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

REPLY BRIEF FOR PETITIONERS

WALTER M. LUERS
COHN LIFLAND PEARLMAN HERRMANN & KNOPF LLP
250 Pehle Avenue
Suite 401
Saddle Brook, NJ 07663

PAUL D. CLEMENT
Counsel of Record
ANDREW C. LAWRENCE*
JAMES Y. XI*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioners

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REPLY BRIEF

New Jersey gives primary candidates six words to communicate directly with voters on the ballot—the most critical point of the election—but not the six words they want. Instead, the slogan statutes discriminate based on content and viewpoint and in favor of entrenched political machines. The Third Circuit held that this naked effort to skew the debate does not even implicate core political speech or trigger ordinary First Amendment analysis, but rather passes muster under the amorphous *Anderson-Burdick* balancing test. That decision is profoundly wrong, and the issue is profoundly important and merits this Court's plenary review.

The state comes nowhere close to demonstrating that the decision below and its problematic slogan statutes should escape this Court's review. The state abandons most of the Third Circuit's justification for skirting strict scrutiny. The state barely mentions, let alone defends, the court's content-discrimination holding, even though it is necessary to avoid strict scrutiny under *Anderson-Burdick*. The state denies the lower-court conflict only by rewriting the conflicting decisions and inadvertently reinforcing that *Anderson-Burdick* departed from well-established First Amendment principles. And the state describes this case as insufficiently important while ignoring a raft of amici submissions suggesting otherwise and highlighting that this Court just granted certiorari in a "similar[]" case involving another consent statute: *Vidal v. Elster*, No. 22-704. BIO.31. As a last-ditch effort to avoid plenary review, the state suggests this Court should hold this case

pending *Vidal*. But *Vidal* does not provide a vehicle to clarify or recalibrate *Anderson-Burdick*, and granting plenary review would allow this Court to evaluate how consent provisions operate differently (and more perniciously) when it comes to political speech on the ballot. Whatever is true in commercial contexts, a state conditioning a right to speak critically about public figures on the consent of the criticized is a First Amendment anathema.

I. The Decision Below Is Egregiously Wrong.

This Court has admonished that "the offer of ideas by a candidate to the voters" is "core" political speech and that state efforts to "restrict[]" it "surely" trigger strict scrutiny. *Brown v. Hartlage*, 456 U.S. 45, 52-54 (1982). That principle resolves this case. New Jersey invites primary candidates to offer a six-word message to voters on the ballot in the sole political communication that actual voters are guaranteed to receive. *See* N.J. Stat. Ann. §19:23-17. But the state then prohibits messages that name individuals or in-state corporations absent written consent. *See id.* §§19:23-17, -25.1. The slogan statutes thus trigger strict scrutiny three times over: They not only "burden[] a category of speech … 'at the core of our First Amendment freedoms,'" but "prohibit[] speech on the basis of its content," *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002), and also "go[] even beyond mere content discrimination, to actual viewpoint discrimination," in "practical operation," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). And the state just as plainly cannot survive strict scrutiny, especially when the failure to require consent for out-of-state corporations or on the general-

election ballot eviscerates any claim that the slogan statutes are narrowly tailored to advance a compelling government interest, rather than perfectly designed to entrench political machines that employ New Jersey corporations and face realistic threats only in the primaries.

1. The state agrees that restrictions on core political speech trigger strict scrutiny under traditional First Amendment analysis, but insists that the Third Circuit "correctly found" such speech missing here. BIO.23. But the state hardly defends the reasoning below. The Third Circuit limited core political speech to that which (1) "occur[s] outside of the polling place and over a long period of time leading up to Election Day" and (2) is "interactive" and not a "one-way communication." Pet.App.30. As to the former, the state concedes that it is "'absurd and irreconcilable' with precedent" to suggest that core political speech ceases on election day. BIO.24-25. As to the latter, the state never disputes that this Court has repeatedly held that one-way communications qualify as core political speech. *See* BIO.24-25.

Having agreed that core political speech *can* come in the form of one-way communication on election day, the state's defense of the decision below reduces to the proposition that core political speech can never occur on the "ballot" because the ballot is not a "for[um] for political expression." BIO.24. But while that may accurately describe the ballot in most states, that is decidedly not the case in New Jersey.[1] As the state

[1] The state observes that it characterized its primary ballot as a "non-public forum" below. BIO.25 n.10. The Third Circuit's

emphasizes, its slogan statutes are "unique," BIO.1—and they uniquely open the ballot to six words that are plainly core political speech.

