UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK DIVISION

EUGENE MAZO, and LISA McCORMICK, *Plaintiffs,* v. TAHESHA WAY, in her official capacity as New Jersey Secretary of State, et al., *Defendants*.	Civil Action No. 20-CV-08174 Judge Susan D. Wigenton PLAINTIFFS' RESPONSE TO JOANNE RAJOPPI'S, ELAINE FLYNN'S, AND PAULA SOLLAMI-COVELLO'S MOTIONS TO DISMISS RETURN DATE: SEPT. 21, 2020

Walter M. Luers
LAW OFFICES OF WALTER M. LUERS, LLC
The Corbit Building
67 Beaver Ave., Suite 18
Annandale, NJ 08801
908-894-5656
wluers@luerslaw.com
Counsel of Record for Plaintiffs

Ryan Morrison (*pro hac vice* pending)
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Suite 801
Washington, DC 20036
202-301-3300
rmorrison@ifs.org
Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

DOCUMENTS FROM THE RECORD

Plaintiffs, Eugene Mazo and Lisa McCormick, by counsel, submit this Response to Defendants Joanne Rajoppi's, Elaine Flynn's, and Paula Sollami-Covello's (the "Defendants") Motions to Dismiss.

FACTUAL ALLEGATIONS

Plaintiffs' Verified Complaint alleges New Jersey Statutes §§ 19:23-17 and 19:23-25.1 (the "Slogan Statutes") violate the First Amendment. (See V. Compl., DN 1, ¶¶ 2-6, 27-28, 48-56). Plaintiffs were candidates for the 2020 Democratic Party nomination for the U.S. House of Representatives in their respective congressional districts and wanted to use certain slogans next to their names, pursuant to the Slogan Statutes, on the New Jersey primary election ballot. (Id. at ¶¶ 11-12, 20, 24-25, 29-30, 33-36). However, state officials denied their requests and the county clerks did not print their slogans on the primary election ballot because Plaintiffs' desired slogans did not comply with the authorization requirements of the Slogan Statutes. (Id. at ¶¶ 26, 31-36). Consequently, Plaintiffs used alternative slogans and brought this lawsuit. (Id. at ¶¶ 32, 37).

Plaintiffs were eventually defeated in their respective primary elections. However, they intend to run for the same offices in the 2022 election. (Id. at ¶¶ 22).

The New Jersey Secretary of State is the state's chief election official. *See* N.J. Stat. §§ 19:31-6a; 52:16A-98. But she does not control the substantive content and printing of the primary election ballots. New Jersey county clerks print and distribute primary election ballots in their respective counties and are responsible for the structure, format, and substantive content of the ballots. (Id. at ¶¶ 14-19). *See also* N.J. Stat. §§ 19:9-2; 19:23-17; 19:23-22.4; 19:23-24; 19:23-25.1; 19:49-1; 19:49-2.

The Slogan Statutes forbid a New Jersey county clerk from printing any slogan that includes or refers to the name of any person or New Jersey incorporated association on the primary

election ballot without the written consent of that person or association. (See V. Compl., DN 1, ¶¶ 3-4; 14-19; 27-28). *See also* N.J. Stat. §§ 19:9-2; 19:23-17; 19:23-22.4; 19:23-25.1; 19:49-1; 19:49-2.

The Defendants are New Jersey county clerks and responsible for printing Plaintiffs' desired slogan on the primary election ballots. Because of the Slogan Statutes, Defendants failed to print the Plaintiffs' desired slogans in 2020 and will fail to do so again in 2022.

