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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2630

EUGENE MAZO; LISA MCCORMICK,
Appellants,

v.

NEW JERSEY SECRETARY OF STATE; E. JUNIOR MALDANADO, in his official capacity as Hudson County Clerk; JOANNE RAJOPPI, in her official capacity as Union County Clerk; PAULA SOLLAMI COVELLO, in her official capacity as Mercer County Clerk; ELAINE FLYNN, in her official capacity as Middlesex County Clerk; CHRISTOPHER DURKIN, in his official capacity as Essex County Clerk; STEVE PETER, in his official capacity as Somerset County Clerk,
Appellees.

Argued: July 6, 2022
Filed: Nov. 23, 2022

Before: Shwartz, Krause, and Roth, *Circuit Judges*

OPINION

KRAUSE, *Circuit Judge*

Nowhere are the First Amendment rights of free speech and association more essential, or more fiercely guarded, than in the context of free and open elections. Self-government depends on ensuring that speech intended to support, challenge, criticize, or celebrate political candidates remains unrestricted. But at the end of every hard-fought political campaign lies the ballot box, where our constitutional democracy depends equally on States fulfilling their solemn duty to regulate elections to ensure fairness and honesty, even where doing so may burden some First Amendment rights. For this reason, courts have long applied the more flexible *Anderson-Burdick* balancing test to evaluate constitutional challenges to state election laws that govern the mechanics of the electoral process. At the same time, however, courts continue to apply a traditional—and often quite stringent—First Amendment analysis to state election laws that implicate core political speech outside of the voting process.

This case asks us to determine where the campaign ends and the electoral process begins. New Jersey permits candidates running in primary elections to include beside their name a slogan of up to six words to help distinguish them from others on the ballot. N.J. Stat. § 19:23-17. But New Jersey also requires that candidates obtain consent from individuals or New Jersey incorporated associations before naming them in their slogans. Appellants Eugene Mazo and Lisa McCormick challenged this requirement after their desired slogans were rejected for failure to obtain consent. They argue that New

Jersey's ballot slogans are, in effect, part of the campaign—a final, crucial opportunity for candidates to communicate directly with voters—and that the consent requirement should therefore be subject to traditional First Amendment scrutiny. The District Court disagreed. It held that, though the ballot slogans had an expressive function, the consent requirement regulates the mechanics of the electoral process, and so applied the *Anderson-Burdick* test, ultimately finding the consent requirement constitutional.

We agree with the District Court. In so doing, we recognize the line separating core political speech from the mechanics of the electoral process has proven difficult to ascertain: "Not only has the Supreme Court itself fractured deeply in the application of this jurisprudence, but so too has the judiciary in general." PRINCIPLES OF THE L. OF ELECTION ADMIN.: NON-PRECINCT VOTING AND RESOL. OF BALLOT-COUNTING DISP. § 201 (AM. L. INST., Tentative Draft No. 2, 2017). Thus to "develop[] . . . this constitutional jurisprudence in ways that most promote rule-of-law values and the legitimacy of the electoral process, including the critical value of clarity," we take this opportunity to survey the range of election laws to which the Supreme Court and appellate courts have applied the *Anderson-Burdick* test, as opposed to a traditional First Amendment analysis. *Id.* From that review, we derive criteria to help distinguish—along the spectrum of mechanics of the electoral process to pure political speech—which test is applicable. And applying those criteria here, we conclude that New Jersey's consent requirement is subject to *Anderson-Burdick*'s balancing test. We also conclude that

because New Jersey's interests in ensuring election integrity and preventing voter confusion outweigh the minimal burden imposed on candidates' speech, the consent requirement passes that test. We will therefore affirm the judgment of the District Court.

I. Background

A. New Jersey's Ballot Slogan Statutes

In New Jersey, a candidate who wants to have her name placed on the ballot for a primary election must file a petition containing certain information about the candidate and the requisite signatures for the public office sought. *See* N.J. Stat. Ann. §§ 19:23-5 to -11.[1] For candidates seeking federal office, these petitions must be directed to the Secretary of State, *id.* § 19:23-6, who is responsible for certifying petitions, *id.* §§ 19:13-3, 19:23-21, and instructing local election officials about the names and information that are to be placed on the primary ballots, *id.* §§ 19:23-21 to -22.4.[2]

Since 1930, New Jersey law has permitted candidates running in a primary election for "any public office" to "request that there be printed opposite his name on the primary ticket a designation, in not more than six words, . . . for the purpose of indicating either any official act or policy to which he is pledged

[1] New Jersey has adopted a similar system for unaffiliated candidates seeking to be placed on the general election ballot. *See* N.J. Stat. §§ 19:13-1 to -3.

[2] The Secretary of State is also responsible for petitions for statewide offices; candidates seeking county or local office, however must direct their petitions to the appropriate county or municipal clerks. *See* N.J. Stat. § 19.23-6.

or committed, or to distinguish him as belonging to a particular faction or wing of his political party." N.J. Stat. § 19:23-17.

In 1944, the New Jersey legislature amended the law to include the proviso that "no such designation or slogan shall include or refer to the name of any person or any incorporated association of this State unless the written consent of such person or incorporated association of this State has been filed with the petition of nomination of such candidate or group of candidates." *Id.* This consent requirement is reiterated in N.J. Stat. § 19:23-25.1, which states that no ballot slogan "shall be printed" that "refers to the name of any other person unless the written consent of such other person has been filed with the petition of nomination of such candidate or group of candidates."[3] These "Slogan Statutes" and their consent requirement are enforced by the Secretary of State in all federal and state-wide primary races as part of the certification process. *See* N.J. Stat. § 19.23-21.[4]

B. Appellants' Slogans

Appellants Eugene Mazo and Lisa McCormick were candidates in the July 7, 2020, Democratic Primary for the House of Representatives in New Jersey's Tenth and Twelfth Congressional Districts,

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[3] New Jersey allows for unaffiliated candidates running in a general election to include a similar three-word slogan conveying "the party or principles" the candidate represents, so long as that slogan does not include any part of the name of another political party. N.J. Stat. § 19:13-4.

[4] For local primary elections, county and municipal clerks are responsible for enforcing the consent requirements. *See* N.J. Stat. §§ 19:23-22; 19:23-22.1.

respectively. Mazo requested ballot slogans for each of the ballots printed by the three counties that comprise New Jersey's Tenth District:

- In Essex County: "Essex County Democratic Committee, Inc."
- In Hudson County: "Hudson County Democratic Organization."
- In Union County: "Regular Democratic Organization of Union County."

Am. Compl. ¶ 37 (App. 48). Because each of these slogans "referred to the names of New Jersey incorporated associations," state officials informed Mazo that authorization from the chairperson of the organizations was required and that if he did not obtain authorization, "his nomination petition would be certified as 'NO SLOGAN.'" Am. Compl. ¶ 38 (App. 48-49). Mazo never obtained the required consent, and instead "used three different slogans with the authorization of three other New Jersey incorporated associations that he created." Am. Compl. ¶ 39 (App. 49).

McCormick originally requested the ballot slogan "Not Me. Us.," Am. Compl. ¶ 41 (App. 49), but was told that, because this slogan referred to another New Jersey incorporated association, she also required the organization's authorization. McCormick did not obtain the necessary consent and instead requested, as an alternative slogan, "Bernie Sanders Betrayed the NJ Revolution." Am. Compl. ¶¶ 43-44 (App. 49). But because this new slogan still named an individual, again she was told consent was required. McCormick did not obtain consent and ultimately settled on a different slogan, "Democrats United for Progress," for

which she did obtain authorization. Am. Compl. ¶ 45 (App. 49).

C. Procedural Background

On July 2, 2020, five days before the primary election, Mazo and McCormick filed suit in the District of New Jersey, naming the New Jersey Secretary of State and various county clerks as defendants, collectively "the Government." Their complaint sought declaratory and injunctive relief, claiming that the consent requirement was unconstitutional, both facially and as-applied, under the First and Fourteenth Amendments.[5] In response, both the Secretary of State and the Clerks moved to dismiss.

The Secretary of State argued that Appellants' claims were both moot (because the primary election had passed) and unripe (because the next primary was more than a year away), and also that the consent requirement was constitutional. For their part, the Clerk's primarily urged that they were improper defendants because, under New Jersey law, they did not enforce the Slogan Statutes for congressional elections and lacked discretion to contradict the Secretary of State's instructions.

The District Court considered each of these arguments and concluded that (1) Appellants' claims were both ripe and not moot, *Mazo v. Way*, 551 F. Supp. 3d 478, 491-98 (D.N.J. 2021), (2) the Clerks did not exercise any discretion with respect to enforcing the Slogan Statutes, *id.* at 509, and (3) the consent

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[5] Appellants initially also sought nominal damages but abandoned that claim as against the Secretary of State and no longer press the issue on appeal.

requirement was constitutional, both facially and as-applied, *id.* at 498-508. The Court thus dismissed the case, and Appellants timely appealed.

II. Standard of Review

We review a district court's denial of a Rule 12(b)(6) motion *de novo*. *Keystone Redev. Partners, LLC v. Decker*, 631 F.3d 89, 95 (3d Cir. 2011). We also accept all of Appellants' well-pleaded factual allegations as true and draw "all reasonable inferences" in their favor. *Simko v. U.S. Steel Corp.*, 992 F.3d 198, 203-04 (3d Cir. 2021) (citing *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016)).

To prevail on a facial challenge[6], a plaintiff must "establish that no set of circumstances exists under which the [law] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or, in the First Amendment context, show that the law is overbroad because "a substantial number" of its applications are

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[6] Appellants purport to raise both a facial and an as-applied challenge to the Slogan Statutes. But as the District Court observed, Appellants have not "plead[ed] any facts showing that [the Secretary of State] enforced the [consent requirement] against them in an unconstitutional or otherwise irregular manner." *Mazo*, 551 F. Supp. 3d at 498 n.7 (D.N.J. 2021) (citation omitted). Instead, their complaint merely repeats the legal conclusion that the consent requirement "restricted [Appellants'] freedom of expression," Am. Compl. ¶ 59 (App. 51) and does not specify how their freedom of speech or association was burdened by enforcement of the consent requirement. We therefore construe their Complaint as raising only a facial challenge. *Cf. United States v. Marcavage*, 609 F.3d 264, 274 (3d Cir. 2010) (construing an unclear complaint as bringing an as-applied claim where the plaintiff's argument was "entirely dependent on the facts of th[e] case").

unconstitutional, "judged in relation to [its] plainly legitimate sweep," *New York v. Ferber*, 458 U.S. 747, 770-71 (1982).[7]

III. Jurisdiction and Justiciability

The District Court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction over its final order of dismissal under 28 U.S.C. § 1291. As we have an obligation to determine whether a controversy is justiciable before resolving its merits, we examine whether the challenge is both ripe and not moot. *See Larsen v. Senate of Pa.*, 152 F.3d 240, 246 (3d Cir. 1998).

To determine if a claim is ripe, we consider "whether the parties are in a 'sufficiently adversarial posture,' whether the facts of the case are 'sufficiently developed,' and whether a party is 'genuinely aggrieved.'" *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 539 (3d Cir. 2017) (quoting *Peachlum v. City of York*, 333 F.3d 429, 433-34 (3d Cir. 2003)). In the declaratory judgment context, we apply these principles by considering three enumerated factors: "(1) the adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment." *Khodara Env't, Inc. v. Blakey*, 376 F.3d 187, 196 (3d Cir. 2004) (quoting *Pic-A-State Pa., Inc. v. Reno*, 76 F.3d 1294, 1298 (3d Cir. 1996)); *see also*

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[7] The standard for bringing an as-applied challenge is less demanding; a plaintiff need only show that a law's "application to a particular person under particular circumstances deprived that person of a constitutional right." *Marcavage*, 609 F.3d at 273.

Step-Saver Data Sys., Inc. v. Wyse Tech., 912 F.2d 643, 646-50 (3d Cir. 1990).

Here, Appellants satisfy all three ripeness factors. First, the parties' interests are sufficiently adverse, as Appellants aver that they will suffer a "substantial threat of real harm" in the form of a First Amendment injury "if the declaratory judgment is not entered." *Plains*, 866 F.3d at 541 (quoting *Presbytery of N.J. of Orthodox Presbyterian Church*, 40 F.3d 1454, 1463 (3d Cir. 1994) and *Travelers Ins. Co. v. Obusek*, 72 F.3d 1148, 1154 (3d Cir. 1995)). Second, because the issues in this case are purely legal, and because Appellants plan to request similar ballot slogans without obtaining consent in the future, a declaratory judgment would conclusively resolve Appellants' facial challenge. *See Florio*, 40 F.3d at 1468 ("[P]redominantly legal questions are generally amenable to a conclusive determination in a preenforcement context."). Third, a declaratory judgment would be particularly useful for Appellants here, as New Jersey typically does not provide nominating petitions until the December or January before the spring primary campaign, meaning Appellants would otherwise be left with uncertainty as they plan their future campaigns. *See, e.g.*, *Arsenault v. Way*, 539 F. Supp. 3d 335, 340-41 (D.N.J. 2021) (describing abbreviated timeline). In short, Appellants' claim is ripe for decision.

Appellants' claim is also not moot. A claim is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91

(2013)). There is an important exception, however, for claims that are "capable of repetition, yet evading review," *i.e.*, where "(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." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016) (alterations omitted) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). Courts frequently apply this exception to election cases given the recurring nature of elections and the often strict time frames associated with running for office. *See, e.g.*, *Norman v. Reed*, 502 U.S. 279, 288 (1992) ("There would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints[.]").

That exception applies with full force in this case. New Jersey need not certify a proposed ballot slogan until fifty-four days prior to the primary election, and county clerks may begin printing ballots any time after fifty days prior to the election. That leaves only a narrow window in which candidates might challenge a rejected slogan, N.J. Stat. Ann. §§ 19:23-21; 19:23-22.4, and Appellants have affirmed their intent to run for office again without obtaining the necessary consent. Appellants' challenges to the consent requirement thus present a live controversy over which we may exercise jurisdiction.

IV. Discussion

The central issue in this case is the parties' disagreement over which constitutional test applies to New Jersey's consent requirement. The Government maintains that the District Court correctly applied the

sliding-scale approach for election regulations developed in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Appellants argue that the District Court should have employed a traditional First Amendment analysis applying strict scrutiny because the consent requirement is a content-based restriction of their speech. Thus, to determine the constitutionality of the consent requirement, we must first determine which test applies.

Below we consider: (a) the need for clarification given the case law to date; (b) circumstances in which the *Anderson- Burdick* test applies; (c) the test applicable to New Jersey's consent requirement; and (d) applying this test, whether the consent requirement is constitutional.

A. The Case Law to Date

Elections occupy a special place in our constitutional system, as do election laws. The Constitution expressly grants States the authority to set rules for the time, place, and manner of federal elections. U.S. Const. Art. I, § 4, cl. 1; Art. II, § 1, cl. 2. Pursuant to these clauses, States have long maintained "comprehensive, and in many respects complex, election codes regulating . . . the time, place, and manner of holding primary and general elections." *Storer v. Brown*, 415 U.S. 724, 730 (1974). States' authority over federal elections is broad, encompassing "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley v. Holm*, 285

U.S. 355, 366 (1932). It is even broader with respect to state and local elections. *See Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). That is because, if elections "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick*, 504 U.S. at 433), it is "[c]ommon sense" that States must take an "active role in structuring elections," *Burdick*, 504 U.S. at 433.

Yet because States "comprehensively regulate the electoral process," *Council of Alt. Pol. Parties v. Hooks*, 179 F.3d 64, 70 (3d Cir. 1999), their election laws "inevitably affect[,] at least to some degree[,]" certain fundamental rights, including the right to vote[8] and First Amendment rights of free expression and association, *Anderson*, 460 U.S. at 788. So the question arises, what test should courts apply to evaluate the constitutionality of those laws?

In some cases, a traditional First Amendment test fails to account for the fact that, for elections to run smoothly, some restrictions on expression and association are necessary. Recognizing this, the Supreme Court in *Anderson* and *Burdick* crafted a unique test for "[c]onstitutional challenges to specific provisions of a State's election laws." *Anderson*, 460 U.S. at 789. This test is "more flexible" than the rigid tiers of scrutiny under a traditional First Amendment analysis, *Burdick*, 504 U.S. at 434, reflecting the reality that there is no "'litmus-paper test' that will

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[8] The right to vote has long been recognized as a fundamental political right under the Constitution. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964).

separate valid from invalid restrictions," *Anderson*, 460 U.S. at 789 (quoting *Storer*, 415 U.S. at 730).

