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 IN OPPOSITION

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QUESTION PRESENTED

Whether a New Jersey provision that permits candidates to display a six-word slogan on the primary ballot, but provides that they must obtain consent from individuals or New Jersey incorporated associations before naming them in the slogan, is constitutional.

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INTRODUCTION

This case involves the straightforward application of the framework this Court established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and later refined in *Burdick v. Takushi*, 504 U.S. 428 (1992) ("*Anderson-Burdick*"), to a set of statutes unique to New Jersey's primary election ballots. N.J. Stat. Ann. §§ 19:23-17 and 19:23-25.1 ("Slogan Statutes"). The Slogan Statutes allow all primary candidates to include a six-word slogan next to their names on the ballot, but provide that if any candidate chooses to name specific persons or name associations incorporated in New Jersey in the ballot slogan, they must first obtain that third party's consent. A Third Circuit panel unanimously affirmed the dismissal of a challenge to this law, reasoning that the law advanced New Jersey's interests in ensuring election integrity and minimizing voter confusion by barring misrepresentations regarding candidates' endorsements or associations with third parties directly on the ballot.

For four reasons, the Petition does not satisfy this Court's traditional criteria for certiorari. *First*, there is no split for this Court to resolve, either as to methodology or to outcome. The courts of appeals consistently apply this Court's *Anderson-Burdick* framework to statutes directly regulating the ballot and its mechanics, and this Court has denied prior petitions raising identical claims of tension as to *Anderson-Burdick*'s scope. In particular, Petitioners' claim of a split with *Bachrach v. Secretary of the Commonwealth*, 415 N.E.2d 832 (Mass. 1981)—the only case they allege struck down a comparable state law—strains credulity. That case, which was decided before *Anderson* and *Burdick*, invalidated an inapposite law barring any candidates from describing themselves as

"Independent" on the ballot—an obviously viewpoint-based measure that is quite unlike New Jersey's neutral provisions. *Id.*, at 839.

Second, this case provides a poor vehicle to address the question presented. To this Court, Petitioners articulate a novel theory of First Amendment viewpoint discrimination, arguing that New Jersey law is viewpoint-discriminatory "*in effect*" because it gives "third parties a veto and *in practical operation* discriminates on the basis of viewpoint" by effectively precluding slogans that disparage or criticize named persons. Pet.20 (emphasis added). But below, Petitioners actually conceded in the First Amended Complaint that the Slogan Statutes are facially viewpoint neutral, and they did not plead this as-applied theory either. Furthermore, Petitioners' own pleadings make clear they are poorly situated to advance such a theory.

Third, this narrow issue is insufficiently important to justify this Court's review. Petitioners themselves concede that New Jersey primary ballots and the Slogan Statutes are unlike the laws of other States, reducing the issue's practical importance anywhere else in the Nation. And the harms that Petitioners ascribe in New Jersey itself are currently the subject of ongoing litigation challenging separate state laws in the District of New Jersey. This Court has repeatedly denied Petitions challenging other applications of the *Anderson-Burdick* framework, and there is no basis to take a different tack in this sui generis case.

Fourth, the unanimous decision below is correct. The Third Circuit thoroughly canvassed this Court's and circuit cases and faithfully applied the *Anderson-Burdick* framework to the Slogan Statutes, which regulate language directly on the ballot—a textbook

part of the election mechanics process. There is no error to correct, and no other basis for certiorari.

Petitioners are unsuccessful congressional candidates in the 2020 Democratic Primaries who sought to co-opt slogans of multiple third-party political entities that never endorsed or consented to be associated with Petitioners—and that had even endorsed their opponents. The Third Circuit and district court applied the *Anderson-Burdick* framework to New Jersey's non-discriminatory, content-neutral provisions and unanimously upheld them. Petitioners' claim that language on the ballot reflects core speech, even if their slogan misrepresents their associations with third parties, overwrites settled precedent, the approaches of other courts, and the pleadings in this very case. There is no reason for this Court to grant review.

STATEMENT OF THE CASE

1. New Jersey has a longstanding and comprehensive set of laws that regulate elections, including those that establish rules for the ballots used in both primary and general elections. See, *e.g.*, N.J. Stat. Ann. §§ 19:14-1 to 19:15-34, 19:23-23 to 19:23-37.

At issue in this case are several statutes that govern primary ballots. The New Jersey Legislature first enacted N.J. Stat. Ann. § 19:23-17 in 1930, permitting candidates in a primary election for "any public office" to "request that there be printed opposite his name on said primary ticket a designation, in not more than six words . . . 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." 1930 N.J. Laws 798.

In 1944, the Legislature amended N.J. Stat. Ann. § 19:23-17 to include a proviso: "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." 1944 N.J. Laws 787. The Legislature also reinforced the third-party consent provision in N.J. Stat. Ann. § 19:23-25.1, which establishes that no ballot slogan "shall be printed" that "includes or refers to the name of any person" without such consent.

Primary slogan requests are submitted with their petitions for nomination. N.J. Stat. Ann. § 19:23-17. Petitions for nomination for federal or statewide office are submitted to the New Jersey Secretary of State. N.J. Stat. Ann. § 19:23-21. County clerks review petitions and any slogan requests for local primary elections. N.J. Stat. Ann. § 19:23-22.

2. Petitioners Eugene Mazo and Lisa McCormick were candidates for Congress in New Jersey's July 7, 2020 primary elections. Pet.App.5-6. Mazo sought the Democratic Party nomination to compete for the U.S. House of Representatives seat in New Jersey's Tenth Congressional district. McCormick did the same for the Twelfth Congressional district. Pet.App.5-6.

Both sought to use ballot slogans that referred to organizations that did not in fact support them. In his petition, Mazo requested the following ballot slogans appear next to his name on the ballots in Essex, Hudson, and Union counties, respectively: "Essex County Democratic Committee, Inc."; "Hudson County Democratic Organization"; and "Regular Democratic Organization of Union County." Pet.App.6. But Mazo did not obtain the consent of these incorporated

associations; instead, these entities had previously endorsed Mazo's opponent.[1] Thus, in accordance with the Slogan Statutes, the Division of Elections in the Office of the Secretary of State informed Mazo that his ballot slogans "referred to the names of New Jersey incorporated associations," and that if he did not receive consent from those entities to use their names, "his nomination petition would be certified as 'NO SLOGAN.'" Pet.App.6. Mazo "did not obtain the required authorizations"; he instead decided to "use[] three different slogans with the authorization of three other New Jersey incorporated associations that he created." Pet.App.6.

