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

AMICUS CURIAE BRIEF OF GOOD GOVERNMENT COALITION OF NEW JERSEY AND REPRESENTUS OF NEW JERSEY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Good Government Coalition of New Jersey (GGCNJ) is a nonpartisan, grassroots group whose mission is to strengthen democracy by working with residents across New Jersey to bring greater transparency, accountability, and participation to New Jersey's state and local governments and political system. GGCNJ advocates for fairer primary ballots in New Jersey and nonpartisan rules of good ballot design.

RepresentUS of New Jersey is the New Jersey chapter of RepresentUs, America's leading nonpartisan, anti-corruption organization fighting to fix broken and ineffective government. It unites people across the political spectrum to pass laws that hold corrupt politicians accountable, defeat special interests, and strengthen American democracy.

Amici are interested in this case because New Jersey's slogan statute impairs New Jersey voters' First Amendment rights and its operation undermines democracy. They respectfully submit that the Court should grant the petition.

[1] The parties were timely notified of this *amicus curiae* brief as required by Rule 37.2. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel funded its preparation or submission.

SUMMARY OF ARGUMENT

New Jersey's "slogan statute," N.J. Stat. Ann. § 19:23-17, grants a primary election candidate the right to speak to New Jersey voters by placing on the ballot a slogan of up to six words for either of two overtly stated purposes: (1) engaging in core political speech to voters stating the candidate's position on matters of policy, or (2) aligning the candidate with a faction of his political party.[2] The slogan statute was amended in 1944 by (3) regulating the substantive content of such slogans to dictate that they may not include or refer to the name of a person or New Jersey corporation absent written permission.

The slogan statute's name restrictions violate the First Amendment. They are not only content- and viewpoint-based, as the petition for *certiorari* argues convincingly, but, as this brief from New Jersey *amici* demonstrates, operate on the ground in a manner both vague and overbroad, providing additional reasons the

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[2] Any primary candidate may "request" "a designation, in not more than six words" to appear on the ballot "for the purpose of indicating either [1] any official act or policy to which he is pledged or committed, or [2] to distinguish him as belonging to a particular faction or wing of his political party; provided, however," that [3] "no such designation or slogan shall include or refer to the name of any person or any incorporated association of this State" without that person's or corporation's "written consent." N.J. Stat. Ann. § 19:23-17.

A separate provision, N.J. Stat. Ann. § 19:23-25.1, imposes the same name restriction, though only as to persons. The statutes are sometimes collectively known as the slogan statutes; this brief refers to the entirely overlapping, more comprehensive provision, N.J. Stat. Ann. § 19:23-17, as the slogan statute.

petition should be granted. Furthermore, the slogan statute's primary purpose and effect is to empower local political machines to use slogans to create a nearly outcome-dispositive "county line" in primary elections, undermining democracy.

The purpose and history of the slogan statute, as amended to add name restrictions, demonstrates that it was intended, and operates, to achieve twin goals: (1) limiting core political speech through name restrictions that are not only content- and viewpoint-based, but that are also vague and both underinclusive and overbroad, and (2) enabling New Jersey's county-level political machines to exert extraordinary control not only over their own faction of the party, but over the outcome of the overwhelming majority of New Jersey primary elections.[3] *See* Brett M. Pugach, *The County Line: The Law and Politics of Ballot Positioning in New Jersey*, 72 Rutgers U. L. Rev. 629, 630 (2020) ("Pugach").

First, the state's actual implementation of the slogan statute's opaque name restrictions has, for more than 75 years, repeatedly proved arbitrary and inconsistent, as journalistic investigation and public records requests have revealed. The statute's opacity obligates

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[3] *See also* N.J. Stat. Ann. § 19:49-2 (authorizing local party machines to decide whether to permit "bracketing" of candidates whom the machine has permitted to use its incorporated name as a slogan so that all such candidates—across races—appear together in a favorable, prominent position on the ballot).

local officials to divine what the statute means. It is therefore unconstitutionally vague.