The *Anderson-Burdick* test requires the reviewing court to (1) determine the "character and magnitude" of the burden that the challenged law imposes on constitutional rights, and (2) apply the level of scrutiny corresponding to that burden. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). If the burden is "severe," the court must apply exacting scrutiny and decide if the law is "narrowly tailored and advance[s] a compelling state interest." *Timmons*, 520 U.S. at 358. But if the law imposes only "reasonable, nondiscriminatory restrictions," *Anderson*, 460 U.S. at 788, the court may use *Anderson-Burdick's* sliding scale approach under which a State need only show that its "legitimate interests . . . are sufficient to outweigh the limited burden," *Burdick*, 504 U.S. at 440.

Courts have applied *Anderson-Burdick* to a wide range of state election laws covering nearly every aspect of the electoral process. *See, e.g.*, *Belitskus v. Pizzingrilli*, 343 F.3d 632, 643-47 (3d Cir. 2003) (applying *Anderson-Burdick* in challenge to Pennsylvania ballot access law requiring candidates to pay filing fee to have their names placed on the general election ballot); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 626-36 (6th Cir. 2016) (applying *Anderson-Burdick* to a challenge to Ohio law that changed the first day of early absentee voting from 35 days before election day to the day after the close of voter registration).

In other cases, however, the Supreme Court has declined to apply *Anderson-Burdick*'s balancing test

and has reverted instead to a traditional First Amendment analysis. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (rejecting application of *Anderson-Burdick* in challenge to ban on anonymous leafletting of political materials as it constituted the "regulation of pure speech"); *Meyer v. Grant*, 486 U.S. 414, 420 (1988) (declining to apply *Anderson-Burdick* to free expression challenge to ban on paying petitioner circulators for ballot initiatives). The problem we confront today is that the Supreme Court has never laid out a clear rule or set of criteria to distinguish between these two categories of election laws, nor has any Court of Appeals to our knowledge. So to decide the category in which New Jersey's consent requirement falls, we must first identify their defining characteristics.

B. When Does the *Anderson-Burdick* Test Apply?

A survey of the Supreme Court's case law both before and after *Anderson* and *Burdick* reveals two principal characteristics of the laws to which their test applies. First, the law must burden a relevant constitutional right, such as the right to vote or the First Amendment rights of free expression and association. Second, the law must primarily regulate the mechanics of the electoral process, as opposed to core political speech. We address each below.

1. *Anderson-Burdick* Applies Beyond Free Association Claims.

Appellants espouse a narrow view of the constitutional rights that trigger review under *Anderson-Burdick*, contending that the test is limited to challenges based on First Amendment free

association claims. But precedent from the Supreme Court and our sister circuits defies this cramped view and applies *Anderson-Burdick* to vindicate a variety of constitutional rights.

True, *Anderson* itself focused on "voters' freedom of association," 460 U.S. at 787-88, and associational rights have also played a central role in many of the Supreme Court's other cases applying the *Anderson-Burdick* test. *See, e.g.*, *Clingman v. Beaver*, 544 U.S. 581, 588 (2005) (focusing on the associational interests of voters); *Norman*, 502 U.S. at 288, 290 (focusing on "the constitutional interest of like-minded voters to gather in pursuit of common political ends" under the "First Amendment right of political association"); *Timmons*, 520 U.S. at 358 (discussing "associational rights"); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008) (focusing on "political parties' associational rights").

But the Court has also applied *Anderson-Burdick* to free speech claims. Indeed, *Burdick* itself concerned a claimed right to send a message by casting a "protest vote." 504 U.S. at 438. Other examples abound. *See Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222, 224 (1989) (applying the *Anderson* test where the challenged law "directly affect[ed] speech" in addition to "infring[ing] upon [voters'] freedom of association"); *Timmons*, 520 U.S. at 357, 363 (tying associational rights to "the independent expression of a political party's views" and recognizing that the challenged law, in addition to burdening associational rights, "also limit[ed], slightly, the party's ability to send a message to the voters and to its preferred candidates") (quoting in part *Colo. Republican Fed. Campaign*

Comm'n v. Fed. Election Comm., 518 U.S. 604, 616 (1996)). As these cases make clear, *Anderson-Burdick* pertains not only to association claims, but also to challenges to election laws that "have the effect of channeling expressive activity at the polls." *Burdick*, 504 U.S. at 438.

Nor is *Anderson-Burdick* limited to First Amendment challenges. Certainly, it does not apply where the alleged right relates only to a statutory right or there is otherwise no cognizable constitutional right at issue[9] or where the burden on

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[9] *Valenti v. Lawson* declined to apply *Anderson-Burdick* to a law that banned a registered sex offender from voting at a school because sex offenders were not a suspect class and convicted felons had no constitutional right to vote, "only . . . a statutory right to vote" to the extent permitted by a State. 889 F.3d 427, 429-30 (7th Cir. 2018); *see also Donatelli v. Mitchell*, 2 F.3d 508, 514, 515 n.10 (3d Cir. 1993) (no constitutional right implicated where state reapportionment plan resulted in the temporary reassignment of a state senator to a new district for the remainder of his term, statute was not targeted at a discrete group of voters, and did not deprive voters of equal access to ballot); *Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004) (noting that "[t]he right to run for office has not been deemed a fundamental right" and "voter's rights are not infringed where a candidate chooses not to run because he is unwilling to comply with reasonable state requirements") (quoting in part *Adams v. Askew*, 511 F.2d 700, 703 (5th Cir. 1975)); *Cecelia Packing Corp. v. U.S. Dept. of Agric./Agric. Mktg. Serv.*, 10 F.3d 616, 624 (9th Cir. 1993) (declining to apply *Anderson-Burdick* to a law regulating voting in agricultural marketing order referenda because the right to vote did not extend to elections for government officials who "do not exercise general governmental powers"); *Hayden v. Paterson*, 594 F.3d 150, 169-70 (2d Cir. 2010) (applying rational basis review to a felon disenfranchisement law that was otherwise nondiscriminatory); *Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc.*, 158 F.3d 92, 105, 108 (2d Cir. 1998)

a constitutional right is no more *de minimis*.[10] But it has been applied to the right to vote,[11] the right to

(declining to apply *Anderson-Burdick* balancing to a malapportionment challenge because, while the elected body performed types of services "often provided by local government," its role was secondary to city and therefore did not exercise "responsibilities or general powers typical of a governmental entity").

[10] *See Molinari v. Bloomberg*, 564 F.3d 587, 606 (2d Cir. 2009) (declining to apply *Anderson-Burdick* where the only effect on First Amendment rights was "incidental[] and constitutionally insignificant") (alteration in original) (quoting *Cohen v. Cowles Media Co*., 501 U.S. 663, 672 (1991)). In *Clingman*, for example, the Supreme Court considered a semi-closed primary law, under which members of a given party and Independents could vote in that party's primary, but not members of other parties. 544 U.S. at 584. The law was challenged by a group of Democratic and Republican voters who wished to vote in the Libertarian Party's primary without changing their party affiliation. *See id.* at 588. The Court was skeptical of the alleged burden on plaintiffs' association claims, however, and, observing they did "not want to associate with the [Libertarian Party], at least not in any formal sense," noted that "a voter who is unwilling to disaffiliate from another party to vote in [another party's] primary forms little 'association.'" *Id.* at 588-89; *see also Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12 (1982) (applying rational basis review to a challenge to a State's choice to fill legislative vacancies by appointment because any effect on individual rights was "minimal").

[11] In *Crawford v. Marion County Election Board*, for instance, the Supreme Court recognized that "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious," and proceeded to apply *Anderson-Burdick*'s balancing test to the voter identification law at issue. 553 U.S. 181, 189-91 (2008) (plurality opinion) (quoting *Anderson*, 460 U.S. at 788 n.9). The plurality opinion from which these quotations are taken commanded only the votes of three Justices. But while the three concurring Justices disagreed on how exactly to apply the *Anderson-Burdick* test, they all agreed

"travel throughout the United States,"[12] and the right to procedural due process,[13] among others.

We have no occasion here to exhaust the list of constitutional claims reviewable under the *Anderson-Burdick* test. It suffices for present purposes that this test is not limited to laws that burden free association.

2. *Anderson-Burdick* Applies to Laws that Regulate the Mechanics of the Electoral Process

The fact that an election law burdens a fundamental right is necessary but not sufficient to trigger *Anderson- Burdick*; the law also must regulate "the mechanics of the electoral process." *McIntyre*, 514 U.S. at 345. After all, the basic premise of *Anderson-Burdick* is that ordinary election laws necessarily have incidental burdens on political speech by "channeling expressive activity at the polls[,]" meaning that courts must examine whether a law that burdens speech is nonetheless directed primarily at regulation of the electoral process. *Burdick*, 504 U.S.

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that "generally applicable, nondiscriminatory voting regulation[s]" are subject to the balancing test. *See Crawford*, 553 U.S. at 205-06 (Scalia, J., concurring).

[12] In *Dunn v. Blumstein*, the Court observed that a State's durational residency requirements burdened not only the right to vote, but also the distinct right "to travel throughout the United States." 405 U.S. 330, 338 (1972) (quoting *United States v. Guest*, 383 U.S. 745, 758 (1966)); *see also Donatelli v. Mitchell*, 2 F.3d 508, 515 (3d Cir. 1993) (distinguishing State's reapportionment plan from *Dunn* on grounds that it did not burden right to travel).

[13] *See Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1194- 95 (9th Cir. 2021); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 233-35 (5th Cir. 2020); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020).

at 438. Thus, if the law primarily regulates the electoral process, we employ *Anderson-Burdick* and determine the appropriate level of scrutiny. Conversely, if the law does not primarily regulate the electoral process and instead aims at regulating political speech, it is subject to a traditional First Amendment analysis.[14]

The Supreme Court's case law bears this out, applying *Anderson-Burdick* to a wide range of electoral-process regulations. These include the time, place, and manner of elections, such as "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U.S. at 366. In line with this broad authority, the Supreme Court has also applied *Anderson-Burdick* to ballot access rules, *see Anderson*, 460 U.S. at 788-806; *Norman*, 502 U.S. at 288-91; regulation of party primaries, *see Tashjian v. Republican Party*, 479 U.S 208, 214-29 (1986); *Grange*, 552 U.S. at 451-59; voter identification laws, *see Crawford*, 553 U.S. at 189-204; and the content of ballots, *see Burdick*, 504 U.S. at 428; *Timmons*, 520 U.S. at 351-52.

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[14] The Supreme Court has also explained that the Elections and Electors Clauses themselves impose limits on a state's power to regulate federal elections. *See, e.g.*, *Cook v. Gralike*, 531 U.S. 510, 525-26 (2001) (holding that requiring ballot designation reflecting candidates' views on term limits fell "far from regulating the procedural mechanisms of elections" and instead attempted to dictate electoral outcomes). Because such laws fall outside of State's constitutional authority, they do not enjoy the deference afforded by the *Anderson-Burdick* balancing test.

The Courts of Appeals have followed suit, scrutinizing under *Anderson-Burdick* laws regulating, *e.g.*, the order in which candidates' names appear on the ballot,[15] whether the ballot is electronic,[16] the form and content of ballot initiatives,[17] absentee voting,[18] early voting,[19] nomination of candidates,[20] voter registration,[21] the counting of ballots,[22] polling

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[15] *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907-08 (8th Cir. 2020).

[16] *See, e.g.*, *Wexler v. Anderson*, 452 F.3d 1226, 1232-33 (11th Cir. 2006); *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003).

[17] *See, e.g.*, *Thompson v. DeWine*, 976 F.3d 610, 615-16 (6th Cir. 2020); *Lemons v. Bradbury*, 538 F.3d 1098, 1103-04 (9th Cir. 2008); *Kendall v. Balcerzak*, 650 F.3d 515, 525, 528 (4th Cir. 2011); *Schmitt v. LaRose*, 933 F.3d 628, 639-42 (6th Cir. 2019); *Campbell v. Buckley*, 203 F.3d 738, 741, 743-45 (10th Cir. 2000).

[18] *See, e.g.*, *Hobbs*, 18 F.4th at 1181; *Tully v. Okeson*, 977 F.3d 608, 615-16 (7th Cir. 2020); *Short v. Brown*, 893 F.3d 671, 676-79 (9th Cir. 2018); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 107-12 (2d Cir. 2008).

[19] *See, e.g.*, *Husted*, 834 F.3d at 626-27.

[20] *See, e.g.*, *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008).

[21] *See, e.g., Fish v. Schwab*, 957 F.3d 1105, 1121-23 (10th Cir. 2020); *Harlan v. Scholz*, 866 F.3d 754, 759-61 (7th Cir. 2017); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387-88 (5th Cir. 2013). Importantly, the law at issue in *Steen* regulated only the qualifications for voter registration volunteers, not any of the expressive elements of voter registration, such as one-on-one communication. *See Steen*, 732 F.3d at 389-90. This demonstrates that voter registration can have both "electoral mechanics" and "pure speech" components, and that courts must carefully examine which components are implicated by a particular regulation.

[22] *See George v. Hargett*, 879 F.3d 711, 724-25 (6th Cir. 2018); *Libertarian Party v. D.C. Bd. of Elections and Ethics*, 682 F.3d

hours,[23] voter identification and proof-of-citizenship requirements,[24] regulation of voter data,[25] the appointment and qualifications of election workers,[26] the use of primaries or caucuses,[27] the use of straight-ticket voting,[28] the use of ranked choice voting,[29] the cancellation of an uncontested primary,[30] the use of district-level or at-large election systems,[31] and the

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72, 73-74 (D.C. Cir. 2012). For a comprehensive discussion of the range of courts' application of *Anderson-Burdick* in the ballot-counting context, see PRINCIPLES OF THE L. OF ELECTION ADMIN.: NON-PRECINCT VOTING AND RESOL. OF BALLOT-COUNTING DISP. § 201 (AM. L. INST., Tentative Draft No. 2, 2017).

[23] *See, e.g.*, *Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1040-41 (7th Cir. 2020).

[24] *See, e.g.*, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 605-07 (4th Cir. 2016); *Gonzalez v. Arizona*, 485 F.3d 1041, 1050-51 (9th Cir. 2007).

[25] *See, e.g.*, *Fusaro v. Howard*, 19 F.4th 357, 361, 363-64 (4th Cir. 2021).

[26] *See, e.g.*, *Werme v. Merrill*, 84 F.3d 479, 483-84 (1st Cir. 1996).

[27] *See, e.g.*, *Cool Moose Party v. Rhode Island*, 183 F.3d 80, 82-88 (1st Cir. 1999).

[28] *See Tx. All. for Retired Ams. v. Scott*, 28 F.4th 669, 670-74 (5th Cir. 2022); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 660-69 (6th Cir. 2016).

[29] *See Dudum v. Artnz*, 640 F.3d 1098, 1100-17 (9th Cir. 2011).

[30] *See Yang v. Kosinski*, 960 F.3d 119, 126-36 (2d Cir. 2020).

[31] *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019-28 (9th Cir. 2016). We note that several of our sister Circuits have in recent years employed the *Anderson-Burdick* framework to evaluate challenges to the appointment of Presidential electors. *See Baten v. McMaster*, 967 F.3d 345, 373-75 (4th Cir. 2020); *Rodriguez v. Newsom*, 974 F.3d 998, 1011 (9th Cir. 2020); *Lyman v. Baker*, 954 F.3d 351, 376-78 (1st Cir. 2020).

composition of Independent Redistricting Commissions.[32] Even beyond laws governing the voting process itself, the appellate courts regularly apply *Anderson-Burdick* to regulations affecting candidates, including the qualifications of elected and appointed officers,[33] the filling of vacancies and special elections,[34] term limits,[35] and even the expulsion of elected officials.[36] Though each of these regulations necessarily implicated speech and association to some degree, each was nonetheless primarily directed at regulating specific mechanics of the electoral process.

In contrast, the *Anderson-Burdick* test does not apply to laws that are primarily directed at regulating "pure speech." *McIntyre*, 514 U.S. at 345. The distinction between "pure speech" and the mechanics of the electoral process is not always easy to ascertain. There are, however, two distinguishing factors to consider: the location and timing (the "where and when") and the nature and character (the "how and what") of the regulated speech.

