UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ANDY KIM, et al., Plaintiffs, v. CHRISTINE GIORDANO HANLON, in her capacity as Monmouth County Clerk, et al., Defendants	Docket No.: 3:24-cv-01098-ZNQ-TJB **Motion Return Date:** March 18, 2024 **CIVIL ACTION**

BRIEF OF DEFENDANT NANCY PINKIN IN HER OFFICIAL CAPACITY AS MIDDLESEX COUNTY CLERK IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THOMAS F. KELSO, ESQ.
Middlesex County Counsel
By: Michael S. Williams, Esq.
Deputy County Counsel
Middlesex County Administration Bldg.
75 Bayard Street, 2nd Floor
New Brunswick, NJ 08901
Tel. (732)745-3228
Fax. (732)745-4539
Attorneys for Defendant, Nancy Pinkin, in her Official capacity as Clerk of Middlesex County

Michael S. Williams
Deputy County Counsel
On the Brief

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PRELIMINARY STATEMENT

In this matter, the Plaintiffs Andy Kim, Sarah Schoengood, and Carolyn Rush and their related official campaign entities seek preliminary injunctive relief against 19 County Clerks enjoining them from designing ballots in columns or rows, requiring them to conduct a ballot draw for each office sought, and other restraints as to the arrangement of the ballot. Notably, the Plaintiffs do not seek to invalidate any statutory law or seek class relief on behalf of similarly situated campaigns.

With regard to Defendant Nancy J. Pinkin, sued in her official capacity as Middlesex County Clerk ("Middlesex County Clerk"), Plaintiffs Sarah Schoengood and Carolyn Rush would not even be on the ballot in Middlesex County as they respectively seek office in Congressional Districts 2 and 3, two districts located entirely outside of Middlesex County. Andy Kim, a Democratic candidate for United States Senate, a statewide office, would be on the Middlesex County ballot. However, per statutory law, Plaintiff Kim and other primary candidates for Senate would be placed at the top row or column on the ballot, and the candidates for Senate would be the "pivot point" or the office drawn for election. Accordingly, the relief Plaintiffs seek is overly broad as it seeks to impact a county for which Plaintiffs' concerns raised in their Verified Complaint are for the most part irrelevant. In doing so, Plaintiffs seek to take away the Middlesex County Clerk's discretion in arranging a ballot, preclude Middlesex County from following New Jersey public policy as

expressed in statute as it relates to providing candidates the right to file a joint petition, and restricts other candidates rights to associate freely amongst themselves.

Lastly, the relief Plaintiffs seek as a whole is not appropriate as Plaintiffs have not demonstrated a probability of success on the merits with regard to their constitutional claims, they have not demonstrated irreparable harm, and the balance of equities and public interest weigh heavily against such relief, particularly as it relates to Middlesex County for which the constitutional rights asserted in Plaintiffs' verified complaint are not applicable.

FACTUAL BACKGROUND

The clerk will rely on the facts asserted by other Defendant County Clerks and add the facts set forth in the Certification of Deborah Braga. Namely, that pursuant to N.J.S.A. 19:23-26.1, the United States Senate office has served as Middlesex County's "pivot point" and Plaintiff Andy Kim would accordingly be able to draw for his preferred ballot placement in Middlesex County. See Braga Cert. at ¶2-4.

LEGAL ARGUMENT

I. THIS COURT SHOULD DENY PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF BECAUSE PLAINTIFFS HAVE FAILED TO DEMONSTRATE IRREPARABLE HARM, THEY ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS, AND THE REQUESTED RELIEF IS NOT IN THE PUBLIC INTEREST AND THE BALANCE OF HARMS WEIGHS DECISIVELY AGAINST SUCH RELIEF.

Plaintiffs' request for preliminary injunctive relief fails because they are not likely to succeed on the merits, they have not demonstrated irreparable harm, and it would be in the public's interest to avoid the greater harm that would occur if the Court were to enter an Order infringing upon other candidate's associational rights, the clerk's broad discretion in determining how to arrange a ballot to make it understandable to the voter, and the State's ability to enforce its public policy as set forth under New Jersey statutory law.

"Preliminary injunctive relief is an extraordinary remedy and should be granted only in limited circumstances." Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004). To prevail on a motion for preliminary injunctive relief, Plaintiffs must demonstrate (1) a reasonable probability of success on the merits; (2) that the denial of the requested injunction will result in irreparable harm; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and

(4) whether granting the injunction is in the public interest. Issa v. Sch. Dist. of Lancaster, 847 F.3d 121, 131 (3d Cir. 2017).

As demonstrated below, Plaintiffs fail to establish all four factors and consequently, the request for preliminary injunctive relief should be denied.

A. Plaintiffs' Cannot Demonstrate Irreparable Harm if an Injunction Does Not Issue Against the Middlesex County Clerk.

To establish irreparable harm in the absence of preliminary relief, a movant has the burden of establishing a "clear showing of immediate irreparable injury." Donald J. Trump for President, Inc. v. Way, 492 F. Supp. 3d 354, 373 (D.N.J. 2020) (citing ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987)). The claimed injury cannot merely be possible, speculative or remote, in other words "a risk of irreparable harm is not enough." Laidlaw, Inc. v. Student Transp. of Am., Inc., 20 F. Supp. 2d 727, 766 (D.N.J. 1998), abrogated on other grounds by ADP, LLC v. Rafferty, 923 F.3d 113 (3d Cir. 2019) (internal citations omitted).

In this case, the Plaintiffs' ultimate goal is to prevail in a primary election. While Plaintiffs speculate that they could be harmed by receiving an unfavorable placement on the ballot, or a failure to be part of a slate of candidates, that does not rise to the level of an irreparable injury. First, with the exception of Plaintiff Kim, none of the Plaintiffs are campaigning for an office that would place them on a

Middlesex County ballot. In the case of Plaintiff Kim, as a statewide candidate for Senate, pursuant to statute and practice, he would have the same statistical opportunity to be drawn in the first column or row irrespective of whether he were to file a joint petition with other candidates. N.J.S.A. 19:23-26.1 (stating that "In the case of a primary election for the nomination of a candidate for the office of United States Senator and in the case of a primary election for the nomination of a candidate for the office of Governor, the names of all candidates for the office of United States Senator or Governor shall be printed on the official primary ballot in the first column or horizontal row designated for the party of those candidates."); see Braga Cert. Thus, assuming these claims have merit, much of Plaintiffs' arguments of being harmed by a "primacy effect" would not be applicable to the Middlesex County Clerk.

Even assuming Plaintiff Kim fails to be drawn in his preferred placement on the ballot, much like his ability to draw for such a placement, he would have the same opportunity as every other candidate to campaign and advise voters where they can find his name on the ballot. There would also be no impediment to Plaintiff Kim campaigning with and recruiting like-minded candidates to form a bracket of candidates. That said, there would be no irreparable harm to Plaintiff Kim as either with or without the grant of the preliminary injunctive relief, Plaintiff Kim will be able to be drawn for his preferred ballot position in Middlesex County and will have

an unfettered opportunity to run a successful campaign to be the Democratic Party nominee for Senator irrespective if he runs alone or if he decides to associate and bracket with other like-minded candidates.

Finally, to the extent that Plaintiffs' alleged irreparable harm comes as a result of an alleged constitutional injury, for the reasons set forth in Part B below, Plaintiffs have failed to demonstrate an irreparable injury as they have not demonstrated a reasonable probability of success on the merits with regard to their Constitutional claims against the Middlesex County Clerk.

B. **Plaintiffs Cannot Demonstrate a Probability of Success on the Merits As Against the Middlesex County Clerk Particularly As The Bracketing Laws Do Not Violate Plaintiffs' Constitutional Rights, Particularly When Plaintiffs' Allegations Are Not Applicable As Against the Middlesex County Clerk.**

As demonstrated below, Plaintiffs cannot demonstrate a probability of success on the merits as their claims relate to the Middlesex County Clerk as they will not be able to establish that the Middlesex Clerk's actions would violate their First Amendment Right to Vote, their right to Equal Protection Under the Law, Right to Freedom of Association, nor would her actions violate the Elections Clause under the Federal Constitution.

1. **Plaintiffs Cannot Demonstrate a Violation of the Right to Vote Under the First and Fourteenth Amendment**

In Count I of the Complaint, Plaintiffs allege violations of the First and

Fourteenth Amendments based on their constitutional right to vote.

As this Court has recognized in the companion case of Conforti v. Hanlon[1], the Supreme Court developed the Anderson-Burdick test to analyze the constitutionality of burdens on election-related First Amendment rights. Under this test, a court weighs the burdens placed on the rights a plaintiff seeks to assert verses the State's interests and the extent that these interests require such a burden. Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and Burdick v. Takushi, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). If the law imposes a severe burden, then strict scrutiny is appropriate, but if the burden is not severe but only imposes reasonable nondiscriminatory restrictions, the State's important regulatory interests are generally sufficient to justify the restrictions. Mazo v. Way, 54 F.4th 124, 145 (3d. Cir. 2022).

Plaintiffs First Amendment Constitutional claims fail as the mandate to follow N.J.S.A. 19:49-2 and to permit candidates to file a joint petition in no way burdens the right to vote as any voter would have the unfettered ability to vote for candidate of his or her choice and would not dilute any votes.

Even assuming for the sake of argument that Plaintiffs' assertion that the primacy effect of being in the first column or row biases voters, such an argument is

[1] Available at 2022 WL 1744774 (D.N.J. 2022).

not relevant to Middlesex County as only Plaintiff Kim is a candidate on Middlesex County's ballot. Further, as a candidate for Senate, Plaintiff Kim is in the "pivot" position and accordingly has the same chance to be in a primary column as any other primary Senate candidate. N.J.S.A. 19:26.1. Thus, as it relates to the Middlesex County Clerk, none of the Plaintiffs would be forced to associate with any other candidate to participate in the ballot drawing process. As a candidate in the pivot position, Plaintiff Kim has the opportunity to bracket, or not to bracket with any other candidate of his choosing as it will not have any impact where he would appear on the ballot vis a vis other Senatorial candidates. To the extent that he complains that he may not be aligned with other candidates, as a candidate for Senate, he has the unfettered right to recruit and campaign with other like-minded candidates. As such, the weight of Plaintiff Kim's alleged burdens would be *de minimis* and the State's interests would be subject to a less exacting level of review.

On the other hand, the Clerk's interests in following the legislative mandate of N.J.S.A. 19:49-2, having the ability to exercise her discretion to design a ballot in a manageable and understandable way, and respecting the associational rights of other candidates are weighty. While none of the Plaintiffs would be forced to associate with any other candidate to participate in the ballot drawing process. if this Court were to grant Plaintiffs' request for injunctive relief and preclude parties from associating with one another, the only candidates whose freedom of association

would be violated would be all other Middlesex County candidates who are not parties to the present matter. Eu v. San Francisco Cty. Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (invalidating laws banning primary endorsements and imposing restrictions on internal policy governance of political parties and holding that "Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to " 'identify the people who constitute the association, and to select a "standard bearer who best represents the party's ideologies and preferences.").

Moreover, as this Court has recognized that "the State has an interest in regulating elections to ensure that voters are able to understand the ballot. . . Democratic-Republican Org. of New Jersey v. Guadagno, 900 F. Supp. 2d 447, 456 (D.N.J.), aff'd, 700 F.3d 130 (3d Cir. 2012). In this case, the Legislature could have reasonably determined that permitting candidates to bracket one another would further those candidates rights to associate, while also communicating to the voters the principled alignment of those candidates, providing a manageable and understandable ballot. Further, the Legislature has accorded County Clerks broad discretion to set up ballot arrangements and arrays in a manner that furthers the interest in an orderly election. Schundler v. Donovan, 377 N.J. Super. 339, 347–48, (App. Div.), aff'd, 183 N.J. 383 (2005).

Overall, given the *de minimis* burden that would be placed on Plaintiffs asserted rights verses the considerable and weighty burdens placed on the State's interests, Plaintiffs have not demonstrated a reasonable probability of success on the merits on their First Amendment Right to Vote claims against the Middlesex County Clerk to warrant preliminary injunctive relief against that office.

2. Plaintiffs Cannot Demonstrate a Probability of Success on the Merits With Regard to Their Equal Protection Claims Against the Middlesex County Clerk.

In this case, Plaintiffs assert that the Middlesex Clerk's adherence to N.J.S.A. 19:49-2 violates their rights as unbracketed candidates to Equal Protection under the Fourteenth Amendment of the Federal Constitution. Plaintiffs assert that as unbracketed candidates they would be subject to a disadvantageous ballot draw. See ¶ 189 of the Verified Complaint.

The Middlesex County Clerk's adherence to N.J.S.A. 19:49-2 is non-discriminatory and neutral on its face as it applies to all candidates for office. As this Court recognized in the unpublished decision in Conforti, the classification between bracketed and non-bracketed candidates does not fall into a suspect or quasi-suspect category warranting a lesser standard of review. Conforti v. Hanlon, 2022 WL 1744774, at *16 (D.N.J. 2022).

With regard to the Middlesex County Clerk, two of the Plaintiffs are not candidates for office in Middlesex County and the one candidate, Plaintiff Kim,

would be drawn for the ballot on the same footing as all other Democratic candidates for Senate. Accordingly, Plaintiffs concern that they would be prevented from obtaining preferred placement on the ballot is not applicable to the Middlesex County Clerk.

With regard to the Plaintiffs' concern that their candidacy will be given less weight if not part of a large bracket of candidates, Plaintiffs fail to demonstrate how they would be prevented from recruiting other like-minded candidates to form a bracket for which they could campaign as a whole. It is axiomatic in the First Amendment context that oftentimes the "remedy to be applied is more speech, not enforced silence." Linmark Assocs., Inc. v. Willingboro Twp., 431 U.S. 85, 97, 97 S. Ct. 1614, 1620, 52 L. Ed. 2d 155 (1977) (citing Whitney v. California, 274 U.S. 357, 377, 47 S. Ct. 641, 649, 71 L. Ed. 1095 (1927), overruled by Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969)). Rather than seeking to prohibit other candidates from associating with one another and campaigning together to express their common principles as candidates, the more appropriate response in our system of government would be to recruit other candidates to also bracket and campaign as a collective unit of candidates who share common interests, principles, and goals.

Altogether, because the Plaintiffs do not form a suspect or quasi-suspect class and will not be subjected to differential treatment as it relates to their candidacy in

Middlesex County, their Equal Protection claims fail and accordingly they have not demonstrated that they have a reasonable probability of success on the merits.

3. **Plaintiffs Freedom of Association Claims Are Improperly Asserted Against the Middlesex County Clerk Because They Will Be Subject to No Burden if They Choose Not to Associate With Other Candidates. Instead, the Relief Plaintiffs Seek Only Harms Other Candidates Right to Associate.**

Plaintiffs assert that the clerk's adherence to New Jersey's bracketing laws infringes upon their right not to associate because they may be precluded from obtaining a preferred ballot position. Eu, 489 U.S. at 224 ("The right of association includes the corresponding right not to associate.").

However, as it relates to Middlesex County, Plaintiffs' concerns are not present as they either will not be on the ballot in Middlesex, or, in Plaintiff Kim's place, will be afforded the opportunity to be drawn for his preferred ballot position irrespective of whether he associates or does not associate with other candidates. As New Jersey's Appellate Division recognized, "there can be no rights violation where a county clerk makes a fair effort to follow the dictate that all candidates for the highest office, *i.e.,* U.S. Senator or Governor, be treated equally to the extent physical constraints allow, as long as, at the same time, a good faith effort is made to effect the expressive rights of all candidates." Schundler v. Donovan, 377 N.J. Super. 339, 348 (App. Div.), aff'd, 183 N.J. 383 (2005). In this case, all Plaintiffs who will be on the ballot in Middlesex County will

be treated equally and drawn for ballot position with chance being the only determining factor.

Further, in this case, the relief Plaintiffs seek as it relates to Middlesex County will have no impact on their freedom to associate, but will instead inhibit all other candidates' rights to associate with one another. Again, in Schundler, New Jersey's Appellate Division determined that such a preclusion on the associational rights of candidates, albeit in the form of a statute rather than a Court Order, violated candidates' First Amendment rights . Schundler v. Donovan, 377 N.J. Super. 339, 348 (App. Div.), aff'd, 183 N.J. 383 (2005) (stating that "The First Amendment protects the free speech and associational rights of every candidate in a primary election to declare a ballot affiliation with any other candidate or cause, or to designate his or her choice not to affiliate. Thus, the absolute prohibition contained in the last sentence of N.J.S.A. 19:23–26.1 must be seen as a violation of the Eu standard.")

Even to the extent the Plaintiffs assert that the Middlesex County Clerk's adherence to N.J.S.A. 19:49-2 has a minimal impact on Plaintiff Kim's right to associate, the State's interests in providing a manageable and understandable ballot that assures the associational rights of the candidates and informs voters of those candidate's associational preferences, outweigh any *de minimis* infringement of Plaintiffs' associational rights.

4. **Plaintiffs' Cannot Demonstrate That the Middlesex Clerk's Actions Violated the Elections Clause.**

The Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Moore v. Harper, 600 U.S. 1, 10, 143 S. Ct. 2065, 2074, 216 L. Ed. 2d 729 (2023) (citing U.S. Const., Art. I, § 4, cl. 1). When a regulation does not regulate the "time, place, or manner," courts must consider whether the regulation on its face or as applied falls outside that grant of power to the state and instead impermissibly dictates electoral outcomes, favors candidates, or evades important constitutional constraints. Cook v. Gralike, 531 U.S. 510, 523 (2001).

In this case, the clerk's practice of adhering to N.J.S.A. 19:49-2 is done pursuant to the State's important interest in regulating elections, particularly with regard to the arrangement of ballots in an orderly fashion that respects candidate's associational rights. The placement of candidate's on the ballot does not rise to the level of a constitutional injury so long as they are on the ballot, as the potential for being placed on a less preferred area of the ballot is inherent in the process particularly where ballot placement is oftentimes determined by "the luck of the

draw." Schundler v. Donovan, 377 N.J. Super. at 349; Democratic-Republican Org. of New Jersey v. Guadagno, 900 F. Supp. 2d 447, 456 (D.N.J.), aff'd, 700 F.3d 130 (3d Cir. 2012) (stating that "placement is surely a less important aspect of voting rights than access.")

Further, again, with regard to these Plaintiffs, they have diminished claims against the Middlesex County Clerk as their placement on the ballot in Middlesex County is either irrelevant, or in the case of Plaintiff Kim, he will be accorded the same "luck of the draw" chance as all other Senate Primary candidates. Altogether, Plaintiffs have not demonstrated a reasonable probability of success on the merits against the Middlesex County Clerk.

C. If Injunctive Relief Is Granted, There Will Be Greater Harm to the Middlesex County Clerk and Other Non-Parties.

As demonstrated above, Plaintiffs requested relief seeks to overturn the New Jersey Legislature's statutorily expressed interests in organizing ballots in a manageable and understandable order, infringe upon the clerk's broad discretion in fashioning a manageable and easily understandable ballot, and affect other candidate's rights to associate. What's more, is that Plaintiffs' requested relief with regard to the Middlesex County Clerk comes with regard to a ballot to which two of the Plaintiffs are not even be present. The one remaining Plaintiff who will be on the Middlesex ballot will be listed in the first row or column with the placement

determined by chance weighted equally with all other candidates. On the other hand, the Plaintiffs' requested relief will infringe upon the associational rights of other candidates, and infringe upon New Jersey public policy as expressed through N.J.S.A. 19:49-2 and the discretion accorded county clerks in designing ballots. In sum, the balance of hardships weigh heavily in favor of not granting such relief.

Moreover, the timing of Plaintiffs' complaint is also concerning and should factor into the harm to the non-moving parties. Per Federal Elections Commission filings, Plaintiff Kim filed as a candidate for Senate since September 25, 2023. See Federal Elections Commission website, available at https://docquery.fec.gov/cgi-bin/forms/C00648220/1726789. Despite undertaking the early stages of his candidacy in September of 2023, Defendant Kim did not file this matter until five months later at the end of February, 2024. Insofar as Plaintiffs in this matter seek equitable relief, it is worthwhile referencing the doctrine of laches which has been used to bar relief when there is "inexcusable delay in instituting suit, and prejudice resulting to the defendant from such delay." United States v. One Toshiba Color Television, 213 F.3d 147, 157 (3d Cir. 2000). While that doctrine is usually inapplicable when suit is filed within the statutory period, it is worthwhile referencing with regard to the balance of the hardships. Id. at 158. In this case, given the Plaintiffs' delay in seeking equitable relief, it is anticipated that even despite the Court's expedited hearing schedule, the outcome of the request for

preliminary injunctive relief will not be determined until April 5th or 6th, the deadline to prepare the primary election ballot for printing. N.J.S.A. 19:14-1. In other contexts, denial of the right to meaningful appellate review has been deemed a constitutional violation. See generally Douglas v. People of State of Cal., 372 U.S. 353, 355, 83 S. Ct. 814, 815, 9 L. Ed. 2d 811 (1963). In this case, given Plaintiffs' delay in filing, should an Order issue, the clerks will be faced with the unenviable Hobson's choice of either seeking appellate review, or complying with the statutorily imposed deadlines designed to ensure that voters have an opportunity to cast their ballots, particularly Mail-in Ballots. Moreover, Plaintiffs delay in filing after they had months to secure expert testimony prejudices defendants who have been denied a meaningful opportunity to obtain expert testimony of their own. Altogether, Plaintiffs' months-long delay in filing the instant matter should be considered in weighing the hardships to the parties.

