UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK DIVISION

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| EUGENE MAZO,<br><br>and<br><br>LISA McCORMICK,<br><br>*Plaintiffs*,<br><br>v.<br><br>TAHESHA WAY, in her official capacity as New Jersey Secretary of State, et al.,<br><br>*Defendants*. | Civil Action No. 20-CV-08174<br><br>Judge Susan D. Wigenton<br><br>PLAINTIFFS' RESPONSE TO DEFENDANT TAHESHA WAY'S MOTION TO DISMISS |

Walter M. Luers
COHN LIFLAND PEARLMAN HERRMANN & KNOPF LLP
Park 80 West – Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, NJ 07663
201-845-9600, Ext. 144
wml@njlawfirm.com
*Counsel of Record for Plaintiffs*

Ryan Morrison
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW, Suite 801
Washington, DC 20036
202-301-3300
rmorrison@ifs.org
Admitted *pro hac vice*
*Counsel for Plaintiffs*

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Plaintiffs, Eugene Mazo and Lisa McCormick, by counsel, submit this Response to Defendant New Jersey Secretary of State Tahesha Way's (the "Secretary" or the "Defendant") Motion to Dismiss. (See Motion to Dismiss, DN 57).

## FACTUAL ALLEGATIONS

Plaintiffs' Amended Verified Complaint alleges New Jersey Statutes §§ 19:23-17 and 19:23-25.1 (the "Slogan Statutes") violate the First Amendment. (See Am. V. Compl., DN 45, ¶¶ 5-9, 27-31, 34-68). Plaintiffs were candidates for the 2020 Democratic Party nomination for the U.S. House of Representatives in their respective congressional districts and wanted to use certain slogans next to their names, pursuant to the Slogan Statutes, on the New Jersey primary election ballot. (Id. at ¶¶ 14-15, 23, 27-30, 36-46). However, state officials denied their requests and the county clerks did not print their slogans on the primary election ballot because Plaintiffs' desired slogans did not comply with the authorization requirements of the Slogan Statutes. (Id. at ¶¶ 29-30, 36-39, 41-45). Consequently, Plaintiffs used alternative slogans and brought this lawsuit before the primary election. (Id. at ¶¶ 2, 4, 39, 45).

Plaintiffs were eventually defeated in their respective primary elections. (Id. at ¶¶ 25). However, they intend to run for the same offices in the 2022 election and subsequent primaries. (Id. at ¶¶ 26, 40, 46).

To appear on the primary election ballot with a slogan, a candidate for the U.S. House of Representatives must file a nomination petition that lists the requested slogan with the Secretary. *See* N.J. Stat. §§ N.J. Stat. §§ 19:13-1; 19:13-3; 19:23-17; 19:23-21; 19:23-25.1.

The Secretary is the state's chief election official. (See Am. V. Compl., DN 45, 16). *See also* N.J. Stat. §§ 19:31-6a; 52:16A-98. She certifies candidate petitions for the U.S. House of Representatives. (Id. at ⁋ 16). *See also* N.J. Stat. §§ 19:13-3; 19:23-21. Once the Secretary certifies that a candidate's petition and requested slogan meet the requirements of New Jersey election law, she notifies the relevant county clerks what names and slogans should appear on the primary election ballot. *See* N.J. Stat. §§ 19:23-17; 19:23-21; 19:23-25.1.

However, the Slogan Statutes forbid the Secretary from certifying the desired slogan of a primary election candidate if the slogan includes or refers to the name of any person or New Jersey incorporated association without the written consent of that person or association. (See Am. V. Compl., DN 45, ⁋⁋ 6-9; 34-35; 38, 40, 42, 44, 46). *See also* N.J. Stat. §§ 19:23-17; 19:23-25.1.

Accordingly, the Secretary is one of the state officials that is responsible for denying Plaintiffs' the use of their desired slogan on the primary election ballot. (See Am. V. Compl., DN 45, ⁋⁋ 14-16, 23, 26-31, 36-46). Because of the Slogan Statutes, the Secretary did not allow the Plaintiffs to use their desired slogans in 2020, will

refuse their request again in 2022, and will continue to refuse their request in all future primary elections in violation of the First Amendment. (Id. at ¶¶ 14-16, 26-31, 34-46).

