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

BRIEF FOR APPELLANTS EUGENE MAZO AND LISA McCORMICK

Ryan Morrison
INSTITUTE FOR FREE SPEECH
1150 CONNECTICUT AVE., NW
Suite 801
Washington, DC 20036
202-301-3300
rmorrison@ifs.org

Walter M. Luers
COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Park 80 West – Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, NJ 07663
201-845-9600, Ext. 144
wml@njlawfirm.com

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

This case is about free speech—political speech—and two New Jersey laws that unconstitutionally regulate the content of messages candidates want to communicate to voters. New Jersey allows each candidate to place a six-word slogan next to their name on the ballot. But before naming a person or a New Jersey corporation in the slogan, the laws require candidates to first obtain permission from that individual or corporation, thereby censoring slogans in violation of the First Amendment where such permission is unavailable or not forthcoming. These content-based speech regulations must face strict scrutiny, which they cannot survive.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this First Amendment challenge to New Jersey laws under 28 U.SC. §§ 1331, 1343(a) and 42 U.S.C. § 1983. The district court entered its final order on July 30, 2021, dismissing all of Plaintiffs' claims. Plaintiffs timely filed their notice of appeal on August 27, 2021. App. Vol. I, 1-2.

This Court has jurisdiction over this appeal per 28 U.S.C. § 1291.

STATEMENT OF ISSUE

Whether the speech authorization requirements of New Jersey Statutes §§ 19:23-17 and 19:23-25.1 are content-based regulations that fail First Amendment Speech Clause strict scrutiny. [Preserved: Op., App. Vol. I, 5-41; Order, App. Vol. I, 3-4.]

STATEMENT OF RELATED CASES

This case has not previously been before the Court. Plaintiffs are unaware of any related cases.

STATEMENT OF THE CASE

1. *New Jersey's ballot slogan regulations.*

New Jersey allows primary election candidates to place a six-word slogan next to their name on the ballot. *See* New Jersey Statutes §§ 19:23-17 and 19:23-25.1 (the "Slogan Statutes"). Congressional candidates must file a nomination petition with the New Jersey Secretary of State requesting any desired slogans. N.J. Stat. §§ 19:13-1; 19:13-3; 19:23-17; 19:23-21; 19:23-25.1.

The Secretary of State is the state's chief election official. N.J. Stat. §§ 19:31-6a; 52:16A-98. She certifies candidate petitions for Congress. N.J. Stat. §§ 19:13-3; 19:23-21. Once the Secretary certifies that a

candidate's petition and requested slogan meet legal requirements, she instructs the relevant county clerks what names and slogans should appear on the primary election ballot. *See* Slogan Statutes; N.J. Stat. §§ 19:23-21; 19:23-22; 19:23-22.4; 19:49-1; 19:49-2.

However, the Slogan Statutes forbid the Secretary from certifying the desired slogan of a primary election candidate if the slogan includes or refers to the name of any person or New Jersey incorporated association without that person or association's written consent. *See* Slogan Statutes.

2. *Defendant censors Plaintiffs' ballot slogans.*

Plaintiffs were candidates for the 2020 Democratic Party nomination for the U.S. House of Representatives in their respective congressional districts who wanted to use certain slogans next to their names on the New Jersey primary election ballot. Am. V. Compl., App. Vol. II, 45-50. As a protest to the perceived preferential treatment that local political machines give to some primary election candidates, Plaintiff Eugene Mazo listed three slogans to be used in Essex, Hudson, and Union counties, respectively: "Essex County Democratic Committee, Inc.;" "Hudson County Democratic Organization;" and "Regular Democratic

Organization of Union County." *Id*. at 48. However, the Secretary denied his request to use these slogans on the ballot because they were unauthorized by the respective New Jersey corporations they mentioned. *Id*. 48-49.

Plaintiff Lisa McCormick wanted to use a slogan that she felt embodied the purpose of her campaign for Congress, and requested to use the slogan, "Not Me. Us." *Id*. at 49. However, the Secretary denied her request because it did not comply with the authorization requirements of the Slogan Statutes. *Id*. Subsequently, McCormick requested to use the slogan, "Bernie Sanders Betrayed the NJ Revolution," to criticize Senator Sanders and promote her candidacy. *Id*. But the Secretary denied her request again to use this slogan on the ballot for lack of Sanders's authorization. *Id*.

Both Plaintiffs thus used alternative slogans that met the requirements of the Slogan Statutes. *Id*. at 43, 49. Plaintiffs eventually lost their respective primary elections. *Id*. at 46. However, they plan to run for the same offices in the 2022 election and subsequent primaries, and intend to use their original desired slogans denied by the Slogan Statutes. *Id*. at 46, 49-50.

