No. 22-1033

In the Supreme Court of the United States

EUGENE MAZO, et al.,
Petitioners,

v.

TAHESHA WAY, NEW JERSEY SECRETARY OF STATE, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF PROFESSOR MICHAEL R. DIMINO, SR., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state that permits a political candidate to engage in core political speech on the ballot by printing his campaign slogan there may restrict that speech on the basis of content and viewpoint without facing strict scrutiny under the First Amendment?

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INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

New Jersey permits primary candidates to include on the ballot a "designation or slogan" of not more than six words. N.J. Stat. § 19:23-17. The choice of words is left to each candidate, except that no slogan may include "the name of any person or incorporated association of this State," without the "written consent" of the named person or corporation. *Id.*; *see also* N.J. Stat. § 19:23-25.1. A candidate may not identify himself as a "Never Trumper," for example, without obtaining the permission of the former President (or perhaps someone else whose name is "Trump"). The statute's prohibition extends to "any person," so even a slogan that urged voters to "Oppose

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2

Vladimir's Putin's Invasion of Ukraine" could not appear on the ballot without Putin's consent.

By designating a space on the primary ballot for a candidate's speech, New Jersey has created a limited public forum. Under well-established public-forum precedent, content-based limitations on speech in a limited public forum must satisfy strict scrutiny. New Jersey's laws are content-based because the decision of whether to print a particular candidate's slogan depends on the content of that slogan—and whether it includes the name of a person or a New Jersey corporation or not. Because New Jersey's laws are wildly overinclusive and underinclusive of the state's purported interests in "protecting election integrity and preventing voter deception and confusion," *Mazo v. New Jersey Secretary of State*, 54 F.4th 124, 144 n.37 (3d Cir. 2022), they are unconstitutional.

Yet the Third Circuit did not apply strict scrutiny to evaluate New Jersey's content-based restriction on a political candidate's speech. Rather, because the state's restrictions concerned speech appearing on the ballot, the Third Circuit concluded that *Anderson-Burdick*'s flexible balancing test applied. *Mazo*, 54 F.4th at 143-45. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). In extending *Anderson-Burdick* to all contexts involving an "electoral mechanic," *Mazo*, 54 F.4th at 145, the Third Circuit permitted a content-based limitation on core political speech to be evaluated under a standard far less speech-protective than strict scrutiny. Contrary to the Third Circuit's holding, the term "election mechanic" is not a talismanic phrase justifying content-based restrictions on political

speech. Strict scrutiny should have applied, just as it would apply if New Jersey permitted a candidate with a certain message to campaign in a polling place while denying that right to a candidate with a different message. *Cf. Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018) (striking down a ban on "political" apparel in polling places because it was vague and therefore could be applied discriminatorily).

Here, by focusing on the fact that New Jersey's speech restriction applied to ballot speech, the Third Circuit gave the state more deference than if the state had attempted to limit that candidate's speech elsewhere during his campaign. While a state has wide authority to choose the messages that *it* wishes to express on the ballot, permitting content-based restrictions on the *candidate*'s message imposes an especially severe burden on core First Amendment rights. It interposes the state between the candidate and voters "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). *Cf. Mills v. Alabama*, 384 U.S. 214, 219 (1966) (holding that a ban on election-day editorials was an "obvious and flagrant abridgment" of the First Amendment because it "silences the press at a time when it can be most effective"). Even worse, by placing content-based restrictions on a candidate's ballot slogan, New Jersey limits the candidate's ability to express the "common principles" he shares with voters by imposing its limitation at the exact moment his slogan is likely to be most effective. *Id.* Content-based restrictions on

candidate speech are most problematic, not least, when that speech appears on the ballot.

The Third Circuit's opinion reflects widespread confusion over this Court's holdings relating to the First and Fourteenth Amendments and the power of states over election administration. Specifically, there is great uncertainty about which election laws should be reviewed under *Anderson-Burdick*, and which laws should be evaluated under the traditional strict-scrutiny and rational-basis tests used for laws alleged to abridge fundamental rights. The Third Circuit's decision threatens to countenance censorship of speech that lies at the very heart of the First Amendment.

