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* NEW JERSEY LIBERTARIAN PARTY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Libertarians seek a world of liberty, in which individuals control their own lives, and no one is forced to sacrifice his values for the benefit of others. Libertarians believe that respect for individual rights is essential for a peaceful, prosperous world. Consequently, libertarians defend each person's right to engage in any activity that is peaceful and honest, and they welcome the diversity that freedom brings. Libertarians seek to create a world where individuals are free to achieve their goals using their own judgments, without interference from government.

Amicus curiae the New Jersey Libertarian Party ("NJLP") opposes all attempts by government to abridge the freedom of speech, which the state's slogan statutes do. The NJLP respectfully submits this *amicus* brief to highlight New Jersey's practice of compelling ballot speech, and to explain why that is unconstitutional. In New Jersey, state officials will compel a political candidate to speak on the ballot by printing the words "No Slogan" next to his name when the state does not approve of the candidate's own slogan, regardless of whether the candidate wants those words to be printed or not. *Amicus* NJLP opposes this

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

form of compelled speech, and thus has a particular interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

It has been more than a hundred years since this Court has upheld any kind of restriction or sanction on the words that a political candidate may wish to communicate to his voters. *See Debs v. United States*, 249 U.S. 211 (1919). Yet, by allowing candidates for public office in a primary election to print a slogan next to their name on the ballot, and then by restricting what those candidates can say, *see* N.J. Stat. Ann. §§ 19:23-17, 19:23-25.1, New Jersey does just that. It restricts and sanctions candidate speech.

New Jersey's egregious restrictions on speech, however, are even worse than they appear. If New Jersey officials disapprove of a primary candidate's speech and deny his chosen ballot slogan, the state will actually speak for the candidate by printing the words "No Slogan" next to his name on the ballot. *Mazo v. New Jersey Secretary of State*, 54 F.4th 124, 133 (3d Cir. 2022). In effect, state officials interpret the slogan statutes to give themselves the power to compel the candidate to utter words to his voters that are not his, whether that candidate likes it or not.

Printing the phrase "No Slogan" on the ballot next to a candidate's name and without his consent is an example of government compelled speech, and it is unconstitutional. *See Cook v. Gralike*, 531 U.S. 510 (2001).

New Jersey cannot require candidates to say or display any message on the ballot with which they disagree. *See* Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881, 885 (2022). This Court has held that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Amicus seeks to highlight three points for this Court. First, after New Jersey officials reject a primary candidate's ballot slogan, their practice is to print the words "No Slogan" next to that candidate's name. This amounts to compelled political speech by the state. Second, New Jersey can offer no recognizable state interest in promoting such compelled speech. The state could just as easily print nothing next to the candidate's name on the ballot, which would surely cause him less harm. Finally, this Court has already held, in *Cook v. Gralike*, 531 U.S. 510 (2001), that forcing a political candidate to engage in compelled speech on the ballot violates the Constitution. This case thus provides the Court with an opportunity to reaffirm its earlier decision.

ARGUMENT

It has been more than a hundred years since the Supreme Court has upheld any kind of restriction or

sanction on the words that a political candidate may wish to communicate to his voters. *See Debs v. United States*, 249 U.S. 211 (1919). New Jersey's slogan statutes, *see* N.J. Stat. Ann. §§ 19:23-17, 19:23-25.1, amount to one such restriction or sanction on a candidate's speech. By allowing a primary candidate to print a slogan next to his name on the ballot, and then by placing content and viewpoint restrictions on that candidate's slogan, New Jersey sanctions a candidate's speech and runs afoul of the First Amendment. Both the Petition for Certiorari and other *amici* have already made this point.

