UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK DIVISION

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

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Plaintiffs, Eugene Mazo and Lisa McCormick, by counsel, submit this Response to Defendant County Clerks' (the "Clerks" or the "Defendants") Motions to Dismiss. (See Motions to Dismiss, DNs 51; 52; 53; 54; 55; 56).[1]

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. (Id. at ¶¶ 39, 45).

[1] To the extent the Clerks incorporate the Secretary of State Tahesha Way's Motion to Dismiss by reference, (see Motion to Dismiss, DN 55 (joining "all other possible motions to dismiss")), Plaintiffs Response to Defendant Tahesha Way's Motion to Dismiss is incorporated by reference here.

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. (Id. at ¶¶ 26).

The New Jersey Secretary of State is the state's chief election official. *See* N.J. Stat. §§ 19:31-6a; 52:16A-98. But she does not control the substantive content and printing of the primary election ballots. New Jersey county clerks draft, print, prepare, store, and distribute primary election ballots in their respective counties and are responsible for the structure, format, and authoring the substantive content of the ballots. (See Am. V. Compl., DN 45, ¶¶ 17-22). *See also* N.J. Stat. §§ 19:9-2; 19:23-17; 19:23-22.4; 19:23-24; 19:23-25.1; 19:49-1; 19:49-2.

The Slogan Statutes forbid a New Jersey county clerk from printing any slogan that includes or refers to the name of any person or New Jersey incorporated association on the primary election ballot 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. §§ 19:9-2; 19:23-17; 19:23-22.4; 19:23-25.1; 19:49-1; 19:49-2.

The Clerks are responsible for printing Plaintiffs' desired slogan on the primary election ballots. (See Am. V. Compl., DN 45, ¶¶ 14-15, 17-23, 26-31). Because of the Slogan Statutes, the Clerks failed to print the Plaintiffs' desired slogans in 2020, will fail to print them again in 2022, and will continue to fail to print them in all future primary elections.

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. The Clerks are proper defendants in this litigation because, pursuant to the Slogan Statutes, they did not print Plaintiffs' desired slogans on the primary election ballot, which caused Plaintiffs' constitutional injury. 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. Therefore, the Clerks' Motion to Dismiss should be denied.

I. The Clerks are Proper Litigants and Responsible for Plaintiffs' Injury.

The Clerks are proper litigants and responsible for the Plaintiffs' injury. Plaintiffs want their desired slogans printed on the New Jersey primary election ballots. Defendants are responsible for the content and printing of the ballots. It is the Clerks' responsibility to ensure that nothing is printed on the ballots that is not authorized by law. The Slogan Statutes forbid Plaintiffs from using their desired slogans on the ballots. The Defendants refused to print the Plaintiffs' desired slogans on the ballots because of the Slogan Statutes. Therefore, the Clerks are enforcing the Slogan Statutes by refusing to print Plaintiffs' desired slogans on the ballots. Accordingly, they are proper defendants, and their actions are a cause of the Plaintiffs' injury.

The Clerks present themselves as mere spectators in the New Jersey election system and argue that the Secretary of State is the only state official that has any authority over what is printed on the ballots. (See Mem. in Supp. of Mot. to Dismiss, DN 51-1, 7-9). The Clerks assert they are not proper defendants in this litigation and that Plaintiffs cannot prove causation to establish Article III standing. (Id.). Specifically, the Clerks claim that: (1) they have no authority "to evaluate the constitutional merit of the Slogan Statutes;" (2) "performed no action" to cause Plaintiffs' constitutional injury; (3) are powerless to print Plaintiffs' desired slogans on the ballot because they have no "authority to enforce New Jersey election

statues;" (4) have "no election-related duty" except for distributing the ballots; and (5) the New Jersey Secretary of State is the only properly named defendant. (Id.). But the Clerks are selling themselves short and demonstrating a fundamental lack of understanding of what injunctive relief is.

