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 Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONERS AND REVERSAL

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QUESTION PRESENTED

Whether a state that permits political candidates to engage in core political speech on the ballot may restrict that speech on the basis of content and viewpoint without satisfying strict scrutiny.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization. FIRE's mission is to defend and sustain the individual rights of all Americans to free speech and free thought—the most essential qualities of liberty. FIRE educates Americans about the importance of these inalienable rights, promotes a culture of respect for these rights, and provides the means to preserve them.

Since 1999, FIRE has successfully defended expressive rights nationwide through public advocacy, targeted litigation, and *amicus curiae* participation, including challenges to content- and viewpoint-based laws and policies. Br. of FIRE as *Amicus Curiae* in Support of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Order Granting Prelim. Inj. Mot., *Novoa v. Diaz*, Case No. 4:22cv324, — F. Supp. 3d. —, 2022 WL 16985720 (N.D. Fl. Nov. 17, 2022); Order Granting Prelim. Inj. Mot., *Volokh v. James*, Case No. 1:22-cv-10195, — F. Supp. 3d. —, 2023 WL 1991435 (S.D.N.Y. Feb. 14, 2023). FIRE has seen how public officials discriminate based on content and viewpoint in order to stifle controversial or unpopular expression.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief. Pursuant to Rule 37.2, amicus affirms that counsel for all parties have been given timely notification of amicus's intent to file this brief.

This case presents a good vehicle for the Court to clarify the standards for determining whether a speech restriction is content or viewpoint based, a crucial issue of law in cases that FIRE litigates. FIRE urges the Court to grant certiorari and reverse.

SUMMARY OF ARGUMENT

New Jersey allows candidates in primary elections to communicate a slogan of their choosing directly on the voters' ballot. N.J. Stat. Ann. §§ 19:23-17, 19:23-25.1. Under New Jersey's ballot slogan law, candidates are free to select an up to six-word slogan of their choosing with two crucial exceptions. If a candidate wishes to refer to any person in the world or to any company incorporated in New Jersey, then he or she must obtain written consent from that person or company. *Id.* § 19:23-17.

For instance, New Jersey's law would require a candidate to get consent from former President Donald J. Trump to add the ballot slogan "Never-Trump Conservative." If former President Trump is offended or dislikes the appearance of the "Never-Trump" label on the ballot, then he can refuse to give his consent to such a slogan and prevent its placement on the ballot.

As a result of this law, certain slogans are excluded from the ballot because of the message that they convey or because the subject of the speech has refused consent, exercising a preemptive heckler's veto. This is precisely what happened to Petitioners Eugene Mazo and Lisa McCormick who were repeatedly denied their preferred slogans because they could not acquire the mandatory consent.

The consent requirement for ballot slogans regulates ballot speech "based on its substantive content or the message it conveys," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). It is therefore content and viewpoint based and should have been subject to strict scrutiny.

Unfortunately, the U.S. Court of Appeals for the Third Circuit was confused by this Court's pronouncements on what makes a law content or viewpoint based. In *Reed* v. *Town of Gilbert*, this Court clarified the standard on content neutrality, articulating a bright-line rule where any law that "applies to particular speech because of the topic discussed or the idea or message expressed" is content based, regardless of whether the law was enacted with benign intentions or can be justified by some purpose beyond suppressing speech. 576 U.S. 155, 163 (2015). Under this standard, New Jersey's law is content based, as it distinguishes between certain categories of expression based on their subject matter.

But this Court's recent decision in *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) reintroduced confusion as evidenced by the Third Circuit's error. In *City of Austin*, this Court explained that a law that distinguished between on-premises and off-premises signs was not content based because "[t]he message on the sign matters only to the extent that it informs the sign's relative location" and therefore differentiation between on- and off-premises signs was "similar to ordinary time, place, or manner restrictions." *Id.* at 1473. In doing so, the Third Circuit improperly expanded the narrow carve out in *City of Austin* to laws that look directly to "the topic discussed, or the

idea or message expressed," threatening to swallow up *Reed* altogether. 576 U.S. at 163.

