

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 OF *AMICUS CURIAE* MICHAEL D. BYRNE
IN SUPPORT OF PETITIONERS**

—◆—
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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 First Amendment strict scrutiny.

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INTEREST OF *AMICUS CURIAE*¹

Michael D. Byrne is the duly elected municipal chairman of the Republican County Committee in Montclair, New Jersey. The Montclair Republican County Committee, Inc., is incorporated as a New Jersey non-profit corporation and exists pursuant to N.J. Stat. Ann. § 19:5-3. Mr. Byrne has long worked in New Jersey politics. He has served as a campaign manager for several New Jersey Republican candidates at the municipal, state, and federal levels. He has also been a campaign manager for federal campaigns in other states and has worked on several Republican U.S. presidential campaigns. Mr. Byrne has owned, used, awarded, and denied ballot slogans to candidates throughout New Jersey. He possesses intimate knowledge about the slogan statutes and how they function. Mr. Byrne currently owns or controls the slogans “Montclair Republican County Committee, Inc.,” “Essex Republican Party Organization,” “Make New Jersey Great Again,” “America First,” “America First Republicans,” “Toms River First Republicans,” and “Save Toms River.” He is filing this brief to explain how the slogan statutes work in practice and how they can be used to restrict core political speech.



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* and his counsel made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

SUMMARY OF ARGUMENT

New Jersey allows its political candidates to speak to voters on the ballot. The so-called “slogan statutes,” *see* N.J. Stat. Ann. §§ 19:23-17, 19:23-25.1, authorize a candidate running 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. However, New Jersey also places a significant handicap on a primary candidate’s speech, by regulating the content of his campaign slogan at “the most crucial stage in the electoral process—the instant before the vote is cast.” *Cook v. Gralike*, 531 U.S. 510, 525 (1995) (quoting *Anderson v. Martin*, 375 U.S. 399, 402 (1964)). If a candidate’s slogan refers to the “name of any person” or to “any incorporated association of this State,” his slogan will not be approved by state officials unless the “written consent” of such person or incorporated association is filed with the candidate’s nominating petition. N.J. Stat. Ann. § 19:23-17.

For decades, New Jersey’s political insiders and party bosses have controlled a variety of slogans and have used these statutes to weaponize the state’s primary ballots. By creating fake corporations with names that they lend out for use as ballot slogans to their own hand-picked candidates, New Jersey’s party bosses employ the consent requirement of the slogan statutes to regulate and limit the speech that may

appear on the state’s primary ballots. New Jersey’s political insiders also create fake corporations for the specific purpose of censoring the speech of their political rivals, and thus are able to prevent their primary opponents from speaking to voters as they wish.

In *Mazo v. New Jersey Secretary of State*, 54 F.4th 124 (3d Cir. 2022), the Third Circuit concluded that the slogan statutes do not regulate core political speech in part because the court had no understanding of how the slogan statutes work in practice. Further, the Third Circuit concluded that a candidate’s printed ballot slogan does not constitute core political speech by awkwardly limiting the definition of core political speech to words that (1) occur “outside of the polling place” and “over a long period of time [before] Election Day,” and (2) constitute “interactive, one-on-one communication[s].” *Id.* at 143, 145. The Third Circuit managed to define core political speech narrowly in this way because it relied on the views advanced in but two election law cases, *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999). Had the Third Circuit looked more broadly, however, it would have found that “core political speech” is a much more expansive concept, one that encompasses campaign finance, petition circulation, ballot access, and, of course, candidate speech, among other things.

This case provides an excellent vehicle for this Court to clarify what qualifies as core political speech and under what circumstances, if any, core political speech can be regulated. At the very least, the speech

in question in this case is core political speech, and the decision below should be rectified. The Court should grant *certiorari* to address these important issues.