[add Deborah]

D. Granting Plaintiffs' Injunctive Relief Will Not Be In the Public Interest.

Finally, granting Plaintiffs' request for preliminary injunctive relief is not in the public's interest as it will disturb New Jersey public policy with regard to the design of ballots and infringe upon the clerk's discretion in preparing a manageable and understandable ballot.

First, in passing N.J.S.A. 19:49-2, New Jersey's Legislature favored a system in which candidates can advance their shared beliefs by filing a joint petition and bracketing and associating with one another. In doing so, they were able to communicate to voters those candidates who share such goals and principles simplifying and aiding in voters' decision making process. While Plaintiffs certainly would prefer a ballot where each candidate runs separately to assert that candidate's individual merit, that is a matter left for the Legislature particularly when Plaintiffs' have failed to demonstrate a violation of their Constitutional rights. As the Supreme Court has recognized, when

> "Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. . . It is not the mission of this Court or any other to decide whether the balance of competing interests [] is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply "because they may be unwise, improvident, or out of harmony with a particular school of thought." Rather, "when an issue involves policy choices as sensitive as those implicated here . . . , the appropriate forum for their resolution in a democracy is the legislature."
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> Harris v. McRae, 448 U.S. 297, 326, 100 S. Ct. 2671, 2693, 65 L. Ed. 2d 784 (1980) (internal citations omitted).

Lastly, the Plaintiffs requested relief significant precludes County Clerk's from exercising the discretion accorded to them under New Jersey law to fashion an understandable and manageable ballot. Specifically, Plaintiffs seek to preclude

clerks from preparing ballots, amongst other things, 1) designed by columns or rows…; 2) with "incongruous separation" from other candidates 3)) precluding the placement of candidates underneath other candidates running for the same office; 4) and requiring a ballot draw for each office sought, even for more localized offices such a County Committee which in Middlesex County alone would require a draw for all 615 districts within the County, which would be unwieldy potentially requiring ballot draws for thousands of candidates across the ballot. See Braga Cert. at ¶7-10.

As the Appellate Division of the Superior Court of New Jersey has recognized, it is beyond judicial expertise to require "any particular method of ballot construction" and that "judicial officers on any such review should not substitute their judgment for the reasonable decisions of the public officers in whom the Legislature has reposed the authority and duty to administer the electoral process" which as it relates to ballot design, resides with the county clerks. Plaintiffs' requested relief in seeking to have this Court supervise ballot spacing and design seeks to usurp the role of the county clerks. Schundler v. Donovan, 377 N.J. Super. 339, 349–50 (App. Div.), aff'd, 183 N.J. 383 (2005).

CONCLUSION

Based on the foregoing reasons, the Middlesex County Clerk respectfully requests that Plaintiffs' request for preliminary injunctive relief against Middlesex County be denied.

Respectfully submitted,

BY: _____

Michael S. Williams, Esq.
Deputy County Counsel
THOMAS F. KELSO, ESQ.
Middlesex County Counsel
Middlesex County Administration Bldg.
75 Bayard Street, 2nd Floor
New Brunswick, NJ 08901

Joseph J. Bell, Esq. (016881985)
Bell, Shivas & Bell, P.C.
150 Mineral Springs Drive
P.O. Box 220
Rockaway, NJ 07866
Attorneys for Defendant, Holly Mackey, Warren County Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ANDY KIM, in his personal capacity as a candidate for U.S. Senate, et al., Plaintiffs, v. CHRISTINE GIORDANO HANLON, in her official capacity as Monmouth County Clerk, et al., Defendants.	Case No.: 3:24-cv-01098-ZNQ-TJB

BRIEF ON BEHALF OF DEFENDANT, HOLLY MACKEY, IN HER OFFICIAL CAPACITY AS WARREN COUNTY CLERK, IN RESPONSE TO PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

On the Brief:

Joseph J. Bell, Esq.

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INTRODUCTION

The instant matter arises out of an emergent application of Plaintiffs for injunctive relief with respect to a constitutional challenge to bracketing and ballot placement and position systems in advance of the State of New Jersey 2024 Primary Election. Plaintiffs include Andy Kim, a candidate for the United States Senate, and candidates for the United States House of Representatives, Carolyn Rush and Sarah Schoengood, and organizations advocating for their respective campaigns ("Plaintiffs"). Plaintiffs have raised a constitutional challenge and are seeking injunctive relief with respect to ballot positioning and placement which would appear to ensure that candidates who exercise bracketing rights do not have any perceived advantages over other candidates seeking the same offices.

Plaintiffs' Complaint names all County Clerks within the State of New Jersey as Defendants or Interested Parties in this action. The County Clerk for the County of Warren, Holly Mackey, has been named as a Defendant in her official capacity as County Clerk ("Defendant" or "County Clerk"). Plaintiffs' Complaint asserts violations of the First and Fourteenth Amendments of the United States Constitution and Elections Clauses on the basis that candidates for the same office within a major political party's primary election are not treated in a similar manner. Plaintiffs argue that candidates who are able to exercise bracketing rights or obtain endorsement from a county organization and thus are placed on the ballot under a county

organizational line benefit from positioning that ends up being more favorable than other candidates.

The County of Warren, through the County Clerk, evaluates this case from previous experience with respect to litigation involving bracketing. The County was involved in litigation in 2017 arising out of its then-current election and ballot software system's inability to render a ballot which would allow for bracketing where there were blank spots on the ballot and draw of position of the office for Governor. In that case, the Superior Court of New Jersey found that the technical inability to render such a ballot violated the candidates' bracketing rights even though such candidates prevailed in the 2017 Primary Election. Accordingly, the County Clerk is bound under current New Jersey statutory and case law to abide by bracketing wishes of candidates seeking office in the Primary Election. Plaintiffs' proposed relief runs contrary to established New Jersey state law and the associational rights of candidates seeking to exercise bracketing rights in the Primary Election, where bracketing rights are recognized, and could cause the County of Warren to violate current law and a Superior Court Order. Therefore, the County Clerk respectfully requests that any remedy balances recognized rights of candidates and voters and duties of the Office of County Clerk, be clear that such relief is being required by the Court, and ensures that County Clerks, including the Warren County Clerk, not be subject to any legal liability as the result of implementing any relief in

the event that the Court's balancing of interests results in any granting of relief in favor of Plaintiffs. Lastly, the County Clerk also respectfully requests that any decision be made with sufficient time for ballot design in order to comply with statutory deadlines governing the Primary Election. Given the relative interests of parties and legal requirements regarding ballot design and bracketing, the County Clerk is not in a position to support Plaintiffs' application.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter arises out of a Verified Complaint and a Motion for Preliminary Injunction filed by Plaintiffs on February 26, 2024 in connection with the arrangement and production of ballots for the 2024 State of New Jersey Primary Election scheduled for June 4, 2024 ("Primary Election"). (ECF No. 1, Plaintiffs' Complaint ¶¶ 1-227; ECF No. 5, Motion for Injunctive Relief). Plaintiffs include Andy Kim, a candidate for the United States Senate, and candidates for the United States House of Representatives, Carolyn Rush and Sarah Schoengood, and respective campaign organizations. (ECF No. 1, Plaintiffs' Complaint ¶¶ 24-29). Nineteen (19) of the twenty-one (21) County Clerks in the State of New Jersey have been named as Defendants in their official capacities, while the Secretary of State for the State of New Jersey and the County Clerks for Salem and Sussex Counties have been named as Interested Parties. (ECF No. 1, Plaintiffs' Complaint ¶¶ 28-52). Plaintiffs' Complaint asserts that New Jersey's system of ballot placement and

positioning in the Primary Election are unconstitutional. (ECF No. 1, Plaintiffs' Complaint ¶¶ 1, 16-17, 53-227). Plaintiffs seek injunctive relief which would result in county line and bracketed candidates not having any advantage over other candidates. Such relief would include a preliminary injunction against County Clerks making use of any ballot design which Plaintiffs would assert to be unconstitutional, and thereby require the use of an office-block ballot layout (also known as a "bubble ballot"). (ECF No. 1, Plaintiffs' Complaint ¶¶ 16-17; ECF No. 5, Motion for Injunctive Relief).

Defendant Holly Mackey, in her official duty, is the Clerk of the County of Warren ("Defendant" or "County Clerk"), having served as County Clerk since 2018, whose statutory duties and obligations include election-related functions, such as responsibility for ballot design of Primary and General Election ballots utilized within the County of Warren ("Warren County" or "County") and that ballot design complies with applicable New Jersey statutes and case law precedent. Such applicable controlling law includes the right of bracketing which may be exercised by candidates pursuant to N.J.S.A. 19:49-2 and the case of Warren County Democratic Committee, et al. v. Patricia Kolb, et al., Docket No. WRN-L-000120-17 (Law Div. 2018) ("Kolb Matter"), which was filed in April 2017 in the Superior Court of New Jersey, Law Division, Somerset County. (Defendant's Certification

¶¶ 1-3, 15; Counsel Certification ¶¶ 1-5, Exhibit "A", December 22, 2017 Court Order and Opinion in "Kolb Matter").

The Kolb Matter was filed ahead of the 2017 State of New Jersey Primary Election as a result of technical difficulties which prevented the County's then-current election and ballot software system from being able to provide for the exercise of bracketing rights where there were blank spots on the ballot based on the number of candidates running for various offices. The technical difficulties resulted in the County designing a Primary Election ballot layout containing features consistent with a bubble ballot. (Defendant's Certification ¶¶ 3-4; Counsel Certification ¶¶ 1-5, Exhibit "A", December 22, 2017 Court Order and Opinion in "Kolb Matter").

Plaintiffs Warren County Democratic Committee and Iris Perrot prevailed in the Kolb Matter litigation, where in December 2017 the Court found that they were entitled to relief with respect to the ballot design. The Court also awarded attorney's fees to Plaintiffs in 2018. Since that time, the Cunty Clerk's understanding of the result of the litigation is that Warren County is bound by the Court Order and requirement to accommodate requests for bracketing whenever requested by candidates for elective office. (Defendant's Certification ¶ 5; Counsel Certification ¶¶ 1-5, Exhibit "A", December 22, 2017 Court Order and Opinion in "Kolb Matter"). In 2018, after Defendant became County Clerk, she was advised for the first time

that the election and ballot software system could provide technical modifications for the ballot design which would enable bracketing under the circumstances requested by Plaintiffs in the preceding litigation. (Defendant's Certification ¶ 6).

In 2019 the County of Warren began to utilize its current system, which has the ability to technically allow a ballot design which is either based on a bubble ballot, or bracketing of candidates, including the use of a county organizational line ("organizational line") at the request of a county or local political party organization. Paper ballots utilized in 2018 and 2019 included a bubble ballot design. By way of contrast, in 2020 paper and electronic ballots for the General Election were matched to include bracketing. (Defendant's Certification ¶ 7).

The County can currently design a ballot that either contains bracketing or a bubble ballot, which could include the use of a common slogan by groups of candidates at the request of candidates and/or county or local political party organization. However, the intrinsic properties associated with bracketing lines and bubble ballot layout are such that it is not possible for a ballot to be designed which simultaneously comply with the functional elements of both formats while also avoiding voter confusion if there are several offices and sufficiently significant numbers of candidates for at least one (1) office on the ballot, and at least two (2) different requested bracketing groups, especially if the different groupings and offices do not exactly correspond. (Defendant's Certification ¶ 8).

The nature of Plaintiffs' requested relief effectively places the County in a virtually impossible position. If the County designs a ballot according to the wishes of Plaintiffs, Warren County could be subject to litigation by current candidates for elective office or other parties for violating the contours of bracketing rights and legal requirements set forth in the Kolb Matter. The County was presented with such a possibility in 2020 based on the Warren County Democratic Committee's wish to make use of bracketing for the 2020 General Election, which required that the County utilize a ballot design which included bracketing. (Defendant's Certification ¶ 9).

As a result of the Court's ruling in the Kolb Matter, as well as the First Amendment associational rights afforded by bracketing, the County is compelled to design ballots with bracketing, and if sought, organizational lines, whenever such requests are made. This condition is effective unless and until another Court decision requires that the County design a ballot with a bubble layout and/or other form of relief. Any action by the County in designing a ballot contrary to requests for bracketing and/or organizational lines would technically violate State law and a prior Court ruling. (Defendant's Certification ¶¶ 10-11).

The additional remaining issue of concern relates to the early April statutory deadlines associated with ballot design and mailing. Ballots for the 2024 State of New Jersey Primary Election must be locked down, finalized, and sent off for

printing no later than April 6. (Defendant's Certification ¶¶ 12, 14). It takes some time for the information relating to the candidates and offices to be compiled into a compliant and functional ballot design, which then need to be printed by the thousands, assembled, and mailed for the purposes of mail-in, overseas, military, and absentee ballots. (Defendant's Certification ¶ 13). Such input will by definition be unavailable until such time that the Court is able to rule on Plaintiffs' present application. (Defendant's Certification ¶ 14).

On February 27, 2024, the Court conducted a case management and scheduling conference. Defendant County Clerk now files the instant response pursuant to the Court's scheduling in this matter.

LEGAL ARGUMENT

POINT I

PLAINTIFFS' REQUESTED RELIEF VIOLATES THE STATUTORY AND CONSTITUTIONAL RIGHTS OF ALL OTHER CANDIDATES AND POLITICAL ORGANIZATIONS.

Plaintiffs' underlying requested substantive relief with respect to the layout of ballots for the 2024 State of New Jersey Primary Election is problematic in that it is contrary to the recognized constitutional and statutory rights of candidates to associate. It is clear that the law recognizes the associational right of bracketing by candidates for elective office and prescribes requirements for the production of primary election ballots. Even where such recognized rights and requirements are not absolute, they are of paramount concern.

It is clear that New Jersey election law statutes provide for the availability of bracketing by candidates seeking to exercise their First Amendment associational rights on the ballot, as set forth in N.J.S.A. 19:49-2, as well as the contiguous primary ballot placement of candidates for the Office of Governor or United States Senator, as set forth at N.J.S.A. 19:23-26.1. The exercise of fundamental First Amendment rights such as these are not absolute and may be subject to regulations which safeguard the electoral process. See, e.g., Schundler v. Donovan, 377 N.J. Super. 339, 347 (App. Div. 2005), aff'd, 183 N.J. 383 (2005), citing Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217-218, 107 S. Ct. 544, 93 L. Ed.2d 514 (1986). Fundamental rights are subject to limitation if a sufficiently compelling public interest is present, and with respect to elections the test for whether a compelling public interest exists "is whether 'the regulation … is necessary to the integrity of the electoral process.'" Schundler at 347, quoting Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 222, 233, 288, 109 S. Ct. 1013, 103 L. Ed.2d 271 (1989). This principle will be applied with respect to the constraints of ballot arrangement. The linchpin of the legislative scheme for electoral purposes is that to the extent physical constraints allow, there should be "equality of treatment among candidates for the same office." Schundler at 347-348. Such interests will also factor in bracketing rights and any statutorily-required separate line, such as for Governor or United States Senator. See N.J.S.A. 19:49-2; 19:23-26.1; Andrews v.

Rajoppi, 2008 WL 1869869, at *2 (App. Div. Apr. 28, 2008), certif. denied, 195 N.J. 518 (2008) (finding that an "L"-shaped listing of three (3) candidates for Senate violated requirements set forth in N.J.S.A. 19:23-26.1, in part due to greater availability of space on ballot). The approaches used by the Appellate Division in Schundler and Andrews displayed an awareness and application of specific factual circumstances to the controlling law.

In the present case, Plaintiffs' proposed ultimate relief would violate bracketing and associational rights of various candidates for office in the 2024 Primary Election. (Defendant's Certification ¶¶ 9-10). These recognized rights and requirements do not permit the County Clerk to design a ballot according to the relief sought by Plaintiffs in their Verified Complaint and Motion for Injunctive Relief.

POINT II
THE COUNTY CLERK'S DUTIES REQUIRE COMPLIANCE WITH APPLICABLE STATUTORY PROVISIONS AND CONSTITUTIONAL RIGHTS.

Plaintiffs' underlying requested substantive relief with respect to the layout of ballots for the 2024 State of New Jersey Primary Election is also problematic in relation to the duties of the County Clerk. All County Clerks within the State of New Jersey are duty bound to comply with applicable statutory and constitutional provisions that govern election law, including N.J.S.A. 19:49-2. Such duties include the design of ballots for use in Primary Elections. Any contrary actions taken may violate the duties of the County Clerk.

The statutory duties and obligations of the County Clerk, an office established pursuant to the New Jersey Constitution of 1947, include election-related functions, such as responsibility for ballot design of Primary and General Election in a manner that complies with applicable New Jersey statutes and case law precedent. Governing authority includes the separate line for the offices of Governor and United States Senator pursuant to N.J.S.A. 19:23-26.1 and the right of bracketing which may be exercised by candidates pursuant to N.J.S.A. 19:49-2. (Defendant's Certification ¶¶ 1-3). The failure or inability of the County Clerk to follow such duties, even where the problem may be of a technical or technological nature relating to bracketing rights, may still result in litigation and the potential for liability on the part of a County Clerk and/or County. The County Clerk in this matter understands the need to accommodate requests for bracketing whenever requested by candidates for elective office. (Defendant's Certification ¶¶ 3-7; Counsel Certification ¶¶ 1-5, Exhibit "A", December 22, 2017 Court Order and Opinion in "Kolb Matter").

These duties also mitigate heavily in favor of ballot design which facilitate ease of use by voters and to reduce or eliminate the potential for voter confusion. Although the County Clerk presently is able to design a ballot which contains bracketing or a bubble or block ballot, the properties associated with each format make it impossible for the County clerk to design a ballot which would comply with both formats while avoiding voter confusion. (Defendant's Certification ¶ 8).

Indeed, optimizing the utility of a ballot for the voter is of paramount significance. See Farrington v. Falcey, 96 N.J. Super. 409, 414 (App. Div. 1967) (legislative policy for ballot design to favor voters' ability to find their candidates with the least amount of difficulty that the ballot will permit).

The nature of the relief requested by Plaintiffs violates County Clerk duties and places the County in a virtually impossible position. A ballot designed according to the wishes of Plaintiffs and in violation of bracketing rights would expose the County and County Clerk to litigation akin to the Kolb Matter in 2017. (Defendant's Certification ¶ 9). The County Clerk's duties include designing ballots with bracketing, and if sought, organizational lines, whenever such requests are made. This condition is the present state of the law, as noted in the Kolb Matter. (Defendant's Certification ¶¶ 10-11). These recognized duties do not permit the County Clerk to design a ballot according to the relief sought by Plaintiffs in their Verified Complaint and Motion for Injunctive Relief.

POINT III
THE COUNTY CLERK'S DUTIES REQUIRE COMPLIANCE WITH APPLICABLE BALLOT DESIGN DEADLINES.

Plaintiffs' underlying requested substantive relief with respect to the layout of ballots for the 2024 State of New Jersey Primary Election is also problematic in relation to the timing of ballot design and preparation. All County Clerks within the

State of New Jersey are duty bound to comply with applicable statutory deadlines governing ballot design and preparations for use in Primary Elections.

Title 19 of New Jersey Statutes Annotated sets forth deadlines for the design of ballots for use in Primary Elections. Preparation must be completed in early April for ballots which are to be utilized in a Primary Election. See N.J.S.A. 19:14-1. The Warren County Clerk is concerned with the early April deadlines associated with ballot design and mailing. Ballots for the 2024 State of New Jersey Primary Election must be locked down, finalized, and sent off for printing no later than April 6. (Defendant's Certification ¶ 12). It takes some time for the information relating to the candidates and offices to be compiled into a compliant and functional ballot design by the County Clerk and staff. Once such ballot design is complete, the ballot design would then be transmitted to the printer for printing. Thousands of ballots need to be assembled and mailed for the purposes of mail-in, overseas, military, and absentee ballots. All such activities are governed by applicable deadlines in order for the Primary Election process to be able to successfully function. (Defendant's Certification ¶ 13).

The input needed for design and printing of ballots will by definition be unavailable until the Court is able to rule on Plaintiffs' present application, including the Motion for Injunctive Relief. Accordingly, the County respectfully requests that any decision be made with sufficient time for the County Clerk's Office to be able

to fulfill its duties and meet all applicable statutory deadlines. (Defendant's Certification ¶ 14). The timing of this litigation presents a significant problem with the County Clerk being able to comply with statutory deadlines and perform her official duties. Papers by additional named Defendants have highlighted these concerns, including the legal issues relating to ballot placement having been known or available to Plaintiffs prior to the timing of the actual filing date. Accordingly, the County Clerk is not able to accommodate or support such proposed relief in light of the above-referenced statutory and constitutional rights and requirements, Including as to the ballot design deadline.

CONCLUSION

As set forth above, the proposed relief requested by Plaintiffs in their Verified Complaint and Motion for Injunctive Relief run contrary to the statutory and constitutional rights of other parties and candidates for elective political office in the 2024 State of New Jersey Primary Election. Such requested relief also runs contrary to the duties of the County Clerk and applicable ballot design deadlines under current New Jersey law. The County Clerk is obligated to carry out her official duties under New Jersey law, which require the recognition of bracketing and associational rights of candidates seeking elective office.