3. *Procedural history.*

On July 2, 2020, before the primary election for which they had sought to use their ballot slogans, Plaintiffs filed this suit in the United States District Court for the District of New Jersey against the Secretary and the county clerks, challenging the constitutionality of the Slogan Statutes. Am. V. Compl., App. Vol. II, 43-46. The defendants moved to dismiss under Fed. R. Civ. P 12(b)(1) and (6). The Secretary argued that Plaintiffs lacked standing and that the Slogan Statutes were constitutional. Op., App. Vol. I, 6. The Clerks primarily asserted that they had no control over what slogans to print, and also argued the Plaintiffs lacked standing. *Id*.; Mem., DN 51-1, PageID# 265-70.

The district court granted the defendants' motions to dismiss.

With respect to both defendants' mootness argument, the court held that Plaintiffs have standing to continue their challenge, because their claims are "'capable of repetition, yet evading review,'" due to the "truncated" schedule during New Jersey primary elections. Op., App. Vol. I, 12. "[A] last-minute candidate, who files a nominating petition at the deadline, could conceivably have as few as four days to challenge an adverse determination on his slogan before some counties begin

printing ballots, if the State also waits until the last minute to review it." *Id*. at 12-13. "Even a prudent candidate" will not have enough "time to challenge the Slogan Statutes in court because the State does not make nominating petitions available until December or January before spring primary season." *Id*. at 13. Additionally, "'it is reasonable to expect political candidates to seek office again in the future.'" *Id*. (quoting *Belitskus v. Pizzingrilli*, 343 F.3d 632, 636-37, 648 n.11 (3d Cir. 2003)). Indeed, "courts have determined that election-related challenges such as the present one" meet the "'capable of repetition, yet evading review'" standard. *Id*. at 14.

The district court also ruled Plaintiffs' claims were ripe because "[i]f declaratory judgment [is] not entered, Plaintiffs would face a dilemma come primary season: comply with the Slogan Statutes by foregoing their preferred speech, or use speech they know the State will reject purely for the purpose of establishing the basis for a challenge identical to this one." *Id*. at 19.

However, the district court dismissed the clerks, agreeing that they are not responsible for enforcing the statutes. *Id.* at 39-41.

Turning to the merits, the district court concluded the Slogan Statutes were ordinary ballot laws subject to the Supreme Court's *Anderson-Burdick* framework, rather than content-based speech restrictions warranting strict scrutiny. *Id*. at 24-30. Applying the *Anderson-Burdick* framework, the court upheld the Slogan Statutes, concluding that the burdens they imposed on Plaintiffs were low, and that New Jersey's interests in election integrity, preventing voter deception and confusion, and protecting the associational rights of third parties were "sufficiently weighty." *Id*. at 23-39.

This appeal followed. App. Vol. I, 1-2. Plaintiffs have voluntarily dismissed the County Clerks from this appeal. *See* Mot., 3d Cir. Dkt. 22.

SUMMARY OF ARGUMENT

The state carries a heavy First Amendment burden to justify its content-based regulation of political speech. It cannot meet this burden.

New Jersey is not required to give candidates an opportunity to speak to voters on the ballot. But having done so, its content regulations of candidates' messages can only survive strict scrutiny if the Secretary proves that they are narrowly tailored to serve compelling state interests. She cannot. The Supreme Court has recognized states

have a compelling interest in maintaining election integrity, but only in the context of laws that regulate the mechanics of running an election—not candidate speech. The Supreme Court has recognized New Jersey's asserted voter confusion interests as only "legitimate" or "important"—not trivial, but not on the level of Plaintiffs' interests in exercising a fundamental right.

More critically, and even assuming the State's interests are compelling, the regulations are not narrowly tailored as they ban far more speech than is necessary to advance those asserted interests.

Yet the district court erred when it declined to apply strict scrutiny, and instead analyzed the Slogan Statutes as common ballot regulations. Notwithstanding precedent requiring the application of strict scrutiny to content-based speech regulations, the district court relied upon the *Anderson-Burdick* framework for evaluating garden-variety ballot laws, which presents the option of applying either intermediate or strict scrutiny. The district court applied intermediate scrutiny and upheld the state's speech regulations. This was error too. Even under ordinary *Anderson-Burdick* ballot law analysis, the Slogan Statutes are subject to strict scrutiny.

The Slogan Statutes violate Plaintiffs' First Amendment right to political speech regardless of how they are analyzed. The decision should be reversed.