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ARGUMENT

1. New Jersey's Slogan Statutes Regulate Core Political Speech

Since 1930, New Jersey law has permitted a candidate 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”—*i.e.*, a slogan—“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.” N.J. Stat. Ann. § 19:23-17. Since 1944, however, New Jersey law has mandated 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.* If the candidate fails to obtain written consent, state officials will refuse to print his slogan and often will print the words “No Slogan” on the ballot next to his name. *See* N.J. Stat. Ann. § 19:23-25.1. These so-called slogan statutes are enforced by New Jersey’s Secretary of State, county clerks, and municipal clerks when a primary candidate files his nominating petition

with these officials. *See* N.J. Stat. Ann. §§ 19:23-22, 19:23-22.1.

For decades, New Jersey’s political insiders have created fictitious corporations with the names of popular slogans. They then control whether these “names” may be used as “slogans.” In this way, New Jersey’s political insiders control how candidates get to speak on the ballot and also what they can say there to voters. These slogans are also an intrinsic part of the so-called “County Line” candidate bracketing process which is frequently and successfully employed by the state’s party bosses and political machines to marginalize challengers in primary elections—which, in much of the state, are the only elections that matter.

Although technically the slogan statutes say that no primary candidate’s slogan shall include or refer to the name of “any incorporated association of this State” unless the written consent of such “incorporated association of this State” has been filed with the candidate’s nominating petition, *see* N.J. Stat. Ann. § 19:23-17, in practice one does not have to create a corporate entity to control the speech that appears on the ballot. Rather, filing for a “Certificate of Reservation of a Domestic Business Name” with the Division of Revenue and Enterprise Services at New Jersey’s Department of the Treasury, and paying a small fee, is enough. That allows one to “reserve” a corporate name for four months. *See Business Registration Certificate*, DEP’T TREASURY, NEW JERSEY, <https://perma.cc/8H3Y-ZGES>. Such a Certificate gives its owner the “exclusive right to the use of a corporate name” for a period of 120 days.

N.J. Stat. Ann. § 14A:2-3(1)-(2). Thereafter, the holder of a reserved name “may renew the reservation for additional periods of 120 days by filing an application for renewal within the last 30 days of the current reservation period.” N.J. Stat. Ann. §14A:2-3(4). The law places no limit on the number of renewals. *Id.*

Many political operatives in New Jersey do not bother to create corporations to control the speech that appears on the ballot. Rather, they simply reserve corporate names using the procedure above and then renew those reservations as needed. Often, a corporate name is not needed once campaign season ends. Thus, in petitioner Lisa McCormick’s case, her political rivals in 2020 obtained a Certificate of Reservation for the corporate name “Not Me. Us.” so that they could use that slogan on the ballot and prevent McCormick from using it. But after the primaries ended, her rivals did not bother to incorporate an entity with that name and today there is no corporation in New Jersey named “Not Me. Us.” *See Business Name Search*, DEP’T TREASURY, NEW JERSEY, <https://www.njportal.com/DOR/BusinessNameSearch/Search/BusinessName>. Often, a slogan may be needed again but its owner has neglected to renew his Certificate of Reservation. When this occurs, the ballot slogan a party boss or political operative had traditionally controlled may be misappropriated by another political actor in New Jersey—a not uncommon occurrence.

To candidates and their campaign managers, a candidate’s ballot slogan is certainly “core political speech” under the First Amendment. *See* U.S. CONST.

amend. I. Some voters in New Jersey identify with a particular ballot slogan more than they identify with the candidate, especially if the candidate is not well-known to the voter. In other cases, candidates are effectively forced to have another candidate's slogan printed alongside their names in order to secure more advantageous ballot position. This is particularly true of down-ballot candidates, who rely on the slogans that they may share with others on the ballot for voters to identify them and "any official act or policy to which [they are] pledged or committed." N.J. Stat. Ann. § 19:23-17. Frequently the slogan that appears on the candidate's ballot is the same as the campaign slogan on which the candidate ran during his campaign. In 2016, for instance, after *amicus* reserved the corporate name "America First Republicans," his candidates ran on that campaign slogan. "America First Republicans" was used on the ballot in the state's First Congressional District by U.S. House candidate Bob Patterson. After Patterson lost his primary, *amicus* allowed the slogan to lapse, but reserved it again in 2020 and gave consent to other candidates and campaigns to use it throughout the state, including to a U.S. House candidate and a U.S. Senate candidate. Bob Patterson used this campaign slogan as his ballot slogan when he ran again, this time in the Second Congressional District, and U.S. Senate candidate Tricia Flanagan used it statewide. In 2021, *amicus* reserved the slogan "Make New Jersey Great Again" and lent it to a gubernatorial candidate and to other candidates throughout the state running in state and local elections.