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[32] *Daunt v. Benson*, 999 F.3d 299, 303-22 (6th Cir. 2021).

[33] *See, e.g.*, *Lindsay v. Bowen*, 750 F.3d 1061, 1063-64 (9th Cir. 2014); *Grizzle v. Kemp*, 634 F.3d 1314, 1322-26 (11th Cir. 2011).

[34] *See, e.g.*, *Tedards v. Ducey*, 951 F.3d 1041, 1067-68 (9th Cir. 2020); *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 729-31 (1st Cir. 1994).

[35] *See, e.g.*, *Kowall v. Benson*, 18 F.4th 542, 546-49 (6th Cir. 2021), *cert. denied*, 2022 WL 4651422 (Oct. 3, 2022); *Citizens for Legis. Choice v. Miller*, 144 F.3d 916, 920-24 (6th Cir. 1998).

[36] *See Monserrate v. N.Y. State Senate*, 599 F.3d 148, 155-57 (2d Cir. 2010).

a) Location and Timing of the Regulated Speech

The first factor courts should consider is where and when the regulated speech occurs. At one end of the spectrum, speech that occurs on the ballot or within the voting process will typically trigger application of the *Anderson-Burdick* balancing test. *See, e.g.*, *Burdick*, 504 U.S. at 437-38 (applying *Anderson* where the speech being regulated was a voter's desire to cast a write-in vote on the ballot itself); *cf. Tashjian*, 479 U.S. at 217 ("It is, of course, fundamental . . . that this impingement upon the associational rights of the Party and its members occurs at the ballot box . . . ."). At the other end of the spectrum, speech that relates to an election but occurs nowhere near the ballot or any other electoral mechanism is treated as core political speech entitled to the fullest First Amendment protection. *See, e.g.*, *McIntyre*, 514 U.S. at 347 (applying strict scrutiny where the speech being regulated was leafletting that occurred far from the polling place and potentially weeks or months before Election Day).

In between these two extremes, close analysis is necessary to examine the challenged law with a functional approach in mind, rather than drawing any bright lines based on physical location. States have a legitimate interest, for example, in regulating the polling place to ensure order and fairness, as with any other mechanic of the electoral process. *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1887 (2018) ("Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or representative's vote on a piece of legislation. It is a time for choosing, not

campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.")

b) Nature and Character of the Regulated Speech

The second factor courts should consider in distinguishing between laws directed to the mechanics of the electoral process and those aimed at core political speech is the nature and the character of the regulated speech: what is being said and how it is communicated. In *Buckley v. American Constitutional Law Foundation, Inc.*, the Supreme Court characterized the lodestar for "core political speech" as the involvement of "interactive communication concerning political change." 525 U.S. 182, 186 (1999) (quoting *Meyer*, 486 U.S. at 422). Under this rationale, the Court has declined to apply *Anderson-Burdick* to election-related regulations that burdened such interactive communication between individuals. *See Meyer*, 486 U.S. at 421-22 (concluding that law prohibiting payment for petition circulators was a regulation of core political speech because circulators must engage one-on-one with potential signatories about the pressing issues of the day); *McIntyre*, 514 U.S. at 345-46 & n.10 (concluding ban on anonymous political leafleting regulated pure political speech); *Buckley*, 525 U.S. at 199 (concluding that a requirement that petition circulators be registered voters implicated "core political speech" no less than the "fleeting encounter" of leafletting or the more involved "discussion of the merits" that attended the petition circulation) (quoting in part *Meyer*, 486 U.S. at 421). This principle aligns with other precedents:

both the campaign speech in *Burson* and the political attire in *Mansky* had the potential to spark direct interaction and conversation, while *Burdick*'s write-in vote did not.

With these two factors in mind, the line dividing core political speech from the mechanics of the electoral process comes into sharper focus. Extensive case law reaffirms the wide range of electoral mechanics that States must necessarily regulate to safeguard the honesty and fairness of elections, and we are wary of categorically removing any particular area of election regulation from *Anderson-Burdick*'s ambit. At the same time, however, we do not mechanically apply *Anderson-Burdick* balancing any time a state election law is challenged. Rather, we must engage in a careful analysis to determine if the challenged law primarily regulates the mechanics of the electoral process, or if it is in fact directed to the type of interactive, one-on-one communication that constitutes core political speech. With these considerations in mind, we turn to the challenged law at issue today.

C. Which Test Applies to New Jersey's Consent Requirement?

Having clarified the standards that determine when courts should apply the *Anderson-Burdick* balancing test to a challenged election law, we now apply that standard to New Jersey's consent requirement. For the reasons that follow, we conclude that *Anderson-Burdick* is indeed the appropriate framework.

1. The Consent Requirement Burdens Expressive Rights

The first requirement, that the law burden a relevant constitutional right, is satisfied, as the consent requirement burdens Appellants' freedom of expression.

Under the consent requirement, candidates must obtain authorization from any individual or New Jersey-incorporated association before using their name in a ballot slogan. Appellants argue that, where a candidate has not obtained authorization, the consent requirement "forbid[s] an explicit message Plaintiffs want to send to voters," thereby burdening their freedom of speech. Appellant Br. at 22. As discussed above, the Supreme Court has been skeptical of efforts to assert an unqualified right to speech via the ballot, but it has nonetheless applied the *Anderson-Burdick* balancing test to laws that regulate ballot speech. *See Burdick*, 544 U.S. at 438 (ban on write-in votes burdened speech by prohibiting "protest vote" on a ballot); *Timmons*, 520 U.S. at 363 (requirement that candidates only appear under one party on the ballot "also limit[ed], slightly, the party's ability to send a message to the voters and to its preferred candidates").[37]

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[37] While Appellants focus on the consent requirement's impact on speech rights, the consent requirement also burdens associational rights by limiting a candidate's ability to associate with particular individuals or incorporated associations, and as a result with voters, via the ballot. Indeed, the interests asserted by the Government—protecting election integrity and preventing voter deception and confusion—demonstrate that a primary function of the consent requirement is to prevent candidates from associating with other entities without those entities' consent.

In sum, the consent requirement burdens freedom of expression, such that the first threshold requirement of the *Anderson-Burdick* framework has been satisfied.

2. The Consent Requirement Regulates a Mechanic of the Electoral Process

The other requirement—that the law primarily regulate a mechanic of the electoral process, rather than core political speech—is also satisfied. The consent requirement regulates the words that may appear on the ballot, which is the archetypical mechanic of the electoral process for which the *Anderson-Burdick* test is designed. For ballots to be effective tools for selecting candidates and conveying the will of voters, they must be short, clear, and free from confusing or fraudulent content. This necessarily limits the degree to which the ballot may—or should—be used as a means of political communication. *See Burdick*, 504 U.S. at 438 ("[T]he function of the election process is to 'winnow out and finally reject all but the chosen candidates[.]'") (quoting *Storer*, 415 U.S. at 735); *id.* ("Attributing to elections a more

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Appellant McCormick's proposed slogan "Not Me. Us." is a perfect example: Under the consent requirement, she is precluded from associating with the Bernie Sanders campaign or his supporters via his campaign's slogan without authorization. The consent requirement thus imposes a similar burden on association as the ban on "fusion candidates" in *Timmons*. *See* 520 U.S. at 360 ("Respondent is free to try to convince Representative Dawkins to be the New Party's, not the DFL's, candidate . . . . Whether the party still wants to endorse a candidate who, because of the fusion ban, will not appear on the ballot as the party's candidate, is up to the party.") (citation omitted).

generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."); *Timmons*, 520 U.S. at 365 (treating ballots as forums for political expression "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising"); *Caruso v. Yamhill Cnty. Ex rel. Cnty Comm'r*, 422 F.3d 848, 851, 856 (9th Cir. 2005) ("[T]he fact that the ballot is 'crucial' to an election does not imply that [initiative proponent] therefore has a First Amendment right to communicate a specific message through it."); *Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992) (ballots are "State-devised form[s]" that are "necessarily short" and thus not suitable "for narrative statements by candidates").

Appellants and Amicus protest that, even if the ballot is usually an electoral mechanic, it ceases to be one once a State opens the ballot up for candidates to communicate to voters. As the Government points out, however, courts regularly apply the *Anderson-Burdick* test to laws that regulate the content of ballots, including the information placed beside a candidate's name. *See Chamness v. Bowen*, 722 F.3d 1110, 1116-17 (9th Cir. 2013) (challenge to restrictions on "party preference" ballot designations); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1013-14 (9th Cir. 2002) (challenge to "ballot designation" law that allowed candidates to list their occupations beside their names but which prevented the plaintiff from designating himself a "peace activist"); *Caruso*, 422 F.3d at 851, 855-57 (challenge to requirement that ballot initiatives "proposing local option taxes include a statement" that the "measure may cause property taxes to increase").

But, say Appellants, the slogan statutes explicitly provide that ballot slogans exist "for the purpose of indicating either any official act or policy to which [a candidate] is pledged or committed, or to distinguish him as belonging to a particular faction or wing of his political party." N.J.S.A. § 19:23-17. That may be so, but it does not alter our analysis. Whether a State chooses to allow communication via the ballot for a specific purpose changes neither the fact that the State nonetheless has a duty to regulate the content of ballots, nor the fact that the State's policy choices in this area are due deference under the *Anderson-Burdick* framework.

As a fallback, Appellants attempt to characterize New Jersey's consent requirement as a regulation of core political speech, but New Jersey's ballot slogans differ in two important respects from core political speech. First, unlike the core political speech at issue in *Meyer* or *McIntyre*, which occurred outside of the polling place and over a long period of time leading up to Election Day, the speech that occurs within a ballot slogan is confined to the ballot itself at the moment a vote is cast. Second, ballot slogans are different in kind from core political speech. The Supreme Court has emphasized the "interactive" nature of "core political speech." *See Meyer*, 486 U.S. at 421-22. That crucial element, however, is missing here. Ballot slogans, unlike leafletting, petition circulating, or even the wearing of political clothing at the polling place, cannot inspire any sort of meaningful conversation regarding political change. Rather, the ballot slogan, like the protest vote at issue in *Burdick*, is a one-way communication confined to the electoral mechanic of the ballot. *See Burdick*, 504 U.S. at 438.

In sum, New Jersey's consent requirement regulates only the ballot itself—a classic electoral mechanic—and does not regulate core political speech. Thus, *Anderson-Burdick* is the appropriate constitutional standard to be applied.

D. The Consent Requirement Is Constitutional Under the Relevant Test

Having established that the *Anderson-Burdick* test is the correct constitutional standard, we now apply that standard to New Jersey's consent requirement. The *Anderson-Burdick* framework employs a "two-track approach." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring). "[O]ur scrutiny is a weighing process: We consider what burden is placed on the rights which plaintiffs seek to assert and then we balance that burden against the precise interests identified by the state and the extent to which these interests require that plaintiff's rights be burdened." *Rogers v. Corbett*, 468 F.3d 188, 194 (3d Cir. 2006); *see also Burdick*, 504 U.S. at 434 ("Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens [constitutional] rights."). If the law imposes a "severe" burden, then "[s]trict scrutiny is appropriate." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring) (quoting *Clingman*, 544 U.S. at 592). But if a burden is not severe and "imposes only 'reasonable, nondiscriminatory restrictions'" on constitutional rights, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788).

For the reasons that follow, we conclude that New Jersey's consent requirement is constitutional, as it does not impose a severe burden on Appellants' First Amendment rights, and New Jersey's interests in protecting the integrity of elections and preventing voter deception and confusion are sufficient to justify the consent requirement's minimal burdens.

1. The Consent Requirement Does Not Impose Severe Burdens on First Amendment Rights

As discussed above, New Jersey's consent requirement burdens the expressive rights of candidates. The question, however, is the severity of that burden. There is no "litmus test for measuring the severity of a burden that a state [election] law imposes." *Crawford*, 553 U.S. at 191. Here, though, we conclude that the consent requirement imposes only a minimal burden because (a) the requirement is nondiscriminatory and applies equally to all candidates and slogans; (b) the requirement leaves open ample and adequate alternatives for expression and association; and (c) Appellants have failed to provide evidence of any specific burden on either themselves or any other candidate.

a) The Consent Requirement is Non-Discriminatory

Election laws that discriminate by "limit[ing] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status" impose severe burdens and will be "especially difficult for the State to justify." *Anderson*, 460 U.S. at 793. That

discrimination can come in different forms.[38] None, however, is implicated by the consent requirement.

i. Discrimination Among Candidates, Parties, or Voters.

In the case of discrimination among candidates, parties, or voters, the Court's "ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity.'" *Anderson*, 460 U.S. at 793 (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982) (plurality opinion)); *cf. Williams v. Rhodes*, 393 U.S. 23, 24, 32 (1968) (applying strict scrutiny where state laws in effect gave the two major parties "a complete monopoly" by making it "virtually impossible for a new political party . . . to be placed on the state ballot"). In *Anderson*, for example, Ohio required Independent candidates seeking a place on the ballot to file in March, long before major-party candidates, thus "totally exclud[ing] any candidate who [made] the decision to run for President as an independent after

[38] Laws that burden the right to vote based on classifications unrelated to voter qualifications, and therefore disproportionately affect certain classes of voters, impose a severe burden and therefore would trigger strict scrutiny under *Anderson-Burdick. See, e.g.*, *Hussey v. City of Portland*, 64 F.3d 1260, 1265-66 (9th Cir. 1995) (applying strict scrutiny under *Anderson-Burdick* to a law denying a utility subsidy to voters who voted against annexation because it "disproportionately affect[ed] the poor" and "severely" interfered with the right to vote).

the March deadline." *Id.* at 792. The law also burdened the associational rights of two distinct groups of voters: Independent voters who wished to nominate Independent candidates, due to the added difficulty of campaigning further out from Election Day, and "disaffected" voters who decided to support an Independent candidate only after seeing the nominees put forward by the two major parties. *See id.* at 790-91. The early filing deadline therefore "discriminate[d] against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Id.* at 794.

In contrast, burdens that apply to all voters, parties, or candidates are less likely to be severe. In *Storer*, California prohibited Independent candidates from appearing on the ballot as such if they had been a member of a political party or voted in a party's primary in the past year, but it also "impose[d] a flat disqualification upon any candidate seeking to run in a party primary" who had been a member of a different party within the past year. *See* 415 U.S. at 733-34. The law therefore "involve[d] no discrimination against independents." *Id.* at 733. Likewise, in *Timmons*, Minnesota's ban on "fusion candidates," who are candidates designated as the candidate for more than one party, was not discriminatory because it "applie[d] to major and minor parties alike." 520 U.S. at 360. Even laws that give modest preferential treatment to major political parties at the expense of minor parties may be constitutionally firm. *See, e.g.*, *Jenness v. Fortson*, 403 U.S. 431, 432 (1971) (upholding higher petition requirement for non-major parties); *Norman*, 502 U.S. at 279 (same, for greater signature

requirement); *Daunt v. Benson*, 956 F.3d 396, 402 (6th Cir. 2020) (concluding no severe burden where Michigan law required certain composition of members on redistricting commission based on party affiliation).

Here, New Jersey's consent requirement applies to all primary candidates and to any slogans mentioning a person or a New Jersey incorporated association. The law thus draws no distinctions and does not impose unique burdens on any identifiable group of voters or candidates.

ii. Discrimination Based on Content or Viewpoint.

Whether a law is viewpoint- or content-based may also bear on the severity of the burden imposed.[39] New Jersey's consent requirement, however, is neither content- nor viewpoint-based.

The government may not restrict speech because of its "message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)). A regulation of speech is "facially content

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[39] A content-based law does not necessarily impose a severe burden, however, if it does not prohibit or limit speech on any particular topic or otherwise favor certain candidates or outcomes. *See, e.g.*, *Caruso*, 422 F.3d at 857-58 (upholding an Oregon law requiring ballot initiatives proposing local taxes to include a statement that the measure "may cause property taxes to increase more than three percent" because—in contrast to a Missouri law that was "not neutral" and that "skew[ed] the ballot listings," *Cook v. Gralike*, 531 U.S. 510, 532 (2001) (Rehnquist, C.J. concurring)—the tax-statement requirement "applie[d] to all 'measures authorizing the imposition of local option taxes,' . . . so no measure or group of measures was 'singled out'") (cleaned up).

based" if it target[s] speech 'based on its communicative content.'" *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)) (alteration in original). In other words, a regulation is content based if the regulation applies to speech "because of the topic discussed or the idea or message expressed." *Id.* (quoting *Reed*, 576 U.S. at 163). Content-based election regulations may be severe when they "[l]imit[] speech based on its 'topic' or 'subject'"; such laws "present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint" because they "favor[] those who do not want to disturb the status quo" and may "interfere with democratic self-government and the search for truth." *Reed*, 576 U.S. at 174 (Alito, J., concurring).

