FIRST AMENDMENT — CONTENT NEUTRALITY — THIRD CIRCUIT HOLDS THAT NEW JERSEY'S "CONSENT REQUIREMENT" FOR BALLOT SLOGANS IS CONTENT NEUTRAL. — *Mazo v. New Jersey Secretary of State*, 54 F.4th 124 (3d Cir. 2022).

New Jersey law allows candidates for elected office to place a six-word slogan next to their names on the ballot.[1] However, candidates who want to use the name of a person or New Jersey corporation in their slogans must first obtain that person's or corporation's consent.[2] Recently, in *Mazo v. New Jersey Secretary of State*,[3] the Third Circuit held that this consent requirement was a content-neutral regulation of speech that did not violate candidates' First Amendment rights.[4] In holding that the New Jersey consent requirement was content neutral, the Third Circuit adopted an implausibly broad reading of the Supreme Court's recent decision in *City of Austin v. Reagan National Advertising of Austin, LLC*.[5] The Third Circuit set forth a new "extrinsic features" test for content neutrality,[6] which exempted from strict scrutiny a law that effectively prohibits certain categories of political speech. *Mazo* exemplifies the potential danger of *City of Austin*'s departure from the clear content-neutrality rule of *Reed v. Town of Gilbert*.[7]

New Jersey permits candidates running in primary elections for state or federal office to choose a slogan of up to six words that will appear next to their names on the ballot.[8] However, there is a catch. If candidates want their slogans to include or "refer to" the name of any person or any New Jersey corporation, they must first obtain that person's or corporation's written consent.[9] Candidates must file that written

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[1] N.J. STAT. ANN. § 19:23-17 (West 2014).

[2] *Id.*

[3] 54 F.4th 124 (3d Cir. 2022).

[4] *Id.* at 132, 149.

[5] 142 S. Ct. 1464 (2022).

[6] *Mazo*, 54 F.4th at 149.

[7] 135 S. Ct. 2218 (2015).

[8] *Mazo*, 54 F.4th at 132–33 (citing N.J. STAT. ANN. § 19:23-17 (West 2014)). The full text of the statute reads:

> Any person indorsed as a candidate for nomination for any public office or party position whose name is to be voted for on the primary ticket of any political party, may, by indorsement on the petition of nomination in which he is indorsed, request that there be printed opposite his name on the primary ticket a designation, in not more than six words, as named by him in such petition, for the purpose of indicating either any official act or policy to which he is pledged or committed, or to distinguish him as belonging to a particular faction or wing of his political party; provided, however, that no such designation or slogan shall include or refer to the name of any person or any incorporated association of this State unless the written consent of such person or incorporated association of this State has been filed with the petition of nomination of such candidate or group of candidates.

N.J. STAT. ANN. § 19:23-17.

[9] *Mazo*, 54 F.4th at 133 (citing N.J. STAT. ANN. § 19:23-17). The consent requirement is repeated in N.J. STAT. ANN. § 19:23-25.1.

consent with the Secretary of State as part of their petitions to appear on the ballot.[10]

This "consent requirement" proved troublesome for Eugene Mazo and Lisa McCormick, who were candidates in New Jersey's July 7, 2020, Democratic primary election for the House of Representatives.[11] Mazo initially sought to use the following three slogans, one in each of three different counties within New Jersey's Tenth Congressional District: "Essex County Democratic Committee, Inc."; "Hudson County Democratic Organization"; and "Regular Democratic Organization of Union County."[12] But because those slogans all referred to the names of New Jersey corporations whose consent to be named Mazo had not obtained, state officials rejected the proposals.[13] Mazo eventually chose different slogans.[14] McCormick initially submitted the slogan "Not Me. Us.," but that slogan was denied on the basis that it "referred to" a New Jersey corporation.[15] She then tried to use the slogan "Bernie Sanders Betrayed the NJ Revolution," but that too was rejected since it referenced a person — Senator Bernie Sanders — whose consent McCormick had not obtained.[16] McCormick ultimately used the slogan "Democrats United for Progress" after receiving the consent of that corporation.[17]

Five days before the primary election, Mazo and McCormick sued the New Jersey Secretary of State and various election officials in the United States District Court for the District of New Jersey.[18] They sought declaratory relief and an injunction against the enforcement of the consent requirement, arguing that it violated their First Amendment rights.[19] In granting the defendants' motions to dismiss, the district court first concluded that the plaintiffs' claims were not moot and were ripe, although the primary election had already passed and the next primary was over a year away.[20] The district court then upheld the constitutionality of the consent requirement after applying the *Anderson-Burdick*[21] balancing framework.[22]

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[10] *Mazo*, 54 F.4th at 132–33.