McCormick, for her part, requested in her nomination petition to include the ballot slogan "Not Me. Us." Pet.App.6. That designation referred to the slogan of the Bernie Sanders campaign, which was an incorporated association in New Jersey. Pet.App.6, 28 n.37. McCormick did not obtain the consent of the Sanders campaign, and thus received a similar response from the Division of Elections. Pet.App.6. McCormick then requested "Bernie Sanders Betrayed the NJ Revolution" as her slogan, and was again told that the ballot slogan would not be printed pursuant to the same requirement. Pet.App.6. Finally, McCormick designated "Democrats United for Progress," for which she obtained authorization, as her ballot slogan. Pet.App.6-7.

3. Five days before the primary election, Petitioners sued the New Jersey Secretary of State,[2] alleging the

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[1] See, *e.g.*, City of Jersey City, Primary Election Sample Ballot, Hudson County Clerk, https://www.hudsoncountyclerk.org/wp-content/uploads/2020/06/JC-Prov-Sample-f.P13.pdf (July 7, 2020).

[2] Petitioners also sued various county clerks, but the district court dismissed the clerks because they were not responsible for

consent provision is unconstitutional and seeking declaratory and injunctive relief. Pet.App.7.

The district court granted Respondent's motion to dismiss. Pet.App.97. The court observed that Petitioners "primarily raise[d] a facial challenge," and therefore analyzed the claims accordingly. Pet.App.73 & n.7. Because Petitioners did "not plead any facts showing that [the Secretary of State] enforced the Slogan Statutes against them in an unconstitutional or otherwise irregular manner," any as-applied challenge failed on that basis alone. Pet.App.73 & n.7.

The district court held that Petitioners' facial challenge failed under the *Anderson-Burdick* framework, Pet.App.75-83; see *Anderson*, 460 U.S. 780; *Burdick*, 504 U.S. 428, which governs "'a wide variety of challenges to . . . state-enacted election procedures,' including those implicating First Amendment rights," Pet.App.77 (quoting *Soltysik v. Padilla*, 910 F.3d 438, 444 (CA9 2018)). The court found that the burdens imposed by the law were justified by the legitimate state interests it promoted. Pet.App.87-92.

As to the former, the district court held that while the burdens on candidates were more than slight, they were less than severe, and thus warranted lesser scrutiny. Pet.App.87. The court reasoned the burden was not severe because: (1) Petitioners did "not allege how frequently the Slogan Statutes thwart" candidates' plans; (2) the Slogan Statutes are generally applicable to all primary candidates; (3) as a practical matter, the non-consenting parties more directly burdened candidates' speech than the State did; and (4) candidates retained "many other—and more substantial—

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enforcing the statutes for the relevant elections, Pet.App.95-97, and Petitioners did not challenge that holding on appeal.

opportunities to speak" and "express associations with people or groups throughout the campaign, in other forums, and by other means." Pet.App.87-88.

The district court then held that the Slogan Statutes were justified by the State's "relevant and legitimate" interests. Pet.App.90. The court agreed that the third-party consent requirement: (1) preserves the integrity of, and "safeguard[s] public confidence" in, the nomination process, Pet.App.91 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008)); (2) prevents voter deception and confusion by reducing the risks that candidates would use ballot slogans referencing a third party that suggest an association that does not exist in fact, Pet.App.91-92; and (3) protects the associational rights of third parties named in the official ballot slogans, Pet.App.92.

4. The Third Circuit panel unanimously affirmed. Pet.App.1. Like the district court, the panel concluded that the case only genuinely presented a facial challenge. It held while Petitioners "purport[ed] to raise both a facial and an as-applied challenge to the Slogan Statutes," they "ha[d] not plead[ed] any facts showing that [Respondent] enforced the [consent requirement] against them in an unconstitutional or otherwise irregular manner." Pet.App.8 n.6. Because the factual allegations did not "specify how their" First Amendment rights were particularly burdened, the panel "construe[d] their Complaint as raising only a facial challenge." *Ibid.*

The panel also held that the facial challenge failed. Initially, the panel concluded that *Anderson-Burdick* applied to this ballot law. Pet.App.15-31. The panel canvassed the decisions of this Court and its sister circuits and found that the *Anderson-Burdick* framework applies to suits that challenge laws which "primarily regulate the mechanics of the electoral process, as

opposed to core political speech." Pet.App.15. And the panel found that while this Court had not set forth one bright-line test for what constituted the mechanics of the electoral process, see *ibid.*, this Court's decisions did already make quite clear the right criteria to use: the "location and timing" and "nature and character" of the covered speech. Pet.App.23. The panel canvassed the decisions of its sister circuits and found they regularly "followed" these criteria for applying *Anderson-Burdick* across a range of elections contexts. Pet.App.21-23 (collecting examples).

The panel held that this law qualifies as regulating the mechanics of the electoral process. As it reasoned, the consent requirement primarily regulates election mechanics because it regulates the words that appear on the ballot. Pet.App.26-31. It held that a ballot slogan statute differs from laws addressing core political speech because the slogan is "confined to the ballot itself at the moment the vote is cast" and "is a one-way communication confined to the electoral mechanic of the ballot." Pet.App.30; see Pet.App.28-30 (explaining that unlike traditional political speech, ballot slogans "cannot inspire any sort of meaningful conversation regarding political change," including a response that the ballot slogan is misrepresenting another entity's endorsements or associations).[3]

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[3] The panel also rejected Petitioners' separate argument that *Anderson-Burdick* applies to freedom of association claims alone. Pet.App.15-16. The panel held that *Anderson-Burdick* had been consistently applied to claims alleging a "burden" on other "constitutional right[s], such as the right to vote or the First Amendments rights of free expression and association." Pet.App.15; see also Pet.App.17 (citing decisions applying *Anderson-Burdick* "not only to association claims, but to challenges to election laws that 'have the effect of channeling expressive activity at the

Applying *Anderson-Burdick* to the facts of this particular law, the panel affirmed the dismissal of these claims. Pet.App.31-50. It first considered the magnitude of the burden and found that the Slogan Statutes imposed only a minimal burden on expressive rights because (1) the requirement applies to all candidates and does not discriminate based on content or viewpoint, (2) the requirement leaves "open ample and adequate alternatives for expression and association," and (3) Petitioners' complaint included no evidence of any specific burden to them or to any other candidate. Pet.App.32-47; see Pet.App.42-44 (emphasizing candidates remain free "to try and earn the consent of individuals and incorporated associations with whom they would like to associate on the ballot," as well as "to say whatever they want and communication any message about any individual or incorporated association so long as they do not do so via the ballot slogan").