Content neutral laws, on the other hand, do not regulate speech based on its content, but rather do so based on some other neutral characteristic of the speech. Most content neutral laws fall into the category of "Time, Place, or Manner" regulations, which dictate only when, where, or how speech must be conveyed, regardless of the message. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "[T]he essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares at 2 a. m. disturbs neighborhood tranquility." *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980).

Appellants contend that the consent requirement is content based because whether it applies to a given ballot slogan will depend on whether the slogan names an individual or a New Jersey incorporated association. Appellants rest their argument almost entirely on the Supreme Court's decision in *Reed*, where a town's sign ordinance treated certain categories of signs, like "Ideological," "Political," and "Temporary Directional Signs," differently. 576 U.S. at 159-60. Observing that a law is content-neutral if it "target[s] speech based on its communicative content," the Supreme Court held that the sign code was "content based on its face" because each of these categories was defined by the subject matter conveyed by the signs. *Id.* at 164. Appellants seize on the phrase "target[s] speech based on its communicative content" in *Reed*. The upshot, according to Appellants, is that "the law applies only when certain words are present in a statement," Appellant Br. at 10, or when an official would need to "examine the content of the message that is conveyed to determine whether a violation has occurred," Appellant Br. at 11 (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014)).

The Supreme Court expressly rejected that argument in *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022). At issue was Austin, Texas's sign code, which allowed digital signs for businesses operating on the premises of a building but generally prohibited signs for off-premises activities. *Id.* at 1472. The Fifth Circuit had held that the on-/off-premises distinction was facially content based because its application depended on the sign's message, but the Supreme Court disagreed, explaining that the message only mattered insofar as

it informed the sign's location, making the law analogous to a content neutral "time, place, or manner restriction[]." *Id.* at 1470, 1473.

By way of illustration, the Court pointed to *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). There, the Minnesota State Fair prohibited the sale or distribution of any merchandise by "all persons, groups or firms which desire to sell, exhibit or distribute materials," except from a booth rented by the fair. *Id.* at 643-44. The Court upheld the anti-solicitation law as a content neutral "time, place, or manner" regulation because it "applie[d] evenhandedly to all who wish[ed] to distribute and sell written materials or to solicit funds," *id.* at 648-49, regardless of whether "one must read or hear [the speech]" to "identify whether speech entails solicitation," *City of Austin*, 142 S. Ct. at 1473 (discussing *Heffron*). The Court thus distinguished *Reed* as "swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result" and reaffirmed that classifications that consider function or purpose are not always content based. *Id.* at 1474.

Under *City of Austin*, then, a law is "agnostic as to content," if it "requires an examination of speech only in service of drawing neutral" lines. *Id.* at 1471. One category of such neutral line-drawing tracks ordinary time, place, or manner regulations, such as the on-/off-premises distinction at issue in *City of Austin*, which related only to the location of speech. *See id.* at 1472-73. A second category of neutral line-drawing distinguishes between speech based on its function or

purpose without indirectly regulating subject matter, such as whether speech constitutes "solicitation." *Id.* at 1473.

New Jersey's consent requirement falls into a third category of permissible neutral line-drawing that distinguishes between speech based on extrinsic features unrelated to the message conveyed. Unlike the sign code in *Reed*, the consent requirement applies to all slogans, regardless of message, and does not "single out any topic or subject matter for differential treatment." *Id.* at 1472. Appellants argue that the consent requirement regulates slogans based "entirely on the communicative content of [slogans,]" but this is not so. Reply Br. at 4 (quoting *Reed*, 576 U.S. at 164). Rather, the communicative content of the slogan—*i.e.*, whether the slogan names an individual or a New Jersey incorporated association—only matters to determine whether the consent requirement applies at all. Once a regulator has read a slogan to determine whether the consent requirement applies, the communicative content of the slogan ceases to be relevant. Accordingly, the consent requirement is content neutral.

The consent requirement is also viewpoint neutral. Laws that directly regulate speech based on political viewpoint constitute a severe burden. "Viewpoint discrimination is an 'egregious form of content discrimination'" that targets speech based not on its subject but rather on "particular views taken by speakers." *Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Because

regulation of particular views is especially offensive to the First Amendment, viewpoint discrimination is generally not permitted under any circumstances. *See Mansky*, 138 S. Ct. at 1885. Laws that restrict speech "regardless of the viewpoint that is expressed," in contrast, are viewpoint neutral. *Porter v. City of Philadelphia*, 975 F.3d 374, 391 (3d Cir. 2020).

The consent requirement applies equally to any viewpoint related to the person or entity named and the consent procedure is the same regardless of whether the candidate wishes to convey support or criticism of the named individual or association. Nonetheless, Appellants urge that the requirement *indirectly* discriminates against slogans that criticize individuals and New Jersey incorporated associations because these entities are unlikely to give consent to be named in slogans that criticize them. This argument fails for two reasons. First, the Supreme Court has held that laws that ban "criticism" without regard to any particular viewpoint are content based, not viewpoint based. *See Boos v. Barry*, 485 U.S. 312, 319 (1988) (noting that, because a law prohibiting criticism of foreign governments outside embassies "determine[d] which viewpoint is acceptable in a neutral fashion," the law was content based, rather than viewpoint based). Second, the consent requirement does not directly regulate criticism, and "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." *McCullen*, 573 U.S. at 480.

Appellants also argue that the consent requirement "deter[s] candidates from using their desired slogans, causing them to alter their

messages," again citing the potential chilling effect on political speech. Appellant Br. at 32. One category of chilling effects involves laws that attach punitive consequences to particular exercises of protected speech after the fact. *See Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 672-73 (1996) (termination of an independent contractor for criticizing a local government); *Circle Schs. v. Pappert*, 381 F.3d 172, 180, 183 (3d Cir. 2004) (requiring school officials to notify parents of students who declined to recite the Pledge of Allegiance). This category is not implicated here, as New Jersey's consent requirement does not impose any consequences on a candidate's speech, but rather sets forth a condition that must be satisfied prior to a slogan being allowed on the ballot.

The Supreme Court has nonetheless acknowledged that an election law setting forth such an ex ante condition may nonetheless have a chilling effect on speech, and therefore impose a severe burden, where the condition relates in some way to the viewpoint of the speech or association. *See Tashjian*, 479 U.S. at 218-25 (holding that requiring independent voters to affiliate publicly with a political party as a condition of voting in that party's primary imposed a severe burden). The District Court, citing to *Matal v. Tam*, 137 S. Ct. 1744 (2017), acknowledged that the consent requirement could "channel dissenting, negative, controversial, or unpopular slogans into more tolerable forms or benign/positive tones" because either individuals or New Jersey incorporated associations would not consent to being criticized on the ballot or because candidates would alter their own speech in order to obtain consent.

Mazo, 551 F. Supp. 3d at 504. In *Matal*, the Supreme Court struck down a facially even-handed law prohibiting offensive trademarks with reference to whether the targeted speech was "offensive to a substantial percentage of the members of any group." 137 S. Ct. at 1763. The Court observed that "[g]iving offense is a viewpoint" and concluded that the restriction was viewpoint discriminatory. *Id.*

The consent requirement, in contrast, does no such thing: a candidate who wishes to criticize a public figure widely despised in New Jersey would be required to get the same consent as a candidate who wishes to criticize Bruce Springsteen. The consent requirement thus does not target any specific viewpoint, nor does it compel candidates to speak or associate in any particular way as a condition of using a given slogan. It is, instead, non-discriminatory. Thus, the potential, or even likely, effect of the consent requirement on critical speech is immaterial to both the viewpoint and content based inquiries.

b) The Consent Requirement Leaves Open Alternatives for Speech and Association

A law that operates to explicitly or effectively exclude a group of candidates, voters, or parties from the ballot imposes a severe burden. *See, e.g.*, *Anderson*, 460 U.S. at 792-93 (concluding that early filing deadline imposed a severe burden by "totally exclud[ing]" Independent candidates who wanted to file after the March deadline); *Norman*, 502 U.S. at 289 (barring "candidates running in one political subdivision from ever using the name of a political party established only in another. . . . would obviously

foreclose the development of any political party lacking the resources to run a statewide campaign"); *cf. Williams*, 393 U.S. at 32 (election laws were unconstitutional where they made it "virtually impossible for a new political party . . . to be placed on the state ballot"); *Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 177 (2d Cir. 2020) ("[The] hallmark of a severe burden is exclusion or virtual exclusion from the ballot.") (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016)).

One way that a State can lessen the burden imposed by an election law, then, is to provide alternative methods for the exercise of burdened rights. In *Timmons*, for instance, the Court agreed that Minnesota's "fusion candidate" ban "shut[] off one possible avenue a party might use to send a message," but nonetheless found the burden to be not severe because parties "retain[ed] great latitude in [their] ability to communicate ideas to voters and candidates through [their] participation in the campaign," and because voters could still "campaign for, endorse, and vote for their preferred candidate even if he [was] listed on the ballot as another party's candidate." 520 U.S. at 362-63; *see also Rubin*, 308 F.3d at 1015-16 (concluding that law limiting how a peace activist candidate "may describe his occupation on the ballot" did not impose a severe burden because candidate retained ample alternative channels "for communicating his peace activities to the public").

Here, New Jersey's consent requirement leaves open the same two adequate alternatives as the "fusion candidate" ban in *Timmons*: first, candidates are free to try and earn the consent of individuals and

incorporated associations with whom they would like to associate on the ballot; and second, Appellants remain free to say whatever they want and communicate any message about any individual or incorporated association so long as they do not do so via the ballot slogan. Appellants push back on this point, arguing that this reasoning would allow "New Jersey to violate a candidate's First Amendment rights once per primary season." Appellant Br. at 33. But their disagreement is misplaced. We do not examine each burden on speech in isolation. To the contrary, whether a particular restriction on speech violates the First Amendment depends in part on whether alternative channels exist. *Cf. Ward*, 491 U.S. at 791 (narrowly-tailored, content-neutral restrictions on speech are constitutional if they "leave open ample alternative channels for communication of the information") (quoting *Clark v. Cmty. for Creative Non- Violence*, 468 U.S. 288, 293 (1984)). So where, as here, Appellants have every other possible avenue to criticize or align themselves with individuals and groups, keeping that speech off the ballot simply does not impose a severe burden.

c) Appellants Provide No Evidence of Any Specific Burden to Either them or any other Candidate

Appellants bring a facial challenge to the consent requirement, which requires them to show that the consent requirement lacks "a plainly legitimate sweep," *Grange*, 552 U.S. at 449, or that a "substantial number" of its applications are unconstitutional, "judged in relation to [its] plainly legitimate sweep," *Ferber*, 458 U.S. at 770-71. But it is easy to imagine

legitimate applications of the consent requirement, such as where a candidate may try to use a ballot slogan to mislead or confuse voters into thinking they have been endorsed by a popular candidate or organization. Here, the consent requirement serves to protect the associational rights of others. As the Supreme Court observed in *Grange*, "a facial challenge fails where 'at least some' constitutional applications exist." 552 U.S. at 457 (quoting *Schall v. Martin*, 467, U.S. 253, 264 (1984)).

Evidence is key to the balancing of interests at the heart of the *Anderson-Burdick* framework. *Cf. Grange*, 552 U.S. at 449 (emphasizing that facial challenges "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records'") (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). A court assessing whether a plaintiff has met his or her burden in a facial challenge "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 450. Thus, to determine whether the consent requirement's constitutional applications are outweighed by impermissibly burdensome applications, we need evidence of both the existence and prevalence of such unconstitutional applications. Appellants, however, provide none—their Complaint does not allege how many candidates want to use the names of individuals or New Jersey incorporated associations in their slogans, how many of those candidates sought consent, how many were denied consent, or the nature of the slogans that were ultimately rejected. *See id.* ("[A]n empirically debatable assumption . . . is too thin a reed to support a credible First Amendment distinction' between permissible and impermissible

burdens . . . .") (alteration in original) (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 600 (2000) (Stevens, J., dissenting)).

Appellants' Complaint does not suggest that Appellants themselves faced any burdens in seeking consent. The most we can infer from Appellants' Complaint is that a candidate who wishes to use the name of an individual or group in their slogan must take some steps to seek consent, and that in some cases said consent is not given. Such a burden is not trivial, but it is the sort of "ordinary and widespread" burden that the Supreme Court has long held to not be severe. *Clingman*, 544 U.S. at 593; *Crawford*, 553 U.S. at 206 ("*Clingman*'s holding that burdens are not severe if they are ordinary and widespread would be rendered meaningless if a single plaintiff could claim a severe burden.") (Scalia, J., concurring); *cf. Norman*, 502 U.S. at 290 (concluding that total prohibition on using name of established party warranted strict scrutiny but acknowledging that State have could avoided constitutional infirmity "merely by requiring the candidates to get formal permission to use the name from the established party they seek to represent").

The District Court also suggested that candidates who are not able to use their preferred slogans might lose out on "'the potential power of [naming a person or group] as a signal to voters of a candidate's ideological bona fides,' a valuable voting cue without which a candidate may face 'a potentially serious handicap.'" *Mazo*, 551 F. Supp. 3d at 504 (quoting *Soltysik v. Padilla*, 910 F.3d 438, 442 (9th Cir. 2018)). That may be so, but for a burden to be severe, it is not

enough that it makes it more difficult for a candidate or party to win an election. Indeed, as the Court observed in *Timmons,* "[m]any features of our political system—*e.g.*, single-member districts, 'first past the post' elections, and the high costs of campaigning—make it difficult for third parties to succeed in American politics," but nonetheless, "the Constitution does not require States to permit fusion [candidacies] any more than it requires them to move to proportional-representation elections or public financing of campaigns." 520 U.S. at 362. The same is true here.

In sum, New Jersey's consent requirement does not discriminate against any particular voters, candidates, parties, or viewpoints, and to the extent it limits candidates' ability to communicate or associate with voters via their preferred ballot slogans, that burden is mitigated by the availability of alternative avenues. New Jersey's consent requirement thus imposes only a minimal burden on Appellants' First Amendment rights, so application of strict scrutiny under *Anderson-Burdick* is unwarranted.

2. New Jersey's Interests are Sufficient to Justify the Consent Requirement's Minimal Burden

Where a state election law imposes only minimal burdens, the State's "'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434). New Jersey asserts four interests that are furthered by the consent requirement: "preserving the integrity of the nomination process, preventing voter deception,

preventing voter confusion, and protecting the associational rights of third parties who might be named in a slogan." *Mazo*, 551 F. Supp. 3d at 506.[40] Because the consent requirement does not impose a severe burden, a state must show "relevant and legitimate" interests that are "sufficiently weighty to justify the limitation" for the consent requirement to survive lesser scrutiny. *Crawford*, 553 U.S. at 191 (quoting in part *Norman*, 502 U.S. at 288-89). In considering the weight of these interests, our review is "quite deferential," *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008), and we will not require "elaborate, empirical verification of the weightiness of the State's asserted justifications," *Timmons*, 520 U.S. at 364.[41]

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[40] The District Court also held that "[p]rotecting the associational rights of third parties who may be named in slogans" as a separate interest that was "closely correlated" with the other interests asserted by the Government. *Mazo*, 551 F. Supp. 3d at 507. We agree that protecting third parties' associational rights is a legitimate and important state interest for purposes of *Anderson-Burdick* balancing.

[41] Because the consent requirement does not impose a severe burden, there is no requirement that the law be narrowly tailored to the Government's asserted interests. *See, e.g.*, *Timmons*, 520 U.S. at 365. Furthermore, as stated previously, the Supreme Court expressly acknowledged in *Norman* that a State could "avoid" the ills of foreclosing one political party from using the name of an established party "merely by requiring the candidates to get formal permission to use the name from the established party they seek to represent." 502 U.S. at 290. Because New Jersey's policy choices satisfy *Anderson-Burdick*, our inquiry ends there.