Yet New Jersey's egregious regulation of political speech is even worse than it appears. If New Jersey disapproves of a primary candidate's chosen ballot slogan, the state will go ahead and speak for the candidate by printing the words "No Slogan" next to his name on the ballot. As the Third Circuit explained in this case, "state officials informed Mazo that authorization from . . . the organizations [he referenced in his preferred slogans] was required and that if he did not obtain authorization, his nomination petition would be certified as 'NO SLOGAN.'" *Mazo v. New Jersey Secretary of State*, 54 F.4th 124, 133 (3d Cir. 2022) (internal quotation marks omitted). The Petition for Certiorari referenced this practice, too. "State officials informed Mazo that he could reference those organizations only if he obtained their consent to do that—and that, if he failed to do that, the state would include the words 'NO SLOGAN' next to his name." *See* Pet. at 9; *see also* Pet.App.6.

In effect, state officials interpret the slogan statutes to give themselves the power to compel the candidate to utter words to his voters that are not his. These may be words to which the candidate objects or with which he disagrees, but the state will print them nonetheless, whether the candidate likes it or not.

State officials derive the power to print the words "No Slogan" next to a candidate's name after they reject his preferred ballot slogan based on their interpretation of N.J. Stat. Ann. §19:23-25.1. That statute provides: "No designation or slogan shall be printed on any ballot to be used in the conduct of any primary election in connection with any candidate or group of candidates for office, which designation or slogan includes or refers to the name of any other person unless the written consent of such other person has been filed with the petition of nomination of such candidate or group of candidates." *Id.*

Slogan rejection letters obtained from the state pursuant to the New Jersey Open Public Records Act ("OPRA"), *see* N.J. Stat. Ann. §§ 47:1A-1 *et seq*., confirm the above practice. In 2022, when Mr. Mazo again filed to run for Congress, one of the slogans he tried to use on the ballot in Union County was "Supported by the Governor." *See* David Wildstein, *Is Gene Mazo Looking for a Fight on Ballot Slogans?*, N.J. Globe (April 7, 2022), https://bit.ly/3pFoTXw. This slogan did not mention any person's "name" in contravention of state law. *See* N.J. Stat. Ann. §§ 19:23-17, 19:23-25.1. Nonetheless, officials from the Division of Elections, acting arbitrarily, as they are known to do, rejected that slogan,

reasoning that because, in their eyes, it "refers to a specific governor, you must obtain and submit written consent from that person, the specific governor referred to in the slogan," and "If no slogan is received [by our deadline], you will be certified as 'No Slogan' for Union County." *See* Letter from Robert F. Giles, Director of the Division of Elections, State of New Jersey, to Eugene D. Mazo, at 2 (Apr. 7, 2022) (response to open records request).

Separately, a U.S. House candidate in 2022 filed to use the slogan "Let's Go Brand*n—FJB" on the ballot. Again, though no person's actual "name" was mentioned in this slogan, state officials from the Division of Elections wrote to the candidate, Robert Shapiro, stating: "[y]our proposed slogan refers to a person and you did not include the statutorily required written consent. Therefore, your slogan cannot be approved at this time." Letter from Robert F. Giles, Director of the Division of Elections, New Jersey, to Robert Shapiro (April 6, 2022) (open records request). The staff from the Division of Elections then added: "If you do not have the necessary written consent, you may file a replacement slogan," and "If no slogan is received [by our deadline], you will be certified as 'No Slogan.'" *Id.*; *see also* David Wildstein, *N.J. GOP Congressional Candidate Can't Use 'Let's Go Brand*n' Slogan on Primary Ballot, State Says*, N.J. Globe (Apr. 6, 2022), https://bit.ly/42Aiyvg.