The Clerks are not passive onlookers in the ballot promulgation process; rather, they are responsible for administering elections within their respective counties and enforcing the Slogan Statutes. The Secretary of State is the chief election official. *See* N.J. Stat. §§ 19:31-6a; 52:16A-98. But the Clerks are elected constitutional public officers that function independently of the gubernatorially appointed Secretary of State. *See* New Jersey Const. Art. V, § 4, cl. 3; Art. VII, § 2, cl. 2. County clerks work in concert with the Secretary of State only insofar as they are required to by statute. *See e.g.*, N.J. Stat. §§ 19:23-21; 19:23-22; 19:23-55. And if an individual is running in the primary election for public office at the county level of state government, the relevant county clerk accepts that candidate's filed nomination documents and qualifies her, including her slogan, for the primary election ballot. *See* N.J. Stat. §§ 19:23-5; 19:23-6; 19:23-7; 19:23-8; 19:23-10; 19:23-11; 19:23-14; 19:23-17; 19:23-19; 19:23-22.

Defendants, and no other public officials, are ultimately responsible for the content and printing of the primary election ballots. The Secretary of State does provide "election supplies" to the Clerks, (see Mem. in Supp. of Mot. to Dismiss,

DN 51-1, 8-9), but the supplies are "things other than ballots." *See* N.J. Stat. §§ 19:9-1; 19:9-3. Defendants are accountable for the substantive content, format, and printing of the primary election ballots and enforcing the Slogan Statutes. *See* N.J. Stat. §§ 19:9-2; 19:23-17; 19:23-22.4; 19:23-24; 19:23-25.1; 19:49-1; 19:49-2.

Defendants have the responsibility to enforce all ballot statutes, including the Slogan Statutes. The Clerks admit that they must "fully comply with the Slogan Statutes." (See Mem. in Supp. of Mot. to Dismiss, DN 51-1, 7). Indeed, before assuming their public office, each county clerk must take an oath to support the New Jersey constitution, which means they must use their authority to enforce the state's laws, including the Slogan Statutes. *See* New Jersey Const. Art. II, § 1; Art. VII, § 1, cl. 1; Art. XI, § 1, cls. 2, 3. Accordingly, if any primary election candidate wanted the slogan, "Endorsed by County Clerk Joanne Rajoppi,"[2] and the phrase made it through the approval process up until the point of being printed on the primary election ballot, County Clerk Rajoppi has the power to enforce the Slogan Statutes and refuse to print the slogan on the ballot.[3]

A public official is "properly named as a defendant if the official 'by virtue of his office has some connection with the enforcement of the [law at issue].'" *Finberg*

[2] Alternatively, the primary election ballot slogan could state an endorsement by any of the Clerks.

[3] The other Clerks have this power too.

v. Sullivan, 634 F.2d 50, 54 (3d Cir. 1980) (*en banc*) (quoting *Ex Parte Young*, 209 U.S. 123, 157 (1908)). It is irrelevant if, as the Defendants assert, (see Mem. in Supp. of Mot. to Dismiss, DN 51-1, 7-8), their role in enforcing the Slogan Statutes is "entirely ministerial." *Finberg*, 634 F.2d at 54. "[T]he inquiry is not into the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights." *Id*. *See also Constitution Party of Pa. v. Cortes*, 824 F.3d 386, 396 (3d Cir. 2016) (citing this quote from *Finberg*). Courts "often" allow "suits to enjoin the performance of ministerial duties in connection with allegedly unconstitutional laws." *Finberg*, 634 F.2d at 54. (collecting cases). It is irrelevant if, as the Defendants argue, their role "does not require [them] to evaluate the constitutional merit of the Slogan Statutes." (See Mem. in Supp. of Mot. to Dismiss, DN 51-1, 7). Once they "have relied on the authority conferred by the [Slogan Statutes] to work an injury to the plaintiff[s], they may not disclaim interest in the constitutionality of these [laws]." *Finberg*, 634 F.2d at 54.

Put simply, if there is a "connection" between the Defendants and enforcement of the Slogan Statutes, then they are properly named litigants in this case. *Id*.