The Third Circuit's decision reveals similar confusion as to whether laws that disproportionately burden the expression of certain viewpoints or categories of speakers are viewpoint based. New Jersey's law discriminates against the viewpoint of candidates like Eugene Mazo and Lisa McCormick in four ways: (1) by disproportionately excluding speech that is critical of a person or New Jersey corporation; (2) by discriminating against speakers based on their political affiliations and political access; (3) by granting a preemptive heckler's veto to those that are the subject of critical speech; and (4) by granting arbitrary discretion to state officials to allow or exclude speech based on whether they agree with a candidate's viewpoint.

The petition for certiorari touched on the ways that the consent requirement is content- and viewpoint-based. Cert. Pet. at 26–28. But the Third Circuit's error reflects the confusion that exists when courts attempt to determine whether a law is content or viewpoint based. This amicus brief provides a more in-depth analysis to highlight how this law discriminates based on content and viewpoint. The brief also shows how this case provides a prime opportunity to clarify these vital matters of law, to limit misapplication of the ruling of *City of Austin* to blatantly content-based laws, and to prevent lawmakers from employing laws that deliberately stifle particular viewpoints.

Accordingly, this Court should grant certiorari to clarify these standards and declare that New Jersey's consent requirement for ballot slogans is both content

and viewpoint based and should have been invalidated under strict scrutiny.

ARGUMENT

New Jersey's ballot slogan law allows candidates to offer a closing argument directly to voters in the form of a six-word ballot slogan of their choice on the primary ballot. N.J. Stat. Ann. §§ 19:23-17, 19:23-25.1, That is, unless they wish to refer to a person or New Jersey company, in which case their message is banned unless they can submit written consent. This is precisely what happened to Petitioners Eugene Mazo and Lisa McCormick who were repeatedly denied their preferred slogans because they could not acquire the mandatory consent from the persons or companies they wished to refer to. Mazo requested to use the slogans "Essex County Democratic Committee, Inc.," "Hudson County Democratic Organization," and "Regular Democratic Organization of Union County." App. 6. McCormick requested the slogans "Not Me. Us," and "Bernie Sanders Betrayed the NJ Revolution." Id.

New Jersey was under no obligation to open up such a space and could have chosen to leave its ballot free from political speech, as most states do. But once it did so, New Jersey was required to follow the demands of the First Amendment to the United States Constitution, which prohibits it from "regulat[ing] speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* The same is true for restrictions that "favor one speaker over

another." *Id.* Because they are constitutionally suspect, content- and viewpoint-based laws are subject to strict scrutiny. *Id.*

Election-related speech should be no exception. But the Third Circuit applied a less stringent standard, known as the *Anderson-Burdick* test, that this Court has applied to laws that "regulate the mechanics of the electoral process" in a "nondiscriminatory" manner that does not impose a severe burden on expressive freedom. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Nondiscriminatory laws that regulate the mechanics of the electoral process are subject to more deferential scrutiny and are generally upheld.

In their petition for certiorari, petitioners compellingly explain why *Anderson-Burdick* should not have applied. Specifically, under *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995), New Jersey's law is "a direct regulation of the content of speech" rather than a law to "control the mechanics of the electoral process." Cert. Pet. at 22–31.

But strict scrutiny should also have applied to New Jersey's consent requirement for ballot slogans even if it could be said to "control the mechanics of the electoral process" since it was far from "nondiscriminatory" and therefore its burden on speech was "severe." Specifically, New Jersey's consent requirement for ballot slogans discriminates both based on content and viewpoint. The Third Circuit incorrectly found that New Jersey's requirement was neither, evidencing clear confusion over the crucial distinction between

"nondiscriminatory restrictions" and content- and viewpoint-based laws. *Anderson*, 460 U.S. at 788.

I. New Jersey's Consent Requirement for Ballot Slogans Is Content Based.

The Third Circuit erroneously concluded that New Jersey's consent requirement for ballot slogans is not content based. In doing so, the Third Circuit misread this Court's recent decision in *City of Austin*, 142 S. Ct. at 1471.

