

No. 24-1594

**United States Court of Appeals
for the Third Circuit**

ANDY KIM, ET AL.,

Plaintiffs-Appellees,

v.

CHRISTINE GIORDANO HANLON, IN HER OFFICIAL CAPACITY AS MONMOUTH
COUNTY CLERK, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of New Jersey, No. 3:24-01098 (ZNQ-TJB)(Quraishi, J.)

**BRIEF FOR *AMICI CURIAE*
RACIAL JUSTICE ADVOCACY ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE*

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the League of Women Voters of New Jersey, Salvation and Social Justice, New Jersey Alliance for Immigrant Justice, New Jersey Policy Perspective, AAPI New Jersey, Asian American Legal Defense and Education Fund, and Asian Americans Advancing Justice | AAJC make the following disclosure regarding their corporate status:

All *amici* are private, non-profit organizations that have no parent corporation and no publicly held corporation has any form of ownership interest in any of the *amici*.

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INTEREST OF *AMICI CURIAE*¹

Amici curiae the League of Women Voters of New Jersey (“LWVNJ”), Salvation and Social Justice (“SandSJ”), New Jersey Alliance for Immigrant Justice (“NJAIJ”), New Jersey Policy Perspective (“NJPP”), AAPI New Jersey (“AAPI NJ”), Asian American Legal Defense and Education Fund (“AALDEF”), and Asian Americans Advancing Justice | Advancing Justice (“Advancing Justice-AAJC”) are nonpartisan, non-profit organizations working and/or based in New Jersey. LWVNJ, the New Jersey chapter of the national League of Women Voters, is a grassroots organization working to protect and expand voting rights and ensure everyone is represented in our democracy. SandSJ is a statewide racial justice organization in New Jersey that has advocated for major voting rights efforts, including restoring the right to vote to all people with criminal convictions. NJAIJ is New Jersey’s largest immigration coalition and is regularly a leader in campaigns to expand rights, including fair and transparent redistricting, language access, and visibility for immigrants and communities of color through data disaggregation. NJPP is a think tank that focuses on state-level public policies that lift up economic, racial and social justice through evidence-based research and analysis, strategic communications and authentic partnerships, including on democracy-related issues.

¹ All parties have consented to the filing of this brief. No party’s counsel or other person except *amici* and their counsel authored this brief or contributed money to fund its preparation or submission.

AAPI NJ is a statewide Section 501(c)(3) nonprofit organization that advocates for the rights and representation of the over 1 million Asian American and Pacific Islander community members in New Jersey. AALDEF is a national organization, founded in 1974, that protects and promotes the civil rights of Asian Americans through organizing, advocacy, and litigation. Advancing Justice-AAJC is a national, nonprofit, nonpartisan organization that seeks to advance the civil and human rights of Asian Americans and to build and promote a fair and equitable society for all.

Plaintiffs-Appellees have challenged New Jersey's primary ballot rules principally because of the burdens they impose on candidates and the electoral process. But these rules also burden voters' rights. *Amici* work to address these burdens. *Amici* can thus provide the perspective of voters affected by New Jersey's primary ballot design. No party in this appeal focuses on this crucial perspective, yet it is necessary to be considered.

BACKGROUND & SUMMARY OF ARGUMENT

Amici and counsel for *amici* are nonpartisan organizations that neither endorse nor oppose candidates. Our interest is in ending the deleterious and racially discriminatory impact of New Jersey's primary ballot design, known as "the county

line.” We urge this Court to affirm the district court’s decision to enjoin use of the county line in the upcoming New Jersey primary.

The county line is a sophisticated form of voter suppression. While voter suppression elsewhere might outright block voters from exercising their right to vote, New Jersey’s form of suppression manipulates voters in a distinct yet equally harmful and discriminatory manner. This harm disproportionately affects Black, Asian, Latina/o, and other voters of color, and new citizens.

New Jersey’s fixed election design diminishes voting power, hinders candidates of color and women from running for office and being elected, and ensures that the state’s elected officials remain accountable to county party bosses, not voters. The district court accordingly did not abuse its discretion in blocking use of the county line in favor of the public interest. *Amici* urge this Court to affirm the district court’s grant of injunctive relief.

ARGUMENT

I. The District Court Properly Ruled That Public Interest Favors Injunctive Relief Because the County Line Burdens the Right to Vote

New Jersey’s discriminatory primary ballot design encumbers voting rights by allowing county party leadership to dictate who is on the ballot and how prominently (or not) they are positioned on it, and thereby mislead, confuse, and manipulate voters before they even cast their ballot. Too often, whether or how New Jersey voters vote is immaterial because the outcome has already been decided.

That harm is borne disproportionately by Black, Asian, Latina/o, and other voters of color. This violates the spirit of democratic elections and contravenes established legal standards protecting the right to vote. Given the substantial evidence of harm to voters and candidates, the district court did not abuse its discretion in enjoining use of the county line for the upcoming election.