The essential problem is *Anderson-Burdick* itself. This Court has never explained either *when* *Anderson-Burdick* should apply or *why* its more "flexible" test should replace the strict scrutiny/rational basis test that usually applies to fundamental-rights challenges. To make matters worse, *Anderson-Burdick* is a "test" that places no limit on the discretion of the judges who apply it. It instructs courts to balance the government's interest in having a certain law against the "character and magnitude" of the injury to the challenger's constitutional rights. *Anderson*, 460 U.S. at 789. In other words, a court is invited—indeed, required—to engage in an untrammeled weighing of whether the benefits of an election law are worth the burdens it places on constitutional rights. Unsurprisingly, *Anderson-Burdick* has caused widespread confusion and arbitrary results. This Court should clarify that test, or else overrule it and replace it with strict

scrutiny and rational basis—the same tests that apply to other fundamental-rights challenges.

Aside from the future of *Anderson-Burdick*, the Third Circuit's decision raises important questions—and demonstrates the need for this Court's guidance—concerning the meaning of content-neutrality and "core political speech." The New Jersey laws at issue here facially discriminate against speech on the basis of content in order to discourage candidates from using the ballot to communicate certain messages to their voters. Nonetheless, the Third Circuit concluded that the laws were content-neutral, demonstrating a misunderstanding of this Court's precedents in a way that will result in the significant suppression of free speech unless the Third Circuit's decision is corrected.

The Third Circuit concluded that speech by a candidate to his voters explaining the candidate's philosophy and advocating for citizens to vote for him was not "core political speech." The Third Circuit reached this Orwellian conclusion only by confining "core political speech" to "interactive, one-on-one" communication—a definition that would exclude most political advertisements today. This Court should grant certiorari and reverse the Third Circuit.

ARGUMENT

I. By Allowing a Political Candidate to Print His Campaign Slogan on the Ballot, New Jersey Has Created a Designated Public Forum for Core Political Speech

New Jersey allows a candidate in a primary election "for any office" to print a six-word campaign slogan next to his name on the ballot, for the "purpose"

of allowing the candidate to indicate "any official act or policy to which he is pledged or committed, or to distinguish him as belonging to a particular faction or wing of his political party." N.J. Stat. Ann. § 19:23-17. New Jersey, however, also places significant restrictions on a candidate's speech by regulating the content of his ballot slogan. If a candidate's slogan refers to the "name of any person" or to "any incorporated association of this State," it will not be approved by state officials unless the "written consent" of the person or incorporated association referenced is filed with the candidate's nominating petition. *Id.*; *see also* N.J. Stat. Ann. § 19:23-25.1.

The candidate slogans appearing on the ballot are core political speech. They are statements made by candidates for public office; they are made to voters; they concern "official act[s] or polic[ies]" or political associations; and their purpose is to obtain votes. Moreover, the speech occurs on the ballot itself, making the political nature of it indisputable. A candidate's slogan creates a direct connection between a candidate's own speech to a voter and how that voter casts his vote. This Court has time and again reaffirmed that speech by candidates concerning political issues occupies the very core of "the freedom of speech." *See, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 781-82 (2002); *Brown v. Hartlage*, 456 U.S. 45, 52-54 (1982); *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (per curiam); *Wood v. Georgia*, 370 U.S. 375, 395 (1962). Indeed, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

The Third Circuit claimed that "core political speech" is only "interactive, one-on-one communication," *Mazo*, 54 F.4th at 143, but such a restrictive interpretation is directly contrary to nearly every political speech case that this Court has decided. Although this Court has, of course, protected one-on-one communications, *see, e.g.*, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (petition circulation); *Meyer v. Grant*, 486 U.S. 414 (1988) (same), it has always—and correctly—treated mass communications as core political speech. *See, e.g.*, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (flyers); *Gilleo*, *supra* (lawn signs); *Mills v. Alabama*, 384 U.S. 214 (1966) (newspaper editorials). The fact that this case involves speech (1) by candidates themselves (2) to voters (3) concerning the reasons to vote for the candidate only makes it even more obvious that this speech lies at the very center of the First Amendment's "core."