The state's suggestion that a candidate's ballot speech should enjoy less First Amendment protection gets matters exactly backwards. "The ballot … is the only document that all voters are guaranteed to see, and it is 'the last thing the voter sees before he makes his choice.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 465 (2008) (Scalia, J., dissenting). Ballot slogans thus contain the most important political speech of the election. It follows that state efforts to skew that speech cannot trigger anything less than strict scrutiny. After all, "important … speech can be no less protected than impotent speech." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). And contrary to the state's suggestion, *see* BIO.23-25, nothing in *Burdick v. Takushi*, 504 U.S. 428 (1992), *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), or *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), changes the calculus, as none involved candidate speech.

The state's blatant effort to regulate core political speech therefore cannot escape strict scrutiny, and the state cannot satisfy that notoriously demanding test. The state emphasizes that "Petitioners concede that New Jersey's interests in ensuring election integrity

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silence about that dubious theory presumably reflects its view that the state cannot treat the ballot as a non-public forum while making it generally available for candidate expression, subject to the challenged restrictions in the slogan statutes. *Accord* Muller.Amicus.Br.10.

and preventing voter confusion are sufficiently legitimate and important." BIO.26, 28-29. But the problem here is not the absence of compelling interests; it is that the slogan statutes are not even remotely narrowly tailored to further them.

The state does not seriously suggest otherwise. Nor could it, as any serious, let alone narrowly tailored, effort to root out voter confusion or preserve election integrity would not prohibit slogans that have no possibility of confusing voters about claimed endorsement (*e.g.*, "Bernie Sanders Betrayed the NJ Revolution") while allowing claims about false endorsements by out-of-state corporations and adopting an anything-goes approach to the general-election ballot. In reality, the slogan statutes are "so woefully underinclusive" and overinclusive "as to render belief in [the state's interests] a challenge to the credulous." *Republican Party of Minn.*, 536 U.S. at 780. The statutes' distinctions between in-state and out-of-state corporations and primary and general elections "make sense," BIO.27, only if the state's real interest is insulating machine-backed candidates from serious primary challenges, *see* NJ.Law.Profs.Amicus.Br.9-17; Byrne.Amicus.Br.4-14.

2. Even if the slogan statutes were properly analyzed under *Anderson-Burdick*, they would still trigger strict scrutiny. The slogan statutes plainly prohibit speech based on content and viewpoint, and such severe burdens on First Amendment rights trigger strict scrutiny even under *Anderson-Burdick*. The state has no answers.

Although the Third Circuit dedicated page after page to its misguided holding that the slogan statutes

are not content-based, *see* Pet.App.35-39, the state relegates that issue to a footnote, which just recycles the Third Circuit's statement that prohibiting speech based on "'the communicative content of the slogan'" "does not constitute content discrimination," BIO.28 n.11. But that holding "rests on an implausibly broad reading of *City of Austin*." *Recent Case:* Mazo v. New Jersey Secretary of State, 136 Harv. L. Rev. 2168, 2171 (2023); *see* Dimino.Amicus.Br.11-13; Liberty.Just.Amicus.Br.8-10; FIRE.Amicus.Br.7-8. The state thus is forced to declare content-discrimination "irrelevant" because even a "content-based law does not necessarily impose a severe burden [under *Anderson-Burdick*] if it does not prohibit or limit speech on any particular topic or otherwise favor certain candidates." BIO.28 n.11. That theory would be a troubling extension of *Anderson-Burdick* balancing (never embraced by this Court), but is a dead-end regardless, as the slogan statutes self-evidently "prohibit or limit speech on any particular topic" (*i.e.*, speech about people or in-state corporations) and "favor certain candidates" (*i.e.*, candidates who already enjoy the consent of the local machine's in-state corporation).

The state fares no better in defending the statutes' viewpoint-discrimination in practical effect. The slogan statutes allow endorsements from other persons, while making it practically impossible to disparage those same persons, and thus "discriminate[] based on viewpoint." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2301 (2019). The state's only response is that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."

BIO.27. But as just explained, the slogan statutes *are* "content based," not facially neutral, and this Court has already held that a content-based law can produce viewpoint discrimination in "practical operation." *Sorrell*, 564 U.S. at 565. That perfectly describes the slogan statutes. Not even the state suggests that anyone will consent to disparagement or that a statute that permits a candidate to remind voters that she is "Trump-Endorsed" but not a "Never-Trumper" is viewpoint-neutral.