Candidates, campaign managers, and county political committee chairmen (as defined in N.J. Stat. Ann. §§ 19:5-1, 19:5-3) customarily compete for, jockey for, negotiate for, purchase, request, and otherwise reserve the corporate names of slogans that they have an attachment to, deem to be politically beneficial, or regard as a fitting description of or message for their candidacies. Obtaining the exclusive right to use a certain ballot slogan provides enormous advantages to primary candidates in New Jersey. First, over time, voters come to identify with certain slogans that repeatedly appear on the ballot, so owning those “names” provides a significant electoral advantage in terms of being recognized by voters. Second, one’s ownership of a corporate slogan can be used to prevent one’s political rivals from being able to say what they want on the ballot, as petitioner McCormick’s case shows with “Not Me. Us.” Third, the law in New Jersey allows all candidates who share a ballot slogan to be drawn for the ballot “as a unit” and to appear on the “same row” of the ballot. See N.J. Stat. Ann. § 19:49-2. In New Jersey, this ballot feature is known as “the County Line,” and it provides an enormous, even insurmountable, electoral advantage to candidates in primary elections throughout the state. The slogan is the “glue” that forms the County Line.

In practice, the most powerful officials in New Jersey politics are the county party chairs of each major party in New Jersey’s twenty-one counties. Most of these figures hold no elected position, and they are unaccountable to voters. See Brett M. Pugach, *The County*

Line: The Law and Politics of Ballot Positioning in New Jersey, 72 RUTGERS U. L. REV. 629, 660 (2020) (noting how “[d]espite the unprecedented power wielded by county chairs, the position itself is not elected directly by the voters.”). Their power often comes from the fact that they control the corporations whose names over time have become recognizable ballot slogans to voters, which the chairs can lend to their endorsed candidates. See Max Pizarro, *The 25 Most Powerful Municipal Chairs in the State of New Jersey*, INSIDER NJ, Feb. 20, 2017, <https://perma.cc/XZ2R-TPHY> (noting how candidates “in both parties . . . are by and large loyal to a county chair” who boasts “individual, muscled-up power” in New Jersey). These county chairs control corporate names like “Regular Organization Republican of Union County” or “Hudson County Democratic Organization” and, through the consent requirement of the slogan statutes, are usually the sole individuals who decide which candidates will have the county party’s endorsement in the primaries. Effectively, this decision comes down to which candidates will be allowed to use the corporate slogan that the county chair controls. Some but not all county committees in New Jersey also incorporate their official names and use them as ballot slogans, and a county party chair’s endorsed candidates will often request to use those slogans on the primary ballot.

Nonetheless, in most counties, the county chairs make the “ultimate decision” over which candidates to endorse in a primary election, and even if, as matter of law, that function should reside with the county

committee, “the practical reality” is that when the county party chairs control the corporations that lend out their names as ballot slogans, these county chairs “exert pressure to ensure their handpicked candidates” are the candidates the county committee endorses. Pugach, *supra*, at 659. Political candidates in New Jersey have “all of the incentive in the world to provide unwavering support to their county chairs,” and “[a]nything short of unwavering support could amount to political suicide.” *Id.* The county party chairs in each county are colloquially known as “party bosses.” They head the state’s infamously corrupt political machines. See Kathleen Hopkins, *Gallery of New Jersey’s Crooked Politicians*, ASBURY PARK PRESS, Apr. 1, 2015, <https://perma.cc/CK6D-NCEL> (noting how “New Jersey has a long and storied history of political corruption” and chronicling the activities of some of its political machines). New Jersey’s twenty-one county clerks, the officials who are primarily responsible for designing the ballot by state law, see N.J. Stat. Ann. § 19:23-24, are also beholden to these party bosses in each of New Jersey’s twenty-one counties.