Appellants' proffered alternatives also fail on the merits. First, Appellants contend that "New Jersey could place a disclaimer on the ballot to alert voters that each slogan is an unverified

Appellants concede that these are important and legitimate interests and the caselaw agrees. *See, e.g.*, *Eu*, 489 U.S. at 231 ("A State indisputably has a compelling interest in preserving the integrity of its election process."); *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973) ("It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal."); *Jenness*, 403 U.S. at 442 ("There is surely an important state interest . . . in avoiding confusion, deception, and even frustration of the democratic process[.]"); *Norman*, 502 U.S. at 290 (States have a legitimate interest in preventing "misrepresentation and electoral confusion"); *Tashjian*, 479 U.S. at 221-22 (States have "legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions"); *Anderson*, 460 U.S. at 796 ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will.").

Because these interests are all important, they need only outweigh the minimal burden imposed by the consent requirement. *Burdick*, 504 U.S. at 439. We conclude that the balance weighs decisively in the

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statement of fact or opinion" and proceed to allow any and all slogans. Appellant Br. 17. But, as the Government points out, this could actually undermine voter confidence and would thus be less capable of achieving the State's legitimate end. Gov. Br. 37-38. Second, Appellants contend that New Jersey should make a carve-out for slogans that express criticism. Appellant Br. 17. But that accommodation would itself be a form of content and viewpoint based discrimination, and so would not be an appropriate alternative. Gov. Br. 38-39.

Government's favor, and thus hold that the consent requirement is constitutional.

V. Conclusion

To safeguard the promise of democratic self-governance, our constitution charges States with the noble but often difficult duty to protect the fairness and integrity of elections without stifling the free exchange of ideas and associations that takes place between voters, parties, and candidates as part of every political campaign. And while courts have their own duty to fiercely guard First Amendment rights, where States enact politically neutral regulations of the mechanics of the electoral process itself, the deference embodied in the *Anderson-Burdick* balancing test is both appropriate and necessary. Here, New Jersey has struck a proper balance between the rights of voters, candidates, and third parties on the one hand, and the need to ensure order and fairness on the ballot on the other. We will therefore affirm the judgment of the District Court.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 20-08174

EUGENE MAZO; LISA MCCORMICK,

Plaintiffs,

v.

TAHESHA WAY, in her official capacity as New Jersey Secretary of State; CHRISTOPHER DURKIN, in his official capacity as Essex County Clerk; E. JUNIOR MALDANADO, in his official capacity as Hudson County Clerk; JOANNE RAJOPPI, in her official capacity as Union County Clerk; PAULA SOLLAMI COVELLO, in her official capacity as Middlesex County Clerk; STEVE PETER, in his official capacity as Somerset County Clerk,

Defendants.

Filed: July 30, 2021

OPINION

WOLFSON, Chief Judge:

Eugene Mazo and Lisa McCormick ("Plaintiffs"), former candidates for Congressional seats in New Jersey, bring suit against Secretary of State Tahesha Way and County Clerks Christopher Durkin, E. Junior Maldonado, Joanne Rajoppi, Paula Sollami

Covello, Elaine Flynn, and Steve Peter (collectively, "the Clerks"), alleging that Way denied their request to use certain political slogans on the primary ballot, which included the names of New Jersey incorporated associations or persons, but lacked written consent from those entities and persons, in violation of the First Amendment, and that the Clerks unconstitutionally declined to print those slogans. Plaintiffs seek to strike down N.J.S.A. §§ 19:23-17 and 25.1 ("the Slogan Statutes") as a result. Defendants now move to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The Clerks primarily contend that they had no say in whether Plaintiffs could use their preferred slogans, and no discretion to print them otherwise.[1] Way contends that the Court lacks subject matter jurisdiction because the 2020 primary is over, the 2022 primary is some time away, and the Slogan Statutes are constitutional under any standard of scrutiny. For the following reasons, I **GRANT** both motions to dismiss.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mazo and McCormick ran for Congress in 2020 but lost in the primaries. Am. Compl., ¶¶ 14-15, 23, 25. At issue are New Jersey's Slogan Statutes. N.J.S.A. § 19:23-17 permits primary candidates to request a six-word slogan to appear on the ballot next to their names. The slogan must "be for the purpose of indicating either any official act or policy to which he

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[1] Rajoppi moved to dismiss first. ECF No. 51. Covello and Flynn joined her motion. ECF Nos. 53, 55. Durkin, Maldonado, and Peter have neither joined nor filed their own motions, but this Opinion applies to them as well.

is pledged or committed, or to distinguish him as belonging to a particular faction or wing of his political party." *Id.* But "no such [ ] slogan shall include or refer to the name of any such person or any incorporated association of this State unless the written consent of such person or incorporated association of this State has been filed with the petition of nomination of such candidate." *Id.* If a candidate's slogan includes a name but lacks consent, it cannot be printed. N.J.S.A. § 19:23-25.1.

Both candidates allege that they could not use their preferred slogans in 2020. Mazo originally asked to use "Essex County Democratic Committee, Inc.," "Hudson County Democratic Organization," or "Regular Democratic Organization of Union County." Am. Compl., ¶ 37. State officials[2] rejected them all, informing Mazo that he needed to obtain consent from the named groups or else his nomination petition would read "NO SLOGAN." *Id.* ¶ 38. Mazo ultimately used a slogan authorized by an association he incorporated. *Id.* ¶ 39. McCormick originally asked to use "Not Me. Us.," which apparently names an organization in New Jersey, but learned that she could not do so without obtaining consent from the chairperson. *Id.* ¶¶ 41-42. She then sought to use "Bernie Sanders Betrayed the NJ Revolution," but never obtained permission from Bernie Sanders, so she could not use that slogan either. *Id.* ¶ 43-44. She settled for "Democrats United for Progress." *Id.* ¶ 45. Mazo and McCormick assert in their verified

[2] The Amended Complaint is unclear on this point, but it appears that the Division of Elections is solely responsible for reviewing candidates' slogans. Am. Compl., ¶¶ 41-44.

Amended Complaint that they will run for Congress again in 2022 using their preferred, though rejected, slogans. *Id.* ¶¶ 26, 40, 46.

New Jersey held its primaries on July 7, 2020. *Id.* ¶ 24. Five days before the election, Plaintiffs filed the instant lawsuit. ECF No. 1. On October 23, 2020, they filed an Amended Complaint, which contains one Count under the First and Fourteenth Amendments. ECF No. 45. Plaintiffs contend that the consent requirements in N.J.S.A. §§ 19:23-17 and 25.1 are an unconstitutional restriction on free speech and seek injunctive and declaratory relief.[3] Am. Compl., ¶¶ 48-68.

Rajoppi moved to dismiss on December 9, 2020, arguing that the Clerks are improperly named as defendants because they lack the authority to enforce the Slogan Statutes or depart from decisions made by State officials. Raj. Br., at 7-9. In short, the Clerks contend, they merely print what the Secretary approves. Way moved to dismiss on December 10, 2020, arguing that Plaintiffs' claims are moot as they relate to the 2020 primary because it is long over, yet unripe as they relate to the 2022 primary because it is speculative that Plaintiffs will use the same slogans without authorization if they run again. Way Br., at 8-11. Regardless, Way argues, the Slogan Statutes do not run afoul of the First Amendment whatever the standard of scrutiny is: the State has a compelling interest in preserving election integrity and

[3] Plaintiffs originally sought nominal damages against all Defendants. They have conceded that claim as to Secretary Way under the Eleventh Amendment, but not as to the Clerks. Pl. Br., at 6, 27-28.

preventing voter deception, which the Statutes advance by ensuring that candidates have a legitimate relationship with any person or group they name, and an equally compelling interest in protecting the associational rights of anyone named in a slogan. Way Br., at 25-27. The Slogan Statutes are also narrowly tailored to fit these ends, Way contends, because they do not completely ban any speech, just the non-consensual use of some names. *Id.* at 28.

Plaintiffs oppose both motions. They contend that the Clerks "refused to print the slogans" despite being independent, elected officials who are "accountable for the content and format of the ballots" and operate beyond "the Secretary's control." Pl. Br. I, at 6-9, 10-13. Next, Plaintiffs contend that their case is both not moot and ripe. They reason that, because the nomination process is compressed to a couple of months and they expect to run again in 2022 with the same slogans, the harm they suffered is "capable of repetition yet evading review." Pl. Br. II, at 9-10. Finally, according to Plaintiffs, the Slogan Statutes are content based speech restrictions subject to strict scrutiny, which are not narrowly tailored to fit the State's asserted interests. *Id.* at 19-25. Plaintiffs suggest that the State could place a general disclaimer on ballots, alerting voters to the fact that slogans are unverified, as a less restrictive means of achieving the same ends. *Id.* at 25.

II. LEGAL STANDARD

Under Fed. R. Civ. P. 12(b)(1), a court may dismiss a claim if there is no subject matter jurisdiction. *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007). A Rule 12(b)(1) motion can raise a

facial attack or a factual attack, which determines the standard of review. *Const. Party of Pennsylvania v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014) (citations omitted); *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 632 (3d Cir. 2017). On a facial attack, courts "only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff," since the motion contests the sufficiency of the pleadings. *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (quotations omitted); *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016).

On a factual attack, courts may "consider evidence outside the pleadings," such as affidavits, since the motion contests the underlying basis for jurisdiction. *Gould Elecs. Inc.*, 220 F.3d at 176 (citing *Gotha v. United States*, 115 F.3d 176, 178-79 (3d Cir. 1997)); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) ("[N[o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims."); *CNA v. United States*, 535 F.3d 132, 139 (3d Cir. 2008) ("[A] factual attack concerns the actual failure of [plaintiff's] claims to comport with the jurisdictional prerequisites.") (quotations and citation omitted). In such circumstances, the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case," *Mortensen*, 549 F.2d at 891, but "must be careful [ ] not to allow its consideration of jurisdiction to spill over into a determination of the merits of the case, and thus must tread lightly." *Kestelboym v. Chertoff*, 538 F. Supp. 2d 813, 815

(D.N.J. 2008) (quotations and citation omitted). The proponent of jurisdiction bears the burden to prove that it exists throughout the litigation. *Mortensen*, 549 F.2d at 891.

A court may also dismiss an action under Fed. R. Civ. P. 12(b)(6) if a plaintiff fails to state a claim upon which relief can be granted. When evaluating a Rule 12(b)(6) motion, I must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)). A complaint survives dismissal if it contains sufficient factual matter, accepted as true, to "state a claim . . . that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

To determine whether a complaint is plausible, a court conducts a three-part analysis. *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010). First, the court "takes note of the elements a plaintiff must plead to state a claim." *Id.* (quoting *Iqbal*, 556 U.S. at 675). Second, it identifies allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 131 (quoting *Iqbal*, 556 U.S. at 679). For example, "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do," *Iqbal*, 556 U.S. at 678, nor am I compelled to accept "unsupported conclusions and unwarranted inferences, or a legal conclusion couched

as a factual allegation." *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013) (quoting *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007)). Third, "where there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Santiago*, 629 F.3d at 131 (quoting *Iqbal*, 556 U.S. at 680). This is a "context-specific task that requires [me] to draw on [my] judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

III. DISCUSSION

A. Mootness and Ripeness

The Constitution gives federal courts the power to adjudicate only genuine "Cases" and "Controversies." Art. III, § 2, cl. 1; *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019). Courts enforce the case-or-controversy requirement through several "justiciability doctrines that cluster about Article III." *Allen v. Wright*, 468 U.S. 737, 750 (1984). These doctrines include "standing, ripeness, mootness, the political-question doctrine, and the prohibition on advisory opinions." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Toll Brothers, Inc. v. Twp. of Readington*, 555 F.3d 131, 137 (3d Cir. 2009). While "the most important . . . is standing," *Allen*, 468 U.S. at 750-51, solely mootness and ripeness are at issue here.

i. Mootness

"[I]t is not enough that a dispute [is] very much alive when suit [is] filed." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotations and citation omitted). Article III's case-and-controversy requirement "subsists through all stages of" litigation. *Lewis v.*

Continental Bank Corp., 494 U.S. 472, 477 (1990); *Alvarez v. Smith*, 558 U.S. 87, 92 (2009). This means that courts do not have the power to hear disputes if they become moot. *Khodara Envtl., Inc. ex rel. Eagle Envtl., L.P. v. Beckman*, 237 F.3d 186, 192-93 (3d Cir. 2001). A dispute is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)). The determinative question is "whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Rendell v. Rumsfeld*, 484 F.3d 236, 240 (3d Cir. 2007) (quotations and citation omitted). "[I]f developments occurring during the course of adjudication eliminate [the] plaintiff's personal stake in the outcome . . . , then a federal court must dismiss the case." *Gayle v. Warden Monmouth Cty. Corr. Inst.*, 838 F.3d 297, 303 (3d Cir. 2016) (quotations and citation omitted). But mootness sets a high bar: it must be "impossible for a court to grant any effectual relief whatever." *Knox v. Service Employees*, 567 U.S. 298, 307 (2012) (quotations and citation omitted).

Way argues that Plaintiffs' claims are moot because the 2020 primary is over, the nominees proceeded to the general election, the results of that election are certified, the winners are sworn into office, and Plaintiffs used other slogans without issue, all of which suggests there is no longer a live dispute concerning the Slogan Statutes. Way. Br., at 8. Without contesting those facts, Plaintiffs believe their claims fall within the "exception to the mootness doctrine for a controversy that is capable of repetition,

yet evading review."[4] *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (citing *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). That exception applies "if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Turner v. Rogers*, 564 U.S. 431, 439-40 (2011); *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018).

I agree with Plaintiffs that their claims are "capable of repetition, yet evading review." Plaintiffs meet the first prong because New Jersey's primaries are too truncated to permit meaningful, if any, judicial review in normal procedural time before voters choose who to nominate. Candidates must file their slogans no more than 64 days before the election. N.J.S.A. § 19:23-14. The State need not certify slogans until

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[4] Plaintiffs assert the First Amendment's overbreadth doctrine as an alternative basis for subject matter jurisdiction. Under that doctrine, a party may bring a facial challenge to a statute, even though it is not unconstitutional as applied to that party, because "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Such a party need only "satisf[y] the requirement of 'injury-in-fact'" to establish jurisdiction. Pl. Br. II, at 18-19 (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 953 (1984)). But Plaintiffs misapply the doctrine in this case. It is merely an exception to the "prudential limit[] on standing . . . . that a plaintiff generally must assert *his own* legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of others." *SEIU, Local 3 v. Municipality of Mt. Leb.*, 446 F.3d 419, 423 (3d Cir. 2006) (emphasis added). Satisfying it will not make a claim any less moot or more ripe.

there are 54 days to go, at which time it informs the Clerks of the names of the candidates who will appear on the ballot. *Id.* § 19:23-21. And the Clerks may print ballots anywhere from 50 days before the election to less than three, depending on the county. *Id.* § 19:23-22.4. This means that 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. Even a prudent candidate who timely submits her slogan will not generally have 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. *Arsenault v. Way*, No. 16-01854, 2021 WL 1986667, at *4 (D.N.J. May 17, 2021) (describing short timeline). Plaintiffs also satisfy the second prong because, quite simply, "it is reasonable to expect political candidates to seek office again in the future." *Belitskus v. Pizzingrilli*, 343 F.3d 632, 636-37, 648 n.11 (3d Cir. 2003); *see also Davis v. F.E.C.*, 554 U.S. 724, 736 (2008) (observing that a case would not be moot if plaintiff intended to "self-finance another bid for a House seat"). That expectation obtains regardless of whether a plaintiff substantiates her plans with evidence. *Merle v. United States*, 351 F.3d 92, 94 (3d Cir. 2003) (holding that it was "reasonable to expect that Merle will wish to run for election either in 2004 or at some future date" without even allegations of intent to do so). Nonetheless, in their Verified Amended Complaint, Plaintiffs maintain that they will run again in 2022, which carries the same weight as an affidavit. *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.").