## LEGAL STANDARD

For Plaintiffs to state a claim for relief in their Amended Verified Complaint, F. R. Civ. P. 8(a) requires only "a short and plain statement of the grounds for the court's jurisdiction;" '"a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Rule 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); and "a demand for the relief sought." F. R. Civ. P. 8(a)(3). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*). Rule 8 does not require "the hypertechnical, code-pleading regime of a prior era." *Id*.

Federal Rule of Civil Procedure 12(b)(1) motions are separated "into two categories: facial and factual." *Med. Soc'y of N.J. v. Herr*, 191 F. Supp. 2d 574, 578 (D.N.J. 2002). "A facial attack on jurisdiction is directed to the sufficiency of the pleading as a basis for subject matter jurisdiction. In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced

therein and attached thereto in the light most favorable to the plaintiff." *Id*. (internal quotation marks and citation omitted). A factual attack "calls into question the essential facts underlying a claim of subject matter jurisdiction" and "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id*. (internal quotation marks and citation omitted). Accordingly, "the court may consult materials outside the pleadings." *Id*. "The trial court must be careful, however, not to allow its consideration of jurisdiction to spill over into a determination of the merits of the case, and thus must tread lightly in its consideration of the facts concerning jurisdiction." *Kestelboym v. Chertoff*, 538 F. Supp. 2d 813, 815 (D.N.J. 2008) (internal punctuation marks and citation omitted).

The plaintiff has the burden to prove jurisdiction exists, "and must not only demonstrate that a controversy existed at the time it filed suit, but that it continues to exist throughout the litigation." *Id*.

Under Fed. R. Civ. P 12(b)(6), the Court must accept all factual allegations in the Plaintiffs' complaint as true and draw all inferences in the light most favorable to the plaintiffs. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). The complaint "does not need detailed factual allegations." *Twombly*, 550 U.S. at 555. But the plaintiffs' "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id*.

A motion to dismiss must be denied if the complaint alleges enough facts to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

District courts "should conduct a two-part analysis" "when presented with a motion to dismiss for failure to state a claim." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, after separating the factual and legal arguments in a complaint, the Court "must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Id*. at 210-11. Second, the Court must decide "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id*. at 211 (quoting *Iqbal*). "In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Id*.

## ARGUMENT

Plaintiffs' Amended Verified Complaint demonstrates the Court has jurisdiction over this matter and states a valid claim for relief under the First Amendment. Plaintiffs' claims are not moot because they are "capable of repetition, yet evading review," and any ripeness issues are unconcerning. Plus, the facially

overbroad Slogan Statutes grant Plaintiffs standing. Plaintiffs have a valid First Amendment injury. Therefore, the Secretary's Motion to Dismiss should be denied.

Finally, the Secretary's joinder argument is invalid, and Plaintiffs concede a nominal damages award against the Secretary—but not the Clerks—is barred by the Eleventh Amendment.

## I. Plaintiffs' Claims are Justiciable.

The Court has subject-matter jurisdiction over this matter. Plaintiffs' First Amendment challenge against the Slogan Statutes is not moot or unripe. Because Plaintiffs' claims are "capable of repetition, yet evading review," they "fit comfortably within the established exception to mootness," *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (collecting cases), and, consequently, are ripe for review.

Additionally, the Slogan Statutes are facially overbroad. Therefore, traditional standing rules are relaxed "to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984).

Under these doctrines, Plaintiffs' claims are justiciable.

A. Plaintiffs' Claims are Neither Moot Nor Unripe Because they are Capable of Repetition, Yet Evading Review.

This "case present[s] a 'mixed question' of ripeness and mootness, hinging on the possibility that the [Slogan Statutes] will be applied again to [the Plaintiffs]. [The Supreme Court] has confronted mixed questions of this kind in cases presenting issues 'capable of repetition, yet evading review." *Vitek v. Jones*, 445 U.S. 480, 503 (1980) (Blackmun, J., dissenting) (citations omitted). "In those contexts, the [Supreme] Court has lowered the ripeness threshold so as to preclude … the mere passage of time from frustrating judicial review." *Id*.

The "capable of repetition, yet evading review" mootness exception applies when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Wis. Right to Life, Inc*., 551 U.S. at 462.

