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Via ECF
Patricia S. Dodszuweit, Clerk
U.S. Court of Appeals for the Third Circuit
601 Market Street
Philadelphia, PA 19106

Re: *Mazo et al. v. New Jersey Secretary of State*, Case No. 21-2630

Dear Ms. Dodszuweit:

Appellee, the New Jersey Secretary of State, submits this response to the Court's May 5, 2022 request for supplemental letter briefing to address (1) whether New Jersey's ballot slogan laws at issue, N.J. Stat. Ann. §§19:23-17, -25.1 ("Slogan Statutes"), are content neutral under *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022), and (2) whether the Slogan Statutes are analogous to any "ordinary time, place, or manner restrictions," *id.* at 1473.

As set forth below and in Appellee's merits briefing, the Court need not reach the issue of content neutrality for two separate and independent preliminary reasons. First, the Slogan Statutes are properly reviewed under the *Anderson-Burdick* framework for election regulations. Second, New Jersey's primary ballot is a

nonpublic forum, where even content-based reasonable regulations that do not discriminate on the basis of viewpoint survive constitutional scrutiny.

But even if this Court does consider content neutrality, *City of Austin* confirms that the Slogan Statutes are content-neutral because they require an examination of the content of a ballot slogan only to draw neutral distinctions to determine whether a candidate's slogan of choice names or references an individual or an association incorporated in the State of New Jersey. In that sense, the Slogan Statutes are analogous to a time, place, or manner regulation on speech, and are thus subject to, and survive, intermediate scrutiny.

I. The Court Need Not Reach The Question Of Content Neutrality.

A. The *Anderson-Burdick* Test Applies To Election Regulations Like The Slogan Statutes.

As a threshold matter, the content neutrality analysis set out in *City of Austin* does not apply because Appellants assert "[c]onstitutional challenges to specific provisions of [New Jersey's] election laws," *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), which trigger the *Anderson-Burdick* balancing framework. *See* State's Br. 16-27. Under this "more flexible" standard unique to elections regulations, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), courts "weigh the 'character and magnitude' of the burden the State's [elections] rule imposes on [constitutional] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary," *Timmons v. Twin*

Cities Area New Party, 520 U.S. 351, 358 (1997) (quoting *Burdick*, 504 U.S. at 434) (cleaned up). This "'practical assessment' . . . . applies to *all* First and Fourteenth Amendment challenges to state election laws." *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (Barrett, J.) (citation omitted).

Indeed, this Court has applied *Anderson-Burdick* to First Amendment speech and associational challenges to an analogous New Jersey general election ballot slogan law and upheld the statute. *See Democratic-Republican Org. of New Jersey v. Guadagno*, 700 F.3d 130 (3d Cir. 2012). Like in *Guadagno*, the Slogan Statutes impose a minimal burden on candidates while advancing a compelling government interest in preventing voter deception and confusion. Thus, they survive any tier of *Anderson-Burdick* scrutiny. *See* State's Br. 27-39.

B. The Primary Ballot Is A Nonpublic Forum.

Even if the Slogan Statutes were subject to traditional First Amendment analysis rather than the *Anderson-Burdick* test, the Court should not reach the issue of content neutrality because that doctrine does not apply to nonpublic forums such as election ballots. *See* State's Br. 25-27. *City of Austin*, which concerned billboards—the quintessential "public forum"—confirms that where a regulation targets speech in a particular government-controlled location, a court should first conduct a forum analysis. 142 S. Ct. at 1473 (citing, *inter alia*, *Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S.

640, 649 (1981)).[1] By contrast, ballots are "a means of choosing candidates," not "billboard[s] for political advertising." *Timmons*, 520 U.S. at 365.

And as the State outlined in its merits brief (at 25-27), because a ballot is not a public forum, "the government may impose some content-based restrictions on speech" on the ballot, "including restrictions that exclude political advocates and forms of political advocacy," *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885-86 (2018) (*citing International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("*ISKCON*")). For nonpublic forums, the only requirement is that the regulations "are reasonable in light of the purpose of the forum and viewpoint neutral," *Porter v. City of Philadelphia*, 975 F.3d 374, 387 (2020). This is so because "[n]othing in the Constitution requires the Government freely to" permit speech on "Government property without regard to the nature of the property or to the *disruption that might be caused* by the spe[ech]." *Mansky*, 138 S. Ct. at 1885 (emphasis added).