Second, the statute is unconstitutionally overbroad. The slogan statute's actual primary interest is different than a simple review of its text might reveal; in practice, its primary purpose and effect is empowering local political machines to use slogans to control primary election results. The state suggests that the statute is supported by its interests in avoiding voter confusion and preserving election integrity, both of which are interests the slogan statute operates to undermine. And the state's compelling interest in preventing false factual statements of endorsement is only minimally advanced by the slogan statute, whereas it bars a substantial sweep of First Amendment-protected political speech. The slogan statute is therefore unconstitutionally overbroad.

ARGUMENT

I. The Purpose and History of New Jersey's Slogan Statute Demonstrates that It Is Intended to and Operates to Restrict Core Political Speech and to Empower Local Political Machines.

A. The Slogan Statute Has Twin Purposes: Establishing a Forum for Core Political Speech and Empowering Local Political Machines to Control Slogans and Thereby Give Their Favored Candidates an Overwhelming Advantage in Primary Elections.

1. The first of the slogan statute's overt purposes is to establish a forum for candidates to engage in core political speech, communicating policy positions directly to voters to influence their vote. Such "speech designed to influence the voters in an election" does not concern "the mechanics of the electoral process. It is a regulation of pure speech," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995), "seek[ing] to restrict directly the offer of ideas by a candidate to the voters," *Brown v. Hartlage*, 456 U.S. 45, 52-54 (1982), and is thus subject to strict First Amendment scrutiny.

New Jersey was not, of course, required to establish a forum for core political speech on the ballot. But given New Jersey's idiosyncratic choice, it may not restrict that speech, selectively undermining First Amendment expression "at the most crucial stage in the election process—the instant before the vote is

cast." *Cook v. Gralike*, 531 U.S. 510, 525 (2001) (quoting *Anderson v. Martin*, 375 U.S. 399, 402 (1964)). The Third Circuit's legal standard has this precisely reversed: "[T]he speech that occurs within a ballot slogan is confined to the ballot itself at the moment a vote is cast" and is thus *not* "core political speech" entitled to robust First Amendment protection. *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 145 (3d Cir. 2022).

The Third Circuit brushed aside the state's rejection of Petitioner Lisa McCormick's slogan, "Bernie Sanders Betrayed the NJ Revolution"—barred for using Sanders's name—as somehow not core political speech, and not a direct restriction of a candidate's ideas offered to voters. The court's exceedingly narrow test for political speech meant it did not construe that denial to be meaningful enough even to present an *unsuccessful* as-applied challenge. *Id.* at 133, 134 n.6.

The other reason the Third Circuit held slogans not to be core political speech is that they are purportedly "one-way communication" that appear only on the ballot and thus "cannot inspire any sort of meaningful conversation regarding political change." *Mazo*, 54 F.4th at 145. This is not only a highly dubious legal proposition, it is demonstrably false: New Jersey election law requires that "sample ballots shall be mailed to each registered voter," N.J. Stat. Ann. § 19:49-4, providing voters with the slogans intended to influence their vote not only on the ballot itself, but beforehand as they contemplate political change.

2. The second, overtly expressed purpose of the slogan statute is to enable candidates to align with other candidates belonging to a particular faction of their party. The slogan statute operates in practice, along with other New Jersey election provisions and state judicial decisions, to supercharge the power of local political machines to use slogans as the glue to bind together a county line of favored primary candidates that almost always prevails.

In the early 1900s, New Jersey had sought to minimize the power of such local machines, establishing direct primaries to increase the voice of voters, *Stevenson v. Gilfert*, 100 A.2d 490, 491-92 (N.J. 1953), and passing the Geran Act in 1911, as Governor Woodrow Wilson explained it, to "break up the private and secret management of party machines." Pugach, 633 & n.16 (quoting Ralph Simpson Boots, *The Direct Primary in NJ* 30-31 (1917)). Over the coming decades, local machines regained significant power.

B. The Slogan Statute's Name Restrictions Have the Purpose and Effect of Barring Core Political Speech and of Empowering Local Political Machines to Use Slogans to Create a County Line, Effectively Dictating Primary Results.