STANDARD OF REVIEW

A district court's Fed. R. Civ. P 12(b)(6) decision is subject to *de novo* review. *Simko v. U.S. Steel Corp.*, 992 F.3d 198, 203-04 (3d Cir. 2021). All of Plaintiffs' factual allegations are accepted as true and "all reasonable inferences" are drawn in their favor. *Id*. at 204.

ARGUMENT

I. THE SLOGAN STATUTES' AUTHORIZATION REQUIREMENTS FOR SPEECH MENTIONING INDIVIDUALS OR NEW JERSEY CORPORATIONS VIOLATES PLAINTIFFS' FIRST AMENDMENT SPEECH RIGHTS.

A. The challenged provisions are content-based speech restrictions subject to strict scrutiny.

The First Amendment bars New Jersey from "restrict[ing] expression because of its … content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (internal quotation marks omitted). "Government regulation of speech is content based if a law applies to particular speech because of the … message expressed." *Id*. Content-based speech restrictions are subject to strict scrutiny, *id*. at 171, and, therefore, "presumptively unconstitutional and may be justified only if the

government proves that they are narrowly tailored to serve compelling state interests." *Id*. at 163.

"[F]acially 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." *Id*. at 164 (internal quotation marks omitted). "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id*. at 169. Likewise, a regulation "is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. at 171. Therefore, if the law applies only when certain words are present in a statement, then the law is a content-based regulation of speech. *Id*. at 164, 171.

On their face, the Slogan Statutes target speech that references an individual or a New Jersey corporation. The regulations are based on "the topic discussed or the … message expressed." *Id*. at 163. Applying these regulations, the Secretary denied Plaintiffs the use of their desired slogans because they contained references to an individual and New Jersey corporations. Am. V. Compl., App. Vol. II, 48-50. 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. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotation marks omitted). Accordingly, the Slogan Statutes trigger strict scrutiny. They are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163.

B. New Jersey's interests, though important, are not "compelling."

The district court found New Jersey's interest in preserving election integrity, preventing voter deception and confusion, and protecting the associational rights of third parties supported the authorization provisions. *See* Op., App. Vol. I, 35-37. They do not.

Plaintiffs never denied that New Jersey has such interests. But the district court erred in claiming that "[Plaintiffs] largely do not challenge the State's interests," *id.* at 38, with respect to strict scrutiny analysis. Plaintiffs' argument before the district court, *see* Resp., DN 58, PageID# 370, is the same as it is here—New Jersey does not have compelling interests to justify the Slogan Statutes.

New Jersey's purported interests, important though they may be, do not rise to the level required by strict scrutiny. The Supreme Court recognizes a state "has a compelling interest in preserving the integrity of its election process." *Eu v. S.F. Cty. Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989). But this interest is only compelling with respect to commonplace election mechanics such as voter eligibility, requiring political parties to nominate candidates through a primary, limiting voter participation to one primary election, waiting periods before a voter may change party affiliation, and candidate filing fees. *Id.* (collecting cases).

This government interest does not apply to speech. "The State's interest in protecting the integrity of the [election] process does not justify the [content-based speech regulations] because the State has failed to demonstrate that it is necessary to burden appell[ant]s' ability to communicate their message in order to meet its concerns." *Meyer v. Grant*, 486 U.S. 414, 426 (1988).

Indeed, the Supreme Court has never recognized the election integrity interest to uphold content-based speech regulations for partisan candidates, much less regulating their express speech on the

ballot or anywhere else. None of the authorities the district court cites in identifying the state's election integrity interest concern candidate speech. *See* Op., App. Vol. I, at 35-37 (citing *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973) (voter registration); *Eu*, 489 U.S. at 231 (associational rights); *American Party of Texas v. White*, 415 U.S. 767, 779-80 (1974) (mechanics of the candidate nomination process); *Bullock v. Carter*, 405 U.S. 134, 145 (1972) (candidate filing fees); *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); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 343 (W.D. Pa. 2020) (mail-in ballot procedures))).

Whether the 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. That question should be answered in the negative. It is for the voters, not the state, to determine the value of the candidates' speech.

Next, the district court found that New Jersey's "*important* interest in preventing voter deception" and "*substantial* interest in preventing voter confusion" justifies the Slogan Statutes' content regulations. Op., App. Vol. I, at 36-37 (emphasis added). It also stated these interests are "closely correlated" with "[p]rotecting the associational rights of third parties." *Id*. at 37.