The panel explained why the requirement was facially neutral as to content and viewpoint. Pet.App.35-42. As to content, the panel noted that the third-party provision plainly "applies to all slogans, regardless of message" and "does not 'single out any topic or subject matter for differential treatment'"; instead, it "distinguishes between speech based on extrinsic features unrelated to the message conveyed." Pet.App.33-39 (quoting *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022)). The panel also found the law facially viewpoint neutral because it "applies equally to any viewpoint related to the person or entity named and the consent procedure is the same regardless of whether the candidate wishes to convey support or criticism of the named individual

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polls'" (quoting *Burdick*, 504 U.S., at 438)). Petitioners have apparently abandoned this argument before this Court.

or association." Pet.App.40. It rejected Petitioners' argument that the statute *indirectly* discriminates against slogans that criticize third parties because "the consent requirement does not directly regulate criticism, and 'a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.'" Pet.App.40 (quoting *McCullen v. Coakley*, 573 U.S. 464, 480 (2014)).

Especially given the minimal burden that the challenged provision imposes, the panel held that New Jersey's "relevant and legitimate" interests in preserving the integrity of the nomination process, preventing voter deception, preventing voter confusion, and protecting associational rights of third parties named in the slogans are "sufficiently weighty to justify the limitation." Pet.App.48.[4] The panel thus held the balance "weigh[ed] decisively" in New Jersey's favor and that the statute is constitutional. Pet.App.49-50.

This petition for certiorari followed.

REASONS FOR DENYING THE PETITION

This Court should deny review for four reasons: (1) there is no split over the validity of this or comparable state laws, nor any division of authority over whether and how to apply the *Anderson-Burdick* framework to ballot regulations like the Slogan Statutes; (2) the Petition presents a poor vehicle in which to resolve the question presented, as Petitioners below agreed that the statute was viewpoint-neutral on its

[4] The panel also held that while the State did not bear a burden of showing its policy was the least restrictive alternative, Petitioners' "proffered alternatives" all notably "fail[ed]" to advance the States' interests or introduced their own constitutional problems. Pet.App.48-49 n.41.

face and nowhere pleaded facts supporting any as-applied challenge; (3) the issue does not impact States outside New Jersey, and even the harms Petitioners claim are happening in New Jersey turn on other state laws being challenged in other pending cases; and (4) the decision below correctly applied precedent to this statute.

In the alternative, this Court should hold the Petition pending resolution of *Vidal v. Elster*, No. 22-704, *cert. granted* (U.S. June 5, 2023). Although there are significant differences between the two disputes, that case presents overlapping questions regarding the implications under the First Amendment for third-party consent requirements. There is no apparent reason for this Court to grant review in both cases.

I. This Court Should Deny This Petition.

While Petitioners vigorously oppose New Jersey's longstanding ballot laws, they have not satisfied this Court's traditional criteria for certiorari.

A. No Circuit Split Exists.

Petitioners cannot muster a split over the validity of statutory provisions like the Slogan Statutes, nor can they establish a split over when and how to apply the *Anderson-Burdick* framework.

1. Notwithstanding the importance of circuit splits in the certiorari analysis, Petitioners dedicate just over two pages to alleging a split on the validity of "comparable" state statutes. Pet.31. For good reason: no conflict exists over the validity of provisions like this one.

While Petitioners cite *Bachrach v. Secretary of the Commonwealth*, 415 N.E.2d 832 (Mass. 1981), that decision could hardly be further afield. See Pet.31-32.

As an initial matter, *Bachrach* cannot support Petitioners' view that there is a split over whether the *Anderson-Burdick* framework applies to state laws like New Jersey's because *Bachrach*—a 1981 decision that has been infrequently cited since—predates the decisions in both *Anderson* and *Burdick*. It is thus unsurprising that Petitioners never so much as mentioned *Bachrach* to the Third Circuit when arguing below regarding the application of *Anderson-Burdick*.

Regardless, the laws at issue here and in *Bachrach* are markedly different: while New Jersey's provision is neutral on its face, the statute at issue in *Bachrach* facially discriminated against specific and express political viewpoints. *Bachrach* involved a Massachusetts statute governing the ballot designations of all candidates not affiliated with a political party. 415 N.E.2d, at 833. The designation was to consist of up to three words but could not include the word "Independent." *Ibid.* Bachrach challenged that statute, alleging that using the word "Independent" was necessary because it "best expressed his political views." *Ibid.*; see *id.*, at 834-35 (record evidence explaining Bachrach's use of the "Independent" moniker in his campaign and its general customary meaning as "referring to persons who do not formally affiliate with any political party"). Unsurprisingly, the Massachusetts Supreme Judicial Court found a direct statutory prohibition on the use of the word "Independent" was unconstitutional. *Id.*, at 836-37. As the Court succinctly put it, a "candidate who chose . . . to campaign under the label Independent, was singled out and denied that expression on the ballot" via direct operation of state law. *Id.*, at 836, 839.

Bachrach and the decision below do not conflict—and are not even in tension—either in outcome or reasoning. Where the Massachusetts statute invalidated

in *Bachrach* singled out a particular political affiliation for exclusion—that is, those who were Independent and did not affiliate with any political party—that is not true for New Jersey's Slogan Statutes, which do not prohibit any specific language. To the contrary, it requires all slogans mentioning third-party individuals and New Jersey incorporated associations to obtain consent, no matter who they are, and no matter what the slogan would say about them. *Bachrach* thus has no bearing on the validity of New Jersey's Slogan Statutes. And *Bachrach* had no occasion to weigh in on Petitioners' current theory that discrimination "in effect" creates a First Amendment problem—because third parties might withhold consent based on their viewpoint, even if the law itself does not—as this was not at issue in that 1981 case.