When reviewing a district court’s preliminary injunction decision, this Court “review[s] . . . for an abuse of discretion, an error of law, or a clear mistake in the consideration of proof.” *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). Abuse of discretion is a “deferential” standard.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). A district court’s decision can be appropriate even without a hearing. *See ADP, LLC v. Lynch*, 678 F. App’x 77, 79 (3d Cir. 2017).

In this case, the district court’s decision rested on a searching, exhaustive review of the evidence presented by the parties and six *amici* through written submissions and a nine-hour evidentiary hearing, which included seven witnesses.²

The district court’s finding that the county line’s deleterious effects on voters and

² *Kim v. Hanlon*, Opinion, Doc. No. 194, No. 24-01098, at 22-23 (D.N.J. filed Mar. 29, 2024). While the district court’s decision was limited to only the Democratic party primary, arguments and evidence offered in the case below challenged the fairness and constitutionality of New Jersey’s ballot design laws broadly. Importantly, the imminent and irreparable harm suffered by voters by the county line is shared by all voters, regardless of party affiliation. Accordingly, *amici* aver that the county line is unconstitutional and should be abolished for all party primaries.

candidates evinced a likelihood of success on the merits and showing of irreparable harm and that, therefore, the public interest warranted a preliminary injunction, was well-supported.³

A. New Jersey’s Primary Ballot Design Burdens the Right to Vote by Manipulating and Confusing Voters

Since New Jersey’s primary ballot is designed to manipulate, confuse, and influence voters into voting for preselected candidates, the district court did not err in finding that the county line infringes upon the fundamental right to vote.⁴ This infringement is not merely procedural, but also strikes at the heart of democratic participation, effectively diluting voter choice and agency.

New Jersey is the only state that permits counties to organize primary election ballots by bracketing groups of candidates for different offices in a column (or row).⁵ In counties using the “county line” design, bracketed candidates running for different offices usually appear in the same column together, while unbracketed candidates are exiled separately, or, depending on the County Clerk’s discretion, listed with other unrelated unbracketed candidates several columns away, in “Ballot Siberia.”⁶

³ *See id.* at 47.

⁴ *See id.* at 46.

⁵ JULIA SASS RUBIN, TOEING THE LINE: NEW JERSEY PRIMARY BALLOTS ENABLE PARTY INSIDERS TO PICK WINNERS, N.J. POL’Y PERSPECTIVE (June 29, 2020), <https://www.njpp.org/publications/report/toeing-the-line-new-jersey-primary-ballots-enable-party-insiders-to-pick-winners/>.

⁶ *Id.*

This approach departs from the conventional “office block” design used in every other state, the District of Columbia, and two New Jersey counties, in which all candidates running for a particular office are listed under that office.⁷

Apart from being highly unusual, New Jersey’s county line design is also discriminatory, manipulative, and confusing. First, New Jersey’s discriminatory ballot design rules grant bracketed candidates more favorable positions on the ballot (e.g., further to the left or closer to the top) than unbracketed candidates. Candidates listed first on a ballot receive a significant advantage due to “positional bias” or “primacy effect,” a well-documented phenomenon that “when choosing between a set of visually-presented options, a significant percentage of people will demonstrate a bias toward choosing the first or earlier-listed option.”⁸ This bias not only favors certain candidates, but also interferes with voters’ ability to make independent and informed choices.

New Jersey’s discriminatory ballot design rules confer positional bias on candidates “blessed” by county parties. While bracketed candidates can be placed in that favored first position, unbracketed candidates are never afforded that same

⁷ During the June 2020 primary, Hunterdon, Passaic, and Warren counties also used an office block structure for their vote-by-mail ballots. The Morris County Republican party used office block ballot design until 2021. *Kim v. Hanlon*, Verified Complaint, Doc. No. 1, No. 24-01098, at p. 18 (D.N.J. Mar. 29, 2024).

⁸ See *Kim v. Hanlon*, Verified Complaint, Doc. No. 1, No. 24-01098, Dr. Josh Pasek, Expert Report, Ex. B, at ¶ 4 (D.N.J. filed Mar. 29, 2024).

opportunity.⁹ This creates a system whereby county party leadership awards a significant, nearly insurmountable advantage on the candidates they endorse.¹⁰

Party-endorsed candidates grouped in a single, easily identifiable column gain an additional visual advantage, as voters are unconsciously steered towards candidates in this column, known as the “weight of the line.” Candidates in Ballot Siberia, on the other hand, appear less legitimate to voters.¹¹ The combined impact of the visual weight of the county line and the primacy benefits for early placement of bracketed candidates is substantial. A statistical study found that “the first position benefits and the weight of the line appear to reinforce one another, yielding even larger benefits when they present together.”¹² Ultimately, the county line manipulates voters’ unconscious biases to steer them toward certain preselected

⁹ *Kim, supra* note 7, at pp. 18-19.