The district court's "argument depends upon the belief that voters can be 'misled.'" *Tashjian v. Republican Party*, 479 U.S. 208, 220 (1986). "But [the Supreme Court's] 'cases reflect a greater faith in the ability of individual voters to inform themselves….'" *Id*. (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983)). "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson*, 460 U.S. at 798. Consequently, the Supreme Court has never called these purported interests "substantial," much less "compelling" as strict scrutiny requires. At best, these interests are "legitimate," *Republican Party*, 479 U.S. at 221 ("The State[ ] [has] *legitimate* interests in preventing voter confusion," (emphasis added)), or "important." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("There is

surely an *important* state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." (emphasis added)). But these interests "in no respect 'make it necessary to burden [Plaintiffs'] rights.'" *Republican Party*, 479 U.S. at 221-22 (quoting *Anderson*, 460 U.S. at 789).

Additionally, none of the district court's cited authorities involve express candidate speech or content-based speech regulations. *See* Op., App. Vol. I, at 36-37 (citing *Norman v. Reed*, 502 U.S. 279, 290 (1992) (freedom of association); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354, 357, 365 (1997) (freedom of association); *Jenness*, 403 U.S. 431, 432 (1971) (ballot access); *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (ballot access); *Republican Party of Connecticut*, 479 U.S. 208, 210-11 (1986) (freedom of association); *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (ballot access); *Anderson*, 460 U.S. at 786-87, 793, 806 (ballot access and freedom of association))). At most, *Timmons* tangentially delt with a political party's *symbolic* speech through fusion candidates.

520 U.S. at 362. But this does not compare with candidates expressly speaking to voters.

Regardless, no matter how "important," Op., App. Vol. I, at 36, or "substantial," *id*., these interests are, they are not "compelling" for purposes of carrying the state's strict scrutiny burden.

C. The authorization requirement is not narrowly tailored to advancing the state's interests.

Even assuming, *arguendo*, that New Jersey's interests are compelling, the Secretary still failed to prove the Slogan Statutes "are narrowly tailored." *Reed*, 576 U.S. at 163. The Secretary has not offered any evidence or genuine argument that the laws are narrowly tailored. At the district court, the Secretary simply asserted the Slogan Statutes were narrowly tailored because they achieved the state's interests. *See* Br., DN 57-1, PageID# 328, 333. This circular reasoning is a far cry from proving the Slogan Statutes are narrowly tailored.

Indeed, by giving the targets of Plaintiffs' criticism a veto over their speech, and by prohibiting speech about historical figures whose approval is unavailable, New Jersey bans an array of political speech without advancing any interest whatsoever. No voter would imagine that McCormick's slogan criticizing Sen. Sanders constitutes an

endorsement. Many candidates might describe themselves as "Never Trump," or a "Lincoln Republican," but neither of those presidents likely would or could give their assent to such slogans. And why can candidates criticize Facebook or the National Rifle Association in their slogans, but not New Jersey corporations like Merck or Johnson & Johnson? In this way, the restriction is under-inclusive as well as over-inclusive.

Narrow tailoring, however, is not elusive. Because voters are supposed to be informed decision makers, *see Republican Party*, 479 U.S. at 220, New Jersey could place a disclaimer on the ballot to alert voters that each slogan is an unverified statement of fact or opinion. In this way, the government would treat ballot slogans just like it treats all other candidate statements.

Alternatively, because New Jersey is concerned about third-party associational rights, candidates claiming a third-party endorsement could be required to provide the Secretary some evidence that the support exists. In this way, candidates can still praise or criticize individuals or organizations to promote their candidacy without claiming a fictional endorsement that affects a third party.

These proposed rules are neutral, less restrictive, and allow candidates to communicate with voters without violating the First Amendment. "There is simply no basis to presume that a well-informed electorate will" be confused if the Slogan Statutes are tailored this way. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 454 (2008). And other solutions might well be imagined. But silencing so much critical, legitimate political speech, without advancing any of the state's asserted interests, does not make for a strict scrutiny fit.

* * *

Because the government cannot demonstrate a compelling interest for the Slogan Statutes, and because the regulations are not narrowly tailored, the regulations are unconstitutional.

II. THE DISTRICT COURT ERRED IN APPLYING *ANDERSON-BURDICK* BALLOT ANALYSIS.

The district court correctly recognized that "[t]he constitutionality of the Slogan Statutes turns on whether the consent provision may exist at all consistent with the First Amendment." Op., App. Vol. I, 23 n.7. The parties presented the district court with different jurisprudential options to answer this question: either apply Speech Clause strict scrutiny to content-based speech regulations, as Plaintiffs maintained,

or assess the Slogan Statutes as common ballot regulations and apply the more deferential *Anderson-Burdick* ballot law analysis (named after *Anderson* and *Burdick v. Takushi*, 504 U.S. 428 (1992)), as Defendants suggested. The district court erred in choosing the latter option. Op., App. Vol. I, 24.