1. Any Content-Based Restrictions in a Designated Public Forum Must Satisfy Strict Scrutiny

Although candidates' slogans are core political speech, no candidate would have a right to have a slogan printed on the ballot if the state reserved the ballot for the government's own speech. *Cf. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that a charitable campaign soliciting funds from federal employees was a nonpublic forum because it was not intentionally opened for speech). States need not allow any private individual to use the ballot to convey a message. But, by enacting Section 19:23-17, New Jersey has chosen

to open its ballot for speech. By statute, New Jersey allows candidates to choose six-word messages that serve as their final pitches to voters just seconds before those same voters decide to whom they will give their votes. The space for such messages is a designated limited-purpose public forum.

Only last Term, this Court held unanimously that the City of Boston had designated the flagpole outside of its City Hall as a public forum because Boston permitted private organizations to use that flagpole to fly their own flags. *Shurtleff v. Boston*, 142 S. Ct. 1583 (2022). The flags promoted the messages of the private organizations and were created by the organizations themselves. Likewise, New Jersey does not require a candidate's ballot slogan to promote the government's views; these slogans are not the government's speech. Rather, as in *Shurtleff*, the government has designated government property to be used for a candidate to advance his own message—specifically, to "indicat[e] either any official act or policy to which he is pledged or committed, or to distinguish him as belonging to a particular faction or wing of his political party." N.J. Stat. § 19:23-17. The candidate, not the government, decides what the content of his message should be. The candidate, not the government, decides which acts or policies to highlight to voters. The candidate, not the government, decides how to signal his sympathies with various party constituencies.

This case is thus fundamentally different from *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), in which this Court held that specialty license plate designs were government speech because of the review process that

the state employed before permitting any design to be displayed on license plates. As *Shurtleff* explained: "In *Walker*, a state board 'maintained direct control' over license plate designs by 'actively' reviewing every proposal and rejecting at least a dozen. Boston has no comparable record." 142 S. Ct. at 1592. Neither, in this case, does New Jersey. While New Jersey certainly has "control" over its ballot in a manner comparable to the control that Boston had over its flagpoles, neither Boston nor New Jersey sought to exercise that control by approving only those messages that comported with the government's own views. New Jersey candidates' ballot slogans, then, like the private organizations' flags in *Shurtleff*, are private speech.

The Third Circuit argued that for ballots to serve as a tool for allowing voters to select candidates efficiently, there must be a limit on the extent to which "the ballot may—or should—be used as a means of political communication." *Mazo*, 54 F.4th at 144 (citing, inter alia, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365 (1997)). True. States need not allow their ballots to be used for candidates' speech at all, or they may impose content-neutral restrictions on that speech, such as the requirement that all ballot slogans be no greater than six words in length. But if a state *chooses* to permit its primary ballots to contain short narrative statements by candidates, it cannot be said, as the Third Circuit said here, that "ballots . . . are . . . not suitable 'for narrative statements by candidates.'" *Mazo*, 54 F.4th at 144 (cleaned up).

Indeed, the defining features of a designated limited public forum are that the state (1) opens a government-controlled resource (here, the ballot) for

private expression, and (2) places limits on that expression "in light of the purpose served by the forum." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995) (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 804-06 (1985)). New Jersey's six-word limit advances the purpose of the forum by ensuring that the slogan be reasonable in length and not unwieldy, and its requirement that the six words relate to a candidate's policy commitments or "to a particular faction or wing of his political party" serves to limit that speech in the public forum to certain topics. N.J. Stat. § 19:23-17. Allowing the government to impose content-based restrictions beyond those relating to the purpose of the forum, however, would essentially eliminate the category of the limited forum. *See Rosenberger*, 515 U.S. at 830 ("content discrimination . . . may be permissible if it preserves the purposes of the forum"); *Shurtleff*, 142 S. Ct. at 1595-96 (Alito, J., concurring in judgment).

Accordingly, the space for candidates' slogans on New Jersey's primary election ballots is a "designated public forum . . . property that the State has opened for expressive activity by part or all of the public." *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) ("*ISKCON*"). Content-based restrictions on speech within that designated public forum, therefore, must satisfy strict scrutiny. *See id.*; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

2. New Jersey's Ban on Certain Candidate Slogans Is Content-Based and Cannot Survive Strict Scrutiny

Under New Jersey's law, a candidate's ability to have his or her preferred slogan appear on the primary ballot depends on its content. Slogans that do not contain the name of a person or name of a New Jersey corporation appear on the ballot without triggering the requirement of written consent. Slogans that do contain the name of a person or the name of a New Jersey corporation, however, do not appear on the ballot unless the candidate obtains written consent from the person or entity named. The law thus distinguishes on its face between slogans based on their content, making the law content-based. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).

