No. 22-1033

IN THE
Supreme Court of the United States

EUGENE MAZO, et al.,
Petitioners,
v.
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 PROFESSOR DEREK T. MULLER AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Derek T. Muller is the Ben V. Willie Professor in Excellence and Professor of Law at University of Iowa College of Law. He teaches and writes about election law and federal courts, and he has an interest in the resolution of this case within the appropriate legal framework. He filed an *amicus* brief in the Third Circuit on this case, which was alluded to in the opinion. *Mazo v. New Jersey Secretary of State*, 54 F.4th 124, 144 (3d Cir. 2022). Portions of this argument are drawn from Professor Muller's preexisting scholarship, including *Ballot Speech*, 58 ARIZ. L. REV. 693 (2016).

SUMMARY OF ARGUMENT

This Court has expressly held that the *Anderson-Burdick* balancing test for evaluating certain kinds of election laws does not extend to cases of pure political speech. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 344 (1995). Laws restricting political speech are subject to strict scrutiny. Nevertheless, lower courts—including the Third Circuit in this case—continue to defy this Court's guidance.

This case presents an important opportunity to restrict application of the well-known *Anderson-Burdick* test to a more limited domain. The *Anderson-Burdick* balancing test has received its fair share of

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to fund the brief. Counsel for the parties received notice under Rule 37.2 of the intention to file this *amicus* brief. (The College of Law is not a signatory to the brief, and the views expressed here are solely those of *amicus curiae*.)

criticism and questions in recent years,[2] and this case provides an important vehicle to limits its misuse in the lower courts.

Simply put, political expression is core First Amendment activity. New Jersey creates a forum for political speech on the ballot where candidates can communicate with voters and distinguish themselves from other candidates. By law, however, New Jersey prohibits candidates from using "the name of any person or any incorporated association" in New Jersey without consent. It places conditions on the ability of candidates to engage in core political speech.

Petitioner Mazo attempted to communicate to voters by means of the ballot and distinguish himself among other candidates. New Jersey law prevented him from doing so. And when he sought judicial review, the courts deferred to New Jersey's interests. The Third Circuit refused to examine the law with strict scrutiny under the First Amendment. Instead, it opted for the more malleable *Anderson-Burdick* balancing test.

This Court should grant certiorari to address the ever-widening use of *Anderson-Burdick* in the lower courts, which has been used to subject core First Amendment rights to lesser judicial scrutiny and to

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[2] *See, e.g.*, Schmitt v. LaRose, 933 F.3d 628, 644 (6th Cir. 2019) (Bush., J., concurring in part and concurring in the judgment); Daunt v. Benson, 999 F.3d 299, 323 (6th Cir. 2021) (Readler, J., concurring in the judgment); Kate Hardiman Rhodes, *Restoring the Proper Role of the Courts in Election Law: Toward a Reinvigoration of the Political Question Doctrine*, 20 GEO. J. L. & PUB. POL'Y 755 (2022).

limit the ability of candidates to engage in political speech.

ARGUMENT

I. The appropriate rules for reviewing election laws with pure political speech are questions of exceptional and recurring importance.

The Third Circuit's error, compounding errors in other courts, undermines the rules courts use to adjudicate election law disputes. As this Court's decisions in cases like *McIntyre* demonstrate, it is crucial for courts to separate a First Amendment inquiry from an *Anderson-Burdick* inquiry. Courts that confuse those rules impede the ability of the state to regulate the rules for elections within the proper framework, the ability of voters to choose the preferred candidate of their choice, and the ability of candidates to appear on the ballot and communicate their identity through core pollical speech.

The Third Circuit is hardly alone. The Third Circuit relied on extensive Ninth Circuit precedent that has also expanded application of *Anderson-Burdick* to core political speech. *Mazo*, 54 F.4th at 144–45. The extraordinary and repeated intrusion of the *Anderson-Burdick* balancing test into judicial review of pure speech merits this Court's attention. Lower courts have routinely disregarded this Court's admonitions regarding the expansive protection that core political speech receives. This case is an opportunity to ensure that political speech in the context of elections receives the full safeguards of the First Amendment that such speech deserves.

II. Political expression is core First Amendment activity.

To begin, political expression merits the highest constitutional protection. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . . ." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). This Court's cases routinely ensure that political expression secures the highest level of protection under the First Amendment. U.S. CONST., amend. I.