Respectfully submitted,

BELL, SHIVAS & BELL, PC
Attorneys for Defendant,
Holly Mackey, Warren County Clerk

/s/ Joseph J, Bell Esq.
Joseph J. Bell, Esq.

DATED: March 6, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ANDY KIM, in his personal capacity as a candidate for U.S. Senate, ANDY KIM FOR NEW JERSEY, SARAH SCHOENGOOD, SARAH FOR NEW JERSEY, CAROLYN RUSH and CAROLYN RUSH FOR CONGRESS ***Plaintiffs,*** ***v.*** **CHRISTINE GIORDANO HANLON, in her official capacity as Monmouth County Clerk; SCOTT M. COLABELLA, in his official capacity as Ocean County Clerk; PAULA SOLLAMI COVELLO, in her official capacity as Mercer County Clerk; MARY H. MELFI, in her capacity as Hunterdon County Clerk; STEVE PETER, in his official capacity as Somerset County Clerk; HOLLY MACKEY, in her official capacity as Warren County Clerk; NANCY J. PINKIN, in her official capacity as Middlesex County Clerk; JOSEPH GIRALO, in his official capacity as Atlantic County Clerk; JOHN S. HOGAN, in his official capacity as Bergen County Clerk; JOANNE SCHWARTZ, in her official capacity as Burlington County Clerk; JOSEPH RIPA, in his official capacity as Camden County Clerk; RITA M. ROTHBERG, in her official capacity as Cape May County Clerk; CELESTE M. RILEY, in her official capacity as Cumberland County Clerk; CHRISTOPHER J. DURKIN, in his official capacity as Essex**	**CIVIL ACTION No.:** **3:24-cv-01098-ZNQ TJB**

County Clerk; JAMES N. HOGAN, in his official capacity as Gloucester County Clerk; E. JUNIOR MALDONADO, in his official capacity as Hudson County Clerk; ANN F. GROSSI, in her official capacity as Morris County Clerk; DANIELLE IRELAND- IMHOF, in her official capacity as Passaic County Clerk; and JOANNE RAJOPPI, in her official capacity as Union County Clerk. ***Defendants,*** **DALE A. CROSS, in his official capacity as Salem County Clerk; and JEFF PARROTT, in is official capacity as Sussex County Clerk, TAHESHA WAY, Esq., in her official capacity as Secretary of State for New Jersey,** ***As Interested Parties***	

DEFENDANT E. JUNIOR MALDONADO'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Edward J. Florio, Esq. (025311987)
FLORIO KENNY RAVAL, L.L.P
125 Chubb Avenue, Suite 310 - N
Lyndhurst, New Jersey 07071
Phone: 201-659-8011, Fax: 201-659-8511
E-mail: efloriofkrlaw.com
Attorneys for Defendant:
E. JUNIOR MALDONADO
In his official capacity as Hudson County Clerk

Of Counsel:
Edward J. Florio, Esq. (025311987)

On the Brief:
Christopher K. Harriott, Esq. (035382001)
Michael B. Simone, Esq. (27720219)

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PRELIMINARY STATEMENT

In the present matter, PLAINTIFFS, ANDY KIM, in his personal capacity as a candidate for U.S. Senate, ANDY KIM FOR NEW JERSEY, ("KIM,") SARAH SCHOENGOOD, SARAH FOR NEW JERSEY, ("SCHOENGOOD,") CAROLYN RUSH and CAROLYN RUSH FOR CONGRESS, ("RUSH,") (collectively "PLAINTIFFS,") seek injunctive relief of an unprecedented nature, relief that threatens to disrupt the entire electoral process and change the rules in the middle of the game. DEFENDANT, E. JUNIOR MALDONADO, in his official capacity as Hudson County Clerk, ("MALDONADO,") opposes PLAINTIFF'S application on the grounds that it fails to satisfy the relevant standard for the granting of such relief. First, PLAINTIFFS cannot establish the existence of imminent, irreparable harm in the absence of an injunction. In as much as KIM has already, in several counties, obtained the "County line," it is as likely that he will benefit from the current "bracketing" system in place as he will be harmed by it. Moreover, any harm that would be experienced by PLAINTIFFS is due to their own unreasonable delay in seeking a preliminary injunction. Second, PLAINTIFFS are not likely to prevail on the ultimate, substantive merits of their claims. Not only does PLAINTIFFS' application demonstrate a likelihood of success as either their First Amendment or Equal Protection constitutional claims, but any such claim would be subject to the affirmative defense of laches, as PLAINTIFFS have chosen to lie in wait, and seek extraordinary relief in the midst of an electoral process, rather than moving promptly to protect his rights when they first believed them to be violated. KIM has spent the last several months attempting to obtain the benefit of the same process he now seeks to destroy, and it was only when his efforts proved to be unsuccessful that he chose to file the present application. Finally, in light of the massive disruption, ranging from confusion to voter disenfranchisement, to the status quo of the electoral process that will occur if this Court

were to award PLAINTIFFS the injunctive relief sought herein, the balance of equities weighs strongly in favor of MALDONADO and the other defendants herein. Accordingly, respectfully requests that this Court enter an Order denying the application of PLAINTIFFS, ANDY KIM, in his personal capacity as a candidate for U.S. Senate, ANDY KIM FOR NEW JERSEY, SARAH SCHOENGOOD, SARAH FOR NEW JERSEY, CAROLYN RUSH and CAROLYN RUSH FOR CONGRESS, for injunctive relief.

PROCEDURAL HISTORY

MALDONADO relies upon and incorporates herewith the procedural history contained in the briefs of CO-DEFENDANTS as if set forth verbatim herein.

STATEMENT OF FACTS

MALDONADO relies upon and incorporates herewith the relevant facts contained in the briefs of CO-DEFENDANTS as if set forth verbatim herein. Additionally, MALDONADO states as follows. Candidates for political office participate in the ballot draw for the first or primary ballot position. This ballot drawing is conducted in a blind, fair, unbiased manner. Preference, or advantage is provided to no candidate, or slate of candidates. This is true and factual, in every election, for Senate and Gubernatorial whether a general or primary election. (See MALDONADO CERT. at ¶3.) For example, a candidate who has been endorsed and runs on what is called a county party line, Republican or Democrat, or any candidate, who runs with a full or partial slate, or no slate, All participate in a draw which in the election, which is the subject matter of this lawsuit, would be for column one through four. (See MALDONADO CERT. at ¶4.) Once the initial draw for the first or primary ballot position is completed, other candidates, bracketed with Senate candidates will be placed in the respective columns. (See MALDONADO CERT. at ¶5.) It is imperative to note that each Senate candidate has equal opportunity to obtain through the ballot

draw process the first column, while the bracketing protects constitutionally protected rights of all parties, whether political parties, or individuals running without political party endorsement or political party affiliation. (See MALDONADO CERT. at ¶6.) The ballot draw process is open and transparent form inception to completion. It is open to the public, for candidates and non-candidates to observe. The ballot draw is also live streamed on Facebook and Instagram, as well as, the Hudson County Clerk YouTube Channel. (See MALDONADO CERT. at ¶7.)

LEGAL ARGUMENT

PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF.

It is well-established that "[p]reliminary injunctive relief is an extraordinary remedy and should be granted only in limited circumstances." Ferring Pharms., Inc. v. Watson Pharms., Inc., 765 F.3d 205, 210 (3rd Cir. 2014) (quoting Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 586 (3rd Cir. 2002)). The purpose of a preliminary injunction under Fed. R. Civ. P. 65 is to preserve the status quo between the parties pending final determination on the merits of an action. University of Texas v. Camenisch, 451 U.S. 390 (1981); Acierno v. New Castle Cty., 40 F.3d 645, 647 (3rd Cir. 1994). Particular scrutiny is required where, as in the present matter, the plaintiff is asking the Court to order an affirmative act that changes the status quo. See Bennington Foods LLC v. St. Croix Renaissance, Group LLP, 528 F.3d 176, 179 (3rd Cir. 2008) ("[W]here the relief ordered by the preliminary injunction is mandatory and will alter the status quo, the party seeking the injunction must meet a higher standard of showing irreparable harm in the absence of an injunction."); Acierno, 40 F.3d at 653 ("A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity.").

To obtain a preliminary injunction, the moving party must establish: (1) a likelihood of success on the merits; (2) that [he] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 708 (3rd Cir. 2004) The movant bears the burden of establishing "the threshold for the first two 'most critical' factors .... If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." Reilly v. City of Harrisburg, 858 F.3d 173, 179 (3rd Cir. 2017).

A party's delay in seeking a preliminary junction weighs strongly against granting the extraordinary relief they seek, particularly where, as here, an election is looming[1]. Purcell v. Gonzalez, 549 U.S. 1 (2006). "[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief...." Reynolds v. Sims, 377 U.S. 533, 585 (1964). As set forth in Purcell, supra, there is good reason to avoid last-minute intervention in a state's election process as any intervention at this point risks practical concerns including disruption, confusion or other unforeseen deleterious effects. Purcell, 549 U.S. at 5. Federal intervention at a late hour risks "a disruption in the state electoral process [which] is not to be taken lightly." Page v. Bartels, 248 F.3d 175, 195–96 (3rd Cir. 2001); See also, Chisom v. Roemer, 853 F.2d 1186, 1189 (5th Cir.1988) (vacating a district court's preliminary injunction of

[1] This delay would also form the basis for an affirmative defense of laches, which requires a defendant to prove two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. Costello v. United States, 365 U.S. 265, 282 (1961). With respect to the second prong, MALDONADO relies upon and incorporates by reference the various examples of prejudice set forth in the brief of CO-DEFENDANTS.

a state election, on the rationale that "intervention by the federal courts in state elections has always been a serious business, not to be lightly engaged in" (internal quotations and citations omitted)).

A. Plaintiffs Cannot Demonstrate Imminent, Irreparable Harm.

In the first instance, PLAINTIFFS' request for a preliminary injunction should be denied as PLAINTIFFS fail to demonstrate imminent, irreparable harm will result in the absence of such relief. Simply put, PLAINTIFFS' alleged harm is speculative and remote. In as much as KIM has already, in several counties, obtained the "County line," it is as likely that he will benefit from the current process that is in place as he will be harmed by it. Moreover, PLAINTIFFS' argument places an undue emphasis on ballot placement and ignores other relevant factors for an individual in casting their vote. Campaigns run months-long campaigns in which, to varying degrees of success, they marshal votes, raise funds, and increase their public notoriety. Mere placement of a candidate's position on a ballot does not influence, signal, or control a voter's likelihood of voting for a candidate. PLAINTIFFS' claims of being disadvantaged due to their placement in one column or another fails to account for the most important factor in determining how an individual casts a vote – whether or not the voter agrees with the candidate's political views.

Moreover, any harm that would be experienced by PLAINTIFFS is due to their own unreasonable delay in seeking a preliminary injunction. PLAINTIFFS bring this action less than six (6) months before the upcoming Democratic Primary Election to be held on June 4, 2024. KIM could have, and should have, sought injunctive relief as early as September 23, 2023, when he announced that he would mount a primary challenge to Senator Menedez. If not in September, then certainly two months later, on November 15, 2023, when Tammy Murphy announced her run for Senate and KIM was then aware that he would not be running un-opposed for Senator Menendez's seat. Additionally, SCHOENGOOD'S argument with respect to being left off the

county line is due to her announcing her candidacy after the date which she could have obtained the Monmouth County Democratic Convention's endorsement.

In addition to the cases cited above discussing a plaintiff's unreasonable delay in seeking preliminary restraints, MALDONADO respectfully directs the Court's attention to McKenzie v. Corzine, 396 N.J. Super. 405 (App. Div. 2007), in which the plaintiffs sought preliminary injunction prohibiting the printing of ballots pending adjudication of their challenge to the interpretive statement adopted by the Legislature in seeking voter approval of the New Jersey Stem Cell Research Bond Act. Plaintiff's application in McKenzie was brought "a mere few days before the requirement that the county clerks begin the process of printing of the ballots." Id. at 414. As set forth therein, "[c]ertainly, this issue could have been adjudicated much earlier in the process without the potential of additional costs to the public and disruption of the voting process. Due to this delay, it is plaintiffs, knowingly or unknowingly, who have self-created a situation where it is alleged the irreparable harm is 'imminent' which could have been avoided if filed timely." Id. at 414-15.

B. Plaintiffs Are Not Likely to Succeed on the Ultimate Merits of their Claims.

PLAINTIFFS are not entitled to a preliminary injunction as they have failed to demonstrate a likelihood of success on the ultimate merits of their claim, be it under the First Amendment or the Equal Protection Clause.

(1) First Amendment Claims.

The United States Supreme Court has held that the First Amendment protects the right of citizens to band together in promoting among the electorate candidates who espouse their political views. Clingman v. Beaver, 544 U.S. 581, 586 (2005). Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. Id. at 586.

However, when regulations impose lesser burdens, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. Id. at 586-87.

In Anderson v. Celebrezze, 460 U.S. 780 (1983), the U.S. Supreme Court set forth a framework for the review of the constitutionality of alleged violations of the right to freely associate under the First Amendment. The Court found that not all restrictions imposed by States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on a voter's right to freely associate and acknowledged that any state law governing the election process has at least some effect on "the individual's right to vote and his right to associate with others for political ends." Id. at 788. This test was later refined in Burdick v. Takushi, 504 U.S. 428 (1992). Together, the Supreme Court provided a factoring test to determine the constitutionality of burdens on election-related First Amendment rights. Id. constitutionality of burdens on election-related First Amendment rights. Id.

Specifically, the Court in Anderson held that, where a state law is alleged to burden the right of a candidate, the reviewing court must analyze the character and magnitude of the asserted injury, as well as the precise interests put forward by the State as justifications for the burden imposed by its rule. Id. at 789. Courts must then weigh the burdens against the state interests and take into consideration the extent to which those interests make it necessary to burden a candidate's rights. Id. Rational basis review is warranted when a plaintiff's rights are minimally burdened in a nondiscriminatory manner. Burdick, 504 U.S. at 434. Strict scrutiny, on the other hand, is warranted when a plaintiff's constitutional rights are severely burdened, such as when there is a prohibition on certain guaranteed rights. Id.

Here, regardless of which test/standard the Court ultimately chooses to apply to the facts and circumstances of the present case, MALDONADO contends that the precise interests put

forward by the State as justifications for the burden imposed by its bracketing system are sufficient to pass muster under either strict scrutiny or rational basis. The Complaint alleges no cognizable claim of exclusion of "certain classes of candidates from the electoral process," nor exclusion of voters' ability to cast votes for candidates. Anderson, supra, 460 U.S. at 793. Even if PLAINTIFFS could somehow demonstrate their first amendment rights are in some way burdened by their ballot position, Plaintiffs' own respective association rights can be limited without constitutional infringement because of the public interest served by protecting the associational rights of all political organizations that seek placement on the ballot. New Jersey's comprehensive election laws, including but not limited to those pertaining to bracketing, demonstrate that New Jersey has a significant interest in assisting its registered voters by streamlining the election process and making it as easy as possible for them to make their voices heard in so far as who they believe to be the best candidates to run New Jersey. This process has assisted voters for more than seventy years, has never been invalidated, and has become a system that New Jersey residents have come to rely on during primary elections. As set forth in the MALDONADO Certification, "ballot drawing is conducted in a blind, fair, unbiased manner. Preference, or advantage is provided to no candidate, or slate of candidates" and that "each Senate candidate has equal opportunity to obtain through the ballot draw process the first column, while the bracketing protects constitutionally protected rights of all parties, whether political parties, or individuals running without political party endorsement or political party affiliation." Again, the New Jersey Supreme Court has previously noted that the "purpose of the ballot is to permit voters to record their will, and one must assume that the Legislature intended a ballot so arranged that all voters may find their candidates with the least difficulty the total content of the ballot will permit. Quaremba v. Allan, 67 N.J. 1, 12 (1975).Moreover, the legislative determination that whatever the effect on an

unaffiliated candidate, the public interest is better served by permitting a grouping of candidates having common aims or principles and authorizing those candidates to have this fact brought to the attention of the voter in a primary election with the additional effectiveness produced by alignment of their names on the machine ballot. Id. at 13.

(2) Equal Protection Claims.

The Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution states that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. In their Complaint, Plaintiffs allege that New Jersey's bracketing and ballot placement system violate their equal protection rights as they fail to treat similarly situated persons – candidates pursuing the same office in the same political party – the same with respect to ballot order and the display of the ballot.

In Quaremba, supra, one of the two seminal cases upholding the New Jersey bracketing statutes, the New Jersey Supreme Court analyzed the plaintiff's equal protection claim as follows, "If claiming an equal protection violation, the appellants' burden was to demonstrate in the first instance a discrimination against them of some substance. Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution. Quaremba, supra, 67 N.J. at 11 (1975) (citing Ferguson v. Skrupa, 372 U.S. 726, 732 (1963)). In so doing, the Court distinguished between provisions of N.J.S.A. 19:49-2, which regulate the positioning on lines of a voting machine of the names of candidates for nomination at a primary election, from provisions of N.J.S.A. 19:23-24, which regulate positioning on paper ballots. Specifically, the plaintiff argued that those affected by the provisions of N.J.S.A. 19:49-2 were denied equal protection of the laws because the statute improperly (1) created preferred classes of primary candidates; (2) favored candidates and voters in rural counties which use paper

ballots over candidates and voters in populous counties which use voting machines; (3) favored candidates in counties using voting machines who file a joint petition and those who affiliated with them over all other candidates; and (4) imposed an unequal burden on unaffiliated candidates and thus denied them their constitutional rights. Id. at 10.

In upholding the constitutionality of the bracketing laws, the Court held that (1) N.J.S.A. 19:49-2 did not deny equal protection of the laws to any class or primary candidates; (2) the county clerk in counties using voting machines was not required to list all candidates for nomination to any given office in a single column or row and in an order determined by lot; and (3) whether or not a particular course taken by a county clerk in the exercise of discretion vested in him by the statute depends on the specific facts and circumstances of the individual case, but the clerk must act in good faith and may not intentionally discriminate against any candidate or group of candidates. Id. at 10-16. In doing so, the Court reasoned,

> Even if we were to disregard the presumption of validity which attaches to N.J.S.A. 19:49-2, it is clear that it is not invidiously discriminatory. The obvious differences in the physical makeup of the face of a voting machine and a paper ballot afford a reasonable basis for the Legislature's decision to provide the different procedures governing the listing of candidates' names on the face of the voting machine than are provided for listing such names when paper ballots are used.

Id. at 11-12.

Here, as previously discussed, PLAINTIFFS' facial attack on the constitutionality of the Equal Protection Clause of the Fourteenth Amendment is vague, at best. They have not presented any sort of analysis of the bracketing statutes with regard to an equal protection challenge. Furthermore, even if the Court assumes that PLAINTIFFS intended a facial attack, their claims of unequal application of the laws do not involve either suspect or quasi-suspect classifications. Thus, the proper standard to apply to a facial attack would be the rational basis test. Here, the statutes and the case law of New Jersey make clear that the ballot system is designed to assist voters. As

the Court in *Quaremba* noted, the "purpose of the ballot is to permit voters to record their will, and one must assume that the Legislature intended a ballot so arranged that all voters may find their candidates with the least difficulty the total content of the ballot will permit. Id. at 12. Moreover, the legislative determination that whatever the effect on an unaffiliated candidate, the public interest is better served by permitting a grouping of candidates having common aims or principles and authorizing those candidates to have this fact brought to the attention of the voter in a primary election with the additional effectiveness produced by alignment of their names on the machine ballot. Id. at 13.

Finally, with regard to PLAINTIFFS' as-applied attack, they have not presented any evidence that MALDONADO acted in bad faith and with invidious discrimination in his application of the bracketing laws. However, the mere fact that Defendants, including MALDONADO, may have made certain ballot design features, pursuant to their discretionary right to do so under the bracketing laws, that PLAINTIFFS feel have resulted in the unequal treatment of certain candidates, is a far cry from alleging that Defendants acted with any sort of malicious intent or invidious discrimination when they designed these features. Again, as set forth in MALDONADO'S Certification, the ballot positioning is determined in a blind, fair, unbiased manner and no preference, or advantage is provided to any candidate, or slate of candidates. Finally, as previously discussed, the government has a significant interest in assisting the voters with the current ballot system.

Accordingly, PLAINTIFFS' cannot demonstrate a likelihood of success on the merits and, as such, are not entitled to injunctive relief in their favor.

C. The Balance of Equities Is Not in Plaintiffs' Favor.

In as much as PLAINTIFFS' fail to satisfy the first two elements of the analysis, the Court need not proceed any further. However, MALDONADO notes that the harm which will result from the granting of a preliminary injunction during the late stages of the electoral process is far more severe than the harm, if any, which purportedly would be imposed upon PLAINTIFFS in the absence of an injunction. Again, PLAINTIFFS' claims of irreparable harm ignore, consciously or otherwise, the myriad of factors which determine the success of an electoral candidate. Instead, PLAINTIFFS fixate solely on the "County line" and ballot positioning. PLAINTIFFS' arguments also ignore the havoc that would be wreaked upon our State's electoral process if the rules of the game were to be changed once the contest had already begun. Given the looming election deadlines, the time and expense that would inevitably be incurred, and the potential for not just confusion, but voter disenfranchisement, MALDONADO respectfully suggests that the public interest would be well-served by denying PLAINTIFFS' application.