LEGAL STANDARD

When ruling on a motion to dismiss under Fed. R. Civ. P 12(b)(6), the Court must accept all factual allegations in the Plaintiffs' complaint as true and draw all inferences in the light most favorable to the plaintiffs. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). The complaint "does not need detailed factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But the plaintiffs' "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

A motion to dismiss must be denied if the complaint alleges enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

District courts "should conduct a two-part analysis" "when presented with a motion to dismiss for failure to state a claim." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, after separating the factual and legal arguments in a complaint, the Court "must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Id.* at 210-11. Second, the Court must decide "whether the facts alleged in the complaint are sufficient to

show that the plaintiff has a 'plausible claim for relief.'" *Id*. at 211 (quoting *Iqbal*). "In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Id.*

ARGUMENT

Plaintiffs' Verified Complaint states a valid claim for relief under the First Amendment. Union County Clerk Joanne Rajoppi, Middlesex County Clerk Elaine Flynn, and Mercer County Clerk Paula Sollami-Covello are proper defendants in this litigation because, pursuant to the Slogan Statutes, they did not print Plaintiffs' desired slogans on the primary election ballot, which caused Plaintiffs' constitutional injury. And the Slogan Statutes cause a free speech injury that is "capable of repetition, yet evading review." Therefore, the Defendants' Motions to Dismiss should be denied.

I. Defendants are Proper Litigants and Responsible for Plaintiffs' Injury.

The Defendants are proper litigants and responsible for the Plaintiffs' injury. Plaintiffs want their desired slogans printed on the New Jersey primary election ballots. Defendants are responsible for the content and printing of the ballots. It is the Defendants' responsibility to ensure that nothing is printed on the ballots that is not authorized by law. The Slogan Statutes forbid Plaintiffs from using their desired slogans on the ballots. The Defendants refused to print the Defendants desired slogans on the ballots because of the Slogan Statutes. Therefore, Defendants are enforcing the Slogan Statutes by refusing to print Plaintiffs' desired slogans on the ballots. Accordingly, they are proper defendants and their actions are a cause of the Plaintiffs' injury.

Defendants present themselves as mere spectators in the New Jersey election system and argue that the Secretary of State is the only state official that has any authority over what is printed on the ballots. (See Mem. in Supp. of Mot. to Dismiss, DN 7-2, 7-9). Defendants assert they are

not proper defendants in this litigation and that Plaintiffs cannot prove causation to establish Article III standing. (Id.). Specifically, they claim that: (1) they have no authority "to evaluate the constitutional merit of the Slogan Statutes;" (2) "performed no action" to cause Plaintiffs' constitutional injury; (3) are powerless to print Plaintiffs' desired slogans on the ballot because they have no "authority to enforce New Jersey election statues;" (4) have "no election-related duty" except for distributing the ballots; and (5) the New Jersey Secretary of State is the only properly named defendant. (Id.). But the Defendants are selling themselves short.

Defendants are not passive onlookers in the ballot promulgation process; rather, under New Jersey law, they are responsible for administering elections within their respective counties. In their official capacity as county clerks, the Defendants are responsible for enforcing the Slogan Statutes. The Secretary of State is the chief election official. *See* N.J. Stat. §§ 19:31-6a; 52:16A-98. But the Defendants are elected constitutional public officers that function independently of the gubernatorially appointed Secretary of State. *See* New Jersey Const. Art. V, § 4, cl. 3; Art. VII, § 2, cl. 2. County clerks work in concert with the Secretary of State only insofar as they are required to by statute. *See e.g.*, N.J. Stat. §§ 19:23-21; 19:23-22; 19:23-55. And if an individual is running in the primary election for public office at the county level of state government, the relevant county clerk accepts that candidate's filed nomination documents and qualifies her, including her slogan, for the primary election ballot. *See* N.J. Stat. §§ 19:23-5; 19:23-6; 19:23-7; 19:23-8; 19:23-10; 19:23-11; 19:23-14; 19:23-17; 19:23-19; 19:23-22.