The Third Circuit's decision is a warning signal that courts are erroneously using *City of Austin* to fatally undercut this Court's holding in *Reed*. This Court should grant certiorari in this case in part to clarify that *City of Austin* did not undermine *Reed*'s core holding that laws that regulate differently based on "the topic discussed, or the idea or message expressed" are subject to strict scrutiny. *City of Austin*'s carve-out for time, place, or manner-like regulations should not be allowed to open the door to blatantly content-based laws like New Jersey's consent requirement.

In *Reed v. Town of Gilbert* this Court clarified long-lingering confusion as to which laws were considered content-based and subject to strict scrutiny. 576 U.S. 155 at 166. The *Reed* Court explained that any law that "target[s] speech based on its communicative content" is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Id.* at 163. Any law that "applies to particular speech because of the topic discussed or the idea or message expressed" is content based, regardless of whether the

law was enacted with benign intentions or can be justified by some purpose beyond suppressing speech. *Id.* Content-based restrictions are constitutionally suspect because such restrictions lend themselves to use "for invidious, thought-control purposes." *Id.* at 167.

Under *Reed*, New Jersey's law is plainly content based. To determine whether consent is required, the Secretary must review the "communicative content" of the proposed slogan to determine whether the slogan refers to a person or to an entity incorporated in New Jersey. This distinction is based directly on the content of the slogan and what the candidates wish to express. For instance, a candidate could express his endorsement or opposition to a ballot initiative without getting the consent of the initiative's proponents. But if a local Republican candidate wishes to call herself a "Trump Republican" or a local Democratic candidate wishes to call herself a "Biden Democrat," then she must obtain that candidate's consent. Therefore, the category of speech about ballot initiatives is privileged over speech about candidates on the ballot based on the communicative content of the speech, just as political signs were privileged in the *Reed* case.[2]

Furthermore, even if New Jersey's ballot slogan law was erroneously considered facially content neutral, it cannot be "justified without reference to the content of

[2] New Jersey's consent requirement for ballot slogans also has the effect of excluding certain categories of content such as any speech about a foreign leader given that it would be practically impossible to get Vladimir Putin's signature to say "Putin is a Warmonger" or to get Benjamin Netanyahu's signature to say "I love Bibi."

the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). For instance, a candidate could use the slogan "Endorsed by the *Times*" if she is referring to *The New York Times* (which is incorporated in New York not New Jersey), but not if she is referring to *The Times of Trenton*, a newspaper serving New Jersey's capital city. New Jersey's justification for distinguishing between these overwise identical statements has everything to do with the content of the regulated speech—specifically that the subject of one ballot slogan is based in New Jersey and the other New York.

Similarly, New Jersey's consent requirement for ballot slogans was adopted "because of disagreement with the message" that certain signs convey. *Id.* The legislature likely intended to exclude slogans referring to people or New Jersey corporations because it believed that such messages were more likely to be misleading or to trick voters and would therefore be more disruptive to the democratic process. *See* Appellee's Answer Br. at 36, 38, *Mazo v. Way*, No. 21-2630, ECF No. 39 (3d Cir. Feb. 14, 2022) (arguing that allowing references to candidates without consent would "create a misleading impression among voters" and turn the ballot into a "free-for-all for false or misleading claims"). This is the type of content-based judgment that the First Amendment is intended to protect against and therefore New Jersey's law must be subject to strict scrutiny.

Nevertheless, the Third Circuit found New Jersey's consent requirement for ballot slogans not to be content based because it "appl[ies] to all primary candidates and to any slogans mentioning a person or

a New Jersey incorporated association," and because a candidate *hoping* 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." App. 33–42. In reaching this conclusion, the Third Circuit cited this Court's recent decision in *City of Austin*.

In *City of Austin*, this Court considered whether a law that distinguished between off-premises and on-premises signs was content based. The Court distinguished between *Reed* because the sign ordinance in *Reed* "single[d] out specific subject matter for differential treatment" while the sign ordinance in *City of Austin* did not treat different types of messages differently based on "the topic discussed or the idea or message expressed" and instead differentiated based on the sign's location. As the Court explained, "[t]he message on the sign matters only to the extent that it informs the sign's relative location" and therefore this distinction was "similar to ordinary time, place, or manner restrictions." 142 S. Ct. at 1473.