The Third Circuit concluded that, despite the distinction that New Jersey draws between slogans containing different words, the state's law was not content-based. The Third Circuit reached this erroneous conclusion because of its misinterpretation of *City of Austin v. Reagan National Advertising, Inc.*, 142 S. Ct. 1464 (2022). *City of Austin* held that a ban on "off-premises" advertising was content-neutral because Austin's laws "d[id] not single out any topic or subject matter for differential treatment. A sign's substantive message itself [wa]s irrelevant to the application of the provisions . . ." In other words, the laws in Austin regulated where advertisements could be displayed, but all advertising was subject to the same rule—it had to be displayed at the location of the advertised business and not elsewhere—regardless of its content. Austin had no problem with signs saying "Joe's Diner" or "Sally's Insurance Agency"; Austin simply wanted Joe and Sally to post their signs where

their respective businesses were located.

This case is dispositively different. New Jersey believes that slogans with certain content—in other words, that use certain words—create problems that are not created by slogans with different content. Whether or not New Jersey is correct in its belief, the content of the slogan is more than "relevant to the application of the" speech restriction; content is the whole point. Thus, New Jersey's laws are content-based. *See Reed*, 576 U.S. at 163 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

As noted above, states may not impose content-based restrictions in a public forum—whether it is a public forum by tradition or designation—without satisfying strict scrutiny. *See, e.g.*, *ISKCON*, 505 U.S. at 678 ("Regulation of [a designated public forum] is subject to the same limitations as that governing a traditional public forum."); *Perry Ed. Assn.*, 460 U.S. at 45-46 (1983).

New Jersey's laws clearly fail to satisfy strict scrutiny, and the Third Circuit upheld them only by refusing to apply strict scrutiny. Even if the laws served a compelling interest in preventing voter confusion, they are not narrowly tailored. They are under-inclusive in that they apply only to New Jersey corporations. And they are over-inclusive in that they prevent candidates from using certain names (such as in the slogan "Never Trumper") where there is no reasonable possibility of confusion. It *would* be narrowly tailored to impose a ban on candidate slogans that make false statements of fact (such as the

slogan "Endorsed by Donald Trump"), but a state may not assume that *any* use of a person's (or New Jersey corporation's) name is inherently confusing to voters, as such an assumption would ban far too much otherwise legitimate core political speech.

Therefore, strict scrutiny should apply.

II. This Case Clearly Highlights the Problems with the *Anderson-Burdick* Balancing Test, Which This Court Should Either Clarify or Overrule

The Third Circuit declined to apply strict scrutiny and instead applied the *Anderson-Burdick* balancing test. That test, however, neither adequately protects individual rights nor provides clear guidance to states concerning the limits of their authority. The Court should take this opportunity to jettison that standardless test and replace it with the strict-scrutiny and rational-basis tests that the Court regularly employs whenever laws are challenged as violating fundamental rights. Whereas the Court's usual standards constrain judicial discretion and lead to consistency because of the demanding nature of strict scrutiny and the deference of rational basis, *Anderson-Burdick* invites arbitrariness and unpredictability. The Third Circuit's decision is the perfect illustration: A content-based restriction on core political speech was held constitutional based on a mere balancing of interests. Such "balancing" fails to provide adequate protection to fundamental rights.

In the area of free speech, especially, this Court has been insistent on the need for clear rules and bright lines, and it has disavowed the power to distinguish

between protected and unprotected speech based on "a free-floating . . . ad hoc balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010). Such a power would be utterly inconsistent with the Constitution's determination to protect even unpopular speech—and, for that reason, "startling and dangerous." *Id.*; *see also Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 792 (2011) (characterizing *Stevens* as "emphatically reject[ing]" the idea that a "simple balancing test" could determine if a category of speech was entitled to constitutional protection).