In *McIntyre v. Ohio Elections Commission*, this Court considered the constitutionality of an Ohio law that prohibited the distribution of anonymous election leaflets. Margaret McIntyre was fined for anonymously printing and distributing some leaflets opposing a referendum on a new school tax. *McIntyre*, 514 at 337. The Court emphasized that the Ohio statute at issue "is a regulation of pure speech." *Id.* at 345. Regulations of "pure speech," according to the Court, are limitations on political expression "subject to exacting scrutiny." *Id.* at 346.

The precedents on which *McIntyre* relied rejected alternative tests that would have subjected political speech to a lower level of scrutiny. And they did so in cases, like this one, that involved state election laws that regulated pure speech. In *Meyer v. Grant*, 486 U.S. 414 (1988), for instance, this Court applied strict scrutiny when it examined an election law that prohibited paying petition circulators for gathering signatures to put an initiative on the ballot. Under

that exacting standard, the Court found the law unconstitutional: proponents of a ballot initiative have a First Amendment right to express themselves to prospective petition signers, even if they pay circulators to disseminate that message. *Id.* at 420–23.

And in *Burson v. Freeman*, 504 U.S. 191 (1992), a majority of this Court used strict scrutiny when considering the constitutionality of a law forbidding campaign-related speech within 100 feet of a polling place. *Id.* at 210–11. The Court ultimately found the ban on electioneering permissible, because the right to free speech ran into "the right to cast a ballot in an election free from the taint of intimidation and fraud." *Id.* at 211.

More recently, this Court decided *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876 (2018). Minnesota prohibited any person from wearing "political" apparel in the polling place on Election Day. The polling place, the Court concluded, was a "nonpublic" forum, "government-controlled property set aside for the sole purpose of voting." *Id.* at 1886. States can ensure that there is not "partisan discord" in the voting booth that may "distract" from voting, as the Court held in *Burson*. *Id.* at 1888. But a content-based ban restricting political speech must satisfy strict scrutiny, *id.* at 1885–86, and Minnesota's broad statute prohibiting "political" apparel did not survive that scrutiny, *id.* at 1890–92.[3]

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[3] This Court has elsewhere explained that "exacting scrutiny" looks like "strict scrutiny." *See McCutcheon v. Federal Election Commission*, 572 U.S. 185, 197 (2014) (plurality opinion). *Accord*

McIntyre, *Meyer*, *Burson*, and *Mansky* each involved "pure speech," avowedly First Amendment-protected expressive activity. Voters' and candidates' opportunities to speak about contested political topics merits the highest protection under the Constitution. The rules at issue were subject to strict scrutiny.

The same is true for New Jersey's ballot slogan law, which creates a forum for political expression at the very core of the First Amendment.

III. New Jersey's ballot slogan law creates a forum for political expression.

All states allow some form of political expression on the ballot—the form of a candidate's name and the candidate's political affiliation being two such means of expressing one's identity to voters. And the State of New Jersey does not need to allow printed slogans on the ballot. But once New Jersey decided to allow candidates to list a six-word slogan, it created a forum for political expression, a forum for pure speech protected by the First Amendment.

This case involves a congressional candidate, and State power to regulate federal elections arises from the Constitution. States may regulate the "manner" of holding congressional elections, power that comes from the Elections Clause, U.S. CONST. art. I, § 4, cl.

McIntyre, 514 U.S. at 347–48 (describing "exacting scrutiny" applying when "[n]o form of speech is entitled to greater constitutional protection" and calling it "the strictest standard of review").

1. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *Arizona v. Inter Tribal Council of Arizona, Inc.* 570 U.S. 1, 8–9 (2013).

There is a longstanding pedigree in the United States of candidates and political parties communicating political speech to voters by means of the ballot. In early elections in the United States, voters sometimes expressed their preferences *viva voce*, and at other times by ballot. States did not write the ballot or provide printed ballots to voters. Instead, voters might fill out a blank slip of paper. By the mid-nineteenth century, political parties would print "tickets" for voters to use and cast at the polling place. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693, 708–09 (2016).

To identify a couple of examples of the content that appeared on these tickets: a 1844 Whig ticket for Henry Clay for president called him "The Glory of his Country, and the first Living Statesman." A "prohibition" ticket in California in 1884 called for voters to "pulverize the rum power." Ballots would display photos of candidates, logos of parties, and messages to voters. *Id.* at 709–14.

When the state took over the printing and distribution of the ballot, it necessarily made choices about what content to include or exclude. These choices had historically been left to private actors or political parties.

The state chooses what to display on the ballot. The ballot gives instructions to the voter. It lists

candidates and the offices they are seeking. A candidate's name appears on the ballot. A candidate may choose whether to associate with a political party in a partisan race or to associate with no party. If a candidate affiliates with no party, the ballot may have a blank space or "no party preference" beside the candidate's name. And in New Jersey, candidates may add political slogans alongside their names.

