiny is employed, both the *Anderson-Burdick* framework and *Reed* can harmoniously apply to the Slogan Statutes. Indeed, *Reed* may require the *Anderson-Burdick* framework to apply strict scrutiny in free speech challenges to ballot laws.

associate to advance group beliefs is "inseparable" from the "'liberty' assured by the Due Process Clause of the Fourteenth Amendment." 460 U.S. at 786-87 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). It is true that the Due Process Clause "'embraces freedom of speech,'" *id.*, and that there is a "nexus between the freedoms of speech and assembly." *NAACP*, 357 U.S. at 460. But *Anderson* dealt with how candidate filing deadlines impacted candidate and voter "associational choices protected by the First Amendment"—not their freedom of speech. *Id.* 790-94. And *NAACP* did not concern election law at all, but a trial court order which the Supreme Court reviewed under "the closest scrutiny," that forced the NAACP to disclose its members. 357 U.S. at 460-61. The issues in these cases are not analogous to the content-based speech regulations contested here.[3]

Next, the Secretary argues that *Democratic-Republican Org. v. Guadagno*, 900 F. Supp. 2d 447 (D.N.J. 2012), *aff'd*, 700 F.3d 130 (3d

[3] The Secretary also cites *Rogers v. Corbett*, 468 F.3d 188, 193 (3d Cir. 2006) to further her freedom of association and speech nexus argument. Appellee Br. 22-23. But *Rogers*, a ballot access case that delt with the relationship between the freedom of association in the First Amendment with the equal protection rights protected in the Fourteenth Amendment, *supra*, is as inapposite to the issues here as are the decisions in *Anderson* and *NAACP*.

Cir. 2012), dictates the *Anderson-Burdick* framework must apply to the Slogan Statutes. Appellees' Br. 19-20. That case concerned a New Jersey election law that controlled candidate political party identification on the general election ballot. 900 F. Supp. 2d at 461. The law allowed candidates to have no more than three words next to their name that stated "the party or principles" they represented, which could not contain "any part" of the name of a political party that selected its candidate in the preceding primary election. N.J. Stat. § 19:13-4. The plaintiffs wanted the party name "Democratic-Republican," but the party identification statute did not allow it. *Democratic-Republican Org.*, 900 F. Supp. 2d at 450. The district court applied the *Anderson-Burdick* framework and upheld the law, *id.* at 463, 466, and this Court affirmed the result. 700 F.3d at 131.

The Secretary argues *Democratic-Republican Org.*, controls this case, Appellees' Br. 20 n.7, because the district court upheld the party identification law on First Amendment freedom of association and speech grounds. *Democratic-Republican Org.*, 900 F. Supp. 2d at 452, 454. But as Plaintiffs demonstrated, Appellants' Br. 24 n.1, the district court analyzed the statute under a freedom of association framework—

not speech—stating, "Plaintiffs specifically claim that the statute is facially invalid because it violates the First Amendment insofar as it prevents candidates from meaningfully *associating* through placing the slogan of their choice on the ballot next to their name." *Democratic-Republican Org.*, 900 F. Supp. 2d at 461-62 (emphasis added). The district court also characterized *Democratic-Republican Org.* as a freedom of association case in the decision below. *See* Op., App. Vol. I, 28. And rightfully so.

Democratic-Republican Org., is a political party freedom of association case like *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) and *Wash. State Grange*. Indeed, in *Democratic-Republican Org.*, the district court found "*Timmons* to be instructive in resolving [the plaintiffs'] claim." 900 F. Supp. 2d at 466. *Timmons* concerned a ballot party identification law that was reviewed under the *Anderson-Burdick* framework. *Id.* at 459, 466. The state interest in both cases was the same: avoid voter confusion. *Id.* at 464; *Timmons*, 520 U.S. at 364. In ruling the New Jersey party identification law did not violate the plaintiffs' freedom of association, the district court offered that, "[s]ignificantly," as it was in *Timmons*, the regulation did "not 'directly

limit the party's access to the ballot,'" or impose severe burdens "'on the party's First and Fourteenth Amendment *associational* rights.'" *Democratic-Republican Org.*, 900 F. Supp. 2d at 466 (quoting *Timmons*) (emphasis added).

