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 a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AND MANHATTAN INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

The decision below allows New Jersey to regulate core political speech at the election's critical moment, and to do so on the basis of content and viewpoint while insulating entrenched political machines from serious primary challenges. New Jersey allows candidates in primary elections to engage in political speech on the ballot via six-word slogans next to their names. New Jersey was not obligated to allow candidates to communicate directly with voters at the very moment they cast their ballots. But having done so for the express purpose of allowing candidates to distinguish themselves from their primary opponents, the state could not dictate content or skew the debate. Undeterred, the state prohibits candidates from referencing the name of any individual anywhere in the world (e.g., "Never Trump" or "Evict Putin From Ukraine") or any New Jersey corporation (e.g., "Higher Taxes for Merck & JnJ") absent written consent. Entrenched political machines have long exploited this law by using political associations incorporated in New Jersey to signal which candidates enjoy machine support in the primary. Tellingly, New Jersey drops the consent requirement altogether on the general election ballot. The Third Circuit upheld this glaring free-speech violation only by bypassing traditional First Amendment scrutiny in favor of the amorphous *Anderson-Burdick* balancing test.

The question presented is:

Whether a state that permits political candidates to engage in core political speech on the ballot may restrict that speech on the basis of content and viewpoint without satisfying strict scrutiny.

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INTEREST OF THE AMICI CURIAE

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Manhattan Institute is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting the rule of law and opposing government overreach, including in the marketplace of ideas.

This case particularly interests *amici* because the freedom of speech is a core value vital to a free society. To that end, the Liberty Justice Center has long represented clients seeking to protect their First Amendment rights before this Court. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018); *Vugo, Inc. v. City of New York*, 931 F.3d 42 (2d Cir. 2019), *petition for cert. denied* No. 19-792 (April 27, 2020); *Ariadna Ramon Baro v. Lake County Federation of Teachers, Local 504, et al.*, 57 F.4th 582 (7th Cir. 2023), *petition for cert. filed* No. 22-1096 (May 8, 2023).

SUMMARY OF ARGUMENT

The Third Circuit greatly confused and misapplied this Court's First Amendment content-based speech jurisprudence here by misclassifying a content-based law as content neutral. *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 124 (3d Cir. 2022); App. 39. The New Jersey

law in question allows a candidate running for office to create a slogan containing up to six words next to his or her name on the election ballot. N.J. Stat. § 19:23-17; App. 2. But for primary elections, if the candidate wants to include the name of an individual or New Jersey corporation in the slogan, the candidate must first obtain the permission of that individual or corporation. N.J. Stat. § 19:23-25.1; App. 5.

In a singular paragraph, the court below deemed the consent requirement content neutral because it "applies to all slogans" and after a regulator reads the slogan "to determine whether the consent requirement applies, the communicative content of the slogan ceases to be relevant." *Mazo*, 54 F.4th at 149; App. 39.

Contrary to the lower court's conclusion, the New Jersey law is content based for at least two reasons: First, the law discriminates on the basis of content because it adds an additional burden for certain speakers based on their specific "topic discussed or the idea or message expressed," *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), in particular, slogans that "discuss" individuals or New Jersey corporations. Second, the law is content (and viewpoint) based in its application because it serves the "impermissible purpose" of regulating content by suppressing criticism of individuals and New Jersey corporations. *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022).

The Court should intervene and correct the Third Circuit's detrimental mistake. Without the such an intervention, the Court's content-based speech jurisprudence could be profoundly confused and rewritten as lower courts continue to misapply *Reed*

and *City of Austin*. If this holding is allowed to stand, New Jersey voters will be deprived of honest and complete slogans from the candidates on the election ballot.

ARGUMENT

I. This Court has long held that content-based restrictions on speech are heavily disfavored.

The content-discrimination principle serves as one of the most important concepts in this Court's First Amendment jurisprudence. It reflects that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). Such "content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, [and] are particularly susceptible to being used by the government to distort public debate." *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring). They are therefore "presumptively invalid." *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted).