In contrast, New Jersey's consent requirement for ballot slogans looks directly to "the topic discussed, or the idea or message expressed." A slogan is permissible without any consent if it is about loving puppies or being an atheist or living in Weehawken or any other topic other than an individual or a New Jersey-based corporation. This is not akin to an "ordinary time, place, or manner restriction," but is instead a distinction that can be used "for invidious, thought-control purposes" and is therefore subject to strict scrutiny. *Reed*, 576 U.S. at 167.

In his dissenting opinion in *City of Austin* Justice Thomas (joined by Justices Gorsuch and Barrett) warned that the majority's decision "misinterprets *Reed*'s clear rule for content-based restrictions and replaces it with an incoherent and malleable standard" that would open the door for "the implementation of individual judges' policy preferences" and "giv[e] more leeway for government officials to punish disfavored speakers and ideas." 142 S. Ct. at 1481, 1492 (Thomas J., dissenting). The Third Circuit's decision shows that Justice Thomas's prescient warning has already been fulfilled. This Court should grant certiorari in this case to clarify and limit the ruling of *City of Austin* and close the door on blatantly content-based laws like New Jersey's being treated as content neutral due to a misreading of *City of Austin*.

II. New Jersey's Consent Requirement for Ballot Slogans Is Viewpoint Based.

New Jersey's consent requirement for ballot slogans is also viewpoint based because it is designed to exclude or burden certain types of expression. Viewpoint discrimination is "an egregious form of content discrimination" because it arises "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 829.

New Jersey's law discriminates against the viewpoint of candidates like Eugene Mazo in four ways. First of all, the law excludes speech that is critical of a candidate or New Jersey corporation. Second, the law discriminates based on speaker. Third, the law grants a preemptive heckler's veto to

those that are the subject of critical speech. Fourth, the law grants arbitrary discretion to state officials to allow or exclude speech based on whether they agree with a candidate's viewpoint.

A. New Jersey's Ballot Slogan Law Disproportionalty Excludes Critical Viewpoints.

New Jersey's consent requirement for ballot slogans effectively prohibits negative or critical speech about any person or New Jersey corporation through the imposition of an impossible to acquire consent requirement. On the other hand, speech that expresses a favorable viewpoint about a candidate will be far more likely to receive approval. In doing so, the law distorts public debate by systematically excluding disparaging, critical, or negative statements from the ballot. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 197–98 (1983) (stating that "the first amendment is concerned . . . with the extent to which the law distorts public debate"). This law is therefore "viewpoint discriminatory in operation." *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1233 (10th Cir. 2021).

When a law, by design, has a dramatically disproportionate impact on certain viewpoints, that law "raise[s] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). A highly disproportionate impact should at the bare minimum "raise[] a yellow caution flag for the possible presence of a governmental purpose toward that content that may not be benign; hence, applying

strict scrutiny to suss out the government's true purpose, as opposed to its claimed one, is appropriate." Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. Rev. 65, 94 (2017).

The Third Circuit found that 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." *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 149–50 (3d Cir. 2022). But this flawed conclusion ignores how the law operates in practice. While speech conveying support or praise may occasionally be rejected, it is reasonable to conclude that speech that is negative, unflattering, or critical will almost always be excluded under New Jersey's law. This disproportionate impact on certain viewpoints is not incidental to the law's purpose or design. Instead, those to whom a proposed ballot statement refers can exclude speech precisely because they disagree with the viewpoint that is expressed.

In concluding that New Jersey's law was not viewpoint based, the Third Circuit cited to this Court's decision in *Boos v. Barry*, 485 U.S. 312, 319 (1988). In *Boos*, the Court found that a District of Columbia ordinance that prohibited the display of sign that "tends to bring that foreign government into 'public odium' or 'public disrepute'" was unconstitutionally content based. *Id.* at 315. However, the Court first concluded that this law was not viewpoint based because it "determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments." *Id.* at 319.