Yet "ad hoc balancing of relative social costs and benefits," *Stevens*, 559 U.S. at 470, is exactly what *Anderson-Burdick* requires. Under that mis-guided precedent:

> [a] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (1992) (quoting *Anderson*, 460 U.S. at 789; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-14 (1986)). That kind of balancing test is full of imponderable and immeasurable parts virtually inviting courts to be results-oriented. As a

result of the "flexible" nature of *Anderson-Burdick*, 504 U.S. at 434, judges have "far too much discretion," which leads to anomalous, inconsistent results. *Daunt v. Benson*, 956 F.3d 396, 424 (6th Cir. 2020) (Readler, J., concurring in the judgment) (explaining that "*Anderson-Burdick* is a dangerous tool. In sensitive policy-orientated cases, it affords far too much discretion to judges in resolving the dispute before them."); *see also* Edward B. Foley, *Voting Rules and Constitutional Law*, 81 Geo. Wash. L. Rev. 1836, 1859 (2013) (noting that *Anderson-Burdick* is "imprecise" and subject to differing application in the hands of different judges); Joshua A. Douglas, *A Vote for Clarity: Updating the Supreme Court's Severe Burden Test for State Election Regulations that Adversely Impact an Individual's Right to Vote*, 75 Geo. Wash. L. Rev.. 372, 373 (2007) (noting that *Anderson-Burdick* "is nebulous and unclear, resulting in vague decisions that fail to distinguish between constitutional and unconstitutional state election regulations.").

The *Burdick* Court asserted that its test would apply in challenges to "state election law[s]," 504 U.S. at 434, but it did not explain what sorts of laws fit that category and provided no rationale that could allow lower courts to fashion a test of their own. The result is the Third Circuit's opinion here, which extended *Anderson-Burdick* to uphold a content-based limitation on a political candidate's message to his voters—without even applying strict scrutiny.

The *Burdick* Court explained its decision to apply its "more flexible standard" by pointing out that:

> [e]lection laws will invariably impose some burden upon individual voters.

> Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

504 U.S. at 433 (internal citations omitted). *Burdick* was undoubtedly correct that courts should not apply strict scrutiny to "every voting regulation." *Id.* It does not follow, however, that there is anything about election laws that should cause this Court to abandon its usual two-track approach to fundamental-rights cases, applying strict scrutiny or rational basis, depending on the "directness and substantiality of the interference with" a fundamental right. *Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978).

1. It Is Unclear Why *Anderson-Burdick* Should Be Applied in Election Law Cases

The key error in *Burdick* was in acting as if every law that "affects . . . an individual's right to vote," *id.* (quoting *Anderson*, 460 U.S. at 788), *interferes with* the right to vote. In no other fundamental-rights-based constitutional challenge does this Court indulge such an assumption, even though virtually every law

"affects" a fundamental right. That is why *Anderson-Burdick*'s policy-based balancing test is so anomalous. In other fundamental-rights challenges, rational basis applies if a law does not "direct[ly] and substantial[ly] . . . interfere with" a fundamental right, and strict scrutiny applies if there is such a direct and substantial interference. *Id.*

Thus, rational basis applies to an infinite number of potential challenges to state laws that "affect" fundamental rights. To note only a few obvious examples, the state regulation of employment relationships, the practice of law and medicine, commercial transactions, land use, and education "inevitably affects—at least to some degree," *Burdick*, 504 U.S. at 433, fundamental rights to individual autonomy and familial privacy that this Court has found in the Due Process Clauses. Yet those regulations are non-controversially evaluated under the rational-basis test unless they directly and substantially interfere with a fundamental right. If there is such a direct and substantial interference with a fundamental right, then strict scrutiny applies. But judges do not get to determine whether the government's "precise interests" outweigh the "magnitude" of an impingement on a fundamental right. *Id.* at 434.

If *Burdick*'s analysis were applied outside the election law context, this Court's standard two-tiered analysis of fundamental-rights claims would be replaced by an unadministrable sliding scale. And there is no principled reason to confine *Anderson-Burdick* to the realm of election law.

