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

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Case(s)

Statute(s)

Rule(s)

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. <u>New Jersey's Election Law Framework for Ballot Design</u>

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. The State's Strong Interest in Preserving Timely and Orderly Elections and Avoiding Voter Confusion

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. The Public's Interest in Avoiding Voter Confusion

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.

Dated: March 6, 2024

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

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

ANDY KIM, et al

Plaintiffs,

V. Case CIV- No. 24 CV-1098

CHRISTINE GIORDANO HANLON, et al

Defendants.

AFFIDAVIT OF BENJAMIN R. SWARTZ

State of Nebraska)
) ss.
County of Douglas)

I, Benjamin R. Swartz, being first duly sworn, state as follows:

1. I am over the age 18 and am competent to provide this affidavit.

2. I am the Principal State Certification Manager for Election Systems & Software, LLC ("ES&S") and have been in this role for 14 years.

3. The information contained in this affidavit is based upon my personal knowledge and information that I have obtained as the Principal State Certification Manager for ES&S.

4. I am familiar with the State of New Jersey's certification process to test and certify election systems and election software for use in the State's elections.

5. ES&S manufactures and supplies elections systems, including the Election Management Software (EMS) and the ExpressVote XL, to units of government nationwide, currently including fifteen (15) counties in the State of New Jersey.

6. The New Jersey Secretary of State certified the following ExpressVote XL machine(s) along with the following software version(s) on the corresponding dates according to its regular customary certification procedures: ExpressVote XL v. 4.2.1.0 / Electionware v. 6.3.0.0 ("EVS

6300") - Certified 1/10/2023; and ExpressVote XL v. 4.2.0.0 / Electionware v. 6.2.0.0 ("EVS 6200")– Certified 2/24/2022.

7. EVS 6200 is currently installed and in use in two (2) counties in New Jersey and EVS 6300 is currently installed and in use in thirteen (13) counties in New Jersey.

8. Both EVS 6200 and EVS 6300 of the ES&S ExpressVote XL system 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 elections.

9. I hereby certify under penalty of perjury that the foregoing statements are true and correct.

Benjamin R. Swartz, Affiant

State of Nebraska)
) ss.
County of Douglas)

Subscribed and sworn to before me on this 4th day of March, 2024 by Benjamin R. Swartz.

Notary Public

GENERAL NOTARY - State of Nebraska
TYLER A. MASTERSON
My Comm. Exp. June 2, 2026

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 **CERTIFICATION OF DEFENDANT, CHRISTINE GIORDANO HANLON, IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

I, CHRISTINE GIORDANO HANLON, certify as follows:

1. I am the Monmouth County Clerk, a position I have held since 2015. In my capacity as Monmouth County Clerk, I am also the Clerk of Elections for the County of Monmouth, New Jersey (the "County"). Prior to becoming the County Clerk, I served as a Commissioner on the Monmouth County Board of Elections.

2. As the Clerk of Elections, I am responsible for the preparation of all ballots pertaining to most elections in the County. This includes machine, mail-in, provisional, emergency, federal and sample ballots.

3. My office is also responsible for intake and processing of mail-in ballot applications, the issuance of mail-in ballots to voters via mail or hand delivery, and the receipt of candidate petitions for county offices.

4. There are two other County election offices with independent jurisdiction that have important roles in the planning and administration of elections in the County that have not been named in this litigation. The Superintendent of Elections/Commissioner of Registration (the "Superintendent") and the Board of Elections. The three offices work together to effectuate each election.

5. The Superintendent is responsible for voter registration, maintaining the voter lists, voting machines, and electronic poll books. The Board of Elections is responsible for counting mail in ballots, polling locations, poll workers and redistricting of election districts. These offices are responsible for procuring the voting machines, equipment, scanners and related software that will be utilized in an election. The County Clerk does not have jurisdiction over these decisions.

6. My elections staff consists of only six employees.

7. My office's entire budget is annually appropriated by the County Commissioners, which also manage the contracting and purchasing of equipment and supplies for my office.

8. In a primary election, the Republican and Democrat ballots are prepared separately. The design and layout of the ballot in a political party's primary election is governed by Title 19 of the New Jersey statutes, which dictates the filing of candidate petitions, bracketing of candidates, candidate slogans, the process for the ballot draw to determine the order of candidates, the information required to appear on the ballot and the organizational format of the ballot.

9. In Monmouth County, the 2024 primary election includes candidates for President, Delegates for President, United States Senate, United States Congress, County Commissioner, and municipal officials. This primary election also includes municipal political party or "county committee" representatives for each election district in the County, pursuant to the bylaws of the Monmouth County Democrat and Republican parties.

10. In Monmouth County, there are 53 municipalities with 474 election districts apportioned between approximately 497,000 registered voters. For the 2024 primary election, each political party is entitled to two county committee representatives per election district, which requires two separate ballots—one for Democrats and one for Republicans, necessitating the preparation of 948 separate ballots by my office.

11. In preparation for this year's primary election, mindful of the very tight statutory timeframes for the collection of information set forth in Title 19, my

office is currently in the process of gathering information from the municipal clerks from 53 municipalities as to what offices and contests will be included on the ballot. Based upon similar elections in the past, I anticipate that there will be over 2,000 candidate names to be placed on the primary election ballot this year.

12. Pursuant to *N.J.S.A.* 19:23-14, Republican and Democrat candidates must file petitions seeking their respective party's nomination no later than 71 days prior to the primary election, which is March 25, 2024. Municipal candidates 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.

13. Pursuant to *N.J.S.A.* 19:23-18 and 19:49-2, candidates wishing to bracket with other candidates and use slogans to associate with one another must submit those requests within 48 hours after the March 25, 2024 petition filing deadline, which is March 27, 2024. At this time, my office determines which candidates are permitted to bracket by ascertaining whether they have received consent from the campaign managers of the jointly filed petition candidates (*i.e.*, the County Commissioner(s)) who file petitions with my office.

14. Pursuant to *N.J.S.A.* 19:23-18 and 19:49-2, any candidates can form a bracketed slate or line with a slogan of their choice (so long as it's not incorporated by someone else) by securing at least 100 signatures on a petition for a County

Commissioner candidate to form a slate with them. Nowhere in the statutory framework is this ability limited to just political party organizations.

15. According to *N.J.S.A.* 19:49-2, the ballot shall be arranged in "columns or horizontal rows" and candidates wishing to bracket with one another are placed in the same line.

16. Pursuant to *N.J.S.A.* 19:23-24, the deadline for my office to conduct the drawing to determine final ballot positions for all primary election candidates for each political party is 61 days before election day, which falls on April 4, 2024.

17. By this date, most if not all of the offices being contested and the initial candidate information has already been entered into spreadsheets and the elections management software's database, and the basic ballot layout has been designed so that my office can comply with the statutory deadline for printing of ballots, which is the very next day.

18. Because this year's primary election includes a U.S. Senate election, *N.J.S.A.* 19:23-26.1 applies and is harmonized with *N.J.S.A.* 19:49-2. *N.J.S.A.* 19:23-26.1 requires the U.S. Senate candidates for each party to be placed in the first column or row of the ballot. If a U.S. Senate candidate has bracketed with others, they are placed in the same column or row on the ballot. When determining which U.S. Senate candidate appears in the first column or row on the ballot, the names of the U.S. Senate candidate (along with any other candidates they have

bracketed with) are, pursuant to *N.J.S.A.* 19:23-24, placed in a box, shaken, and the names are randomly drawn one by one. The first name drawn is placed in the first column or row, and so on. Thereafter, the positions of any unbracketed candidates for offices other than U.S. Senate are determined by separate drawing if need be.

19. Pursuant to *N.J.S.A.* 19:14-1, the deadline for the preparation of primary election ballots for printing is 60 days before election day, which falls on April 5, 2024. This 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 the finalizing of ballot layout and the mailing of mail-in ballots (which, in Monmouth County, due to the integrated elections management software system that is in place, impacts the voting machine programming and ballot design).

20. Accordingly, my office needs to design, program, print and mail 948 separately designed ballots containing more than 2,000 candidate names and slogans in a very short amount of time. This process requires coordination between my office, the Superintendent, the Board of Elections, ES&S and our ballot printer, Reliance Graphics, which is an outside contractor.

21. The same unified elections management software used by my office is also utilized to program the County's electronic voting machines, which are maintained by the Superintendent, and to program the optical scanners used to canvass paper ballots, which are maintained by the Board of Elections.

22. All ballots that are designed and programmed for the mail-in ballots in the elections management software directly affects the programming for the machines under the custody and control of the Superintendent and Board of Elections.

23. In 2021, pursuant to a new state law requiring early in person voting, the Superintendent invested in an entirely new fleet of voting machines, and the Board of Elections invested in new ballot scanners to function in conjunction with the County's elections management software. These decisions required my office to utilize the same elections management software for the preparation of ballots and tabulation of election results in a timely fashion.

24. All of the equipment and technology is integrated into one system. The voting machines are ES&S ExpressVote XL machines, which have only been designed, coded and certified by the Secretary of State to conform with existing law. The ES&S ballot scanners purchased and utilized by the Board of Elections have also been designed, coded and certified by the State. All of this equipment is compatible and connected to an ES&S software program called Electionware, which is the main software system utilized to create the database for all of the information for a particular election and ultimately, the tabulation of results.

25. My staff and my ballot printer have been extensively trained in the operation of the ES&S election system and software in the current format since

2021. Any changes to these machines, software, policies and procedures would require significant training.

26. I am not personally aware of the ES&S Express Vote XL machines or accompanying elections management software being used with an office block balloting format in any county in the state.

27. Plaintiff's expert claims that it might be "possible" for the ES&S ExpressVote XL to support office block balloting; however, even if it were possible, I have seen no evidence as to how it would be accomplished or how long it would take to accomplish those changes. In my experience, it would be costly and unwise to attempt to re-code the 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.

28. Pursuant to *N.J.S.A.* 19:63-9 and the Uniformed and Overseas Citizens Absentee Voting Act (52 *U.S.C.* 20302), the deadline for mailing mail-in ballots for the primary election is 45 days before election day, which falls on April 20, 2024.

29. The statutory time constraints imposed upon my office (and others) to complete these tasks in the normal course are extraordinary and have become increasingly difficult with the increased utilization and prevalence of voting by

mail, the enactment of early voting, and the recent state requirement that mail in ballot and early in person votes be reported by election district. These tasks are particularly difficult in Presidential election years when turnout is extraordinarily high and county committee races are also taking place, which means the volume of individual ballots and candidates is at its highest.

30. The risks of making significant changes in such a short amount of time with software and equipment 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.

31. Primary election voters are accustomed to New Jersey's ballot design, which has been utilized for decades. Significant voter education would be required to make primary election voters aware of any new proposed changes. Based on my personal experience, especially during presidential election cycles during which turnout is highest, 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.

32. For these reasons, it is practically impossible and imprudent at this time to re-code untested and uncertified hardware and software, then design, program, print and mail ballots in time for the 2024 primary election. Any effort to

implement changes at this late stage of the process would create an enormous strain on already strained resources and impose a significant risk to the integrity of the primary election process.

I HEREBY CERTIFY that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By: Christine G. Hanlon (Mar 6, 2024 19:22 EST)

CHRISTINE G. HANLON
Monmouth County Clerk

Date: 03/06/2024

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 **CERTIFICATION OF COUNSEL AS TO UNPUBLISHED OPINIONS**

I, JASON C. SPIRO, ESQ., of full age, hereby certify as follows:

1. I am an attorney-at-law of the State of New Jersey and I am a Partner at Spiro Harrison & Nelson LLC, attorneys for defendant Christine Giordano Hanlon ("Defendant Hanlon") in the above-captioned matter and make this Certification in opposition to plaintiffs' Motion for Preliminary Injunction.

2. A true and correct copy of *Exec. Home Care Franchising LLC v. Marshall Health Corp.,* No.15-1887, 642 Fed. Appx. 181 (3d Cir. February 23, 2016) is attached as Exhibit A.

3. A true and correct copy of *Singh v. Murphy*, Docket No. A-0323-20T4, 2020 WL 6154223 (App. Div. October 21, 2020) is attached as Exhibit B.

4. A true and correct copy of *Conforti v. Hanlon*, No. 20-08267, 2022 U.S. Dist. LEXIS 97003 (D.N.J. May 31, 2022) is attached as Exhibit C.

5. A true and correct copy of *N.J. Press Ass'n v. Guadagno*, No. 12-06353, 2012 U.S. Dist. LEXIS 161941 (D.N.J. Nov. 13, 2012) is attached as Exhibit D.

6. Counsel is not aware of any contrary unpublished opinions.

I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 6, 2024

/s/Jason C. Spiro
JASON C. SPIRO, ESQ.

642 Fed.Appx. 181
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals, Third Circuit.

EXECUTIVE HOME CARE FRANCHISING LLC, Appellant
v.
MARSHALL HEALTH CORP.; Well–Being Home Care Corp.; Clint Marshall; Massare Marshall; Greer Marshall; John Does 1–5.

No. 15–1887
|
Submitted Pursuant to Third Circuit LAR 34.1(a) Jan. 20, 2016.
|
Filed: Feb. 23, 2016.

Synopsis
Background: Franchisor of in-home health care franchises brought action against franchisees alleging breach of franchise agreement, breach of contract, unfair competition and violation of Lanham Act, and trade dress infringement. Franchisees counterclaimed for breach of contract, breach of good faith and fair dealing, fraudulent inducement and several related claims. The United States District Court for the District of New Jersey, Linares, J., 2015 WL 1422133, denied franchisor's motion for preliminary injunction. Franchisor appealed.

[Holding:] The Court of Appeals, Cowen, Circuit Judge, held that franchisor failed to establish that it would suffer irreparable harm if its motion for preliminary injunction was not granted.

Affirmed.