Likewise, if Plaintiffs' First Amendment injury '"is fairly traceable'" to the Defendants' failure to print Plaintiffs' desired slogans on the ballot, then the causation requirement of Article III standing is met and their injury '"is likely to be

redressed by a favorable judicial decision.'" *Kamal v. J. Crew Grp., Inc*., 918 F.3d 102, 110 (3d Cir. 2019) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

The Clerks are responsible for the substantive content, format, and printing of the primary election ballots and enforcing the Slogan Statutes. *See* N.J. Stat. §§ 19:9-2; 19:23-17; 19:23-22.4; 19:23-24; 19:23-25.1; 19:49-1; 19:49-2. They are accountable for what slogans ultimately appear on the ballot. *Id*. Accordingly, there is a connection between the Defendants' responsibility to print the ballots and the enforcement of the Slogan Statutes. And because they print the ballot, courts can provide Plaintiffs the relief they seek by ordering the Clerks to print Plaintiffs' desired slogans on the ballot. *See MacManus v. Allan*, 2 N.J. Super. 557, 563 (Law Div. 1949) (the court ordered the clerk what could and could not be printed on the ballot). And Defendants' enforcement of the Slogan Statutes is traceable to the absence of Plaintiffs' desired slogans on the ballot. Therefore, the Defendants are properly named litigants in this case and a cause of Plaintiffs' injuries.

The Eleventh and Fourth Circuits faced these issues when they had to determine which state officials were the proper defendants and could provide the requested relief. In *Jacobson v. Fla. Sec'y*, 957 F.3d 1193 (11th Cir. 2020), the Eleventh Circuit reversed a district court for endorsing a similar argument to the one the Clerks are advancing. The *Jacobson* plaintiffs filed a constitutional challenge to

a Florida election law that governed the order candidates appeared on the ballot, and only sued the Florida Secretary of State for injunctive relief. *Id*. at 1197. The district court found for the plaintiffs and "permanently enjoined the Secretary – and the 67 county Supervisors of Elections, none of whom were made parties to [the] lawsuit – from preparing ballots in accordance with the law." *Id*. at 1198. The trial court held the Secretary was "responsible for ballot order because she [was] Florida's 'chief election officer.'" *Id*. at 1199. Even though state law "task[ed] the nonparty Supervisors with placing candidates on the ballot in the correct order, [], the district court ruled that relief against the Secretary could redress the [plaintiffs'] injuries." *Id*. at 1199-1200.

However, the Eleventh Circuit reversed the district court. *Id*. at 1198. It held that the Supervisors of Elections were "responsible for placing the candidates on the ballot in the order the law prescribes," and because they were not parties in the litigation the case should be dismissed. *Id*. Under Florida law, the Secretary was only responsible for certifying the names to be placed on the ballot to the Supervisors. *Id*. at 1207. "Because the Secretary didn't do (or fail to do) anything that contributed to their harm," the Plaintiffs failed to prove causation for Article III standing. *Id*. (punctuation marks and citation omitted).

The Court explained that its decision rested "on the reality that the Supervisors are independent officials under Florida law who are not subject to the Secretary's

control. The Supervisors are constitutional officers who are elected at the county level by the people of Florida; they are not appointed by the Secretary." *Id*. The only control the Secretary had over the Supervisors was "through coercive judicial process," *i.e*., she could sue them. *Id*. The fact that the Secretary "must resort to judicial process if the Supervisors fail to perform their duties underscores her lack of authority over them." *Id*. at 1207-08. "Because the Supervisors are independent officials not subject to the Secretary's control, their actions to implement the ballot statute may not be imputed to the Secretary" to establish causation. *Id*. at 1208. "Contrary to the reasoning of the district court, the Secretary's position as 'the chief election officer of the state,' with 'general supervision and administration of the election laws,' does not make the order in which candidates appear on the ballot traceable to her." *Id*.