Like *Democratic-Republican Org.*, *Wash. State Grange*, concerned a law that regulated party identification on the ballot. 552 U.S. at 447. The plaintiffs challenged the law on First Amendment freedom of association grounds, but the Supreme Court upheld the regulation under the *Anderson-Burdick* framework. *Id.* at 448, 451, 459.

Party identification ballot laws like the one at issue in *Democratic-Republican Org.* raise freedom of association issues that welcome *Anderson-Burdick* analysis, as opposed to free speech issues that require Speech Clause jurisprudence. That was the court's approach in *Democratic-Republican Org.*, 900 F. Supp. 2d at 466 (quoting *Timmons*), and the district court's view of that case here. *See* Op., App. Vol. I, 28. It is also the view of the Supreme Court. *See Timmons*, 520 U.S. at 363, 365; *Wash. State Grange*, 552 U.S. at 459. Because the Slogan Statutes are not party identification laws that raise freedom of association issues, but concern content-based speech regulations that raise Speech

Clause issues, *Democratic-Republican Org.*, is inapplicable to this case.[4]

Next, the Secretary argues this Court should follow the *Anderson-Burdick* framework's application in *Rubin v. City of Santa Monica*, 308 F.3d 1008 (9th Cir. 2002). Appellees' Br. 21-22. But this argument is also unavailing. *Rubin* applied the *Anderson-Burdick* framework to a free speech challenge on behalf of a candidate's ballot designation that explained his profession. *Id*. at 1011, 1014. The plaintiff wanted his designation to read "peace activist," but the law prohibited any "activist" designations because the label is too "generic" to describe a person's profession. *Id*. at 1012. The Ninth Circuit ruled that the burden the law placed on candidates was low, that the state's interests were sufficient, and upheld the law under the *Anderson-Burdick* framework. *Id*. at 1015.

The Ninth Circuit did not have the benefit of *Reed* to help guide its analysis. Even so, citing several circuit and Supreme Court cases, the

[4] Alternatively, if the Court concludes the *Anderson-Burdick* framework does apply, *Democratic-Republican Org.*, still does not control the outcome of this case. The burden the party identification statue places on candidates is not severe. But the burden the Slogan Statutes place on candidates is severe. *See*, *infra*, § III. Accordingly, the Slogan Statutes must face strict scrutiny even under *Anderson-Burdick*, which they fail. *Id*.

Ninth Circuit held "state election laws" that "stifle core political speech," like the Slogan Statutes, are unconstitutional. *Id*. at 1015-16. Indeed, candidate speech has the "fullest" First Amendment protection. *Eu*, 489 U.S. at 223 (internal quotation marks omitted).[5] The other Ninth Circuit cases relied upon by the Secretary, *Chamness v. Bowen*, 722 F.3d 1110 (9th Cir. 2013) and *Caruso v. Yamhill Cty*., 422 F.3d 848 (9th Cir. 2005), likewise lacked *Reed*'s benefit in relying upon *Rubin*.

The Secretary's argument based on *Fusaro v. Cogan*, 930 F.3d 241 (4th Cir. 2019) fares no better. Appellees' Br. 22. She claims that case concerned a free speech challenge to the state's voter roll disclosure statute, *id.*, but the issues in *Fusaro* were "not easily categorized." 930 F.3d at 256. The disputed statute in *Fusaro* regulated "access to a government record, which is not ordinarily subject to any First Amendment constraints." *Id*. It was also "entangle[d] with political speech," which "typically requires an application of strict scrutiny." *Id*.