New Jersey enacted the slogan statute, N.J. Stat. Ann. § 19:23-17, in 1930, absent name restrictions. The statute was amended in 1944 to impose name restrictions, barring slogans that "include or refer to the

name of any person or any incorporated association of this State" without that person or corporation's "written consent." N.J. Stat. Ann. § 19:23-17.[4] First, these name restrictions violate the First Amendment because they were intended at their inception—and continue to operate—to bar the content of core political speech that criticizes (or, for that matter, praises) politicians (and other people) or New Jersey corporations. Second, they operate in practice to empower local party machines to control the use of slogans as a means of exerting extraordinary control over primary election results.

1. The name restriction amendments were imposed for the very purpose of preventing disfavored, core political speech, as was recognized at the time by everyone who favored or opposed the 1944 amendment. A splinter group of Republicans wished to use the slogan "Draft Dewey for President," overtly supporting Dewey, New York's governor, for the Republican presidential nomination. This slogan greatly concerned New Jersey "Republican state leaders" who did not want to commit to Dewey and did not want voters to be swayed by the substantive content of slogans favoring Dewey. *Bill to Help Dewey Keep Mum to Pass*, The Jersey Journal, at 2 (Feb. 21, 1944). Republican leaders thus "plan[ned] to jam through legislation that will prevent the use of Dewey's name on the

[4] The provision imposing name restrictions on persons, N.J. Stat. Ann. § 19:23-25.1, was also enacted in 1944.

Republican primary ballot" "without first having [his] permission." *Id.*

The "bill aimed to void the petition filed by Morris County Dewey supporters naming Gov. Thomas Dewey" in their proposed primary slogan on the Republican ballot. *G.O.P. Rift Over Voiding Dewey Name*, The Jersey Journal, at 16 (Feb. 23, 1944). The "Democratic minority leader," recognizing the restriction of free speech, "assailed" the bill "as a gag rule and as an attempt to prevent free expression by [primary] voters." *Id.*

The name restriction on slogans was "supposed to be a spanking for Mott," the "Morris County leader" who sought to use Dewey's name in his slogan, "and a notice to all local leaders not to get ahead of the parade," i.e., not to defy the substantive political wishes of party leaders. *Trenton Legislature Keeping Dewey Mum Suits N.Y. Governor*, The Jersey Journal, at 22 (Feb. 23, 1944); *see also Wittreich Files for U.S. Senate*, The Jersey Journal at 1, 12 (Mar. 24, 1944) (reporting that Senate candidate Andrew Wittreich objected that the name restriction amendment was passed to prevent his use of "Draft Dewey" as a slogan). The slogan statute barred Wittreich from expressing his policy preference.

2. The slogan statute's name restriction on New Jersey corporate names is even more perfidious: The restriction not only prevents policy-based criticism (or praise) of New Jersey corporations, it also reveals the state legislature's actual interest underlying a statute

that is ill-fitted to furthering any legitimate state purpose. Slogans are the means enabling local political machines to control the county line, exerting nearly complete control over New Jersey primary election results.

"New Jersey law provides advantages to machine-backed candidates that are extremely difficult for any challenger to overcome. In state primaries, party-backed candidates are given the opportunity to bracket with one another, to use the same party slogan, and to appear on the same line on the ballot." Pugach 630-31. The slogan statute, in conjunction with N.J. Stat. Ann. § 19:49-2 (the bracketing provision), and state court judicial interpretation, Pugach 637, 701, "combine to guarantee that each party-backed candidate always receives a favorable position on the ballot," a practice "used by the state's party bosses and county chairs" that "is often referred to as 'the County Line.' " Pugach 630-31.

Political machines at the county level incorporate their own name as a slogan; they put up multiple, "joint" county-level commissioners (previously called "freeholders") whom they authorize to use that slogan. The machines then choose a slate of candidates they favor—up and down the county's primary ballot, from Congressional and gubernatorial candidates to sheriffs and county clerks—whom they also permit to use that slogan. The joint commissioners' campaign chair (in practice, virtually always the county party chair, head of the local machine) is empowered to grant permission to all those candidates who have been permitted to

share the machine's slogan to also "bracket" with the freeholders. Bracketed candidates appear together on the "county line," so-called because bracketed candidates appear on a single column (or row) of the ballot. *Id.*

County clerks—*themselves* running on the county line—then have vast discretion to structure the ballot such that the county line gets a highly favorable ballot position (in or very near the left column or top row), placing the county line in a preferential ballot draw with absolute priority over unbracketed candidates. *See* N.J. Stat. Ann. § 19:23-24; *Moskowitz v. Grogan*, 243 A.2d 280, 283 (N.J. Super. Ct. App. Div. 1968). County clerks strategically exile opposing candidates who are not on the line to scattered, unfavorable ballot positions. Pugach 654-55, 661. The slogan is the glue that binds together the county line.