2. Political Elites In New Jersey Abuse The Slogan Statutes To Control The Core Political Speech Of Their Political Rivals

Usurping a rival’s ballot slogan is a sport played with particular gusto in the Garden State. See, e.g., David Wildstein, *Progressive Leaders Now Own Camden Democratic Machine Slogan*, N.J. GLOBE, Mar. 30, 2020, <https://perma.cc/JV3B-Y29L> (Working Families

Party steals slogan of the Democratic political machine in Camden County); David Wildstein, *Somerset Democrats Let Slogan Lapse, and GOP Now Owns It*, N.J. GLOBE, Apr. 5, 2021, <https://perma.cc/5KUU-ZAVF> (Republicans in Somerset County steal slogan of Democratic rivals). New Jersey's political insiders engage in this mischief by surreptitiously registering the name of the corporate entity whose consent is needed to use a particular ballot slogan whenever its owners inadvertently let that registration lapse.

One famous example of this kind of gamesmanship occurred in 1996, when the chairman of the Essex County Republican Committee, John Renna, inadvertently let his corporate slogan lapse. That allowed the Republican county executive in Essex County, Jim Treffinger, with whom Renna was feuding, to steal the slogan "Essex Republican Party Organization." Treffinger registered that corporate name and then awarded that slogan to his own friendly county committee candidates on the primary ballot, and in this way engineered a coup to oust Renna as party boss. Treffinger then became the new party boss in Essex County before eventually being indicted and convicted of corruption charges. See Ronald Smothers, *Treffinger Pleads Guilty To Corruption*, N.Y. TIMES, May 31, 2003, <https://perma.cc/NST4-TA84>. Today, *amicus* owns the slogan "Essex Republican Party Organization," which, given its political value, he always makes sure to renew in a timely manner.

By 2017, Al Barlas was the Essex County Republican party boss. He went a step further than his predecessor, Treffinger. Barlas registered the slogan

“Republicans for Responsible Government” when his rival party boss in Bergen County failed to renew that corporate name. Bergen County Republicans had long used “Republicans for Responsible Government” as their ballot slogan, and this episode was an embarrassment for them. Unsurprisingly, it made headlines throughout the state. See John F. X. Graham, *DiGaetano v. Barlas: Bergen and Essex GOP Chairs War Over Party Slogan*, INSIDER NJ, Mar. 21, 2017, <https://perma.cc/Y2EZ-2EQ8> (noting that “Owning the slogan is party chairmanship 101.”). Ironically, while Barlas was able to steal “Republicans for Responsible Government” from his neighboring party boss in Bergen County, he managed to lose his *own* political machine slogan, “Essex Republican Party Organization,” to *amicus* after inexplicably neglecting to register its corporate name with the state.

In addition to stealing each other’s slogans, political insiders in New Jersey often create fake corporations to chill the ballot speech of their political rivals. See Joey Fox, *Off-the-Line Toms River Slates Descend into Legal Battle over Ballot Slogan*, N.J. GLOBE, Apr. 12, 2023, <https://perma.cc/WSP2-YCH5> (Republican insurgents—whom *amicus* was advising—reserved the corporate name “Save Toms River” in an attempt to prevent Republican incumbents from using those words on the ballot); David M. Halbfinger, *State Court Judge Rebuffs a Ballot Ploy by Florio*, N.Y. TIMES, Apr. 19, 2000, <https://perma.cc/MS75-X4Q6> (Democratic machines endorsed Jon Corzine for U.S. Senate, only for Corzine to find that his primary opponent,

former governor Jim Florio, “had set up 20 non-profit corporations” to deny Corzine his machine-backed ballot slogans); David Wildstein, *McCann Wins Fight Over Lonegan Slogan*, N.J. GLOBE, Apr. 5, 2018, <https://perma.cc/H8VE-47DR> (Republican Steve Lonegan sought to run for Congress in 2018 under the slogan “Republicans for the President’s Agenda,” only to find that his opponent, John McCann, had formed a corporation with that name to chill Lonegan’s ballot speech; the Secretary of State then denied that ballot slogan to Lonegan).