Because there was no "evidence that the Secretary controls ballot order, the [plaintiffs could not] rely on the Secretary's general election authority to establish traceability." *Id*. (citation omitted). State law "expressly" gave "a different, independent official control over the order in which candidates appear on the ballot." *Id*. The Secretary could not cause "any injury" the plaintiffs might suffer. *Id*. Accordingly, relief against the Secretary would not redress their injury—"either directly or indirectly." *Id*. (internal quotation marks and citation omitted). An injunction against the Secretary would not give the plaintiffs their desired relief, "for

neither she nor her agents control the order in which candidates appear on the ballot. Nor can declaratory relief against the Secretary directly redress any injury to the [plaintiffs]. A declaratory judgment against the Secretary does not bind the Supervisors, who are not parties" to the case. *Id*. (internal quotation marks omitted). Unless the Supervisors were parties to the case, no ruling from the court could bind them. *Id*. "If a plaintiff sues the wrong defendant, an order enjoining the correct official who has not been joined as a defendant cannot suddenly make the plaintiff's injury redressable." *Id*. at 1209.

Here, the New Jersey Secretary of State cannot force the Clerks to print anything on the primary election ballots. The Secretary, while powerful, is a political appointee. *See* New Jersey Const. Art. V, § 4, cl. 3. The Clerks are duly elected public officials. *Id*. at Art. VII, § 2, cl. 2. Just as no state official had direct control over the other in *Jacobson*, the Secretary has no control over the Defendants other than through the judicial process. The Secretary and the Defendants only work jointly as prescribed by statute. *See e.g.*, N.J. Stat. §§ 19:23-21; 19:23-22; 19:23-55. Under New Jersey law, the Secretary has no authority over the printing of the primary election ballots, or, consequently, their content. Only the Clerks have that authority. *See* N.J. Stat. §§ 19:9-2; 19:23-17; 19:23-22.4; 19:23-24; 19:23-25.1; 19:49-1; 19:49-2. Like the *Jacobson* Supervisors, state law expressly gives the Clerks control over the content and printing of the primary election ballots. *Id*.

Accordingly, if the Plaintiffs want a particular slogan to appear on the ballot, then they must sue the Clerks to force them to print it and directly redress their injury. Therefore, the Clerks are proper litigants in this case and a cause of Plaintiffs' injuries.

In *Bostic v. Schaefer*, 760 F.3d 352, 367-69 (4th Cir. 2014), the Fourth Circuit faced a similar Article III standing issue as the one found here, when a Virginia same-sex couple wanted to marry in Virginia and challenged the commonwealth's marriage laws.[4] The *Bostic* plaintiffs sued the Clerk of the Circuit Court in the jurisdiction where they sought a marriage license because that public official denied them an application for a marriage license. *Id*. at 368-69, 371. They also sued the State Registrar of Vital Records because she was responsible for "developing Virginia's marriage license application form and distributing it to the circuit court clerks throughout Virginia." *Id*. at 371. The Registrar was also "responsible for ensuring compliance with the Commonwealth's laws relating to marriage," including "those laws that limit marriage to opposite-sex couples and that refuse to honor the benefits of same-sex marriages lawfully entered into in other states." *Id*.

[4] Additionally, a California same-sex couple relocated to Virginia and wanted their out-of-state marriage recognized in the commonwealth. *Id*. at 369. But, for the purposes of this response, only the Virginia couple's standing analysis is relevant.

In its standing analysis, the Fourth Circuit recognized the Clerk, an elected public official, *see* Va. Code § 15.2-1634, and the Registrar, an appointed public official, *see* Va. Code § 32.1-251, worked in tandem to enforce Virginia's marriage laws. *Bostic*, 760 F.3d at 371-72. The Circuit Clerk had "the requisite connection to the enforcement of the Virginia Marriage Laws due to his role in granting and denying applications for marriage licenses." *Id*. at 371 n.3. Granting the Virginia couple the relief they sought against the Circuit Clerk would redress their constitutional injuries. *Id*. at 371. Accordingly, they had standing to sue the Circuit Clerk. *Id*.