Voters with great regularity select each candidate on that coherent line, headed by a prominent candidate they recognize and favor, rather than making the effort to hunt around on the otherwise-fragmented ballot for disfavored candidates who have been exiled to the ballot's fringes. A sample ballot best illustrates the county line in operation. *See* Julia Sass Rubin, *New Jersey's Primary Ballot Design Enables Party Insiders to Pick Winners* (2020) at 4, http://dx.doi.org/doi:10.7282/t3-31dy-0j57.

Empirical research has demonstrated that the county line's boost is almost always outcome-dispositive, with "no state legislative incumbent on the line

[losing] a primary election in New Jersey between 2009 and 2018," *id.*, or, for that matter, since 2018. Placement on the county line increases a candidate's vote total by approximately "35 percentage points." Julia Sass Rubin, *Does the County Line Matter? An Analysis of New Jersey's 2020 Primary Election Results*, N.J. Policy Perspective (Aug. 13, 2020), https://bit.ly/42HXlQj.[5]

The county line has substantial relevance to this case: The practical effect of the slogan statute, on the ground, demonstrates that this Court's review is of exceptional importance, even beyond the obvious First Amendment violations imposed by the name restrictions. The slogan statute's essential role in enabling the county line demonstrates that, rather than avoiding voter confusion or preventing misrepresentation, as the state suggests, the primary interest of legislators—beholden to the local political machines when seeking re-election because of New Jersey campaign

[5] The operation of the county line is deeply problematic when it is implemented pursuant to the slogan statute as written. There is compelling reason to believe that the corruption enabled by the slogan statute is not limited to that which is directly authorized. *See Mochary v. Caputo*, 100 N.J. 119, 122 (1985) (addressing "random" draw for first ballot position in which "Democrat" was in the "first capsule" drawn "on 40 out of the last 41 times that the draw in Essex County had been made"). *See also* Matt Friedman, *Anti-machine Democrats in Camden County Complain of 'Phantom Candidates,'* Politico (Apr. 10, 2019), https://www.politico.com/states/new-jersey/story/2019/04/09/anti-machine-democrats-in-camden-county-complain-of-phantom-candidates-960442.

finance law, Pugach 652-53—is far more plausibly to empower those machines and thus their own re-election.

II. The Actual Operation of New Jersey's Slogan Statute Demonstrates That It Is Vague, Underinclusive, and Overbroad.

The state's implementation of the slogan statute over the past 75 years demonstrates its vagueness and overbreadth. A statute is vague when statutory distinctions between permitted and prohibited conduct is "at best, murky," thereby granting lower-level officials "alone the power to decide in the first instance" whether particular conduct violates unclear statutory dictates. *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987). The slogan statute's opaque language has resulted in arbitrary and inconsistent restrictions of core political speech.

Moreover, the statute is facially overbroad, given the mismatch between the state's quite narrow compelling interest—preventing false factual statements of endorsement—and the slogan statute's quite modest furtherance of that interest, compared with the statute's far more extensive prohibition of First Amendment-protected speech, which bars *any* mention of a person or New Jersey corporation absent permission. The slogan statute is overbroad because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."

Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008) (cleaned up).

The Third Circuit rejected overbreadth because it found it "easy to imagine legitimate applications" of the name restrictions, to wit, barring false factual statements of endorsement. *Mazo*, 54 F.4th at 152. That application is admittedly easy to imagine, but its sweep is quite narrow.[6]

The Third Circuit concluded that the statute is not overbroad because "at least some constitutional applications exist," i.e., the name restrictions could bar false endorsements, and constitutionally so. *Id.* (citing *Washington State Grange*, 552 U.S. at 457). The court thereby imposed a test for First Amendment-overbreadth that conflicts with those of other circuits, and of this Court, by failing to *compare* the relative scope of the statute's legitimate sweep with that of its unconstitutional applications. *Id.*