Nor is there tension between their reasoning. Both decisions acknowledge the level of constitutional scrutiny can depend on the burdens an elections law imposes, even though *Bachrach* used language that predates this Court's instructions in *Anderson* and *Burdick*. See *Bachrach*, 415 N.E.2d, at 837 n.18 (referring to the "continuum of constitutional vulnerability" that courts must consider "at every point by the competing values involved," an approach sharply at odds with Petitioners'). And *Bachrach*, no less than the decision below, considered the law's content- and viewpoint-neutrality a central consideration. Compare *id.*, at 836, 839 (emphasizing repeatedly that the Massachusetts statute was unconstitutional because the law "singled out and denied th[e] expression" of Independent candidates), with Pet.App.32 (agreeing "[e]lection laws that discriminate by 'limit[ing] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status' impose severe burdens

and will be 'especially difficult for the State to justify'" (quoting *Anderson*, 460 U.S., at 793)). That simply cut in different directions for these two different laws: the Massachusetts law discriminated against candidates who described themselves as Independent, while New Jersey's law applies neutrally to all.

At bottom, the alleged split over "comparable" state statutes, Pet.31, is illusory. Petitioners can dredge up only a single state court decision from 42 years ago, one that predates the decisions in *Anderson* and *Burdick* that form the basis of this Petition. And even that decision creates no split: it just applies the same concerns over neutrality to a materially different law.

2. Just as Petitioners cannot identify a genuine split over comparable statutes, Petitioners' one-paragraph claim that there is at least a more general "lower-court conflict" over how *Anderson-Burdick* applies generally cannot withstand scrutiny. Pet.33; see also Pet.29-31 (suggesting *Anderson-Burdick* is a "morass"); Pet.34-35 (claiming *Anderson-Burdick* is "murky").

As an initial matter, this Court has repeatedly denied remarkably similar petitions alleging a need for this Court to address whether and how the *Anderson-Burdick* framework governs provisions relating to ballot language. See *Rubin v. City of Santa Monica*, Pet. for Cert., 2003 WL 22428483, at *9 (U.S. May 5, 2003), *cert. denied* 124 S. Ct. 221 (2003); *Caruso v. Yamhill Cnty.*, Pet. for Cert., 2006 WL 341285, at * 4 (U.S. Feb. 13, 2006), *cert. denied* 126 S. Ct. 1786 (2006); *Schmitt v. LaRose*, Pet. for Cert., 2020 WL 584340, at *2 (U.S. Feb. 3, 2020), *cert. denied*, 140 S. Ct. 2803 (2020). As in the instant case, each of these petitions urged this Court to deem language on the ballot as "core political speech" outside the ambit of *Anderson-Burdick*. Each time, this Court declined the

invitation to take up the issue. This Petition presses the same claim, see, *e.g.*, Pet.i (asserting a restraint on core political speech on the ballot), and should meet the same fate.

Petitioners identify no split on *Anderson-Burdick*, let alone one that has emerged since those denials. Notably, the panel below already canvassed the decisions from other circuits and found that they support its approach. See Pet.App.21-23 & nn.15-36 (citing decisions from the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits). Petitioners reply only by briefly citing *Rubin v. City of Santa Monica*, 308 F.3d 1008 (CA9 2002), and *Rosen v. Brown*, 970 F.2d 169 (CA6 1992), but both cases applied *Anderson-Burdick* to language on a ballot. *Rubin* involved a challenge to a viewpoint neutral law allowing candidates to state their occupations on the ballot but barring them from listing "statuses," including "peace activist," and therefore upheld the law. 308 F.3d, at 1015. And *Rosen* involved a challenge to a distinct state law that—as in *Bachrach*—allowed political parties to appear on a general election ballot but barred a designation of "Independent" and therefore was invalidated because it discriminated based on viewpoints. 970 F.2d, at 171, 176. Neither support Petitioners' effort to have a facially neutral restriction on ballot language struck down.[5]

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[5] Indeed, the circuits have consistently rejected challenges to neutral statutes that govern ballot language. See, *e.g.*, *Schmitt v. LaRose*, 933 F.3d 628, 634 (CA6 2019) (statute requiring ballot initiatives to be certified as properly proposing legislative action), *cert. denied*, 140 S. Ct. 2803 (2020); *Soltysik*, 910 F.3d, at 445 (statute listing qualified-party affiliation next to candidate, but listing "none" for candidates affiliated with non-qualified parties); *Democratic-Republican Org. of N.J. v. Guadagno*, 700 F.3d 130 (CA3 2012) (statute authorizing the use of a three-word party

Particularly given the lack of any genuine splits on *Anderson-Burden*'s scope, Petitioners' sudden effort to use this case as a vehicle in which to "abandon the *Anderson-Burdick* project," Pet.29, is puzzling. The Petition lacks any discussion of the factors this Court considers in reevaluating its precedent. See *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019) (listing criteria to reevaluate stare decisis, such as "the quality of its reasoning, the workability of the rule it established, [its] consistency with other related decisions, and reliance on the decision"). All Petitioners can muster are observations in one judge's concurring opinions in a case involving the criteria for serving on an independent redistricting commission, see *Daunt v. Benson* (*Daunt I*), 956 F.3d 396, 424 (CA6 2020) (Readler, J., concurring in the judgment); *Daunt v. Benson* (*Daunt II*), 999 F.3d 299, 323, 325-27 (CA6 2021) (Readler, J., concurring in the judgment),[6] and a smattering of law review articles and student notes. That is hardly evidence of the sort of lower-court chaos or practical unworkability that may justify granting certiorari to consider the vitality of a prior precedent.

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slogan on general election ballot but prohibiting use of existing party name); *Caruso v. Yamhill Cnty. ex rel. Cnty. Comm'r*, 422 F.3d 848, 851 (CA9 2005) (law requiring indication of tax impact on ballot initiatives), *cert. denied*, 126 S. Ct. 1786 (2006).