¹⁰ *See Kim, supra* note 8, Ex. B, at ¶ 183. Some county clerks “are willing to manipulate the rules to place” certain bracketed candidate groupings first, specifically to take advantage of the benefits of the first position. *See* Brett M. Pugach, *The County Line: The Law and Politics of Ballot Positioning in New Jersey*, 72 RUTGERS U. L. REV. 629, 655-656 (2020). Expert analysis by Dr. Samuel S.-H. Wang of 45 congressional and senatorial primaries from 2002 to 2022 found that the difference between being on the county line and not varies by a range of 13 to 79 percentage points—an average of 38% margin difference. Dr. Wang found that “the likelihood that it could have occurred by chance was less than 1 in 1 quintillionth.” *Kim v. Hanlon*, Verified Complaint, Doc. No. 1, No. 24-01098, Dr. Samuel S.-H. Wang, Expert Report, Ex. D, at p. 11 (D.N.J. filed Mar. 29, 2024); *Kim, supra* note 7, at pp. 23-24.

¹¹ *See* Pugach, *supra* note 10.

¹² *See Kim, supra* note 8, Ex. B, at ¶ 183.

candidates, making it harder for voters to find their preferred candidate on the ballot and vote for them.

In fact, New Jersey ballot design rules run afoul of federally-recognized best practices and general good balloting principles;¹³ as a result, primary ballots contain features that induce voter confusion and voting errors, such as races split between different rows and columns.¹⁴ This design can be especially confusing for first-time voters, new citizens, those with limited English proficiency (“LEP”), low literacy skills, and even new New Jersey residents from one of the other 49 states.¹⁵ Studies

¹³ *Id.* at ¶ 106; see *Designing Polling Place Materials*, U.S. Election Assistance Comm’n (last visited Mar. 10, 2024), <https://www.eac.gov/election-officials/designing-polling-place-materials>.

¹⁴ In its June 2021 primary elections, for example, Camden County’s Democratic Party ballot for Camden City had a three-column gap and a four-column gap between candidates for the same office, as well as multiple split-row races. See David Wildstein, *Most New Jerseyans oppose organization lines, FDU poll says*, N.J. GLOBE (Nov. 15, 2022), <https://newjerseyglobe.com/polling/most-new-jerseyans-oppose-organization-lines-fdu-poll-says/> (first image above the article).

¹⁵ One in five Americans struggle to read English at a basic level. For people who struggle to read, “the electoral process can become its own form of literacy test,” creating barriers to voting, “from registration to casting a ballot.” This difficulty is exacerbated when the ballot is visually confusing and not intuitive. Annie Waldman & Aliyya Swaby, *How We Analyzed Literacy and Voter Turnout*, PROPUBLICA (Sept. 12, 2022), <https://www.propublica.org/article/voter-participation-literacy-accessibility>. Additionally, due to insufficient language access at the polls, as well as being new to the “system”, new citizens are also affected by many of the same voting challenges as voters of color. New citizens are often first-time voters in a household, thus even less familiar with the peculiarities of New Jersey’s ballot design. U.S. IMMIGRATION POLICY CENTER, *NEW AMERICAN VOTERS IN NEW JERSEY: BUILDING THE ELECTORAL POWER OF NATURALIZED VOTERS* (Sep. 2022), <https://newamericanvoters.org/assets/2022/10/NJ-NAV-State-Report-1.pdf>.

have shown that new citizens are disproportionately people of color, and first-time LEP voters are overwhelmingly Asian and Latina/o.¹⁶

These and other confounding design features “contribute to . . . systemic biases and voter confusion leading to over and under votes, which can disenfranchise substantial numbers of voters.”¹⁷ A study of New Jersey’s 2020 primary election results, for example, found that confusion over the county line design resulted in almost 20% of voters not voting in the U.S. Senate race in one congressional district, and almost 32% of voters were disenfranchised by selecting too many candidates for the House of Representatives race in another district.¹⁸

Consequently, this undemocratic process diminishes the power of New Jersey voters by forcing them to cast their vote on a visually perplexing ballot that manipulates, misleads, and confuses them, often resulting in the invalidation of their own vote.

¹⁶ See, e.g., APIAVote & AAPI Data, 2022 AAPI Voter Demographics by State, New Jersey 2 (2022), <https://tinyurl.com/4pu63k4e>; *NBC News Exit Poll: Biden Outperforming Clinton Among New Voters*, NBC NEWS (Nov. 3, 2020), <https://tinyurl.com/2nxfddad>.

¹⁷ See JULIA SASS RUBIN, *supra* note 5.

¹⁸ JULIA SASS RUBIN, DOES THE COUNTY LINE MATTER? AN ANALYSIS OF NEW JERSEY’S 2020 PRIMARY ELECTION RESULTS, N.J. POL’Y PERSPECTIVE (Aug. 13, 2020), <https://www.njpp.org/publications/report/does-the-county-line-matter-an-analysis-of-new-jerseys-2020-primary-election-results/>.