Parties often proceed under the "capable of repetition, yet evading review" exception in election cases. *See, e.g.*, *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (holding that election law challenge was not moot "as long as [the state] maintains [its] present [laws]"); *Merle*, 351 F.3d at 95 (holding that election law challenge was not moot because it was reasonable to assume plaintiff would run for office again, and the same statute that caused plaintiff to sue would again bar candidacy); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 18 (1st Cir. 1996) ("[Elections are routinely] too short in duration to be fully litigated, and there [is] a reasonable expectation . . . that the same controversy will recur involving the same complaining party.") (collecting cases); *Branch v. F.C.C.*, 824 F.2d 37, 41 n.2 (D.C. Cir. 1987) ("Controversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters 'capable of repetition, yet evading review.'"); *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003) ("Election cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits."); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 545 n.1 (6th Cir. 2014) (same); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1242 n.2 (11th Cir. 2013) (same); *De La Fuente v. Cortes*, 261 F. Supp. 3d 543, 549 (M.D. Pa. 2017) ("Cases in which apparently moot claims are likely to arise again have long been gathered under the 'capable of repetition yet evading review' exception."); *Arons v. Donovan*, 882 F. Supp. 379, 383 (D.N.J. 1995) ("The issues in the

instant case are not moot merely because the election that gave rise to the request for injunctive relief is over."); *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 623-24 (E.D. Pa. 2018) ("[I]t is reasonable to assume that Plaintiffs would attempt to run for office in future elections. Furthermore, the present case is too short in duration to be fully litigated, and the same electoral misconduct is capable of repetition in future elections.").

Way's remaining arguments similarly find no sound footing. She first points to the basic, undisputed proposition that the "capable of repetition, yet evading review" exception is "narrow and available only in exceptional situations." Way. Rep. Br., at 3 (quoting *Brennan v. William Paterson College*, 492 Fed. App'x. 258, 265 (3d Cir. 2012)). Yet, courts have determined that election-related challenges such as the present one rise to that level, and Way recognizes as much elsewhere in her motion. *Id.* at 9 ("[T]he 'capable of repetition, yet evading review' doctrine is appropriate in election matters."). Way also argues that Plaintiffs have not made a "credible showing that the Slogan Statutes would bar the use of their desired slogans and that they would be subject to the same harm in 2022." *Id.* at 4-5. That argument is better directed at ripeness (or even standing), *see infra*, since it goes to whether the allegedly harmful conduct will repeat as anticipated. *Cf. Vitek v. Jones*, 445 U.S. 480, 504 (1980) (Blackmun, J., dissenting) (explaining, in the context of ripeness, that "[a] hypothetical threat is not enough"); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (holding that standing's injury-in-fact requirement cannot be "stretched beyond its purpose," *e.g.*, by a string of events that is too hypothetical or

contingent to count as "imminent"). In any case, Way offers nothing more than a bare assertion that the conduct giving rise to this suit is unlikely to happen again, which is not sufficient to meet her "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000).

Way further argues that Plaintiffs' claims are moot because "[t]he mere act of running for office is not the triggering event for the application of the Slogan Statutes." Way Br., at 9. Rather, Way says, the triggering event is one step removed: seeking approval for a slogan. I disagree. For one, there is no reason to doubt that Plaintiffs will take advantage of the opportunity afforded by the Slogan Statutes should they decide to run in 2022, since they attempted to do so repeatedly in 2020. That fact is crucial. Moreover, entering the primary reasonably entails invoking the Slogan Statutes to communicate with voters, advocate for a certain brand of political reform, or support particular causes with particular viewpoints. Running for office goes hand in hand with engaging in such speech activity, and the two are highly correlated here as well.[5] *Cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010) ("[Political expression] is central to the meaning and purpose of the First Amendment."); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement

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[5] It appears that a candidate designates a slogan on her nomination petition itself, which she must file at the outset to enter the primary, so these events actually happen in tandem. N.J.S.A. § 19:23-17.

that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

Stated differently, Way frames the "features of [this] particular series of [events]" as especially "unique" or attenuated when they are not, while overlooking record evidence—Plaintiffs' candidate history—which "apprises us of the likelihood of a similar chain." *Hamilton v. Bromley*, 862 F.3d 329, 336 (3d Cir. 2017) (some alterations in original); *New Jersey Tpk. Auth. v. Jersey Cent. Power & Light*, 772 F.2d 25, 33 (3d Cir. 1985). Viewed through the proper lens, it is plausible, neither too speculative nor tenuous, that each contingency will take place as alleged, and as it did in 2020. *Compare Int'l Organization of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 468-70 (1991) (rejecting mootness because candidate for union office needed to simply (1) run again and (2) face the same rule against preconvention mailing), *with Cephas v. Int'l Longshoremen's Ass'n*, 785 Fed. App'x. 89, 91 (3d Cir. 2019) (finding mootness because candidate would need to (1) run again, (2) win, (3) engage in similar behavior triggering investigation, and (4) not receive notice of discipline). Accordingly, Plaintiffs' challenge to the Slogan Statutes is not moot.

ii. Ripeness

Way also argues that Plaintiffs' claims are not ripe because the next primary will not happen for some time. Like mootness, ripeness originates from the case-or-controversy requirement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 n.5 (2014). Although it is "a matter of degree whose threshold is notoriously hard to pinpoint," *Plains All Am. Pipeline*

L.P. v. Cook, 866 F.3d 534, 539 (3d Cir. 2017) (quotations and citation omitted), at its core, ripeness determines whether a plaintiff sues at the right time, *i.e.*, whether she has suffered a harm *yet*, or whether the threat of future harm is sufficiently imminent to constitute a cognizable injury. *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir. 1994); *Free Speech Coal., Inc. v. Att'y Gen. of United States*, 825 F.3d 149, 167 n.15 (3d Cir. 2016). The point is to ensure that the parties are in a "sufficiently adversarial posture," the facts of the case are "sufficiently developed," and the plaintiff is "genuinely aggrieved." *Plains*, 866 F.3d at 539; *Wyatt, Virgin Islands, Inc. v. Gov't of the Virgin Islands*, 385 F.3d 801, 806 (3d Cir. 2004) (requiring a dispute to "have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them") (quotations and citation omitted).

The Supreme Court gauges ripeness in two principal ways: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The Third Circuit applies a "somewhat refined" test in declaratory judgment cases, where it is particularly "problematic" to define ripeness with precision. *Khodara Envtl., Inc. v. Blakey*, 376 F.3d 187, 195-96 (3d Cir. 2004). Courts must look to the (1) adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment. *Step-Saver Data Systems, Inc. v. Wyse*

Technology, 912 F.2d 643, 647 (3d Cir. 1990). Although different in form, this test is not different in substance from *Abbott Lab*, whose factors "still guide [the] analysis." *Plains*, 866 F.3d at 540. Nor are the factors "exhaustive." *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 412 (3d Cir. 1992). Any ripeness analysis must heed the well-settled rule that courts should avoid deciding "federal constitutional matters in advance of the necessity of deciding them, to postpone judicial review where it would be premature." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring); *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1249 (3d Cir. 1996) ("Courts are particularly vigilant to ensure that cases are ripe when constitutional questions are at issue.") (citation omitted).

1. Adversity of Interests

I begin with adversity of interests. "Parties' interests are adverse where harm will result if the declaratory judgment is not entered." *Travelers Ins. Co. v. Obusek*, 72 F.3d 1148, 1154 (3d Cir. 1995). If a "plaintiff's action is based on a contingency, it is unlikely that the parties' interests will be sufficiently adverse." *Armstrong*, 961 F.2d at 411-12. This is no less true in the First Amendment context. *Salvation Army v. Dep't of Cmty. Affairs of N.J.*, 919 F.2d 183, 192 (3d Cir. 1990). However, "the party seeking review need not have suffered a 'completed harm' to establish adversity." *Florio*, 40 F.3d at 1463. "It suffices that there is a 'substantial threat of real harm and that the threat . . . remain real and immediate throughout the course of the litigation." *Plains*, 866 F.3d at 541 (quoting *id.*). The threat simply cannot be "imaginary

or speculative," *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), as "[a] claim is not ripe for adjudication if it rests upon [ ] future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotations and citation omitted).

Plaintiffs argue that they will use—and the State will deny—their same preferred slogans again in 2022, which Way characterizes as "speculative at best." Way Br., at 12-13. However, the facts in this case support Plaintiffs' position. The State rejected Plaintiffs' slogans in 2020, under "binding election law," and there is no basis on which to conclude that the Slogan Statutes will operate to a different end in 2022. *De La Fuente*, 261 F. Supp. 3d at 549-50 (concluding that plaintiff "pled sufficient facts to establish Article III standing" when he "intend[ed] to engage in the political process" because it is "beyond question that participation in politics is affected with constitutional interests") (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979), *aff'd*, 751 Fed. App'x. 269 (3d Cir. 2018)). In other words, Plaintiffs' injuries are likely to repeat because they have happened already, and Plaintiffs sufficiently allege that nothing material will change next time around. Where the Third Circuit has found such a dispute to be unripe, the State has expressly and completely disavowed enforcing the statute in the future. *Tait v. City of Phila.*, 639 F. Supp. 2d 582, 593-94 (E.D. Pa. 2009) (collecting cases), *aff'd*, 410 Fed. App'x. 506 (3d Cir. 2011). Way has not disavowed the Slogan Statutes here, but stands by them.

Similarly, although Plaintiffs have not *yet* entered the 2022 primary, or asked the State for permission to use their original slogans in that race specifically, because they cannot do so until the State releases nominating petitions in December 2021 or January 2022, they are not strictly requesting pre-enforcement review, as Way suggests. They are asking the Court to review a statute that the State has invoked against them once before, under circumstances they insist will recur. Indeed, they have represented in their Verified Amended Complaint that they will reuse their preferred, but rejected, slogans verbatim in 2022. Am. Compl., ¶¶ 26, 40, 46. If declaratory judgment were 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. There does not appear to be a path for Plaintiffs to follow to comply with the Slogan Statutes without surrendering what they wish to say on the ballot, short of unexpectedly obtaining consent from organizations or persons who to this point have withheld it. The ripeness doctrine does not put Plaintiffs to such a "Hobson's choice," especially not when they seek to engage in protected activity. *Babbitt*, 442 U.S. at 298 ("When the plaintiff has alleged an intention to engage in a course of conduct, arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of [enforcement] thereunder, he should not be required to await [an adverse State decision] as the sole means of seeking relief.") (quotations and citation omitted). Accordingly, Plaintiffs' interests are adverse to the State's.

2. Conclusiveness of Judgment

In addition to adverse interests, the parties' dispute "must be based on a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." *Plains*, 866 F.3d at 542 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)). Two concerns are paramount here: (1) whether the "legal status of the parties would be changed or clarified," *Travelers*, 72 F.3d at 1155, and (2) "whether further factual development . . . would facilitate decision, so as to avoid issuing advisory opinions, or the question presented is predominantly legal." *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 344 (3d Cir. 2001).

This prong also favors ripeness. Plaintiffs bring a facial First Amendment challenge to the Slogan Statutes, which presents a predominantly legal question, as with "most First Amendment cases." *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 426 (W.D. Pa. 2013); *Florio*, 40 F.3d at 1468-69 ("Factual development would not add much to the plaintiffs' facial challenges to the constitutionality of the statute . . . . [it] is of minimal assistance in facial challenges such as this."). Further, there is not "substantial ambiguity as to what conduct [the Slogan Statutes] authorize[]," which might render the legal question inappropriate for judicial resolution at this time. *City of Los Angeles v. Patel*, 576 U.S. 409, 416 (2015). The Statutes plainly (and only) prohibit nonconsensual use of any person's name or the name of any incorporated association in New Jersey. Under

these circumstances, it is not "impossible to tell whether and to what extent [they] deviate from the requirements of the [First Amendment]," *id.*, and "factual development would [not] significantly advance [my] ability to deal with the legal issues presented." *Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 68 (3d Cir. 2003) (quotations omitted). The Slogan Statutes are not "susceptible to a wide variety of interpretations" either. *Sibron v. New York*, 392 U.S. 40, 60 (1968).

Even if this case did not present a predominantly legal question, "it is hard to see how a more concrete factual situation would aid resolution of the plaintiffs' First Amendment free speech challenge to the statute." *Florio*, 40 F.3d at 1469; *Armstrong*, 961 F.2d at 412. Plaintiffs allege that they already engaged in proscribed speech, they will do so again in 2022, and the same State law will operate to their detriment then. If I dismissed this case as unripe, their future claims "would most likely parallel those claims already presented in the present action, and as such it is unlikely that there would be any change in the substance or clarity of the challenges to the [Slogan Statutes]." *Florio*, 40 F.3d at 1469. To that extent, whatever judgment I render, it will be conclusive.

3. Practical Utility of Judgment

Finally, I turn to practical utility, which "goes to whether the parties' plans of actions are likely to be affected by a declaratory judgment." *Plains*, 866 F.3d at 543-44; *Step-Saver*, 912 F.2d at 649 (holding that a useful judgment helps parties "make responsible plans about the future"). A judgment in this case will be useful to Plaintiffs no matter the result. "A

declaration of [their] rights and those of all others who would seek to engage in similar activity would permit [them] to speak without fear of governmental sanction or regulation of their activities." *Florio*, 40 F.3d at 1470. That is what Plaintiffs seek, and it would give them desired clarity in the 2022 primaries. At the same time, although Plaintiffs maintain that they will resubmit their rejected slogans in 2022, without the requisite consent, I assume that their "willingness to do so is likely to be affected by resolution of this action." *Florio*, 40 F.3d at 1470 & n.13 ("Current First Amendment jurisprudence does not require a Thoreau or a Gandhi who is willing to go to jail for his beliefs but permits the more cautious Emersons among us to assert our fears of interference with our fundamental rights in the civilized atmosphere of a court before subjecting ourselves to the risk of [enforcement].").

In sum, Plaintiffs have demonstrated that their claims are both not moot and ripe. The crux of Way's opposition is that I cannot hear this case because it is too far removed from 2020, and too far away from 2022. However, my "abiding interest in the constitutionality of the elections process . . . cannot be regulated by adjudging every case unripe before the election or moot after [it]." *Benezet Consulting, LLC v. Boockvar*, 433 F. Supp. 3d 670, 684 (M.D. Pa. 2020) (quoting *Morrill v. Weaver*, 224 F. Supp. 2d 882, 891 (E.D. Pa. 2002) (citing *Meyer v. Grant*, 486 U.S. 414, 425 (1988))). That would place Plaintiffs in a constitutional catch-22 with no clear path to

jurisdiction.[6] I may therefore review Plaintiffs' challenge to the Slogan Statutes at this time.

B. The Constitutionality of the Slogan Statutes

Plaintiffs primarily raise a facial challenge[7] to the Slogan Statutes, arguing that the consent provision is

[6] This would arguably be made worse by the fact that courts generally decline to upset the status quo, in terms of election procedures, in the run up to an election, and operate under a presumption against lastminute changes. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). I suspect that the State would invoke the *Purcell* principle if Plaintiffs brought this challenge close to primary day. *Accord Democratic-Republican Org.*, 900 F. Supp. 2d at 461 n.8 ("As in many election related cases, timing is critical . . . . At this late state in the election process, any injunctive remedy ordered by this Court would dramatically upset ongoing ballot printing and distribution.").

[7] Plaintiffs do bring an as-applied challenge, which "does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010). Although the burden is lighter compared to a facial challenge, *see Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998), Plaintiffs' as-applied challenge fails because they do not plead any facts showing that Way enforced the Slogan Statutes against them in an unconstitutional or otherwise irregular manner. *Accord Democratic-Republican Org.*, 900 F. Supp. 2d at 460 ("I do not understand how Plaintiffs' argument in this regard varies from their argument that the statute is facially invalid . . . . [they] do not offer the 'particular circumstances' in which they were deprived of their constitutional rights. Indeed, Plaintiffs have failed to provide any facts or allegations demonstrating that the statute is being applied specifically against Plaintiffs in an

an unconstitutional speech restriction regardless of how it is enforced or applied.[8] Am. Compl., ¶ A, at 11. "A facial challenge 'seeks to vindicate not only [Plaintiffs'] own rights, but those of others who may also be adversely impacted by the statute in question.'" *Bruni v. City of Pittsburgh*, 841 F.3d 353, 362 (3d Cir. 2016) [*Bruni I*] (quoting *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 623 (3d Cir. 2013)). Normally, to prevail, a plaintiff must "establish that no set of circumstances exist under which the [law] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or show that the law lacks "a plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quotations omitted). But facial challenges in the First Amendment context are "more forgiving." *Bruni v. City of Pittsburgh*, 914 F.3d 73, 84 (3d Cir. 2019) [*Bruni II*]. The Supreme Court has recognized "a second type of facial challenge" in such cases, "whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *United States v. Stevens*, 559 U.S.

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unconstitutional manner."). The constitutionality of the Slogan Statutes turns on whether the consent provision may exist at all consistent with the First Amendment, not on how it was enforced in this instance.