Such games take place in New Jersey all because of the slogan statutes. In each case, they radically violate the First Amendment. The slogan statutes allow New Jersey’s party bosses and party machines to regulate the speech that appears on the ballot—in essence, to regulate a candidate’s core political speech—both for their own endorsed candidates and for the rival candidates they oppose. Given how New Jersey’s political system works, it may be little wonder that even the state’s longtime political insiders refer to the Garden State’s politics as “colorful,” see RAYMOND LESNIAK, *CULTIVATING JUSTICE IN THE GARDEN STATE: MY LIFE IN THE COLORFUL WORLD OF NEW JERSEY POLITICS* (2022) (longtime New Jersey state senator), “rough-and-tumble,” see RICHARD J. CODEY, *ME, GOVERNOR? MY LIFE IN THE ROUGH-AND-TUMBLE WORLD OF NEW JERSEY POLITICS* (2011) (former governor and state senator), and “corrupt[.]” WILLIAM E. SCHLUTER, *SOFT CORRUPTION: HOW UNETHICAL CONDUCT UNDERMINES GOOD GOVERNMENT AND WHAT TO DO ABOUT IT* (2017)

(longtime state senator). To some observers, the she-nanigans here may be acceptable in the ordinary course of politics. But they also operate at the expense of the First Amendment and violate the core political speech rights of candidates running for public office.

3. The Third Circuit’s View That New Jersey’s Ballot Slogans Do Not Comprise Core Political Speech Was Profoundly Wrong

The Third Circuit affirmed the dismissal of the petitioners’ complaint, but only after stating that this case presented “difficult” issues and bemoaning that “the Supreme Court has never laid out a clear rule or set of criteria” to guide a case like this. *Mazo*, 54 F.4th at 132, 137. Although the court below acknowledged that laws that “aim[] at regulating political speech” are “subject to a traditional First Amendment analysis,” it concluded that the slogan statutes do not regulate political speech, reasoning that a slogan is a “classic electoral mechanic” that purportedly “cannot inspire any sort of meaningful conversation regarding political change,” whereas the “lodestar for core political speech” is “the involvement of interactive communication” between individuals. *Id.* at 140, 142, 145 (quotation marks and citations omitted). The Third Circuit then concluded that the “more flexible *Anderson-Burdick* balancing test” supplies the “appropriate framework” to resolve the issues presented in this case. *Id.* at 131-32, 143.

The Third Circuit based its chilling conclusion on two grounds. First, the Third Circuit reasoned that core political speech supposedly occurs only “outside of the polling place and over a long period of time leading up to Election Day,” whereas the slogan statutes regulate speech that is “confined to the ballot itself at the moment a vote is cast.” *Id.* at 145. Second, the Third Circuit found that “ballot slogans are different in kind from core political speech,” in part because “[t]he Supreme Court has emphasized the ‘interactive’ nature of ‘core political speech.’” *Id.* “That crucial element, however”—being interactive—“is missing here,” the Third Circuit reasoned. *Id.* “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” because a “ballot slogan . . . is a one-way communication confined to the electoral mechanic of the ballot.” *Id.* at 145.

On both fronts, the Third Circuit’s reasoning was gravely mistaken, not to mention divorced from political reality. The court did not explain why ballot slogans cannot inspire any “meaningful conversation regarding political change.” If the message a candidate prints in his ballot slogan happens to be the same message his supporters circulate through “leafletting” or wear on their “political clothing,” it belies common sense that the message on the ballot would be any less inspiring. And why must core political speech take place “outside of the polling place” before Election Day, or why must it be “interactive”? Numerous cases from this Court

have treated one-way communication as core political speech, *see, e.g., Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449 (2007); *Brown v. Hartlage*, 456 U.S. 45 (1982); *Mills v. Alabama*, 384 U.S. 214 (1966), and have consistently subjected restrictions of that speech to strict scrutiny. The Third Circuit, wholly detached from retail politics, got this wrong. Political change, by definition, comes from *casting a vote*. In that sense, a ballot slogan has the potential to inspire political change more than the “leafletting” or wearing of “political apparel” that takes place several steps from the polling place. This is especially true because the words that appear on the New Jersey ballot belong to the candidate himself. (And it may be equally true because, in practice, the majority of New Jerseyans today are absentee voters who receive their ballots at home long before “Election Day” even arrives.)