[11] *Id.* at 133. Mazo was a candidate for New Jersey's Tenth Congressional District, and McCormick ran in the Twelfth District. *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 134; *see* Mazo v. Way, 551 F. Supp. 3d 478, 488 (D.N.J. 2021).

[19] *Mazo*, 551 F. Supp. 3d at 489.

[20] *Id.* at 497.

[21] The *Anderson-Burdick* balancing test is derived from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

[22] *Mazo*, 551 F. Supp. 3d at 503–08.

The Third Circuit affirmed.[23] Writing for the panel, Judge Krause[24] first affirmed the district court's conclusion that the case was neither unripe nor moot.[25] The court then concluded that the consent requirement should be assessed as an election regulation under the *Anderson-Burdick* balancing framework, as opposed to a regulation of pure speech that would trigger a First Amendment doctrinal test.[26] The *Mazo* court adopted a "two-track approach" to the *Anderson-Burdick* framework.[27] Under that two-track approach, a law that imposes a "severe" burden on constitutional rights is subject to strict scrutiny.[28] But if a burden imposes only "reasonable, nondiscriminatory restrictions" on constitutional rights, then "the State's important regulatory interests are generally sufficient to justify the restrictions."[29] The court concluded that the consent requirement imposed only a minimal burden on First Amendment rights.[30] The law applied equally to all candidates and slogans and left open "ample and adequate alternatives for expression and association."[31] As to whether the law was "nondiscriminatory," the court noted that "[w]hether a law is viewpoint- or content-based may also bear on the severity of the burden imposed."[32]

The court then held that the consent requirement was a content-neutral regulation of speech.[33] The court based its holding on the Supreme Court's decision in *City of Austin*.[34] In that case, the Court upheld the sign code of Austin, Texas, which permitted businesses to use digital signs to advertise goods and services located on the same

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[23] *Mazo*, 54 F.4th at 132.

[24] Judge Krause was joined by Judge Shwartz and Judge Roth.

[25] *Mazo*, 54 F.4th at 135–36. On ripeness, the court held that (1) the parties' interests were sufficiently adverse, since Mazo and McCormick alleged that they would suffer real harm to their First Amendment rights in the absence of a declaratory judgment; (2) a declaratory judgment would conclusively resolve the controversy, since the court's resolution of the legal issue would settle whether Mazo and McCormick could follow through with their plans to request similar ballot slogans without obtaining consent in the future; and (3) a declaratory judgment would be useful to the plaintiffs, since it would enable them to plan their future campaigns unencumbered by legal uncertainty. *Id.* at 135. On mootness, the court held that Mazo's and McCormick's claims fell within the exception to mootness for cases that are "capable of repetition, yet evading review." *Id.* at 135–36 (citing Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016)).

[26] *Id.* at 137, 145.

[27] *Id.* at 145 (quoting Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment)).

[28] *Id.* (quoting *Crawford*, 553 U.S. at 205).

[29] *Id.* at 145–46 (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

[30] *Id.* at 146.

[31] *Id.*

[32] *Id.* at 146–47.

[33] *Id.* at 149. A content-based regulation is one that applies to speech "because of the topic discussed or the idea or message expressed." City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1471 (2022) (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015)). By contrast, a content-neutral law regulates speech not based on its content, but rather based on some other characteristic such as the time, place, or manner of the speech. *Mazo*, 54 F.4th at 148 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[34] *Mazo*, 54 F.4th at 149.