As Appellee's merits brief explains, the ballot is a nonpublic forum because it is, first and foremost, "government-controlled property set aside for the sole

[1] To be clear, viewpoint discrimination is "impermissible in any forum." *Ne. Penn. Freethought Soc'y v. Cty. of Lackawanna Transit Sys.*, 938 F.3d 424, 436 (3d Cir. 2019). But the Slogan Statues draw no distinction based on the viewpoint of any slogan. Rather, it applies uniformly so long as a third-party entity is mentioned, not when a particular view is expressed. "Candidates may . . . say whatever they want about a person or group" so long as they obtain authorization, "and whatever else if they avoid using certain names. App. 34.

purpose of voting." *Mansky*, 138 S. Ct. at 1886. Ballots are not "historically held out for speech and assembly, such as public streets and parks." *Porter*, 975 F.3d at 386. Nor is the ballot a designated public forum—a space where government not only "permit[s] limited discourse, but . . . open[s] a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Rather, the ballot is a nonpublic forum "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Porter*, 975 F.3d at 387.[2] The Slogan Statutes only permit candidates who have qualified to be on the primary election ballot to select a slogan of up to six words for an extremely limited purpose: "indicating either any official act or policy to which he is pledged or committed, or to distinguish him as belonging to a particular faction or wing of his political party." N.J. Stat. Ann. §19:23-17. Like a designation of a political party or myriad other restrictions for ballots, the Slogan Statutes advance the limited purpose of voting.

Supreme Court precedent also confirms that the ballot is a nonpublic forum. After all, if the interior of a polling place is a nonpublic forum, *Mansky*, 138 S. Ct. at 1886, then *a fortiori*, so too is the ballot. Of course, just because some expressive activity "occurs in the context of the forum," in connection with the forum's primary purpose, does not mean the forum is necessarily public. *Cornelius*, 473 U.S. at 802;

[2] As this Court has explained, the limited and nonpublic designations are "synonymous." *Porter*, 975 F.3d at 386, n.75.

see also ISKCON, 505 U.S. at 682 (airport terminals are a nonpublic forum because they "have never been *dedicated* . . . to expression" (emphasis added)); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 39 n.2, 46-47 (1983) (holding that "internal mail system" in school district was nonpublic forum even though various private groups, including "church groups," received permission to use system to "communicate with teachers"). And because the statutes survive any form of scrutiny under *Anderson-Burdick* review, including strict scrutiny (State's Br. 33-41), they necessarily survive the reasonableness standard applicable to nonpublic forums.

II. *City Of Austin* Confirms That The Slogan Statutes Are Content-Neutral, And Are Analogous To Time, Place, And Manner Restrictions.

Even if this Court declines to apply the *Anderson-Burdick* test, and even if this Court determines that the New Jersey primary ballot is a public forum, the Slogan Statutes still pass First Amendment scrutiny. The Supreme Court's most recent opinion on content neutrality, *City of Austin*, 142 S. Ct. 1464, confirms that the Slogan Statutes are content-neutral regulations and analogous to time, place, and manner regulations on speech.

In *City of Austin*, the Court held that a city code provision that applied different standards to on-premises and off-premises advertisements was "agnostic as to content." *Id.* at 1471. Even though the code requires the reader to examine the

words on a sign to determine whether the words refer to on-premises or off-premises activity, that did not make it a content-based restriction. The fact that the code treated differently signs that contained references to activities co-located with the sign versus signs that contained references to activities elsewhere did not matter. Rather, the Court held that "absent a content-based purpose or justification," the regulation's drawing of such distinctions was "content neutral and does not warrant the application of strict scrutiny." *Id.* Thus, the Court rejected the lower court's interpretation, which took *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) to mean that a regulation is automatically content-based "if '[a] reader must ask: who is the speaker and what is the speaker saying.'" *Id*. Calling such a view a "too extreme an interpretation of th[e] Court's precedent," *id.*, the Court instead confirmed that "restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral," *id.* at 1473.

In rendering its decision, the *City of Austin* Court reaffirmed longstanding precedent, such as *Heffron*, which have long held that rules that require the mere identification of a topic for differential regulation does not constitute content discrimination. *Id.* In *Heffron*, the Court upheld a Minnesota State Fair rule that required individuals to "confine their distribution, sales, and solicitation activities to a fixed location." *Heffron*, 452 U.S. at 648. The Court rejected the challengers' contention that the "regulation [was] not content-neutral in that it prefers listener-

initiated exchanges to those originating with the speaker." *Id.* at 649, n.12; *City of Austin*, 142 S. Ct. at 1473 (noting that although "identify[ing] whether speech entails solicitation" requires that "one must read or hear it first," that does not make the rule "content-based"). Instead, because the rule applies "evenhandedly to all who wish to distribute and sell written materials or to solicit funds," it did not discriminate based on content. *Heffron*, 452 U.S. at 649.