I. After New Jersey Officials Reject a Candidate's Preferred Slogan, Their Practice of Printing "No Slogan" Next to the Candidate's Name on the Ballot against His Wishes Amounts to Compelled Speech

As various commentators have noted, there is no single compelled speech doctrine, but rather several doctrines that apply to different forms of what may be conceptualized as government compelled speech. *See* Chen, *supra*, at 885. First, there are the classic cases concerning laws that require individuals to say or display statements of an ideological nature with which they disagree. *See*, *e.g.*, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977). A second category of cases deals with government regulations that compel the disclosure of private, personal information about people who have engaged in political association or speech. *See*, *e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451 (1958).[2] Third, there is a group of cases that addresses whether the government may, under the First Amendment, compel private entities to allow access to their property for other speakers. *See*, *e.g.*, *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986); *PruneYard*

[2] Included in this category are cases assessing the constitutionality of measures that prohibit the anonymity of speakers and people who sign petitions or contribute money to election campaigns. *See*, *e.g.*, *Doe v. Reed*, 561 U.S. 186 (2010); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Buckley v. Valeo*, 424 U.S. 1 (1976).

Shopping Ctr. v. Robins, 447 U.S. 74 (1980); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). Finally, there are cases that involve laws that require licensed professionals and businesses to disclose truthful factual information relating to their services, operations, and products. *See*, *e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626 (1985). *See generally* Chen, *supra*, at 885-886 (delineating these categories)

New Jersey's practice under the slogan statutes falls into the first of the above categories of compelled speech. It is by now axiomatic that the "right of freedom of thought . . . as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all," *Barnette*, 319 U.S. at 645 (Murphy, J., concurring), "except in so far as essential operations of government may require it for the preservation of an orderly society." *Id.* Eighty years ago, in *Barnette*, this Court applied the above principle to protect the right of public school children to refrain from reciting the Pledge of Allegiance and saluting the flag of the United States. In so doing, the Court explained how, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. And "[i]f there are

any circumstances which permit an exception," the Court went in to say, "they do not now occur to us." *Id.*

Almost thirty-five years later, the Court further defined compelled speech to include an unwanted association with a slogan, *see Wooley*, 430 U.S. at 706, when it ruled that the state of New Hampshire could not require its citizens to display the state motto "Live Free or Die" on automobile license plates. *Id.* "No matter how acceptable to some" the state's purported intent or interest might be, "such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for [the] message" that the government wishes to disseminate by compelling an individual to speak against his wishes. *Id.* at 717. More recently, this Court has struck down other forms of compelled speech, including when it has been tied to receiving government funding. *See*, *e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013).

There is little question that New Jersey's practice of affixing the words "No Slogan" on the ballot amounts to compelled speech. It forces the candidate to display words next to his name which he does not approve and with which he may disagree. Before it mandates the printing of those words, the state first must reject the candidate's preferred slogan, so the state knows full well that the candidate wishes to have different words printed by his name instead. But the state nonetheless forces its words upon the candidate, despite the fact that the average voter who sees those words next to his name will believe they reflect negatively on the candidate. Those words are, at best, facially ambiguous, and

at worst they are harmful to him. Either way, they are likely to cause voter confusion, and to cause an injury to the candidate 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)). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976).

II. New Jersey Has No Recognizable State Interests in Compelling a Candidate to Speak on the Ballot

In the litigation below, the Third Circuit upheld New Jersey's consent requirement for the slogan statutes, arguing that it was necessary to justify the state's purported interests. *Mazo*, 54 F.4th at 154. The state's four asserted interests were "preserving the integrity of the nomination process, preventing voter deception, preventing voter confusion, and protecting the associational rights of third parties who might be named in a slogan." *Id.* at 153.

While the Third Circuit clearly recognized that New Jersey compels a primary candidate to speak on the ballot and to have "his nomination petition . . . certified as 'NO SLOGAN[ ]' " if the state does not approve of the candidate's actual, preferred slogan, *Mazo v. New Jersey Secretary of State*, 54 F.4th at 133, nowhere did the Third Circuit explain how the state's interests were advanced by this practice.