When a case is capable of repetition, yet evading review, it is also ripe. *See Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (election law challenge was neither moot nor unripe because it was capable of repetition, yet evading review "as long as [the state] maintains her present [election laws]"); *De La Fuente v. Cortés*, 261 F. Supp. 3d 543, 549-50 (M.D. Pa. 2017) (*aff'd*, 751 F. App'x. 269 (3d Cir. 2018)) (plaintiff's constitutional claims against state election laws were neither moot after his 2016

campaign nor unripe before his 2020 campaign because his past and intended campaign efforts were "capable of repetition yet evading review," and, therefore, justiciable); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 545 n.1 (6th Cir. 2014) (plaintiff's claims against a state election law were neither moot nor unripe because they "were capable of repetition, yet evading review,"); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1242 n.2 (11th Cir. 2013) (same). *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 623 n.3 (1982) (Stevens, J., dissenting) (noting the capable of repetition, yet evading review exception to the mootness doctrine is also "generally" an exception to the ripeness doctrine too, and dissenting to the expanded scope for the exception because the case was not ripe in the first place); *Jones*, 445 U.S. at 503 (1980) (Blackmun, J., dissenting)

"Election cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003)). These cases are "classic example[s] of the well-established exception to the mootness doctrine for cases that are 'capable of repetition, yet evading review.'" *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 202 (D.D.C. 2006) (collecting cases). And this is not only true for litigation in the trial court. "If such cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws—including the one under

consideration here—could never reach appellate review." *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir. 1983).

Indeed, the Third Circuit has ruled that "most election cases[] fit[] squarely within the 'capable of repetition yet evading review' exception," *Merle v. United States*, 351 F.3d 92, 94 (3d Cir. 2003)—and rightfully so. In New Jersey, the deadline for primary election candidates to file their nominating petitions, with their desired slogans, is 64 days before the election and candidates, including their slogans, do not have to be certified for the ballot until 54 days before the election. *See* N.J. Stat. §§ 19:23-14; 19:23-17; 19:23-21; 19:23-25.1. And while the deadline for printing the primary election ballots is unclear under New Jersey election law, the date is a short time before the primary election; falling sometime between 50 and less than three days before election day. *See* N.J. Stat. §§ 19:14-1; 19:14-18; 19:23-26.2; 19:23-27; 19:23-47; 19:23-58; 19:48-6 (date for voting machine inspection and delivery to polling locations is undefined); 19:49-3; 19:49-4; 19:63-9. Regardless, it is impracticable for a constitutional challenge to the Slogan Statutes to be fully litigated before a New Jersey primary election and avoid a mootness challenge under these state election law deadlines.

"The second prong of the capable of repetition exception requires a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *Wis. Right to Life, Inc.*, 551 U.S. at 463

(internal quotation marks and citations omitted). "[T]he same controversy [is] sufficiently likely to recur when a party has a reasonable expectation that it "will again be subjected to the alleged illegality." *Id*. (internal quotation marks and citations omitted).

Plaintiffs were candidates for the 2020 Democratic Party nomination for the U.S. House of Representatives in their respective congressional districts in New Jersey and they intend to be candidates again for the same elected offices in 2022 and beyond. (See Am. V. Compl., DN 45, ⁋⁋ 23, 26, 40, 46). Plaintiffs also intend to use the same slogans in the next and subsequent elections. (Id. at ¶¶ 40, 46). Furthermore, given that Plaintiffs' desired slogans were not authorized in the last primary election and considering the past actions of all Defendants, it is reasonable to expect that use of slogans will be denied, in violation of the First Amendment. Accordingly, Plaintiffs will be subject to the Slogan Statutes yet again and denied the use of their desired slogans, (id. at ⁋⁋ 40, 46), in violation of the First Amendment. Because Plaintiffs' complaint is verified it is the equivalent of an affidavit, and, therefore, their expressed political intentions are considered true in all legal contexts. *See Real Alternatives, Inc. v. Sec'y of HHS*, 867 F.3d 338, 371 n.9 (3d Cir. 2017) ("A Verified Complaint is treated as an affidavit."). Consequently, the Court must credit the Plaintiffs' political plans and conclude the Slogan Statutes

will violate the Plaintiffs' free speech rights again in the 2022 primary election and in the future.

The Secretary's arguments to the contrary harken back to the "hypertechnical, code-pleading regime of a prior era," *Iqbal*, 556 U.S. at 678, which are inappropriate for today—especially to trigger the exception for First Amendment cases that are capable of repetition yet evading review. Specifically, the Secretary contents Plaintiffs' claims do not qualify for the capable of repetition yet evading review exception and are unripe because Plaintiffs have only expressed an intention to run for office again and she asserts that the complaint is defective because Plaintiffs did not plead that they will file a petition for nomination with a slogan that requires authorization to trigger the Slogan Statutes. (See Mem. in Supp. of Mot. to Dismiss, DN 57-1, 9). The Secretary also argues the complaint is defective because Plaintiffs did not present evidence—at the pleading stage—that "they will both be denied the required authorizations" for their slogans in the next election. (Id. at 10).