[8] Although Plaintiffs appear to assert an unqualified right to dictate what appears next to their names on the ballot, Pl. Br. II, at 25 ("This case is about candidates saying whatever they want without restriction, regardless of any government authorization requirement."), I do not construe their Amended Complaint to raise such an across-the-board challenge. My review is confined to the consent provision alone.

460, 473 (2010). The party seeking to invalidate the law nevertheless bears a heavy burden to demonstrate that it is unconstitutional. *Grange*, 552 U.S. at 450-51 (describing reasons for this including judicial restraint, importance of formulating narrow rules of constitutional law, and desire not to short circuit the democratic process). I must apply the "relevant constitutional test" to resolve Plaintiffs' challenge while keeping "these principles in view." *Bruni II*, 941 F.3d at 83.

i. The Relevant Constitutional Test Is *Anderson-Burdick*

The parties disagree on what constitutional test applies to the Slogan Statutes. Way initially argues for the sliding scale test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and refined in *Burdick v. Takushi*, 504 U.S. 428 (1992). Plaintiffs argue for strict scrutiny, construing the Slogan Statutes as content based speech restrictions. Way disputes whether strict scrutiny applies, but nonetheless argues that, assuming *Anderson-Burdick* does not, intermediate scrutiny is appropriate because the Slogan Statutes are content neutral. I agree with Way that *Anderson- Burdick* is the correct test.[9]

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[9] Where a state election regulation does not burden a right at all, the state need only provide a rational basis for the statute. *Donatelli v. Mitchell*, 2 F.3d 508 514 & n.10 (3d Cir. 1993) (declining to apply *Anderson-Burdick* because plaintiffs' rights not burdened); *Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004) ("Biener also cannot establish an infringement on the fundamental right to vote . . . . As the [election] filing fee does not infringe upon a fundamental right, nor is Biener in a suspect class, we consider the claims under a rational basis test.") (citation omitted); *Voting for Am., Inc. v. Andrade*, 488 Fed.

States have for a long time enacted "comprehensive, and in many respects complex, election codes regulating in most substantial ways . . . the time, place, and manner of holding primary and general elections." *Storer v. Brown*, 415 U.S. 724, 730 (1974). In much the same way, although it is "beyond cavil that 'voting is of the most fundamental significance,'" *Burdick*, 504 U.S. at 433 (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)), "the right to vote in any manner and the right to associate for political purposes through the ballot are [not] absolute." *Id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986)). States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. Art. I, § 4, cl. 1, and they have even more power over local elections. *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986); *Foster v. Love*, 522 U.S. 67, 69 (1997) ("[The Elections Clause] invests the States with responsibility for the mechanics of . . . elections."). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick*, 504 U.S. at

App'x. 890, 899 (5th Cir. 2012) (applying rational basis review as opposed to *Anderson-Burdick* because state election law did not implicate or burden specific constitutional rights); *Molinari v. Bloomberg*, 564 F.3d 587, 602 (2d Cir. 2009) (same); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 310 (S.D.N.Y. 2020) ("Under this framework, election laws that impose no burden on the right to vote are subject to rational-basis review."). There is no dispute here that the Slogan Statutes burden, in some manner, Plaintiffs' First Amendment rights. *See infra*.

433. Accordingly, the Supreme Court applies the so-called *Anderson-Burdick* sliding scale test to "a wide variety of challenges to . . . state-enacted election procedures," including those implicating First Amendment rights. *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018).

Under *Anderson-Burdick*, "the rigorousness of [a court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens" protected activity under the First Amendment. *Burdick*, 504 U.S. at 434. Determining the extent of the burden requires "weighing" three factors: (1) the "character and magnitude" of the constitutional injury, (2) "the precise interests put forward by the State as justifications for the burden imposed by its rule," and (3) "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789-90. If, after reviewing these factors, an election administration regulation imposes "'severe' restrictions" on a plaintiff's First Amendment rights, then it is constitutional only if "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). "In other words, [something like] strict scrutiny applies."[10] *Wilmoth v. Sec'y of New Jersey*,

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[10] In contrast, to determine whether strict or intermediate scrutiny applies to speech that is regulated outside of the *Anderson-Burdick* framework, the inquiry is whether the regulation is content based or content neutral. *See, e.g.*, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated

731 Fed. App'x. 97, 102 (3d Cir. 2018). But if a regulation "imposes only 'reasonable, nondiscriminatory restrictions,'" *Anderson*, 460 U.S. at 788, then "the State need not establish a compelling interest to tip the constitutional scales in its direction." *Burdick*, 504 U.S. at 439. The State must simply show that its "legitimate interests sufficient[ly] . . . outweigh the limited burden." *Id.* at 440. In short, lesser burdens receive lesser scrutiny, while greater burdens require more substantial justifications. *Wilmoth*, 731 Fed. App'x. at 101-02.

Although the *Anderson-Burdick* test is well-defined, the threshold question—*whether* it applies—is not. The Supreme Court has never articulated a general rule or set of factors. *See, e.g.*, *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999) (stating that there is no "litmus-paper test" to separate "valid ballot-access provisions from invalid interactive speech restrictions" and "no substitute for the hard judgments that must be made"). Neither, it appears, has any appellate court done so. *See, e.g.*, *Rogers v. Corbett*, 468 F.3d 188, 194 (3d Cir. 2006)

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speech.") (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (observing that whether a law is content based is often "dispositive"). The nature or size of the burden does not affect the standard of review in this context. *See, e.g.*, *Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000) ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans . . . . When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not afforded to the Government merely because the law can somehow be described as a burden rather than outright suppression.").

("*Anderson* promulgated a less categorical system of classification . . . . [a court's] scrutiny is a weighing process."); *Ariz. Green Party v. Reagan*, 838 F.3d 983, 990 (9th Cir. 2016) ("The Supreme Court and our sister circuits have emphasized the need for context-specific analysis.").

In deciding to apply *Anderson-Burdick* to the Slogan Statutes, I am guided primarily by the Supreme Court's decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), in which it utilized the test to reject a First Amendment challenge to Minnesota's "anti-fusion" law, which barred multiple parties from endorsing the same candidate on the ballot. 520 U.S. at 351. The Court in *Timmons* was "unpersuaded . . . that [a party] has a right to use the ballot itself to send a particularized message," explaining that "[b]allots serve primarily to elect candidates, not as forums for political expression," and parties "retain great latitude . . . to communicate ideas . . . through [their] participation in the campaign." *Id.* at 361-63. The Court then invoked *Timmons* in *Grange* to reject a First Amendment challenge to a Washington statute permitting candidates to self-select party designations regardless of which party actually nominated them, and even if the party they selected found them "repugnant." 552 U.S. at 444, 447. The *Grange* Court characterized the law as "unexceptionable," and reiterated that the First Amendment does not guarantee political parties a right to use the ballot for speech or expressive purposes, even where "the State affords candidates the opportunity to [do so]." *Id.* at 453 n.7.

Applying the reasoning in *Timmons* and *Grange* to this case,[11] it is clear that the speech-related consent provision in the Slogan Statutes, though it may prevent Plaintiffs from referencing associations with a person or entity on the ballot in certain circumstances, warrants the *Anderson- Burdick* framework. New Jersey's primary ballots are not "billboards for political advertising," *Timmons*, 520 U.S. at 365, nor are they designed to advance Plaintiffs' campaign-adjacent speech, regardless of whether there is some "connection" or "relationship" between the slogans and political expression/association. *Fusaro v. Cogan*, 930 F.3d 241, 250-52 (4th Cir. 2019). The ballots are "State-devised forms" that are "necessarily short" and that "do not allow for narrative statements by candidates," and over which the State has wide "discretion in prescribing the particular makeup." *Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992); *New York State Democratic Party v. Lomenzo*, 460 F.2d 250, 251-252 (2d Cir. 1972) (holding that there is much useful information about parties and candidates that a State is free not to mention or elicit on the ballot, even if physical limitations do not prevent it from doing so); *see also Anderson v. Martin*, 375 U.S. 399, 402 (1964)

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[11] While *Timmons* and *Grange* both concerned the rights of political parties, the Fourth Circuit has reasoned that the same logic applies to candidates, a proposition with which I agree. *Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169, 176 (4th Cir. 2017) (reading *Timmons* and *Grange* to "confirm[] that *local candidates themselves* have no First Amendment right to use the ballot 'as [a] forum[] for political expression' in which to communicate to voters their status as a party's nominee") (emphasis added).

(describing "the most crucial stage in the electoral process" as "the instant before the vote is cast"). I reached a similar conclusion in *Democratic-Republican Org. of New Jersey v. Guadagno*, 900 F. Supp. 2d 447 (D.N.J. 2012), *aff'd*, 700 F.3d 130 (3d Cir. 2012), where I applied *Anderson-Burdick* to a State election provision which, like the Slogan Statutes, permits unaffiliated candidates to request a party designation of up to three words, with the caveat they may not use the name of a party whose candidates have already qualified for the ballot, such as "Democrat" or "Republican." *Id.* at 461-63; N.J.S.A. § 19:13-4. I made this determination despite plaintiff's contention that the provision "prevent[ed] candidates from meaningfully associating" with the party "of their choice." *Id.* at 462. In doing so, I noted that there is no "fundamental right regarding ballot treatment," and found "*Timmons* to be instructive." *Id.* at 466.

In sum, the Supreme Court has "repeatedly [considered under *Anderson-Burdick*] . . . regulations that have the effect of channeling expressive activity at the polls." *Burdick*, 504 U.S. at 438; *Storer*, 415 U.S. at 728. Of course, like all such regulations, the Slogan Statutes "inevitably affect[]—at least to some degree—the individual's right" to speak about political issues and "associate with others for political ends." *Anderson*, 460 U.S. at 788; *John Doe No. 1 v. Reed*, 561 U.S. 186, 213 (2010) (Sotomayor, J., concurring). But they do so in the context of inherently "limited ballot space," where there is no fundamental right to mere party designations, much less substantial declarations of political sentiment. *Timmons*, 520 U.S. at 364. The Slogan Statutes are therefore subject to *Anderson-Burdick* sliding scale scrutiny, not a more

"conventional and familiar" First Amendment standard of review. *Rogers*, 468 F.3d at 194.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), does not command a contrary result. In *McInytre*, the Supreme Court distinguished between laws which regulate "pure speech" on the one hand, and laws which by contrast "control the mechanics of the electoral process." *Id.* at 345. The Court then declined to apply *Anderson-Burdick* to a law prohibiting people from distributing political leaflets without printing the responsible party's name and address on them. *Id.* at 344-47. *McIntyre* is distinguishable because, unlike the Slogan Statutes, leafletting cannot be construed as an "election code provision[] governing the voting process itself." *Id.* at 345. Likewise, contrary to the law struck down in *McIntyre*, the Slogan Statutes stand "a step removed from the communicative aspect" of the regulated conduct, and fall "within the realm" of *Anderson-Burdick* in that regard. *Doe*, 561 U.S. at 213 (Sotomayor, J., concurring); *see also Am. Const. L. Found.*, 525 U.S. at 215 (O'Connor, J., concurring in part) (suggesting "less exacting" scrutiny for regulations which "indirectly burden speech but are a step removed from [its] communicative aspect . . . and are necessary to maintain an orderly electoral process"). Finally, "[s]ince the turn of the century, 'a consensus has emerged' that laws [regarding restrictions on leafletting or petition] circulators 'are subject to strict scrutiny analysis'" rather than something akin to the *Anderson-Burdick* test. *Wilmoth*, 731 Fed. App'x. at 102 (quoting *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 316-17 (4th Cir. 2013)). This consensus "has its genesis in

Meyer [ ], where a unanimous Supreme Court held that Colorado's criminalization of paid petition circulators amounted to an unconstitutional restriction on 'core political speech.'" *Id.* (quoting 486 U.S. at 422). Critically, in *Meyer*, the Court observed that "the circulation of a petition involves the type of interactive communication concerning political change" for which First Amendment protection "is at its zenith." 486 U.S. at 421-22. *McIntyre* thus does not change the conclusion that *Anderson-Burdick* governs my constitutional inquiry into the Slogan Statutes.

ii. Applying *Anderson-Burdick* to the Slogan Statutes

As discussed *supra*, under *Timmons* and *Grange*, Plaintiffs do not have a right to speak through the ballot. New Jersey could presumably repeal the Slogan Statutes altogether without running afoul of the First Amendment, and did not need to enact them in the first place. *See, e.g.*, *Rosen*, 970 F.3d at 175 ("With respect to the political designations of the candidates on nomination papers or on the ballot, a State could wash its hands of such business and leave it to the educational efforts of the candidates themselves, or their sponsors, during the campaigns."); *Bachrach v. Sec'y of Com.*, 382 Mass. 268, 273 (1981) ("There is certainly much useful information about parties and candidates that a State is free not to mention or elicit on the ballot, even if physical limitations do not prevent [it].").

But once a State "admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of the Federal and

State Constitutions regarding freedom of speech and association." *Rosen*, 970 F.3d at 175; *Riddell v. Nat'l Democratic Party*, 508 F.2d 770, 775-79 (5th Cir. 1975) ("While it is true that the administration of the electoral process is a matter that the Constitution largely entrusts to the states, in exercising their powers of supervision over elections 'the states may not infring[e] upon basic constitutional protections,' and 'unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments.'") (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)). That is, the State must exercise its election- related discretion in subordination to relevant constitutional guarantees. *Bullock v. Carter*, 405 U.S. 134, 140-41 (1972). *Anderson-Burdick* safeguards the relevant constitutional guarantees in this matter, and I account for Plaintiffs' First Amendment rights to speech and association on the ballot in the context of its framework. The State, recognizing this, does not take the position that Plaintiffs are entitled to less than *Anderson-Burdick*.

1. The Magnitude of the Burden

With *Anderson-Burdick* as the standard, I now address the extent to which the Slogan Statutes burden Plaintiffs' rights, which determines whether the Statutes must be narrowly tailored to a compelling state interest or must merely "outweigh" a legitimate state concern. *Wilmoth*, 731 Fed. App'x. at 102. "Strict scrutiny [ ] is appropriate only if the burden is severe." *Clingman v. Beaver*, 544 U.S. 581, 582 (2005). If it is not severe, then lesser scrutiny is appropriate, and the

State's "important regulatory interests will usually be enough." *Timmons*, 520 U.S. at 351.

"Burdens are severe if they go beyond the mere inconvenient." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment) (quoting *Storer*, 415 U.S. at 728-29). "The hallmark of a severe burden is exclusion or virtual exclusion from the ballot." *Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 177 (2d Cir. 2020). Burdens generally are not severe if they require "nominal effort" from everyone, *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment), or if they are "ordinary" and "widespread." *Clingman*, 544 U.S. at 593-97. Beyond these guideposts, I must make "a careful, ground-level appraisal [ ] of [the] burdens" from a "practical" perspective. *Crawford*, 553 U.S. at 210-11 (Souter, J., dissenting) (citing *Burdick*, 504 U.S. at 434). To begin, I do not have any information before me suggesting that the act of obtaining consent, or the process of filing it in written form with the Division of Elections, burdened Plaintiffs. They do not allege that seeking approval from various people or groups proved prohibitive or even difficult. However, the "relevant" burdens must also be "those imposed on" candidates who *have not* obtained the requisite consent, or who cannot do so. *Crawford*, 553 U.S. at 198 ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of SEA 483."). Viewed through this lens, the Slogan Statutes may pose obstacles as a general matter. For instance, a candidate may not have easy access to the person she wishes to name; may not know who from an

incorporated group to ask for consent or where to find them; may need to go to great lengths or inconvenience to convince someone to agree to an association; or may need to offer concessions in return. These are non-trivial burdens arising out of the consent provision.

Determining the magnitude of the burden further requires considering its "likely" consequences "*ex ante*," "categorically," and on "[candidates] generally." *Crawford*, 553 U.S. at 206 (Scalia, J., concurring in the judgment) (quoting *Storer*, 415 U.S. at 738). I can perceive three in this case. First, the Slogan Statutes may chill speech if candidates suspect that they will never be able to obtain consent from someone they wish to name. *Cf. Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring) (writing that the First amendment protects against government "inhibition as well as prohibition"). Second, the Statutes may force Plaintiffs to change what they say altogether if a named entity withholds consent (for whatever reason), or only consents if the message is sufficiently favorable to it. This could channel dissenting, negative, controversial, or unpopular slogans into more tolerable forms or benign/positive tones. *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1763 (2019) ("Giving offense is a viewpoint."). As pled, McCormick arguably experienced a similar situation: she could not obtain consent from Bernie Sanders for her slogan stating that he "Betrayed the NJ Revolution." Am. Compl., ¶¶ 43-44. Third, the Statutes may undercut "the potential power of [naming a person or group] as a signal to voters of a candidate's ideological bona fides," a valuable voting cue without which a candidate may face "a potentially serious handicap 'at the climactic moment of choice' in

the voting booth." *Soltysik*, 910 F.3d at 442 (quoting *Rosen*, 970 F.2d at 175); *see also Tashjian*, 479 U.S. at 220 ("To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise."). For these reasons, the Slogan Statutes impose more than a slight burden.