Simply put, affixing the words "No Slogan" next to a candidate's name does not seem to support any of New Jersey's interests. Instead, it does the opposite. First, it leads to voter deception and confusion. A voter who sees the words "No Slogan" printed by a candidate's name may believe any number of things: that the candidate chose not to select a slogan to represent his policies; that the candidate was too lazy to think of a slogan; or that the candidate did something wrong and had his slogan rejected by the state, among other things. Without knowing which may be the case, the voter is led to form a lessened view of the candidate, whom New Jersey thus harms at "the most crucial stage in the electoral process—the instant before the vote is cast." *Cook*, 531 U.S. at 525 (quoting *Anderson*, 375 U.S. at 402).

Contrary to the Third Circuit's findings, New Jersey's practice also does not protect the integrity of the state's primary nomination process. Rather, it does the opposite. It compromises the integrity of the nomination process by compelling a candidate to speak against his wishes when it matters to him most and to communicate ideas to voters that he does not want. And of course, New Jersey's practice of forcing primary candidates to engage in compelled speech on the ballot does nothing at all to protect the associational rights of third parties, which is anyway hardly a compelling state interest.

Compelled speech may be allowed if New Jersey's countervailing interests are sufficiently compelling to justify the government's practice. *See*, *e.g.*, *United*

States v. O'Brien, 391 U.S. 367, 376-377 (1968). But here, it is hard to see how any state interests are served by affixing "No Slogan" to a ballot in the event the state rejects a candidate's slogan, when instead the state could simply stay neutral and print nothing next to the candidate's name. Any countervailing interest that New Jersey may urge "must also be viewed in the light of less drastic means for achieving the same basic purpose." *Wooley*, 430 U.S. at 716 (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). In New Jersey's case, printing no words at all in the event a candidate's preferred slogan is rejected would be preferable to affixing the words "No Slogan" to a candidate's name. Thus, any countervailing interest that New Jersey may urge in this case does not outweigh Petitioner's interest in protecting his constitutional right of not being forced to speak.

III. This Court Has Already Held That Forcing a Political Candidate to Engage in Compelled Speech on the Ballot is Unconstitutional

The compelled ballot speech that New Jersey forces on its primary candidates does not present a new issue for this Court. Rather, this Court has already held, in *Cook v. Gralike*, 531 U.S. 510 (2001), that forcing political candidates to speak on the ballot is unconstitutional. This is therefore an easy case.

In the aftermath of *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), in which this Court struck down, under the Qualification Clause of the U.S.

Constitution, an Arkansas law that prohibited an otherwise eligible federal candidate from appearing on the general election ballot if he or she had already served three terms in the U.S. House of Representatives or two terms in the U.S. Senate, other states began to contemplate how they could impose term limits on their federal officials. In 1996, Missouri adopted an amendment to its state constitution, Article VIII, that was designed to lead to the same result. *Cook*, 531 U.S. at 513. Missouri wanted its federal candidates to pledge to support a "Congressional Term Limits Amendment" to the U.S. Constitution once they were elected. *Id.*

Thus, Missouri amended its state constitution to allow state officials to print the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" next to the names of all incumbent federal candidates running in primary and general elections who failed to support the Congressional Term Limit Amendment. *Id.* at 514. The state was also authorized to print the words "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" next to the name of all non-incumbent federal challengers who refused to take a pledge to support term limits once elected. *See id.* at 514-515. Explaining that Missouri's new constitutional amendment "is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal," *Cook*, 531 U.S. at 524, this Court upheld the Eighth Circuit's judgment that Missouri's practices were unconstitutional. *Id.* at 526-527. This Court

found that Missouri's labels impose a "substantial political risk" on "current and prospective congressional members who, for one reason or another, fail to comply with the conditions set forth [by the state]," and that "the adverse labels handicap candidates 'at the most crucial stage in the election process—the instant before the vote is cast.'" *Id.* at 525 (quoting *Anderson*, 375 U.S. at 402).