The Third Circuit went astray in this case, and came to baffling conclusions, because it failed to conduct a complete survey of the various kinds of activities that the courts have found constitute “core political speech.” Had it done so, the Third Circuit would have realized that core political speech is a much broader concept. But the court did not do this. Instead, it relied on the definition of core political speech advanced by but two election law cases, *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999). In *Meyer*, this Court said that “the circulation of a petition involves the type of interactive communication concerning political change that is

appropriately described as ‘core political speech.’” 486 U.S. at 421-22. And in *Buckley*, this Court characterized the lodestar for “core political speech” as the involvement of “interactive communication concerning political change.” 525 U.S. at 186 (quoting *Meyer*, 486 U.S. at 422). Only by relying exclusively on these precedents did the Third Circuit find that what “constitutes core political speech” is “interactive, one-on-one communication.” *Mazo*, 54 F.4th at 143.

In defining core political speech, the Third Circuit wore these cases as blinders. The court found that “speech that relates to an election but occurs nowhere near the ballot or any other electoral mechanism” should be “treated as core political speech entitled to the fullest First Amendment protection,” *id.* at 142, but, inexplicably, it excluded speech that occurred *on the ballot* from this category. The Third Circuit noted that a “ballot is usually an electoral mechanic,” *id.* at 145, which is correct, but it did not offer any explanation of what specific electoral mechanism New Jersey’s ballot slogans performed. Even if the ballot itself is an electoral mechanism, in that it is used to elect candidates, that does not mean that the slogans printed on the ballot are as well. The failure to reason carefully led the Third Circuit to conclude that New Jersey’s statutory scheme “regulates only the ballot itself—a classic electoral mechanic—and does not regulate core political speech.” *Id.* at 145.

To its credit, the Third Circuit admitted that “the line separating core political speech from the mechanics of the electoral process has proven difficult to

ascertain[.]” *Id.* at 132. Moreover, the court conceded that “the Supreme Court itself [has] fractured deeply in the application of this jurisprudence.” *Id.* Nonetheless, the Third Circuit waded into these waters in an attempt “to develop . . . this constitutional jurisprudence” on its own. *Id.* at 132. It would have been wiser had the Third Circuit not gotten its toes wet, at least not without first considering how the slogans that appear on New Jersey ballots work in practice.

4. The Court Should Grant Certiorari To Clarify What Core Political Speech Entails, For There Is Widespread Confusion On This Issue

Coming to terms with what constitutes “core political speech” is crucial because “core political speech [is] the ‘primary object of First Amendment protection.’” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 485 (2010) (Thomas, J., concurring in part, concurring in judgment in part) (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 264 (2003) (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part)). It is “an area in which the importance of First Amendment protections is ‘at its zenith.’” *Meyer*, 486 U.S. at 425. Because “it would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech,” *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744 n.8 (2008), this Court has repeatedly held that “[w]hen a law burdens core political speech, we apply ‘exacting scrutiny.’” *McIntyre v. Ohio Elections*

Comm'n, 514 U.S. 334, 347 (1995). But what core political speech entails, in the first instance, has never quite been settled.

The Third Circuit, not realizing this, relied on the definition of core political speech advanced by *Meyer* and *Buckley*. These cases, however, are not the only ones where the concept of “core political speech” has been discussed or defined. Restrictions on campaign contributions and expenditures also burden “core political speech.” Only last Term, this Court found that the provision of the Bipartisan Campaign Reform Act that limited the amount of personal loans that could be repaid to federal candidates by their campaigns from post-Election Day contributions “burden[ed] core political speech without proper justification.” *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1657 (2022). Likewise, two decades ago, Justice Thomas noted how, “[w]ith breathtaking scope, the Bipartisan Campaign Reform Act[’s]” restrictions “directly target and constrict core political speech,” *McConnell*, 540 U.S. at 265 (Thomas, J., concurring in part and dissenting in part) (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 410-11 (2000) (Thomas, J., dissenting)), and how “limitations on independent expenditures” should be “recognize[d]” “as a direct restriction on core political speech.” *McConnell*, 540 U.S. at 272 (Thomas, J., concurring in part and dissenting in part).