Under the Elections Clause, the "manner" of holding congressional elections extends to the power to administer the form of the ballot. But the ballot also communicates information between candidates and voters, and there is a *separate* First Amendment interest at stake. That First Amendment interest is prominent in New Jersey's ballot slogan law, which expressly offers candidates the opportunity to speak to voters through words on the ballot.

New Jersey's current ballot slogan law traces back to 1930. New Jersey Laws of 1930, ch. 187, ¶ 282, § 17, p. 798. The law was amended slightly in 1936. *See* New Jersey Laws of 1936, ch. 260, § 1, p. 802.

Neither the 1930 law nor the 1936 law included any qualification or condition on the content of the slogan, apart from the purpose language defining the content of the slogan. That was revised, however, in 1944 to its present form, with a "provided" clause:

> Any person indorsed as a candidate for nomination for any public office or party position whose name is to be voted for on the primary ticket of any political party, may, by indorsement on the petition of nomination in which he is indorsed,

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

New Jersey Laws of 1944, ch. 231, § 1, p. 787.

The statute expressly acknowledges that it is creating a forum for political speech: "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.S.A. § 19:23-17. It creates an opportunity for a candidate to convey a message to voters by means of language on the ballot. It is a regulation of "pure speech." *McIntyre*, 514 U.S. at 345. And only in 1944 did New Jersey choose to place conditions that speech.

The law allows candidates to "pledge[]" or "commit[]" to an "act or policy." The government has thus created a forum for the private expression of the candidates; it is not the government's slogans that appear on the ballots, but slogans chosen by the "candidate for nomination."

The law anticipates that candidates will "distinguish" themselves from other candidates, as "belonging" to a "faction" or a "wing" of the political party. The slogans regulated by New Jersey's law are designedly matters of pure speech, activity protected by the First Amendment. The mere fact that they arise in the context of an election does not subject them to lesser scrutiny, as *McIntyre*, *Meyer*, *Burson*, and *Mansky* show. Whether the words appear on a leaflet, a T-shirt a voter wears to the polling place, or on the ballot itself, it is pure speech. *Cf. Cook v. Gralike*, 531 U.S. 510, 530–32 (2001) (Rehnquist, C.J., concurring in the judgment) (finding that a law that placed "pejorative language" on the ballot beside candidates' names "in a way that is not neutral as to issues or candidates" "violates the First Amendment right of a political candidate").

IV. New Jersey may only regulate the content of candidates' speech on the ballot if the regulation is narrowly tailored to a compelling interest.

This content-based speech restriction is subject to strict scrutiny. New Jersey opened up the ballot for candidates to communicate to voters and differentiate themselves. When the state opens a part of the ballot for expressive activity, the state's regulation must survive strict scrutiny. *See International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009). Even if the entire ballot is not a forum for speech, lower courts—including the Third Circuit—routinely examine which parts of

government-controlled property have been opened for speech, subjecting restrictions on speech to strict scrutiny. *See, e.g.*, *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1378 (3d Cir. 1990) (determining that the auditorium of a public high school was a designated public forum); *Brody By and Through Sugzdinis v. Spang*, 957 F.2d 1108, 1120 (3d Cir. 1992) (acknowledging possibility that a graduating ceremony at a public school could be a designated public forum). New Jersey has opened the ballot to political candidates running for office, and those candidates may engage in political speech with prospective voters.

While ballots may not be "*primarily*" "forums of political expression," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (emphasis added), New Jersey's decision to create space on the ballot for candidates' expressive activity to voters creates a forum of political expression. *Cf. Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983) ("The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.").

New Jersey's limitation on campaign speech—forbidding the use of "the name of any person or incorporated association" of New Jersey without consent—is constitutional only if narrowly tailored to a compelling interest.

This Brief makes no assessment of the analysis of the New Jersey law (*e.g.*, whether names could be used without consent, whether in-state incorporated

associations should be treated differently from out-of-state associations, etc.). Instead, it simply argues that the appropriate framework is one of the First Amendment, not *Anderson-Burdick*. The Third Circuit's failure to use the appropriate framework is a significant error and burdens core political speech.

V. The *Anderson-Burdick* framework is not appropriate for rules regulating pure political speech in a forum created by the state for candidates to distinguish themselves to voters.

The alternative to the First Amendment framework is the *Anderson-Burdick* balancing test, which the Third Circuit erroneously used. Under that test, as Court in *Anderson* explained,

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). The "rights protected by the First and Fourteenth Amendments" are best understood as "associational" rights—how candidates and voters associate with one another at the ballot box. *See id.* at 791–92 n. 12 & 793–95. "Election laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Courts are supposed to weigh rules of election administration with this type of balancing.