In *Police Department of the City of Chicago v. Mosley,* the plaintiff challenged a law that allowed "peaceful labor picketing" but prohibited all other picketing around schools. 408 U.S. at 92. The Court found that the ordinance made an impermissible distinction based on content of picketers' message by "select[ing] which issues are worthy discussing or debating in public facilities." *Id.* at 96. Eight years later, the Court struck down a similar law that also prohibited non-labor picketing. *Carey v. Brown*, 447

U.S. 455, 470 (1980). The Court determined that content-based restrictions are generally prohibited and may only be allowed if they pass strict scrutiny, meaning that there must be a "state interest" that is "compelling" and "narrowly drawn" to serve that interest if "no adequate alternatives exist[.]" *Id.* at 465. Under the First Amendment, the general rule is that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *see also, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (declaring "[c]ontent-based regulations . . . presumptively invalid"); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (striking down a content-based tax on magazines).

The Court articulated its current First Amendment test for determining whether restrictions on speech are content-based in *Reed v. Town of Gilbert*, striking down a sign ordinance that treated ideological signs more favorably than political signs, which were treated more favorably than "Temporary Directional Signs Relating to a Qualifying Event." 576 U.S. at 159–161. Ideological signs could be displayed with no time limit, while political signs were allowed up to 60 days before a primary election and 15 days after a general election. *Id.* Temporary directional signs could be displayed no more than 12 hours before an event and only one hour after said event. *Id.*

The Court reaffirmed that, for purposes of First Amendment review, a court should deem a speech-restrictive law content-based, and thus presumptively unconstitutional, if the law "'on its face' draws distinctions based on the message a speaker conveys."

Id. at 163 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–64 (2011)). Such laws "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 163.

Reed set forth a two-step analysis to determine whether a restriction is content based and thus subject to strict scrutiny. First, if a law's text "draws distinctions based on the message a speaker conveys," then strict scrutiny applies. *Id.* at 163. Content-based laws receive this high scrutiny regardless of the government's "benign motive, content-neutral justification, or lack of animus toward the ideas." *Id.* at 165 (cleaned up). A court may begin the inquiry into whether a restriction is content based by considering whether the law "requires authorities to examine the contents of the message to see if a violation has occurred." *Tschida v. Motl,* 924 F.3d 1297, 1303 (2019); *see also McCullen v. Coakley*, 573 U.S. 464, 479 (2014).

The second step becomes necessary only if the law's text makes no reference to content, making it content-neutral on its face. Under the second inquiry, the Court determines whether the law is content based on its "purpose and justification." *Reed*, 576 U.S. at 166. If a law is content-neutral on its face, but was adopted because the government sought to suppress the message expressed, it is content-based in its application. *Id.*

The Court's most recent case to consider content-based restrictions on speech further explained how courts should apply *Reed*. *City of Austin*, 142 S. Ct. at 1464. To protect "aesthetic value," the City of Austin's outdoor sign code distinguished between on-premises

and off-premises signs, "specially regulat[ing] the latter." *Id.* at 1469. In a lawsuit brought by two billboard operators, the Court determined that the sign code was not content based because it did not "single out any topic or subject matter for differential treatment" and enforcement of the sign code had nothing to do with the sign's "substantive message." *Id.* at 1472.

The Court explained that, notwithstanding *Reed*, some restrictions on speech that require evaluation of a type of speech may sometimes "nonetheless remain content neutral." *Id.* at 1473. The Court gave two examples. First are typical "time, place, or manner" restrictions, such as those allowing only quiet expressions of speech after 11pm in residential areas. *Id.* at 1473. The Court found Austin's sign code to be that sort of regulation: it looked to a sign's content only for the purpose of determining where it could be located. *Id.* at 1475. The Court found the restriction "agnostic as to content" because its sole purpose was to draw "neutral, location-based lines." *Id.* at 1471.