Washington State Grange recognized the meaningful possibility that state courts might provide a limiting construction if given an opportunity and pointed to "the absence of evidence" in that case that voters would be harmed by the challenged statute. *Id.* at 456-57. In New Jersey, however, state courts have imposed

[6] Indeed, the *only* apparent instances in which proposed slogans have implicated the interest in barring false endorsements since the slogan statute's enactment in 1930 (including the 14 years prior to implementation of the name restrictions) have been by Petitioner Mazo, since the filing of this suit, who submitted slogans to demonstrate the statute's arbitrariness because the name restrictions did not actually apply.

no coherent limiting construction on the slogan statute in more than 75 years, and there is abundant evidence that New Jersey voters are harmed by inconsistent and overbroad application of the slogan statute, both as to persons, Point II.A, and corporations, Point II.B.

A. Inclusion of or Reference to the Name of a Person.

1. The state has been repeatedly inconsistent about whether a slogan that contains a politician's title "include[s] or refer[s] to the name of any person." N.J. Stat. Ann. § 19:23-17. The plain statutory language bars including or referring to "the name of any person"—not referring to a *person*, but "refer[ring] to the name of a person." *Id.* As explained above, 1944 Senate candidate Wittreich was barred from employing the slogan "Draft Dewey for President" because it used Dewey's name.

Shortly thereafter, Wittreich revised his slogan, eliminating the inclusion or reference to a name of a person, submitting the "new slogan, 'Draft New York's Governor' for President." *New Court Fight on Dewey Slogan*, Trenton Evening Times at 10 (Apr. 10, 1944). New Jersey courts nonetheless barred the revised slogan, ruling that "the slogan 'Draft New York's Governor for President' placed on the ballot 'was an evasion of what the Legislature intended' in the primary law," rejecting the argument "that the slogan designated an office, not a person." *Court Dismisses Challenge of Law*, Trenton Evening Times, at 16 (Apr. 16, 1944).

Similarly, Petitioner Mazo submitted the slogan, "Supported by the Governor" (intended to demonstrate the slogan statute's arbitrary application and unconstitutionality) containing a politician's title but not using or referring to a person's name. Robert F. Giles, Director of New Jersey's Division of Elections, wrote a letter to Mazo, ruling: "[B]ecause your proposed Union County ballot slogan, 'Supported by the Governor,' refers to a specific governor, you must obtain and submit written consent from that person, the specific governor referred to in the slogan." Giles Letter (Apr. 6, 2022) at 2.[7]

In contrast, Tahesha Way, New Jersey's Secretary of State, ruled in an April 4, 2018, letter that congressional candidate Steve Lonegan was not barred from using the slogan, "Republicans for the President's Agenda" (regardless of whether it used a title or referred to a specific president), rejecting "the argument that permission from Donald Trump is necessary before [a] candidate may use the slogan. The slogan does not include or refer by name to Mr. Trump. N.J.S.A. 19:23-17." (Way barred Lonegan's slogan on other grounds.) David Wildstein, *McCann Wins Fight Over Lonegan Slogan*, N.J. Globe (Apr. 5, 2018) (including attached letter from Way), https://newjerseyglobe.com/congress/mccann-wins-fight-over-lonegan-slogan/. The letter was copied to Director Giles, who ruled in

[7] Giles's letters to and from Mazo, available through public records requests, are subject to judicial notice.

precisely the opposite way as to Mazo's slogan four years later.[8]

Both the state court in 1944, and Director Giles in 2022, read the slogan statute through the lens of what they believed the restrictions were intended to accomplish rather than what the statutory language provides. This demonstrates not only the statute's arbitrariness, inconsistency, and vagueness in application, but also makes plain that the name restrictions are interpreted by lower-level officials and judges in a way that is content-based, turning on the official's understanding of the *purpose* of the statute's prohibiting certain content, rather than as a content-neutral, first-order sorting mechanism with minimal First Amendment implications. *Compare Austin v. Reagan Nat'l Adver. of Austin*, 142 S. Ct. 1464, 1473 (2022) ("The [billboards'] on-/off-premises distinction" "inform[ing] the sign's relative location" is "similar to ordinary time, place, or manner restrictions," thus "not requir[ing] the application of strict scrutiny to this kind of location-based regulation.").