[1] **Injunction** Franchise agreements
Trademarks Grounds and Subjects of Relief

Franchisor of in-home health care franchises failed to establish that it would suffer irreparable harm if its motion for a preliminary injunction was denied pending resolution of its claims against franchisees for breach of franchise agreement, breach of contract, unfair competition and violation of Lanham Act, and trade dress infringement, and thus was not entitled to preliminary injunction, where franchisees were no longer using nor creating a potential for confusion regarding franchisor's trademarks, franchisees had returned 13 boxes of documents, stationary, manuals, marketing materials, and other items to franchisor, which franchisor's counsel acknowledged included all materials in franchisees' possession containing franchisor's trademarks, and franchisees were no longer operating out of the franchised location or physically using franchisor's mark or trade name. Lanham Trade–Mark Act, § 1 et seq., 15 U.S.C.A. § 1051 et seq.

2 Cases that cite this headnote

***181** On Appeal from the United States District Court for the District of New Jersey, (D.C. Civil No. 2–15–cv–00760), District Judge: Hon. Jose L. Linares.

Attorneys and Law Firms

Evan M. Goldman, Esq., Justin M. Klein, Esq., Louis D. Tambaro, Esq., Marks & Klein, Red Bank, NJ, for Plaintiff–Appellant.

Louis H. Miron, I, Esq., Cranford, NJ, for Defendant–Appellee.

Before: FISHER, CHAGARES and COWEN, Circuit Judges.

West Headnotes (1)

OPINION*

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

COWEN, Circuit Judge.

Executive Home Care Franchising LLC ("Executive Care") appeals from the order ***182** of the United States District Court for the District of New Jersey denying its motion for preliminary injunctive relief. We will affirm.

I.

Executive Care is engaged in the business of selling in-home health care franchises. On February 25, 2013, Clint Marshall, Massare Marshall, and Greer Marshall entered a franchise agreement with Executive Care. However, they abandoned the franchise on or about January 19, 2015. Executive Care subsequently filed a complaint against the Marshalls, Marshall Health Corp., and Well–Being Home Care Corp., alleging claims for: (1) Declaratory Judgement—Termination of Franchise Agreement and Injunctive Relief; (2) Breach of Contract; (3) Unfair Competition and Violation of the Lanham Act; and (4) Trade Dress Infringement. Defendants filed counterclaims of their own for: (1) Breach of Contract; (2) Breach of Duty of Good Faith and Fair Dealing; (3) Fraudulent Inducement; (4) Tortious or Malicious Interference with Contract; (5) Intentional or Malicious Interference with Prospective Economic Advantage; (6) Violations of the New Jersey Franchise Practices Act; and (7) Unjust Enrichment.

Executive Care moved for temporary restraints and a preliminary injunction. Specifically, they asked the District Court to enjoin Defendants from:

> 1. continuing to operate an Executive Care franchise located in Morristown, New Jersey, or anywhere else due to Marshall Defendants' breach of their payment obligations and the in-term and post-termination restrictive covenant contained in the Executive Franchise Agreement;
>
> 2. Operating a competing, "independent" in-home care business in violation of the express provisions of the parties' franchise agreement;
>
> 3. further violating the fair and reasonable non-disclosure, non-competition, and/or non-solicitation clauses in the Franchise Agreement and/or in separate the Non-disclosure and Non–Compete Agreement executed by Defendants; and,
>
> 4. from improperly failing to return or otherwise using the clients, caregivers, charts, phone numbers, proprietary materials, trademarks, trade names, trade dress of Executive Care and from holding themselves out to the public as, and operating as Executive Care franchisees or any entity in any way affiliated with Executive Care in order to divert business from Executive Care to Defendants.

Executive Home Care Franchising LLC v. Marshall Health Corp., Civil Action No. 15–760(JLL), 2015 WL 1422133, at *2 (Mar. 26, 2015). Finding that Executive Care failed to show that it would suffer irreparable harm, the District Court denied its motion. Executive Care subsequently filed a claim with the American Arbitration Association. The District Court dismissed both the complaint and the counterclaims without prejudice because the parties agreed that they had entered a valid agreement to arbitrate and that all of the claims (apart from Executive Care's request for a preliminary injunction) were subject to this arbitration agreement.

II.

In general, injunctive relief represents an extraordinary remedy that should be granted only in limited circumstances.[1] ***183** *See, e.g., Kos Pharm., Inc. v. Andrx Corp.,* 369 F.3d 700, 708 (3d Cir.2004). In order to obtain a preliminary injunction, a party must establish: "(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." *Miller v. Mitchell,* 598 F.3d 139, 147 (3d Cir.2010) (citing *Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.,* 386 F.3d 514, 524 (3d Cir.2004)). We conclude that the District Court properly disposed of Executive Care's motion for a preliminary injunction on the basis of the "irreparable harm" requirement.

[1] The District Court possessed subject matter jurisdiction pursuant to 28 U.S.C. §§ 1338 and 1367. We have appellate jurisdiction under 28 U.S.C. § 1292. We review a district court's findings of fact for clear error, its conclusions of law *de novo,* and the ultimate decision whether or not to grant a preliminary

injunction for an abuse of discretion. *See, e.g., McTernan v. City of York,* 577 F.3d 521, 526 (3d Cir.2009)

According to Executive Care, the District Court "committed legal errors by abandoning the longstanding precedent finding irreparable harm in franchise cases and ignoring Executive Care's overwhelming evidence of irreparable harm." (Appellant's Brief at 13.) However, we are "satisfied that Defendants are no longer using nor creating a potential for confusion regarding Plaintiff's trademarks." *Executive Care,* 2015 WL 1422133, at *5. Defendants returned thirteen boxes of documents, stationery, manuals, marketing materials, and other items to Executive Care. Counsel for Executive Care acknowledged that, "[a]s a far as I know, they have delivered all of the stuff in their possession that has Executive Care trademarks, and they have delivered back a copy of the operations manual and those materials that we referenced in our papers." (A238.) Counsel further admitted that Defendants are no longer operating out of the franchised location and are no longer physically using his client's mark or trade name. Instead, "[t]hey are using Well–Being Home Care Corp." (A239.) The parties have worked to transfer the telephone number back to Executive Care. In addition, Defendants evidently informed their existing clients that they are no longer associated with the Executive Care system. Given these circumstances, we believe that (even though Defendants may have agreed in the franchise agreement that Executive Care would be entitled to an injunction if it established a substantial likelihood of breach or threatened breach and recognized that the failure to comply with the franchise agreement would likely cause irreparable harm) the District Court committed no reversible error by denying a request for an extraordinary remedy.[2]

[2] Executive Care specifically attacks the District Court for ignoring two prior decisions: *Jackson Hewitt, Inc. v. Dupree–Roberts,* Civ. No. 13–00388, 2013 WL 4039021 (D.N.J. Aug. 7, 2013), and *H & R Block Tax Services, LLC v. Strauss,* No. 1:15–CV–0085 (LEK/CFH), 2015 WL 470644 (N.D.N.Y. Feb. 4, 2015). However, district court rulings do not constitute binding precedent (and *H & R Block* was not even decided by a district court in this Circuit). The two opinions are also distinguishable (e.g., the defendants continued to operate out of their respective franchised locations, *H & R Block,* 2015 WL 470644, at *1; *Jackson Hewitt,* 2013 WL 4039021, at *1).

III.

For the foregoing reasons, we will affirm the order of the District Court.

All Citations

642 Fed.Appx. 181

End of Document

2020 WL 6154223
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Hirsh SINGH, Plaintiff-Appellant,
v.
Honorable Philip D. MURPHY, in his official capacity as Governor of New Jersey, Honorable Tahesha Way, in her official capacity as New Jersey Secretary of State, Defendant-Respondent.
In the Matter of the Petitions of Hirsh Singh for Recount and Recheck.

DOCKET NO. A-0323-20T4
|
Argued October 15, 2020
|
Decided October 21, 2020

On appeal from Executive Order No. 144 and related Executive Orders, pursuant to a transfer from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1757-20.

Attorneys and Law Firms

Hirsh Singh, appellant, argued the cause pro se.

Beau C. Wilson, Deputy Attorney General, argued the cause for respondents Philip D. Murphy, Governor and Tahesha Way, Secretary of State (Gurbir S. Grewal, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Beau C. Wilson, on the brief).

Joseph J. Bell argued the cause for respondent Holly Mackey, County Clerk, County of Warren (Bell & Shivas, P.C., attorneys; Joseph J. Bell, on the brief).

Before Judges Sabatino, Currier and Gooden Brown.

Opinion

PER CURIAM

***1** Plaintiff Hirsh Singh[1] is a New Jersey resident who was a candidate in the 2020 New Jersey Republican primary election for the United States Senate. Self-represented, he challenges the validity of the mail-in voting procedures that were utilized in the July 7, 2020 primary. The modified procedures were implemented pursuant to Executive Orders of the Governor issued in the wake of the COVID-19 pandemic. Plaintiff further challenges the validity of the modified mail-in voting procedures now being used for the 2020 general election in accordance with an additional Executive Order and a cognate statute enacted by the Legislature this summer. He seeks injunctive and other relief, including an order nullifying the announced results of the July 2020 primary election for Senate and the House of Representatives, directing a new primary election to be conducted, and enjoining the continued use of the modified mail-in system for the November 2020 General Election.

[1] As he pointed out in a motion with the trial court, plaintiff's first name had been misspelled in some previous court documents, but it is correctly shown here.

Plaintiff brought lawsuits in several counties to obtain relief, contending that if the modified mail-in voting procedures were nullified, he would have been declared the winning candidate in the statewide primary election. After the lawsuits were consolidated, plaintiff abandoned his efforts to seek a recount of the primary results and narrowed his focus to seek to invalidate the modified voting procedures under federal law. Insofar as that claim entails a facial challenge to the validity of the Governor's Executive Orders, it was transferred to this court procedurally for appellate review under the Court Rules, thereby leaving to the trial court any lingering as-applied factual disputes or other claims.

For the reasons that follow, plaintiff's facial challenges and his associated requests for injunctive relief are denied. As to his claims that the modified voting procedures for the primary election prescribed by Executive Order 144 did not comport with the federal constitution, we conclude that exercise of

authority was permissible under the emergency powers the Legislature delegated to the Governor under the Emergency Health Powers Act, N.J.S.A. 26:13-1 to - 31, and the Civilian Defense and Disaster Control Act, N.J.S.A. App. A:9-30 to -63. Given the unassailable severity of the COVID-19 pandemic and the need to reduce the risk of infection to New Jersey voters and

polling workers, the Governor was authorized to exercise those delegated emergency powers and revise customary in-person voting processes in order to protect the public health and safety.

As to plaintiff's claims that the modified voting procedures now being implemented for the general election violate the federal constitution and federal law, similar arguments were very recently rejected by the United States District Court in a persuasive October 6, 2020 published opinion, and we likewise decline to declare them invalid.

***2** Further, plaintiff has not demonstrated a right to the extraordinary and summary injunctive relief he seeks, applying the well-established criteria of Crowe v. De Gioia, 90 N.J. 126 (1982). Among other things, plaintiff has not established that his claims of invalidity are supported by settled law, that alteration of the present status quo is equitably warranted, or that the public interest favors nullification of the statewide primary results and the immediate cessation of the ongoing vote-by-mail processes for the general election.

Lastly, plaintiff's non-facial claims, including his claim of a deprivation of free speech rights by the Attorney General, are reserved for the trial court for disposition. The claims he has attempted to assert under the federal Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), seeking records and information from the United States Postal Service are dismissed without prejudice, for lack of jurisdiction in this state court.

I.

The Executive Orders at Issue

On February 3, 2020, three days after the United States Department of Health and Human Services Secretary declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19, Governor Philip D. Murphy issued Executive Order 102. That order created the state Coronavirus Task Force, to be chaired by the Commissioner of the New Jersey Department of Health (DOH), and consisting of the heads of the Department of Human Services, the Department of Law & Public Safety, the New Jersey State Police, the Department of Education, and the Office of Homeland Security and Preparedness. Exec. Order No. 102 (Feb. 3, 2020), 52 N.J.R. 366(b) (Mar. 2, 2020), ¶ 2-3.

On March 9, when there were more than 500 confirmed cases of COVID-19 in the United States, and eleven in New Jersey, Governor Murphy issued Executive Order 103, declaring a public health emergency and directing the "State Director of Emergency Management, who is the Superintendent of State Police, in conjunction with the Commissioner of DOH, to take any such emergency measures as the State Director may determine necessary." Exec. Order No. 103 (Mar. 9, 2020), 52 N.J.R. 549(a) (Apr. 6, 2020), ¶ 1.

Thereafter, on April 8, Governor Murphy issued Executive Order 120. The Executive Order noted in a preamble that public health officials were predicting that New Jersey's COVID-19 public health emergency was anticipated to peak in April 2020, and to continue for an indefinite time beyond the peak. Given those circumstances, Executive Order 120 postponed the statewide primary elections for United States Congressional and state local elections from the first Monday in June, as is normally called for by statute in N.J.S.A. 19:2-1, and rescheduled that primary election for July 7. Exec. Order No. 120 (Apr. 8, 2020), 52 N.J.R. 957(a) (May 4, 2020), ¶ 1.

According to the DOH, in the three weeks that followed the issuance of Executive Order 120, there were 6,285 additional confirmed COVID-19 deaths in New Jersey.[2]

[2] SeeN.J. COVID-19 Information Hub, https://covid19.nj.gov/index.html (last accessed on October 9, 2020).

More election-related changes designed to deal with the COVID-19 crisis followed. On May 15, the Governor, through Executive Order 144, instituted a series of changes to the election infrastructure for the July 7 primary elections. Exec. Order No. 144 (May 15, 2020), 52 N.J.R. 1238(a) (June 15, 2020). In the preamble to that order, Governor Murphy referred to data received from the Center for Disease Control and Prevention (CDC) reporting that, as of that time, there were more than 4,000,000 COVID-19 cases worldwide, with nearly 300,000 deaths. Of those, more than 1,000,000 cases and 80,000 deaths were in the United States. As of that point, the Governor continued, there had been more than 100,000 cases and nearly 10,000 deaths in New Jersey. The severity of the pandemic had "ma[d]e it difficult for election officials, candidates, and voters to properly plan and prepare for and fully participate in the July primary elections if they were to proceed as they would under normal circumstances." Ibid.