3. In all events, if *Anderson-Burdick* actually allows the state to avoid strict scrutiny and discriminate when it comes to the last words voters will receive from candidates, the Court should discard that rights-diluting test. The state labels that request "puzzling" because it perceives no evidence of "lower-court chaos or practical unworkability." BIO.16. Even the Third Circuit begs to differ: "Not only has the Supreme Court itself fractured deeply in the application of this jurisprudence, but so too has the judiciary in general." Pet.App.3. Other judges have documented *Anderson-Burdick*'s shortcomings at greater length. *See, e.g.*, *Daunt v. Benson*, 999 F.3d 299, 322-33 (6th Cir. 2021) (Readler, J., concurring in the judgment). And scholars who literally write the election-law casebooks agree. *See* Dimino.Amicus.Br.4 ("*Anderson-Burdick* has caused widespread confusion and arbitrary results.").

II. The Decision Below Conflicts With Decisions From Other Lower Courts.

This Court routinely grants certiorari in First Amendment cases without a circuit split. *See, e.g.*, *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S.Ct.

2335, 2345-46 (2020); *Brunetti*, 139 S.Ct. at 2298; *Matal v. Tam*, 582 U.S. 218, 230 (2017). *Vidal* is just the latest example. That dynamic makes the case for certiorari here particularly clear, as the lower-court conflict is undeniable.

The state posits that it "strains credulity" to suggest that the Third Circuit's decision conflicts with other decisions because the slogan statutes are "sui generis" outliers. BIO.1-2. But fashioning an alone-in-the-nation method of restricting core political speech is not a defense to certiorari so much as a "'telling indication of [a] severe constitutional problem.'" *United States v. Texas*, 143 S.Ct. 1964, 1970 (2023). Regardless, the New Jersey slogan statutes currently stand alone largely because the Massachusetts Supreme Judicial Court struck down that state's comparable law in *Bachrach v. Secretary of the Commonwealth*, 415 N.E.2d 832 (Mass. 1981). Massachusetts' high court squarely held that, when the state "allow[s]" "political expression" "on the ballot," that expression qualifies as core political speech that lies at the "heart" of the First Amendment and that state efforts to "manipulate the content" of such expression is a "content"-based "regulation," which triggers "strict scrutiny." *Id.* at 834-37 & n.9, 839. That holding is irreconcilable with the decision below.

The state's contrary view rests entirely on its (mis)characterization of *Bachrach* as involving a law that "facially discriminated against specific and express political viewpoints." BIO.12. That assertion is mystifying: *Bachrach* found the Massachusetts law facially viewpoint-*neutral* because it

"[n]ominally … applied across the board to all candidates." 415 N.E.2d at 835-36. But *Bachrach* nonetheless found the statute viewpoint-discriminatory—a problem that "deepened" the law's already-existing "constitutional vice"—because it had the "practical effect" of "den[ying] expression" to "candidate[s] who chose … to campaign under the label Independent." *Id.* at 836. The state describes *Bachrach*'s viewpoint-discrimination holding as "[u]nsurprising" and correct. BIO.12. With that much, petitioners heartily agree, but the Third Circuit just as clearly disagreed, rejecting that same theory of viewpoint-discrimination.

The state's effort to dismiss *Bachrach* as a historical relic that "predates" *Anderson-Burdick* is even less persuasive. BIO.12-14. The state "agree[s]" that *Anderson-Burdick* is inapplicable to laws that restrict "core political speech," BIO.23, and *Bachrach* held that state-permitted candidate speech on the ballot is core political speech. Thus, there is a square conflict wholly apart from *Anderson-Burdick*. But if what the state really means to suggest is that *Anderson-Burdick* was a watershed, epoch-marking development that *departed* from (and rendered outmoded) all prior First Amendment jurisprudence, that would be a powerful argument in favor of plenary review.

In all events, the state fails to refute the circuit split that postdates—indeed, was produced by—*Anderson-Burdick*. As the state never actually denies, *see* BIO.15, other circuits have recognized that "core political speech" can occur on the ballot and that strict scrutiny is the operative test when the state attempts

to regulate it. *See Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002) (citing *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992)). Those holdings are directly contrary to the Third Circuit's unqualified view that language "confined to the ballot" necessarily "differ[s] … from core political speech" and that *Anderson-Burdick* is *always* the "appropriate constitutional standard to be applied" to ballot speech. Pet.App.30-31.