premises as the sign, but prohibited digital advertisements for things located on different premises.[35] The *Mazo* court explained that under *City of Austin*, a law can remain content neutral even if it requires the enforcement official to examine speech, but only if the speech is examined "in service of drawing neutral lines."[36] The *Mazo* court read *City of Austin* as expressly endorsing two categories of content-neutral line drawing: (1) when examining the speech is necessary to determine compliance with a neutral time, place, or manner regulation, such as the on-/off-premises distinction in *City of Austin* itself; and (2) when examining speech is necessary to determine its "function or purpose," such as whether speech constitutes regulable "solicitation."[37] In addition to those two enumerated categories, the *Mazo* court then read *City of Austin* as supporting a "third category" in which a state may examine speech: to determine whether the speech contains "extrinsic features unrelated to the message conveyed."[38] According to the court, the consent requirement fell into this third category, since an enforcement official needed to examine a ballot slogan's content only to determine objectively whether the candidate satisfied the consent requirement.[39] Finally, the court concluded its *Anderson-Burdick* analysis. Since the law's burden on speech was minimal, it was justified by New Jersey's four asserted interests in the consent requirement: "preserving the integrity of the nomination process, preventing voter deception, preventing voter confusion, and protecting the associational rights of third parties who might be named in a slogan."[40]

Mazo is particularly concerning for its holding that New Jersey's consent requirement is content neutral. To reach that conclusion, the Third Circuit read *City of Austin* as allowing for a content-neutrality determination if an official examines speech for the purpose of identifying "extrinsic features unrelated to the message conveyed."[41] This expanded test for content neutrality rests on an implausibly broad reading of *City of Austin*. That case does not contemplate that a law can be considered content neutral if it authorizes a government official to ban entire categories of political messages from a particular sphere of public discourse, as New Jersey's consent requirement does. Although *Mazo* should have adopted a narrower reading of *City of Austin*, its expansion of that case is perhaps a foreseeable side effect of *City of Austin*'s departure from *Reed v. Gilbert*'s clear content-neutrality rule. To prevent additional expansions of *City of Austin*, the Supreme Court should clarify its limits in a future case.

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[35] *City of Austin*, 142 S. Ct. at 1468–70.
[36] *Mazo*, 54 F.4th at 149 (quoting *City of Austin*, 142 S. Ct. at 1471).
[37] *Id.* (citing *City of Austin*, 142 S. Ct. at 1471–73).
[38] *Id.*
[39] *Id.*
[40] *Id.* at 153 (quoting Mazo v. Way, 551 F. Supp. 3d 478, 506 (D.N.J. 2021)).
[41] *Id.* at 149.

City of Austin rejected as "too extreme" the lower court's holding that a regulation is content-based whenever it requires an enforcing official to read the sign at issue.[42] The Court explained that Austin's ordinance was content neutral because it required an examination of speech "only in service of drawing neutral, location-based lines."[43] However, the case did not define what counts as a "neutral" line. In lieu of a comprehensive definition, the Court gave two precedent-based examples of laws that require evaluating speech while still remaining content neutral: (1) those that require an official to distinguish "between on-premises and off-premises signs," and (2) those that require an official to "identify whether speech entails solicitation."[44] But the case provided no further guidance regarding which other types of restrictions, if any, could count as neutral.

The Third Circuit tried to fill this gap by defining "neutral" restrictions to include those that regulate speech "based on extrinsic features unrelated to the message conveyed."[45] But that is too broad a reading of *City of Austin*. The central problem with the court's new test is that "extrinsic features" will often determine which messages can be spoken and which cannot. The extrinsic feature at issue here — names of people and corporations who had not consented — is a prime example. Suppose New Jersey banned any candidate from referencing any deceased person in any election speech, for the same reasons as it passed the consent requirement.[46] This would prevent candidates from saying things like "Ronald Reagan would want you to vote for me." The mention or non-mention of a deceased person would be an "extrinsic feature" of the election speech. This restriction would be "unrelated to the particular message conveyed" to the same extent as the consent requirement is unrelated to the particular message contained in a ballot slogan, since this hypothetical ban would "appl[y] to all [speeches], regardless of message."[47] But such a rule would not pass *City of Austin*, or even "the laugh test."[48]

Another hypothetical will further illustrate the implausibility of the *Mazo* court's expanded test for content neutrality. Suppose that New Jersey had established a database of "hurtful words or phrases" that it deemed offensive to the state's citizens, and then banned electoral candidates from using any of those designated words in their six-word ballot slogans. Although this hypothetical regulation would be a transparent

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[42] *City of Austin*, 142 S. Ct. at 1471.

[43] *Id.*

[44] *Id.* at 1473.

[45] *Mazo*, 54 F.4th at 149.

[46] Those reasons are listed above. *See supra* text accompanying note 40.

[47] *Mazo*, 54 F.4th at 149.