"The [Secretary] asks for too much." *Wis. Right to Life, Inc*., 551 U.S. at 463. The Supreme Court has ruled "the capable of repetition, yet evading review doctrine, in the context of election cases, is appropriate" when, as here, plaintiffs bring facial and as-applied constitutional challenges. *Id*. (internal quotation marks and citation omitted). "Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively overrule [the

Supreme Court] by making [the capable of repetition, yet evading review] exception unavailable for virtually all as-applied challenges. History repeats itself, but not at the level of specificity demanded by the [Secretary]." *Id*.

Through their Amended Verified Complaint, Plaintiff have submitted for the record an affidavit that states they will be candidates in the 2022 and subsequent New Jersey primary elections and that their ballot slogans will be barred by the authorization requirements of the Slogan Statutes. (See Am. V. Compl., DN 45, ¶¶ 26, 31, 40, 46). Despite the Secretary's assertions, if Plaintiffs are going to run again and use their desired ballot slogans, then they will file the required paperwork to run for office and propose a ballot slogan. And the Plaintiffs know that they will not obtain the required authorizations under the Slogan Statutes, (id. at ¶¶ 40, 46), because there is no reasonable expectation that their slogans will be authorized in the future when consent has already been denied and such efforts meet the legal doctrine of futility.

Plaintiffs are not required to prove authorization to use their desired slogans will be denied again to show their claims are ripe when successive attempts would be futile. "Litigants are not required to make [] futile gestures to establish ripeness." *Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639, 643 (3d Cir. 1995) (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977)). *See also Chassen v. Fid. Nat'l Fin., Inc.*, 836 F.3d 291, 296 (3d Cir. 2016) ("we have recognized futility

as an exception to both ripeness and administrative exhaustion"). In *Int'l Bhd. of Teamsters*, the Supreme Court held a Title VII plaintiff could have standing to challenge racially discriminatory employment practices even if he did not apply for the job in question. 431 U.S. at 364-68. A nonapplicant could have standing if he could show that "he was a potential victim of unlawful discrimination." *Id*. at 367.

Similarly, in *Grid Radio v. F.C.C.*, 278 F.3d 1314, 1319 (D.C. Cir. 2002), the D.C. Circuit ruled the plaintiff had standing to challenge his broadcasting ban even though he did not seek a waiver as the government rules provided because those efforts would be futile.

And in *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997), the Second Circuit observed that generally, "to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy." But it held "[t]his threshold requirement for standing may be excused" when the plaintiff "makes a substantial showing" that submitting to the policy "would have been futile." *Id*.

Here, Plaintiffs have made a substantial showing that they will not be authorized to use their desired slogans. They were not authorized to use them in the 2020 primary election. It would be futile to try again. Given the past actions by New Jersey state officials and the parties that must authorize the Plaintiffs' desired ballot

slogans, there is "every reason to expect the same parties to generate a similar, future controversy." *Norman v. Reed*, 502 U.S. 279, 288 (1992).

The Secretary's hypertechnical pleading games should be rejected; especially because the capable of repetition yet evading review standard is so lenient in the election context. Plaintiffs "credibly claimed" that they planned on running for the same offices again, with the same desired slogans, and without authorization. *Wis. Right to Life, Inc*., 551 U.S. at 463. Accordingly, they assert they will engage in "materially similar"—if not identical—conduct as the 2020 election. *Id*. (internal quotation marks and citations omitted). And "there is no reason to believe" state officials will allow them to use their desired slogans because of the Slogan Statutes. *Id*. Accordingly, "there exists a reasonable expectation that the same controversy involving the same part[ies] will recur. [The Court has] jurisdiction to decide [this case]." *Id*. at 464.

Moreover, the Supreme Court has ruled the capable of repetition, yet evading review doctrine applied in an election law case with less evidence than what the Plaintiffs have provided here. In *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 736 (2008), the candidate plaintiff challenged a campaign finance law and did not make his jurisdiction-sustaining intentions known, regarding the law, until he made a public statement shortly before filing his U.S. Supreme Court *reply* brief. The Supreme Court noted the plaintiff's intent to "self-finance another bid for a House

seat," and, *on that basis alone*, the Court was "satisfied that [his] facial challenge [was] not moot." *Id*.