[6] In fact, these concurrences repeatedly emphasized the concern that *Anderson-Burdick* was being applied in "cases … that have nothing to do with an election." *Daunt II*, 999 F.3d, at 323 (Readler, J., concurring in the judgment). But this case, unlike *Daunt*, directly concerns the mechanics of an election: the language on the ballot that records the voter's decision. Pet.App.28 (emphasizing that the words appearing on a ballot "is the archetypical mechanic of the electoral process for which the *Anderson-Burdick* test is designed").

B. This Case Presents A Poor Vehicle To Review the Question Presented.

Even were a split to exist, this would be a poor case in which to address it. Before this Court, Petitioners repeatedly contend that the Slogan Statutes are unconstitutional because the provisions are "viewpoint-discriminatory . . . *in effect*"—that is, they give "*third parties* a veto and in practical operation discriminate[] on the basis of viewpoint." Pet.20 (emphasis added); see also Pet.1, 13, 14, 19, 22, 28. Petitioners claim that the Slogan Statutes thus "effectively preclude all slogans that disparage or criticize named persons, who have no incentive to consent to the insult." Pet.28. But Petitioners' pleadings make this a profoundly flawed vehicle in which to review this theory.

To start, Petitioners' own pleadings expressly contradict the argument that the law discriminates based on viewpoint—a key part of their current case for certiorari. In their First Amended Complaint, the operative pleading, Petitioners acknowledged that the Slogan Statutes are viewpoint neutral on their face. See CA3.App.52 ¶ 64 ("It is irrelevant that the Slogan Statutes do not discriminate among viewpoints."). Compounding the problem, the First Amended Complaint contained no allegations that the Slogan Statutes are viewpoint discriminatory as-applied and built no as-applied case based on specific allegations whatsoever. In particular, the operative pleading is devoid of any claim that the Slogan Statutes as applied to Petitioners work the harms they now assert here—that the Slogan Statutes impermissibly give "third parties a veto" that allows third parties to discriminate based on viewpoint against slogans that disparage or criticize the named persons. Pet.20.

As a result, both the district court and the Third Circuit construed Petitioners "as raising only a facial challenge." Pet.App.8 n.6 (quoting Pet.App.73 n.7). As the Third Circuit noted, Petitioners did not plead "any facts showing that [Respondent] enforced the [consent requirement] against them in an unconstitutional or otherwise irregular manner" and did not "specify how their freedom of speech or association was burdened by enforcement of the consent requirement." *Ibid.* And it found this fatal for as-applied claims. See *ibid.*[7] This combination—the findings below that Petitioners did not sufficiently present any as-applied claims, and Petitioners' own recognition that the Slogan Statutes are not discriminatory based on viewpoint on their face—make this a poor vehicle to consider the viewpoint-discrimination-in-effect claim made here.

There is a good reason Petitioners never pressed a facial viewpoint-discrimination claim or built a proper as-applied case: none of their factual allegations support a disparate-effects theory. See Pet.i, 6, 9, 28 (emphasizing impact of challenged state statutes on hypothetical ballot slogans criticizing third-party officials or entities). Far from adopting a slogan criticizing any entity, Mazo sought to co-opt affiliations with entities that did not consent to his use of their names. Mazo sought to use as his own ballot slogans "Essex County Democratic Committee, Inc."; "Hudson County

[7] Given that the courts below declined to pass on any as-applied theory, this Court should not do so in the first instance. See, *e.g.*, *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 441 n.4 (2017) ("[I]n light of the . . . lack of a reasoned conclusion on this question from the Court of Appeals, we are not inclined to resolve it in the first instance."); *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) ("Because these [arguments] were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

Democratic Organization"; and "Regular Democratic Organization of Union County" in the three counties where his name appeared on the ballot. But these were real, incorporated associations; these organizations had not given consent to be associated with him; and (as Mazo knew) they had already endorsed his opponent. Pet.9; Pet.App.6. Mazo thus has no basis to present this as-applied claim regarding ballot slogans that disparage third parties; his proposed ballot slogans would have suggested *support* that he did not have.

Petitioner McCormick's circumstances also undermine a disparate-effects theory: McCormick proposed two slogans referring to the same third-party association, one positive and one negative, but failed to obtain consent both times. See Pet.10; Pet.App.6 (describing her efforts to obtain consent from the Bernie Sanders campaign for both "Not Me, Us" and "Bernie Sanders Betrayed the NJ Revolution"). That neither her pro- nor anti-Sanders ballot slogans received consent also makes her a far-from-ideal plaintiff for the as-applied discriminatory-in-effect claims that the Petition now emphasizes.[8] Petitioners' experiences provide helpful

[8] Other problems surrounding Petitioner McCormick's campaign conduct make her a less than ideal Petitioner. Earlier this year, McCormick's campaign manager, Jim Devine, was charged with three counts of election fraud for submitting fraudulent petitions on her behalf in the 2021 Democratic Primary for Governor. See David Wildstein, *Attorney General Charges Jim Devine with Election Fraud after Filing Fake Petitions in '21 Governor's Race*, N.J. Globe (Apr. 28, 2023), https://newjerseyglobe.com/governor/attorney-general-charges-jim-devine-with-election-fraud-after-filing-fake-petitions-in-21-n-j-governors-race/; David Wildstein, *Devine Admits he Filed Fake Petitioners, Complaint Shows*, N.J. Globe (May 1, 2023), https://newjerseyglobe.com/campaigns/devine-admits-he-filed-fake-petitions-complaint-shows/.

context for why the operative complaint expressly recognized "that the Slogan Statutes do not discriminate among viewpoints." CA3.App.52 ¶ 64.