Obviously, the contours of what “core political speech” entails have created uncertainty. But references to core political speech can be found beyond the context of campaign finance law. “A documentary film

critical of a potential Presidential candidate is core political speech.” *Citizens United*, 558 U.S. at 393 (Scalia, J., concurring). If that is so, it begs the question of why Lisa McCormick’s ballot slogan criticizing a potential presidential candidate—*i.e.*, “Bernie Sanders Betrayed the NJ Revolution”—would not constitute core political speech as well.

Because “[t]he precise contours of what constitutes ‘core political speech’ are less than perfectly clear[,]” *Pest Committee v. Miller*, 626 F.3d 1097, 1105 (9th Cir. 2010), the courts have struggled to define this concept. Does all speech “critical” of a presidential candidate count, as in *Citizens United*? Do only “one-on-one interactive communications” count, as in *Meyer*? Do only “communications concerning political change” count, as in *Buckley*? There is lack of clarity, and as a result splits have arisen within the circuit courts. *Cf. Angle v. Miller*, 673 F.3d 112, 1133 (9th Cir. 2012) with *Voting for America, Inc. v. Steen*, 732 F.3d 382, 389-96 (5th Cir. 2013). Is the trigger a specific call for political change? Do broader efforts at ballot access count? All voter registration activity as a whole?

As the nature of communication has changed, the need to clarify what counts as core political speech is even more pressing. Today, *Buckley*’s sentiment that “core political speech” requires “interactive communication concerning political change,” 525 U.S. at 186, seems antiquated. It fails to account for how candidates communicate with their voters in the modern era. The call for “political change” today is more likely to happen on television, over the Internet, and via

social media. It is through these fora, rather than “leaf-letting” or the “wearing of political apparel,” that voters learn about proposals to “Make American Great Again,” to enact “Medicare-for-All,” or to pass the “The Green New Deal.” These well-known candidate slogans constitute calls for political change, and they are certainly core political speech, even though no voter interacts one-on-one with the television set where he first hears these slogans.

“The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.” *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (Kennedy, J., concurring). This Court’s precedents have been unwavering in finding that candidate speech is “core” political speech and that strict scrutiny must apply “[w]hen a State seeks to restrict directly the offer of ideas by a candidate to the voters.” *Brown*, 456 U.S. at 52-54. Indeed, a candidate’s speech to his voters lies at the absolute “core” of the First Amendment, regardless of the medium in which it is broadcast. All of the words uttered by a political candidate to his voters constitutes core political speech. Still, this Court should clarify its definition of this term to acknowledge today’s era of digital communications. Otherwise, there will be more absurd results like the Third Circuit’s opinion below. For instance, if a candidate posts a message on Facebook and has the “comment” function turned on, that would constitute “one-on-one interactive communication,” and, under *Meyer*, it would be deemed to

constitute core political speech. But if the comment function is turned off, it wouldn't? *Meyer*'s definition is incomplete.

“Of course, core political speech need not center on a candidate for office.” *McIntyre*, 514 U.S. at 347. Other speech should count as core political speech as well; the concept should be broadly construed. As the Ninth Circuit has recognized, one-on-one communication through the circulation of petitions is “a *form* of core political speech,” *Pierce v. Jacobsen*, 441 F.4th 853, 862-63 (9th Cir. 2022) (emphasis added), but it is not the only form. There are others. It was in excluding these other forms of core political speech that the Third Circuit erred.

This Court should take the opportunity to clarify what core political speech entails, for the alternative is the chilling result that the Third Circuit reached in *Mazo v. New Jersey Secretary of State*.



CONCLUSION

For the reasons stated, this Court should grant *certiorari* in this case.

Respectfully submitted,

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