Likewise, the Third Circuit has ruled the capable of repetition, yet evading review doctrine applied with less evidence than Plaintiffs have provided. In *Belitskus v. Pizzingrilli*, 343 F.3d 632, 636-37, 648 n.11 (3d Cir. 2003), candidates challenged a state ballot access law for the 2000 general election without expressing any intent of running in a subsequent election and being subject to the same law again. Following the election, the Court did not dismiss the case as moot because it believed similarly situated candidates would challenge the ballot access law in future election cycles. *Id*. at 648 n.11. After all, "it is reasonable to expect political candidates to seek office again in the future." *Id*. And "[g]iven the lack of evidence to the contrary," the Third Circuit "conclude[d] that it is reasonable to assume" the plaintiffs would be subject to the same ballot access law again. *Id*. "Thus, there [was] every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints." *Id*. (internal quotation marks and citations omitted).

And again, in *Merle*, the Third Circuit ruled the capable of repetition, yet evading review doctrine applied to a challenge against the Hatch Act's prohibition on Postal Service employees from running for partisan political office. 351 F.3d at 94. The Court ruled that a race for the House of Representatives is too short for a

candidate's Hatch Act claim "to be litigated fully prior to the cessation or expiration" of the election. *Id*. at 95. The government argued that there was no evidence that the *Merle* plaintiff intended to be a candidate for Congress again to challenge the constitutionality of the offending statute. *Id*. But the Third Circuit held evidence that the *Merle* plaintiff intended to run for the House of Representatives again was unnecessary and assumed he would run for election "either in 2004 or at some future date." *Id*. (citing *Int'l Org. of Masters. Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991); *Norman*, 502 U.S. at 288. Because the Hatch Act remained binding law, "any future candidacy of [the Merle plaintiff would] be similarly affected by his employment" as a postal worker. *Id*. The Court went on to state, "Even if we were to require some expression of intent," the *Merle* plaintiff had implicitly stated in his briefs that he and similarly situated individuals would be subject to the offending statute in future elections. *Id*. Therefore, the *Merle* plaintiff's case, "like most election cases, fits squarely within the 'capable of repetition yet evading review' exception to the mootness doctrine." *Id*. at 94.

Under New Jersey election law, *Davis*, *Belitskus*, and *Merle* this case meets the two requirements of the "capable of repetition, yet evading review" exception to the mootness and ripeness doctrines. First, New Jersey primary election deadlines for candidate applications, candidate qualification and slogan certification, and ballot production are too close to election day for a constitutional challenge to any

election law to be fully litigated before the election. *See* N.J. Stat. §§ 19:14-1; 19:14-18; 19:23-14; 19:23-17; 19:23-21; 19:23-25.1; 19:23-26.2; 19:23-27; 19:23-47; 19:23-58 19:48-6; 19:49-3; 19:49-4; 19:63-9. And the Third Circuit has ruled that a campaign for the U.S. House of Representatives is too short in duration for a challenge to an election law "to be litigated fully prior to the cessation or expiration" of the election. *Merle*, 351 F.3d at 95.

Second, there is a reasonable expectation that the Plaintiffs will be subject to the Slogan Statutes again. Plaintiffs submitted a sworn statement that they intend to run for the 2022 Democratic Party nomination for the U.S. House of Representatives in their respective congressional districts and use their desired slogans again. Consequently, they will be subject to the Slogan Statutes' prohibitions again. This is far more evidence of a candidate being subject to a disputed law in subsequent elections than the plaintiffs in *Davis*, *Belitskus*, or *Merle* provided and none of those cases were dismissed as moot or unripe.

Plaintiffs will run for Congress again in 2022 and the election cycle is too short to complete this litigation. They want to use their desired slogans once again. Consequently, the Slogan Statutes will violate their free speech rights again. Accordingly, Plaintiffs' First Amendment claims against the Slogan Statutes are "capable of repetition, yet evading review." Therefore, the Secretary's Motion to Dismiss should be denied.