Defendants, and no other public officials, are ultimately responsible for the content and printing of the primary election ballots. The Secretary of State does provide "election supplies" to county clerks, (see Mem. in Supp. of Mot. to Dismiss, DN 7-2, 8), but the supplies are "things other than ballots." *See* N.J. Stat. §§ 19:9-1; 19:9-3. Defendants are accountable for substantive

content, format, and printing of the primary election ballots and enforcing the Slogan Statutes. *See* N.J. Stat. §§ 19:9-2; 19:23-17; 19:23-22.4; 19:23-24; 19:23-25.1; 19:49-1; 19:49-2.

Defendants have the responsibility to enforce all ballot statutes, including the Slogan Statutes. The Defendants admit that they must "fully comply with the Slogan Statutes." (See Mem. in Supp. of Mot. to Dismiss, DN 7-2, 7). Indeed, before assuming their public office, each county clerk must take an oath to support the New Jersey constitution, which means they must use their authority to enforce the state's laws, including the Slogan Statutes. *See* New Jersey Const. Art. II, § 1; Art. VII, § 1, cl. 1; Art. XI, § 1, cls. 2, 3. Accordingly, if any primary election candidate wanted the slogan, "Endorsed by County Clerk Joanne Rajoppi,"[1] and the phrase made it through the approval process up until the point of being printed on the primary election ballot, County Clerk Rajoppi has the power to enforce the Slogan Statutes and refuse to print the slogan on the ballot.[2]

A public official is "properly named as a defendant if the official 'by virtue of his office has some connection with the enforcement of the [law at issue].'" *Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980) (*en banc*) (quoting *Ex Parte Young*, 209 U.S. 123, 157 (1908)). It is irrelevant if, as the Defendants assert, (see Mem. in Supp. of Mot. to Dismiss, DN 7-2, 7-8), their role in enforcing the Slogan Statutes is "entirely ministerial." *Finberg*, 634 F.2d at 54. "[T]he inquiry is not into the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights." *Id*. *See also Constitution Party of Pa. v. Cortes*, 824 F.3d 386, 396 (3d Cir. 2016) (citing this quote from *Finberg*). Courts "often" allow "suits to enjoin the

[1] The primary election ballot slogan could also be, "Endorsed by County Clerk Sollami-Covello," or "Endorsed by County Clerk Elaine Flynn."

[2] County Clerks Sollami-Covello and Flynn have this power too.

performance of ministerial duties in connection with allegedly unconstitutional laws." *Finberg*, 634 F.2d at 54. (collecting cases). It is irrelevant if, as the Defendants argue, their role "does not require [them] to evaluate the constitutional merit of the Slogan Statutes." (See Mem. in Supp. of Mot. to Dismiss, DN 7-2, 7). Once they "have relied on the authority conferred by the [Slogan Statutes] to work an injury to the plaintiff[s], they may not disclaim interest in the constitutionality of these [laws]." *Finberg*, 634 F.2d at 54.

Put simply, if there is a "connection" between the Defendants and enforcement of the Slogan Statutes, then they are properly named litigants in this case. *Id.*

Likewise, if Plaintiffs' First Amendment injury '"is fairly traceable'" to the Defendants' failure to print Plaintiffs' desired slogans on the ballot, then the causation requirement of Article III standing is established and their injury '"is likely to be redressed by a favorable judicial decision.'" *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 110 (3d Cir. 2019) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

It is Defendants' "duty" "to print only what complies with the law" on the ballots. *MacManus v. Allan*, 2 N.J. Super. 557, 563 (Law Div. 1949). Accordingly, there is a connection between the Defendants' responsibility to print the ballots and the enforcement of the Slogan Statutes. Courts can order the state official responsible for printing primary election ballots what slogans they can and cannot print on the ballot under the Slogan Statutes, as well as remedy an injury caused by the laws. *Id.* And Defendants' enforcement of the Slogan Statutes is traceable to the absence of Plaintiffs' desired slogans on the ballot. Therefore, the Defendants are properly named litigants in this case and a cause of Plaintiffs' injuries.