B. New Jersey’s Primary Ballot Design Rules Disproportionately Burden Voters and Candidates of Color and Women Candidates

The burdens of New Jersey’s intentionally misleading ballot design fall disproportionately on Black, Asian, Latina/o, and other voters of color, new citizens, and candidates of color and women candidates, who historically face obstacles to voting and running for office. Ballot design studies demonstrate “that when basic usability principles are ignored in the design of ballots, a significant percentage of voters will be disenfranchised, and the affected voters will disproportionately be . . . minority [voters].”¹⁹ Indeed, “poor and racial and ethnic minorities [across] the

¹⁹ See LAWRENCE NORDEN ET AL., BETTER BALLOTS, BRENNAN CTR. 20, at 13 (2008) (listing this ballot design issue as “Problem 1”), https://www.eac.gov/sites/default/files/eac_assets/1/28/Better-Ballots-Brennan-Center.pdf; see also *id.* at 19 (“[S]everal studies indicate that residual vote rates are higher in low-income and minority communities and among the elderly As a result, the failure of a voting system to protect against residual votes is likely to harm low-income and minority voters, as well as the elderly, more severely than other communities.” (citing eight academic studies, including Robert Darcy & Anne Schneider, *Confusing Ballots, Roll-Off, and the Black Vote*, 42 W. Pol. Q. 347 (1989))); LAWRENCE NORDEN ET AL., BETTER DESIGN, BETTER ELECTIONS, BRENNAN CTR. (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Better_Design_Better_Elections.pdf (“Poor design increases the risk for lost or misrecorded votes among all voters, but the risk is even greater for particular groups. Several studies have shown higher rates of lost or misrecorded votes in low-income and minority communities as well as for the elderly and the disabled[.]” (footnote omitted)).

country have been most impacted when these problems are not adequately addressed.”²⁰

The impact of the county line on voters of color exacerbates the effects of structural racism, serving as a barrier to political representation and voter agency. For instance, in Camden—in a county notorious for its Ballot Siberia²¹—people of color make up over 95% of the city’s population.²² In Camden County, one in four Black residents and one in five Latina/o residents, live in poverty.²³ Unsurprising, as New Jersey has one of the worst racial wealth gaps in the country.²⁴ Voters experiencing poverty are disproportionately impacted by poor ballot design, which makes the county line particularly harmful to these communities.²⁵

The county line also diminishes voter choice in “majority-minority” areas by causing candidates to withdraw from the race before they even make it to the ballot.

²⁰ LAWRENCE NORDEN & SUNDEEP IYER, DESIGN DEFICIENCIES AND LOST VOTES, BRENNAN CTR. 4 (2011), https://www.brennancenter.org/sites/default/files/2019-08/Report_Design_Deficiencies_Lost_Votes.pdf. In the report mentioned *supra* note 5, Dr. Sass Rubin found that the Democratic Congressional District 2 (CD2) primary in 2020 likely resulted in a 20% undervote. CD2, a plurality district, was comprised of 35% people of color.

²¹ See Wildstein, *supra* note 14.

²² Black people comprise almost 43% and the Latina/o community is 53.3% of the population. U.S. Census Bureau, Quick Facts: Camden City, New Jersey, <https://www.census.gov/quickfacts/fact/table/camdencitynewjersey/IPE120219#IPE120219> (last visited Feb. 5, 2024).

²³ *Id.*

²⁴ See HARBANI AHUJA ET AL., TWO NEW JERSEYS: ONE STATE OF INEQUITY, N.J. INST. FOR SOC. JUSTICE (Feb. 2024), <https://njisj.org/reports/stateofinequity/>.

²⁵ See NORDEN, BETTER BALLOTS, *supra* note 19.

In 2021, the incumbent Assemblyman for Legislative District 31, overwhelmingly comprised of people of color,²⁶ was dropped from the county line due to a party practice that allows town mayors to choose county line recipients.²⁷ The Assemblyman chose not to run because of the “daunting” challenges of running off the county line.²⁸ The Mayor/party-endorsed candidate ran unopposed.²⁹ Instead of having a meaningful choice, the voters of this racial plurality district had their decision made for them by one man due to New Jersey’s ballot design system. Removing voters’ opportunity to elect a preferred candidate with one chosen for

²⁶ Legislative District 31 is majority people of color: in 2021, when the 2010 legislative maps were in effect, the district was 25.6% Black, 25.2% Latino/a, and 23.0% Asian. *N.J. 2020 State Legislatures*, DAVE’S REDISTRICTING, <https://davesredistricting.org/maps#viewmap::3e874200-c618-42b5-8ed0-55cfc0bc5755> (last visited Mar. 6, 2024).

²⁷ Daniel Israel, *Chiaravalloti Ends Re-Election Bid*, HUDSON REPORTER (Apr. 19, 2021), <https://hudsonreporter.com/2021/04/19/chiaravalloti-ends-re-election-bid>; see also Ryan P. Haygood ET AL., *The End of the Line: Abolishing New Jersey’s Antidemocratic Primary Ballot Design*, 48 SETON HALL J. OF LEGIS. & PUB. POL’Y 1, 21 (2023).