***3** The Governor further stated in Executive Order 144 that social distancing measures were necessary "for a period of as-yet-undetermined duration," and that "the COVID-19 outbreak may have significant effects on New Jersey's voting systems as long as social distancing measures are in place." Ibid. The order recognized a danger that, without an alternative way of voting, the pandemic would "hinder public participation in the democratic process, particularly among elderly and immune-compromised voters," and thereby would "undermine the legislative intent of N.J.S.A. 19:8-2 and 19:8-3.1," statutes aimed at securing the "right to vote," including for individuals with disabilities and the elderly. Ibid.

Based on these risks to public health and safety recited in the preamble, Executive Order 144 directed that "[a]ll elections that take place on July 7, 2020, shall be conducted primarily via vote-by-mail ballots," which would be sent automatically to all voters registered as Democrats or Republicans. Id. at ¶ 1. The order further directed that each county would be required to keep polling places open for the primary election and that voters who went to those polling places would be able to fill out provisional ballots there. Id. at ¶¶ 8, 10.

The primary election took place as planned on July 7, with most voters taking advantage of the vote-by-mail method for casting ballots.

Additional measures ensued. On August 14, Governor Murphy issued Executive Order 177, titled "[A]n Order to Protect Public Health by Mailing Every Active Registered Voter a [Vote-By-Mail] Ballot Ahead of the General Election." Exec. Order No. 177 (Aug. 14, 2020), 52 N.J.R. 1701(b) (Sept. 21, 2020).

Two weeks later, on August 28, the Legislature enacted N.J.S.A. 19:63-31, essentially incorporating the universal vote-by-mail procedures set forth in Executive Order 177 into statutory law, to be operative for the November 2020 General Election.

The Primary Election Results and Plaintiff's Challenges

The tabulated results for the primary election, certified by the Secretary of State, revealed that plaintiff received 146,139 votes, which was 8,727 votes less than Rikin Mehta, who received 154,866 total votes, and was declared the winner of the Republican Party nomination for United States Senate.[3]

[3] SeeOfficial Primary Election Results: U.S. Senate, N.J. Div. of Elections, https://www.state.nj.us/state/elections/assets/pdf/election-results/2020/2020*o*fficial-primary-results-us-senate-amended-0826.pdf.

On September 1, plaintiff filed in the Superior Court in Morris County a statewide petition to contest the primary election. Eight days later, on September 9, the Assignment Judge for the Morris/Sussex Vicinage issued an order consolidating that petition in Morris County, along with various other recount petitions which plaintiff had, as of that time, filed throughout the State. On September 14, plaintiff filed an application for "partial summary judgment" on his consolidated Morris County claims.

On September 16, the Attorney General, representing both the Governor and the Secretary of State, entered opposition to plaintiff's motion for partial summary judgment and simultaneously cross-moved to dismiss plaintiff's petition, arguing that it was both unsupported and untimely. On the same day, plaintiff filed an order to show cause seeking a temporary restraining order and injunction to prevent the printing of mail-in ballots for the general election containing the names of the candidates certified to have won the primary election of July 7, 2020. Plaintiff also moved, as he phrased it, to "disqualify" the Attorney General's response papers, which he alleged had been submitted late. He asked the trial court to rule on the papers that had been submitted in his motion for partial summary judgment. The Attorney General filed opposition.

***4** On September 22, the trial court denied plaintiff's motion to disallow defendants' motion to dismiss but did not rule on the merits of the dispositive motions. On the same day, the court denied plaintiff's order to show cause for a temporary restraining order and preliminary injunction. Plaintiff concurrently filed an amended verified petition to contest the Republican primary election for United States Senator.

The next day, on September 23, the Chief Justice issued an order stating that, pursuant to N.J.S.A. 19:29-2, any of plaintiff's still-pending recount petitions or previously filed petitions to contest the primary election would be consolidated in the trial court in Morris County.

On September 28, plaintiff filed a motion in the trial court seeking to, among other things, withdraw from all pending recount applications he had filed, and obtain a prompt resolution of his partial motion for summary

judgment on his petitions to contest the election. In that application, plaintiff argued that only the in-person provisional ballots were constitutionally valid, that the mail-in-ballots were constitutionally invalid, and that the court should "declare the entire primary election null and void" and "hold it again" to avoid disenfranchising voters.

Transfer to the Appellate Division of the Facial Challenge to Executive Order 144

On September 30, the trial court transferred the consolidated matters to the Appellate Division for review under Rules 1:13-4(a) and 2:2-3(a)(2), and Vas v. Roberts, 418 N.J. Super. 509 (App. Div. 2011). Two days later, on October 2, plaintiff filed an application for emergent appellate relief challenging Executive Order 144, the primary election based on it, and the use of the results of the primary election on the ballots for the general election to be held on November 3, 2020.

On October 5, Presiding Judge for Administration Carmen Messano issued an order of this court denying plaintiff's application for emergent relief, noting that the matter had already been fully briefed in the Law Division and had been transferred to the Appellate Division under Rule 1:13-4. The order further stated plaintiff's application for emergent relief would be treated as a motion seeking acceleration of the matter, which the court granted. The order established an expedited simultaneous deadline for optional supplemental briefs, "limited to the constitutional challenge plaintiff has brought to the Executive Order issue," in anticipation of a prompt calendar date.

The following day, on October 6, plaintiff sent an email to this court, asking for a dispositive ruling on the papers already submitted to the Law Division. He also sought clarification as to whether an argument he had raised under the federal Freedom of Information Act (FOIA) remained a part of the case. The Attorney General separately advised this court that he intended to submit a supplemental brief by the court's specified October 13 deadline, and that he requested oral argument rather than a disposition on the papers.

Later that same day, this panel issued a follow-up order, setting oral argument for October 15, and clarifying that "[t]he discrete issues for which the Appellate Division has accepted jurisdiction solely concern appellant's facial challenges to the Governor's Executive Orders and the voting procedures for the 2020 election, and not any factual disputes or other disputes." The order further made clear that "[t]he various County Clerks and U.S. Senate candidate Rik Mehta who had responded to the trial court with regard to non-facial issues concerning the 2020 U.S. Senate Republican Primary need not participate as respondents in this appeal" unless they filed briefs by the common October 13 deadline.

***5** In accordance with this scheduling order, plaintiff filed on October 13 a twenty-nine-page submission, which he labeled as a "motion for summary judgment."[4] The submission concludes with these numerous requests for relief:

> i. Declare the Executive Order 144 issued by Governor Phil Murphy to be unconstitutional and in contravention of the Elections Clause and the Due Process [Clause] of the United States Constitution[.]
>
> ii. Restore the status quo ante as to the manner of conducting elections[.]
>
> iii. Declare the primary election of July 7, 2020 for all political parties unconstitutional and hence null and void[.]
>
> iv. Forbid the use in the General Election of ballots with names of candidates nominated through the process of the unconstitutional primary election created through the Executive Order 144 of Governor Phil Murphy[.]
>
> v. Direct the [S]tate of New Jersey to conduct fresh primary elections in accordance with the law for all races to fill up the offices of Senators and Representatives mentioned in the Elections Clause of the U.S. Constitution[.]
>
> vi. Declare the cease and desist letter sent by New Jersey's Attorney General to be election interference and in violation of the due process clause[.]
>
> vii. Declare the cease and desist letter sent by New Jersey's Attorney General to be in violation of the free speech clause[.]
>
> viii. Direct the Attorney General's office to rescind the letter and clarify that they were in violation of the Constitution and admit that the Petitioner acted in accordance with the Constitution and all laws[.]
>
> ix. Declare the entire system of mail-in ballots except as provided by previously defined procedures for the absentee ballots to be issued to the members of the Armed Forces to be in violation of the Freedom of Information Act[.]

x. Issue an injunction forbidding the use of the mail-in ballot system for the general election of November 3, 2020[.]

[4] Consistent with appellate practice, we treat the pro se submission as a motion for summary disposition under Rule 2:8-3, and, because it presents legal arguments and citations to case law and various codified provisions, as an appellant's brief. We have also considered plaintiff's various submissions to the trial court.

On October 13, the Attorney General submitted a timely supplemental brief opposing plaintiff's application. The Attorney General argues that plaintiff's claims are procedurally untimely and that he should be equitably estopped from seeking relief. As to the merits, the Attorney General further argues that the Executive Orders at issue are facially and constitutionally valid, and that no injunctive or other relief is warranted.

In addition, the County Clerk of Warren County submitted a short letter brief requesting that plaintiff's appeal be denied in its entirety. The County Clerk argues that the special circumstances of the COVID-19 pandemic supported the Executive Orders modifying customary election processes, that the County dutifully carried out those processes, and that there is no reason at this juncture to nullify the outcome of the primary election or to alter the ongoing voting methods in the general election.[5]

[5] The County Clerk also observes that plaintiff received the most tabulated votes in Warren County in the Republican Senate primary.

***6** No other county clerks or parties submitted briefs or appeared in the appeal, including the declared Republican Party nominee for Senate. Oral argument was conducted on October 15, and the issuance of this opinion has been expedited.

The District of New Jersey Federal Decision

Meanwhile, on October 6, 2020, the United States District Court for the District of New Jersey issued a 31-page published opinion in Donald J. Trump for President, Inc. v. Way, —— F. Supp. 3d —— (D.N.J. 2020) (slip opinion). In that case, the Republican National Committee, along with President Donald J. Trump for President, Inc., and the New Jersey Republican State Committee, primarily sought a preliminary injunction enjoining N.J.S.A. 19:63-31. The plaintiffs argued the newly enacted statute violated the Elections Clause of the United States Constitution. The plaintiffs argued the new state statute violates the Elections Clause because it authorizes the canvassing of mail-in ballots beginning up to ten days before election day and the canvassing of ballots not postmarked but received within forty-eight hours of the polls' closing. Way, slip op. at 16, 21. The plaintiffs asserted this was inconsistent with the Elections Clause because Congress had set forth the time, place, and manner of holding national elections by federal statute in establishing a uniform general election day to be the Tuesday following the first Monday in November. 2 U.S.C. §§ 1, 7.

The District Court in Trump v. Way declined to enter the injunction and allowed the ongoing mail-in voting procedures to continue. Among other things, the opinion found no violation of the Elections Clause or federal law occurring as the result of the modified procedures.[6]

[6] We discuss the opinion in more detail, infra, with respect to plaintiff's arguments to enjoin the vote-by-mail processes being used in the present general election.

II.

Pursuant to Rule 2:2-3(a)(2), "appeals may be taken to the Appellate Division as of right ... to review final decisions or actions of any state administrative agency or officer." Under this rule, "agencies whose actions have been held to be reviewable in the first instance by the Appellate Division are those located within the principal departments in the executive branch of state government." Vas v. Roberts, 418 N.J. Super. at 517. As "the Governor is the State's chief executive or administrative officer," id. at 519, a challenge to the constitutionality of an Executive Order of the Governor falls within the scope of a challenge to a final administrative decision or order under Rule 2:2-3(a)(2), Commc'ns Workers of Am., AFL-CIO v. Christie, 413 N.J. Super. 229, 251 (App. Div. 2010).

Plaintiff's main argument of facial invalidity rests upon the application of the Elections Clause set forth in Article I, Section 4, Clause 1 of the United States Constitution. That clause reads:

> 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 [choosing] Senators.
>
> [U.S. Const. art. I, § 4, cl. 1.]

Plaintiff contends that Executive Order 144 violated this provision because the Elections Clause requires a state's "Legislature thereof" to enact the procedures for holding elections for Senators and members of Congress. He argues that Executive Order 144 was a unilateral action of the Governor that needed to be concurrently adopted by the New Jersey Legislature in order to be constitutionally valid. However, that argument is not supported by settled law. In fact, precedents of the United States Supreme Court have adopted a more expansive notion of the form of state legislative power that may satisfy the Elections Clause.[7]

[7] Respondents do not dispute that the Elections Clause and federal power potentially extend to state primary elections for federal offices. SeeFoster v. Love, 522 U.S. 67, 71 n.2 (1997) ("Congressional authority extends not only to general elections, but also to any 'primary election which involves a necessary step in the choice of candidates for election as representatives in Congress.' ") (citing United States v. Classic, 313 U.S. 299, 320 (1941)).

***7** The Elections Clause authorizes each state to enact processes to be followed in electing members of the House and Senate from their respective states. As the Supreme Court recognized in Storer v. Brown, 415 U.S. 724 (1974), states retain the power of establishing the time, place, and manner of primary elections under the Elections Clause. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." Id. at 730. The Court explained in Foster v. Love, 522 U.S. 67, 69 (1997), that the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of congressional elections." The Court reiterated in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832 (1995) that the Framers intended the Elections Clause to grant states the authority to create procedural regulations for such federal elections.

Recent Supreme Court precedent has established that the reference to the "Legislature" in the Elections Clause encompasses more than just legislative lawmaking bodies. In Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 806-09 (2015), the Court upheld the validity of an independent congressional redistricting commission created by a voter ballot initiative rather than through a statute enacted by the Arizona Legislature. The Court rejected the challengers' argument that only the Arizona Legislature could specify the district boundaries and electoral processes. Tracing the history of Article I, Section 4, Justice Ginsburg's majority opinion for the Court observed that "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation." Id. at 814-15.

The Supreme Court has made clear that the term "Legislature" as used in the Elections Clause does "not mean the representative body alone." Id. at 805. Instead, the term more broadly refers to a state's legislative power, "performed in accordance with the State's prescriptions for lawmaking." Id. at 808; see alsoSmiley v. Holm, 285 U.S. 355, 367-68 (1932) (holding that the Elections Clause allows a state's governor to exercise veto powers under state law to override decisions made by the legislature concerning the time, place, and manner of elections).