The Eleventh and Fourth Circuits faced these issues when they had to determine which state officials were proper defendants and could provide the requested relief. In *Jacobson v. Fla.*

Sec'y, 957 F.3d 1193, 1197 (11th Cir. 2020), the plaintiffs filed a constitutional challenge to a Florida election law that governed the order candidates appeared on the ballot, but they sued only the Florida Secretary of State for injunctive relief. The district court found for the plaintiffs and "permanently enjoined the Secretary – and the 67 county Supervisors of Elections, none of whom were made parties to [the] lawsuit – from preparing ballots in accordance with the law." *Id*. at 1198. The trial court held the Secretary was "responsible for ballot order because she [was] Florida's 'chief election officer.'" *Id.* at 1199. Even though state law "task[ed] the nonparty Supervisors with placing candidates on the ballot in the correct order, [], the district court ruled that relief against the Secretary could redress the [plaintiffs'] injuries." *Id*. at 1199-1200.

However, the Eleventh Circuit reversed the district court. *Id.* at 1198. It held that the Supervisors of Elections were "responsible for placing the candidates on the ballot in the order the law prescribes," and because they were not parties in the litigation the case should be dismissed. *Id*. Under Florida law, the Secretary was only responsible for certifying the names to be placed on the ballot to the Supervisors. *Id.* at 1207. "Because the Secretary didn't do (or fail to do) anything that contributed to their harm," the Plaintiffs failed to prove causation for Article III standing. *Id.* (punctuation marks and citation omitted).

The Court explained that its decision rested "on the reality that the Supervisors are independent officials under Florida law who are not subject to the Secretary's control. The Supervisors are constitutional officers who are elected at the county level by the people of Florida; they are not appointed by the Secretary." *Id*. The only control the Secretary had over the Supervisors was "through coercive judicial process," *i.e.*, she could sue them. *Id*. The fact that the Secretary "must resort to judicial process if the Supervisors fail to perform their duties underscores her lack of authority over them." *Id*. at 1207-08. "Because the Supervisors are independent officials

not subject to the Secretary's control, their actions to implement the ballot statute may not be imputed to the Secretary" to establish causation. *Id*. at 1208. "Contrary to the reasoning of the district court, the Secretary's position as 'the chief election officer of the state,' with 'general supervision and administration of the election laws,' does not make the order in which candidates appear on the ballot traceable to her." *Id*.

Because there was no "evidence that the Secretary controls ballot order, the [plaintiffs could not] rely on the Secretary's general election authority to establish traceability." *Id*. (citation omitted). State law "expressly" gave "a different, independent official control over the order in which candidates appear on the ballot." *Id*. The Secretary could not cause "any injury" the plaintiffs might suffer. *Id.* Accordingly, relief against the Secretary would not redress their injury – "either directly or indirectly." *Id.* (internal quotation marks and citation omitted). An injunction against the Secretary would not give the plaintiffs their desired relief, "for neither she nor her agents control the order in which candidates appear on the ballot. Nor can declaratory relief against the Secretary directly redress any injury to the [plaintiffs]. A declaratory judgment against the Secretary does not bind the Supervisors, who are not parties" to the case. *Id*. (internal quotation marks omitted). Unless the Supervisors were parties to the case, no ruling from the court could bind them. *Id.* "If a plaintiff sues the wrong defendant, an order enjoining the correct official who has not been joined as a defendant cannot suddenly make the plaintiff's injury redressable." *Id*. at 1209.

Here, the New Jersey Secretary of State cannot force the Defendants to print anything on the primary election ballots. The Secretary, while powerful, is a political appointee. The Defendants are duly elected public officials. Just as no state official had direct control over the other in *Jacobson*, the Secretary has no control over the Defendants other than through the judicial

process. Under New Jersey law, the Secretary has no authority over the printing of the primary election ballots, or, consequently, their content. Only the Defendants have that authority. Like the Supervisors, state law expressly gives the Defendants control over the content and printing of the primary election ballots. Accordingly, if the Plaintiffs want a particular slogan to appear on the ballot, then they must sue the Defendants to force them to print it and directly redress their injury. Therefore, the Defendants are proper litigants in this case and a cause of Plaintiffs' injuries.