[48] *Cf.* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2239 (2015) (Kagan, J., concurring in the judgment) ("The Town of Gilbert's defense of its sign ordinance . . . does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test.").

attempt to regulate the content of speech, it would seem to qualify as a content-neutral law under the Third Circuit's test, since the law identifies an "extrinsic feature[] unrelated to the message conveyed."[49] The official would need to examine the speech only in service of evaluating whether an extrinsic feature, capable of objective determination, was present — does the slogan use any of the banned words? — regardless of whatever message the slogan expressed. As stark as this example might seem, it is directly analogous to the New Jersey consent requirement at issue in *Mazo*. New Jersey established a category of prohibited words that could not be used in a slogan without consent: the name of any living person and the name of any New Jersey corporation.[50] A candidate may make her desired speech only after obtaining the consent of the individual or corporation at issue; if that consent is not forthcoming, then the effective "banned names list" operates to block the candidate's choice of message.[51]

The *Mazo* court would have done better to narrowly read *City of Austin* as endorsing only the two categories of neutral line-drawing that the case expressly mentioned: (1) "location-based lines" such as the "off-premises distinction" at issue in the case itself, and (2) determining whether speech counts as solicitation.[52] The *Mazo* court could have distinguished the case before it by showing that *City of Austin* sanctioned only the "zoning" of particular messages, not the outright prohibition of them. Indeed, New Jersey's consent requirement directly regulates the content of speech in a way that the law at issue in *City of Austin* did not. Even if *City of Austin* did treat certain categories of speech differently than others,[53] it at least did not permit a total ban on digitizing certain messages. Rather, the Court approved Austin's attempt at "zoning" speech into different locations. The billboard operators in Austin could digitize any message they wanted — so long as that message was in the right place. The slogan "Bob's Place: Best Barbecue in Town" could be digitized on Bob's premises, but not off Bob's premises. Either way, the speaker could digitize the message he sought to convey: Bob's Place has the best barbecue in town.[54]

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[49] *Mazo*, 54 F.4th at 149.

[50] *Id.* at 133.

[51] *See id.*

[52] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1471, 1473 (2022).

[53] *See id.* at 1481 (Thomas, J., dissenting) ("[Austin's sign ordinance] discriminates against certain signs based on the message they convey — *e.g.*, whether they promote an on- or off-site event, activity, or service."). *City of Austin* might have erred by not adopting this view of the Austin sign ordinance. Nonetheless, the narrow point here is that even if the Austin ordinance discriminated between certain messages, it did so by "zoning" them, not by prohibiting them.

[54] To be sure, the Austin sign ordinance did effectively ban the use of locational adverbs to connect a message to a particular geographic area. For example, a digital sign could not say "best barbecue available *over there*" or "*up the street*." *See* Transcript of Oral Argument at 86, *City of Austin* (No. 20-1029). But that is true of all time, place, or manner regulations on speech. For

By contrast, New Jersey's electoral candidates are not free to communicate any message they want in their slogans. They will inevitably be prohibited from naming or "refer[ring] to" certain people and corporations, since it will not always be possible to obtain the consent of those people or corporations.[55] The result is that certain messages will be purged from this form of political discourse altogether. For example, New Jersey prohibited McCormick from criticizing a major political figure in her slogan because she did not obtain his consent to be named.[56] Likewise, a politician seeking to use the slogan "Not Me. Us." may believe that those words are the most effective way for her to convey a message of unity with her constituents.[57] But here, McCormick was prevented from using exactly that phrase, since it "referred to" an existing corporation.[58] The Third Circuit blessed as content-neutral New Jersey's attempt to regulate which words and messages are allowed to feature in political speech — an attempt that should have been struck down as an "obvious content-based inquiry."[59]

Mazo's content-neutrality holding is perhaps a foreseeable side effect of *City of Austin*'s retreat from the Court's previous bright-line rule for content neutrality. In 2015, *Reed v. Gilbert* held that a law is facially content based if it "applies to particular speech because of the topic discussed or the idea or message expressed."[60] The sign ordinance at issue in that case triggered strict scrutiny, since it "require[d] Town officials to determine" certain facts about the purpose of the speech after reading it — an "obvious content-based inquiry."[61] Lower courts, including the Fifth Circuit in *City of Austin*, distilled from *Reed* that if a law requires a government official to read the speech's message in order to implement a restriction, then that alone renders the restriction content based.[62]

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example, the speakers in *Heffron v. International Society for Krishna Consciousness, Inc.* could not have distributed a message with the words "you should read our literature at this particular plot of land underneath your feet" if the intended reference was to a plot of land located somewhere other than one of the designated literature-distribution booths. *See* 452 U.S. 640, 647–49 (1981).