CONCLUSION

Accordingly, for the reasons set forth herein, DEFENDANT, E. JUNIOR MALDONADO, in his official capacity as Hudson County Clerk, respectfully requests that this Court enter an Order denying the application of PLAINTIFFS, ANDY KIM, in his personal capacity as a candidate for U.S. Senate, ANDY KIM FOR NEW JERSEY, SARAH SCHOENGOOD, SARAH FOR NEW JERSEY, CAROLYN RUSH and CAROLYN RUSH FOR CONGRESS, for injunctive relief.

Respectfully submitted,
FLORIO KENNY RAVAL, L.L.P.

Edward J. Florio

EDWARD J. FLORIO, ESQ.

ATTORNEYS FOR DEFENDANT, E. JUNIOR MALDONADO, in his official capacity as Hudson County Clerk

DATED: March 6, 2024

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ANDY KIM, in his personal capacity as a candidate for U.S. Senate, ANDY KIM FOR NEW JERSEY, SARAH SCHOENGOOD, SARAH FOR NEW JERSEY, CAROLYN RUSH and CAROLYN RUSH FOR CONGRESS;

Plaintiffs,

v.

CHRISTINE GIORDANO HANLON, in her official capacity as Monmouth County Clerk; SCOTT M. COLABELLA, in his official capacity as Ocean County Clerk; PAULA SOLLAMI COVELLO, in her official capacity as Mercer County Clerk; MARY H. MELFI, in her capacity as Hunterdon County Clerk; STEVE PETER, in his official capacity as Somerset County Clerk; HOLLY MACKEY, in her official capacity as Warren County Clerk; NANCY J. PINKIN, in her official capacity as Middlesex County Clerk; JOSEPH GIRALO, in his official capacity as Atlantic County Clerk; JOHN S. HOGAN, in his official capacity as Bergen County Clerk; JOANNE SCHWARTZ, in her official capacity as Burlington County Clerk; JOSEPH RIPA, in his official capacity as Camden County Clerk; RITA M. ROTHBERG, in her official capacity as Cape May County Clerk; CELESTE M. RILEY, in her official capacity as Cumberland County Clerk; CHRISTOPHER J. DURKIN, in his official capacity as Essex County Clerk; JAMES N. HOGAN, in his official capacity as Gloucester County Clerk; E. JUNIOR MALDONADO, in his official capacity as Hudson County Clerk; ANN F. GROSSI, in her official capacity as Morris County Clerk; DANIELLE IRELAND-IMHOF, in her official capacity as Passaic County Clerk; and

Civ. Action No.: 3:24-cv-01098 (ZNQ) (TJB)

JOANNE RAJOPPI, in her official capacity as Union County Clerk;

Defendants.

- and –

DALE A. CROSS, in his official capacity as Salem County Clerk; and JEFF PARROTT, in his official capacity as Sussex County Clerk; TAHESHA WAY, Esq., in her official capacity as Secretary of State for New Jersey.

As Interested Parties.

SOMERSET COUNTY CLERK STEVE PETER'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

WILENTZ, GOLDMAN & SPITZER, P.A.
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Defendant Steve Peter, in his official capacity as Somerset County Clerk

Of Counsel and On the Brief:
Gordon J. Golum, Esq.

On the Brief:
Richard K. Wille Jr., Esq.

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PRELIMINARY STATEMENT

The County Clerk in the State of New Jersey is a Constitutional Officer charged with certain duties relating to the orderly administration of our elections. These duties require compliance with a series of legislative enactments that enjoy the presumption of constitutionality and are designed to preserve the integrity of our elections. The County Clerks' responsibilities do not begin on Election Day, nor do they begin the day ballots are mailed out. In order to fulfill these duties, the County Clerk must work to ensure that the instrumentalities of our elections are in place. This includes overseeing the programming and testing of voting machines that must be certified by the New Jersey Secretary of State, the programming and testing of ballot-printing machines, bidding on vendor contracts and procurement of necessary funds to ensure that the voters are equipped with the necessary tools for their voices to be heard in our representative democracy.

Plaintiffs Andy Kim, in his personal capacity as a candidate for U.S. Senate ("Mr. Kim"); Andy Kim for New Jersey; Sarah Schoengood ("Ms. Schoengood"); Sarah for New Jersey; Carolyn Rush ("Ms. Rush") and Carolyn Rush for Congress (collectively, "Plaintiffs") urge this Court to intervene in their primary election contests by upending the legislative framework of our elections, regardless of the mischief it will sow. It is long past the time that the requested relief can be provided without a substantial risk of error and adverse impact on voter confidence in our elections. Indeed, to even try to do so now would force a change in the process historically used in New Jersey without full investigation and consideration given the short time to address Plaintiffs' request.

A preliminary injunction is a drastic and extraordinary remedy that should not be routinely granted. Particularly where the injunction is directed at disrupting the status quo, the movant bears a heavy burden.

As discussed in this brief, the Third Circuit has recognized that the greater the public interest and harm to other parties, the greater the likelihood of success on the merits must be to support an injunction. The questionable feasibility of complying with the extraordinary changes Plaintiffs seek at this late stage should defeat their motion, regardless of their ultimate chances of success. To the extent the Court analyzes Plaintiffs' chance of success on the merits, the United States Constitution and Supreme Court of the United States have recognized and protected the right of association since the early days of our republic. Courts have rejected similar challenges to the legislative enactments that Plaintiffs challenge, which enjoy a presumption of constitutionality that Plaintiffs bear a heavy burden to invalidate.

Plaintiffs' request for relief should be denied because the public interest is not served by rushing to judgment on an important issue of constitutional magnitude which will have an impact on the rights of every New Jersey voter and the ability to administer our elections. Moreover, federal courts have recognized that there is a compelling public interest in promoting the associational rights of candidates and political institutions because they are protected under constitutional law. As Plaintiffs waited until the eleventh hour to file this action, their delay negates any claim of irreparable harm. Yet the constitutionally protected associational rights of the many candidates and political committees that are not even party to his action stand to be irreparably harmed at least as much as Plaintiffs. The balance of equities thus militates against injunctive relief.

While all the foregoing reasons strongly support denial of Plaintiffs' request for emergency judicial intervention, Plaintiffs' failure to join necessary parties with constitutional interests that are at stake in this matter is an independent ground to deny their motion. Due process demands that their associational rights should not be ignored without an opportunity to

be heard. Similarly, the doctrine of laches should bar Plaintiffs' requested relief. Plaintiffs' inexcusable delay in bringing this action long after it was ripe has prejudiced the ability of Defendants to investigate and demonstrate to the Court the grave danger in granting an injunction.

For all the foregoing reasons, the Court should deny Plaintiffs' request for preliminary injunction.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Procedural History

Plaintiffs Andy Kim, in his personal capacity as a candidate for U.S. Senate ("Mr. Kim"); Andy Kim for New Jersey; Sarah Schoengood ("Ms. Schoengood"); Sarah for New Jersey; Carolyn Rush ("Ms. Rush") and Carolyn Rush for Congress' (collectively, "Plaintiffs") filed a Verified Complaint and Motion for a Preliminary Injunction on February 26, 2024. Plaintiffs did not serve the Verified Complaint on the political committees of any counties, nor the candidates whose constitutional rights may infringed by Plaintiffs' requested relief.

The Court held a Case Management Conference on February 29, 2024. ECF Doc. No. 31. On March 4, 2024, the Camden County Democratic Committee moved to intervene. ECF Doc. No. 41. A hearing on Plaintiffs' emergency application is scheduled for March 18, 2024.

B. Statement of Facts

Somerset County Clerk Steve Peter ("Mr. Peter") is a duly elected constitutional officer of Somerset County pursuant to Article 7, § 2, ¶2 of the New Jersey Constitution. Certification of Steve Peter, dated March 6, 2024 ("Peter Cert."), ¶2. The duties of his office are enumerated in the duly enacted New Jersey Statutes, N.J.S.A. 40A:9-63 to N.J.S.A. 40A:9-77.2. *Id.*, ¶3. Mr. Peter has served in this capacity since 2018. *Id.*, ¶9. Mr. Peter previously served as the Deputy County Clerk of Champaign County, Illinois. *Id.*, ¶7. Mr. Peter also serves as the Vice President of the Constitutional Officers Association of New Jersey, and previously served as the Secretary

and Section Chief of Clerks and Recorders of that organization. *Id.*, ¶¶10-11. Through these roles, Mr. Peter has firsthand knowledge of the many factors associated with administering elections. *Id.*, ¶12.

A main significant difficulty the Somerset County Clerk's Office would face if the Court grants Plaintiffs' request for a preliminary injunction is the extremely tight timeline for preparation of ballots, which is already a challenge using the system it has been using for decades (the county line), let alone having to learn a new setup while complying with the deadlines. *Id.*, ¶13.

The first deadline at issue is March 25, 2024 at 4:00 p.m. *Id.*, ¶14. Pursuant to N.J.S.A. 19:23-14, before 4:00 p.m. on or before the 71st day prior to the primary election, county candidates submit to the Clerk their nominating petitions. Peter Cert., ¶14. In advance of this March 25 deadline, the candidates must coordinate their associations on the ballot and slogans to submit pursuant to N.J.S.A. 19:23-14. Peter Cert., ¶14.

Between March 25 and April 5, candidates must submit the name of their campaign manager to empower that person to determine which candidates will appear on their column in the ballot. *Id.*, ¶15. If any races are contested, the Clerk must coordinate with the campaign manager to determine which candidates will be associated with others on the ballot. *Id.*

At this point, the County Clerk begins the ballot layout. *Id.*, ¶16. This is started before the drawing to ensure that all of the offices, candidate names and translations are correct before being placed in the appropriate space on the ballot after the drawing. *Id.* Somerset County produces ballots in two languages, English and Spanish. *Id.* Other counties may be required to add additional languages to their ballots, depending on their population. *Id.* While these functions will need to be carried out regardless of whether an injunction is entered, it is one of many steps in the election process that must be executed in a tight timeframe. *Id.*, ¶17. The longer the ballot

preparation process is delayed due to Plaintiffs' litigation, the less time there is to engage in these processes and correct any issues with the translations. *Id.*

Pursuant to N.J.S.A. 19:23-24, at 3:00 p.m. on the 61st day before the primary election, the County Clerks and municipal clerks conduct the drawings for ballot positions. Peter Cert., ¶18. For the 2024 primary, the statutory deadline for drawing falls on April 4, 2024. *Id.*, ¶18. In advance of this date, the Clerk must prepare slips with the names of candidates and the capsules to place the slips in. *Id.* There are 319 contests in this election in Somerset County. *Id.* At a minimum, there will be 638 names to put on the ballot if there are no contested races. *Id.* There are likely to be many contested races with multiple candidates, which will significantly increase the number of names to be drawn and placed on the ballots. *Id.*

In 2023, Mr. Peter drew for 57 names of candidates across 26 contests in Somerset County, which took approximately 30 minutes. *Id.*, ¶19. If the preliminary injunction is granted, ballot draws will now become a multi-hour affair, cutting into the 24-hour clock that is already ticking for ballot preparation pursuant to N.J.S.A. 19:23-24 (April 4th drawing date) and N.J.S.A. 19:14-1 (April 5th ballot submission to printer). Peter Cert., ¶20. This is because if candidates are no longer able to associate as a block consistent with N.J.S.A. 19:49-2 and be drawn with a single capsule, each candidate for each race must get a separate drawing. Peter Cert., ¶20.

The next day, April 5, 2024, is the deadline for preparation of the official primary election ballot for printing pursuant to N.J.S.A. 19:14-1 (60 days before the primary election). Peter Cert., ¶21. The statute expressly requires that "Every county clerk shall have ready for the printer on or before the 60th day prior to the primary election . . . a copy of the contents of official ballots as hereinafter required to be printed for use at such election." *Id.*, ¶21. There is thus a 24-hour clock

between the drawing for ballot position on April 4th and preparation of the ballots for submission to the printer on April 5th. *Id.*

Typically, Mr. Peter personally prepares the layouts for the ballots between the drawing and the submission to the printer. *Id.*, ¶22. Some county clerks do the same, while other county clerks utilize vendors to accomplish this function. *Id.* If the preliminary injunction is granted, given the departure from the usual process and the significant additional demands resulting from the drawing, Mr. Peter will likely need to utilize a vendor to assist with the ballot layout, which will incur additional costs and come with its own risk of human error. *Id.* This is but one of many points in the process where errors may occur as a result of the novelty of the procedure for New Jersey clerks if Plaintiffs' eleventh-hour request for injunctive relief is granted. *Id.*, ¶23.

Pursuant to N.J.S.A. 19:63-5 and -9, the mailing of mail-in ballots commences 45 days before the primary election, which falls on April 20th this year. Peter Cert., ¶25. This includes the deadline to send ballots according to the Uniformed and Overseas Voters Absentee Voting Act ("UOCAVA"), a federal law that protects the voting rights of military members, public servants and their families serving our nation's interests abroad. *Id.*

By April 26, 2024, the programming and proofing of machine ballots for each district must be complete to meet subsequent deadlines. *Id.*, ¶26. If a preliminary injunction is granted, this voting ballot machine process will take longer, leaving even less time to program the machine ballots. *Id.* For each of the 267 election districts in Somerset County, Mr. Peter must perform various functions to ensure the integrity of the election and protect the franchise of New Jersey voters. *Id.*, ¶27. For example:

- Proofread the draft ballots for substantive and technical accuracy, *id.*;
- Print test deck and deliver to the voting machine vendor (for Somerset County, ES&S), *id.*;

- ES&S then performs tests to ensure proper function of voting machine and to detect and correct any errors, *id.*;
- The ballot printing then begins, *id.*;
- County Clerk staff prepares mailing: address envelopes, insert ballots and other materials and delivers to USPS for delivery, *id*.

The County Clerks are responsible for overseeing the aforementioned process in their respective counties. *Id.*, ¶28. Each county is served by one of only two vendors: ES&S or Dominion. *Id.*

Notably, Somerset is one of fifteen (15) counties that utilize ES&S for the foregoing services. *Id.*, ¶29. Thus, the Office of the Somerset County Clerk would need to know whether ES&S, its current vendor, is able to accommodate the changes Plaintiffs seek in time for the 2024 primary elections. *Id.*, ¶30. ES&S has indicated that it cannot implement the changes necessary to comply with the last-minute overhaul of our elections that Plaintiffs request in time for New Jersey's 2024 primary elections. *See* ECF Doc. No. 46.

The remaining six (6) counties utilize Dominion, which is the only other vendor capable of executing these necessary tasks. *Id.*, ¶31. It is unclear whether it is feasible for Somerset County to use Dominion in the short time remaining to administer the rapidly approaching primary election. *Id.*, ¶32. Even if Dominion were able to accommodate the requested changes, my office would need to contract with them and procure the necessary funds. *Id.*, ¶33. There may be additional unforeseen challenges in any effort to switch to Dominion, particularly at this late stage in the election cycle. *Id.*, ¶34.

From April 26th to May 22nd, County Clerks' offices and vendors conduct testing. Each district's machine data is downloaded onto a thumb drive. *Id.*, ¶35. Each thumb drive is then uploaded onto each voting machine. *Id.* Somerset County has over 300 voting machines that will

need to undergo this process. *Id.* If errors are detected, the vendor costs would likely increase. *Id.* The County would be required to fund these costs. *Id.*

From May 13 to 16, sample ballots are proofread and the printers prepare for mailing. *Id.*, ¶36. On May 14, non-partisan elections are held in some counties. *Id.*, ¶37. The Somerset County Clerk's printing vendor, Royal Printing Service, has submitted a sworn affidavit in this matter expressing its concerns that it will not be able to implement the changes necessary to comply with Plaintiffs' request for relief in time for the 2024 primary election if an injunction is granted. *See* ECF Doc. No. 53-1, ¶27.

On or around May 22, 2024 an inspection of the voting machines is conducted pursuant to N.J.S.A. 19:23-34. Peter Cert., ¶38. If there are substantial errors detected as a result of the requested drastic overhaul of every step of the foregoing processes, additional time will be necessary to remedy any issues with the novel systems, if they can be remedied at all. *Id.*

By May 22, 2024 at the latest (on or before 12 noon on Wednesday preceding the start of the early voting period for the primary election), sample ballots of the primary election must be mailed to the voters pursuant to N.J.S.A. 19:23-34. Peter Cert., ¶39. In any Presidential election year, the Somerset County Clerk's Office historically receives a high volume of calls from voters concerning the ballot format and instructions to ensure their vote is counted. *Id.*, ¶40. If a preliminary injunction requiring the drastic changes requested in a short timeframe, based on Mr. Peter's extensive experience in election administration, he expects that a new design will prompt many new calls from voters and declarations of conspiracy. *Id.*, ¶41.

While all of this will present significant difficulties and disruption to the Clerk's offices (and we note that Clerks have duties outside of elections that must be fulfilled while they prepare ballots), the Clerks can do their best to comply. *Id.*, ¶42. What they cannot do, however, is ensure

a lack of errors because of the totality of new processes required, new designs to test, and a new format to explain to the voters. *Id.*

In addition to all stages in the process where errors can occur and would need to be addressed in advance of rapidly approaching deadlines, there may be many unforeseen issues that the Clerks cannot anticipate if an injunction is granted. *Id.*, ¶43. If there are errors in any ballot, many of the processes involved must be re-run and re-tested to ensure there are no other errors, until every ballot and machine is free of errors. *Id.*, ¶44. Any errors, no matter how minor, caused by this rapid switch will call into question the integrity of the election. *See id.*, ¶45.

If the voting machines cannot ultimately pass the required tests and certifications in time, the only remaining option is to utilize emergency ballots. *Id.*, ¶46. This is not feasible, as the preparation of emergency ballots involves the previously described testing, printing, and challenges to create emergency ballots using a completely novel format. *Id.*

In that scenario, there would be significant additional time and expense associated with preparing huge volumes of emergency ballots and the logistical challenge of administering the election on that basis. *Id.*, ¶47. The use of paper emergency ballots also requires significant time for the counting of the ballots, which could be subject to human error given the scale of an election without voting machines. *Id.*, ¶48. The "Track My Ballot" website normally permits New Jersey voters to verify that their vote is counted shortly after an election. *Id.*, ¶49. If all voters are required to use emergency ballots, their ability to check on the status of their vote will be significantly delayed. *Id.*

Ultimately, even if an election using emergency paper ballots could be conducted (which is not feasible because it requires nearly every step of the foregoing processes to be error free),

this would likely have an impact on voter confidence because of the resultant risk of error. *Id.*, ¶50.

The New Jersey Division of Elections must certify state-wide totals for federal and state election contests. *Id.*, ¶51. Any delays in certification by the County Clerks will in turn affect their certification. *Id*. Depending on the severity of the issues and errors resulting from granting Plaintiffs' request for relief, this could impact whether New Jersey's vote is certified in time for the dates imposed by the United States Constitution with respect to the 2024 Presidential Election. Peter Cert., ¶52.

LEGAL ARGUMENT

POINT I

THIS MATTER SHOULD PROCEED NO FURTHER BECAUSE PLAINTIFFS HAVE FAILED TO JOIN INDISPENSABLE PARTIES TO THIS ACTION.

The Court should not grant the extraordinary remedy of injunctive relief sought in this action because indispensable parties have not been joined, and their rights will be irreparably prejudiced as a result. Those parties include the county Democratic and Republican Committees and the candidates whose associational rights Plaintiffs seek to sever by judicial intervention.

A. Plaintiffs have failed to Join Necessary Parties Pursuant to Fed. R. Civ. P. 19

Federal Rule of Civil Procedure 19 expressly states:

> (a) **Persons Required to Be Joined if Feasible**.
>
> (1) **Required Party**. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; **or**

> (B) **that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may**:
>
> (i) **as a practical matter impair or impede the person's ability to protect the interest**; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
>
> [Fed. R. Civ. P. 19 (emphasis added).]

Courts treat clauses (A) and (B) in the disjunctive, just as Rule 19 phrases them. *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (3d Cir. 2007); *Colony Ins. Co. v. Aspen Specialty Ins. Co.*, 20-CV-09446-JHR-JS, 2021 WL 1589355, at *7 (D.N.J. Apr. 23, 2021) (noting that *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 405 (3d Cir. 1993) wrongly stated that that "[a] Rule 19(a)(1) inquiry is limited to whether the district court can grant complete relief to the persons already parties to the action," which "ignores that subsections (a)(1)(A) and (a)(1)(B) are distinct factors, either of which can render a party necessary to the litigation."). "[T]hus, if ***either*** subsection is satisfied, the absent party is a necessary party that should be joined if feasible." *Abuhouran v. KaiserKane, Inc.*, CIV. 10-6609 NLH/KMW, 2012 WL 4027416, at *4 (D.N.J. Sept. 12, 2012) (emphasis added).

"Subdivision (a)(2)(i) protects the interests of absent third parties who might be prejudiced if not joined." *Princeton Biochemicals, Inc. v. Beckman Coulter, Inc.*, 223 F.R.D. 326, 329 (D.N.J. 2004). Subdivision (a)(2)(ii) "was enacted to protect parties from a substantial risk of multiple or inconsistent obligations" and "also helps to protect defendants from needless multiple litigation." *Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel, Known as "The Sindia"*, 895 F.2d 116, 122 (3d Cir. 1990) (quotations and citations omitted).