Similarly, in *Bostic v. Schaefer*, 760 F.3d 352, 367-69 (4th Cir. 2014), the Fourth Circuit faced an Article III standing issue when a same-sex couple brought a constitutional claim against Virginia's marriage laws. A Virginia same-sex couple wanted to get married in Virginia.[3] *Id.* at 368. The plaintiffs sued the Clerk of the Circuit Court in the jurisdiction where they sought a marriage license because that public official denied them an application for a marriage license. *Id.* at 368-69, 371. They also sued the State Registrar of Vial Records because she was responsible for "developing Virginia's marriage license application form and distributing it to the circuit court clerks throughout Virginia." *Id.* at 371. The Registrar was also "responsible for ensuring compliance with the Commonwealth's laws relating to marriage in general" and "those laws that limit marriage to opposite-sex couples and that refuse to honor the benefits of same-sex marriages lawfully entered into in other states." *Id.*

During its standing analysis, the Fourth Circuit recognized a dichotomy between the Clerk, an elected public official, *see* Va. Code § 15.2-1634, and the Registrar, an appointed public official, *see* Va. Code § 32.1-251, and how they worked in tandem to enforce Virginia's marriage laws. *Bostic*, 760 F.3d at 371-72. The Circuit Clerk had "the requisite connection to the enforcement of

[3] A California same-sex couple relocated to Virginia and wanted their out-of-state marriage recognized in the commonwealth. *Id.* at 369. But, for the purposes of this response, only the Virginia couple's standing analysis is relevant.

the Virginia Marriage Laws due to his role in granting and denying applications for marriage licenses." *Id*. at 371 n.3. Granting the Virginia couple the relief they sought would redress their constitutional injuries. *Id*. at 371. Accordingly, they had standing to sue the Circuit Clerk. *Id*.

Likewise, the Registrar's "promulgation of a marriage license application form that does not allow same-sex couples to obtain marriage licenses resulted in [the Circuit Clerk's] denial of [the Virginia couple's] marriage license request." *Id*. at 372. And because they could "trace [their] injury to [the Registrar] due to her role in developing the marriage license application form in compliance with the Virginia Marriage Laws," the Virginia couple had standing to sue the Registrar. *Id*. As it was with their claims against the Circuit Clerk, granting the relief the Virginia couple sought from the Registrar, "would redress their injuries." *Id.* at 372.

Here, the Plaintiffs are in the same situation as the plaintiffs in *Bostic* – they must sue two different public officials to obtain the relief they seek. The New Jersey Secretary of State and Defendants are separate public officials that do not answer to one another, have different roles in the primary election process, and are responsible for enforcing state election laws—including the Slogan Statutes. Like the Registrar, the Secretary is responsible for ensuring compliance with state election law. But the Secretary cannot force the Defendants to print a particular slogan on the primary election ballot any more than the Registrar could force the Circuit Clerk to issue an application for a marriage license to the *Bostic* plaintiffs. Because the Defendants are responsible for printing the ballots, they have "some connection with the enforcement of the [Slogan Statutes]," and are proper defendants in this case. *Finberg*, 634 F.2d at 54 (internal quotation marks omitted). And when the Defendants enforce the Slogan Statutes by refusing to print the Plaintiffs' desired slogans on the ballot, they cause an injury to the Plaintiffs.

Plaintiffs cannot receive the relief they seek unless they sue both the Secretary and the Defendants. The Defendants may claim it is absurd that they would not follow the Secretary's directives. But New Jersey law vests them—not the Secretary—with the authority to print the primary election ballots. Nothing is printed on the primary election ballot except what the Defendants permit.