²⁸ Israel, *supra* note 27. (“In reviewing my options, I considered running off the line,” Chiaravalloti said. “The task of winning off the line is daunting in a normal year; however, running against the [Hudson County Democratic Organization] this year would mean running against Governor Phil Murphy. I believe the power of the line and the popularity of Governor Murphy would make it impossible to compete successfully. As a strong supporter of the Governor, I do not see any benefit to running against a ticket he leads.”).

²⁹ *Id.*

them is voter suppression.³⁰ In New Jersey, voters of color bear this suppression the most.

New Jersey's primary ballot design laws also create insurmountable barriers for aspiring candidates of color and women candidates to be elected—as reflected in the racial and gender disparities in the State Legislature.³¹ While people of color are nearly 50% of New Jersey's population,³² the State Legislature is nearly 70% white, a disparity reinforced by the county line.³³ Asian Americans, one of the fastest-growing demographics in the state, hold only 5% of state legislative seats.³⁴ New

³⁰ Ronald Chen & John Farmer, Jr., *New Jersey's primary election ballots are rigged*, NJ.COM (June 27, 2021), <https://www.nj.com/opinion/2021/06/new-jerseys-primary-election-ballots-are-rigged-opinion.html> (Ronald Chen is the former Public Advocate of New Jersey and John Farmer, Jr. was the Attorney General of New Jersey from 1999-2006); Clifford Kulwin & Ahmed Shedeed, *Voter suppression by another name*, NJ.COM (May 2, 2021), <https://www.nj.com/opinion/2021/05/voter-suppression-by-another-name-opinion.html>.

³¹ Sue Altman, Ryan Haygood & Jesse Burns, *Democracy in New Jersey is Tainted*, NJ.com (Feb. 21, 2021), <https://www.nj.com/opinion/2021/02/democracy-in-new-jersey-is-tainted-opinion.html>; see also Ryan P. Haygood & Henal Patel, *New Jersey, this is no way to elect a U.S. Senator*, NJ.COM (Nov. 26, 2023), <https://www.nj.com/opinion/2023/11/new-jersey-this-is-no-way-to-choose-a-senator-opinion.html>.

³² U.S. Census Bureau, QuickFacts: N.J., <https://www.census.gov/quickfacts/NJ> (last visited Mar. 5, 2024).

³³ See Colleen O'Dea, *Will the new Legislature be any more diverse than the last?*, N.J. SPOTLIGHT NEWS (Jan. 9, 2024), <https://www.njspotlightnews.org/2024/01/how-diverse-is-njs-221-legislature/>.

³⁴ *Id.* At the county level, only 1.5% of elected officials are either Asian Americans or Pacific Islander Americans. This, too, reflects a broader trend of underrepresentation at all political levels going back years. See Amber Reed *et al.*, *How New Jersey's Line Disempowers Asian Americans*, N.J. MONITOR, (Feb. 13,

Jersey’s state representation is also overwhelmingly male-dominated.³⁵ While women account for nearly 51% of New Jersey’s population,³⁶ they make up only 34.2% of the State Legislature.³⁷

The county line causes these disparities in representation by limiting voters’ choices. Because, the county line favors incumbents, who are disproportionately white and male,³⁸ it perpetuates a cycle of underrepresentation. Congresswoman Bonnie Watson-Coleman expressed that the county line affirmatively limits opportunities for women and persons of color to compete and win as candidates,³⁹ and recently a group of 45 women elected officials and former candidates called for abolishing the county line.⁴⁰ Even with the advantages of incumbency, the county line can hinder a woman candidate’s chance of success. For example, New Jersey’s

2024), <https://newjerseymonitor.com/2024/02/13/how-new-jerseys-line-disempowers-asian-americans/>.

³⁵ *O’Dea, supra* note 33.

³⁶ U.S. Census Bureau, *supra* note 32.

³⁷ *See O’Dea, supra* note 33.

³⁸ *See* CENTER FOR AMERICAN WOMEN AND POLITICS, WOMEN IN NEW JERSEY, RUTGERS U. (Apr. 28, 2021), <https://cawp.rutgers.edu/sites/default/files/resources/nj.pdf>.

³⁹ The NJ Congresswoman explains that “the political mechanisms that order who gets to be the candidate, who gets the valued position on the ballot, who gets to be supported – that had generally been controlled by white men who were most comfortable with advancing people that they knew best, which were white men.” Joey Fox, *An Interview with Bonnie Watson-Coleman*, N.J. GLOBE (Feb. 15, 2024), <https://newjerseyglobe.com/congress/an-interview-with-bonnie-watson-coleman>.

⁴⁰ *Elected Officials and Former Candidates Call for Abolishing the Line*, INSIDER N.J. (Mar. 14, 2024), <https://www.insidernj.com/press-release/elected-officials-and-former-candidates-call-for-abolishing-the-line/>.

recent redistricting forced incumbent State Senator Nia Gill to run against a then-colleague in the 2023 primary elections for Legislative District 27.⁴¹ Although both were longtime incumbents, Senator Gill did not secure the line and consequently lost the race and her seat.⁴² In turn, New Jersey lost a Black woman in the legislature.