In our own state, constitutional powers are distributed among the three classic branches of democratic government: the Governor, the Legislature, and the Judiciary. SeeN.J. Const. art. III. Lawmaking power is shared by the Legislature and the Governor in numerous ways, including the Governor's power to veto legislation, N.J. Const. art. V, § 1, and the Legislature's reciprocal power to invalidate certain administrative regulations, which otherwise have the force of law, issued by the Executive Branch, N.J. Const. art. V, § 4. Our case law has long recognized that the branches of state government are not "water-tight compartments," but rather that the "aim of the separation-of-powers doctrine is not to prevent such cooperative action, but to guarantee a system in which one branch cannot" usurp the powers of another. Commc'ns Workers of Am., AFL-CIO v. Florio, 130 N.J. 439, 449-50 (1992).[8]

[8] Plaintiff's appellate brief states that "no challenge is made under the provisions of the New Jersey Constitution," although he has referred to its provisions at times for purposes of context. An issue not briefed on appeal is deemed waived. SeeMidland Funding LLC v. Thiel, 446 N.J. Super. 537, 542 n.1 (App. Div. 2016).

The State convincingly argues that in issuing Executive Order 144 while the public health crisis caused by COVID-19 escalated, the Governor lawfully acted pursuant to his legislatively-assigned responsibilities vested in him by two statutes: The Emergency Health Powers Act, N.J.S.A. 26:13-1 to -31 (EHPA), and the Civilian Defense and Disaster Control Act, N.J.S.A. App. A:9-30 to -63 (Disaster Control Act). These statutes, duly

adopted by the Legislature, respectively define emergencies to include "an occurrence or imminent threat of an occurrence" of disease that "poses a high probability of," among other things, "a large number of deaths, illness, or injury in the affected population," N.J.S.A. 26:13-2, and "any unusual incident resulting from natural or unnatural causes which endangers the health, safety or resources of the residents of one or more municipalities of the State," N.J.S.A. App. A:9-33.1.

***8** The Disaster Control Act, the older and more invoked provision, is especially on point. Enacted in 1941, the statute bestows on the Governor broad authority "to utilize and employ all the available resources of the State Government and of each and every political subdivision of this State, whether of men, properties or instrumentalities, and to commandeer and utilize any personal services and any privately owned property necessary to avoid or protect against any emergency." N.J.S.A. App. A:9-34.

The purpose of the statute is to "protect the public by centralizing control over local government resources in situations whose remedies were beyond the authority and power of local government." Worthington v. Fauver, 88 N.J. 183, 195 (1982). For this reason, the Governor is not required to "wait for a serious disruption to occur" before invoking the powers granted under the Act. Ibid. The Governor's broad delegated authority to issue emergency orders encompasses "any matter that may be necessary to protect the health, safety and welfare of the people," N.J.S.A. App. A:9-45(i), even where such action alters the rules that would govern in non-emergency periods. Cnty. of Gloucester v. State, 132 N.J. 141, 145 (1993).

Our courts on multiple occasions have sustained executive orders that "flow[ ] out of the Governor's legislatively-delegated emergency powers to act on behalf of the safety and welfare of the people of New Jersey under the Disaster Control Act." SeeCommc'ns Workers of Am., AFL-CIO v. Christie, 413 N.J. Super. at 259 (listing such cases in which the Governor invoked his or her emergency powers).

"Where the executive acts pursuant to an express or implied authorization from the Legislature ... he exercises not only his own powers but those of the Legislature." Worthington, 88 N.J. at 208 (emphasis added). Hence, as a matter of established New Jersey law, the Governor may exercise powers that have been delegated to him by the Legislature in order to address emergency situations. Such emergency action does not offend legislative hegemony in its delegated sphere.

Nor do the emergency statutes repose in the Governor, as plaintiff argues, unbridled "dictatorial" power. If the Legislature disagrees with a Governor's emergency action it can respond by passing legislation, subject to veto, that repeals or amends the Disaster Control Act or EHPA with language disallowing a particular exercise of authority.

Judicial review of the exercise of delegated powers is limited. "In such circumstances the executive action should be 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.' " Ibid. (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)) (concerning analogous concepts of federal separation of powers). "In such a case [the executive's] actions pursuant to that delegated authority are constitutionally valid as long as he has not exceeded his statutory authority and the government as a whole has the power to act." Worthington, 88 N.J. at 208.

Executive Order 144 was issued and implemented consistent with this legislative delegation of emergency authority. Plaintiff has not demonstrated any basis on which to conclude that the Governor's issuance of Executive Order 144 to conduct the primary election in a way designed to canvass votes while minimizing person-to-person contact due to the COVID-19 emergency exceeded his broad authority "to utilize and employ all the available resources of the State Government and of each and every political subdivision of this State ... to avoid or protect against any emergency." N.J.S.A. App. A:9-34.

***9** Plaintiff's brief asserts that the Disaster Control Act does not support the Executive Order because the modifications of the election process "have nothing to do with property damage or destruction." But that argument overlooks the other language within the Act empowering the Governor to protect the "health, safety and welfare of the people." N.J.S.A. App. A:9-33. It is plain that the measures undertaken to reduce in-person contact at the polls are aimed at promoting the health and safety of voters and poll workers in the midst of a deadly pandemic that still has yet to be contained.[9]

[9] The Attorney General has drawn our attention to a recent opinion of the federal district court in Montana involving parallel issues. In that case, the Montana Governor, under emergency powers delegated to him by the Legislature to suspend enforcement of regulatory statutes, issued a directive that the ordinary statutory prohibition on the use of mail-in ballots in the general election in Montana was going to be lifted for the 2020 general election due to concerns caused by COVID-19. Against a challenge that, among other things, the

> Governor's suspension of the regulatory prohibition on mail-in balloting violated the Elections Clause, the District Court held that by invoking his emergency powers under state law in enacting the regulatory suspension, the Governor acted within the scope of the delegated powers of the Legislature in affecting the time, place, and manner of Montana's federal elections. The Attorney General contends this result and reasoning, although not binding precedent, happens to be consistent with the similar delegation of emergency powers exercised by Governor Murphy in his Executive Orders under the EHPA and the Disaster Control Act. Because the opinion apparently has not been published, we do not cite to it or rely on it as precedential authority, seeRule 1:36-3, and mention it only for comparative and historical purposes.

Plaintiff argues that the Executive Order itself represents an improper delegation of authority to other executive agencies, such as the State DOH and the county departments of health, as well as the CDC. The Executive Order merely recites in this regard that vote-by-mail ballots shall be processed and canvassed "in accordance with guidelines provided" by such health agencies. The reference to health guidelines is not a misuse or transfer of the emergency powers delegated to the Governor. Rather, it bespeaks a commitment that those powers will be implemented in accordance with public health standards. If anything, the reference to such guidelines helps assure that the emergency powers are not implemented recklessly or arbitrarily.

Plaintiff has pointed out that on April 14, six days after Governor Murphy issued Executive Order 120, which postponed the primary election, the Legislature ratified the postponement of the primary date. L. 2020, c. 21, titled "An Act Concerning the Date of the Primary Election." The complete text of that April 14 legislation reads:

> 1. a. Notwithstanding the provisions of [N.J.S.A. 19:2-1], [N.J.S.A. 19:23-40], any provision of Title 19 of the Revised Statutes, or any other law, rule, or regulation to the contrary, the 2020 primary election shall not be held on the Tuesday next after the first Monday in June, falling on June 2, 2020, and shall be held instead on the Tuesday next after the first Monday in July, falling on July 7, 2020. Any other election scheduled to occur between May 13, 2020 and July 6, 2020, inclusive, shall be rescheduled to be held on July 7, 2020.
>
> ***10** b. Nothing in this act shall be interpreted to affect the deadlines prescribed under the provisions of Title 19 of the Revised Statutes for the nomination of candidates, filing of petitions, acceptance of nominations, certification of nominations, and any other deadline required to be met preceding the primary election, when that deadline occurs before April 11, 2020, including, but not limited to, the deadline for filing nominating petitions under [N.J.S.A. 19:23-14], for amending defective petitions under [N.J.S.A. 19:23-20], for the filing of objections to nominating petitions under [N.J.S.A. 19:13-10], for determining the validity of objections to nominating petitions under [N.J.S.A. 19:13-11], and for drawing for ballot positions under [N.J.S.A. 19:23-24], which dates shall continue to be determined by reference to June 2, 2020. All other deadlines prescribed under the provisions of Title 19 of the Revised Statutes for meeting statutory requirements for a primary election shall be calculated using the July 7, 2020 primary election date.
>
> c. Notwithstanding the provisions of subsection b. of this section, or any other law, rule, or regulation to the contrary, the party affiliation deadline established under [N.J.S.A. 19:23-45] shall be calculated based on the July 7, 2020 primary election date.
>
> d. Notwithstanding the provisions of Title 19 of the Revised Statutes, or any other law, rule, or regulation to the contrary, petitions for direct nomination for the general election required to be filed under [N.J.S.A. 19:13-3] through [N.J.S.A. 19:13-9] shall be due by 4:00 p.m. on July 7, 2020.
>
> 2. This act shall take effect immediately.
>
> [Ibid.]

To be sure, the Legislature did not pass similar legislation ratifying the universal vote-by-mail procedures effectuated by Executive Order 144 between its issuance on May 15, and the primary election on July 7. As we have already shown, the passage of such cognate legislation was not vital, because the Governor already possessed the delegated authority to take emergency action to safeguard public health and safety.

Moreover, although it is not essential to our analysis, subsequent events are indicative of an arguable legislative ratification of, or acquiescence to, the health and safety measures undertaken in Executive Order 144. Such ratification or acquiescence is intimated by the statute that established the vote-by-mail procedures for the 2020 general election, enacted on August 28, 2020. L. 2020, c. 71 (Chapter 71).

Chapter 71 states that "[n]otwithstanding any other law to the contrary, to allow enough time for the county clerks to

print and mail the ballots to voters, the following deadlines are modified as follows ... the last day a vacancy may occur for primary election nominees for the November 2020 General Election ... shall be August 28, 2020," the date that the law went into effect. N.J.S.A. 19:63-31(k)(2). The statute further states that "the deadline to fill a vacancy in the primary election nominees for the November 2020 General Election ... shall be August 31, 2020." N.J.S.A. 19:63-31(k)(3). By thereby foreclosing the possibility of a special election to fill any vacancy for primary election nominees for the 2020 general election, the Legislature appears to have implicitly ratified the outcomes of the July 7 primary election and, also by implication, the validity of the modified election procedures that were used in that election.

Additionally, the legislative fiscal estimate prepared by the non-partisan Office of Legislative Services for the 2020 general election legislation expressly references Executive Order 144, stating that "many of the requirements of [L. 2020, c. 71] coincide with those of Executive Order 144 requiring the procurement of secure ballot drop boxes for the July 7, 2020 primary elections. This bill expands that requirement to any subsequent election in the State." Office of Legis. Servs., Fiscal Note to Assembly Bill No. 4475 (Aug. 26, 2020) (emphasis added).

***11** Courts "may refer to [a] bill's fiscal note to ascertain legislative intent if necessary." Matter of 1997 Assessments, 311 N.J. Super. 600, 606 (App. Div. 1998). Here, the August 26 Fiscal Note's express declarations that the provisions of N.J.S.A. 19:63-31 "coincide with" and "expand" election procedures and "requirements" implemented by Executive Order 144 provide further indicia that the Legislature intended to ratify those emergency procedures. SeeIn re Plan for Abolition of Council on Affordable Hous., 424 N.J. Super. 410, 419-20 n.3 (App. Div. 2012) (holding that legislative history referencing a reorganization plan enacted by the Governor through legislatively delegated powers constituted a ratification of executive action), aff'd asmodified, 214 N.J. 444 (2013).

As we have said, we need not and do not rely on an inference of ratification to uphold the constitutional validity of Executive Order 144. We mention it simply as an indication that the Legislature itself evidently has not concluded that its institutional lawmaking powers were usurped. For that matter, the Legislature has not brought suit or moved to intervene in this litigation, as contrasted with the lawsuit pursued by the Arizona Legislature in the redistricting commission case seeking to nullify the commission's authority under the Elections Clause. Arizona State Legislature, 576 U.S. at 787.

In sum, plaintiff's argument that Executive Order 144 was facially invalid and violated the Elections Clause of the United States Constitution is unpersuasive. Through the exercise of the emergency powers delegated to him by the Legislature, the Governor took authorized action to address a mounting pandemic and protect the public health, safety, and welfare.

Due Process and Equal Protection Clauses

Plaintiff's facial challenge to the Governor's actions under the Due Process Clause of the Federal Constitution is also unavailing. Plaintiff alleges he was deprived by Executive Order 144 of his due process right to cast ballots in an election created by the Legislature in accordance with the Constitution.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "[A] statute is invalid on substantive due process grounds if it 'seeks to promote [a] state interest by impermissible means.' " Caviglia v. Royal Tours of Am., 178 N.J. 460, 472 (2004) (alterations in original). "[A] state statute does not violate substantive due process if the statute reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory." Greenberg v. Kimmelman, 99 N.J. 552, 563 (1985).

Plaintiff offers no controlling legal authority for a claimed Due Process right to cast a vote by a particular method. Nor has he convincingly argued that by changing the primary rules to limit person-to-person contact and the spread of infection from COVID-19, Executive Order 144 was enacted with an illegitimate, arbitrary, or discriminatory purpose.

Although plaintiff has made factual contentions that the vote-by-mail processes for the primary election were incorrectly administered in certain locations and resulted in irregularities in the counting of ballots, those claims are beyond the scope of a facial challenge to the Executive Orders properly before this court. Any remaining as-applied factual contentions must be litigated in the trial court. R. 2:2-3(a)(2) (noting the appellate court's function as a reviewing court, and not as a fact-finder that can hear witnesses and make factual findings); see alsoState v. S.S., 229 N.J. 360, 365 (2017) ("the customary role of an

appellate court is not to make factual findings but rather to decide whether those made by the trial court are supported by sufficient credible evidence in the record"); In re Contest of Democratic Primary Election of June 3, 2003 for Off. of Assembly of Thirty-First Legis. Dist., 367 N.J. Super. 261, 265 (App. Div. 2004) (reviewing a Law Division adjudication of an election contest petition brought under N.J.S.A. 19:29-1).

***12** We similarly discern no basis for relief as to plaintiff's facial arguments under the Equal Protection Clause. U.S. Const. amend. XIV, § 1. He asserts that if the court nullifies the results of the Republican Primary Election, then it must likewise nullify the results of the Democratic Primary Election, or else that would give the other major political party an unfair campaigning advantage. We need not adjudicate that hypothetical situation, because, as noted above, plaintiff has failed to demonstrate that the Executive Order regulating the primary election as a whole was facially unconstitutional.