The Third Circuit's application of *Boos* was problematic in several respects. To start, the part of *Boos* that the court relied on was not the majority opinion of the Court. Justices Brennan and Marshall did not join Part II-A of the decision where Justice O'Connor explained why the plurality believed the law was not viewpoint based. *Boos*, 485 U.S. at 334 (Brennan J., concurring in part and concurring the judgment).[3] Similarly, the three justices who dissented in part did not comment on whether the law was viewpoint based. *See* Nicole B. Cásarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 Alb. L. Rev. 501, 512 n.79 (2000) ("It should be noted that this section of the decision, Part II-A, is the only section in which Justice O'Connor did not write for a majority of the Court.").

Second, the *Boos* plurality opinion has been rightly criticized for missing the mark on this point. As the dissenting opinion in the D.C. Circuit correctly observed, "the statute prohibits demonstrations with signs that disapprove of the embassy government's position, but allows demonstrations with signs that support it," which is "a classic, textbook example of prohibited viewpoint discrimination." *Finzer v. Barry*, 798 F.2d 1450, 1491, 1479 (D.C. Cir. 1986) (Wald J., dissenting), *aff'd in part, rev'd in part sub nom. Boos v. Barry*, 485 U.S. 312 (1988). And as Professor R. George Wright argue, "[a]ny sign that is subject to the regulation would first have to be read, understood, and interpreted with regard to its message. And

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[3] Although Justices Brennan and Marshall joined the portion of the plurality opinion concluding that the District of Columbia ordinance was content based, that portion was silent on the matter of viewpoint discrimination.

crucially, messages favorable to a particular government or policy would then be permitted, while critical messages tending to evoke odium or disrepute would not." R. George Wright, *A Variable Number of Cheers for Viewpoint-Based Regulations of Speech*, 96 Notre Dame L. Rev. Reflection 82 (2021).[4]

Third, the plurality decision in *Boos* is incompatible with more recent decisions by this Court that emphatically hold that "[g]iving offense is a viewpoint." *Matal* v. *Tam*, 582 U.S. 218, 243 (2017). Barring speech based on whether it offends a particular listener is viewpoint based under *Matal* and this reasoning should apply with full force to the law that was struck down in *Boos*. As the Federal Circuit correctly explained in its earlier decision in *Matal*, "[t]he legal significance of viewpoint discrimination is the same whether the government disapproves of the message or claims that some part of the populace will disapprove of the message," *In re Tam*, 808 F.3d 1321, 1336 (Fed. Cir. 2015), as corrected (Feb. 11, 2016), aff'd sub nom. *Matal v. Tam*, 582 U.S. 218 (2017). The same reasoning should also apply to New Jersey's law, which conditions speech on whether "some part of the populace" will accept or disapprove of the message.

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[4] In addition, *Boos* also opened the door for an approach to content neutrality which this Court later rejected in *Reed*. Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 Notre Dame L. Rev. 1347, 1374 (2006) (explaining that the effect of *Boos* "was to open up speech regulations that made content distinctions on their face to arguments that they were content-neutral under a government purpose analysis").

The Third Circuit also relied on this Court's decision in *McCullen v. Coakley*, where the Court held that a buffer zone for an abortion clinic was not content based even though it "disproportionately affects speech on certain topics" since the law could be "justified without reference to the content of the regulated speech." 573 U.S. 464, 480 (2014) (internal citations omitted).

New Jersey's law is expressly concerned with the "content of the regulated speech" in a manner that the abortion buffer-zone in *McCullen* arguably was not. The impact on certain topics and viewpoints is not merely an incidental byproduct of the law. Instead, the New Jersey legislature has given offended individuals veto power of speech that they dislike precisely because they disagree with that speech.