The Eleventh Circuit dismissed the case in *Jacobson* because those plaintiffs failed to sue the party actually in control of the content of the ballots. 957 F.3d at 1198, 1207-08. But the *Bostic* plaintiffs obtained the relief they sought because they sued all relevant state officials. 760 F.3d at 367, 371-72. For the Plaintiffs to avoid the fate of the *Jacobson* plaintiffs and enjoy the success of the *Bostic* plaintiffs, the Defendants must remain in this case. Accordingly, the Defendants' Motions to Dismiss should be denied.

II. Plaintiffs' Claims are Justiciable.

Plaintiffs' First Amendment challenge against the Slogan Statutes is justiciable. Because Plaintiffs' claims are "capable of repetition, yet evading review," they "fit comfortably within the established exception to mootness," *Fed. Election Comm'n v. Wis. Right to Life, Inc*., 551 U.S. 449, 462 (2007) (collecting cases), and are ripe for review. *See De La Fuente v. Cortés*, 261 F. Supp. 3d 543, 549-50 (M.D. Pa. 2017) (*aff'd*, 751 F. App'x. 269 (3d Cir. 2018)) (plaintiff's constitutional claims against state election laws were neither moot after his 2016 campaign nor unripe before his 2020 campaign because his past and intended campaign efforts were "capable of repetition yet evading review," and, therefore, justiciable); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 545 n.1 (6th Cir. 2014) (plaintiff's claims against a state election law were neither moot nor unripe because they "were capable of repetition, yet evading review,"); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1242 n.2 (11th Cir. 2013) (same). *See also Globe Newspaper Co. v.*

Superior Court, 457 U.S. 596, 623 n.3 (1982) (Stevens, J., dissenting) ("The 'capable of repetition, yet evading review' exception to the mootness doctrine generally is compatible with our settled policy of avoiding the premature adjudication of constitutional questions for an [issue] that is capable of repetition yet evading review generally is no less ripe for review the first time it is presented than it would be on subsequent occasions." (citations omitted)).

The "capable of repetition, yet evading review," exception applies when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Wis. Right to Life, Inc*., 551 U.S. at 462.

Plaintiffs were candidates for the 2020 Democratic Party nomination for the U.S. House of Representatives in their respective congressional districts in New Jersey and they intend to be candidates again for the same elected offices in 2022. Accordingly, Plaintiffs will be subject to the Slogan Statutes again and denied the use of their desired slogans again, in violation of the First Amendment. Not only must the Court accept these factual allegations as true, *Phillips*, 515 F.3d at 228, but Plaintiffs' political intentions expressed in their Verified Complaint are also treated as truthful outside the context of a motion to dismiss. *See Real Alternatives, Inc. v. Sec'y of HHS*, 867 F.3d 338, 371 n.9 (3d Cir. 2017) ("A Verified Complaint is treated as an affidavit."). Accordingly, the Court must credit the Plaintiffs' political plans and, therefore, conclude the Slogan Statutes will violate the Plaintiffs' free speech rights again in the 2022 primary election.

In *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 736 (2008), the candidate plaintiff made his jurisdiction-sustaining political intentions known not just after the litigation began, or even after the district court decision, but in a public statement he made shortly before filing his U.S. Supreme Court reply brief. The Supreme Court noted the plaintiff's intent to "self-finance another

bid for a House seat," and, on that basis alone, the Court was "satisfied that [his] facial challenge [was] not moot." *Id.*

Also, the Third Circuit has ruled that "most election cases[] fit[] squarely within the 'capable of repetition yet evading review' exception," *Merle v. United States*, 351 F.3d 92, 94 (3d Cir. 2003), and that "it is reasonable to expect political candidates to seek office again in the future." *Belitskus v. Pizzingrilli*, 343 F.3d 632, 648 n.11 (3d Cir. 2003).