The Freedom of Information Act

Plaintiff alleges that the procedures implemented by Executive Order 144 violate the FOIA by creating an "opaque process," alleging he has no means of obtaining information regarding certain procedures followed by the county canvassing boards. In particular, plaintiff alleges that the United States Postal Service has failed to produce records relating to the election that he has requested, which also violates the FOIA. Plaintiff has not, however, made the United States Postal Service, or any federal entity, a party in this case.

The FOIA states that, absent certain exceptions, "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

State courts do not have jurisdiction over a FOIA claim. Jurisdiction for FOIA claims lies in "the district court of the United States in the district in which the complainant resides," not in state court. 5 U.S.C. § 552(a)(4)(B). Plaintiff has not pointed to any authority in which a state court has entertained such a claim in the context of an election contest, or in any other context. His FOIA claims against the United States Postal Service or any other federal agency must be brought in federal court, should he choose to pursue them.

Free Speech Claims

Plaintiff contends that a cease-and-desist letter he received from a Deputy Attorney General on June 25 directing him to stop asking voters to submit duplicate ballots and change their votes was a violation of his free speech rights under the First Amendment to the United States Constitution. U.S. Const. amend. I. The letter was apparently founded upon 52 U.S.C. § 10307(e), which makes it illegal for voters to vote twice in federal elections, subject to certain exceptions.

The factual, as-applied issue as to whether plaintiff's speech was unconstitutionally chilled by the Attorney General's letter is outside the narrow appropriate scope of this court's review of a final administrative decision under Rule 2:2-3(a)(2). The claim does not assert facial invalidity of the Governor's Executive Orders, which were the only claims properly transferred here pursuant to the appellate rules. Consequently, that particular claim must be adjudicated in the trial court.

Claims Concerning the General Election and for Injunctive Relief

Apart from his arguments concerning the primary election, plaintiff contends the administration of the present general election is likewise invalid under the federal constitution. He argues the inclusion of prevailing nominees for federal office from the primary election on the ballot for the general election violates the Due Process Clause, because the primary election itself was unconstitutional. The premise of that argument is incorrect, for the reasons this opinion has already noted.

***13** Plaintiff specifically requests the court to "[d]eclare the entire system of mail-in ballots except as provided by previously defined procedures for the absentee ballots to be issued to members of the Armed Forces" to be invalid. He further asks this court to "[i]ssue an injunction forbidding the use of the mail-in ballot system for the general election."

These and other requests for injunctive relief asserted by plaintiff implicate well settled principles under New Jersey civil law. In Crowe v. De Gioia, 90 N.J. at 126, the Court identified several factors to guide whether injunctive relief is appropriate.

First, a preliminary injunction should not be granted except to prevent irreparable harm, which the Court defined as harm that "cannot be redressed adequately by monetary damages," "severe personal inconvenience," or where the "nature of the injury or of the right affected" make it appropriate. Id. at 132-33. The second principle is that "temporary relief should be withheld when the legal right underlying the plaintiff's claim is unsettled." Ibid. Third, a preliminary injunction should not issue unless the plaintiff makes a preliminary showing of "a reasonable probability of success on the merits." Ibid. Fourth, a court must evaluate "the relative hardship to the parties in granting or denying relief." Id. at 134.

In addition, and germane here, a case that " 'presents an issue of significant public importance' requires the court to 'consider the public interest in addition to the traditional Crowe factors.' " N.J. Election Law Enf't Comm'n v. DiVincenzo, 445 N.J. Super. 187, 195-96 (App. Div. 2016) (quoting Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013)) (emphasis added).

These traditional Crowe factors likewise bear upon requests for permanent injunctive relief. See, e.g., Murray v. Lawson, 136 N.J. 32, 50-51 (1994), cert.granted, judgment vacated on other grounds, 513 U.S. 802 (1994); Horizon Health Center v. Felicissimo, 135 N.J. 126, 139 (1994).

The Crowe analysis has been applied in the context of injunctive relief sought concerning an election. See, e.g., Finkel v. Twp. Comm., 434 N.J. Super. 303, 310 (App. Div. 2013); McKenzie v. Corzine, 396 N.J. Super. 405, 416 (App. Div. 2007) (citing N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 190 (2002)).

Applying those factors here, plaintiff has not demonstrated that injunctive relief of any kind should be ordered.

First, for simplicity, we will assume purely for sake of discussion that plaintiff has alleged that his rights as both a political candidate and voter will be irreparably harmed if the court does not compel an immediate halt to the processes being used in the general election. Even if that assumption were true, the other Crowe factors overwhelmingly tip against his requests for the extraordinary and massive injunctive measures he has sought.

On the second prong, plaintiff has not shown his legal theories of invalidity are supported by "settled law." Nor, on the related third prong, has he made a sufficient showing of a probability of success on the merits to justify enjoining the ongoing general election.

To the contrary, we have already dispelled above plaintiff's arguments of unconstitutionality under the Elections Clause. And, to the extent that plaintiff argues the mail-in voting procedures now being used for the general election violate "settled" federal law, the recent published opinion of the United States District Court in Trump v. Way shows otherwise.

***14** The District Court in Trump v. Way declined to enter an injunction regarding the 2020 general election and rejected the plaintiffs' "broad construction" of the federal election laws, noting that states had historically been given wide discretion in permitting various forms of absentee voting and early voting. Way, slip op. at 16. As to the late-received ballots, the court held there was "no direct conflict" between New Jersey's law and the federal election day statutes. Id. at 24. The court also found, in balancing the harms, that entering an injunction against the universal vote-by-mail procedures "would frustrate ... ongoing efforts to educate voters about the new by-mail election ... at the risk of time and expense for the State and confusion for the voters." Id. at 29. The court held, for the same reason, that enjoining a state's election procedures on the eve of an election would not be in the public interest and would risk voter disenfranchisement. Id. at 30.

"[I]t is well-established that under principles of comity, and in the interests of uniformity, federal interpretations of federal enactments" by federal courts in published cases, though not controlling on state courts, are nevertheless "entitled to our respect." Ryan v. American Honda Motor Co., Inc., 186 N.J. 431, 436 (2006). The District Court's precedential opinion in Trump v. Way appears to be soundly reasoned, and, at the very least, reflects that plaintiff's requests for injunctive relief are not supported by "settled" law and that they lack rather than possess a probability of success.[10]

10 Since plaintiff's facial challenges lack merit, we need not ponder the legal and voter confusion that would ensue if a federal court ruled under federal law that an election may continue to proceed as planned and a state court separately ruled under federal law that it may not.

The fourth and fifth Crowe factors—concerning the relative interests of the parties and the interests of the public at large—manifestly tip against granting the extraordinary measures plaintiff seeks. McKenzie, 396 N.J. Super. at 416 (including the consideration of the public interest in the Crowe analysis in the context of an

election). The general election utilizing the mail-in voting procedures has been underway for many weeks. According to the representation of the Deputy Attorney General made to us at oral argument, it is estimated that over a million New Jersey voters have already marked and mailed in their ballots. Disrupting that process now would inevitably cause widespread upheaval and potential voter disenfranchisement. Similarly, an order nullifying the primary election at this juncture and invaliding nominees on the general election ballot would produce comparable harm.

It must also be underscored that the entire state, including political candidates such as plaintiff, were on notice as of May 15 when Executive Order 144 was issued, that the procedures for the primary election would be modified to allow mail-in voting due to the COVID-19 pandemic. Apparently no one, including plaintiff, filed suit to enjoin that process before the primary election took place.

The voters and other candidates who participated in that primary election had a right to expect that the votes would be counted and that the results would be certified and used in the general election. Although we need not reach or rest upon defendants' argument that plaintiff is "equitably estopped" from bringing his claims, his inaction before the primary took place surely affects the comparative equities.[11] Plaintiff took advantage of the extended opportunity to campaign and attract voters for the primary election and did not attempt to halt the process. It was only after he was not victorious in the primary that he went to court and argued that Executive Order 144 is unconstitutional. Meanwhile, other candidates for the Senate and the House of Representatives, as well as other offices, had their status as nominees (or, as the case may be, defeated candidates) determined.

[11] We recognize that plaintiff filed his election contest petition on September 1 apparently in compliance with the twelve-day deadline for such petitions under N.J.S.A. 19:29-3, as the last Senate recount from Sussex County was announced on August 20. Nevertheless, mere compliance with the statutory deadline for an election contest does not mean the equities and the public interest support the extraordinary injunctive relief he seeks. Plaintiff knew weeks before the July primary what Executive Order 144 said, and that it was allowing citizens to vote by mail without an advance request for a ballot. The change from usual voting processes was clear. There was no need to wait for the election to occur in order to bring a challenge to the procedures. Ideally, "[t]he time to protest [to the process] is before the election, and not, as here, after the event." Two Guys from Harrison, Inc. v. Furman, 32 N.J. 199, 233 (1960). Even if plaintiff's complaint is not time barred or estopped, its timing bears upon the balancing of Crowe factors for obtaining injunctive relief.

***15** In addition to the Crowe factors under state law, there is a wealth of federal precedent that weighs heavily against entertaining on-the-brink challenges to the voting procedures of upcoming elections. See, e.g., Purcell v. Gonzalez, 549 U.S. 1, 5-6 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."); Nader v. Keith, 385 F.3d 729, 736 (7th Cir. 2004) (disallowing third-party presidential candidate's suit challenging constitutionality of state election code that was not filed until June of an election year, which was four months after his candidacy was announced, and "created a situation in which any remedial order would throw the state's preparations for the election into turmoil"); Kay v. Austin, 621 F.2d 809, 813 (6th Cir. 1980) ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights.").

To the extent we have not discussed them, any other arguments made by plaintiff that bear upon facial validity lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

III.

For these abundant reasons, plaintiff's facial challenges to Executive Order 144 and any other pertinent Executive Orders are denied, and his requests for injunctive relief and summary judgment/decision are likewise denied. Jurisdiction in this appellate court is concluded, and the matter is remanded to the trial court to adjudicate in due course plaintiff's as-applied and other claims, including any necessary determinations of material fact.

Affirmed in part, remanded in part.

All Citations

Not Reported in Atl. Rptr., 2020 WL 6154223

2020 WL 6154223

End of Document

Conforti v. Hanlon

United States District Court for the District of New Jersey

May 31, 2022, Decided; May 31, 2022, Filed

Civil Action No. 20-08267 (ZNQ) (TM)

Reporter
2022 U.S. Dist. LEXIS 97003 *; 2022 WL 1744774

CHRISTINE CONFORTI, et al., Plaintiffs, v. CHRISTINE GIORDANO HANLON, in her official capacity as Monmouth County Clerk, et al., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by, Request granted, Request denied by, Without prejudice Conforti v. Hanlon, 2023 U.S. Dist. LEXIS 56359 (D.N.J., Mar. 31, 2023)

Core Terms

candidates, Bracketing, ballot, county clerk, election, Plaintiffs', rights, parties, column, allegations, burdens, pivot, primary election, regulation, votes, argues, primacy, voters, Reply, moot, motion to dismiss, state law, disfavoring, printed, cases, official capacity, first column, designation, endorsed, row

Counsel: **[*1]** For CHRISTINE CONFORTI, ARATI KREIBICH, KEVIN MCMILLAN, ZINOVIA SPEZAKIS, MICO LUCIDE, JOSEPH MARCHICA, NEW JERSEY WORKING FAMILIES ALLIANCE, INC., Plaintiffs: FLAVIO L. KOMUVES, LEAD ATTORNEY, Weissman & Mintz LLC, Somerset, NJ; YAEL BROMBERG, LEAD ATTORNEY, BROMBERG LAW LLC, GLEN ROCK, NJ; BRETT M. PUGACH, LEAD ATTORNEY, BROMBERG LAW LLC, New York, NY.

For CHRISTINE GIORDANO HANLON, in her official capacity as Monmouth County Clerk, Defendant: ERIK ANDERSON, LEAD ATTORNEY, REARDON ANDERSON LLC, Tinton Falls, NJ.

For SCOTT M. COLABELLA, in his official capacity as Ocean County Clerk, Defendant: JOHN C. SAHRADNIK, MATHEW BRADY THOMPSON, LEAD ATTORNEYS, BERRY, SAHRADNIK, KOTZAS & BENSON, TOMS RIVER, NJ.

For PAULA SOLLAMI COVELLO, in her official capacity as Mercer County Clerk, Defendant: ANGELO JOSEPH GENOVA, JENNIFER BOREK, LEAD ATTORNEYS, Genova Burns LLC, Newark, NJ; CHRISTOPHER ZAMLOUT, LEAD ATTORNEY, CHIESA SHAHINIAN & GIANTOMASI PC, WEST ORANGE, NJ.

For EDWARD P MCGETTIGAN, in his official capacity as Atlantic County Clerk, Defendant: JAMES T. DUGAN, LEAD ATTORNEY, ATLANTIC COUNTY DEPARTMENT OF LAW, ATLANTIC CITY, NJ.

For E. JUNIOR MALDONADO, in his official capacity as Hudson County Clerk, Defendant: **[*2]** MICHAEL L. DERMODY, LEAD ATTORNEY, OFFICE OF HUDSON COUNTY COUNSEL, JERSEY CITY, NJ.

For LEAGUE OF WOMEN VOTERS OF NEW JERSEY, Salvation and Social Justice, Amicuss: HENAL PATEL, RYAN PAUL HAYGOOD, LEAD ATTORNEYS, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, NEWARK, NJ.

For OFFICE OF THE BERGEN COUTY CLERK, Intervenor: JAIME RICHARD PLACEK, LEAD ATTORNEY, DECOTIIS, FITZPATRICK, COLE & GIBLIN, LLP, PARAMUS, NJ; RAFAEL JAUME CORBALAN, LEAD ATTORNEY, CHIESA SHAHINIAN & GIANTOMASI P.C., WEST ORANGE, NJ.

For GURBIR S GREWAL, Intervenor: GEORGE N. COHEN, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, R.J. HUGHES JUSTICE COMPLEX, TRENTON, NJ.