[5] The Ninth Circuit clearly views restrictions on "core political speech," *Rubin*, 308 F.3d at 1015, like candidate speech, *see Eu*, 489 U.S. at 223, as a severe burden on candidates under the *Anderson-Burdick* framework. *See Rubin*, supra, at 1015-16. Accordingly, the Slogan Statutes would still face and fail strict scrutiny under the *Anderson-Burdick* framework. *See*, *infra*, § III.

However, "the gravamen of [the plaintiff's] claims [was] a request for government information," which "remains, fundamentally, a policy choice," and "accorded a lower level of scrutiny." *Id*. at 256-57. The court applied the lower scrutiny review of the *Anderson-Burdick* framework because the burdens were "a step removed from direct acts of communication," which receives "more flexible treatment." *Id*. at 258-60. Because *Fusaro* is not a true free speech challenge to an election law, it is unhelpful here.

Finally, the Secretary claims that *McIntyre* does not support Plaintiffs' claims. Appellees' Br. 23. She argues *McIntyre* "concerned prohibitions on political speech writ large, not a specific election regulation." Appellees' Br. 23. The thrust of her argument is that the Slogan Statutes "are not prohibitions on general advocacy," but election laws that govern the voting process—"*i.e.*, they exclusively govern how candidates identify themselves to voters on the ballot, not what candidates may say [ ] in any other context." *Id*. at 24-25. She claims the law at issue in *McIntyre* sought to regulate speech "far beyond the electoral process," but that the Slogan Statutes do not stop candidates "from widely promoting the ideas underlying [their] slogans" or

expressing their slogans "throughout their campaigns." *Id.* at 25. "Compared" to the law in *McIntyre*, "the Slogan Statutes' effect on" speech is slight." *Id*.

The Secretary's analysis of *McIntyre*, and of free speech law generally, is erroneous. It is axiomatic that candidate speech is a part of political speech writ large. *See Eu*, 489 U.S. at 223 (candidate speech has full First Amendment protection). And because a candidate's slogan on a New Jersey primary election ballot is candidate speech, that slogan is a part of the political discourse. Thus, to the extent that *McIntyre* applies to political speech writ large, the Slogan Statutes should fit into that analysis.

That the law in *McIntyre* had a broader scope of speech regulation than do the Slogan Statutes' regulation of ballot slogans is irrelevant. "The level of scrutiny for speech restrictions does not change if … a content-based burden is modest." *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. of N.J.*, 910 F.3d 106, 129 (3d Cir. 2018) (Bibas, J., dissenting) (citing *Reed*). "Strict scrutiny applies to laws that burden speech [ ] even if they do not nearly eliminate the right to speak." *Id.* at 130 (citing *Reed*). Indeed, it is immaterial even if, as the Secretary

argues, the Slogan Statutes effect on political speech "is slight." Appellee Br. 25. "Strict scrutiny applies." *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 130 (Bibas, J., dissenting) (citing *Reed*). It is beside the point that candidates have "every opportunity to disseminate their views off of the ballot." Appellees' Br. 24 n.8. Their ballot slogans still fall within "the bounds of First Amendment protection." *Meyer*, 486 U.S. at 424. *Reed*, *McIntyre*, and strict scrutiny apply to the Slogan Statutes.

III. EVEN UNDER *ANDERSON-BURDICK*, THE SLOGAN STATUTES CANNOT AVOID STRICT SCRUTINY.

The Secretary appears to assume that if *Anderson-Burdick* were applicable, she could avoid having to carry a strict scrutiny burden. But that argument depends on minimizing the challenged speech restriction's impact. After all, even under *Anderdon-Burdick*, severe burdens trigger strict scrutiny. *Timmons*, 520 U.S. at 358.