B. The Facially Overbroad Slogan Statutes Grant Plaintiffs First Amendment Standing.

Even if Plaintiffs did not meet the standards for the capable of repetition, yet evading review doctrine, they still have standing under the First Amendment overbreadth doctrine. In the context of a facial overbreadth challenge, like this one, the Supreme Court has instructed the judiciary to relax traditional standing rules so as "to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Joseph H. Munson Co*., 467 U.S. at 958. *See also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (First Amendment facial overbreadth doctrine permits "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity") (citation and quotation marks omitted); *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992) ("It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable."); *SEIU, Local 3 v. Municipality of Mt. Leb*., 446 F.3d 419, 423 (3d Cir. 2006).

In a facial challenge, standing is satisfied irrespective of "whether or not [a plaintiff's] own First Amendment rights are at stake." *Joseph H. Munson Co*., 467 U.S. at 958. All a plaintiff must do is show that he or she "satisfies the requirement

of 'injury-in-fact,' and whether it can be expected satisfactorily to frame the issues in the case." *Id*. As in *Joseph H. Munson Co* and *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001), Plaintiffs have done both. Plaintiffs are undoubtedly injured by the Slogan Statutes, and as in *Clark*, Plaintiffs have "a vested interest in having [the authorization requirements] overturned." *Id*. at 1011. Plaintiffs have "been [] aggressive advocate[s] in this matter so far," and, if they prevail, they will also be able to freely share their political messages and "to recover…attorney's fees." *Id*. at 1011. Accordingly, Plaintiffs have established that the Court has subject-matter jurisdiction over this case and the Secretary's motion should be dismissed.

## II. The Slogan Statutes are Unconstitutional.

The Slogan Statutes are content based speech regulations that violate the First Amendment.

Under the First Amendment, made applicable to the states through the Fourteenth Amendment, New Jersey cannot "restrict expression because of its … content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (internal quotation marks and citation omitted). "Government regulation of speech is content based if a law applies to particular speech because of the … message expressed." *Id*. Content based laws are subject to strict scrutiny, *id*. at 171, and, therefore, "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id*. at 163. Plaintiffs have

sufficiently pled that the Slogan Statutes are content based regulations and fail strict scrutiny.

The Secretary disputes Plaintiffs' facial and as-applied challenge with nearly identical arguments that depend on the purported facial neutrality of the Slogan Statutes. (See Mem. in Supp. of Mot. to Dismiss, DN 57-1, 16-21, 29-31). For the facial challenge, the Secretary argues the Slogan Statutes are content-neutral and subject to intermediate scrutiny. (Id. at 16-21). Similarly, for the as-applied challenge, she asserts the complaint should be dismissed because the Plaintiffs did not plead their slogans were denied because of their content. (Id. at 29-31). The Secretary argues the Plaintiffs mistakenly pled that the slogans were denied because they were unauthorized, which would be required no matter what individual or organization was named in the slogans under the facially neutral Slogan Statutes. (Id.). Accordingly, the thrust of both arguments is the Slogan Statutes are constitutional because they are facially neutral, (id. at 19, 29-31), and that they "apply equally to all candidates and all desired slogans that seek to use the name of an incorporated entity or an individual." (Id. at 20). (See also id. at 30-31). But these arguments are irrelevant.

"[F]acially content neutral [laws], will be considered content-based regulations of speech" if they "cannot be justified without reference to the content of the regulated speech." *Reed*, 576 U.S. at 164 (internal quotation marks and citation

omitted). "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id*. at 169. Likewise, a regulation "is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. at 171. Therefore, if the law applies only when certain words are present in a statement, then the law is a content-based regulation of speech. *Id*. at 164, 171. The inverse is also true—if the law applies regardless of what words are in the statement, then the law is not a content-based regulation of speech. *Id*. Here, because the Slogan Statutes authorization requirements only apply when individuals or New Jersey incorporated associations are present in the slogan, they are content-based speech regulations. *Id*.

Plaintiffs' pled in the complaint their desired ballot slogans are being regulated because of the content of the message they express. At the pleading stage this should be sufficient. On their face, the Slogan Statutes target speech that references an individual or a New Jersey corporation. Accordingly, regulation is based on "the topic discussed or the … message expressed." *Id*. at 163. Furthermore, the Secretary examined Plaintiffs' desired message and applied particular requirements because of the content—because they contained references to an induvial and New Jersey corporations. Because the Slogan Statutes "require[] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred," the laws are "content based" speech

regulations. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotation marks and citation omitted). Accordingly, Plaintiffs' complaint demonstrates the Slogan Statutes trigger strict scrutiny.