Nor does the non-emergency posture of this action somehow overcome such serious vehicle problems. See Pet.35 (asserting that the non-emergency posture affords this Court an allegedly rare opportunity to review the contours of the *Anderson-Burdick* test). This Court has received many invitations to review *Anderson-Burdick*'s scope in non-emergency petitions and it has consistently denied them. See *supra* at 15 n.5; see also, *e.g.*, *Libertarian Party of Ala. v. Merrill*, No. 20-13356, 2021 WL 5407456 (CA11 Nov. 19, 2021), *cert. denied*, 142 S. Ct. 2652 (2022); *Ariz. Libertarian Party v. Hobbs*, 925 F.3d 1085 (CA9 2019), *cert. denied*, 141 S. Ct. 111 (2020); *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570 (CA6 2016), *cert. denied* 137 S. Ct. 2119 (2017); *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708 (CA4 2016), *cert. denied*, 137 S. Ct. 1093 (2017); *Balsam v. Sec'y of N.J.*, 607 F. App'x 177 (CA3 2015), *cert. denied*, 136 S. Ct. 189 (2015). Should this Court one day decide to revisit the *Anderson-Burdick* framework, it will have many opportunities to do so in cases that do not present the vehicle problems here.

The instant Petition rests heavily on the idea that the Slogan Statutes must be invalidated because they discriminate based on viewpoint on a disparate-effects theory. But the operative pleadings correctly disclaimed any allegation that the provisions do so on their face, and—consistent with their own requested slogans—did not sufficiently present any as-applied case. So while this *Petition* raises a specter of consent to

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It is unclear if Petitioner McCormick will pursue office again or obtain sufficient signatures to be placed on a future ballot.

oppositional ballot slogans being withheld, this *case* involves Petitioners who instead sought to misleadingly associate with entities that did not wish to associate with them.

C. This Case Lacks Sufficient Practical Importance To Warrant Certiorari.

Beyond the request for splitless error correction, and beyond the vehicle problems, there is a third reason to deny certiorari: the limited importance of the decision below. The ruling will not impact States beyond New Jersey, and even the harms Petitioner ascribe within New Jersey are significantly overstated.

The former problem is striking: the Petition presents only a narrow question of the validity of one portion of New Jersey's Slogan Statutes, what Petitioners themselves describe as a unique provision of one State's primary election ballot regulations. As Petitioners have repeatedly admitted, "New Jersey primary ballots are unlike those of any other state," Pet.8, n.2, and "the Slogan Statutes are unique and unlike any other ballot regulation in the United States," Appellants' Br.23, CA3 Dkt. 23; see also, *e.g.*, CA3 Oral Arg. Tr.4:9-11, CA3 Dkt. 58 (Petitioners' counsel stating at oral argument to the Third Circuit, "there's nowhere else in the United States where you have a slogan on the ballot"). As a result, whether the New Jersey Slogan Statutes appropriately fall within the *Anderson-Burdick* framework and whether the New Jersey Slogan Statutes survive review, are questions that have little to no consequence to the rest of the Nation.

Even as to New Jersey, Petitioners' consequentialist arguments are overblown. In an effort to amplify the importance of this case, Petitioners contend that the Slogan Statutes' "design works perfectly to allow New

Jersey's political insiders to stifle their rivals" when considered in conjunction with other statutory provisions not at issue here. Pet.34. Petitioners primarily emphasize *other* New Jersey laws that allow primary candidates to appear on the primary ballot grouped (referred to as "bracketed") together by "choos[ing] the same designation or slogan," thereby allowing "their names [to be] placed on the same line of the ballot." Pet.8 (citing N.J. Stat. Ann. § 19:49-2; see *id.* § 19:23-18). Petitioners argue that this combined scheme allows New Jersey's county political committees to allow their preferred candidates to be grouped on the ballot under the same designation. Pet.7.

But whatever ills Petitioners ascribe to this practice, they are the subject of separate pending lawsuits. A pair of lawsuits—including one filed by Petitioner Mazo—are pending in the District of New Jersey challenging the constitutionality of those bracketing statutes and related balloting practices. See *Conforti v. Hanlon*, No. 20-8267 (D.N.J.); *Mazo v. Durkin*, No. 20-8336 (D.N.J.). The district court has allowed the constitutional claims to proceed beyond the motion-to-dismiss stage, see *Conforti v. Hanlon*, No. 20-8267, 2022 WL 1744774, at *15 (D.N.J. May 31, 2022), and the parties are presently engaged in discovery. But if the Slogan Statutes have little to no practical impact on other States, and if their alleged impacts even within New Jersey turn on their relationship with other challenged statutes, there is no basis for certiorari while those separate challenges proceed. In other words, not only are the bases for certification intensely localized, but those localized concerns regarding the mechanics of New Jersey primary elections may be significantly impacted by future decisions in other already-pending cases. This, too, counsels against granting Petitioners' request for error correction here.

D. The Decision Below Follows Directly From This Court's Precedents.

This Petition does not warrant review in any event because the Third Circuit correctly applied the *Anderson-Burdick* framework to the Slogan Statutes and rejected Petitioners' First Amendment challenge. Said another way, not only is this purely a request for error correction, but there is no error to correct.

1. The Third Circuit's determination that the *Anderson-Burdick* framework applies to the Slogan Statutes follows from this Court's precedents. The parties (and the Third Circuit) agree that regulation of elections falls within *Anderson-Burdick*. The parties (and the Third Circuit) also agree that core political speech does not. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (differentiating between regulations that "control the mechanics of the electoral process," which are subject to *Anderson-Burdick* analysis, versus "regulation of pure speech," which is subject to the tiers of scrutiny). All they dispute is the application of this dichotomy to the Slogan Statutes.

The Third Circuit correctly found that the Slogan Statutes implicate "the mechanics of the electoral process." After all, this Court has consistently applied the *Anderson-Burdick* framework to challenges to the mechanics of voting, including when the challenged statute regulates language on the ballot. Indeed, *Burdick* itself involved a challenge to a Hawaii law that prohibited write-in voting on the basis that such a prohibition impaired the right to cast a "protest vote" and thus violated the First Amendment right to freedom of expression and association. See *Burdick*, 504 U.S., at 430, 438; see also *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222, 224

(1989) (applying *Anderson* to a claim that a law prohibiting party endorsement of candidates in primaries burdened their rights to free speech and association); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (applying framework to laws banning fusion voting, which challengers alleged impaired a party's ability to "send a message" to voters).