Burdick's stated reason for applying its "flexible

standard" rather than strict scrutiny was that the Court did not want to "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Strict scrutiny would indeed have tied the hands of states, and therefore the Court was correct not to apply strict scrutiny to every law that "affects—at least to some degree—the individual's right to vote." *Id.* But what *Burdick* failed to recognize was that its choice was not between its "flexible standard" and a requirement that strict scrutiny be applied to all laws that "affect" voting rights. Rather, the choice was the identical one that this Court has faced when dealing with laws that affect other fundamental rights: between strict scrutiny for laws that directly and substantially. interfere with a fundamental right and rational basis for laws that do not. *Redhail*, 434 U.S. at 387 n.12.

While it is certainly true that states must construct and enforce election laws that achieve their "'important regulatory interests,'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788), the standard rational-basis/strict-scrutiny framework permits state interests to be taken into account. Even if a challenged law "direct[ly] and substantial[ly]" interferes with a fundamental right, *Redhail*, 434 U.S. at 387 n.12, the state can still enforce its law under traditional strict scrutiny so long as the government's interest is compelling and the law is narrowly tailored. And if there is no direct and substantial interference with a fundamental right, then the rational-basis test should apply and states should encounter little difficulty in enforcing election laws that are rationally

related to a legitimate governmental interest. *Id.*

Thus, the Third Circuit was incorrect in asserting that "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." *Mazo*, 54 F.4th at 137. On the contrary, the traditional strict scrutiny test is *focused* on assessing whether a restriction on a fundamental right is "necessary." *Id.* That is the entire point of narrow tailoring: it requires the law to be the *least restrictive means* of achieving a compelling interest.

Furthermore, states always—not just when administering elections—have "important regulatory interests," *Burdick*, 504 U.S. at 434, that they must achieve while being mindful of individuals' fundamental rights. There is nothing special about the regulatory interests in election law cases that requires a different standard of constitutional review than the one applicable to regulations of health, business, education, or law enforcement. If states must comply with strict scrutiny when, for example, their attempts to achieve the best interest of children compromise fundamental rights, *see Troxel v. Granville*, 530 U.S. 57 (2000), they should have to comply with strict scrutiny when their election regulations "direct[ly] and substantial[ly] . . . interfere[]," *Redhail*, 434 U.S. at 387 n.12, with a fundamental right, too.

2. It Is Unclear When *Anderson-Burdick* Should Be Applied in Election Law Cases

To make matters worse, the *Burdick* Court's decision to apply its "flexible standard" to "state election law[s]," 504 U.S. at 434, begs the question

about what exactly an "election law" even is. (On that topic, the Third Circuit itself confessed the absence of "a clear rule or set of criteria to distinguish between" election-related cases in which *Anderson-Burdick* applies and those in which it does not. *Mazo*, 54 F.4th at 137.) Does the category of election laws include, for example, laws governing the structure of government, which may not be part of the electoral "mechanics" but nevertheless "affect" the right to vote? If so, the category is so broad as to require a dangerous amount of judicial policymaking in the electoral arena; if not, the limitation of "election laws" only to those laws governing electoral mechanics would appear arbitrary. *Compare Daunt v. Benson*, 956 F.3d 396, 406-07 (6th Cir. 2020) (applying *Anderson-Burdick* to a law requiring five members of an independent redistricting commission to be unaffiliated with a political party, after concluding that the requirement "could conceivably be classified as an 'election law'"); *Bates v. Jones*, 131 F.3d 843, 846-47 (9th Cir. 1997) (applying *Burdick* to evaluate a term limit), *with Daunt v. Benson* 956 F.3d at 423-424 (Readler, J., dissenting) (disagreeing with the majority that *Anderson-Burdick* applies); *Bates v. Jones*, 131 F.3d at 859 (Rymer, J., concurring in result) (same). Does the "election law" category include bans on anonymous political speech or restrictions on lawn signs like the ones struck down in *McIntyre*, *supra*, and *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)? *McIntyre* attempted to distinguish *Anderson* by characterizing the anonymous-speech ban as a regulation of "pure speech" rather than "the mechanics of the electoral process." *McIntyre*, 514 U.S. at 345. But candidates' ballot slogans are also "pure speech" and yet the Third

Circuit applied *Anderson-Burdick* to them. *Id.* at 347.