The interest protected by Rule 19(a)(1)(B)(i) must be "relat[ed] to the subject of the action," and "a legally protected interest," "not merely a financial interest." *Liberty Mutual Ins. Co. v. Treesdale, Inc.,* 419 F.3d 216, 230 (3d Cir. 2005) (quoting *Spring–Ford Area School District v. Genesis Ins. Co.*, 158 F.Supp.2d 476, 483 (E.D. Pa. 2001)).

Additionally, the interest must be practically impaired or impeded by a disposition in the person's absence, Fed. R. Civ. P. 19(a)(1)(B)(i), and the impairment must be "direct and immediate," "not speculative." *Gov't Employees Ins. Co. (GEICO) v. Korn*, 310 F.R.D. 125, 132 (D.N.J. 2015).

"The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). The United States Supreme Court has recognized that the associational interests of candidates and political parties are of constitutional magnitude.

As the Court held in *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000):

> [T]he First Amendment protects "the freedom to join together in furtherance of common political beliefs," *Tashjian*, at 214–215, which "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only," *La Follette*, 450 U.S., at 122. That is to say, a corollary of the right to associate is the right not to associate. In no area is the political association's right to exclude more important than in its candidate-selection process. That process often determines the party's positions on significant public policy issues, and it is the nominee who is the party's ambassador charged with winning the general electorate over to its views. The First Amendment reserves a special place, and accords a special protection, for that process, [*Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 224 (1989)], because the moment of choosing the party's nominee is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power.

Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire," such as Plaintiffs. *Eu*, 489 U.S. at 214.

These associational interests are further protected by New Jersey statutes, which as enactments of our duly-elected legislature enjoy a presumption of constitutionality. *See State Farm Mut. Auto. Ins. Co. v. State*, 124 N.J. 32, 45–46 (1991) (holding legislative enactments "are presumed to be valid and the burden on the proponent of invalidity is a heavy one."). N.J.S.A. 19:49-2 provides that candidates may signal their association to one another by using the same slogan and being placed on the same line of the voting machine. And as the United States Supreme Court recognizes, the party itself has a constitutionally protected interest in signaling its support for a given candidate. *See Cal. Dem. Party,* 530 U.S. at 574; *Eu*, 489 U.S. at 214.

In this case, the Camden County Democratic Committee has already moved to intervene. As a result, it has claimed an interest relating to the subject of this action. Similarly, all candidates in New Jersey that have chosen "the same designation or slogan" and to "have their names placed on the same line of the voting machine" pursuant to N.J.S.A. 19:49-2 have asserted a cognizable legal interest that Plaintiff's eleventh-hour request for emergency relief would eviscerate, if granted. *See* Fed. R. Civ. P. 19(b). The ability of the parties and candidates to protect their constitutionally protected associational rights will be impaired if a preliminary injunction is granted in their absence. *See Cal. Dem. Party,* 530 U.S. at 574; *Eu*, 489 U.S. at 214; Fed. R. Civ. P. 19(B)(1).

Thus, the political parties and candidates exercising their associational rights by availing themselves of N.J.S.A. 19:49-2 are necessary parties to this action. "[W]hen a party is deemed

'necessary' under Rule 19(a), joinder must occur if feasible." *Gen. Refractories Co.*, 500 F.3d at 319 (holding joinder is not feasible if it would destroy subject matter jurisdiction based on diversity). Indeed, failure to do so is grounds for dismissal.[1] *See* Fed. R. Civ. P. 12(b)(7). In *Princeton Biochemicals, Inc.*, 223 F.R.D. at 329, the court applied Rule 19(a) to find that Rutgers University should be joined as a necessary party, noting that joining it would not defeat jurisdiction and that Rutgers had an interest in the litigation that would be impaired if it remained absent. As joinder of the county and state political committees is perfectly feasible in this matter, the Court need not analyze Rule 19(b), which concerns only circumstances where joinder is not feasible.

Accordingly, the Court should dismiss Plaintiff's Verified Complaint and deny its request for a preliminary injunction because Plaintiffs have failed to join necessary parties pursuant to Rule 19(a).

B. This Matter Should Proceed No Further Because the Absent Necessary Parties are Indispensable

Where non-parties are necessary to an action and their joinder is not procedurally feasible, the court must evaluate whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b); *see also Guthrie Clinic, Ltd. v. Travelers Indem. Co. of Ill.,* 104 Fed. Appx. 218, 221 n. 4 (3d Cir. 2004). If the party is indispensable, the action ultimately cannot go forward. *See Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.,* 844 F.2d 1050, 1053–54 (3d Cir. 1988); *see also Doe v. Matthews*, 420 F. Supp. 865, 870 (1976) (holding "the failure to join an indispensable party" requires dismissal of injunctive application).

In making this determination, Fed. R. Civ. P. 19(b) requires the Court to consider:

[1] The Court indicated in the Case management Conference held on February 29, 2024 that it "wouldn't entertain a dispositive motion in advance of March 18th." TR. 16:1-2. As failure to join necessary parties is a valid grounds for dismissal that directly relates to Defendants' opposition to entry of a preliminary injunction, we raise it here.

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> > (A) protective provisions in the judgment;
> > (B) shaping the relief; or
> > (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.
>
> [Fed. R. Civ. P. 19.]

Political parties and candidates are indispensable because their associational rights will be infringed if the requested relief is granted. This prejudice can be avoided by simply denying the request for injunctive relief and deciding the important constitutional issues in this case on a non-expedited basis. While a judgment rendered in ***favor*** of the Clerks on the motion for a preliminary injunction would be adequate to protect the political parties' interests, an ***adverse*** judgment would gravely affect the political parties' constitutional rights without any meaningful opportunity to oppose in a reasonably timely manner prior to its entry. Finally, no remedy could redress the harm that will result if a preliminary injunction is granted and then Defendants succeed on the merits after the election. This is particularly true of candidates, who may lose an election as result of the grant of a preliminary injunction that deprived them of associational rights without any opportunity to be heard. *See Democratic-Republican Org. of New Jersey*, 900 F. Supp. 2d at 453.

Accordingly, the Court should find that this action cannot move forward, and deny Plaintiffs' request for a preliminary injunction. *See Bank of America Nat'l Trust & Sav. Ass'n*, 844 F.2d at 1053–54; Fed. R. Civ. P. 19.

POINT II

THE COURT SHOULD NOT GRANT PLAINTIFFS' REQUEST FOR THE EXTRAORDINARY REMEDY OF A PRELIMINARY INJUNCTION.

A preliminary injunction is a "drastic and extraordinary remedy that is not to be routinely granted." *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568 (Fed. Cir.1993). A trial court's decision to issue a preliminary injunction is discretionary. *New England Braiding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 882 (Fed. Cir. 1992). In order to obtain the extraordinary relief of an injunction prior to trial, the movant carries the burden to establish a right thereto in light of the following factors: (1) that the movant is likely to succeed on the merits at trial; (2) the movant will suffer irreparable harm if preliminary relief is not granted; (3) that the balance of the hardships tips in the movant's favor; and (4) that the preliminary injunction is in the public interest. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001) (citing *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1555 (Fed. Cir. 1994)); *Larami Ltd. v. Ohio Art Co.*, 270 F. Supp. 2d 555, 557 (D.N.J. 2003)).

"[W]hen the preliminary injunction is directed not merely at preserving the status quo but, as in this case, at providing mandatory relief, the burden on the moving party is particularly heavy." *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980) (citation omitted).

Here, Plaintiffs seek to disrupt the status quo of New Jersey's election laws that have been in place for decades. The Court should deny Plaintiffs request because any alleged harm to Plaintiffs is negated by their delay in bringing this action; the balance of hardships weighs decidedly in Defendants' favor; there is a strong, long-recognized public interest in protecting the

associational rights of political candidates and their parties; and they have not shown they are likely to succeed on the merits. Each of these factors will be discussed in turn below.

i. Plaintiffs' Allegations of Harm Are Undermined by Their Inexcusable Delay in Requesting Emergent Relief.

Plaintiffs' cries of irreparable harm ring hallow, as their own inexcusable delay has created the claimed emergency, which they now seek an extraordinary judicial intervention to avoid.

While courts may presume the existence of irreparable harm if the movants can demonstrate a constitutional injury, *see Democratic-Republican Org. of New Jersey*, 900 F. Supp. 2d at 453, a plaintiff's delay in seeking a preliminary injunction is "an important factor bearing on the need for a preliminary injunction, particularly irreparable harm." *Otsuka Pharm. Co. v. Torrent Pharm. Ltd., Inc.*, 99 F. Supp. 3d 461, 503 (D.N.J. 2015); *Pfizer, Inc. v. Teva Pharm., USA, Inc.*, 429 F.3d 1364, 1382 (Fed. Cir. 2005) (generally noting that delay "negates the idea of irreparability"); *Hybritech Inc. v. Abbott Labs*, 849 F.2d 1446, 1457 (Fed. Cir. 1988) (noting that a "period of delay" constitutes "one factor to be considered by a district court in its analysis of irreparable harm"); *T.J. Smith & Nephew Ltd. v. Consol. Medical Equip. Corp.*, 821 F.2d 646, 648 (Fed. Cir. 1987) (finding that the plaintiff's delay in seeking an injunction negated any irreparable harm).

Here, Plaintiffs could have filed this Verified Complaint and Motion for Preliminary Injunction months ago, which could have greatly reduced the risk of error associated with making the kind of significant changes to every aspect of the administration of our elections that the U.S. Supreme Court cautioned against in *Purcell* and avoided any adverse impact to the integrity of our elections. Instead, Plaintiffs delay has forced an expedited schedule that prejudices Defendants by depriving them of the ability to adequately litigate these constitutional issues of paramount public importance.

This Court should not countenance Plaintiffs' delay, but find any harm Plaintiffs allege will result from denial of their emergent motion is negated by their lack of urgency in bringing this litigation when their purported harm was apparent.

ii. The Balance of Equities Weighs Heavily Against Granting a Preliminary Injunction.

The balance of equities militates against the extraordinary remedy of a preliminary injunction. The United States Supreme Court, in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), held that federal district courts should not enjoin state election laws in the period close to an election because doing so is likely to create problems with the administration of elections that impact the voters. *Purcell* modifies the traditional test for a stay by requiring the Court to consider the its impact on "institutional procedures" specific to the administration of elections and inherent risk of adversely impacting voters through untimely judicial intervention. "As an election draws closer, that risk will increase." *Id.* at 5.

The Court has repeatedly reiterated this standard—the "Purcell Principle"—applying it in numerous election cases since this "bedrock tenet of election law" was first announced. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022); *see Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."). Rather, the "rules of the road" should be determined in advance of elections to avoid any unintended harms to the integrity of our elections. *See Merrill*, 142 S. Ct. at 880.

The United States District of New Jersey has historically applied these principles in the face of untimely election challenges. In *Democratic-Republican Org. of New Jersey v. Guadagno*, 900 F. Supp. 2d 447, 461 (D.N.J. 2012), *aff'd*, 700 F.3d 130 (3d Cir. 2012), this Court denied a request for injunctive relief regarding a candidate's placement on a ballot filed

approximately one week before the deadline to print mail-in ballots pursuant to N.J.S.A. 19:14-1. The court denied the plaintiffs' untimely request for relief, holding: "At this late state in the election process, any injunctive remedy ordered by this Court would dramatically upset ongoing ballot printing and distribution." *Democratic-Republican Org. of New Jersey*, 900 F. Supp. 2d at 461 (citing *Purcell*, 549 U.S. at 4).

In weighing the equities in an election challenge, District Courts in the Third Circuit consistently disfavor a plaintiffs' inexcusable delay in bringing a challenge and its potentially adverse impact, particularly on a national election as here. *See, e.g., Pub. Interest Legal Found. v. Boockvar*, 495 F. Supp. 3d 354, 361 (M.D. Pa. 2020); *Republican Party of Pa. v. Cortes*, 218 F.Supp. 3d 396, 405 (E.D. Pa. 2016) ("There was no need for this judicial fire drill and Plaintiffs offer no reasonable explanation or justification for the harried process they created.").

Here, Plaintiff Kim acknowledges that he has sought endorsements, the support of county political organizations, and bracketing within their county lines for months prior to filing his application for emergency relief. Verified Complaint, ¶ 148. Mr. Kim announced the launch of his campaign for nomination to the U.S. Senate in September 23, 2023. Verified Complaint, ¶ 144. First Lady Tammy Murphy ("First Lady Murphy") launched her primary election bid for the same seat on November 15, 2023. *See id.*, at ¶ 145 and n. 9. As Plaintiff Kim alleges, endorsements for First Lady Murphy by county political parties began immediately. *Id.* Yet, inexplicably, Plaintiffs waited over three months to file the present action to overturn New Jersey's entire election process, notwithstanding the potentially deleterious impact to the integrity of our elections as cautioned against by federal case law. *See, e.g.*, *Democratic-Republican Org. of New Jersey*, 900 F. Supp. 2d at 461, *aff'd*, 700 F.3d 130 (3d Cir. 2012); *Purcell*, 549 U.S. at 4; *Merrill*, 142 S. Ct. at 880.

Plaintiffs' lack of urgency in bringing this action for injunctive relief negates any purported harm to Plaintiffs. *See Otsuka Pharm. Co.*, 99 F. Supp. 3d at 503; *Pfizer, Inc.*, 429 F.3d at 1382.

Conversely, many candidates for political office in New Jersey will suffer irreparable harm if an injunction is granted. *Democratic-Republican Org. of New Jersey*, 900 F. Supp. 2d at 453 (holding the Court assumes that irreparable harm results from a constitutional injury resulting from loss of First Amendment freedoms). Precedent recognizes that the candidates have constitutionally protected associational rights, *Calif. Dem. Party*, 530 U.S. at 574; *Eu*, 489 U.S. at 214, which will be eviscerated if an injunction is entered. The harm to each of these candidates is at least as great as the harm to each Plaintiff in the present action, only there are many, many more of such candidates than are Plaintiffs. Should the Court determine that this matter may proceed in the absence of those candidates as argued against above, the harm to their recognized constitutional rights should be weighed in balancing the equities.

Most importantly, County Clerks are constitutional officers tasked with administering elections according to the duly enacted laws of New Jersey. The preservation of the integrity of the elections is at the heart of this function, of paramount concern. The voting machine vendor used by Somerset County, ES&S, has indicated that it is too far into the primary election cycle to accommodate Plaintiff's request for relief. *See* ECF Doc. No. 46. If an injunction is granted, even Herculean efforts by Defendants to comply will result in an unacceptable risk of error and jeopardize the integrity of the election.

Accordingly, the harm to the voters and public, the adverse impact an injunction will have on our election, and harm to the many candidates, political organizations, and their recognized

constitutional rights of association, all heavily outweigh any purported harm to Plaintiffs, which is negated by their lack of urgency, thus creating this prejudicial and unnecessary judicial fire drill.

iii. The Public Interest Weighs Decidedly in Favor of Denying Plaintiffs Request for a Preliminary Injunction.

"It is well-settled that the State has an interest in regulating elections to ensure that voters are able to understand the ballot, and may do so by treating political party candidates differently than unaffiliated candidates." *Democratic-Republican Org. of New Jersey v. Guadagno*, 900 F. Supp. 2d 447, 456 (D.N.J. 2012), *aff'd*, 700 F.3d 130 (3d Cir. 2012); *Purcell*, 549 U.S. at 4 ("A State indisputably has a compelling interest in preserving the integrity of its election process.") (quoting *Eu*, 489 U.S. at 231).

Article I, Section 4, clause 1 of the U.S. Constitution grants states the right to prescribe "[t]he Times, Places and Manner of Holding Elections for Senators and Representatives," and the Supreme Court has held states have an equal power to regulate their own elections. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) (quoting U.S. Const., Art I, § 4, cl. 1).

In *Quaremba v. Allan*, 67 N.J. 1 (1975), the New Jersey Supreme Court recognized the "public interest [in] permitting a grouping of candidates having common aims or principles and authorizing those candidates to have such fact brought to the attention of the voter in a primary election with the additional effectiveness produced by alignment of their names on the voting machine ballot."

There is thus a recognized public interest in: (1) allowing candidates and parties to signal to voters their cooperation and association so that voters may select those candidates with the greatest chance of victory in the general election, *see id.* and *Calif. Dem. Party*, 530 U.S. at 574; (2) allowing states to decide the manner in which their elections are held, *see* U.S. Const., Art I, §

4, cl. 1; *Tashjian*, 479 U.S. at 217; and *Quaremba*, 67 N.J. at 1; and (3) refraining from judicial intervention that would produce a risk of errors in the voting process that could compromise the integrity of the election and perception of its legitimacy, *Purcell*, 549 U.S. at 4. There is no countervailing public interest if an injunction is granted, as the foregoing law makes clear.

Notably, this Court in *Conforti v. Hanlon* addressed a similar challenge to the present litigation and found: "Plaintiffs' burdens and the State's interests are factual and may require discovery. Depending on further factual findings, the state's interests may be sufficiently compelling to pass muster under the relevant Constitutional tests." *Conforti v. Hanlon*, CV2008267ZNQTJB, 2022 WL 1744774, at *17 (D.N.J. May 31, 2022). Thus, as this Court in *Conforti* has acknowledged, the depth of the public interest at stake requires the development of facts through discovery, and no injunction should be granted without this benefit.

In the same decision, this Court acknowledged that "[t]he State's interests in providing a manageable and understandable ballot, as well as ensuring an orderly election process [we]re hampered by the fact that one-third of all Mercer County voters were disenfranchised because they voted for more than one candidate for the same office." *Id.* at *17. This is precisely the type of voter confusion the Purcell Principle seeks to avoid, and demonstrates the public interest in preventing the invalidation of votes resulting from last-minute changes to ballots and the voter confusion and disenfranchisement that foreseeably results. *See Purcell*, 549 U.S. at 5-6.

Accordingly, the public interest weighs decidedly against granting the extraordinary remedy of a preliminary injunction.

iv. Plaintiffs Have Not Demonstrated The Requisite Likelihood of Success on the Merits.

"If a court finds no likelihood of success on the merits, the inquiry ends and the injunction will be denied." *Nichino Am., Inc. v. Valent U.S.A. LLC*, 44 F.4th 180, 185 (3d Cir. 2022). While

"likelihood of success on the merits" does not mean "more likely than not," the Third Circuit has endorsed a sliding-scale approach to this inquiry, holding that: "How strong a claim on the merits is enough depends on the balance of the harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief," and vice versa. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017), *as amended* (June 26, 2017) (quoting *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (Easterbrook, C.J.)).

Here, because of the harm that will result to the integrity of our elections if a preliminary injunction is granted, the strong constitutional interests and compelling public interest that our courts have repeatedly recognized in candidates and their party's associational rights, and the invalidation of any harm to Plaintiffs by their delay, and the fact that the relief Plaintiffs will disrupt, rather than preserve the status quo, the Court should require Plaintiffs to show a high likelihood of success on the merits to support their request for relief.

The Court should find that Plaintiffs cannot demonstrate the likelihood of success on the merits required to support the drastic relief they seek on several grounds. First, legislative enactments enjoy a presumption of constitutionality, and Plaintiffs bear a heavy burden on the merits. *See State Farm Mut. Auto. Ins. Co.*, 124 N.J. at 45–46. Second, robust precedent from all levels of federal and state court support the exercise of associational rights reflected in N.J.S.A. 19:49-2. *See, e.g.*, *Calif. Dem. Party*, 530 U.S. at 574; *Eu*, 489 U.S. at 214; *Democratic-Republican Org. of New Jersey*, 900 F. Supp. 2d at 461; *Quaremba*, 67 N.J. at 1.

Regardless of whether Plaintiffs can demonstrate any such likelihood of success, nothing changes the fact that is not feasible for Defendants to comply with Plaintiffs request for relief. As Plaintiffs cannot establish any of the four factors necessary to meet their heavy burden of

upending the status quo through emergency judicial intervention, the Court should deny their request.

POINT III

THE COURT SHOULD FIND THE DOCTRINES OF LACHES BARS PLAINTIFFS' REQUEST FOR RELIEF BECAUSE OF THEIR INEXCUSABLE DELAY IN BRINGING THIS ACTION AND SEVERE PREJUDICE TO DEFENDANTS.

The elements of laches are "(1) lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense." *Waddell v. Small Tube Products. Inc.*, 799 F.2d 69, 74 (3d Cir. 1986) (quoting *EEOC v. Great Atlantic & Pacific Tea Co.*, 735 F.2d 69, 80 (3d Cir.), *cert. dismissed*, 469 U.S. 925 (1984)).

As previously discussed, Plaintiffs inexcusably waited until the month before statutory election deadlines began to file this action, notwithstanding that they could have done so months earlier and avoided this judicial fire drill. *See* N.J.S.A. 19:23-14 (March 25, 2024 deadline to file nominating petitions with Clerk). As a result Plaintiffs' delay, Defendants are significantly prejudiced, having a very short time to litigate a significant constitutional challenge that flippantly jeopardizes the integrity of our elections. Moreover, Defendants have been deprived of the ability to obtain and present meaningful expert rebuttals to Plaintiffs purported proofs (let alone seek approval for the funds required to obtain such experts) due to the expedited nature of their self-created emergency. This Court should not countenance Plaintiffs' conduct, and find the Doctrine of Laches bars their extraordinary request for relief. *See Waddell*, 799 F.2d at 74.