That said, the Statutes do not impose a *severe* burden. Plaintiffs, first, do not allege how frequently the Slogan Statutes thwart certain classes of candidates, whether those candidates share any characteristics, or how common it is for individuals or incorporated associations to withhold consent. Based on the Amended Complaint, I can only infer that it happens occasionally, and that consent is not automatic in every case. *Cf. Crawford*, 553 U.S. at 202 ("The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed . . . . [a] single affidavit gives no indication of how common the problem is."). "[N]ailing down precisely how great the cohort of discouraged or totally deterred [candidates] [is] . . . . of course [ ] would greatly aid a plaintiff to establish his claims." *Id.* at 222 (Souter, J., dissenting).

What is more, certain aspects of the Slogan Statutes indicate both neutrality and narrowness. By their terms, the Statutes do not draw any classifications or distinctions, but rather impose a single burden uniformly on all candidates for office: obtain consent to name someone or some incorporated

association. The Statutes also regulate just six words on the primary ballot, the purpose of which is already limited to conveying alignment within a political party, do not extend to groups incorporated outside of New Jersey, and do not outright prohibit any speech. Candidates may, in short, say whatever they want about a person or group if they get consent, and whatever else if they avoid using certain names. And, in the end, it is not the State, but third parties, who impose on Plaintiffs' speech rights, since it is the latter alone who decide whether to consent. I am hard-pressed to view these burdens as severe. *Fusaro*, 930 F.3d at 260 ("[The] state is not constitutionally required to eliminate every logistical barrier in administering its regulatory regime for elections."); *see also Burdick*, 504 U.S. at 433 ("[T]he mere fact that a State's system creates barriers . . . does not itself compel close scrutiny.").

It also matters that the Slogan Statutes regulate just one speech opportunity in the scheme of a primary season with many other—and more substantial—opportunities to speak, and they have no impact on what candidates may say outside the confines of the ballot. *See, e.g.*, *Anderson*, 460 U.S. at 788 ("[A]n election campaign is an effective platform for the expression of views on the issues of the day."); *Socialist Workers Party*, 440 U.S. at 186 ("[A]n election campaign is a means of disseminating ideas."); *Timmons*, 520 U.S. at 361 ("The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen."); *Marcellus v. Va. St. Bd. of Elections*, 849 F.3d 169, 177 (4th Cir. 2017) ("[T]he candidates still have every other avenue by

which to inform voters of this information. Political parties and their nominees are entirely free to publicize their association with each other and may even distribute sample 'party' tickets on election day."); *Fusaro*, 930 F.3d at 260-61 (explaining, while remanding with instructions to apply *Anderson-Burdick*, that "other means of communication remain open" to plaintiff such as "billboards," "newsletters," "the internet," or "simply [ ] mailing [a] letter to any[one] in the phone book"); *Miller v. Brown*, 503 F.3d 360, 368 (4th Cir. 2007) (holding that First Amendment associational rights were not burdened where Virginia provided "multiple options" for political parties to vindicate those rights). Plaintiffs have not offered anything to the contrary, such as facts suggesting that other speech opportunities are "neutralize[d]" by the Slogan Statutes. *Cf. Rosen*, 970 F.2d at 173 ("The absence of a label [on the ballot] gives rise to mistrust and negative inferences [because it denies] the identification [the candidate] had worked to establish at the crucial moment of choice in the election campaign [and makes voters question the authenticity of the candidate's affiliations when explained on the campaign trail]."). In other words, Plaintiffs retain full constitutional flexibility to express associations with people or groups throughout the campaign, in other forums, and by other means. *Timmons*, 520 U.S. at 363-64. The Slogan Statutes do not impose a severe burden to that extent, and because they are not "at the far end of the scale" in terms of restrictiveness, *Soltysik*, 910 F.3d at 444, strict scrutiny is inappropriate.

2. The State's Interests

Having established the magnitude of the burden, I turn next to the State's interests, which must be "relevant and legitimate" or "'sufficiently weighty'" for the Slogan Statutes to survive. *Crawford*, 553 U.S. at 191 (quoting *Norman*, 502 U.S. at 288-89). My review at this stage is "quite deferential," *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008), so as not to "hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Clingman*, 544 U.S. at 593. Way asserts four interests: preserving the integrity of the nomination process, preventing voter deception, preventing voter confusion, and protecting the associational rights of third parties who might be named in a slogan. I find that Way has raised sufficiently weighty interests in this context.

Preserving the integrity of the nomination process is not just an important interest, but a compelling one. *See, e.g.*, *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973) (stating, in the context of a challenge to New York's "delayed enrollment" primary, that "preservation of the integrity of the electoral process is a legitimate and valid state goal"); *Eu v. San Francisco Cty. Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."); *id.* ("We have also recognized that a State may impose restrictions that promote the integrity of primary elections."); *American Party of Texas v. White*, 415 U.S. 767, 779-80 (1974) (interest sufficient to support requirement that major political parties nominate candidates through primary but minor

parties nominate candidates through conventions); *id.* at 785-86 (interest sufficient to support limitation on participation to one primary and ban on both voting in a party primary and signing a petition supporting an independent candidate); *Bullock*, 405 U.S. at 145 (interest sufficient to support reasonable filing fees as a condition of placement on the ballot to stop "frivolous or fraudulent candidacies"). This interest is closely related to safeguarding public confidence *in* the nomination process, which "has independent significance, because it encourages citizen participation." *Crawford*, 553 U.S. at 197. Encouraging participation is important in its own right. *See, e.g.*, *Greenville Cnty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 671 (D.S.C. 2011) (finding "promoting voter participation in the electoral process" to be important); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 393 (W.D. Pa. 2020) (same).

The State also has an important interest in preventing voter deception. *See, e.g.*, *Norman*, 502 U.S. at 290 (acknowledging an interest in preventing "misrepresentation"); *Timmons*, 520 U.S. at 365 (same, and noting possibility that "candidates may exploit fusion as a way of associating . . . with popular slogans and catchphrases"); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("There is surely an important state interest . . . in avoiding . . . deception, and even frustration of the democratic process at the general election."). Likewise, the State has a substantial interest in preventing voter confusion. *See, e.g.*, *Lubin v. Panish*, 415 U.S. 709, 715 (1974); *Jenness*, 403 U.S. at 442; *Tashjian*, 479 U.S. at 221-22 (recognizing "[t]he State's legitimate interests in preventing voter

confusion and providing for educated and responsible voters"); *Bullock*, 405 U.S. at 145 (same); *Anderson*, 460 U.S. at 796 ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will."). Protecting the associational rights of third parties who may be named in slogans is closely correlated with these interests because it effectively assures voters that candidates have accurately portrayed information.

Moreover, while Way's asserted State interests must be grounded in some basis, she need not provide "elaborate, empirical verification" for me to credit them. *Timmons*, 520 U.S. at 352, 364; *Munro*, 479 U.S. at 194-95 (rejecting "a particularized showing of the existence of voter confusion . . . to the imposition of reasonable restrictions on ballot access"). This is especially so where, as here, "the burden a challenged regulation imposes . . . is [not severe]." *Soltysik*, 910 F.3d at 448. The Seventh Circuit goes so far as to hold, in the context of *Anderson-Burdick*, that "[e]ven a speculative concern of voter confusion" suffices as a matter of law to establish a legitimate State interest. *Stone v. Bd. of Election Comm'rs*, 750 F.3d 678, 685 (7th Cir. 2014). The Ninth Circuit disagrees, and has held that a State's informational interest must be substantiated to some degree or else *Anderson-Burdick* becomes nothing more than "ordinary rational-basis review." *Soltysik*, 910 F.3d at 448. The Third Circuit seems to side with the Ninth Circuit. *Patriot Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections*, 95 F.3d 253, 266 (3d Cir. 1996) ("As a factual matter, there is no evidence in the record to support the proposition that myriad small parties will

'clog' the ballot if cross-nomination is permitted . . . . The Department has presented no evidence to indicate that fusion is likely to produce a crippling proliferation of minor parties."). Nonetheless, in this case, the Slogan Statutes aim to further New Jersey's informational interests in a practical, and not purely theoretical, manner: voters may have confidence that, when they cast ballots, any claimed associations or references to such associations are accurate and reflect true political alignments/relationships. To that extent, the State's interests rise above the sort of "theoretically imaginable" interests which the Supreme Court has rejected, *Williams v. Rhodes*, 393 U.S. 23, 33 (1968), and of which the Third Circuit is generally skeptical. *Patriot Party*, 95 F.3d at 266.

3. Balancing the Burden Against the Interests

Plaintiffs largely do not challenge the State's interests. They instead focus on the means-end fit between the interests and the Slogan Statutes. The gist of their argument is that the State could place a general disclaimer on ballots alerting voters to the fact that slogans are unverified, which would be less speech intrusive. *Marcellus*, 849 F.3d at 178 ("While the plaintiffs 'do not dispute the legitimacy' of those interests, they challenge whether [the statute's] restriction serves those interests.").

The flaw in Plaintiffs' position is that New Jersey's integrity and informational interests need only "outweigh" the Slogan Statute's burdens. *Burdick*, 504 U.S. at 439; *Wilmoth*, 731 Fed. App'x. at 102. *Anderson-Burdick* does not require the State to choose the least restrictive alternative of all feasible

alternatives available to it. In fact, "the State need not narrowly tailor the means it chooses to promote ballot integrity" at all. *Timmons*, 520 U.S. at 365. Hence, while a general disclaimer may better serve Plaintiffs' political strategies, "[t]he Constitution does not require that [New Jersey] compromise the policy choices embodied in its ballot-access requirements to accommodate [that]." *Id.* It is not difficult, in any event, to understand how New Jersey could reasonably conclude that the Slogan Statutes serve its ends: they ensure only legitimate associations appear on the ballot, at "the climactic moment of choice" for voters when they do not have time to investigate or verify what they read, and must instead take it at face value. *Rosen*, 970 F.2d at 175; *Anderson*, 375 U.S. at 402.

In short, here, the State has chosen to minimize certain risks when slogans include names of persons or entities who may be improperly referenced, such as creating misleading or false impressions in voters' minds, which could sway an election outcome at the last minute or throw a result into doubt with allegations of deception. I cannot find that policy choice to be unreasonable, illegitimate, or otherwise not "sufficiently weighty to justify" the ancillary burdens that flow from it. *Crawford*, 553 U.S. at 191. "So long as [the State's] choice is reasonable and neutral," as in this case, then "it is free from judicial second-guessing." *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003) ("[I]t is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems."); *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003) ("[That] the line might have been drawn differently . . . is a

matter for legislative, rather than judicial, consideration."); *Trinsey v. Com. of Pa.*, 941 F.2d 224, 235 (3d Cir. 1991) ("We take no position on the balancing of the respective interests in this situation. That is a function for which the legislature is uniquely fitted."). I therefore hold that Plaintiffs have not plausibly alleged that the consent provisions in the Slogan Statutes are unconstitutional.[12]

C. Plaintiffs' Claims Against the Clerks

My determination above that the Slogan Statutes are not unconstitutional ends the inquiry as to the claims against the Clerks. But even had I resolved that question in Plaintiffs' favor, they nonetheless

[12] I note that, unlike this case, many decisions in the *Anderson-Burdick* line arise from summary judgment proceedings. *See, e.g.*, *Crawford*, 553 U.S. at 181; *Timmons*, 520 U.S. at 355; *Munro*, 479 U.S. at 192-93; *Jenness*, 403 U.S. at 432-33. This is indicative of a post-*Crawford* trend toward establishing a robust factual record to characterize an alleged burden. *See, e.g.*, *Nelson v. Warner*, 477 F. Supp. 3d 486, 493 (S.D. W. Va. 2020) (relying heavily on expert witnesses and statistical analysis). Even so, courts also resolve *Anderson-Burdick* cases at the dismissal stage, because the nature of the Rule 12(b)(6) inquiry is whether a plaintiff has stated a claim for relief, not whether discovery may be warranted. *See, e.g.*, *Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708, 718 (4th Cir. 2016) (dismissing case on Rule 12(b)(6) motion despite request for "development of a full factual record" and proposed expert testimony). Here, it is appropriate to decide Plaintiffs' claims at the dismissal stage because they do not assert a factual burden (*i.e.*, that it is difficult to obtain consent) but rather a legal burden (*i.e.*, that they have to ask for consent in the first place). Discovery thus would not benefit the resolution of their claims or change the nature/magnitude of the burden imposed by the Slogan Statutes. *Cf. Soltysik*, 910 F.3d 447 ("[A] remand for further factual development is warranted here.").

have not sufficiently pled that *the Clerks themselves* committed a constitutional violation. Plaintiffs assert that the Clerks had discretion to print their preferred slogans, notwithstanding Way's determination that the slogans violated the Slogan Statutes and could not appear on the ballot, but did not do so in violation of the First Amendment. But Plaintiffs' pleadings belie their own position. *See, e.g.*, Pl. Br. I, at 2 ("The Slogan Statutes forbid a New Jersey county clerk from printing any slogan that [does not comply therewith]."). And, indeed, Plaintiffs plead it correctly. Under N.J.S.A. § 19:23-25.1, "[n]o . . . slogan shall be printed on the ballot . . . which . . . includes or refers to the name of any other person unless the written consent of such person has been filed." *Id.*; *MacManus v. Allan*, 2 N.J. Super 557, 559 (1949) ("Certainly the duty of the Town Clerk is to print only what complies with the law."). This, among other things,[13] forecloses Plaintiffs' theory of liability as to the Clerks. While the Clerks have significant election-related discretion under other State laws, *see, e.g.*, N.J.S.A. § 19:14-12 (position of candidates' names on the ballot), they appear to have done nothing more in this case than print and "transmit [the slogans approved by the Division of Elections] to the Election Law Enforcement Commission in the form and manner prescribed by the commission," N.J.S.A. § 19:23-14, consistent with State law, which is insufficient to

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[13] For instance, Plaintiffs allege that they filed their nominating petitions with Way not the Clerks, *see* N.J.S.A. § 19:13-12, and communicated with the Division of Elections only about their rejected slogans. They also allege that Way is the chief election official in the State who is charged with enforcing the Slogan Statutes.

support Plaintiffs' contention that the Clerks worked a First Amendment harm against them.

IV. CONCLUSION

Plaintiffs have not plausibly stated a First Amendment claim that the consent provisions in N.J.S.A. §§ 19:23-17 and 25.1 violate the First Amendment under *Anderson-Burdick*. Accordingly, I **GRANT** Way's dismissal motion. I also **GRANT** the Clerks' motion and **DISMISS** the claims against them.

DATED: July 30, 2021

/s/Freda L. Wolfson

Hon. Freda L. Wolfson

U.S. Chief District Judge

Appendix C

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

N.J. Stat. Ann. §19:23-17. Designation on primary ticket of policy or faction

Any person indorsed as a candidate for nomination for any public office or party position whose name is to be voted for on the primary ticket of any political party, may, by indorsement on the petition of nomination in which he is indorsed, request that there be printed opposite his name on the primary ticket a designation, in not more than six words, as named by him in such petition, for the purpose of indicating either any official act or policy to which he is pledged or committed, or to distinguish him as belonging to a particular faction or wing of his political party; provided, however, that no such designation or slogan shall include or refer to the name of any person or any incorporated association of this State unless the written consent of such person or incorporated association of this State has been filed with the petition of nomination of such candidate or group of candidates.

N.J. Stat. Ann. §19:23-25.1. Designation or slogan on primary ballots

No designation or slogan shall be printed on any ballot to be used in the conduct of any primary election in connection with any candidate or group of candidates for office, which designation or slogan includes or refers to the name of any other person unless the written consent of such other person has been filed with the petition of nomination of such candidate or group of candidates.