Nor did the Third Circuit err in assessing both "the location and timing" and "the nature and character" of the speech, Pet.App.23, as part of the analysis. As the Third Circuit explained, those distinctions come from this Court's cases and are a through-line in decisions by the courts of appeals. See Pet.App.24 (contrasting *Burdick*, 504 U.S., at 437-38, which involved speech on the ballot, with *McIntyre*, 514 U.S., at 347, which involved leafletting in the period leading up to Election Day); Pet.App.21-23 & nn.15-36 (collecting circuit cases). While Petitioners believe that those criteria should have led to a different result here, see Pet.25-26 (citing *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Brown v. Hartlage*, 456 U.S. 45 (1982); *Mills v. Alabama*, 384 U.S. 214 (1966)), none of Petitioners' cited cases involve ballot regulations or any similar location or means of speech. As this Court already explained in *Timmons*, unlike leafletting or campaign commercials, the State's "[b]allots serve primarily to elect candidates, not as fora for political expression." 520 U.S., at 363.

Petitioners' claims that the Third Circuit decision held either "that core political speech ceases on election day," Pet.23-24, or that restrictions on ballot language will always survive First Amendment scrutiny, Pet.25-26, badly misreads the decision. Nowhere in its opinion does the panel even suggest that election-day speech would categorically not be core political speech,

and the State agrees such a strawman holding would be "absurd and irreconcilable" with precedent. Pet.23-24. But here, the Third Circuit carefully assessed only whether a law exclusively implicating language on the ballot "primarily regulate[s] a mechanic of the electoral process," and held that it did given the special and unique role of ballots. See Pet.App.28-30; see also *Burdick*, 504 U.S., at 438 ("Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."); *Timmons*, 520 U.S., at 365 (noting a ballot is a "a means of choosing candidates" and not "a billboard for political advertising").[9] Nor did the panel exempt all restrictions on ballot language from scrutiny, carefully assessing the burdens imposed and the state interests served by this law. See Pet.App.32-50.[10]

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[9] This helps explain why Petitioners are wrong to cite a conflict with this Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992). See Pet.23-24. Applying the *Anderson-Burdick* framework to the Slogan Statutes is not in tension with that decision at all, because *Burson* involved a law banning "the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place." 504 U.S., at 193. Political expression by voters at polling places differs from ballot slogans in both the "location and timing" and the "nature and character" of speech factors that the Third Circuit analyzed.

[10] Petitioners do not address the State's alternative basis for upholding the Slogan Statutes—without regard to the *Anderson-Burdick* framework—that the ballot is a non-public forum in the same way the polling place is. See Appellees' Br. 26, CA3 Dkt. 39 (citing *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018) (concluding that a polling place is nonpublic forum)); Appellees' Supp. Br. 3-6, CA3 Dkt. 49; cf. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (state-owned television broadcaster did not create designated public forum by inviting candidates to debate). In other words, even were Petitioners right

2. Applying the *Anderson-Burdick* framework, the Third Circuit correctly held that the challenged provisions of the Slogan Statutes are valid. Petitioners err in alleging that the state laws impose discriminatory burdens on candidates and in all-but overlooking the important state interests served.

The Third Circuit correctly held that while the *Anderson-Burdick* framework subjects laws to additional scrutiny if they discriminate against certain groups or on the basis of viewpoint, the Slogan Statutes reflect no such discrimination. Contra the Petition's claims, the Slogan Statutes "draw[] no distinctions and do[] not impose unique burdens on any identifiable group of voters or candidates." Pet.App.34-35; see also*, e.g.*, *Timmons*, 520 U.S., at 360 (upholding Minnesota's ban on "fusion" candidates as non-discriminatory because the law "applie[d] to major and minor parties alike."). Said another way, as a plain reading of the state-law provisions makes clear, the "consent requirement applies equally to any viewpoint related to the person or entity named, and the consent procedure is the same regardless of whether the candidate wishes to convey support or criticism." Pet.App.40. No matter who the candidate is, or what they wish to say about the third party, the laws apply neutrally and uniformly.

The panel also properly rejected Petitioners' creative argument that even if the law is facially viewpoint neutral, it could be invalid because private third parties would withhold consent in viewpoint-discriminatory ways. See Pet.28 (contending the Slogan Statutes are facially viewpoint discriminatory "in their 'practical

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that the *Anderson-Burdick* framework is inapplicable (and they are not), Petitioners still should not prevail.

operation,'" since named persons will not consent to "slogans that disparage or criticize" them). Leaving aside their own allegations in their Complaint, see *supra* at 17-18, Petitioners cite no case adopting such a disparate-effects theory under *Anderson-Burdick*, nor a single First Amendment decision holding a facially neutral law is viewpoint discriminatory based on how private third parties could use it. To the contrary, this Court itself has already held that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." Pet.App.40 (quoting *McCullen*, 573 U.S., at 480). And as to any as-applied viewpoint discrimination theory, the court correctly concluded that Petitioners had not met their burden to provide "evidence of both the existence and prevalence of such unconstitutional applications." Pet.App.44.

Aside from this viewpoint-discriminatory-in-effect theory, Petitioners' other tacks fall short. Petitioners make much of the fact that the Slogan Statutes apply to the primary but not the general election, see Pet.21-22, and require consent before naming a New Jersey association but not an association in any other State, see Pet.19-20. But the distinctions make sense. On the general-election ballot, candidates are listed by partisan affiliation, with only one candidate nominated by any political party. Candidates nominated by petition may designate the "party or principles" they represent, but such designation may not refer to another political party within that primary. See N.J. Stat. Ann. § 19:13-4. In a primary, where many candidates within one political party compete for that party's nomination, slogans provide a way to identify the faction *within* that party to which a candidate belongs. See 1930 N.J. Laws 798 (noting slogans allow

candidate to show that they belong to "a particular faction or wing of [their] political party").