For HONORABLE JAMES HOGAN, Intervenor: JOHN M. CARBONE, LEAD ATTORNEY, CARBONE AND FAASSE, RIDGEWOOD, NJ.

Judges: ZAHID N. QURAISHI, UNITED STATES DISTRICT JUDGE.

Opinion by: ZAHID N. QURAISHI

Opinion

QURAISHI, District Judge

THIS MATTER comes before the Court upon motions to dismiss by all named Defendants and Intervenor State of New Jersey. Plaintiffs Christine Conforti, Arati Kreibuch, Mico Lucide, Joseph Marchica, Kevin McMillan, Zinovia Spezakis, and New Jersey Working Families Alliance, Inc. ("NJWF"), sued in this Court alleging constitutional concerns with the New Jersey primary **[*3]** election system. Plaintiffs allege that the New Jersey "bracketing system" violates their First Amendment[1] rights as well as the Elections Clause of the U.S. Constitution. Their claims are brought pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and 42 U.S.C. § 1983. For the following reasons, the Court will grant in part and deny in part all motions to dismiss.

I. PROCEDURAL HISTORY AND BACKGROUND

This matter arises out of the 2020 Democratic primary election (the "2020 Primary") and 2021 Democratic primary election (the "2021 Primary") in which Plaintiffs Conforti, Kreibich, Spezakis, Lucide, Marchica, and MacMillan ("Candidate Plaintiffs") participated as candidates for public office. NJWF endorsed numerous candidates participating in the 2020 Primary and 2021 Primary. Candidate Plaintiffs and NJWF (collectively, "Plaintiffs") seek declaratory relief and injunctive relief against Defendants Christine G. Hanlon, John S. Hogan, Scott M. Colabella, Paula Sollami Covello, Edward P. McGettigan, and E. Junior Maldonado (collectively, the "County Clerk Defendants") in their official capacities as county clerks.

On July 6, 2020, Conforti filed the initial complaint against Hanlon, Colabella, and Covello in their official capacities as county clerks. (ECF No. 1.) Defendant John Hogan, the Bergen **[*4]** County Clerk, filed a motion to intervene (ECF No. 7), which the Court granted (ECF No. 22). On January 25, 2021, Conforti, the other Candidate Plaintiff, and NJWF filed the operative Amended Complaint ("Am. Compl.," ECF No. 33) against the County Clerk Defendants in their official capacities as county clerks. The State of New Jersey filed a motion to intervene (ECF No. 53), which the Court granted (ECF No. 54). Defendant James Hogan, the Gloucester County Clerk, also filed a motion to intervene (ECF No. 62), which the Court granted (ECF No. 63).

Defendants were properly served. County clerks for the remaining fifteen counties in New Jersey are not parties to the matter but were furnished with a copy of the Amended Complaint. (Am. Compl. ¶ 64.) The Secretary of State was also furnished with a copy of the complaint. (*Id.* ¶ 65.) The County Clerk Defendants and the State of New

[1] Plaintiffs correctly plead their First Amendment injuries via the Fourteenth Amendment. For the sake of brevity only, the Court omits regular reference to the Fourteenth Amendment.

Jersey filed a total of seven separate motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (collectively, the "Motions").[2] To resolve the Motions, the following are facts taken from the Amended Complaint.

During the 2020 Primary, Conforti, Kreibich, and Spezakis were federal candidates running for the U.S. House of Representatives **[*5]** in different districts. (Am Compl. ¶¶ 19, 24, 44.) Plaintiff Lucide ran for Atlantic County clerk. (*Id.* ¶ 28.) Marchica ran for party office on the County Committee in Mercer County. (*Id.* ¶ 33.) McMillan ran as an incumbent candidate seeking reelection to the Neptune Township Committee. (*Id.* ¶ 37.) NJWF is a non-profit independent organization that endorses candidates running in elections. (*Id.* ¶ 48.) As detailed below, the County Clerk Defendants are elected officials who are vested with certain statutory duties and obligations including but not limited to the design, preparation, and printing of all ballots, the issuance of mail-in ballots, and conducting a drawing for ballot position for various elections held in various counties. (*Id.* ¶¶ 57-62.)

New Jersey is the only state in the country that organizes its primary election ballots by bracketing groupings of candidates (the "Bracketing Structure") rather than by listing the office sought followed immediately by the names of all candidates in a column (the "Bubble Ballot Structure"). (*Id.* ¶¶ 3, 68.) County clerks have sole jurisdiction over the Bracketing Structure for primary election ballots and are guided, in part, by New Jersey **[*6]** state law. (*Id.* ¶¶ 69-72.) New Jersey state law allows candidates to request that the county group their names together and that their identified common designation or slogan be printed opposite their names. (*Id.* ¶ 73.) To do so, each candidate's campaign manager must consent in writing to the county clerk (*id*. ¶ 74), and the candidates will thus become "bracketed" (*id*. ¶ 75). State law provides deadlines for candidates to request bracketing. (*Id.* ¶ 74.)

Once petitions are filed and the bracketing deadline passes, the county clerks will choose a specific office as the "pivot point." (*Id.* ¶ 86.) The pivot point is the first column (or row depending on the design) on the primary ballot. (*Id.* ¶ 82.) By law, the names of all U.S. Senators must be placed in the first row of the primary ballot and thus drawn as the pivot point. (*Id.* ¶ 83.) If a U.S. Senator is not on the primary ballot, then Governor should be placed in the first row. (*Id.*) County clerks will then draw (by lottery) all pivot point candidates' names and place them on the ballot in the order drawn. (*Id.* ¶ 6.) This is known as the "preferential ballot draw." (*Id.* ¶ 6.) Once pivot point candidates are placed on the ballot in **[*7]** the preferential ballot draw, all candidates who were bracketed with the pivot point candidates are then placed in the same column. (*Id.* ¶ 6.) Candidates endorsed by the county party, who are all bracketed together and thus appear with a slate of similarly endorsed candidates, appear in a single column of the ballot with the same slogan. (*Id.* ¶ 7.) This is referred to as the "county line." (*Id.*)

If a candidate chooses to not (or cannot) bracket with other candidates, the candidate is an "unbracketed candidate." (*Id.* ¶ 6.) Unbracketed candidates are allegedly not eligible to receive the first ballot position (*i.e.*, the top left position) and will be placed further to the right or further to the bottom. (*Id.*) Moreover, unbracketed candidates are allegedly not guaranteed the next available column after the bracketed candidates. (*Id.* ¶¶ 6, 96-100.) Rather, these unbracketed candidates are (1) placed at the discretion of the county clerk multiple columns away from the

---

[2] Defendant John Hogan, the Bergen County clerk, filed a motion to dismiss (ECF No. 60) and a brief supporting his motion ("Hogan Motion Br.," ECF No. 60-1). Defendant Maldonado, the Hudson County Clerk, filed a motion to dismiss (ECF No. 57) and a brief supporting his motion ("Maldonado Motion Br.," ECF No. 57-3). Defendant Covello, the Mercer County Clerk, filed a motion to dismiss (ECF No. 58) and a brief supporting her motion ("Covello Motion Br.," ECF No. 58-1). Defendant Hanlon, the Monmouth County Clerk, filed a motion to dismiss (ECF No. 59) and a brief supporting her motion ("Covello Motion Br.," ECF No. 59-2). Defendant Colabella, the Ocean County Clerk, filed a motion to dismiss (ECF No. 55) and a brief supporting his motion ("Colabella Motion Br.," ECF No. 55-2). Defendant-Intervenor State of New Jersey filed a motion to dismiss (ECF No. 53) and a brief supporting its motion ("State Motion Br.," ECF No. 53-1). Defendant McGettigan, the Atlantic County Clerk, initially filed a motion to dismiss (incorrectly identified by counsel on the docket as a motion for judgment on the pleadings) at ECF No. 56, but it was rejected by the Clerk's Office for improper electronic signature. *See* Clerk's Quality Control Message entered March 29, 2021. McGettigan re-filed his brief supporting a motion to dismiss and proposed order ("McGettigan Motion Br.," ECF No. 63), but neglected to include a notice of motion. For the sake of clarity, the Court considers McGettigan's brief at ECF No. 63, but will address its decision to his Motion at ECF No. 56. Defendant James Hogan, the Gloucester County Clerk, filed a motion to dismiss but later withdrew it. (ECF No. 106.)

bracketed candidates with only blank spaces in between; (2) stacked in the same column as another candidate for the exact same office; and/or (3) placed in the same column as candidates with whom they did not request to bracket **[*8]** and who requested a different ballot slogan. (*Id.* ¶ 80.)

Although state law only provides that the U.S. Senate or Governor office should be used as the pivot point, some county clerks used the President as the pivot point or did not clearly identify who was the pivot point. (*See id.*, Ex. A.) For example, Atlantic County used the President as the pivot point. (*Id.* ¶¶ 85, 88.) Somerset County used the U.S. Senators as the pivot point in the Republican draw but featured a candidate for US Senator in the first column, a candidate for President in second column, and bracketed slate in third column. (*Id.* ¶ 89.)

The Bracketing Structure is not universal within the state. (*Id.* ¶ 67.) Nineteen out of New Jersey's twenty-one counties have historically used the Bracketing Structure with respect to their full-face machine ballots. (*Id.*) A majority, but not all counties, use a similar design technique with respect to their vote-by-mail ballots. (*Id.*) Salem and Sussex Counties have used the Bubble Ballot Structure. (*Id.* ¶ 68.) Morris County has used the Bubble Ballot Structure but only for Republican primary elections. (*Id.*) Hunterdon, Passaic, and Warren Counties implemented the Bubble Ballot Structure **[*9]** in connection with their vote-by-mail ballots with respect to the 2020 Primary. (*Id.*)

In an executive summary attached to the Amended Complaint as Exhibit B, Dr. Joanne M. Miller provided a summary of various studies into the effect of ballot design. (*Id.* ¶ 96; "Ballot Design Study," Am. Compl., Ex. B.) Dr. Miller reviews several studies that relate "primacy effects," a psychological theory that people have biases toward selecting the first object considered in a set, to a candidate's order on the ballot. (Ballot Design Study at 3.) The studies reviewed ballot designs in multiple states and concluded that first position on the ballot has a positive effect on the number of votes received. (*Id.* at 4-10.) Although none of the studies involved the New Jersey Democratic primary ballot (*id.* at 10), Dr. Miller concludes that the studies show that the unique features of the New Jersey ballot design are likely to have systematic effects similar to the ones studied in other states and candidate races (*id.* at 12-13).

Conforti was placed on ballots in Mercer, Monmouth, and Ocean County. (*Id.* ¶¶ 101-17.) In the Monmouth County ballot, Conforti was placed in the fourth column, three columns to the **[*10]** right from Conforti's competitor who ran in the county line and was bracketed with a U.S. Senate candidate (the pivot point for the ballot). (*Id.* ¶¶ 103, 105.) In the Ocean County ballot, Conforti was also placed in the fourth column (*Id.* ¶ 109.) In the Mercer County ballot, Conforti was placed in the first column with her competitor. (*Id.* ¶ 115.) Upon Plaintiffs' information and belief, approximately one-third of all Mercer County voters had their votes disqualified because they voted for more than one candidate for the same office. (*Id.* ¶ 117.)

Kreibich was placed on ballots in Bergen, Passaic, Sussex, and Warren Counties. (*Id.* ¶ 118.) Kreibich included the Bergen County ballot in the Amended Complaint, alleging she was placed in the third column with county freeholder candidates she chose to bracket with. (*Id.* ¶ 124.) Kreibich notes that the percentage margin of victory for Gottheimer (a competitor bracketed with a U.S. Senate candidate) was larger in Bergen than in Passaic, Sussex, and Warren Counties all of which separated candidates by office in its mail-in ballots and thus did not allow for the Bracketing Structure. (*Id.* ¶ 125.)

Lucide ran in the 2021 Primary. (*Id.* ¶ 128.) Atlantic **[*11]** County, one of the counties Lucide ran in, used the U.S. President candidate as the pivot point on the 2020 Primary ballot. (*Id.* ¶ 128.) Lucide alleges that the Bracketing Structure forces him to associate with candidates running for other offices or risk placement in a column further from the first column. (*Id.* ¶ 131.)

Marchica chose not to bracket with other candidates in Mercer County. (*Id.* ¶ 137.) On the ballot, Marchica was placed in the second column with a candidate for U.S. Senate and a candidate for the Fourth Congressional District, none of whom requested to bracket with one another. (*Id.*)

McMillan was placed on the ballot in Monmouth County. (*Id.* ¶ 144.) The Monmouth County clerk drew for ballot position based on U.S. Senate candidates, then President, and then for Fourth Congressional District. (*Id.* ¶¶ 145,

147, 148.) McMillan was placed in the sixth column with two county committee candidates with whom McMillan chose to bracket. (*Id.* ¶ 149.)

Spezakis intends to run in the 2022 Primary. (*Id.* ¶ 160.) Spezakis does not intend to bracket with any other candidates for any other offices.[3] (*Id.*) As such, Spezakis believes that she will be placed after all other candidates for other **[*12]** offices. (*Id.*)

As of January 2021, all Candidate Plaintiffs, except Lucide, lost their respective primary elections. (*Id.* ¶¶ 20, 25, 34, 42, 45.) Lucide was a candidate in the 2021 Primary and thus the Amended Complaint did not include information on his primary election. (*Id.* ¶ 28.) Conforti, Lucide, Marchica, and Spezakis intend to run for office again. (*Id.* ¶¶ 23, 32, 36, 47.) McMillan is contemplating running again but is highly discouraged by the unfair ballot placement that unbracketed and non-party endorsed candidates receive on the ballot. (*Id.* ¶ 42.) If Lucide wins or loses his primary election, he intends to run again in 2026, the next time that the Atlantic County clerk office appears on the ballot. (*Id.* ¶ 32.) It is unclear if Kreibich intends to run again. (*See id.* ¶¶ 24-27.) NJWF endorsed numerous unbracketed candidates for federal, state, and local office in the 2020 Primary, (*id.* ¶ 52), and intended to endorse candidates in the 2021 Primary, (*id*. ¶ 53).