Finally, we note that Plaintiffs' delay in bringing this action and the expedited nature of this motion has not only deprived Defendants of the ability to support their concerns with expert testimony and a robust factual record, it has also deprived the Court of benefitting from an equal presentation of the relevant facts and expert testimony. The public interest is not served by

rushing to judgment of these important issues, and nothing is preventing the Court from addressing them with the time and consideration they deserve.

Should the Court still be inclined to hold a hearing on Plaintiffs' motion for injunctive relief, Plaintiffs should be barred in equity from supporting their assertions with the benefit of expert testimony because their conduct has deprived Defendants and the Court of that benefit.

CONCLUSION

For all the foregoing reasons, the Court should deny Plaintiffs' Motion for a Preliminary Injunction.

WILENTZ, GOLDMAN & SPITZER, P.A.
Gordon J. Golum, Esq.
Richard K. Wille Jr., Esq.
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Defendant Steve Peter,
in his official capacity as Somerset County Clerk

Dated: March 6, 2024

GORDON J. GOLUM, ESQ.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANDY KIM, in his personal capacity as a candidate for U.S. Senate; *et al*., Plaintiffs, v. CHRISTINE GIORDANO HANLON, in her official capacity as Monmouth County Clerk; *et al*., Defendants.	Civ. Action. No.: 3:24-cv-1098-ZNQ-TJB

DEFENDANT CHRISTINE GIORDANO HANLON'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

SPIRO HARRISON & NELSON LLC
Jason C. Spiro, Esq. (jspiro@shnlegal.com)
Brian M. Nelson, Esq. (bnelson@shnlegal.com)
Marissa K. DeAnna, Esq. (mdeanna@shnlegal.com)
200 Monmouth Street, Suite 310
Red Bank, New Jersey 07701
Tel: (732) 784-1470
Attorneys for Defendant,
Christine Giordano Hanlon

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PRELIMINARY STATEMENT

Utilizing pseudoscience foisted upon County Clerks on the eve of making final preparations for the 2024 primary election, Plaintiffs are belatedly asking this Court to decide whether to disrupt 70 years of statutes and precedents governing how primary election ballots are designed in the State of New Jersey. The extraordinary relief being sought by Plaintiffs must be denied as they lack appropriate standing, fail to name multiple indispensable parties, and fall woefully short of meeting their burden for obtaining preliminary injunctive relief. In any event, the record is clear that adopting a new ballot design at this late stage cannot be accomplished within the timing required by New Jersey's election laws for the 2024 primary election.

Plaintiffs lack standing because they fail to demonstrate concrete, non-speculative harm—and in some instances, such as in Monmouth County—no harm at all. Plaintiffs assert "possible" harm, supported by generalized statistics, that may arise in elections featuring bracketed slates of candidates, without evidence to demonstrate that any constitutional deficiencies will arise in Monmouth County (or any other county) during the 2024 primary election. For example, Plaintiffs raise the concern of being placed in "ballot Siberia", where candidates are visually disconnected from other candidates by space(s) between the candidates on the ballot, but even a cursory review of Monmouth County's 2020 primary election

ballot, attached to Plaintiffs' Complaint, shows the absence of any such candidate positioning or harm.

Further, Plaintiffs claim injuries that simply do not exist based on the facts presented. Despite alleging to be disadvantaged, Congressman Kim successfully secured the endorsement of the Monmouth County Democrats allowing him to bracket with the slate of endorsed candidates on the ballot (*i.e.*, the county line). In addition, as a candidate for U.S. Senate, he is statutorily entitled to be included in the ballot drawing for the first column or row on the ballot regardless of whether he's bracketed with a slate of candidates or not. Likewise, Plaintiff Schoengood claims that she will be deprived of a favorable ballot position because she is only interested in bracketing with Kim, and Kim is on the county line in Monmouth and Burlington Counties without her, but Schoengood had an equal opportunity to seek the county line with Kim. Unfortunately, she entered the race late and missed the deadline for seeking the Democratic endorsement in Monmouth County. Not only are these circumstances of her own making, but there is no cognizable injury attributable to her anticipated ballot position.

Plaintiffs further assert that they can demonstrate a likelihood of success on the merits, but they present no credible evidence in support of that claim. Plaintiffs present expert reports that merely make generalized, speculative conclusions about hypothetical scenarios involving bracketed ballots without any particularized

analysis of the impact of their ballot positioning on their actual elections. The only plausible conclusion from Plaintiffs' expert reports is that the endorsement of the respective county political parties is, in some circumstances, important to a candidate's success; not that the county line itself mythologically generates additional votes that are not attributable to the endorsement of these long-established organizations. Indeed, Plaintiffs' evidence only demonstrates the critical importance of the State's countervailing interest in protecting the associational rights of candidates and political party organizations while providing county clerks with sufficient discretion to effectively carry out their statutory duties in an unbiased manner.

Importantly, Plaintiffs' own actions, sitting on their hands for months while seeking the endorsements of local county political organizations, is evidence that cuts against any finding of irreparable harm. Kim announced his candidacy on September 23, 2023 and raised concerns about bracketed balloting at that time. Nevertheless, Kim *chose* not to proceed with a constitutional challenge to bracketed balloting until after he failed to receive the endorsements of several county political organizations. He sat on his alleged emergent claims for five months, before filing this action for injunctive relief with the same counsel that has been pursuing the same constitutional claims in the pending action in *Conforti v. Hanlon*. This delay is dispositive evidence that, at the very least, Kim did not

believe that the long-established structure for bracketing candidate names would cause irreparable harm to his campaign in the absence of injunctive relief. At best, this is a self-created emergency, at worse it's political gamesmanship at the expense of taxpayers in 19 counties. Indeed, given Congressman Kim's status as the endorsed Democratic candidate in Monmouth County, he is unable to claim any conceivable harm arising out of his ballot placement in Monmouth County.

Plaintiffs' belated action, seeking to impose an entirely new ballot structure on county clerks on the eve of preparing ballots within already condensed statutory timeframes, would throw the primary election into chaos. Plaintiffs undoubtedly should be held accountable for that choice and the resulting risks posed to the integrity of the election process. As it stands, the county clerks have a mere 10 days from the March 27th deadline for receiving bracketing requests to perform the extraordinary work required to design, program and produce ballots in time for printing on April 5 (in the case of Monmouth County, 948 separate ballots with more than 2,000 candidates to be prepared simultaneously for mailing and the machines). The final ballot design has an impact on all aspects of Monmouth County's election systems for mailed and machine cast ballots, all of which must be programmed in the County's elections management software so that mail-in ballots can be sent by April 20 and machines are ready in time for early voting commencing on May 28.

The wholesale changes sought by Plaintiffs to primary election ballots at this late stage of the process would require efforts that are beyond extraordinary, including the recodification and certification of election systems, training and educating election workers, and educating voters, all in time for the primary election, which actually commences upon the mailing of ballots on April 20, not on June 4 as alleged by Plaintiffs. Even if those efforts were possible, and funds could be appropriated to support those tasks, the Principal State Certification Manager for Election Systems and Software ("ES&S"), the election machine and software vendor for Monmouth and many of the New Jersey counties, has submitted an Affidavit averring that changes to the ballot design would require development, testing and certification that ***"could not be made and implemented prior to New Jersey's 2024 primary elections."***

Accordingly, Plaintiffs' request for preliminary injunctive relief should be denied.

PROCEDURAL HISTORY

Plaintiffs Andy Kim, Andy Kim for New Jersey, Sarah Schoengood, Sarah for New Jersey, Carolyn Rush, and Carolyn Rush for Congress (collectively "Plaintiffs") filed a Verified Complaint against numerous New Jersey County Clerks, including Monmouth County Clerk Christine Giordano Hanlon. The Verified Complaint seeks to challenge the constitutionality of New Jersey laws that

dictate the design of the ballot in primary elections. Also on February 26, 2024, Plaintiffs filed an application for a preliminary injunction enjoining Defendants from utilizing the legally authorized ballot design in the 2024 primary election.

On February 29, 2024, the Court held a scheduling conference after which it issued an Order requiring all opposition briefs to be filed by March 6, 2024. An evidentiary hearing will be held at 10:30 a.m. on March 18, 2024.

STATEMENT OF FACTS

On September 23, 2023, Plaintiff Andy Kim announced his candidacy for U.S. Senate.[1] Despite his awareness of the bracketing system utilized on primary election ballots in New Jersey for decades, Kim chose to wait until February 26, 2024 to file this lawsuit. Sarah Schoengood announced her candidacy for Representative of the 3rd Congressional District on January 21, 2024. (Pl. Br.[2] at 14.) Because she filed two days after the Monmouth County Democratic Committee's deadline for filing an intent to seek endorsement at the Monmouth County Democratic Convention, Schoengood foreclosed herself from appearing on the county line. On February 12, 2023, Carolyn Rush announced her candidacy for

[1] Sabrina Malhi, *Rep. Andy Kim will challenge Menendez in primary for Senate seat*, Washington Post (Sept. 23, 2023 6:59 p.m.), https://www.washingtonpost.com/politics/2023/09/23/bob-menendez-andy-kim-primary/ (last accessed March 5, 2024).

[2] Citations to "Pl. Br." refer to Plaintiffs' Brief in Support of their Motion for Preliminary Injunction dated February 26, 2024 and filed on February 26, 2024.

Representative of the 2nd Congressional District (which does not include Monmouth County), over one year before filing this action. Rush was also a candidate for the same seat in the 2022 Democratic Primary election and faced these same issues with the county line.

The primary election, while ostensibly held on June 4, 2024, actually commences when voting starts upon the mailing of mail-in ballots on April 20th, 2024. *N.J.S.A.* 19:63-9. Several months of ballot preparation is required in advance of this date. Less than a month before, Republican and Democratic candidates must file petitions seeking their party's nomination by March 25, 2024. (Hanlon Decl.[3] at ¶ 12.) Candidates seeking to bracket with other candidates and use slogans to signify their association with one another must submit these requests within 48 hours after the March 25, 2024 petition filing deadline. (*Id*. at ¶ 13.) The bracketing process is not controlled by political party organizations, but rather by statute, and any candidates can form a bracketed slate with the slogan of their choice by securing at least 100 signatures on a petition for a County Commissioner candidate. (*Id*. at ¶ 14.)

The County Clerk must conduct the drawing to determine final ballot positions for primary election candidates for each political party 61 days prior to

[3] Citations to "Hanlon Decl." refer to the Certification of Christine Giordano Hanlon dated March 6, 2024 and filed herewith.

election day, or April 4, 2024. (*Id.* at ¶ 16.) By April 4, most, if not all of the candidate information and the offices being contested has been entered into spreadsheets and the elections management software's database. (*Id.* at ¶ 17.) Primary election ballots must be prepared for printing 60 days before election day, or April 5, 2024. (*Id*. at ¶ 19.) In order to meet federal and state deadlines for the mailing of mail-in ballots and to allow for enough time to program the County's elections management software, changes cannot be made to the ballot after April 5, 2024. (*Ibid.*) By April 20, 2024, all mail-in ballots for the primary election must be mailed. (*Id*. at ¶ 28.)

The preparation of the ballots requires a substantial amount of work by the County Clerk's office. The Clerk's office only has six employees and it is already collecting information from the municipal clerks from 53 municipalities as to what offices to include on the ballot. (*Id.* at ¶¶ 6, 11.) Monmouth County has 474 separate election districts, and each election district has two separate ballots – one for Democrats and one for Republicans. (*Id*. at ¶ 10.) The Clerk's office must design, program, print, and mail 948 separately designed ballots containing more than 2,000 candidate names. (*Id*. at ¶¶ 10,11.) This process requires significant coordination between the Clerk's office, the Superintendent, the Board of Elections, Election Systems & Software, and the printer. (*Id*. at ¶ 20.)

Not only does the County Clerk rely upon the elections management software which must be programed for the election, but the County Superintendent relies upon this software to program the voting machines. (*Id*. at ¶ 21.) The Superintendent has custody of the voting machines, and is required to maintain them. (*N.J.S.A.* 19:32-53.) In addition to programming the machines, the Superintendent's office has to ensure that proper logic and accuracy testing is performed before the election. The Board of Elections is responsible for canvassing the mail-in ballots. The optical scanners used to canvass paper ballots must also be programmed, which are maintained by the Board of Elections. (Hanlon Decl. at ¶ 21.) Accordingly, the Superintendent and Board of Elections are impacted by any change to the election management software. (*Id*. at ¶ 22.)

Monmouth County utilizes ES&S ExpressVote XL machines, which have been coded and certified by the Secretary of State in accordance with existing New Jersey law. (*Id.* at ¶ 24.) As sworn to by Benjamin R. Swartz, Principal State Certification Manager for ES&S, the New Jersey Secretary of State certified the ExpressVote XL machines and software in 2022 and 2023. (ES&S Aff.[4] at ¶ 6.) The ExpressVote XL system used in New Jersey was certified and tested using the currently authorized ballot design style. (*Id.* at ¶ 8.) Changes to this format would

[4] Citations to "ES&S Aff." refer to the Affidavit of Benjamin R. Swartz dated March 4, 2024 and filed herewith.

require evaluation to determine if they are feasible, and development, testing, and certification would be required if the software were changed. (*Id.*) Notably, ES&S has sworn under oath that Plaintiffs' requested changes to the ballot could not be implemented prior to the primary election. (*Id.*)

Even if substantial changes could be made in such a truncated time period, the integrity of the election is put at great risk. (Hanlon Decl. at ¶¶ 30, 32.) For decades, primary election voters have used the ballot design that is currently authorized by law. (*Id*. at ¶ 31.) Voter confusion is likely to result if sudden changes are made to the primary election ballot design without sufficient time for the substantial voter education that would be necessary. (*Id*.)

STANDARD OF REVIEW

Injunctive relief, generally, is "an extraordinary remedy that should be granted only in limited circumstances." *Exec. Home Care Franchising LLC v. Marshall Health Corp.*, 642 Fed. Appx. 181, 182-83 (3d Cir. 2016) (citing *Kos Pharms. Inc. v. Andrx Cor.*, 369 F.3d 70, 708 (3d Cir. 2004). To obtain a preliminary injunction, a party must demonstrate: "'(1) a likelihood of success on the merits; (2) he or she will suffer irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief.'" *Id*. at 183 (quoting *Miller v. Mitchell,* 598 F.3d 139, 147 (3d Cir. 2010) (citation omitted)).

POINT I

PLAINTIFFS LACK STANDING TO ASSERT THEIR CLAIMS

Plaintiffs lack standing to challenge the Monmouth County Clerk's implementation of New Jersey election laws because they fail to demonstrate any particular injury arising out of the ballot design for Monmouth County's (or any counties') primary election. *See Jacobson v Fl. Sec'y*, 957 F.3d 1193 (11th Cir. 2020) (requiring particular allegations of an injury to a voter or candidate for the purpose of finding Article III standing).

Article III of the United States Constitution "limits the jurisdiction of federal courts to 'Cases' and "Controversies'. . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). The doctrine of standing is used "to identify those disputes which are appropriately resolved through the judicial process." *Id.* at 560 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).) Standing is "an essential and unchanging part" of Article III's requirement that a "case" or "controversy" be before the court. *Ibid.*; *see*, *e.g.*, *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The *Lujan* Court articulated a three-part test to determine whether a plaintiff has standing. *Lujan*, 504 U.S. at 560. First, the plaintiff must have suffered an "injury in fact." The "injury in fact must be both (a) 'concrete and particularized,' and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Id*. at 560 (citing *Allen* 468 U.S. at 756; *Warth v. Seldin*, 422 U.S. 490, 508 (1975)); *Sierra Club v.*

Morton, 405 U.S. 727, 740–41 (1972); *Whitmore*, *supra,* 495 U.S. at 155 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). This standard requires more than "'someday' intentions" to support a finding of the "'actual or imminent' injury that our cases require." *Nader v. Federal Election Com'n*, 725 F.3d 226, 229 (D.C. Cir. 2013).Second, the plaintiff must demonstrate "a causal connection between the injury and the conduct complained of." *Lujan,* 504 U.S. at 560-61(citing *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976).) That is, the injury must be "'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Ibid*.

Third, the plaintiff must demonstrate that the injury complained of is "'likely,' as opposed to merely "speculative,'" and that the plaintiff's injury will be "redressed by a favorable decision." *Id.*. at 561. It is critical to note that "[t]he party invoking federal jurisdiction bears the burden" of establishing each of these three elements. *Ibid.* Accordingly, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Ibid*.

Plaintiffs Kim and Schoengood are candidates on Monmouth County's ballot, while Plaintiff Rush is not a candidate in Monmouth County. Kim received

the endorsement of the Monmouth County Democrats, and therefore, will be on the county line. Schoengood entered her race for Congress after the deadline to participate in the Monmouth County Democrats' convention had passed, and therefore, will not appear on the county organization's bracketed line.

Plaintiffs' claimed injuries are based on generalized assertions that receiving the endorsement of a county's political party, and the resulting inclusion as part of that organization's bracketed slate of candidates (i) provides an electoral advantage that violates the equal protection rights of candidates who don't receive such endorsements; and (ii) candidates feel associational pressure to bracket with other candidates in order to receive a more favorable ballot position potentially in the first column or row, which increases their chances of success in the primary election due to the primacy effect. These injuries are entirely speculative, and in many respects factually inconsistent with Plaintiffs' anticipated ballot position in Monmouth and other counties.

In Monmouth and other counties, the first column or row on the ballot is randomly selected based on the Senate candidate in Monmouth and other counties in the 2024 primary election. Thus, Kim has an equal chance of being placed in the first column on the ballot in Monmouth County (and others) and receiving the benefit of any primacy effect. Kim also received the endorsement of the Monmouth County Democrats, so he has the benefit of any county line ballot

position effect in Monmouth County (as well other counties in which he will be on the county line). Thus, as the beneficiary of the alleged ballot benefits at issue in this case, Kim has no standing to challenge Monmouth County's primary election ballot, and the impact of Kim's ballot position across all counties is entirely speculative.

Schoengood claims she will not have the opportunity for ballot primacy because she is only interested in bracketing with Kim and she won't have that opportunity because Kim exercised his associational rights (*i.e.*, he obtained the county line position in Monmouth and Burlington Counties, and he might not be interested in bracketing with her in Mercer County). Schoengood does not provide any evidence concerning a concrete injury due to primacy impact in Monmouth County (or any County). Such allegations of generalized risk of a primacy effect are insufficient to establish standing to challenge election processes. *See Jacobson*, 957 F.3d 1193 (11th Cir. 2020)(denying standing when the claimed injury relied solely on an average measure of the primacy effect because there was "no basis to conclude that the primacy effect will impact any particular voter or candidate in any particular election").

For example, there is no evidence in the record that voters would be more likely to vote for Schoengood if she appeared in the first column of Monmouth County's ballot, but not on the county line. Indeed, it is more plausible that

Monmouth voters would vote for Schoengood's opponent, no matter where she appears on the ballot because her opponent received the Monmouth County Democrats' endorsement, while Schoengood missed the deadline for seeking the county party's endorsement.

Similarly, Plaintiffs have failed to allege any concrete injury due to Kim's or Schoengood's association with other candidates. Kim actively sought the endorsement of the Monmouth County Democrats and other county party organizations. That endorsement has value, separate and apart from ballot position, and there is no evidence that Kim would not have sought those endorsements absent the benefit of county line ballot position. Moreover, Kim has no need to associate with candidates for ballot primacy because, as a U.S. Senate candidate, he has an equal chance of ballot primacy.

Likewise, Schoengood had an opportunity to seek the county line position in Monmouth (and other counties), but delayed entering the race until after the deadline for Monmouth County. Thus, she denied herself the opportunity to appear on the county line, and she cannot claim to feel pressure to associate because she expressed that she has no interest in associating (with anyone other than Kim) and did not give herself the opportunity to associate with Kim in Monmouth County. There is no protection for candidates who miss established deadlines that apply equally to all candidates.

POINT II

PLAINTIFFS HAVE FAILED TO NAME INDISPENSABLE PARTIES TO THIS ACTION

Plaintiffs' motion for injunctive relief, seeking to fundamentally change the structure of New Jersey's ballots on the eve of the primary election, fails to join numerous indispensable parties who are either (i) granted authority and discretion under Title 19 over election processes involving ballot design, or (ii) candidates who are constitutionally impacted by the ballot design issues raised by Plaintiffs.

Federal Rule of Civil Procedure 19 provides that:

> A person who is subject to service of process and whose joinder will not deprive the court of competent jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

"There is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not." *Niles-Bement-Pond Co. v. Iron Moulders' Union*, 254 U.S. 77, 80 (1920). "Each case must depend upon its own facts and circumstances…persons who not only have an interest in the controversy, but an interest of such nature that a final decree cannot be made without either

affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience are indispensable parties." *Shields v. Barrow*, 58 U.S. 130, 139 (1854). "All persons who may be affected by the relief caught or who are interested in the object of the suite are generally deemed necessary parties." *Woulfe v. Atlantic City Steel Pier Co.*, 129 N.J. Eq. 510 (Ch. 1941).

Here, Plaintiffs filed an action against the Monmouth County Clerk, based on the duties delegated to her by Title 19, but has failed to join the Superintendent of Elections and the Board of Elections, two parties who also play critical roles delegated to them under Title 19 in connection with election procedures that are implicated by the structuring of ballots. Both the Superintendent and the Board of Elections are indispensable to the ballot design and programming process. (Hanlon Decl. at ¶ 13, 14.) Because the Superintendent and Board of Elections are not under the control of the Monmouth County Clerk, this Court would not be able to grant Plaintiffs' requested relief without joining those additional, indispensable parties.