III. The Question Presented Is Exceptionally Important.

The state attempts to deride this case as "insufficiently important." BIO.2. A veritable flood of amici disagree. Indeed, as on-the-ground amici from New Jersey have attested, this case will determine whether hundreds of primary candidates for all elected offices will continue to have "a significant handicap" on their speech at "'the most crucial stage in the electoral process.'" Byrne.Amicus.Br.2. The best response that the state can muster is that the full "impact" of the slogan statutes "turn[s] on their relationship with other … statutes" challenged in separate litigation. BIO.22. That is a curious defense. One might expect a political system bedeviled by entrenched political machines to have multiple provisions that work in tandem to further entrench those machines. But that is hardly a reason to leave undisturbed the statutes that both form the heart of that regime and most obviously violate the Free Speech Clause.

The state's suggestion that this case has "little to no consequence to the rest of the Nation" is equally unavailing, as the multiple non-New-Jersey amici

attest. BIO.21. Questions about when and how *Anderson-Burdick* applies arise in every circuit. *See* BIO.15. This Court has not provided guidance about *Anderson-Burdick* for years, and its last attempt yielded no majority opinion. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). The court below saw all this as a "problem" for courts and litigants nationwide, not as a Garden State curiosity. Pet.App.15.

The state's purported "vehicle" problems are illusory. The state principally contends that petitioners' argument that the slogan statutes are viewpoint-discriminatory in effect is not properly presented, because petitioners brought a facial challenge and never asserted this so-called "as-applied theory." BIO.2, 10-11, 17-21. But there is no obstacle to finding a statute viewpoint-discriminatory in effect in a facial challenge. *See, e.g.*, *Sorrell*, 564 U.S. at 565, 569 (holding law viewpoint-discriminatory in "practical operation" in context of "facial" challenge); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 391 (1992) (same). That is particularly true of a consent requirement that, like the restriction in *Bachrach*, nominally applies to all candidates but cannot help but discriminate against certain viewpoints. It is thus no surprise that the Third Circuit correctly understood petitioners to be pressing a viewpoint-discrimination argument, and thus addressed it. *See* Pet.App.39-42; *accord* BIO.26 (noting Third Circuit "rejected" petitioners' viewpoint-discrimination argument on the merits). That is more than enough to preserve the issue for this Court's review. *See United States v. Williams*, 504 U.S. 36, 41-45 (1992)

(Court may consider issues "pressed or passed upon" below).[2]

In a last-ditch effort to evade plenary review, the state asks the Court to hold this case pending *Vidal*, which involves an as-applied challenge to a Lanham Act provision that prohibits trademarks naming living individuals absent written consent. While the Federal Circuit's assessment of the speech-distorting effects of consent requirements is hardly compatible with the Third Circuit's, the *Vidal* grant is no reason for the Court to defer plenary review. As the state concedes, "there are significant differences" between *Vidal* and this case, including that *Vidal* "does not involve an election" or the "*Anderson-Burdick* framework." BIO.11, 32. Given those differences, all of which make this case even *more* cert-worthy than *Vidal*, the case for considering this case during the same Term as *Vidal* is overwhelming. Whatever the validity of a consent requirement in the context of commercial speech and a statute designed to avoid consumer confusion about product origin, the use of a consent requirement in the context of political speech is far more pernicious. There is no material concern that six-word slogans criticizing a sitting politician would be misperceived as the politician's own speech or her endorsed message. Yet there is a very real concern that such a six-word slogan might be the best way of making clear where a candidate stands vis-à-vis

[2] Because this case involves a facial challenge, the state's "sheer speculation" that some (but not all) of petitioners' slogans would have "misled" voters merely because they mentioned in-state corporations is irrelevant. *Wash. State Grange*, 552 U.S. at 454; *see* BIO.29.

entrenched political forces. Thus, while both *Vidal* and this case involve the First Amendment implications of consent statutes, the very different contexts involve different government interests and different free-speech concerns. The cases are complementary, not duplicative, and the *Vidal* grant only strengthens the case for plenary review here.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

WALTER M. LUERS
COHN LIFLAND PEARLMAN HERRMANN & KNOPF LLP
250 Pehle Ave.
Suite 401
Saddle Brook, NJ 07663

PAUL D. CLEMENT
Counsel of Record
ANDREW C. LAWRENCE*
JAMES Y. XI*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

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