Under strict scrutiny, the Slogan Statutes are "presumptively unconstitutional and may be justified only if the government *proves* that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163 (emphasis added). Here, at the pleading stage, there is no evidence in the record. Without evidence it is impossible for the government to prove anything. On that basis alone, the Secretary's motion to dismiss should be denied.

Even so, the Secretary contends the Slogan Statutes serve the compelling state interests of defending the First Amendment expressive associational rights of others, *i.e.*, the potential individuals and New Jersey corporations named in a ballot slogan, and preventing voter confusion. (See Mem. in Supp. of Mot. to Dismiss, DN 57-1, 23, 25-26). And then she asserts the Slogan Statutes are properly tailored because the authorization requirement is the least restrictive means to satisfy these compelling interests. (Id.). But these arguments are unavailing.

First, the Secretary has not demonstrated that the Supreme Court has ever recognized that these asserted interests are compelling, or provided any other proof that they are. That is beyond the pleading stage.

But, with respect to her argument, New Jersey cannot assert the constitutional rights of individuals or corporations to prove the Slogan Statutes serve a compelling state interest. "*Parens patriae* standing has traditionally and uniformly been available to the sovereign when the relief sought could not be obtained by individuals." *Pennsylvania v. Porter*, 659 F.2d 306, 328 (3d Cir. 1981) (Garth, J., concurring in part and dissenting in part) (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-58 (1972)). "It has, [], become settled doctrine that a State has standing to sue [with *parens patriae* standing] only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). These types of cases "deal primarily with original suits brought directly [to the Supreme Court] pursuant to Art. III, § 2, of the Constitution under common-law rights of action." *Standard Oil*, 405 U.S. at 258-59. "In order to properly invoke [Supreme Court original] jurisdiction, the State must bring an action on its own behalf and not on behalf of particular citizens." *Id.* at 258 n.12. Indeed, *parens patriae* jurisdiction is reserved for circumstances that are not present here. *See id*. at 258 (collecting cases). Accordingly, the Secretary cannot assert the expressive associational rights of individuals and corporations as a justification for the Slogan Statutes.

Furthermore, it is impossible for candidates to harm the expressive associational rights of individuals or incorporated associations by referencing them in their ballot slogans. Only the government can violate First Amendment association rights. *See Pitt v. Pine Valley Golf Club*, 695 F. Supp. 778, 782 (D.N.J. 1988) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). New Jersey's "mere approval or acquiescence" of a candidate's slogan by the act of printing it on the ballot "is not state action." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). Accordingly, the Slogan Statutes are not protecting anyone's expressive associational rights by requiring authorization before an individual or corporation is included in a slogan. *Id.* Therefore, defending the associational rights of potential individuals and corporations that may appear in a ballot slogan is not a compelling interest.

Next, without evidence, the Secretary argues that if candidates can mention individuals and corporations without authorization on the primary election ballot, then it will cause voter confusion. Plaintiffs object to the notion that any ballot slogan presented without authorization will cause voter confusion. The Secretary must prove this argument with evidence.

But even if the Secretary proves unauthorized slogans create voter confusion, the Slogan Statutes fail strict scrutiny tailoring analysis because they are not appropriately tailored to serve the purported governmental interest.

Under strict scrutiny, the Slogan Statutes must be the least restrictive means to prevent voter confusion. *Reed*, 576 U.S. at 163 (strict scrutiny standard). They are not. Accordingly, the Slogan Statutes are unconstitutional. However, tailoring analysis is beyond the scope of the pleading stage of litigation.

For now, it is enough to state that New Jersey election law should allow a primary election candidate to say anything he or she wants within the six-word allotment for a ballot slogan. The State can place a disclaimer on the ballot to alert voters that each slogan is an unverified statement of fact or opinion. In this way, whatever the candidate expresses on the ballot is treated like any other public statement the candidate utters during the campaign. This rule is a neutral and a less restrictive means of allowing primary election candidates to communicate with voters that does not violate the First Amendment.

This case is about candidates saying whatever they want without restriction, regardless of any government authorization requirement. Under the First Amendment, Plaintiffs should not have to ask anyone or anything for permission to speak on the ballot. And whether permission is granted should be irrelevant. The permission slips required by the Slogan Statutes demonstrate the laws are not properly tailored. And because the Slogan Statutes are not properly tailored, they are unconstitutional under the First Amendment. Therefore, the Secretary's motion should be dismissed.

## III. The Secretary's Joinder Argument is Misplaced.

The Secretary's Joinder Argument demonstrates a fundamental misunderstanding of the Federal Rules of Civil Procedure and constitutional law.