In *Cook*, this Court struck down Missouri's compelled ballot speech for violating Article I, Section 4 of the U.S. Constitution, explaining how "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Cook*, 531 U.S. at 523 (quoting *U.S. Terms Limits, Inc.*, 514 U.S. at 833-834). And in a concurrence, Justice Rehnquist explained that Missouri's provisions violated the First Amendment as well:

> I would affirm the judgment of the Court of Appeals, but on the ground that Missouri's Article VIII violates the First Amendment to the United States Constitution. Specifically, I believe that Article VIII violates the First Amendment right of a political candidate, once lawfully on the ballot, to have his name appear unaccompanied by pejorative language required by the State . . .
>
> Article I, § 4, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be

prescribed in each State by the Legislature thereof. . . ." Missouri justifies Article VIII as a "time, place, and manner" regulation of election. Restrictions of this kind are valid "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984). Missouri's Article VIII flunks two of these three requirements. Article VIII is not only not content neutral, but it actually discriminates on the basis of viewpoint because only those candidates who fail to conform to the State's position receive derogatory labels. The result is that the State injects itself into the election process at an absolutely critical point—the composition of the ballot, which is the last thing the voter sees before he makes his choice—and does so in a way that is not neutral as to issues or candidates. The candidates who are thus singled out have no means of replying to their designation which would be equally effective with the voter.

In *Anderson v. Martin*, 375 U.S. 399 (1964), we held that a Louisiana statute requiring the designation of a candidate's race on the ballot violated the Equal Protection Clause. In describing the effect of such a designation, the Court said: "[B]y directing the citizen's attention to the single consideration of race or color, the State indicates that a

> candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines." *Id.*, at 402. So, too, here the State has chosen one and only one issue to comment on the position of the candidates. During the campaign, they may debate tax reform, Social Security, national security, and a host of other issues; but when it comes to the ballot on which one or the other of them is chosen, the State is saying that the issue of term limits is paramount. Although uttered in a different context, what we said in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), is equally applicable here: "[Government] may not select which issues are worth discussing or debating."
>
> If other Missouri officials feel strongly about the need for term limits, they are free to urge rejection of candidates who do not share their view and refuse to "take the pledge." Such candidates are able to respond to that sort of speech with speech of their own. But the State itself may not skew the ballot listings in this way without violating the First Amendment.

Cook, 531 U.S. at 530-532 (Rehnquist, J., concurring) (cleaned up).

Here, as noted, if a New Jersey primary candidate does not select a slogan for which he has written consent, the words "No Slogan" will be printed without his consent next to his name. It is the state that

determines which slogans require written consent and which do not, on a seemingly random basis. Therefore, the state also determines which primary candidates will be forced to speak on the ballot, and which will not. And while the words "No Slogan" are not necessarily as derogatory as the labels employed by Missouri in *Cook*, they are not neutral either. Indeed, by virtue of the fact that a candidate's original slogan has been rejected, we know the words "No Slogan" do not constitute the candidate's preferred slogan. Rather, as in *Cook*, they constitute the government's compelled speech.

In short, non-compliance with New Jersey's slogan statutes results in a grave infringement of a candidate's First Amendment rights through government compelled speech. Those rights are, in effect, violated twice. The first time is when the candidate's chosen slogan is denied by the state based on its content and viewpoint. The second time is when the state then dictates what shall be printed by the candidate's name for him, when it prints the word "No Slogan" there, instead of nothing at all.

New Jersey's compelled speech practices result in voter deception. Voters are led to believe that certain candidates have chosen not to endorse a platform or party faction when, in fact, the candidate did do so, but his slogan was simply rejected because it may have mentioned another person's name or the name of the New Jersey corporation—or, as the above examples from public records requests show, because state officials, though a slogan did not mention the name of

another person or that of a New Jersey corporation, simply did not like a candidate's slogan.

New Jersey's compelled speech practices also lead to voter confusion, because voters are not able to understand equally the platforms upon which each of the state's primary candidates are running—they only see the slogans of those candidates that have been approved by the state. The compelled speech behind New Jersey's slogan statutes not only impacts the integrity of the state's electoral process, but it also violates the First Amendment—indeed, twice over.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to grant the petition for certiorari.

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