The Superintendent of Elections is responsible for the custody and maintenance of voting machines. *N.J.S.A.* 19:32-53. The same software that is utilized by the County Clerk in designing the ballot is used by the Superintendent to program the voting machines. (Hanlon Decl. at ¶ 14.) If the voting machines

need to be reprogrammed to allow for a different ballot design, the Superintendent would need to participate and the Superintendent's voting machine technicians would require training to understand the new programming. The Superintendent's voting machine technicians are responsible for uploading the election database to the machines, and must also perform or have a vendor perform logic and accuracy testing before an election. If the ballot is suddenly changed, not only will there be no time for training, but there will be no time for the appropriate testing for which the Superintendent is responsible.

Additionally, all voting machines must be certified by the Secretary of State. *N.J.S.A.* 19:48-2, and reprogramming of the voting machines to accommodate a new ballot design would require recertification by the State. (ES&S Aff. at ¶ 8.) The Superintendent would be required to cooperate in certification, and to make the machines available for inspection. Further, the Superintendent must prepare an annual budget request (*N.J.S.A.* 19:32-26.9) to submit to the County Commissioners, and cannot spend money that is not covered by the budget. Therefore, to re-code the voting machines, the Superintendent must have sufficient funds budgeted by the County Commissioners. Accordingly, the Superintendent has a significant interest in this litigation, and failure to name him as a party should result in a denial of Plaintiffs' requested relief.

The Board of Elections is responsible, in part, for receiving, counting, investigating, and certifying mail-in ballots. A new ballot design will necessarily affect the role of the Board of Elections, as the optical scanners used by the Board of Elections to canvass the ballots utilize the same software as the Clerk's office. (Hanlon Decl. at ¶ 14.) Also, the individuals counting the ballots will encounter problematic ballots if voters are confused by the new format, particularly where there has been no time for voter education. The Board of Elections must also train poll workers who will likely confront voter confusion at the polls if a new ballot design is suddenly utilized. Plaintiffs failed to join the Board of Elections despite their essential role in the election and reliance upon a ballot that voters are accustomed to. As such, Plaintiffs' request must be denied.

In addition, Plaintiffs have not named political candidates, including the direct opponents of Plaintiffs, who will be impacted by any decision rendered by the Court in connection with this matter. Through this action, the constitutional rights of candidates who wish to associate and bracket will be directly impacted. Namely, Plaintiffs are seeking a declaration that the statutes at issue are unconstitutional. If that were to occur, the First Amendment rights of candidates who wish to associate and bracket would be impacted.

For example, Tammy Murphy is a leading candidate for nomination through the Democratic primary; however, Kim has failed to join her as a party in this

emergent action. Notably, Kim is leading Murphy in multiple polls and Kim and Murphy have split various contests for the county line position on ballots. Murphy undeniably has a constitutional right of association that would be impacted by any decision made by this Court; however, after pursuing the Democrat's nomination for over five months, Kim did not include his leading opponent, Murphy, as a party to this action. Particularly when considering the emergent timing of this matter, that strategic omission is fatal to his requested relief.

POINT III

PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS IN CHALLENGING THE CONSTITUTIONALITY OF NEW JERSEY'S ELECTION LAWS

Plaintiffs have failed to demonstrate a likelihood of success on the merits of their First and Fourteenth Amendment claims. As this Court recognized in *Conforti*, resolution of Plaintiffs' claims requires weighing of Plaintiffs' burdens and the state's interests, and that balance involves factual issues that necessitate factual discovery. *Conforti v. Hanlon*, 2022 U.S. Dist. LEXIS 97003, *51 (D.N.J. 2022) ("Plaintiffs' burdens and the State's interests are factual and may require discovery. Depending on further factual findings, the state's interests may be sufficiently compelling to pass muster under the relevant Constitutional tests.

Plaintiffs now seek to satisfy their burden of proving likelihood of success without any factual discovery into the facts pertinent to the 2024 primary elections,

based solely on conclusory expert reports opining about "possible" outcomes based on generalized and untested statistical conclusions provided to Defendants and this Court in incomplete and untimely fashion on the eve of the state's ballot design deadlines for the 2024 primary elections. Plaintiffs have failed to meet their burden of demonstrating a constitutional right to appear on an office-block ballot, when weighed against the state's interests in protecting the integrity of the 2024 primary elections and the candidates' First Amendment associational rights.

The United States Supreme Court set forth a framework for the review of the constitutionality of state laws governing elections. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (establishing the standard by which states enact laws to administer elections, while balancing the threat of infringement on voter and candidates' rights); *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (applying a flexible standard under which a court considering a state election law challenge must weigh the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the State as justification for the burden imposed by its rule).

In *Anderson*, the Court recognized that "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Id*. Rather,

there must be "a substantial regulation of elections if they are to be fair and honest . . . some sort of order, rather than chaos." *Id*. (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)). As the Court acknowledged, any state law governing the election process has at least some effect on "the individual's right to vote and his right to associate with others for political ends," however, "the state's important regulatory interests are generally sufficient to justify ***reasonable, nondiscriminatory restrictions***." *Anderson*, 460 U.S. at 788 (emphasis added).

In weighing the burdens to plaintiff against the state interests, election regulations that impose a severe burden are subject to scrutiny by the courts and may be upheld only if they are narrowly tailored to serve a compelling state interest. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). Conversely, election regulations that impose only reasonable burdens require a lower form of scrutiny. *Anderson*, 460 U.S. at 788. The U.S. Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

A. Plaintiffs Fail to Meet their Burden of Establishing that they are Likely to Succeed on the Merits of their First and Fourteenth Amendment Challenges to New Jersey's Election Laws

The New Jersey election laws at issue involve competing constitutional interests governing the right to associate implicated by bracketing slates of candidates running together as a team that must be weighed against Plaintiffs'

claimed infringement of constitutional rights based on being incentivized to associate and/or having an alleged diminished opportunity to be elected if they do not associate through bracketing with a slate of candidates.

1. New Jersey's Election Law Framework for Ballot Design

Given that the primary election which forms the basis of this matter involves a U.S. Senate election, *N.J.S.A.* 19:23-26.1 and *N.J.S.A.* 19:49-2 are applicable. *N.J.S.A.* 19:23-26.1 provides that "in the case of a primary election for the nomination of a candidate for the office of United States Senator . . . the names of all candidates for the office of United States Senator…shall be printed on the official primary ballot in the first column or horizontal row designated for the part of those candidates." *N.J.S.A.* 19:49-2 provides in relevant part, "in those counties where voting machines are used, the county clerk shall have the authority to determine the specifications for, and the final arrangement of, the official ballots." Further, the statute provides that:

> For the primary election for the general election in all counties where voting machines are or shall be used, all candidates who shall file ***a joint petition with the county clerk*** of their respective county and who shall choose the same designation or slogan ***shall be drawn for position on the ballot as a unit*** and shall have their names placed on the same line of the voting machine; and provided further, that all candidates for municipal or party office in municipalities in counties where voting machines are or shall be used who shall file a petition with the clerk of their municipality bearing the same designation or slogan as that of the candidates filing a joint petition with the county clerk as aforesaid, may request that his or her name be

> placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk as aforesaid by so notifying the county clerk of said county in writing within two days after the last day for filing nominating petitions and thereupon the county clerk shall forthwith notify the campaign manager of such candidates filing a joint petition as aforesaid of said request, and if the said campaign manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition as aforesaid. *Id*.

In 2024, the ballot drawing for the primary election is "driven" by the fact that there is a United States Senate race. Accordingly, *N.J.S.A.* 19:23-26.1 mandates that the first columns of the ballot be allocated to United States Senate candidates (regardless of whether they are bracketed with other candidates). Further, *N.J.S.A.* 19:49-2 sets forth the way candidates may affiliate with other candidates. Specifically, the only candidates that can file joint petitions under New Jersey law are county candidates who are running for the same office for the same term. If a candidate seeks to be included "on the line" or bracketed with county candidates, they must make a written request, generally known as a bracketing letter, for such inclusion to the county clerk within two days of the filing of their petition. The county clerk in turn forwards that request to the county candidates' campaign manager for approval. The candidates, through their campaign manager may grant or deny consent to the request to bracket.

In addressing *N.J.S.A.* 19:49-2, the New Jersey Supreme Court has recognized the importance of the Legislature's authority to adopt reasonable election regulations: "there can be no doubt about the authority of the Legislature to adopt reasonable regulations for the conduct of primary and general elections. Such regulations, of course, may control the manner of preparation of the ballot, so long as they do not prevent a qualified elector from exercising his constitutional right to vote for any person he chooses." *Quaremba v. Allan*, 67 N.J. 1, 11 (1975), *aff'd as mod*. 128 N.J. Super 570 (App. Div. 1974).

In *Quaremba*, the New Jersey Supreme Court concluded that bracket ballot placement, under *N.J.S.A* 19:49-2, does not rise to the level of a constitutional, equal protection issue that requires redress. *See id*. at 10-18. In *Quaremba*, Plaintiffs, candidates for State Senate and Freeholder, challenged ballot bracketing, arguing that an unaffiliated candidate would draw more votes if an opponent's name were not grouped with candidates for other offices. The New Jersey Supreme Court flatly rejected that argument, holding: "Even if that be true, it affords no basis for invalidating, as unreasonable, the legislative determination that whatever the effect on an unaffiliated candidate, the public interest is better served by permitting a grouping of candidates having common aims or principles and authorizing those candidates 'to have this fact brought to the attention of the voter

in a primary election with the additional effectiveness produced by alignment of their names on the machine ballot.'" *Id.* at 13.

As further recognized by the United States Supreme Court in *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214 (1989), when considering the balance between plaintiffs' alleged burden and a state's interests, the associational rights of political parties are an important state interest protected under the First Amendment. Thus, Plaintiffs' claimed rights are no more important than the state's interest in protecting the rights of candidates who wish to associate on a primary ballot.

2. Plaintiffs Fail to Establish a Constitutionally Recognized Burden

As this Court recognized in *Conforti*, "[w]hen reviewing a case under the *Anderson-Burdick* [test], courts tend to establish a robust factual record to characterize an alleged burden." *Conforti,* 2022 U.S. Dist. LEXIS 97003 at *45. Plaintiffs seek to satisfy their burden of proving likelihood of success without establishing such a robust factual record.[5] Rather, Plaintiffs rely on generalized

[5] Plaintiffs' counsel consciously delayed engaging in discovery in *Conforti* that could have developed such a factual record. On February 12, 2024, in the weeks leading up to filing this emergent application, Plaintiffs' counsel sought a nearly two-month extension to the exchange of discovery responses from February 20, 2024 to April 12, 2024, thus pushing back the development of relevant evidence until after the anticipated resolution of this motion.

and conclusory expert reports that fail to support Plaintiffs' claims in any particularized way.

a. Plaintiffs' Asserted Burden on their Equal Protection Rights

Ballot allocation cases, such as this one, are recognized as involving a lesser burden on the right to vote. *See Democratic-Republican Org. v. Guadagno*, 900 F. Supp. 2d 447, 456 (D.N.J. 2012) ("[T]he statute in question, however, does not restrict access to the ballot or deny any voters the right to vote for candidates of their choice. . . . Instead, it merely allocates the benefit of positional bias, which places a lesser burden on the right to vote."). In *Conforti*, this Court recognized that such cases should not be pegged to any particular level of scrutiny, but, rather, should employ a weighing process. *Conforti,* 2022 U.S. Dist. LEXIS 97003 at *49 (citing *Democratic-Republican Org.*, 900 F. Supp. 2d at 453). This Court acknowledged that the New Jersey election laws underlying the ballot bracketing structure have a "plainly legitimate sweep," and as such may be invalidated only if "a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *Id.*

Plaintiffs have failed to establish that Monmouth County (or any County) is applying, let alone substantially applying, the New Jersey elections law in an unconstitutional manner. Plaintiffs contend that candidates listed in the first column on the ballot receive additional votes solely because they are listed in the

first column. That position, without more, has been rejected by courts in this Circuit. *See Democratic-Republican Org. v. Guadagno*, 900 F. Supp. 2d at 459 ("placing political party candidates on the left side of the ballot and all other candidates on the right side, as prescribed by *N.J.S.A* 19:5-1 and 19:14-12, does not violate Plaintiffs' constitutional rights. These statutes impose, at most, a minimal burden on Plaintiffs' ballot access."); *Voltaggio v. Caputo*, 210 F. Supp. 337, 339 (D.N.J. 1962) (finding that even though independent candidates could not be placed first on the ballot, there was no violation of the Fourteenth Amendment).

Thus, in order to challenge the constitutionality of ballot position allocations, Plaintiffs must set forth "persuasive, empirical evidence" that their column position will have a significant impact on election day. *See Democratic-Republican Org.,*900 F. Supp. 2d at 458 (collecting cases requiring empirical evidence). Plaintiffs' sole reliance on conclusory expert reports fails to meet that empirical burden.

Plaintiffs contend that certain candidates benefit from the positional bias of being in the first ballot column; however, as Plaintiffs concede, the impacts of positional bias depend on the factual circumstances of the election, office and candidates in question. *See New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282, 288 (S.D.N.Y. 1994) ("[C]ourts have consistently held that the effect of ballot placement on election outcomes is a factual determination. . . . That

position bias is a popular perception of the voting public, however, is not sufficient to exempt [plaintiff] from the burden of proving its claims.").

As a Senate candidate, Kim's ballot position is randomly assigned, so Kim has an equal opportunity to obtain a first column ballot position. Thus, bracketing has no impact on his chances of receiving first column ballot position and Kim has no equal protection argument relating to access to the first ballot column. Indeed, Dr. Pasek compared bracket and office-line ballots based on first column effects and concedes there was *no difference* for Senate candidates. (Pasek Report at ¶ 147.)("On average, the effect of being listed first for a Senate candidate was 2.1[%] larger on a party-column ballot than an office-block ballot. While this may be a real distinction, we could not distinguish a benefit of this magnitude from chance."). For the Congressional candidates, there is still no reliable evidence on the record suggesting that appearing in the first versus second or third column of the ballot will have a significant impact on a candidate's election chances, or that there is any consistent or likely application of New Jersey's election laws that would otherwise significantly impact a candidate's chances.

Plaintiffs also claim to be burdened by the "weight of the line," or the placement of party-endorsed candidates in a single column. Plaintiffs' experts acknowledge, however, that any statistical evidence showing an advantage to the "weight of the line" could be attributed to an "endorsement effect" or other

political or associational factors. Dr. Pasek apparently attempted to address those issues by designing and conducting a study for this case, together with Braun Research, where potential voters are asked to respond to hypothetical ballots delivered to voters through text message links. Plaintiffs failed to provide Defendants with timely or complete information about Dr. Pasek's study design, or his conduct of the study or its results, so any reliance on the study plainly would be prejudicial. Nevertheless, it is apparent that his study generated inconsistent results, general survey confusion, and limited substantiated conclusions. For example, Dr. Pasek observed disparate impacts when attempting to isolate and measure the impact of the "weight of the line," but he ultimately conceded that the benefits a candidate receives depends on the particular circumstances of the election contest. (*Id*. at ¶ 135)("this disparate impact suggests that the benefits of county party endorsements likely hinge on features of the contest in which the endorsement takes place.").[6]

Plaintiffs also contend that they are burdened because unbracketed candidates are not automatically placed in the column next to their opponents, or

[6] Plaintiffs also cite to the fact that no state legislative incumbent who was featured on the county line lost a primary election in the last 14 years, and that only two congressional incumbents lost their primary elections in the last 50 years. Plaintiffs fail to consider, however, that other factors besides the "weight of the line" may be at work, such as the benefits of incumbency, name recognition, gerrymandering, and fundraising.

may be in a column alone or with candidates running for the same office, or with candidates with whom they do not wish to be associated. Plaintiffs assert that these possible placement scenarios, or a combination of these placement scenarios, might place them at a disadvantage, but Plaintiffs fail to point to evidence that these ballot placement possibilities will happen or would significantly impact the candidates.

Accordingly, this is no evidentiary record sufficient to support finding any burden on Plaintiffs' Fourteenth Amendment rights.

b. Plaintiffs' Asserted Burden on their Right to Associate

In *Conforti*, this Court recognized that "if there is a consistent benefit for those who bracket and a consistent detriment for those who do not bracket, then the statute creates a . . . moderate burden on the right to associate." Plaintiffs have failed to establish even that moderate burden in this case. *Conforti,* 2022 U.S. Dist. LEXIS at*48.

Plaintiffs' expert report fails to establish a "consistent benefit" to candidates who bracket or a "consistent detriment" for those who do not bracket. The potential benefits and detriments depend on the factual circumstances of the election, office and candidates in question. For example, as a Senate candidate, Kim has no ballot access basis to believe that bracketing would have a consistent benefit. As a Congressional candidate, Schoengood has not been incentivized to

bracket because she has made clear that she would only bracket with a candidate with aligned interests such as Kim.

Plaintiffs' expert, Dr. Pasek, also speculates in conclusory fashion that because of the bracketing effect, "voters cannot reliably presume that candidates who are bracketed together are doing so for any reason beyond the desire to win their respective elections." (Pasek Report at ¶ 63.) That ignores the endorsement effect and the benefits of association outside of ballot placement that Pasek, himself, acknowledges in his report. The great weight of evidence shows that candidates associate with other candidates because of the value of those associations beyond ballot position.

3. The State's Important Interests in Orderly Regulation of Elections and Protecting the Association Rights of Candidates Justify the State's Reasonable Ballot Allocation Decisions

Because Plaintiffs have failed to demonstrate a severe burden, the State must only show "relevant and legitimate" state interests that are "sufficiently weighty to justify the limitation." *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 191 (2008). In considering the weight of these interests, the Court's review is "'quite deferential,'" *Mazo v. New Jersey Sec'y of State*, 54 F.4th 124, 153 (3d Cir. 2022) (quoting *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008), and will not require "'elaborate, empirical verification of the weightiness of the State's

asserted justifications.'" *Id.* at 153 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997).

Here, New Jersey has important regulatory interests in (a) upholding candidates' right to associate with other political candidates and make those associations known to voters, and (b) maintaining the integrity of the election and preventing voter confusion.

a. The State's Strong Interest in Preserving Candidates' Rights to Associate and Make those Associations Known to Voters

Plaintiffs contend, against the weight of well-settled law, that New Jersey does not have a legitimate interest in allowing candidates to bracket together to demonstrate their association with one another. *See Eu*, 489 U.S. at 224 (citing *Tashjian*, 479 U.S. at 214) ("it is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments."). *Eu* makes clear that States are constitutionally prohibited from enacting election laws that infringe on political parties' rights to associate. *Eu*, 489 U.S. at 222 ("A State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'"). "Barring political parties from endorsing and opposing candidates not only burdens their

freedom of speech but also infringes upon their freedom of association." *Eu*, 489 U.S. at 224.

Thus, the State has a strong interest in preserving the rights of county political organizations to endorse particular candidates and associate with those candidates on the election ballot. Visually aligning those candidates on the primary ballot serves as a valid expression of that interest. Because the burdens alleged by Plaintiffs fail to qualify as severe, the Court should be deferential to the State's identified interest. *Mazo*, 54 F.4th at 153.

Plaintiffs contend that the States already address the candidates' interest in protecting associational rights by including common slogans on the ballots. However, the issue is whether ballot bracketing is a reasonable approach to giving effect to candidates' association rights, and not whether the use of slogans on ballots sufficiently identifies candidates' associations. There is no requirement for a state to choose an alternative to a reasonable ballot alignment.

b. <u>The State's Strong Interest in Preserving Timely and Orderly Elections and Avoiding Voter Confusion</u>

Additionally, as this Court has recognized, the State has a strong interest in preserving a timely and orderly election. *Conforti,* 2022 U.S. Dist. LEXIS at *49 (citing *Valenti v. Mitchell*, 962 F.2d 288, 301 (3d Cir. 1992) ("The state's interest in a timely and orderly election is strong."). "It is well-settled that the State has an interest in regulating elections to ensure that voters can understand the ballot." *Id.*;

see Mazo, 54 F.4th at 154 (quoting *Eu*, 489 U.S at 231) ("'A State indisputably has a compelling interest in preserving the integrity of its election process.'"). To maintain the integrity of the election process, the state must ensure that voters will not be prevented by confusion from exercising their vote. *See Mazo*, 54 F.4th at 154 (quoting *Tashjian,* 479 U.S. at 221-22) ("States have 'legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions.'").

In New Jersey, primary election voters are accustomed to the current ballot design, which has been utilized for decades. (Hanlon Cert. at ¶ 31.) If the ballot were suddenly changed, significant voter education would be required to inform primary voters as to how to identify candidates running as a team or slate on the ballot. *Id.* As this Court has recognized, changes in ballot design can disenfranchise voters by confusing them. *See Conforti,* 2022 U.S. Dist. LEXIS *50 ("The State's interests in providing a manageable and understandable ballot, as well as ensuring an orderly election process are hampered by the fact that one-third of all Mercer County voters were disenfranchised because they voted for more than one candidate for the same office."). As the United States Supreme Court has recognized, "[c]ourt orders affecting election . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Thus, the State has a strong interest in ensuring

that any changes to the ballot are the result of thoughtful and deliberate decisions of the legislature, particularly considering New Jersey's long-standing use of the current ballot structure.