Indeed, the Third Circuit has ruled candidates would run in subsequent elections with less evidence than what the Plaintiffs have provided in this case. In *Belitskus*, candidates challenged a state ballot access law for the 2000 general election without expressing any intent of running in a subsequent election. *Id*. at 636-37, 648 n.11. After the election, the Court did not dismiss the case as moot because it believed similarly situated candidates would challenge the law in future election cycles. *Id*. at 648 n.11.

In *Merle*, the Third Circuit rejected the argument that the case was moot because the 2002 U.S. House of Representatives race was over, and the plaintiff did not win the election. 351 F.3d at 94. The Court ruled that a race for the House of Representatives is too short for a candidate's election law claim "to be litigated fully prior to the cessation or expiration" of the election. *Id*. at 95. The government argued that there was no evidence that the *Merle* plaintiff intended to be a candidate for Congress again in 2004 to challenge the constitutionality of the offending statute. *Id.* The Third Circuit held evidence that the *Merle* plaintiff intended to run for the House of Representatives again was unnecessary and assumed he would run for election "either in 2004 or at some future date." *Id*. (citing *Int'l Org. of Masters. Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991); *Norman v. Reed*, 502 U.S. 279, 288 (1992)). The Court went on to state, "Even if we were to require some expression of intent," the *Merle* plaintiff had implicitly stated in his briefs that he

and similarly situated individuals would be subject to the offending statute in future elections. *Id*. Therefore, the *Merle* plaintiff's claims were "capable of repetition, yet evading review." *Id*.

Under *Davis*, *Belitskus*, and *Merle*, this case meets the two requirements of the "capable of repetition, yet evading review" exception to the mootness and ripeness doctrines. First, the Third Circuit has ruled that an election campaign for the U.S. House of Representatives is too short in duration "to be litigated fully prior to the cessation or expiration" of the election. *Merle*, 351 F.3d at 95.

Second, there is a reasonable expectation that the Plaintiffs will be subject to the Slogan Statutes again. Plaintiffs submitted a sworn statement that they intend to run for the 2022 Democratic Party nomination for the U.S. House of Representatives in their respective congressional districts, and, consequently, be subject to the Slogan Statutes again. This is far more evidence of an intent to be a candidate in subsequent elections than the plaintiffs in *Davis*, *Belitskus*, or *Merle* provided and none of these cases were dismissed as moot or unripe.

Plaintiffs will run for Congress again in 2022 and the election cycle is too short to complete this litigation. Accordingly, their First Amendment claims against the Slogan Statutes are "capable of repetition, yet evading review." Therefore, Defendants' Motion to Dismiss should be denied.

CONCLUSION

For the stated reasons, Defendants Joanne Rajoppi's, Paula Sollami-Covello's, and Elaine Flynn's Motion to Dismiss should be denied.

Respectfully submitted,

/s/ Walter M. Luers
Walter M. Luers
LAW OFFICES OF WALTER M. LUERS, LLC
The Corbit Building
67 Beaver Ave., Suite 18
Annandale, NJ 08801
Counsel of Record for Plaintiffs

and

Ryan Morrison (*pro hac vice* pending)
INSTITUTE FOR FREE SPEECH
150 Connecticut Ave., NW, Suite 801
Washington, DC 20036
202-301-3300
rmorrison@ifs.org
Counsel for Plaintiffs

Dated: September 8, 2020

CERTIFICATE OF SERVICE

On September 8, 2020, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which will serve the document on counsel for all parties.

/s/ Walter M. Luers
Walter M. Luers

COURTESY COPY CERTIFICATE

On September 8, 2020, a courtesy copy of the foregoing was sent by regular U.S. mail in compliance with the Local Rules and the preferences of this Court to the following address:

Hon. Susan D. Wigenton
U.S. District Judge
Martin Luther King Bldg. &
U.S. Courthouse
50 Walnut St.
Newark, NJ 07101

/s/ Walter M. Luers
Walter M. Luers