The county line has also suppressed voter turnout by fueling voter disillusionment and distrust in the integrity of New Jersey's democratic processes.⁴³ Seeing uncompetitive primary races⁴⁴ and a lack of meaningful choices, voters ultimately believe that election results in New Jersey are a foregone conclusion.⁴⁵

⁴¹ Sophie Nieto-Munoz, *Two longtime Democratic senators square off in primary*, N.J. MONITOR (May 5, 2023), <https://newjerseymonitor.com/2023/05/05/two-longtime-democratic-senators-square-off-in-primary>. As of 2022, Legislative District 27 is comprised of 34.3% people of color. U.S. Census Bureau, ACS Demographic and Housing Estimates: State Senate District 27, [https://data.census.gov/table?g=040XX00US34\\$6100000&y=2022](https://data.census.gov/table?g=040XX00US34$6100000&y=2022) (last visited Apr. 7, 2024).

⁴² Joey Fox, *Nia Gill did extremely well in Montclair—but it wasn't enough to win*, N.J. GLOBE (June 8, 2023), <https://newjerseyglobe.com/legislature/nia-gill-did-extremely-well-in-montclair-but-it-wasnt-enough-to-win/>.

⁴³ In general, voter disillusionment and frustration leads to lack of trust in the government, the electoral system, and voting, which in turn leads to low rates of voter engagement. See *Why voting-eligible citizens sat out the 2020 election*, PUBLIC WISE RESEARCH (June 10, 2022), <https://publicwise.org/publication/why-voting-eligible-citizens-sat-out-the-2020-election/>.

⁴⁴ In 2023, only 11.3% of New Jersey's legislative positions were contested in the primaries—one of the lowest percentages in the country. See Colleen O'Dea, *Understanding the party line in NJ*, N.J. SPOTLIGHT NEWS (Dec. 4, 2023), <https://www.njspotlightnews.org/2023/12/understanding-the-party-line-in-nj/>.

⁴⁵ The skepticism is warranted. No incumbent state legislator on the county line has lost a primary in New Jersey since 2009, and only two incumbent congressional legislators on the county line have lost a primary in the state in the last 50 years.

The voter suppression and disillusionment caused by the county line is clearly seen in turnout in New Jersey’s recent elections, where just 12% of voters participated in the 2022 primary elections⁴⁶ and only 41% participated in the 2022 general election—a two-decade low for midterm election turnout.⁴⁷ Among Black, Latina/o, Asian and other voters of color, New Jersey has earned a reputation as a state where “[p]arty insiders, elected officials, and power players”—not the voters—“pick our representatives for us.”⁴⁸ The district court’s grant of injunctive relief, therefore, not only corrects an immediate injustice, but is a necessary step toward rectifying the long-term disenfranchisement of communities of color. The district court correctly determined that without its injunctive relief, the county line “leave[s] our democratic

JULIA SASS RUBIN, *supra* note 5. In the last 20 years, only 3 of 209 incumbent legislators in competitive primaries who ran on the county line in all of the counties in their districts have lost their primaries. It is nearly impossible for an incumbent to lose when running on the line. *See Kim v. Hanlon*, Verified Complaint, Doc. No. 1, No. 24-01098, Dr. Julia Sass Rubin, Expert Report, Ex. C, at p. 3 (D.N.J. filed Mar. 29, 2024). Further, the county line gives candidates, on average, a 38-percentage point advantage over candidates who are not on the line. This advantage, in primary elections with low voter turnout and narrow margins, is nearly insurmountable. *See O’Dea*, *supra* note 44; *see also* JULIA SASS RUBIN, *supra* note 5.

⁴⁶ David Wildstein, *12% of New Jersey voters turned out in 2022 primary election*, N.J. GLOBE (Aug. 12, 2022), <https://newjerseyglobe.com/campaigns/12-of-new-jersey-voters-turned-out-in-2022-primary-election/>.

⁴⁷ Colleen O’Dea, *NJ midterms see low turnout*, N.J. SPOTLIGHT NEWS (Dec. 7, 2022), <https://www.njspotlightnews.org/2022/12/nj-2022-midterm-election-sees-low-turnout/>.

⁴⁸ Charlene Phelps & Joe Marchica, *How can we fix New Jersey’s fixed primary elections?*, N.J. MONITOR (Mar. 11, 2022), <https://newjerseymonitor.com/2022/03/11/how-can-we-fix-new-jerseys-fixed-primary-elections-opinion/>.

system susceptible to justifiably being called into question as to the legitimacy and result of [] election[s],” which “destroy[s] voter confidence in government, their elected representatives, and this and future elections.”⁴⁹

C. New Jersey’s Primary Ballot Design Rules Unconstitutionally Burden the Right to Vote

By allowing county party bosses to put a thumb on the scale before voters are even allowed to cast their ballots, New Jersey’s primary ballot design unconstitutionally burdens the fundamental right to vote.