55 *See Mazo*, 54 F.4th at 133 (recounting the failure of Mazo and McCormick to obtain consent for their desired slogans); *see also* N.J. STAT. ANN. § 19:23-17 (West 2014) (banning slogans that "include or refer to the name of" any person or New Jersey corporation without consent).

56 *See Mazo*, 54 F.4th at 133.

57 *See id.* (noting that this was one of McCormick's desired slogans).

58 *Id.*

59 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015).

60 *Id.* The Court further explained that a facially content-based law must be subjected to strict scrutiny even if the government has a "benign motive" or "content-neutral justification." *Id.* at 2228. *City of Austin* did not disturb this aspect of *Reed*'s holding. *See* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1475 (2022).

61 *Reed*, 135 S. Ct. at 2231.

62 *See* Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 707 (5th Cir. 2020) ("To determine whether a sign is 'off-premises' and therefore unable to be digitized, government officials must read it. This is an 'obvious content-based inquiry' . . . ." (quoting *Reed*, 135 S. Ct. at 2231)), *overruled by City of Austin*, 142 S. Ct. 1464; *see also* Thomas v. Bright, 937 F.3d 721, 730

But *City of Austin* retreated from that clear rule. Like the law invalidated in *Reed*, Austin's sign ordinance clearly required enforcement officials to read the sign's message in order to determine whether to apply the on-/off-premises restriction.[63] However, the Court rejected the Fifth Circuit's holding that a law is content-based whenever it requires an enforcement official to examine its message.[64] Aside from the two examples regarding sign ordinances and solicitation, the Court gave little guidance for how lower courts should decide what counts as "neutral" in future cases. Indeed, the dissent worried that the Court did not sufficiently explain how lower courts should determine what counts as a "sufficiently substantive or specific content-based classification."[65] Introducing these exceptions to the previous rule made it possible for lower courts to adopt broad interpretations of the content-neutrality principle. *Mazo* appears to vindicate the concern that departing from *Reed* may have jeopardized First Amendment freedoms.

The *Mazo* court should have narrowly read *City of Austin* as establishing two exceptions to *Reed*: examination of speech is permissible only to (1) "distinguish based on location"[66] or (2) determine whether the speech qualifies as solicitation.[67] That would have preserved as much of *Reed*'s rule-like clarity as possible.[68] Such clarity is particularly important in this area of the law, where censorship is often subtle and sometimes operates even when the government has innocent motives.[69] But the extrinsic features test threatens to swallow the content-based versus content-neutral distinction altogether. To prevent additional expansions of *City of Austin*, the Supreme Court should clarify its limits in a future case.

(6th Cir. 2019) (concluding that sign regulation was content based where it required a Tennessee official to "read the message written on the sign and determine its meaning, function, or purpose"), *abrogated in part by City of Austin*, 142 S. Ct. 1464.

[63] *City of Austin*, 142 S. Ct. at 1472.

[64] *Id.* at 1471.

[65] *Id.* at 1486 (Thomas, J., dissenting).

[66] *Id.* at 1472 (majority opinion).

[67] *Id.* at 1473.

[68] Some have argued that *Reed v. Gilbert* itself introduced confusion, not clarity, into First Amendment doctrine. *See The Supreme Court, 2021 Term — Leading Cases*, 136 HARV. L. REV. 320, 326 (2022). But those criticisms depend on the premise that courts might have been unsure whether to apply *Reed*'s content-neutrality rule to areas of First Amendment doctrine that are governed by different tests. To be sure, *Reed* does not apply to cases involving conduct (as opposed to speech) or commercial speech. *See* Note, *Free Speech Doctrine after* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1987–98 (2016). It also does not apply to laws that compel disclosure or reporting of factual information, which do not require heightened First Amendment scrutiny. *See id.* at 1987; *cf.* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234–35 (2015) (Breyer, J., concurring in the judgment) (arguing that regulatory requirements such as securities-law disclosures and labeling requirements for consumer electronic devices should not trigger strict scrutiny). *Reed* announced a clear rule for the cases to which it applies.

[69] *See Reed*, 135 S. Ct. at 2229 ("Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute.").