2. The state has similarly ruled that dead persons are not persons within the meaning of the slogan statute in a conclusion also seemingly imbued with

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[8] Giles's office also rejected Mazo's proposed slogan, "No to Nepotism, No to Menendez" (referring to Senator Robert Menendez's anointing of his son, Robert Menendez, Jr., to be the Democratic nominee for an open seat in the House of Representatives), without answering the opaque question: Which Menendez's consent was necessary? Letter from Mazo to Director Giles (Apr. 7, 2020).

officials' understanding of the purpose of the name restrictions rather than the statutory language.

Secretary Way ruled that Congressional Candidate Peter DeNeufville could use the slogan "New Jersey Reagan Republican" because "the plain meaning of the word 'person' is 'A living human being' [and] former President Reagan is deceased and therefore is not a 'person' within the meaning of the statute," citing to Webster's II New College Dictionary. David Wildstein, *State Allows DeNeufville To Use Reagan Slogan* (Apr. 10, 2018) (attached decision letter at 2), https://newjerseyglobe.com/congress/state-allows-deneufville-to-use-reagan-slogan/.

This conclusion is highly contestable as a matter of plain statutory language and of the definition of persons in Merriam-Webster dictionaries. *See* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/person; neither the definition nor the "Legal Definition" of "person" contains any suggestion that a deceased person is not a person. Secretary Way's conclusion that a dead person is not a person again demonstrates both that the slogan statute's application, in practice, has proved content-based, and that the scope of the name restrictions is indeterminate, and thus unlawfully vague, in violation of the First Amendment.

3. The statute is also vague as to whether it prohibits a slogan that contains a person's name, but only as a reference to a policy. In 2014, Congressional Candidate Bruce Todd used the slogan, "For Glass-Steagall

and Nuclear Power" and Congressional Candidate Diane Sare used the slogan, "Glass-Steagall and Impeachment Now." New Jersey Voter Information Portal, 2014 Elections Results, U.S. House of Representatives, https://www.state.nj.us/state/elections/assets/pdf/election-results/2014/2014-official-primary-results-us-house.pdf. Are such references—or ones criticizing or praising "McCain-Feingold" (or, for that matter, "Citizens United")—permissible because, in this context, a rose by any other name passes the official's smell test?

The answer is hazy. "Where statutes have an overbroad sweep, just as where they are vague, 'the hazard of loss or substantial impairment of those precious rights may be critical,' " because "those covered by the statute are bound to limit their behavior to that which is unquestionably safe." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609 (1967) (cleaned up). A candidate who proposes a slogan that is rejected as violating the name restrictions only has three days under state law to submit an amended slogan; if he fails to do so, he is informed that "No Slogan" will be printed on the ballot next to his name if he does not get a slogan approved in that short window. Am. Compl. ¶ 38.

This not only denies the candidate his desired, First Amendment-protected slogan, it unconstitutionally imposes forced speech on him by placing "No Slogan" next to his name—speech that makes the candidate look like an imbecile or contrarian, unable or unwilling to provide a slogan. *See Cook*, 531 U.S. at 524-26 (disapproving of state's placement of "adverse labels" attached to candidates on ballot). The slogan

statute thus operates to chill candidates from submitting slogans that even arguably include or refer to persons or New Jersey corporations.

B. Inclusion of or Reference to the Name of an Incorporated Association of this State.

The slogan statute's bar on inclusion or reference to the name of an "incorporated association of this state" is similarly vague.

1. First, and most obviously, the slogan statute only applies to incorporated associations *of this state*, not to out-of-state corporations. Insofar as the state's actual interest is preventing misrepresentation in the form of false statements of endorsement, there is no rational reason why the slogan statute should insulate in-state corporations, providing them veto power over criticism, while leaving out-of-state corporations unable to prevent even false statements of endorsement.

Moreover, as with persons, notwithstanding the plain language of the statute, the state has implemented the slogan statute in a way that is both unpredictable and content-based. Petitioner Mazo (in an effort to illuminate the slogan statute's unpredictability and arbitrariness) submitted the slogan, "Endorsed by the N.Y. Times." Director Giles's letter of April 6, 2022, barred Mazo from using that slogan because, he ruled, "the 'New York Times' is an incorporated entity in the State of New Jersey." Giles Letter (Apr. 6, 2022) at 2.