But not all laws touching on elections are subject to *Anderson-Burdick*. Ohio attempted to defend the law in *McIntyre* as a slight burden on McIntyre's rights under the *Anderson-Burdick* framework. *McIntyre*, 514 U.S. at 344. But the Court rightly rejected the *Anderson-Burdick* balancing test and found it inapplicable: *Anderson-Burdick* applied to "the voting process itself" and cases involving "ordinary litigation" of election laws, such as filing deadlines, ballot access restrictions, and the eligibility of independent voters to vote in primary elections. *Id.* at 344–45. "Ordinary litigation," however, did not apply to McIntyre, who was engaged in political speech—the same type of political speech at issue in this case.

The *Anderson-Burdick* balancing test can work for rules that have the effect of prohibiting the association between candidates and voters. Consider *Anderson*, which excluded a presidential candidate from the ballot for missing an early filing deadline, *Anderson*, 460 U.S. at 783; or *Burdick*, which forbid write-in candidacies, *Burdick*, 504 U.S. at 430. In *Crawford v. Marion County Election Board*, 553 U.S.

181 (2008), this Court used this balancing test to evaluate Indiana's voter identification law for those who found it difficult to obtain a proper identification as a prerequisite to voting.

Here, in contrast, Petitioner Mazo's name appears on the ballot, and voters can readily associate with him. Because the Third Circuit viewed New Jersey's law through this lens, it is unsurprising that it found the character and magnitude of the associational interest not to be "severe." *Mazo*, 54 F.4th at 146. It is precisely why a First Amendment approach, rather than an *Anderson-Burdick* approach, better captures the issues at stake.

The Third Circuit offered little reason for why *Anderson-Burdick* was the appropriate framework. As it explained:

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

> *Yamhill County*, 422 F.3d 848, 851, 855–57 (9th Cir. 2005) (challenge to requirement that ballot initiatives "proposing local option taxes include a statement" that the "measure may cause property taxes to increase").

Mazo, 54 F.4th at 144–45 (citation to *Caruso* modified).

The Ninth Circuit has repeatedly refused to recognize the core First Amendment interests in political speech that appears on the ballot. The Third Circuit, *ipse dixit*, accepted that conclusion—and that was an error. It is particularly erroneous given that New Jersey expressly created the forum "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.S.A. § 19:23-17.

The issue here also stands in stark contrast to this Court's decision in *Timmons*. In *Timmons*, this Court upheld Minnesota's ban on "fusion" candidacies on the ballot. Multiple parties could not endorse a single candidate and have that endorsement simultaneously appear on the ballot. Parties could endorse candidates, and parties could secure ballot access, but each candidate could only be recognized as the nominee of one party on the ballot. The Court concluded that the law passed scrutiny under *Anderson-Burdick*. *Timmons*, 520 U.S at 369–70. The Court also rejected a speech claim: "Ballots serve primarily to elect candidates, not as forums for political expression." *Id.* at 363.

While ballots might "serve primarily to elect candidates," that is not the only thing they do. They undoubtedly communicate information to voters. And the State of New Jersey has expressly made a choice to designate the ballot as a forum to "pledge[]" or "commit[]" to an "act or policy," to "distinguish" candidates "belonging" to a "faction" or a "wing." N.J.S.A. § 19:23-17.

Timmons considered whether multiple political parties could print the same candidate's name on the ballot. That, however, is a distinct interest from candidates' interest in speaking to the public about acts, policies, or political ideology after the state has opened a forum for that purpose.

Put differently, *Timmons* and *Mazo* both address what words may appear on the ballot. But *Timmons* regulates political party nominations and candidates' choices of associating with one party on the ballot. State regulation of political parties' ballot access is squarely a matter of "the voting *process* itself" (emphasis added). *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968) (addressing the opportunity of a new political party's preferred candidates to appear on the ballot). *Mazo*, in contrast, concerns the ability of candidates to express themselves in the state-designated forum created for the purpose of distinguishing candidates from one another to prospective voters. It is a regulation of "pure speech."

CONCLUSION

The Third Circuit erred when it characterized core political speech as a procedural rule that merited

deference to the State's interests under the malleable *Anderson-Burdick* test. Core political speech is subject to the highest constitutional protection. And when a State creates an avenue for expression on the ballot itself, law regulating that expression should be subject to strict scrutiny. This Court should grant the petition for writ of certiorari to ensure that *Anderson-Burdick* does not continue to expand into areas of core political speech in the lower courts.

Respectfully submitted,

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