The Third Circuit decided that the question of whether to apply *Anderson-Burdick* amounted to whether the challenged law "primarily regulate[d] a mechanic of the electoral process, rather than core political speech." *Mazo*, 54 F.4th at 144. Obviously, the challenged New Jersey laws regulating the content of candidates' ballot slogans *both* "regulate[d] a mechanic of the electoral process" *and* "regulate[d] . . . core political speech"; they did so because they incorporated a candidate's "core political speech" *into* "a mechanic of the electoral process." Accordingly, the Third Circuit's interpretation of *Burdick* rests on a false dichotomy between speech and electoral mechanics, and this very case demonstrates why that supposed distinction is unworkable.

The Sixth Circuit has pointed out yet another problem with *Anderson-Burdick*: No one knows whether it applies to alleged violations of equal protection, or whether it is only limited to alleged abridgments of the right to vote and the freedom of speech. *See Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020); *Mays v. LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020); *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012). The Sixth Circuit extended *Anderson-Burdick* to equal-protection challenges, reasoning that *Burdick*'s rationale of permitting states some freedom to structure their electoral laws was equally applicable regardless of the source of the constitutional challenge, but that court's holdings are difficult to square with this Court's application of the traditional two-tiered standard of review to equal-protection challenges of election laws. *Compare, e.g.*,

Mays, *supra* (applying *Anderson-Burdick* to evaluate the constitutionality of a "moderate" restriction on the right to vote imposed by a law that made it impossible for a jailed person to vote), *with, e.g.*, *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (applying strict scrutiny to a law that restricted the right to vote in school board elections to property owners and parents with children enrolled in the public schools).

In short, *Anderson-Burdick* was poorly reasoned, is inconsistent with scores of fundamental-rights decisions, establishes a non-administrable standard that requires judicial policymaking in the political area (where judicial policymaking is most harmful to the legitimacy of the courts), and has led to chaos that extends beyond the Third Circuit's baffling ruling here. *Anderson-Burdick* should be overruled.

In its place, this Court should reinstitute the approach that governs innumerable other constitutional challenges: substantive-due-process challenges (including those based on the right to vote) are evaluated under strict scrutiny or rational basis depending on whether there is a direct and substantial interference with a fundamental right; free-speech challenges are evaluated under strict scrutiny or intermediate scrutiny depending on whether the speech restriction is content-based or content-neutral; and equal-protection challenges are evaluated under strict scrutiny or rational basis depending on whether there is discrimination against a suspect class. At the very least, this Court should grant certiorari to clarify the scope of *Anderson-Burdick* and to ensure that its balancing test never be used to validate content-based

restrictions on candidates' core political speech.

3. This Case Provides an Excellent Vehicle to Consider the Future of *Anderson-Burdick*

This case is a particularly good vehicle for considering the future of *Anderson-Burdick*. Unlike many election law cases, this case would not require expedited consideration, and so the Court would be able to consider the important questions fully before issuing a decision. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006) (per curiam) (eschewing judicial intervention in elections "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes"). Furthermore, this case presents an important election law issue without any partisan overtones. It would be beneficial for the Court to consider this issue now, rather than to have to consider *Anderson-Burdick* in a context where time is short and a contested election is on the horizon.

Finally, the issues in this case are particularly starkly presented. It is difficult to imagine speech that is more at the heart of the First Amendment than a political candidate's ballot slogan. Yet, because of the uncertainty surrounding *when* and *why Anderson-Burdick* applies, a content-based restriction on core political speech was upheld by the Third Circuit under a balancing test that did not provide the protection for free speech as strict scrutiny would. This case provides an opportunity for this Court to make clear that *Anderson-Burdick* may not be used in way that dilutes the Constitution's protection of political speech.

CONCLUSION

Anderson-Burdick is an outlier. It requires the

Court to undertake standardless balancing in some of the country's most contentious political disputes, virtually guaranteeing arbitrary results. This Court does not apply *Anderson-Burdick*-style balancing outside of election law, and the Court has never explained why it has made an exception for election law cases in the first place. The Court should clarify *Anderson-Burdick*, or else overrule it entirely and apply the same standards it applies in other fundamental rights challenges: strict scrutiny and rational basis, depending on whether there is a direct and substantial interference with a fundamental right, and depending on whether the challenged law is a content-based restriction on protected expression.

To resolve these issues, certiorari is warranted.

Respectfully submitted,

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