Plaintiffs ignore the recognized, strong state interest in the orderly management of elections and cite to inapposite cases where the only state interest was invidious discrimination. For example, in *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977), the County Clerks placed *their own party* first on the ballot, and the Court found the only purpose was intentional discrimination.[7] Similarly Plaintiffs cite to *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969), but in that case, the Secretary of State was basing ballot placement decisions *on his own party affiliation,* and advising people he wanted to be elected to file by mail by a certain day to ensure better placement on the ballot. Finally, Plaintiffs cite to *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996), in support of their proposition that "political patronage is not a legitimate state interest," however, the issue in *Graves* was that the Democratic candidate was always listed first on the General Election ballot. *Id.* at 1571. Here, in contrast, all candidates have the opportunity

[7]Plaintiffs' citation to *Jacobson v. Lee*, 411 F. Supp. 3d 1249 (N.D. Fla. 2019) undermines Plaintiffs' position. The Eleventh Circuit vacated *Jacobson*, finding that the plaintiffs lacked standing because their claimed injury was based on statewide averages of primacy effect similar to Plaintiffs' experts in this case. *Jacobson v. Fla. Sec'y,* 957 F.3d 1193, 1205 (11th Cir. 2020).

to bracket if they wish and seek placement on the county line or to affiliate with any other group of candidates.

Accordingly, the State's interest in upholding associational rights and maintaining election integrity and avoiding voter confusion are sufficiently weighty to justify any minimal burdens to Plaintiffs.

B. Plaintiffs Fail to Meet their Burden of Demonstrating that they are Likely to Succeed on the Merits of their Elections Clause Challenge

Plaintiffs also contend that the manner in which ballot placement occurs as it applies to Senate and House of Representative candidates violates the Elections Clause of the United States Constitution. Article I, Section 4, Clause 1 of the United States Constitution provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may from time to time by Law make or alter such Regulations, except as to the Places of [choosing] Senators." In *Foster v. Love*, 522 U.S. 67, 69 (1997), the Supreme Court noted that the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of Congressional elections." Further, the Supreme Court noted that the Framers intended the Elections Clause to grant states the authority to create procedural

regulations for such federal elections." *U.S. Terms Limits, Inc. v. Thorton*, 514 U.S. 779, 832 (1995).

The Court has also recognized that the reference to "Legislature" encompasses more than just the lawmaking body. *Singh v. Murphy*, 2020 WL 6154223 (App. Div. 2020). Instead, it refers to the state's legislative power "performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 805 (2015).

In this matter, the State Legislature has established the laws, essentially the manner in which ballot position is to be drawn, for primary elections. They have in turn empowered county clerks to implement those laws, which permits reasonable discretion.[8] The Supreme Court has held that "'the states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.'" *Voltaggio,* 210 F. Supp. at 338-39 (quoting *United States v. Classic*, 313 U.S. 299, 311 (1941)). Indeed, the state of New Jersey has exercised this discretion, and in doing so, has given county clerks the power to implement the laws related to ballot design.

[8] It is important to note that discretion is necessary for clerks in configuring their ballot. This is due to spatial and technological limitations created depending on the number of candidates running and positions in which elections are being held.

Plaintiffs rely upon *Cook v. Gralike*, 531 U.S. 510, 523 (2001) to support their untenable position that the current method of ballot design "dictate[s] electoral outcomes," "favor[s] or disfavor[s] a class of candidates," or "evade[s] important constitutional constraints." In *Cook*, a Missouri Constitution provision required a notation to be printed on primary and general election ballots next to congressional and senatorial candidates if they did not support term limits. *Id*. at 514. Plaintiffs attempt to compare New Jersey's ballot design to Missouri's notations, and fail to effectively do so. The notations complained of in Missouri were described by the lower courts, and endorsed by the Supreme Court, as "pejorative," "derogatory," "intentionally intimidating," and "official denunciation." *Id.* at 524. Further, the Supreme Court noted that the notations had been referred to as "the Scarlet Letter." *Id.* at 524-25. Nothing even remotely similar occurs under New Jersey law. Plaintiffs unsuccessfully attempt to cast ballot placement as a "sanction" comparable to a blatantly pejorative notation. Rather, in New Jersey, ballot placement falls squarely within the "manner" of holding an election, and affords all candidates the opportunity to bracket or not bracket with other candidates. It does not pejoratively describe or denunciate candidates who did not agree with a particular political position, or attach a derogatory label to those who choose not to bracket.

Further, Plaintiffs attempt to garner support for their position that New Jersey's primary ballot laws do not serve as a "manner" of regulating elections by pointing to *Conforti*, 2022 U.S. Dist. LEXIS at*19, wherein the Court held that there were "sufficient allegations that the Bracketing Structure does not act as a 'manner' of regulating federal elections and may dictate electoral outcomes and favor or disfavor certain classes of candidates." However, the instant matter relies upon a wholly different standard: Plaintiffs must show a "significantly better than negligible" chance that the Plaintiffs will win on the merits. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). The standard is greater than in a motion to dismiss, and Plaintiffs have failed to meet that burden. They claim that the allegations are now supported by "scientific proof" but the expert reports submitted fall far short of "proof." More accurately, they are *opinions* based upon disputable studies whose authors doubtfully claim their studies to be incontrovertible "proof" that bracketing dictates election outcomes. And, as described *supra*, Pasek's study provides conflicting evidence, hardly qualifying as "scientific proof."

POINT IV

PLAINTIFFS HAVE FAILED TO ESTABLISH IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION

Plaintiffs have failed to meet their burden of making a "clear showing of immediate irreparable injury." *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987). Specifically, Plaintiffs seek to establish irreparable harm by asserting a speculative risk to their constitutional rights, while at the same acknowledging that they sat on their claims and participated in the ballot system that they now seek to turn on its head on the eve of the primary elections. *Id.* ("Establishing a risk of irreparable harm is not enough [to warrant a preliminary injunction]."); *see also Laidlaw, Inc. v. Student Transp. of Am., Inc.*, 20 F. Supp. 2d 727, 766 (D.N.J. 1998) ("[T]he claimed injury cannot merely be possible, speculative, or remote.").

Here, Kim announced his candidacy for United States Senate on September 23, 2023. At the time, Kim stated that he'd support ending the county organizational line system; however, he did not proceed with an emergent action to protect his constitutional rights. Rather, he confirmed that he would, himself, seek county lines for his Senate bid: "I'll work within the system we have, seek county endorsements, and respect the contribution structures and limits that are currently

in place."[9] Kim's own actions demonstrate that he did not foresee a risk of imminent harm as a result of New Jersey's long-standing ballot design laws.

Plaintiffs fail to explain how Kim now faces imminent harm after he failed to address that purported harm for the past five months, particularly given that Plaintiffs' counsel has been litigating the same constitutional challenge in the *Conforti v Hanlon* case for the duration of that time. In fact, for the reasons discussed in Point I, *infra*, Kim, personally, does not face any concrete, non-speculative harm. In fact, Kim has already received the county line from Monmouth, Burlington, Hunterdon, and Warren Counties, and as a Senate candidate, he has an equal opportunity to receive placement in the first column or row on ballots in every county.

For Schoengood, she entered the race late and either missed the deadlines for seeking county convention endorsements (*e.g.*, Monmouth County) or simply has not expressed her intent to pursue those endorsements. Thus, it was her inaction or choice not to appear on the county line (together with Kim, the only candidate with whom she would like to associate) and Plaintiffs have failed to establish that any resulting diminished chances are caused by bracketing on the ballot, as opposed to

[9] Joey Fox, *Kim says he wants to end the county line*, New Jersey Globe, (Sept. 25, 2023 9:00 a.m.) https://newjerseyglobe.com/congress/kim-says-he-wants-to-end-the-county-line/ (last accessed March 6, 2024).

her failure to obtain her party's endorsement, her late entry into the race or her lack of name recognition.

Thus, although a loss of First and Fourteenth Amendment rights can constitute irreparable harm, that is not the case here, given that the New Jersey election laws provide reasonable procedures for administering elections and Plaintiffs have failed to establish that they have suffered any loss of their Constitutional rights. Further, any claimed pressure for Plaintiffs to associate with other candidates is negligible and far outweighed by the candidates' First Amendment right to associate with each other, as discussed more fully under Point IV, *supra*.

POINT V

GRANTING PLAINTIFFS' REQUEST FOR AN INJUNCTION WOULD RESULT IN IRREPARABLE HARM TO DEFENDANTS AND STATE ELECTION OFFICIALS

In weighing the limited, speculative harm identified by Plaintiffs against the competing harm to Defendants resulting from Plaintiffs' far-reaching requests on the eve of ballot preparation, the harm to Defendants caused by any late changes to the ballot would far exceed any harm to Plaintiffs.

Courts have recognized that any order changing the operations of New Jersey's election laws late in the election process would cause significant hardship to election officials and workers. *See N.J. Press Ass'n v. Guadagno*, 2012 U.S.

Dist. LEXIS 161941, *23-24 (D.N.J. 2012) (recognizing risk of irreparable harm when election changes would cause a strain to thousands of election officials and poll workers at more than 3,400 polling locations throughout the State, each of whom would be required to learn and apply a new set of regulations in an extremely short period of time). Plaintiffs' requested injunction would create a similar strain on election officials and workers given that it would require a redesign of an entire ballot with a cascading effect on programming of election machines, state certifications of those machines and retraining and reeducating thousands of election workers and millions of voters. *Id.* (changes to election laws could cause hardship for the voters who would be subjected to new and potentially confusing regulations on the eve of the election).

A. The Harm and Impracticality of Imposing Burdens on the Ballot Design Process at this Late Stage of the Ballot Process

The 2024 primary election involves a particularly complex ballot. It includes candidates for President, Delegates for President, United States Senate, United States Congress, County Commissioner, and municipal officials. The primary election also includes municipal political party or "county committee" representatives for each election district in each county. In Monmouth County alone, this involves 474 separate election districts, and two representatives from each political party to be elected in the primary for each election district. Each election district has two separate ballots—one for Democrats and one for

Republicans. (Hanlon Decl. at ¶ 10.) Accordingly, the clerk's office is tasked with designing, programming, printing and mailing 948 separately designed ballots containing more than 2,000 candidate names and slogans. (*Id*. at ¶¶ 10-11.)

Election officials are responsible for accomplishing those tasks within an incredibly compressed timeframe. Specifically, pursuant to *N.J.S.A.* 19:49-2, the timeframe for submissions from candidates who wish to bracket with other candidates and use slogans to associate with one another is between *March 25 and March 27, 2024*. By that date, municipal candidates must submit petitions to the municipal clerks in their jurisdictions; county candidates submit petitions to the County Clerk; state and federal candidates submit petitions to the Secretary of State. (*Id.* at ¶ 12.) Immediately after those submissions, the county clerks must prepare the ballots by *April 4, 2024*, the deadline for the clerk's office to conduct the drawing to determine final ballot positions for all primary election candidates. (*Id.* at ¶ 16.) The deadline for printing those ballots is April 5, 2024. (*Id*. at ¶ 19.) That is the last possible day that any changes can be made to the ballot in order for the primary election to meet both federal and state deadlines for mail-in ballots (which must be mailed by *April 20, 2024*) and to allow enough time for the programing of the County's election management software. (*Id*. at ¶¶ 19, 28.) Those statutory time constraints are extraordinary *in the normal course* and have become increasingly difficult with the increased utilization and prevalence of

voting by mail, and particularly so in Presidential election years when county committee races are also taking place. (*Id*. at ¶ 29.)

In Monmouth County, the clerk's office has 6 employees to support meeting those deadlines. (*Id*. at ¶ 6.) To prepare for the March 25 submissions, the clerk's office is *already* collecting information from municipal clerks about the types of offices that will be on the ballot in the 53 municipalities in Monmouth County. (*Id*. at ¶ 11.) That information is included in a spreadsheet that the clerk's office updates when the clerk receives name and slogan information that corresponds with the offices. (*Id*. at ¶ 17.) Because it involves over 2,000 names, it takes the clerk's staff days to input all of this information. At the same time, the clerk's office proceeds with approvals from the campaign managers of the county candidates about who will be bracketed.

Once complete, all of the data is transferred into the import spreadsheet and then to an ES&S database to program for the election. (*Ibid.*) The clerk's office then sends the ballot information to the ballot printer to place all of the information on the paper ballot, while at the same time creating the machine layout to correspond with the paper. All of the paper ballots need to be coded to correspond to the scanners at the Board of Elections, which in turn is coded and connected with the ES&S Electionware system. (*See id.* at ¶¶ 21-24.) Then, proofreading and

testing begins to ensure that the ballots will be scanned and counted properly for 948 ballots and more than 2,000 candidates.

Plaintiffs' requested changes to the ballot design at this late stage in the process would cause enormous administrative costs to the clerk's office in terms of resources require to redesign the ballot, retrain and reeducate staff, and accomplish all of the normal tasks that already strain the clerk's office undoubtedly leading to delays that are not permitted by New Jersey election laws and errors that are never acceptable in a Presidential primary election. Primary election voters are accustomed to New Jersey's ballot design, which has been utilized for decades. (*Id.* at ¶ 31.) Significant voter education would be required to make primary election voters aware of any new proposed changes to be able to determine how to identify candidates running as a team or slate on the ballot. (*Ibid.*) Any abrupt changes to New Jersey's longstanding primary election ballot structure would likely cause significant voter confusion in the absence of a comprehensive voter education campaign. (*Ibid*.)

B. The Harm and Impracticality of Imposing Burdens on the Entire Election System at this Late Stage of the Election Process

The process of designing and producing ballots is part of a much larger, integrated election system that involves the election machines and software as well as the physical ballots themselves. In Monmouth County, that system is managed

by the County Clerk, the Superintendent of Elections, and the Board of Elections. (*Id.* at ¶ 4.)

At present, Monmouth County utilizes ES&S ExpressVote XL machines, which have only been coded and certified by the Secretary of State to conform with existing ballot design. (*Id.* at ¶ 24.) Any changes to the ballot require reprogramming of the election machines and software that are specifically tailored to the current ballot design. Further, as Benjamin Swartz, ES&S' Principal State Certification Manager avers, any changes to the ballot design "would need to be evaluated to determine feasibility" and "would require development, testing and certification of a new and/or updated version of the software." (ES&S Aff. at ¶ 8.) For Monmouth County, any effort to re-code ES&S machines and then reprogram the election management software for 948 separate ballots containing more than 2,000 candidate names and slogans in the remaining time provided for the primary election would be fraught with risk for the primary election. (Hanlon Decl. at ¶¶ 30, 32.) Not only would those measures be resource intensive and costly, but as ES&S expressly stated, they "could not be made and implemented prior to New Jersey's 2024 primary elections." (ES&S Aff. at ¶ 8.)

Courts have recognized that imposing additional logistical challenges on state election officials, in circumstances not nearly as fraught with risk, can be a significant harm that would result from entering Plaintiffs' proposed injunction.

See Donald J. Trump for President, Inc. v. Way, 492 F. Supp. 3d 354, 374-75 (D.N.J. 2020) (recognizing significant harm when New Jersey must either "hire and train additional staff members to review, canvass, and count ballots"). The risks of making significant changes in such a short amount of time on machines that have not previously been used, tested or certified for office block balloting, could greatly compromise the integrity of a number of highly competitive primary elections at a time when the integrity of the election process is already under extreme scrutiny. (Hanlon Decl. at ¶ 30.)

For these reasons, the balance of harms weighs heavily against Plaintiffs' requested injunctive relief.

POINT VI

PLAINTIFFS HAVE FAILED TO ESTABLISH THAT GRANTING A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

Plaintiff's motion for a preliminary injunction, on the eve of the New Jersey county clerks' preparation of primary election ballots, is against the public interest because it would (i) require extensive delays to the primary election process, (ii) cause voter confusion and risks to the integrity of the upcoming primary election, and (iii) overturn the New Jersey legislature's long-established determination to

bracket candidates consistent with the public interest in supporting candidates' right to associate on the election ballot.

It is a general principle that "federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell*, 549 U.S. 1 (2006); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 574 U.S. 951 (2014)).

A. Changes to the Ballot Design Process at this Late Stage of the Ballot Process are not Practically Feasible within the Statutory Timing Provided for the 2024 Primary Election Process

A critical consideration for Plaintiffs' application for injunctive relief, is the public interest in a timely, efficiently run and appropriately certified election. Plaintiffs' expert attempts to address the point of whether New Jersey's voting equipment can accommodate an "office block" format; however, those conclusions are generalized and speculative. (*See* Appel Report ("Although no state currently using the ExpressVote XL does so with an office-block format, several pieces of evidence suggest that it is possible").) Also, notably, nowhere do Plaintiffs or their experts address what is required from voting machine vendors to accommodate an office block format on New Jersey's current machines, whether that could be accomplished in time for the 2024 primary elections, or the resources or costs required for such a transition.

In contrast to Mr. Appel's unsubstantiated conjecture, ES&S' Principal State Certification Manager submitted an affidavit that directly addresses this issue and makes clear that certification of a new ballot format could not be accomplished in time for the primary elections:

> [ES&S systems] used in New Jersey were certified and tested using the current, traditional ballot layout style. Any deviations from that style would need to be evaluated to determine feasibility. Depending on the ballot layout style requirements, any changes would require development, testing and certification of a new and/or updated version of software. ***Such deviations could not be made and implemented prior to New Jersey's 2024 primary election.***

(ES&S Aff. at ¶ 8 (emphasis added).) Given that statement from ES&S, there is a strong public interest in proceeding with the 2024 primary election, on the statutory time frame under New Jersey election laws, based on the standard election ballot.

B. <u>The Public's Interest in Avoiding Voter Confusion</u>

In addition to the feasibility of certifying the machines if they must be re-coded, Courts must consider that enjoining a state's election regulations and procedures on the eve of an election can "result in voter confusion" and incentivize voters "to remain away from the polls." *Purcell*, 549 U.S. at 4-5; *see Donald J. Trump for President, Inc.,*, 492 F. Supp. 3d at 375-376 (changes to New Jersey's election procedures on the eve of the election "are likely to cause confusion among the electorate that is against the public interest").

Here, changing the ballot design at this stage of the election would require considerable resources, training and education for election officials to coordinate changes to the ballot, reprogramming and training on the election machines and software, and training and education for election workers and voters on the new ballots themselves. Such changes to the ballot design at this late stage of the primary election process would dramatically impact the county clerks' ability to ensure an orderly and efficient election process. (*See* Hanlon Decl. at ¶¶ 30-32*; see also N.J. Press Ass'n v. Guadagno*, 2012 U.S. Dist. LEXIS 161941, *25 (D.N.J. 2012)(recognizing the "public's interest in the State's ability to ensure a safe, orderly and efficient voting process in which voters are able to exercise their constitutional rights without undue influence or obstruction").) There is a strong public interest in avoiding disorder and confusion caused by late changes to the election process.

C. The Public Interest in Protecting the First Amendment Right to Candidate Association

The New Jersey Supreme Court has also recognized, in considering the election laws at issue here, the strong public interest in permitting grouping of candidates to protect their First Amendment association rights. *See Quaremba,*67 N.J. at13 (quoting *Harrison v. Jones*, 44 N.J. Super. 456, 461 (App. Div. 1957)(holding that "even if it were true that an unaffiliated candidate would draw more votes if his opponent's name were not grouped with those of candidates for

other offices, it affords no basis for invalidating, as unreasonable, the legislative determination that whatever the effect on an unaffiliated candidate, the public interest is better served by permitting a grouping of candidates having common aims or principles and authorizing those candidates 'to have this fact brought to the attention of the voter in a primary election with the additional effectiveness produced by alignment of their names on the machine ballot.'").)

Plaintiffs' request for this court to impose an office-block format on New Jersey ballots conflicts with the long-established principle that courts should not require any particular ballot structure. *See Schundler v. Donovan*, 377 N.J. Super. 339, 349-50 (App. Div. 2005) ("We do not require any particular method of ballot construction. That is beyond our expertise. We are content to rely on the good faith and experienced wisdom of the county clerks to devise an approach to ballot positioning that treats [candidates] fairly and equally to the greatest extent practically possible."). As New Jersey courts also recognize, although ballot structure is subject to judicial review, "judicial officers on any such review should not substitute their judgment for the reasonable decisions of the public officers in whom the Legislature has reposed the authority and duty to administer the electoral process with fidelity to the requirements of law, constitutional principle, and in the public interest." *Ibid.*

Accordingly, given the strong public interests in favor of denying Plaintiffs' requested ballot changes, Plaintiffs have failed to demonstrate that public interests weigh in favor of granting a preliminary injunction at this late stage of the primary election process.

CONCLUSION

For all of the foregoing reasons, the Court should deny Plaintiffs' request for a preliminary injunction.

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Respectfully submitted,

/s/ *Jason C. Spiro*
Jason C. Spiro
Brian M. Nelson
Marissa K. DeAnna
SPIRO HARRISON & NELSON LLC
200 Monmouth Street, Suite 310
Red Bank, New Jersey 07701
Tel: (732) 784-1470
jspiro@shnlegal.com
bnelson@shnlegal.com
mdeanna@shnlegal.com

Attorneys for Defendant Christine Giordano Hanlon