The New York Times is, indeed, an incorporated entity *in* the State of New Jersey, but it is decidedly not an incorporated association *of* this state, the actual language of the slogan statute. It is a New York corporation (registered to do business in New Jersey). New Jersey's highest court has held, contrary to Giles's ruling, that a "corporation of this state" refers to "a corporation organized under the laws of this state," not to a foreign corporation. *Allen v. Francisco Sugar Co.*, 92 N.J. Eq. 431, 432-33 (Ct. Err. & App. 1921); *accord Am. Employers' Ins. Co. v. Elf Atochem N. Am.*, 157 N.J. 580, 588-89 (1999).

County clerks in New Jersey assessing whether a slogan includes or refers to the name of an incorporated association of New Jersey simply check the state's Business Name Search portal, https://www.njportal.com/DOR/BusinessNameSearch/Search/BusinessName. Such a search returns "The New York Times Company," though as a "foreign-for-profit" corporation, not as an incorporated association *of this state*. Such searches return both domestic corporations and foreign corporations (so denominated)—and even names of easily *reserved* businesses, which are created through a simple filing on https://www.njportal.com/DOR/BusinessAmendments/Unrr/AmendmentInformation and a payment of just over $50.

2. The slogan statute also makes a content-based distinction between slogans that include or reference the names of incorporated associations of this state as opposed to slogans including or referencing *unincorporated* New Jersey associations. *Amici* are both

unincorporated associations of New Jersey. They respectfully submit that whatever interest they have in vetoing criticism in a slogan, they have no less interest than do New Jersey corporations. No legitimate interest supports this content-based distinction.

3. The further absurdity and confusion caused by the slogan statute is shown by New Jersey politicians' and organizations' repeated attempts to "poach" the slogans of their rivals. New Jersey operatives have repeatedly seized the opportunity, when a local political machine has let the corporate registration for its slogan lapse, to incorporate that slogan for themselves, and—sometimes successfully, and sometimes not—thereby usurp the county line throne.

"The 'take their slogan' move was originated in 1996 by then-Assemblyman Kevin J. O'Toole when he incorporated the Essex County GOP slogan that allowed him to seize control of the county Republican organization from longtime chairman John Renna." David Wildstein, *Judges Issues TRO On Camden Democratic Slogan* (Apr. 2, 2020). *See also* O'Toole, Kevin, *Courage and Strategy of Getting on the Ballot*, InsiderNJ (Apr. 6 2017), www.insidernj.com/courage-strategy-getting-ballot/ ("[T]he campaign manager for the joint candidates gets to decide who brackets on 'the line' with the countywide candidates (in many counties, they require the Chairman be designated as the campaign manager for this reason). [This] means that the campaign manager has the sole discretion to pick and choose who will appear with the county candidates—whether that be for governor or council or

anything in between. This insider tidbit of information can change the dynamics of a primary election very quickly.").

In 2000, former New Jersey Governor Florio stealthily incorporated the name of numerous counties' democratic party machines (even though they had endorsed Jon Corzine), thereby using his control over their slogans to seek "the coveted county line, the top position on the ballot." David M. Halbfinger, *State Court Judge Rebuffs a Ballot Ploy by Florio*, The New York Times, B8 (Apr. 19, 2000), https://www.nytimes.com/2000/04/19/nyregion/state-court-judge-rebuffs-a-ballot-ploy-by-florio.html. A state court rejected Florio's use of these slogans he owned, finding that "only public confusion and misunderstanding would result," though there was no indication Florio was other than in full compliance with the slogan statute. *Id.*

Poaching success is arbitrary. O'Toole successfully poached the local machine's slogan and thereafter rode the county line to electoral success, establishing himself as the new leader of the local party machine. Florio was unsuccessful when doing precisely the same thing, the court held, because Florio's gambit was "[t]oo clever by half." *Id.*

Judicial assessment of a politician's quantum of cleverness—i.e., whether a politician is just clever enough for his skullduggery to prevail under the statute's actual language, or too clever by half in evading the statutory purpose despite compliance with its

language—is profoundly unpredictable. The statutory language has proved unconstitutionally vague.