The authorization requirements of the Slogan Statutes restrict a candidate's ability to speak. "[F]undamentally, the First Amendment simply cannot tolerate [the Slogan Statutes'] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curium). "Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' … positions." *Id.* at 52-53. "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu*, 489 U.S. at 223 (internal quotation marks omitted). "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny."

Citizens United v. FEC, 558 U.S. 310, 340 (2010) (internal quotation marks omitted).

"Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in" the district court's opinion. *Jenness*, 403 U.S. at 442. The district court applied *Anderson-Burdick*, relying on caselaw where candidates and political parties attempted to use the First Amendment to force states to provide them the means to communicate on the ballot. Op., App. Vol. I, 27 & n.11 (citing *Timmons*, *Wash. State Grange*, and *Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169 (4th Cir. 2017)).

After noting states' longstanding tradition of regulating the manner of primary and general elections, the district court asserted that "'the right to vote in any manner and the right to *associate* for political purposes through the ballot are [not] absolute.'" *Id*. at 24-25 (quoting *Burdick)* (brackets in original) (emphasis added). The district court recognized that "ballots serve primarily to elect candidates, not as forums for political expression." *Id*. at 27 (citing *Timmons*, 520 U.S. at 361-63) (brackets omitted).

True. That is, until the government opens a forum for explicit candidate expression on the ballot. Plaintiffs may not have a freestanding right to place slogans on the ballot, but once candidates are invited to speak on the ballot, the government cannot restrict their speech's content without satisfying Speech Clause scrutiny.

New Jersey is the only state that provides primary election candidates the opportunity to place a slogan on the ballot. The Slogan Statutes are unique and unlike any other ballot regulation in the United States.

> [Accordingly,] [t]he "ordinary [ballot] litigation" test does not apply here. Unlike the statutory provisions challenged in [*Burdick*] and *Anderson*, [the Slogan Statutes] do[] not control the mechanics of the electoral process. [They are] a regulation of pure speech. Moreover, even though [the laws] appl[y] evenhandedly to advocates of differing viewpoints, [they are] a direct regulation of the content of speech.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995).

"Furthermore, the category of covered [slogans] [are] defined by their content—only those [slogans] containing speech" with a person's name or the name of a New Jersey company are prohibited without authorization. *Id*. "Consequently, we are not faced with an ordinary election restriction; this case 'involves a limitation on political

expression subject to [strict] scrutiny.'" *Id*. at 346 & n.10 (quoting *Meyer*, 486 U.S. at 420).

The Slogan Statutes offer primary election candidates a platform for political expression—a "'core'" First Amendment right. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 616 (1996). Under *Reed*, the government cannot control the content of a candidate's message. 576 U.S. at 163-64.

This case is about *speech*. The Slogan Statutes forbid an explicit message Plaintiffs want to send to voters. But the foundational cases for the district court's decision to apply *Anderson-Burdick* to the Slogan Statutes, *Timmons, Wash. State Grange*, and *Marcellus*, are not about speech. Op., App. Vol. I, at 27 & n.11. *Timmons* concerned freedom of association—not speech—and whether a candidate could appear on the ballot as the candidate of more than one party. 520 U.S. at 354, 357, 365. *Wash. State Grange*, was also about 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, 454.

And *Marcellus* is another freedom of association case—not speech. 849 F.3d at 172, 175. In *Marcellus*, the Fourth Circuit did hold "candidates themselves have no First Amendment right to use the ballot as a forum for political expression…." *Id.* at 176 (internal punctuation marks and citation omitted). But in Virginia, there is no forum for political expression on the ballot. *Id.* at 172-73. Where there is no forum to speak on the ballot, the First Amendment does not force the state to create one. *See id.* at 176 (citing *Timmons* and *Wash. State Grange*). But New Jersey has created a forum for political expression on the ballot, and Speech Clause content-based restriction doctrine applies to that forum. Accordingly, the district court's foundational cases for its conclusion are irrelevant.

The district court also cites *Fusaro v. Cogan*, 930 F.3d 241, 248 (4th Cir. 2019) (issue: whether the First Amendment provides a right to review voter rolls), *Rosen v. Brown*, 970 F.2d 169, 171 (6th Cir. 1992) (issue: whether the First Amendment requires the state to designate a nonparty candidate an "Independent" on the ballot), *N.Y. State Democratic Party v. Lomenzo*, 460 F.2d 250, 251 (2d Cir. 1972) (issue: whether the First Amendment requires a state to put certain

information on the ballot), and its own decision in *Democratic-Republican Org. v. Guadagno*, 900 F. Supp. 2d 447, 454, 461-62, 464 (D.N.J. 2012), *aff'd*, 700 F.3d 130 (3d Cir. 2012) (issue: whether a prohibition on using the name of a state recognized political party next to the name of a general election candidate as a party designation when that candidate is unaffiliated with a state recognized political party violates First Amendment freedom of association)[1], to argue New Jersey ballots are not "designed to advance" political speech. Op., App. Vol. I, 27-28. Not so.