Plaintiffs claim that they were deprived of certain First Amendment rights under the color of state law. (*Id.* ¶¶ 169-208, 223-25.) Specifically, Plaintiffs claim their Right to Vote/Vote Dilution, Right to Equal Protection, and Freedom **[*13]** of Association were violated by the County Clerk Defendants' implementation of the Bracketing Structure. (*Id.*) The County Clerk Defendants allegedly acted under the color of law in receiving and acting on bracketing requests, designing ballots, and conducting ballot drawings. (*Id.* ¶¶ 63, 223-25.) Additionally, Plaintiffs allege that the Bracketing Structure violates the Elections Clause of the United States Constitution and thus is unconstitutional. (*Id.* ¶¶ 210-21.)

II. LEGAL STANDARD

Under Rule 12(b)(1), a court may dismiss a claim if it lacks subject-matter jurisdiction. *Ballentine v. United States*, 486 F.3d 806, 810, 48 V.I. 1059 (3d Cir. 2007). Federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party," *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006), and to "raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Group Against Smog and Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 122 n.5 (3d Cir. 2016) (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011)). A Rule 12(b)(1) motion can raise a facial attack or a factual attack, which determines the standard of review. *Mazo v. Way*, 551 F. Supp. 3d 478, 489 (D.N.J. 2021) (quoting *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014)).

A facial attack "is an argument that considers a claim on its face and asserts that it is insufficient to invoke the subject matter jurisdiction of the court because, for example, it does not present a question of federal question . . . or because some other jurisdictional defect is present." *Constitution Party*, 757 F.3d at 357 **[*14]** . In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto in the light most favorable to the plaintiff." *Id.* at 358. "A factual attack concerns the actual failure of [plaintiff's] claims to comport with the jurisdictional prerequisites." *CNA v. United States*, 535 F.3d 132, 139 (3d Cir. 2008); *see id.* ("So, for example, while diversity of citizenship might have been adequately pleaded by the plaintiff, the defendant can submit proof that, in fact, diversity is lacking ") When considering a factual challenge, "the plaintiff [has] the burden of proof that jurisdiction does in fact exist," the court "is free to weigh the evidence and satisfy itself

[3] Maldonado provides a letter from Spezakis for a request to bracket with a candidate for U.S. Senate in the 2020 Primary. (ECF No. 57-2 at 9.) Given that Spezakis is contesting the use of the Bracketing Structure with respect to the 2022 Primary, the Court does not find this letter relevant to the claims at hand.

as to the existence of its power to hear the case," and "no presumptive truthfulness attaches to [the] plaintiffs allegations . . . ." *Mortenson v. Fest Fed. Say. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

Under a Rule 12(b)(6) challenge, courts accept the plaintiffs' well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiffs' favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "Threadbare recitals of the elements of [standing], supported by mere conclusionary statements, do not suffice." *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter" to show that Plaintiffs established standing and state a claim *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *see In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 633 (3d Cir. 2017).

III. DISCUSSION

Plaintiffs argue that the Bracketing Structure is facially unconstitutional (Am. Compl. ¶¶ 86-100) and unconstitutional as applied to the County Clerk Defendants. (Am. Compl. ¶¶ 101-166.) Defendant John Hogan, Defendant Colabella, and Defendant-Intervenor State of New Jersey argue that Plaintiffs fail to show subject-matter jurisdiction. (Hogan Motion Br. at 16-17; Colabella Motion Br. at 2-8; Covello Motion Br. at 16; Maldonado Motion Br. at 9; State Motion Br. at 9-12, 15-18.) In particular, Defendants argue that **[*15]** Plaintiffs do not show Article III standing elements (State Motion Br. at 15-19; ECF No. 89 ("State Reply Br.") at 9-11; Colabella Motion Br. at 5-8; Covello Motion Br. at 16-18; ECF No. 96 ("Covello Reply Br.") at 3-11; Hanlon Motion Br. at 29-31), the claims related to the 2020 Primary are moot (Colabella Motion Br. at 4; Covello Motion Br. at 16-18; Covello Reply Br. at 18-20; Maldonado Motion Br. at 9-11; State Motion Br. at 9; State Reply Br. at 2-6) and claims related to the 2021 Primary and future primaries are unripe (Hogan Motion Br. at 16-17; McGettigan Motion Br. at 12-13; Maldonado Motion Br. at 10-11; State Motion Br. at 12-15; State Reply Br. at 6-9). Certain defendants also argue that Plaintiffs' claims should be dismissed due to a failure to attach indispensable parties (*i.e.*, the Secretary of State and candidates who bracketed in the 2020 Primary and will bracket in future primaries). (Maldonado Motion Br. at 8-9; Hanlon Motion Br, at 27-28.) Defendant Colabella argues that the case should be dismissed because the Eleventh Amendment provides immunity for county clerks. (Colabella Motion Br. at 7.) All Defendants argue that Plaintiffs fail to state a claim.

A. Failure to Join Certain Parties

The **[*16]** Court first turns to arguments made that certain required parties were not named in this matter, as required by Federal Rule of Civil Procedure 19. (Maldonado Motion Br. at 8; Hanlon Motion Br. at 27-28.) Given that a failure to name a required party can be grounds for dismissal for lack of subject-matter jurisdiction, *see Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 117, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968), a court must first determine whether a party should be joined if "feasible" under Rule 19(a). *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11* F.3d 399, 404 (3d Cir. 1993). "If the party should be joined but joinder is not feasible because it would destroy diversity, the court must then determine whether the absent party is 'indispensable' under Rule 19(b)." *Janney Montgomery Scott*, 11 F.3d at 404.

Rule 19(a)(1) provides that:

> [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 **[*17]** of the interest.

Fed. R. Civ. P. 19(a)(1). "Any party whose absence results in any of the problems identified in either subsection is a party whose joinder is compulsory if feasible." *Janney Montgomery Scott*, 11 F.3d at 405.

Maldonado argues that the New Jersey Secretary of State (the "NJ Secretary") is a required party in this matter because the enforcement of the election laws is the Secretary's duty under New Jersey state law.[4] (Maldonado Motion Br. at 8.) Hanlon argues that (unnamed) political candidates must be named as parties because the "constitutional rights of candidates who wish to associate and bracket will be potentially impacted." (Hanlon Motion Br. at 28.) After reviewing the Plaintiffs' Omnibus reply, the Court cannot find any response to the joinder arguments. The lack of response is not dispositive here because the Court may consider the lack of required parties *sua sponte*. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 861, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008).

The Court construes Maldonado's and Hanlon's joinder arguments as factual attacks; as such, no presumption of truth attaches, and the Court may weigh the evidence and satisfy itself as to the existence of its power to hear the case. *Mortenson*, 549 F.2d at 891. The Court assumes that joinder is feasible because the matter arises out of a federal question and Maldonado and Hanlon have **[*18]** not shown that service of process for the NJ Secretary or potential candidates is not feasible.[5] In the absence of the NJ Secretary, the Court's decision can still provide complete relief among the parties because its decision would affect and involve the State of New Jersey, a party to the matter and a party that can speak for the NJ Secretary. Moreover, the Court finds that a decision in the absence of the NJ Secretary would not leave an existing party (*i.e.*, the individual County Clerk Defendants or the State of New Jersey) subject to multiple or otherwise inconsistent obligations because of the interest. The NJ Secretary does have an interest in the subject of the action given the office's position as the enforcer for election laws. Still, the Court does not find that a decision would impair or impede the NJ Secretary's ability to enforce election laws, because Plaintiffs' challenge is to the discretion of the County Clerks.[6] With respect to Hanlon's argument that other (unnamed) candidates are necessary parties due to the impact on their ability to bracket, it is well-settled that the interests of absent parties have no bearing on a Rule 19 analysis. *See Janney, 11* F.3d at 405 ("The effect a decision may have **[*19]** on the absent party is not material [to Rule 19].").

B. Rule 12(b)(1)

As an initial step in a Rule 12(b)(1) challenge, the Court must determine whether Defendants' Motions are a facial or factual attack with respect to subject-matter jurisdiction. However, the court "must be careful [] not to allow its consideration of jurisdiction to spill over into a determination of the merits of the case, and thus must tread lightly." *Mazo*, 551 F. Supp. 3d at 490 (citations omitted).

Courts are entitled to "enforce the case-or-controversy requirement through the several justiciability doctrines that cluster about Article III." *Coastal Outdoor Adver. Group, LLC v. Twp. of Union*, 676 F. Supp. 2d 337, 344 (D.N.J. 2009). "The justiciability doctrines include standing, ripeness, mootness, the political-question doctrine, and the prohibition on advisory opinions." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006); *Toll Brothers, Inc. v. Township of Readington*, 555 F.3d 131, 137 (3d Cir. 2009).

1. Standing - Individuals

---

[4] Maldonado also argues that he is not the proper party to defend the constitutionality of the Bracketing Structure because a clerk's duty is "largely ministerial" and Maldonado's discretion is not being questioned. (*Id.*) Given the nature of and factors under Rule 19(a), the Court construes Maldonado's argument to dispute standing, not advance his "necessary party" argument.

[5] The Court notes that Plaintiffs have indicated they provided the New Jersey Secretary of State with a copy of the initial complaint and the Amended Complaint. (Am. Compl. ¶ 65.)

[6] As discussed below, the County Clerk Defendants have ultimate discretion and authority. *See Quaremba v. Allan*, 67 N.J. 1, 334 A.2d 321 (N.J. 1975).

Article III standing has three well-recognized elements. First, a plaintiff must plead an "injury in fact," or an "invasion of a legally protected interest" that is "concrete and particularized." *Lujan v. Defy. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Second, a "causal connection between the injury and the conduct complained of." Id. Third, a plaintiff must plead a likelihood "that the injury will be redressed by a favorable decision." *Id.* at 561. Because the standing elements "are not mere pleading requirements" but rather an essential part of **[*20]** a plaintiff's case, "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." *Id.* The use of these factors to test the justiciability of a complaint seeking a declaratory judgment survives Iqbal and *Twombly.* *Wayne Land & Min. Grp. v. Del. River Basin Comm'n*, 894 F.3d 509, 524-25 (3d Cir. 2018). Defendants primarily attack Candidate Plaintiffs on the lack of allegations regarding an injury-in-fact and causation related to the County Clerk Defendants. The Court discusses Defendants' facial attacks on Plaintiffs' standing below.

a. Injury-in-fact

"In the context of a motion to dismiss, we have held that the [i]njury-in-fact element is not Mount Everest. The contours of the injury-in-fact requirement, while not precisely defined, are very generous, requiring only that claimant allege[] some specific identifiable trifle of injury." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 278 (3d Cir. 2014) (citation and internal quotation marks omitted). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." **[*21]** *Lujan*, 504 U.S. at 561 (citation and internal quotation marks omitted).

Marchica alleges forced association with candidates they did not choose to bracket with, which suffices as a burden on their freedom to associate. *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000); (Am. Compl. ¶ 137). Candidate Plaintiffs (including Marchica) point to the primacy effect and the weight of the county line as burdens on their First and Fourteenth Amendment rights. (Am. Compl. ¶¶ 90-100.) Circuits are split on whether the primacy effect is a cognizable injury-in-fact, but generally accept it as an injury when a certain group receives the benefit consistently. *Compare* *Mecinas v. Hobbs*, 30 F.4th 890, 904 (9th Cir. 2022) ("Plaintiffs assert a cognizable injury resulting from the 'primacy effect,' which Plaintiffs allege is so substantial so as to give 'Republican candidates . . . a significant, state-mandated advantage, up and down the slate of partisan races,' violating the First and Fourteenth Amendments by diluting votes for candidates whose party the Statute disfavors and conferring an unfair political advantage on certain candidates solely because of their partisan affiliation."), *Nelson v. Warner*, 12 F.4th 376, 385 (4th Cir. 2021) ("Given the expert testimony credited by the district court that it was extremely likely that the primacy effect would have a negative impact on Nelson's vote tally, we hold that Nelson showed **[*22]** a substantial risk of injury that was particular and concrete."), *McLain v. Meier*, 637 F.2d 1159, 1165-67 (8th Cir. 1980) (incumbent-first statute "burden[ed] the fundamental right to vote possessed by supporters of the last-listed candidates" and violated equal protection), *Sangmeister v. Woodard*, 565 F.2d 460, 467 (7th Cir. 1977) (policy of awarding first position on the ballot to the incumbent party violated equal protection), *and* *Mann v. Powell*, 314 F. Supp. 677, *aff'd*, 398 U.S. 955, 90 S. Ct. 2170, 26 L. Ed. 2d 539 (1970) (favoring incumbents when breaking ballot order ties violated "Fourteenth Amendment right to fair and evenhanded treatment") *with* *Jacobson v. Florida Sec 'y of State*, 974 F.3d 1236, 1246 (11th Cir. 2020) (voter's reliance on the average measure of the primacy effect did not state an injury because it cannot tell the court "whether ballot order has diluted or will dilute [plaintiffs] or any other citizen's vote in any particular election.").

Although the parties did not direct the Court to a Third Circuit case that speaks directly to this issue (and the Court could not find a case that did), the Court notes that standing "depends considerably upon whether the plaintiff is himself an object of the action" and that "if he is, there is ordinarily little question that the action or inaction has caused him injury . . . ." *Constitution Party of Pa.*, 757 F.3d at 361 (quoting *Lujan*, 504 U.S. at 561-62). Candidate Plaintiffs pled that they are subject to the Bracketing Structure for the foreseeable future. (Am. Compl. ¶ **[*23]** 11.) The Candidate Plaintiffs have alleged that the primacy effect is significant in their elections and provided some evidence that it occurs in New Jersey elections. (*See* Ballot Design Study.) Plaintiffs allege a cognizable injury to satisfy the Court at this point in the litigation.