Furthermore, the Court's conclusion in *McCullen* was sharply criticized by several members of this Court. Justices Scalia, Kennedy, and Thomas concurred in the judgment but found that the law was viewpoint based because it allowed the abortion clinics to authorize its employees or agents to speak in the buffer zone. *See McCullen*, 573 U.S. at 497 (Scalia J., concurring in judgment). The clinic could therefore exclude speech hostile to abortion but allow for speech affirming abortion. Justice Alito similarly would have concluded that the law was viewpoint based because "petitioners and other critics of a clinic are silenced, while the clinic may authorize its employees to express speech in support of the clinic and its work." *McCullen*, 573 U.S. at 511 (Alito J., concurring in judgment). New Jersey's consent requirement for ballot slogans operates in precisely the same fashion, silencing critics while allowing individuals to

authorize supporters "to express speech in support."[5] This Court should grant certiorari to clarify that laws that are designed to, or by their operation overwhelmingly tend to, exclude critical viewpoints are viewpoint based.

B. New Jersey's Ballot Slogan Law Discriminates Based on a Speaker's Identity.

New Jersey's law also constitutes a "restriction[] distinguishing among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). This type of restriction is "as repugnant to the First Amendment as are restrictions distinguishing among viewpoints." *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 831 (4th Cir. 2023). As instruments to censor, these categories are interrelated: "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.*; *see also First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–85 (1978).

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[5] This Court's reasoning in *McCullen* and earlier cases like *Hill v. Colorado* has also been widely criticized as falling under an "abortion distortion" where individual rights such as free speech were given less protection if they implicated the right to an abortion. Casey Mattox, *Cline symposium: Another correction of the abortion distortion coming?*, SCOTUSblog (Oct. 1, 2013), https://perma.cc/8CUR-PRTJ. As Justice Scalia observed sharply, "[t]here is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. *McCullen*, 573 U.S. at 497 (Scalia J., concurring in judgment). In light of this court's overturning of *Roe v. Wade*, it would be appropriate to reexamine the logic of *McCullen* and *Hill* free from the vortex of the "abortion distortion."

For instance, imagine two candidates who wish to appeal to Republican primary voters by using their ballot slogan to signal their alignment with the views of former New Jersey Governor Chris Christie using the slogan "Chris Christie was the best governor." One is a political insider with connections to the Christie campaign and is therefore able to get the candidate's approval to use slogan. The other is an outsider without connections to the Christie campaign, and would therefore be unable to get the candidate's approval. The law therefore disproportionately favors one category of speakers—political insiders—and disfavors those without such connections and experience. The Third Circuit erred by failing to identify the ways that New Jersey's ballot speech consent requirement discriminated against certain speakers at the expense of others.

C. New Jersey's Ballot Slogan Law Creates an Impermissible Heckler's Veto.

One of the most fundamental principles at the heart of this Court's First Amendment jurisprudence is that a listener's disagreement with the content of a message should not be allowed to shut down a speaker. "[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise." *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)). This principle undergirds this Court's hostility to any law that creates a heckler's veto. It is a recognition of the fact that speech that provokes and creates strong reactions is often the most important and necessary of protection. *See* Daniel Ortner, *The Terrorist's Veto: Why the First Amendment Must*

Protect Provocative Portrayals of the Prophet Muhammad, 12 NW. J. L. & Soc. Pol'y. 1 (2016) (discussing the heckler's veto and how it relates to the need to protect controversial speech).

New Jersey's consent requirement violates this core First Amendment principle by allowing an individual or corporation that is being criticized to exercise a veto over whether a slogan can appear on the ballot. For instance, New Jersey's law would require a candidate to get consent from former President Donald J. Trump to call himself a "Never-Trump Conservative." If former President Trump is offended or dislikes the appearance of the "Never-Trump" label on the ballot, then he can refuse to give his consent to such a slogan and prevent its placement on the ballot.