[1] The district court does not meaningfully rely on *Democratic-Republican Org.*, Op., App. Vol. I, 28, and rightfully so. This Court affirmed the district court's application of the *Anderson-Burdick* framework in *Democratic-Republican Org.* to the laws at issue, but offered no comment on the district court's decision that it was the correct test to apply. 700 F.3d at 131 (noting the district court "correctly applied" *Anderson-Burdick*). And how could it? The district court did not offer any analysis that *Anderson-Burdick* was the correct test but said the framework applied *ipse dixit* because it was an election law case. 900 F. Supp. 2d at 453. Additionally, the *Democratic-Republican Org.* plaintiffs "specifically" framed the issue as a freedom of association case—not speech, 900 F. Supp. 2d at 461-62, and the district court did as well. Op., App. Vol. I, 28. And to the extent the district court provided speech analysis, it relied on *Timmons*, 900 F. Supp. 2d at 465, which, as stated above, is a freedom of association case and tangentially delt with, at most, a political party's symbolic speech.

When New Jersey enacted the Slogan Statutes, it decided to design its ballots to advance political speech. Consequently, in New Jersey, primary election ballots are "billboard[s] for political advertising." *Timmons*, 520 U.S. at 365. "The determination of what should be included [on the ballot] is a state function." *N.Y. State Democratic Party*, 460 F.2d at 251. Indeed, "[e]ach state may, [ ], decide what name, designation, and other information appears on the ballot, provided no unconstitutional objective is facilitated thereby." *Id*. (citing *Ray v. Blair*, 343 U.S. 214, 229 (1952); *Anderson v. Martin*, 375 U.S. 399 (1964)). Therefore, if New Jersey wants to design its ballots to advance political speech it can. And when New Jersey enacted the Slogan Statutes it did.

The district court claims candidates have no right to have "declarations of political sentiment" on New Jersey primary election ballots. Op., App. Vol. I, 29. But New Jersey gave candidates that right when the Slogan Statutes were enacted. Accordingly, now that candidates can declare political sentiments on the ballot, the laws governing those sentiments are subject to the Speech Clause—not ballot law. *Anderson-Burdick* does not apply to this case.

Finally, the district court held *McIntyre* does not support Plaintiffs' argument. *Id*. at 29-30. Not so. In *McIntyre*, the plaintiff challenged an Ohio law that required any flyer, handbill, or other nonperiodical designed to promote the adoption or defeat of any ballot referendum to include the name and address of the person responsible for producing the document. 514 U.S. at 338 n.3. Ms. McIntyre handed out leaflets advocating against an upcoming school tax referendum, but the leaflets did not include her required identifying information. *Id*. at 337-38. School district officials that supported the school tax saw the plaintiff distributing her leaflets and warned her that the documents did not comply with the disclosure law. *Id*. "Undeterred" by warnings from school officials that the leaflets failed to comply with the disclosure requirement, McIntyre continued distributing noncompliant leaflets. *Id*. at 338. Later, a school official reported the plaintiff to the Ohio Elections Commission for her violation of the disclosure law, causing her to be fined $100. *Id*. McIntyre challenged the disclosure law on First Amendment grounds, but the Ohio Supreme Court upheld it under the *Anderson-Burdick* framework. *Id*. at 339-40.

Ohio's Supreme Court applied *Anderson-Burdick* to the disclosure law because it viewed the Speech Clause challenge as "'ordinary litigation.'" *Id.* at 344-45. But the Supreme Court reversed.

As is the case here, *McIntyre* was not "'ordinary litigation,'" so *Anderson-Burdick* did not apply. *Id.* at 345. Like the Slogan Statutes, the Ohio law did "not control the mechanics of the electoral process"—it was "a regulation of pure speech." *Id.* Like the Slogan Statutes, it was "a direct regulation of the content of speech." *Id.* Like the Slogan Statutes, the Ohio statute "involve[d] a limitation on political expression." *Id.* at 345-46 (internal quotation marks omitted). And just like the Slogan Statutes, the Ohio law violated the First Amendment. *Id.* at 357.

The district court attempts to distinguish *McIntyre* by arguing the Slogan Statutes are election laws that govern the voting process and "stand a step removed from the communicative aspect of the regulated conduct." Op., App. Vol. I, 29 (internal quotation marks omitted). But the Supreme Court would disagree. Laws that govern the voting process concern candidate filing deadlines, ballot access, whether to allow write-in voting, and whether independent voters may vote in a party primary.