As to differences for whose consent is required for primary ballot slogans, that flows from the State's important interests in preventing confusion: claiming an association with an organization that has no presence in the State is unlikely to confuse voters, whereas falsely claiming an association with an organization in New Jersey itself is far more likely to mislead. See *supra* at 18-19 (discussing Petitioner Mazo's efforts to claim affiliation with local organizations). And regardless, these arguments are a red herring: they show no discrimination based on viewpoint.[11]

Especially given the limited burden (and the alternative channels Petitioners have to express affiliation or opposition to named persons), the Third Circuit appropriately held that New Jersey's important and legitimate interests are sufficient to justify the Slogan Statutes. See Pet.App.47. Indeed, Petitioners concede that New Jersey's interests in ensuring election integrity and preventing voter confusion are sufficiently

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[11] They also show no content discrimination, but that issue is irrelevant in any event. Consistent with recent cases like *City of Austin*, "neutral line-drawing that distinguishes between speech based on extrinsic features unrelated to the message conveyed" does not constitute content discrimination. Pet.App.38; see also Pet.App.39 (explaining the challenged law fits that test because "the communicative content of the slogan—*i.e.*, whether the slogan names an individual or a New Jersey incorporated association—only matters to determine whether the consent requirement applies at all"). Regardless, in the elections context, a "content-based law does not necessarily impose a severe burden . . . if it does not prohibit or limit speech on any particular topic or otherwise favor certain candidates or outcomes," Pet.App.35 n.39 (citing *Caruso*, 422 F.3d, at 857-58), which this viewpoint-neutral law does not.

legitimate and important. See Pet.20 ("[N]o one doubts that New Jersey has compelling interests in 'ensuring election integrity and preventing voter confusion.'" (quoting Pet.App.4)). For good reason: language on the ballot carries with it the imprimatur of the State; can make representations to voters in the final reflective moments in which they cast their ballot; and could not be rebutted in the ballot box by other candidates.

That heightens the risk that candidates could list on the ballot affiliations that mislead voters. Although the Petition emphasizes the Slogan Statutes apply to efforts by candidates to claim that they oppose a particular official, their facial challenge would also strip the State of any tool to stop them from asserting affiliations with those same officials—no matter how misleading. This case shows how. Petitioner Mazo sought to use as his slogan not language criticizing the Hudson County Democratic Organization, but language suggesting that he was their candidate—although that political organization endorsed his opponent. See *supra* at 18-19. Petitioner McCormick's first slogan likewise indicated affiliation with the Sanders campaign, which never supported her candidacy. See *supra* at 19. As the Third Circuit noted, this Court has previously held a State can "'avoid' the ills of foreclosing one political party from using the name of an established party 'merely by requiring the candidates to get formal permission to use the name from the established party they seek to represent.'" Pet.App.48 n.41 (quoting *Norman v. Reed*, 502 U.S. 279, 290 (1992)). But that is precisely what New Jersey has done for the slogans that appear on its primary ballots.

II. In The Alternative, This Court Should Hold This Petition In Light Of *Vidal v. Elster*.

If this Court does not deny review, it should hold the Petition pending resolution of *Vidal v. Elster*, No. 22-704, *cert. granted* (U.S. June 5, 2023). While the issues are not identical, they present overlapping questions that might bear on resolution of the instant Petition. There is no basis to grant a second question presented as to whether so-called "consent requirements" contravene the First Amendment.

Elster concerns a challenge to the Lanham Act, 15 U.S.C. § 1052, which provides in relevant part:

> No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—
>
> * * * *
>
> (c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

Plaintiffs argued that the requirement to obtain consent from these individuals violated his First Amendment rights, and the Federal Circuit agreed. See *In re Elster*, 26 F.4th 1328, 1334-35 (CAFed 2022). This Court granted the United States's subsequent petition for certiorari, agreeing to review the question whether a "refusal to register a mark" under this

provision "violates the Free Speech Clause of the First Amendment when the mark contains criticism of a government official or public figure." *In re Elster*, Pet. for Cert., 2023 WL 1392051, at *i (U.S. Jan. 27, 2023).

Although the questions are not identical, there are enough similarities that it would still be preferable to hold this Petition pending *Elster* if it is not otherwise denied outright. Like this case, *Elster* involves a First Amendment claim challenging a statutory third-party consent requirement. That is, the challengers contend that applying Section 1052(c) to trademarks critical of named persons "effectively grants all public figures the power to restrict trademarks constituting First Amendment expression before they occur." *Elster*, 26 F.4th, at 1339. Similarly, Petitioners argue here that the "practical operation" of the Slogan Statutes goes "beyond mere content discrimination to actual viewpoint discrimination," "because they effectively preclude all slogans that disparage or criticize named persons, who have no incentive to consent to the insult." Pet.28 (citation omitted).

And at least one overlapping government interest—the importance of preventing false associations—is present in both cases too. Compare Pet. Br., *In re Elster*, 2023 WL 4867871, at 31-32 (U.S. July 25, 2023) ("[T]he government has a reasonable interest in not promoting misleading or deceptive source identifiers." (citation omitted)), with Appellees' Br. 44, CA3 Dkt. 39 ("For example, when Appellant Mazo petitioned to use slogans like 'Essex County Democratic Committee,' approving such a slogan would create a misleading impression among voters that Mazo and the Committee are associated."). A decision deciding the claims in *Elster*—where the law purportedly discriminates

through its application by a third party, rather than by the government—could bear on this case.

There are, of course, some significant differences. *Elster* does not involve an election, and thus does not involve the distinct *Anderson-Burdick* framework. Its scope is different too—the former restricts who can obtain a mark, while the Slogan Statutes merely govern what language may appear directly on the ballot. And some of the justifications provided for each are different too: the Federal Circuit focused largely on the role of Section 1052(c) in protecting the right of publicity, see *Elster*, 26 F.4th, at 1334 (noting the government's justification turned on "substantial interest in protecting state-law privacy and publicity rights"), while the Third Circuit emphasized the State's interests in "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," Pet.App.48-49.

Given these distinctions, the State should prevail in this case whatever the ruling in *Elster*. But because there is at least some conceptual overlap between the cases on how to evaluate a First Amendment "effects" claim that a third party will not consent to slogans or marks that disparage them, this Court could hold this case pending its decision in *Elster*. At the very least, it would make little sense to grant this case before the Third Circuit has a chance to consider its decision in light of the ultimate resolution of that case.

CONCLUSION

This Court should deny the petition, or in the alternative, hold the petition pending this Court's resolution of *Vidal v. Elster*, No. 22-704.

Respectfully submitted,

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