The Supreme Court has long recognized that “voting is of the most fundamental significance under our constitutional structure,” and that the right to an effective vote is protected by the Equal Protection Clause of the Fourteenth Amendment. *Burdick v. Takushi*, 504 U.S. 428, 433-44 (1992). Indeed, the right to vote is the “fundamental political right . . . preservative of all rights.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

A burden on the right to vote is not taken lightly. “However slight [the] burden may appear, . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *See Crawford v. Marion Cty.*

⁴⁹ *See Kim, supra* note 2, at 46-49.

Election Bd., 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

Further, courts have consistently recognized that misleading or unfair ballot designs can improperly burden the right to vote. *See, e.g., McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (holding “incumbent first” ballot statute unconstitutional because ballot design “burden[ed] the fundamental right to vote possessed by supporters”); *Nelson v. Warner*, 477 F. Supp. 3d 486 (S.D.W. Va. 2020) (concluding ballot ordering statute “burden[ed] the individual plaintiffs’ right to vote” by “systemically awarding the highly beneficial first ballot position to candidates based solely on their political party”).

Courts have also recognized that positional bias, caused by ballot design laws, can unfairly influence voters and thereby burden the right to vote. For instance, in *McLain v. Meier*, the Eighth Circuit affirmed the district court’s finding that there is “ballot advantage in the first position” and concluded that this positional bias burdened the right to vote. 637 F.2d at 1166-67; *see also Graves v. McElderry*, 946 F. Supp. 1569, 1579 (W.D. Okla. 1996) (recognizing “position bias arising from ballot configuration” infringes on right to vote and “voters’ rights of free speech and association”).

In New Jersey, the burden of the county line on the right to vote is significant and discriminatory. The state’s primary ballot design burdens voters, frequently

resulting in voter disenfranchisement and impeding voters' ability to cast votes reflecting their preferences, especially among Black, Latina/o, Asian, and other voters of color. "While votes may not be actively suppressed, with classic measures like literacy tests or poll taxes," they are "devalued to a vanishing point by a system" that makes primary elections the critical competition, while structuring the ballots in those primaries with misleading cues that steer voters "toward choices favored by the [county party] bosses."⁵⁰ In that sense, the county line is a sophisticated form of voter suppression. Its subtlety does not diminish its impact; rather, it amplifies the need to affirm the district court's relief. While voter suppression elsewhere may outright block voters from exercising their right to vote, the county line dilutes the voting strength of voters, disproportionately affecting voters of color, LEP voters,⁵¹ and new citizens. These burdens cannot survive any level of scrutiny, let alone the strict scrutiny required under *Anderson-Burdick*; see *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 146 n.38 (3d Cir. 2022).

⁵⁰ Chen, *supra* note 30; see also Kim, *supra* note 8, Ex. B, at ¶ 106.

⁵¹ Sections 203 and 208 of the Voting Rights Act demonstrate that LEP voters are burdened by language inaccessibility, finding that "[w]hat is done at the local level by local officials has the most impact upon the ability of these [language] minorities to vote and the effectiveness of that vote . . . Many obstacles placed by these officials frighten, discourage, frustrate, or otherwise inhibit language minority citizens from voting." See S. Rep. No. 94-295, at 13 (1975). Forcing LEP voters to navigate a confusing ballot is one such obstacle.

Accordingly, the district court properly concluded that the county line likely imposes an unconstitutional burden on the right to vote.

D. New Jersey Voters Will Face Imminent and Irreparable Harm in the Upcoming 2024 Elections Without the District Court’s Injunctive Relief

In light of the likely violations of constitutional rights, the court correctly determined that continued use of the county line would inflict irreparable harm on Plaintiffs-Appellees, and that, accordingly, injunctive relief is in the public interest.

This Court has stated that “[i]n the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights.” *Council of Alt. Pol. Parties v. Hooks*, 121 F.3d 876, 883–84 (3d Cir. 1997). To this point, “[p]rotection of ‘franchise-related rights is without question in the public interest.’” *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 539 (5th Cir. 2013). “As a practical matter, if a plaintiff demonstrates both likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.” *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994).

Here, the district court did not abuse its discretion in finding that the balance of equities and public interest favor preliminary relief.⁵² The record evidence shows that the county line diminishes voter power and burdens the right to vote by

⁵² *Kim*, *supra* note 2, at pp. 47-49.

manipulating voters with a misleading and confusing ballot to predetermine the election outcomes.⁵³ And the district court’s emphasis on the importance of a fair ballot to the public interest astutely recognizes that New Jersey voters will suffer imminent and irreparable harm in the upcoming primary elections absent intervention. Irreparable harm arises when damage “cannot be redressed by a legal or an equitable remedy following a trial.” *Kamdem-Ouaffo v. Task Mgmt. Inc.*, 792 F. App’x 218, 221 (3d Cir. 2019) (quoting *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992)). Indeed, without the granted relief, the use of the county line during the 2024 primary election would infringe upon voters’ constitutional rights and entrench systemic biases. New Jersey voters, especially its Black, Latino/a, Asian, and other voters of color, would lack meaningful choice, subjected to the predetermined manipulations of the county line. These consequences cannot be remedied after the fact; the harm is immediate and definite upon the tabulation of the ballots in June 2024. *Id.* On the other end of the balance, “[n]either the government nor the public has any legitimate interest in enforcing an unconstitutional [law].” *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020).