Accordingly, the Secretary argues the Slogan Statutes place "minor and reasonable parameters" on what candidates can say in their slogan. Appellees' Br. 1. She maintains that candidates can "widely promot[e] the ideas underlying [their ballot] slogans," or express the slogan itself, "throughout their campaigns," with the Slogan Statutes only making a "slight" impact on their political speech. *Id*. at 25. She claims that

"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." *Id.* at 29. And, the Secretary adds that "nothing" in New Jersey election law prevents Plaintiffs from using their slogan "anywhere *but* on the ballot itself." *Id.* at 30. In her view, quoting the district court, because Plaintiffs "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." *Id.* at 30.

Indeed, the Secretary believes the "most important point," *id.* at 29, the district court made was its argument that the Slogan Statutes control "just six words" of candidate speech, "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," "in other forums, and by other means." Op., App. Vol. I, 33-35.

But the severity of the burden the Slogan Statutes impose on candidates cannot be minimized because of the percentage of speech a ballot slogan consumes in a political campaign. "As the Supreme Court has clearly stated, 'the loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury.'" *ACLU v. Reno*, 217 F.3d 162, 180 (3d Cir. 2000) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "That [Plaintiffs] remain free to employ other means to disseminate their ideas does not take their speech through [ballot slogans] outside the bounds of First Amendment protection." *Meyer*, 486 U.S. at 424. Even under *Anderson-Burdick*, the Slogan Statutes would be subjected to strict scrutiny.

The Secretary's claim that all candidates are equally burdened by the Slogan Statutes' authorization requirement, Appellees' Br. 29, assumes that all candidates are interested in using slogans that either do not require authorization, or for which authorization is readily available. But in any event, this argument is irrelevant to measuring the degree of the burden the Slogan Statutes place on candidate speech. After all, the use of strict scrutiny "does not depend on how many people the law burdens." *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 129 (Bibas, J., dissenting).[6]

[6] The Secretary claims Plaintiffs failed to address "any" of the district court's "four" reasons it concluded the Slogan Statutes place a low burden on candidates. Appellees' Br. 29. Not so. Plaintiffs refute the relevance that candidates have other opportunities to express their views outside of the ballot. *See supra* §§ ID2, II, III; Appellants' Br. 33-

The Secretary also argues that the Slogan Statutes do not effectively codify viewpoint discrimination because the laws apply to everyone and every slogan. Appellees' Br. 32-33. But this superficial neutrality analysis misses the point. The Slogan Statutes effectively ban criticism of a person or New Jersey business in a ballot slogan because obtaining the requisite authorization is nearly impossible. Appellants' Br. 31-34. For example, no candidate will be authorized to use "Never Trump," "Biden Ruined The Economy," "Putin Is A Murderous Dictator," or "Xi Jinping Will Destroy Taiwan" to express their domestic or foreign policy positions. Accordingly, only slogans that do not offend individuals or corporations can comply with the Slogan Statutes.

And because "[g]iving offense is a viewpoint," *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (op. of Alito, J.); *see Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019)), the Slogan Statutes effectively codify viewpoint discrimination—the most "egregious form of content discrimination,"

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35. Plaintiffs explained the government, not third parties, place the burden on candidates. Appellants' Br. 35-36. The irrelevance that all candidates share the severe burden the Slogan Statutes place on them is addressed immediately above. *Supra*, § III. And Plaintiffs' explanation of the severe burden the Slogan Statutes place on candidates demonstrates the irrelevance of the frequency that candidates are denied authorization. *Id.*; Appellants' Br. 29-35.

Rosenberger, 515 U.S. at 829-30, and a severe burden on candidate speech. This is not a lesser sort of burden on constitutional freedom that *Anderson-Burdick* would consign to a lower form of scrutiny.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Both attorneys for Appellants are members of the bar for the U.S. Court of Appeals for the Third Circuit.

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On March 7, 2022, I electronically filed this brief with the Clerk of this Court by using the CM/ECF system. The participants in this case are Filing Users of this Court's CM/ECF system and are served electronically by the Notice of Docket Activity.

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