Likewise, the Registrar's "promulgation of a marriage license application form that does not allow same-sex couples to obtain marriage licenses resulted in [the Circuit Clerk's] denial of [the Virginia couple's] marriage license request." *Id*. at 372. Because they could "trace [their] injury to [the Registrar] due to her role in developing the marriage license application form in compliance with the Virginia Marriage Laws," the Virginia couple had standing to sue the Registrar. *Id*. As it was with the Circuit Clerk, granting the Virginia couple the relief they sought against the Registrar, "would redress their injuries." *Id*. at 372.

Here, the Plaintiffs are in the same situation as the *Bostic* plaintiffs—they must sue two different public officials to obtain the relief they seek. The New Jersey Secretary of State and Defendants are separate public officials that do not answer to

one another, have different roles in the primary election process, and are responsible for enforcing state election laws—including the Slogan Statutes. Like the Registrar, the Secretary is responsible for ensuring compliance with state election law. But the Secretary cannot force the Clerks to print a particular slogan on the primary election ballot any more than the Registrar could force the Circuit Clerk to issue an application for a marriage license to the *Bostic* plaintiffs. Because the Clerks are responsible for printing the ballots, they have "some connection with the enforcement of the [Slogan Statutes]," and are proper defendants in this case. *Finberg*, 634 F.2d at 54 (internal quotation marks omitted). And when the Clerks enforce the Slogan Statutes by refusing to print the Plaintiffs' desired slogans on the ballot, they cause an injury to the Plaintiffs.

Plaintiffs cannot receive the relief they seek unless they sue both the Secretary and the Clerks. The Clerks may claim it is absurd that they would not follow the Secretary's directives. But the Secretary does not control them. *See* New Jersey Const. Art. V, § 4, cl. 3 (Secretary is appointed); Art. VII, § 2, cl. 2 (Clerks are elected). New Jersey law vests the Clerks—not the Secretary—with the authority to print the primary election ballots. *See* N.J. Stat. §§ 19:9-2; 19:23-17; 19:23-22.4; 19:23-24; 19:23-25.1; 19:49-1; 19:49-2. Nothing is printed on the primary election ballot except what the Clerks permit. *Id*. The Clerks will continue "to fully comply with the Slogan Statutes," (see Mem. in Supp. of Mot. to Dismiss, DN 51-1, 7), and

refuse to print Plaintiffs' desired slogans on the primary election ballot "unless expressly prohibited by injunctive relief." *Colorado Spring Amusements, Ltd. v. Rizzo*, 387 F. Supp. 690, 698 (E.D. Pa. 1974), *rev'd* on other grounds, 524 F.2d 571 (3d Cir. 1975).

The *Jacobson* plaintiffs' case was dismissed because they failed to sue the party actually in control of the content of the ballots. 957 F.3d at 1198, 1207-08. But the *Bostic* plaintiffs succeeded because they sued all relevant state officials. 760 F.3d at 367, 371-72. Here, for the Plaintiffs to avoid the fate of the *Jacobson* plaintiffs and enjoy the success of the *Bostic* plaintiffs, the Clerks must remain in this case. Accordingly, the Clerks' Motion to Dismiss should be denied.

II. 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 Clerks' 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. The Clerks slip in a F. R. Civ. P. 12(b)(1) citation in their argument, (see Mem. in Supp. of Mot. to Dismiss, DN 51-1, 10), instead of their motion, (see Mot. to Dismiss, DN 51), to assert the Court does not have jurisdiction over this case. Specifically, the Clerks contend Plaintiffs' claims do not qualify for the capable of repetition yet evading review exception and are unripe because Plaintiffs do not know if their future slogans will be denied authorization, if they will acquire enough signatures to appear on the primary election ballot, if they will meet the residency requirements for their respective candidacies, or if they will even run for office. (See Mem. in Supp. of Mot. to Dismiss, DN 51-1, 11-14).

"The [Clerks] ask[] 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 [Clerks]." *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 Clerks' 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, which includes the requisite signatures, meet the residency requirements, 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 Clerks' 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 Clerks' Motions 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 Clerks' motion should be dismissed.

CONCLUSION

For the stated reasons, the Defendant County Clerks' Motions to Dismiss should be denied.

Respectfully submitted,

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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