Thus, the district court’s decision correctly weighs in favor of the public interest and protects the constitutional rights of New Jersey voters by allowing them

⁵³ See *Kim*, *supra* note 7.

to select party nominees without undue influence.⁵⁴ The ruling empowers New Jersey voters and enhances confidence in election results, while also addressing racial justice concerns underlying the use of the county line.

Accordingly, there is no basis upon which to conclude that the district court abused its discretion in deciding that Plaintiffs-Appellees are likely to succeed in showing that the county line burdens the right to vote, and that the balance of equities and public interest favor injunctive relief.

II. Overturning the District Court’s Necessary Relief Risks the Very Disruption the *Purcell* Principle Seeks to Avoid

The district court rightly concluded that the *Purcell* principle poses no barrier to ordering much-needed relief in the June primary election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). In fact, it would be more disruptive, and contrary to the interest of judicial economy and voter clarity, to halt relief that is well underway. Not a single county defendant has opted to appeal the injunction, and their acquiescence clearly indicates the feasibility of the relief. Indulging the request to undo this relief now risks the very confusion and disruption *Purcell* seeks to avoid.

The “*Purcell* principle” instructs lower courts to exercise caution in ordering last-minute changes to election laws that “result in voter confusion and consequent incentive to remain away from the polls.” *Id.* “Changes that require complex or

⁵⁴ *Kim*, *supra* note 2, at pp. 47-49.

disruptive implementation must be ordered earlier than changes that are easy to implement.” *Merrill v. Milligan*, 142 S. Ct. 879, 881 n.1 (2022) (Kavanaugh, J., concurring).

In this case, the district court properly ordered relief because its order enjoining the county line and requiring a more straightforward ballot design was issued well before the June 4 primary and can be readily implemented without disruption. First, Plaintiffs-Appellees sought relief 100 days before the primary date, and the district court’s March 29 injunction was ordered ahead of the statutory deadlines to conduct a public draw of candidates for the ballot and begin sending mail-in ballots. *See* N.J. Stat. Ann. §§ 19:14-12, 19:64-9 (West 2023). The district court’s order is neither complex nor disruptive and can plainly be implemented in time for the June primary. Two counties in New Jersey have long used the office block ballot design the district court ordered in place of the county line, as have several other counties in past elections.⁵⁵

⁵⁵ In fact, the Morris County Republican party only adopted the county line in 2021. *See* William Westhoven, *‘It’s a fair fight now’: Morris GOP votes for new county line on primary ballots*, DAILY RECORD (Feb. 9, 2021), <https://www.dailyrecord.com/story/news/2021/02/09/its-fair-fight-now-morris-gop-votes-new-county-line-primary-ballots/4437927001/>; *see also* @JuliaSassRubin, TWITTER (Mar. 31, 2024, 11:46 AM), <https://twitter.com/juliasassrubin/status/1774463290174853401?t=haGD4L1hrerM3x83bEak5Q>.

And in fact, all county defendants have opted to proceed with implementing the district court's ordered ballot design rather than continue litigating this appeal. On April 4, all New Jersey counties conducted the ballot draw under the district court's ordered ballot design.⁵⁶ It is Intervenor-Appellant's action now that significantly narrows that timeframe; its request, if granted, would force county clerks to redo the public draw and scramble to print and mail ballots mere days before the April 20 deadline for sending mail-in ballots,⁵⁷ causing the very disruption *Purcell* seeks to avoid.

Furthermore, as the district court found, it is New Jersey's *current* primary ballot design that creates voter confusion, not the more straightforward and common alternative mandated by the district court.⁵⁸ The misleading county line ballot has also long impaired electoral fairness and disproportionately disadvantaged communities of color, providing voters incentive to stay away from the polls. The district court's order to implement an office box ballot thus did the opposite of what *Purcell* guards against; it ordered a clearer ballot and simplified the voting process, helping eliminate the systemic biases created by the county line.

⁵⁶ See N.J. Div. of Elections, *2024 Primary Election Chronological Timetable*, <https://www.nj.gov/state/elections/assets/pdf/chrons/2024-chron-primary-election.pdf> (last visited April 7, 2024).

⁵⁷ *Id.*

⁵⁸ See *Kim*, *supra* note 2.

Therefore, to avoid creating a *Purcell* problem now, this Court should affirm the district court's decision.

CONCLUSION

In the interest of protecting the rights of voters, especially Black, Latina/o, Asian, and other voters of color, to cast their ballot free of undue burden, *Amici* respectfully urge this Court to affirm the district court's grant of preliminary injunctive relief.

Dated: April 9, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Henal Patel, certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 6,074 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(a)(7)(b)(iii) and L.A.R. 29.1(b).
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CERTIFICATE OF SERVICE

I, Henal Patel, certify that I filed the foregoing brief by *Amici Curiae* on April 9, 2024, using this Court's CM/ECF system, thereby serving all parties.

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