III. The Slogan Statute Violates the First Amendment Because It Is Vague and Overbroad.

New Jersey's implementation of the slogan statute over its more than 75-year history demonstrates that it is not only content- and viewpoint-based, but also vague and overbroad, further compelling reasons for the Court to grant the petition.

First, the state's application of the statute's name restrictions has been, and remains, exceedingly unpredictable because the slogan statute is vague. State officials and courts have repeatedly (1) applied the slogan statute, contrary to its actual language, to achieve results thought sensible, and (2) applied the slogan statute inconsistently, reaching arbitrary and conflicting results.

The slogan statute would prevent a small (in practice, virtually nonexistent) subset of slogans as to which the state has an actual compelling interest—slogans that knowingly assert false factual statements of a person's or corporation's endorsement, speech warranting little First Amendment protection. Under the "vagueness doctrine," however, the "legislature [must] establish minimal guidelines" that prevent officials from implementing a statute in a manner permitting a "standardless sweep." *Kolender v. Lawson*, 461 U.S.

352, 358 (1983) (cleaned up). The slogan statute has no such guidelines.

Moreover, the slogan statute is an exceedingly poorly crafted means of furthering the state's compelling interest in barring false statements of endorsement. The statute is profoundly underinclusive in relation to this interest. The statutory language applies only to a slogan that includes or refers to a person's *name*—not, e.g., one that refers to a politician's title. And the statute applies only to New Jersey corporations, not to corporations of other states or to unincorporated associations.

Second, the slogan statute is radically overbroad. It prevents a substantial sweep of First Amendment-protected core political speech criticizing (or praising) persons and New Jersey corporations, expression that the state has no legitimate, let alone compelling, interest in barring. The legitimate application of the statute to prevent false factual statements of endorsement is exceedingly narrow; the curtailment of protected speech is exceedingly broad. Because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," the slogan statute is unconstitutionally overbroad. *Washington State Grange*, 552 U.S. at 449 n.6 (cleaned up).

Finally, the state's inconsistent application of name restrictions reveals its principal, actual purpose. The slogan statute's name restrictions apply only to *primary* elections—those in which the local party

machines wield the county line, and the only elections in which bracketing of candidates sharing a slogan is permitted.

The name restrictions do not apply to the three-word slogans permitted in the general election. N.J. Stat. Ann. § 19:13-4. Moreover, the name restrictions do not apply to the otherwise parallel slogans permitted in certain nonpartisan municipal elections; in such elections, "[a]ny candidate" may request a "designation, in not more than six words," "for the purpose of indicating either an official act or policy to which he is pledged or committed." N.J. Stat. Ann. § 40:45-10. "The designation shall not indicate political party affiliation," but there are no name restrictions as to persons or New Jersey corporations. *Id*.[9]

In *Norman v. Reed*, 502 U.S. 279, 294 (1992), this Court held that the state's purported interest in ensuring geographic distribution of supporting petition signatures at the county level was sharply undercut by its failure to require such geographic distribution at the state level. "[I]f the State deems it unimportant to ensure that" its purported interest is applied consistently whenever that interest pertains, "it requires elusive logic to demonstrate a serious state interest" that actually exists. *Id.* The state's serious interest here is similarly elusive.

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[9] *See also* N.J. Stat. Ann. § 40:45-14 ("When persons bearing the same name are nominated for the same office" in nonpartisan municipal elections, each may use a six-word slogan "as a means of identification"—without any name restriction.).

The slogan statute—and the county line it enables—does not prevent voter confusion; it could hardly do a better job of causing voter confusion by enabling a prominent, coherent county line and the scattering of disfavored candidates for the same office across the far reaches of the ballot, a practice differing from that of every other state. And while the state has a compelling interest in preventing false factual statements of endorsement, the slogan statute is both highly underinclusive and vastly overbroad in furthering that interest.

The government "may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980). The slogan statute fails that test. It has a narrow legitimate application, bars a broad sweep of constitutionally protected free speech, and perpetuates a county line that undermines democracy.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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May 25, 2023