McIntyre, 514 U.S. at 345. The Slogan Statutes have nothing to do with who or how someone can be on the ballot or who or how someone may vote for a candidate. The Slogan Statutes, like the *McIntyre* restrictions, regulate political speech, *id.* at 345-46, indeed, "'core'" First Amendment political speech. *Compare id.* at 346 *with Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 616.

Contrary to the district court's view, Op., App. Vol. I, 29, under *McIntyre*, the ordinary *Anderson-Burdick* litigation test "does not apply here." 514 U.S. at 345.

The district court quotes Justice Sotomayor's concurrence in *Doe v. Reed*, 561 U.S. 186, 213 (2010), and Justice O'Connor's concurrence in *Buckley v. Am. Const. L. Found.*, 525 U.S. 182, 215 (1999), to argue the Slogan Statutes are "are a step removed from the communicative aspect" of political speech, Op., App. Vol. I, 29 (internal quotation marks omitted), like disclosing "the names and addresses of [petition] signers." *Doe*, 561 U.S. at 191. Not so. If laws regulating the voter registration status of a petition circulator, whether that circulator wears a name badge, and disclosing the amount each circulator is paid, *Am. Const. L. Found.*, 525 U.S. at 186, 201, will "significantly inhibit communication

with voters about proposed political change," *id.* at 192, then so will the content-based speech regulations in the Slogan Statutes. A candidate speaking to voters is not a step removed from the communicative aspect of political speech, she is directly engaging in "'core'" political speech, *Colo. Republican Fed. Campaign Comm.* 518 U.S. at 616.

Content-based speech laws that regulate core political speech *must* face strict scrutiny. It is not optional. The district court erred when it applied *Anderson-Burdick* to the Slogan Statutes.

III. EVEN UNDER *ANDERSON-BURDICK*, THE SPEECH REGULATIONS SHOULD BE SUBJECTED TO STRICT SCRUTINY, WHICH THEY FAIL.

A. The Slogan Statutes place a severe burden on political speech.

The district court's use of *Anderson-Burdick* as a gateway to lower-level scrutiny misapplied that framework. Even under *Anderson-Burdick*, strict scrutiny applies.

Under *Anderson-Burdick*, "the character and magnitude of the burden the State's rule imposes on [plaintiffs'] rights [is weighed] against the interests the State contends justify that burden, and [ ] the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 358 (internal quotation marks omitted). "Regulations imposing severe burdens on plaintiffs' rights must be

narrowly tailored and advance a compelling state interest," *i.e.*, the laws must survive strict scrutiny. *Id*. *See also Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). "Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id*. (internal quotation marks omitted).

The Slogan Statutes impose severe burdens on Plaintiffs' free speech rights and, therefore, must pass strict scrutiny.

"Burdens are severe if they go beyond the mere inconvenient." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment) (quoting *Storer*, 415 U.S. at 728-29). Burdens that require "'nominal effort' of everyone, are not severe." *Id*. (quoting *Clingman v. Beaver*, 544 U.S. 581, 591, 593-97 (2005)). The Court should review the burdens from "a careful, ground-level [ ] practical" perspective. *Id*. at 210-11 (Souter, J., dissenting) (citing *Burdick*, 504 U.S. at 434). Plaintiffs are not required to demonstrate the severity of the burden "beyond mathematical doubt." *Id*. at 222. It is "enough to show that serious burdens are likely." *Id*. Here, candidates' speech is severely burdened.

As the district court observed, "the 'relevant' burdens must also be

'those imposed on' candidates who *have not* obtained the requisite consent, or who cannot do so." Op., App. Vol. I, 32 (quoting *Crawford*, 553 U.S. at 198). The district court recognized these circumstances arise when candidates cannot locate the individual that can provide authorization, or the desired slogan criticizes the individual or corporation. *Id*.

As the district court acknowledged, candidates seeking authorization have the "non-trivial burdens" of locating the person named in the slogan or identifying the corporate official that can provide consent. *Id*. Indeed, this is not a mere inconvenience but an act that requires more than nominal effort. *See Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). Almost no one can demand a meeting with an individual, much less a prominent one, to obtain authorization or schedule an appointment with a decision maker within an organization to get permission for a slogan. But even if this obstacle is overcome, an insurmountable edifice remains.