That principle applies with full force here. Appellants argue that because the Slogan Statute requires the Secretary to "examine the content of the message that is conveyed to determine whether a violation has occurred," that alone makes the statute "content based" and subject to strict scrutiny. *See* Reply Br. 3. But *City of Austin* confirmed that this is the wrong test. Rather, the examination that the Slogan Statutes call for, like the billboard rule in *City of Austin* and the solicitation rule in *Heffron*, only "requires an examination of speech only in service of drawing neutral, location-based lines." *City of Austin*, 142 S. Ct. at 1471.

Just as the billboard rule in *City of Austin* only requires the reader to examine the sign to determine whether it refers to on-premises activity, and just as the Minnesota State Fair rule in *Heffron* requires the viewer to examine whether the communication is solicitation, the Slogan Statutes only command a cursory review of the slogan to see whether the proposed slogan on a ballot refers to a third party. N.J. Stat. Ann. §§19:23-17, -25.1. If so, a content-neutral rule kicks in: the candidate

must have secured written authorization to include that third-party in their respective slogan. *Id.* The consent requirement serves a content-neutral purpose: it ensures that voters are not confused or deceived by an in accurate association with a third party. Importantly, the substantive message of the slogan itself "is irrelevant to the application of the [the Slogan Statutes]; there are no content-discriminatory classifications." *City of Austin*, 142 S. Ct. at 1472; *see also id.* at 1477 (Breyer, J., concurring) ("If *Reed* is taken as setting forth a formal rule that courts must strictly scrutinize regulations simply because they refer to particular content, we have good reason to fear the consequences of that decision."). In this way, the rule is similar to many laws that "turn on the content of speech without posing any 'realistic possibility that official suppression of ideas is afoot.'" *Id.* at 1477 (Breyer, J., concurring) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992)); *see also id.* (noting that myriad federal and state laws and regulations that "turn, often necessarily, on the content of speech," such as securities-related disclosures, medical product labeling, and workplace safety warnings).

Thus, the Slogan Statutes, like the Austin billboard regulation and the Minnesota State Fair solicitation restriction, are content-neutral time, place, and manner restrictions. These types of regulations do not require the application of strict scrutiny, but rather are valid so long as it serves "a substantial state interest" and leaves "alternative forums for the expression of . . . protected speech." *Heffron*, 452

U.S. at 654 (noting that rule still allowed practice of the solicitation at issue outside fairgrounds, oral propagation of views on the premises, and obtaining the permissions to solicit funds from an official booth). The Slogan Statutes regulate the placement of such statements in a specific location (the ballot), just as the billboard rule regulates the placement of certain advertisements in specific locations (off premises) and the Minnesota State Fair rule regulates certain forms of communication in specific locations (on the fairgrounds outside of designated booths).

Appellants already concede that the State's interest in the Slogan Statutes are "important." Appellants' Br. 11-12; *see also* State's Br. 33-39; *cf. Norman v. Reed*, 502 U.S. 279, 290 (1992) (noting that "requiring the candidates to get formal permission to use the name from the established party they seek to represent [is] a simple expedient for fostering an informed electorate" while avoiding the ills of "misrepresentation and electoral confusion"). And the Slogan Statutes do not foreclose a candidate's ability to speak in alternative forums. After all, a candidate can speak freely—and to even employ the very words at issue—in communications outside the narrow confines of the ballot. The Slogan Statutes do not restrict candidates' ability to speak ahead of their elections. In fact, they do not even *ban* naming individuals or associations incorporated in New Jersey, and instead merely requires written authorization from that individual or association. Thus, the Slogan

Statutes do not close off "ample alternative channels for communication of the information." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014); *see also Frisby*, 487 U.S. at 483-84 (upholding ordinance that prohibiting picketing in front of an individual residence and noting that groups have "ample alternative channels of communication" such as "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses").

Accordingly, if the court reaches the question of content-neutrality, it should find that the Slogan Statutes are content-neutral regulations of speech within the narrow confines of a primary ballot, and are therefore analogous to ordinary time, place, and manner regulations on speech. The statutes are narrowly tailored to serve the State's important interests, and they do not foreclose on other opportunities for candidate speech. Therefore, the statutes survive an intermediate scrutiny analysis. But even if strict scrutiny were to apply, the statutes would also survive, for the reasons stated in the State's Br. (at 34-39).

Respectfully submitted,
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Cc: All counsel of record (via electronic filing)

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