New Jersey's consent requirement is particularly unwise because those that are likely to be critically referenced on a ballot are high-profile, public figures that voters are likely to be familiar with such as the President of the United States or a Supreme Court Justice. Allowing such prominent individuals to have a veto over public criticism over them is contrary to the First Amendment's commitment to "the free discussion of governmental affairs," "includ[ing] discussions of candidates." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

As highlighted in the petition for certiorari, giving opponents of expression veto power can also easily be manipulated to shut down public debate. Cert. Pet. at 7–9. For instance, a candidate's rival may shut down debate by registering a shell company in New Jersey

to shut out the use of particular slogan such as what happened when McCormick wanted to use the slogan, "Not Me. Us." App. 6. McCormick's second attempt, "Bernie Sanders Betrayed the NJ Revolution" then failed because McCormick was not able to get Bernie Sanders's approval. *Id.* And so she was forced to utilize a more generic slogan that did not provide as much an insight into her viewpoints as the proposed slogans would have. By eliminating the ability of critical speech to be placed on the ballot, New Jersey's law "license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 392 (1992). The First Amendment does not permit this result.

The form of a heckler's veto that New Jersey has adopted is also especially egregious because it is a prior restraint. Prior restraints on speech are highly disfavored by the First Amendment. *See Bantan Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."). But New Jersey's consent requirement for ballot speech is even worse than a typical prior restraint because it expressly allows for preemptive censorship based on the viewpoint that is being expressed. It makes no difference that a third-party actor is the one delegated the ability to censor speech in a government created forum. The result is the same. *See Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (refusing to enforce a racially restrictive covenant even though "the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement.").

Vital political speech is stifled before it can ever be expressed merely because the subject of the speech objects to the expressed viewpoint. The Third Circuit's willingness to subject such an objectionable prior restraint on speech to a more permissive standard of review cannot be allowed to stand.

D. New Jersey's Ballot Slogan Law Invites Arbitrary, Viewpoint-Based Enforcement.

The First Amendment is offended by laws such as New Jersey's consent requirement for ballot slogans that give government officials unbridled discretion to selectively target certain messages or viewpoints. Such laws open up the way for favoritism and selective censorship. Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L.A. L. Rev. 67, 69 (2007) ("[T]he most universally condemned threat to the foundations of free expression [is] suppression based on the regulators' subjective disagreement with or disdain for the views being expressed."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 459 (1996) (arguing that a "rule against standardless licensing will identify and reduce the incidence of improperly motivated administrative decisions").

In *Forsyth County v. Nationalist Movement*, this Court struck down a law that gave government officials discretion to impose permit costs on potential speakers. The Court emphasized that "[n]othing in the law or its application prevents the official from encouraging some views and discouraging others

through the arbitrary application of fees." 505 U.S. 123, 133 (1992). This type of discretion impermissibly created "the potential for becoming a means of suppressing a particular point of view." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 52 U.S. 640 (1981).

Similarly, in *Minnesota Voters Alliance v. Mansky*, this Court struck down a law which barred individuals from wearing "political" apparel to the polling place. 138 S. Ct. 1876, 1883 (2018). The Court explained that the "fair enforcement" of such a policy would require those enforcing it to "maintain a mental index of the platforms and positions of every candidate and party on the ballot" and that this unacceptably increased the risk of "erratic application" and "'[t]he opportunity for abuse.'" *Id.* at 1890–91.

The same concerns are present with New Jersey's law allowing for "erratic application" and "the opportunity for abuse." For instance, an official may approve a slogan of "Jesus loves me" if he determines that the slogan is talking about Jesus Christ, but not if he determines that it is talking about Spanish Football star Jesús Navas González. Enforcement is also arbitrary, just as in *Mansky*, because it depends on an official's "mental index" of candidates and corporations. For instance, if someone proposes the slogan "Not Me, Us," as Appellant McCormick did here, App. 6, then if the official is familiar with Bernie Sanders he may look up if there is a registered corporation with that name and ultimately deny the slogan. On the other hand, an official unfamiliar with Bernie Sander's use of that slogan would not think to

look up whether a corporation exists with such an expressive slogan and would approve it.

CONCLUSION

This Court should grant certiorari to provide guidance on the correct standards for determining whether a law is content or viewpoint based and clarify that New Jersey's consent requirement for ballot slogans was content and viewpoint based and therefore subject to strict scrutiny.

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Respectfully Submitted,

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