Second, the Court stated that a law could allow the government to examine speech to decipher its purpose or function but nonetheless be content neutral. This includes regulations of solicitation. *Id.* The First Amendment allows States "to regulate the time and manner of solicitation generally." *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 306–307 (1940)). Even so, seemingly content-neutral regulations may not contain a discriminatory content-based "function or purpose." *City of Austin*, 142 S. Ct. at 1474. Though not "always" content based, function and purpose distinctions can perpetuate less obvious forms of discrimination. *Id.*

The sign ordinance in *City of Austin* was consequently determined to be a location-based restriction, and because it made only neutral determinations, it was content neutral on its face. *Id.* at 1473, 1475. But the Court remanded the case for the lower court to determine whether the regulation contained an "impermissible purpose" that would render it content based. *Id.* at 1475.

City of Austin solidified that restrictions are content based if they "discriminate based on topic, subject matter, or viewpoint." *City of Austin*, 142 S. Ct. at 1473. Such provisions "single out any topic or subject matter for differential treatment." *Id.* at 1472.

After *Reed* and *City of Austin*, the test for determining whether a law is content-based is twofold. First, a court must determine whether the regulation is content-based on its face. A regulation is facially content based only if its text discriminates on the basis of particular content—namely, "topic or subject matter." *City of Austin*, 142 S. Ct. at 1472. If the regulation is looking at content simply to make neutral determinations—such as permissible time, place, and manner restrictions—then the law may be content-neutral on its face. *Id.* at 1475

But the analysis does not end there. If the government has an "impermissible purpose or justification" then the regulation is likely content based. *Id.* at 1475. Essentially, "regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *Id.* at 1474. Such a content-based purpose will require the application of strict scrutiny.

II. New Jersey's election ballot slogan law is content-based.

Here, New Jersey law allows primary candidates to put a slogan of up to six words next to their names to distinguish themselves from others on the ballot. N.J. Stat. § 19:23-17; App. 2. But the law imposes an additional requirement for those who would like to reference individuals or New Jersey corporations in their slogan: they must obtain the consent of each individual or corporation. *Id.* Thus, whether the consent requirement applies depends on the specific content of a candidate's slogan.

Under *Reed* and *City of Austin*, the law is facially content based because it applies to a particular "topic discussed or the idea or message expressed," *Reed*, 576 U.S. at 163—namely, slogans that "discuss" individuals or New Jersey corporations. And even if a court were to deem the law facially content neutral, it would still be content based in its application because it serves the "impermissible purpose" of suppressing criticism of individuals and New Jersey corporations. *City of Austin*, 142 S. Ct. at 1475.

This law is not analogous to one banning solicitation. Although the government may restrict the times and places where solicitation may occur, it may not allow some groups to solicit without restrictions while imposing additional requirements for groups who, say, mention political figures in their solicitation. *Cf. id.* This latter scenario is analogous to the New Jersey rule challenged here. The challenged provision does not regulate whether or where a slogan may appear but rather addresses the content of the

ballot slogan: if it contains certain places or people, the state imposes a burden.

III. The Third Circuit misapplied this Court's content-based speech jurisprudence and incorrectly found New Jersey's election ballot slogan law was content-neutral.

The Third Circuit erred when it determined that this law does not impose a content-based restriction on speech.

A. The law is content-based because it makes determinations based on specific topics within speech and places additional burdens on them.

First, the Third Circuit erred by inventing a new exception to the general rule against content-based restrictions on speech—and then it misapplied that new exception.

In determining whether New Jersey's rule is content based, the Third Circuit first noted the two types of restrictions that *City of Austin* identified as not subject to heightened First Amendment scrutiny: solicitation ordinances and time, place, and manner restrictions. *Mazo*, 54 F.4th at 149; App. 39. Because New Jersey's rule does not fit into either of those categories, the Third Circuit invented a "third category of permissible neutral line-drawing," which makes determinations based on "extrinsic features unrelated to the message conveyed." *Id.* That category has no basis in this Court's precedents; the Third Circuit made it up out of thin air.