Plaintiffs claim the Slogan Statutes are a facial *and* an as-applied violation of the First Amendment. (See Am. V. Compl., DN 45 at Prayer for Relief). Citing F. R. Civ. P. 19(a)(1)(B), the Secretary claims that Plaintiffs cannot obtain their desired relief "without the joinder of the incorporated associations and entities whose associative rights would be impacted by this court's decision." (See Mem. in Supp. of Mot. to Dismiss, DN 57-1, 14 n.2). Logically, because the Slogan Statutes require consent from individuals too, the Secretary's joinder argument also applies to all individuals "whose associated rights would be impacted by this court's decision." (Id.). For Plaintiffs' as-applied challenge to the Slogan Statutes, the potential joined parties would be Sen. Bernie Sanders and the organizations named in the Complaint. (See Am. V. Compl., DN 45, ¶¶ 36-46). But because Plaintiffs are also making a facial challenge to the Slogan Statutes, the Secretary's position will require all individuals that have ever lived and the thousands of New Jersey incorporated associations operating in the state to be joined as parties as well. This is unworkable and unnecessary.

Regardless, the Secretary claims joinder of additional parties is necessary to protect their associative rights. (See Mem. in Supp. of Mot. to Dismiss, DN 57-1, 14

n.2). However, the Secretary fails to explain how Plaintiffs, who are not state actors, can violate anyone's First Amendment rights. Only the government can violate First Amendment associational rights. *See Pitt*, 695 F. Supp. at 782 (D.N.J. 1988) (citing *Lugar*, 457 U.S. at 937). New Jersey's "mere approval or acquiescence" the Plaintiffs' slogans by the act of printing it on the ballot "is not state action." *Sullivan*, 526 U.S. at 52.

Unless and until the Secretary makes a F. R. Civ. P. 12(b)(7) or Rule 19 motion, supported with briefing, the Court should ignore the Secretary's joinder concerns.

## IV. Nominal Damages.

Plaintiffs concede their nominal damages claim against the Secretary. The Eleventh Amendment bars all damages claims against state officials sued in their official capacities, including the Secretary. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985).

The Eleventh Amendment, however, does not bar any damages claims against the Defendant County Clerks. To the extent the County Clerks have incorporated the Secretary's Motion to Dismiss, (see Middlesex Clerk Motion to Dismiss, DN 55 (joining "all other possible motions to dismiss")), the claim for nominal damages should not be dismissed against them.

"[O]nly States and arms of the State possess immunity from suits authorized by federal law." *N. Ins. Co. v. Chatham Cty.*, 547 U.S. 189, 193 (2006). The Supreme Court "has repeatedly refused to extend sovereign immunity to counties." *Id.* (collecting cases). While there are some exceptions to this general rule, the County Defendants have not shown that any of the exceptions apply. *See Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 229 (3d Cir. 2006) (noting exception criteria) superseded by statute as noted in *Denkins v. State Operated Sch. Dist. of Camden*, 715 F. App'x 121, 125 (3d Cir. 2017) (noting counties not protected).

Accordingly, the claim of nominal damages against the County Defendants should not be dismissed.

## CONCLUSION

For the stated reasons, the Secretary's Motion to Dismiss should be denied. Plaintiffs only concede their nominal damages claim against the Secretary.

Respectfully submitted,

/s/ Walter M. Luers
COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Park 80 West – Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, NJ 07663
201-845-9600, Ext. 144
wml@njlawfirm.com
*Counsel of Record for Plaintiffs*

and

Ryan Morrison
INSTITUTE FOR FREE SPEECH
150 Connecticut Ave., NW, Suite 801
Washington, DC 20036
202-301-3300
rmorrison@ifs.org
Admitted *pro hac vice*
*Counsel for Plaintiffs*

Dated: January 25, 2021

CERTIFICATE OF SERVICE

On January 25, 2021, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which will serve the document on counsel for all parties.

/s/ Walter M. Luers
Walter M. Luers

COURTESY COPY CERTIFICATE

On January 26, 2021, a courtesy copy of the foregoing was sent by regular U.S. mail in compliance with the Local Rules and the preferences of this Court to the following address:

Hon. Susan D. Wigenton
U.S. District Judge
Martin Luther King Bldg. &
U.S. Courthouse
50 Walnut St.
Newark, NJ 07101

/s/ Walter M. Luers
Walter M. Luers