Criticizing individuals and organizations is ubiquitous political speech in contemporary politics. But no candidate will receive the required authorization if she wants to criticize most people or

corporations in her slogan. Anyone that wants to complain about an irascible public figure to promote their candidacy, or stress their frustration about various New Jersey corporations, will not receive the requisite authorization. Obtaining authorization for these types of slogans is "so burdensome that it [is] 'virtually impossible' for" a candidate to comply with the Slogan Statutes. *Storer*, 415 U.S. at 728 (quoting *Williams v. Rhodes*, 393 U.S. 23, 25 (1968)). *See also Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment) (citing *Storer*).

Moreover, the Slogan Statutes' authorization requirements deter candidates from using their desired slogans, causing them to alter their messages. As a result, the Slogan Statutes severely burden political speech because "[t]he Supreme Court has repeatedly stated that 'constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.'" *Circle Sch. v. Pappert*, 381 F.3d 172, 181 (3d Cir. 2004) (quoting *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996)).

From "a careful, ground-level [ ] practical" perspective, *Crawford*, 553 U.S. at 210-11 (Souter, J., dissenting), only slogans that do not

offend authorizing 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), the Slogan Statutes effectively codify viewpoint discrimination—the most "egregious form of content discrimination," which is presumptively unconstitutional. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995). Viewpoint discrimination is more than inconvenient—it severely burdens speech, and requires examination under strict scrutiny.

The district court minimized these burdens, reasoning that the Slogan Statutes regulate the content of "just six words" of a candidate's 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. The district court apparently believes it is acceptable for New Jersey to violate a candidate's First Amendment rights once per primary season. But the Supreme Court does not. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67

(2020) (per curiam) (internal quotation marks omitted). Indeed, "[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." *Grant*, 486 U.S. at 424.

Without citing any authority, the district court asserted that the ballot slogan has a "limited" purpose. Op., App. Vol. I, 33. Regardless, candidates necessarily view the slogan space as an opportunity to communicate their message to voters "at the most crucial stage in the electoral process—the instant before the vote is cast." *Anderson v. Martin*, 375 U.S. at 402. The value of this opportunity to communicate with voters is greater than the purported purpose behind allowing ballot slogans. Being restricted from using this opportunity to criticize individuals or New Jersey corporations is no small matter.

Finally on this point, the district stated the Slogan Statutes "do not outright prohibit any speech" if candidates conform to New Jersey's content-based speech regulations. Op., App. Vol. I, 34. But conforming to unconstitutional laws does not obviate the problem. In cases where "the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do (enter into a lease, or distribute

handbills at the shopping center)," the courts retained jurisdiction "because the threat-eliminating behavior was effectively coerced." *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (citations omitted).

Because the Slogan Statutes place a severe burden on candidate free speech rights they must be subjected to strict scrutiny—which, as discussed *supra* § 1, they fail.

B. New Jersey is responsible for Plaintiffs' First Amendment injury, not a third party.

The district court argues it is "third parties" that actually "impose on Plaintiffs' speech rights" because they "decide whether to consent." Op., App. Vol. I, 34. But Plaintiffs have standing to bring their claims "even though the direct source of injury is a third party." *Constitution Party v. Aichele*, 757 F.3d 347, 366 (3d Cir. 2014). Indeed, when "substantial evidence of a causal relationship between the government policy and the third-party conduct, leav[es] little doubt as to causation and likelihood of redress," plaintiffs have standing to challenge a law. *Id.* (citation omitted).

Here, New Jersey created Plaintiffs' constitutional injury when it included the authorization requirements in the Slogan Statutes. The

laws empower the subjects of a slogan's criticism to veto candidate speech. And in some cases, speech is silenced not because consent is denied, but because the third party may no longer be alive to consent, or may be difficult to identify or contact. This alters what candidates may say in their slogans, and, as the Plaintiffs demonstrate here, changes what slogans candidates choose for the ballot. "Because the mere existence of the law[s] cause[ ] [candidate decisions about their slogans] to be made differently than they would absent the law[,] the standing inquiry's second requirement of a causal connection between the plaintiffs' injuries and the law they challenge is satisfied." *Id.* at 367 (internal punctuation marks omitted). Accordingly, New Jersey cannot pass the buck when it is responsible for creating unconstitutional laws.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

s/ Ryan Morrison

RYAN MORRISON
D.C. BAR NO. 1660582
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW
Suite 801
Washington, DC 20036
202-301-3300
rmorrison@ifs.org
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,806 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the word count as calculated by Microsoft Word for Microsoft Office 365, which was used to prepare this brief.

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

The text of the electronic version of this brief is identical to the text in the paper copies.

Virus detection program Microsoft Defender Antivirus version 1.355.247.0 was run on the electronic brief PDF file and no virus was detected.

s/ Ryan Morrison
COUNSEL FOR APPELLANTS