Moreover, New Jersey's law does not even fit into the Third Circuit's new category. New Jersey's speech

restriction is not based on some "extrinsic feature"—to the contrary, it examines—and selectively imposes a burden based on—*what is said* in a candidate's six-word slogan. *Mazo*, 54 F.4th at 149; App. 39.

Nonetheless, the Third Circuit held the rule to be content neutral because, "[o]nce a regulator has read a slogan to determine whether the consent requirement applies, the communicative content of the slogan ceases to be relevant." *Id.* That makes no sense: "the communicative content ceases to be relevant" *only after* the state determines whether a candidate's slogan is subject to an additional burden *based on its content*. Slogans that do not mention a candidate or a New Jersey corporation are automatically approved; those that do mention an individual or New Jersey corporation are not approved unless the candidate obtains consent.

B. The fact that the law applies to all candidates does not make it content or viewpoint neutral.

Next, the Third Circuit wrongly found the law to be permissible because it is "nondiscriminatory and applies equally to all candidates." *Mazo*, 54 F.4th at 146; App. 32. But a restriction that applies equally to all speakers can still discriminate based on content. A law that prohibits speaking certain words or viewpoints is no less offensive to the First Amendment because it equally prohibits *everyone* from saying them.

The Third Circuit's justification confuses political neutrality with general content and viewpoint

neutrality. The Third Circuit claims the statute applies to "all slogans," and "only matters to determine whether the consent requirement applies at all." *Mazo*, 54 F.4th at 149; App. 39. But "a speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 576 U.S. at 169. Thus, for example, "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id.* Here, similarly, it does not matter that all candidates, Republican and Democrat, are subject to the restriction; it is nonetheless content-based because it restricts speech based on *what a candidate says*.

C. The law discriminates based on viewpoint because it effectively bars criticism of individuals or New Jersey corporations.

Finally, the Third Circuit ignored the fact that, even if New Jersey's rule were content neutral on its face, it would still, in practice, discriminate based on viewpoint. And "[g]overnment discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is [an especially] blatant and egregious form of content discrimination." *Reed*, 576 U.S. at 168 (cleaned up).

The Third Circuit concluded that New Jersey's rule does not discriminate on the basis of viewpoint because it applies to both "support or criticism" by the candidate. *Mazo*, 54 F.4th at 150; App. 40. But "even a regulation neutral on its face may be content based

if its manifest purpose is to regulate speech." *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994).

New Jersey's law could have no purpose but to suppress criticism of individuals and New Jersey corporations—and that certainly is its effect in practice. Given a choice, few people or corporations would agree to allow a slogan critical of them to appear on the ballot. This does more than "disproportionately affect[] speech on certain topics." *Mazo*, 54 F.4th at 150 (quoting *McCullen*, 573 U.S. at 480); App. 40. It acts as a blanket ban on criticism, as though the law simply prohibited such statements directly.

This Court has found laws that limit solicitation are acceptable because they "do not inherently present 'the potential for becoming a means of suppressing a particular view.'" *City of Austin*, 142 S. Ct. at 1473 (quoting *Heffron v. Int'l. Soc. For Krishna Consciousness, Inc.,* 452 U.S. 640, 649 (1981)). Here, in contrast, the statute does present a strong potential for—and in practice effects—suppression of criticism of an individual or a New Jersey corporation. The law therefore discriminates not only on the basis of content, but also on the basis of viewpoint.

CONCLUSION

If the Third Circuit's decision is allowed to stand, candidates in New Jersey will be deprived of their right to free speech in a context where that right matters most: elections. The Third Circuit's newfound exception to the rule against content-based speech restrictions would open the floodgates to further such restrictions on speech and encourage courts to make further exceptions.

The petition for certiorari should be granted.

Respectfully submitted,

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