The Qualification Clause of the Constitution provides that "[n]o person shall be a Representative who shall not have attained to the Age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an [i]nhabitant of that State in which he shall be chosen." U.S. Const. Art. I, § 2, cl. 2. With respect to the Elections Clause claims, Conforti's, Kreibich's, and Spezakis's allegations of an impermissible regulation of federal elections are sufficient to show an injury-in-fact given that the Bracketing Structure regulates federal elections, and the three plaintiffs allege injuries related to the candidacy in such elections. With respect to Marchica, McMillan, and Lucide, they cannot provide an injury relating to the Elections Clause because they ran for state or local positions; to allow them to litigate those claims would be akin to an "impermissible generalized grievance." *Lujan*, 504 U.S. at 575.

b. Causation and Redressability

The Court finds that the standing elements of causation **[*24]** and redressability are also satisfied for Candidate Plaintiffs' First and Fourteenth Amendment claims and for Conforti's, Kreibich's, and Spezakis's Elections Clause claims. Under state law, County Clerk Defendants have significant discretion in their implementation of the Bracketing Structure. *See Quaremba v. Allan*, 67 N.J. 1, 334 A.2d 321 (N.J. Sip. Ct. 1975). Candidate Plaintiffs' injuries derive from the current and future enforcement of the Bracketing Structure. Thus, Plaintiffs' injuries flow directly from Defendants' actions. *See Duke Power Co. v. Carolina Env't Study Gip., Inc.*, 438 U.S. 59, 77-78, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978) (applying a "but for" test to the causation analysis). It is likely that a declaratory judgment stating that the Bracketing Structure is unconstitutional and an injunction enjoining Defendants from enforcing it would prevent Plaintiffs' injuries. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, at 185-86, 120 S. Ct. 693, 145 L. Ed. 2d 610 (reasoning that "for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress"); *N.J. Civ. Justice Inst. v. Grewal*, Civ. No. 19-17518, 2021 U.S. Dist. LEXIS 57437, 2021 WL 1138144, at *5 (D.N.J. Mar. 25, 2021) (same).

2. Standing — NJWF

Organizations or associations "are unable to establish standing solely on the basis of institutional interest in a legal issue." *Pa. Prison Soc'y v. Cortes*, 508 F.3d 156, 162 (3d Cir. 2007) Instead, an organization may have standing to bring a claim where: (1) the organization itself has suffered an **[*25]** injury to the rights and/or immunities it enjoys; or (2) where it is asserting claims on behalf of its members and those individual members have standing to bring those claims themselves. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 279 (3d Cir. 2014). An organization has direct organizational standing under the first prong when the organization itself suffers injuries as a result of the defendant's allegedly unlawful conduct. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982). An organization has "associational standing" (sometimes referred to as "representational standing") under the second prong if (1) the organization's members have standing to sue on their own; (2) the interests the organization "seeks to protect are germane to its purpose," and (3) "neither the claim asserted, nor the relief requested requires individual participation by its members." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Defendants attack NJWF's standing primarily on a lack of allegations regarding an injury-in-fact and causation attributable to County Clerk Defendants. The Court discusses these facial attacks below.

a. Injury

The State argues that NJWF lacks standing to bring a claim in the instant matter because it cannot show an injury-in-fact as to any particularized interest that was impacted by the challenged bracketing statute and thus does not have **[*26]** standing to sue on its behalf or on its members' behalf. (State Motion Br. at 15-18.) Plaintiffs state that NJWF has direct organizational standing because the Bracketing Structure injured the organization itself by requiring it to divert resources to counteract unlawful conduct. (Omnibus Opp'n Br. at 31-32.) Plaintiffs also argue that it has associational standing because its members, such as Plaintiff Lucide, would have standing to sue in Lucide's own right. (Omnibus Opp'n Br. at 32.)

NJWF's direct organizational standing is predicated on a "diversion-of-resources" theory. However, such a theory cannot demonstrate an injury under the allegations in the Amended Complaint in the Third Circuit.[7] *See* *Fair Housing Rights Center in Se. Pa. v. Post Goldtex GP, LLC*, 823 F.3d 209, 214 n.5 (3d Cir. 2016) ("The Supreme Court specifically held that a fair housing group, like the FHRC, has standing to sue [under the Fair Housing Act] if the discriminatory practices it is challenging have impaired its ability to carry out its mission."); *Free Speech Coal., Inc. v. Attorney General United States*, 825 F.3d 149, 166 (3d Cir. 2016) ("Sufficient injury exists to confer standing where 'the regulation is directed at [plaintiffs] in particular; it requires them to make significant changes in their everyday business practices; [and] if they fail to observe the . . . rule they are quite clearly exposed to the **[*27]** imposition of strong sanctions,' even where there is no pending prosecution."). Thus, NJWF does not have direct organizational standing to litigate the claims involving burdens on First and Fourteenth Amendment rights. *Free Speech Coal.*, 825 F.3d at 166.

NJWF has adequately alleged that Lucide, a member of NJWF, has standing in his own right. (Omnibus Opp'n Br. at 6 n.3, 32.) Furthermore, NJWF's purpose is to "advance progressive policies and work[] to elect candidates who share its values and policy priorities"; such interests are germane to its purpose and would likely be protected by involvement in the matter. *(Id.* at 6.) Finally, neither the claim asserted nor the relief requested requires individual participation by its members. Thus, NJWF has shown that it has associational standing to litigate burdens on its members' First and Fourteenth Amendment rights.

With respect to the Elections Clause claims, the Court finds that NJWF has not shown it has direct or associational standing within the context of the Elections Clause. Given that NJWF, a corporation, may not run in an election, NJWF cannot prove that it directly suffered injuries due to the State of New Jersey's impermissible regulation of a congressional election. Moreover, the Court finds that NJWF has not shown **[*28]** associational standing. As noted above, Lucide, the only specified member of NJWF involved in this matter (Omnibus Opp'n Br. at 32), does not have standing to sue under the Elections Clause.[8] Thus, the Court finds that NJWF has not shown that it has associational standing for the Elections Clause claim because it has not shown that a specific member has standing.

b. Causation and Redressability

For the same reasons as the Candidate Plaintiffs, NJWF has causation and redressability.[9]

---

[7] Plaintiffs point to the "competitive standing" noted in *Nelson v. Warner*, 477 F. Supp. 3d 486, 495-96 (SD W. Va. 2020) and *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544-45 (6th Cir. 2014) as evidence of an injury-in-fact for NJWF's direct standing. (Omnibus Opp'n Br. at 31-32.) Competitive standing is applicable "when regulations illegally structure a competitive environment — whether an agency proceeding, a market, or a reelection race — parties defending concrete interests . . . in that environment suffer legal harm under Article III." *Shays v. FEC*, 414 F.3d 76, 87, 367 U.S. App. D.C. 185 (D.C. Cir. 2005). The Court notes that the cited cases do not reference a Third Circuit case where "competitive standing" was extended to a corporation. *See* *Nelson*, 477 F. Supp. 3d at 496; *Cf:* *Republic of Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 61 (D.N.J. 1991) (discussing "competitive standing" in the context of sealing business records). Even when courts extended competitive standing, it was to a political party, not a non-profit corporation. *See* *Green Party*, 787 F.3d at 544 (laws "restricted [Green Party's] right to associate as political organizations, and . .. therefore articulated a 'factual showing of perceptible harm' resulting from the state's regulations.")

[8] NJWF does note that another member was a congressional candidate in the 2020 Primary. (Omnibus Opp'n Br. at 6 n.3.) However, NJWF has not provided specific allegations that the member has standing in his or her own right. *(See id.)*

[9] Plaintiffs raised *Jacobson v. Fla. Sec'y*, 957 F.3d 1193 (11th Cir. 2020), as instructive here because Nelson distinguished Jacobson by noting that the injury was not traceable to the Florida Secretary of State because she "had no role in ordering candidates' names on ballots" and "had no control over county supervisors except through coercive judicial process." *Nelson*, 477 F. Supp. 3d at 499. Instead, the parties who directly controlled the ballot order were the proper plaintiffs. *Id.* We do not believe it necessary to discuss here given that the New Jersey Bracketing Structure and relevant case law clearly indicate that county clerks order the names on the election ballot.

3. Mootness

A dispute is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982)). The determinative question is "whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." *Rendell v. Rumsfeld*, 484 F.3d 236, 240 (3d Cir. 2007) (quotations and citation omitted). But mootness sets a high bar: it must be "impossible for a court to grant any effectual relief whatever." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012) (quotations and citation omitted).

The State argues that the case is moot because the 2020 Primary has already been held.[10] *(Id*. at 10.) The State further argues that the "capable of repetition yet evading review" doctrine should not apply because Plaintiffs have not shown **[*29]** there is a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *(Id*. at 11.) Plaintiffs do not dispute that the case is moot but do argue that the "capable of repetition yet evading review" doctrine applies for all Plaintiffs except Lucide whose claim was not attacked as moot. (Omnibus Opp'n Br. at 37-49.) Defendants note that Plaintiffs filed their complaint one day before the 2020 Primary; Defendants contend that this precludes Plaintiffs from arguing that they do not have enough time to litigate the issue. (State Reply Br. at 3.)

A mooted case may still be litigated under the "capable of repetition yet evading review" doctrine[11] if (1) "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration" and (2) "there is a reasonable expectation that the same complaining party will be subject to the same action again." *United States v. Juvenile Male*, 564 U.S. 932, 938, 131 S. Ct. 2860, 180 L. Ed. 2d 811 (2011) *(per curiam)*. The Court has already noted that the New Jersey statutes provide a short timeline to fully litigate matters involving New Jersey primaries because clerks print ballots between 50 days before the election to less than three depending on the **[*30]** county. *See Mazo*, 551 F. Supp. 3d at 492 (noting that "[e]ven a prudent candidate who timely submits her [application to the county clerk] will not generally have time to challenge the [ballot design]") As such, the Court finds that the first prong is satisfied. Plaintiffs argue that *Belitskus v. Pizzingrilli*, 343 F.3d 632, 648 n.11 (3d Cir. 2003), is instructive as to all Plaintiffs with respect to the second prong. (Omnibus Opp'n Br. at 47.) In Belitskus, the Third Circuit noted that "the only question [for the second prong] . . . [is] whether there is a 'demonstrated probability' that the same parties will again be involved in the same dispute." 343 F.3d at 648 n.11 (citing *Honig v. Doe*, 484 U.S. 305, 318 n.6, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1998)). Given that "it is reasonable to expect political candidates to seek office again in the future," the Third Circuit has affirmed that the second prong of "capable of repetition yet evading review" doctrine is generally satisfied absent express statements that a plaintiff would not seek election. *Merle v. United States*, 351 F.3d 92, 94 (3d Cir. 2003) (holding that it was "reasonable to expect that Merle will wish to run for election either in 2004 or at some future date" without allegations of intent to do so). The Court holds that the second prong is satisfied because there is a demonstrated probability that the same parties will again be involved in the same dispute.[12] (Am. Compl. **[*31]** ¶¶ 23, 32, 36, 42, 47.) Thus, Plaintiffs' claims regarding the 2020 Primary are not moot under the "capable of repetition yet evading review" doctrine.

---

[10] Several County Clerk Defendants also make mootness arguments. (Colabella Motion Br. at 4; Covello Motion Br. at 18-19; Maldonado Motion Br. at 9; Hanlon Motion Br. at 29-30.) The mootness arguments made in each County Clerk Defendants' brief are substantially similar to the ones made in the State of New Jersey's brief. For the sake of brevity and clarity, the Court will review arguments made in the State of New Jersey's brief and supplement such arguments with relevant points made in the County Clerk Defendants' briefs.

[11] *Cf Federal Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462-63, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (the doctrine applies to an organization which "credibly claimed that it planned on running 'materially similar' future targeted broadcast ads" in advance of future elections, and the period between elections was too short to allow the organization sufficient time to fully litigate its constitutional challenges sufficiently in advance of the election date).

[12] Although McMillan and Kreibich did not state an intention to run again (Am. Compl. ¶¶ 24-27; State Reply Br. at 4 & n.1), Merle allows plaintiffs such a presumption without expressly alleging it. *Cf Int'l Org. of Masters, Mates & Pilots v. Brown*, 498

4. Ripeness

If further factual development would help the court adjudicate the case, the case may be unripe and therefore nonjusticiable. *Abbott Labs. v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967).; *see, e.g.*, *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, at 812, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 ("[F]urther factual development would 'significantly advance our ability to deal with the legal issues presented."). Within the Third Circuit, the Step-Saver test is applied in declaratory judgment cases and looks to "(1) the adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643 (3d Cir. 1990); *see Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 539-540 (3d Cir. 2017). "[W]here the constitutionality of a state provision is at issue, the Supreme Court has taken into account the degree to which postponing federal judicial review would have the advantage of permitting state courts further opportunity to construe the challenged provisions." *Plains All Am. Pipeline*, 866 F.3d at 540 (quoting *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405,412 (3d Cir. 1992)) (quotation marks omitted).

The State argues that Plaintiffs' claims concerning the 2021 Primary and future elections are not yet ripe for review under the Step-Saver test and under the principles expressed in the Third Circuit's opinion in *Plains All American Pipeline*.[13] (State Motion **[*32]** Br. at 12-15.) The State argues that the first factor is not satisfied here because Plaintiffs' allegations as to future elections are based on a series of contingencies. (State Motion Br. at 13-14.) Applying Third Circuit guidance on the second factor, the State argues that the legal status of the parties will not be changed or clarified by an opinion, that a court ruling would be necessarily advisory, and further development of facts is necessary before a "real and substantive controversy" has occurred. *(Id*. at 14-15.) Finally, the State argues that Plaintiffs' "broad speculation" is insufficient to show that the candidates' plan of action in 2021 or later will be affected by a declaratory judgment in this matter. *(Id*. at 15.)

The Court finds that Mazo v. Way is instructive as to each prong. 551 F. Supp. 3d at 495-98. Although the Court considered the constitutionality of New Jersey's slogan statutes in Mazo, many of the same arguments are prevalent in this matter. *See id.* at 496 (finding that a "speculative at best" argument is not persuasive given that "there is no basis on which to conclude the [statutes] will operate to a different end in 2022."). Here, Plaintiffs' interests are adverse to Defendants' interests because Plaintiffs **[*33]** allege that the Bracketing Statute applied to them once before and will apply again under circumstances that will recur. *Id.* The second prong also favors ripeness because most First Amendment cases present predominantly legal questions and, even if it did not, the same state law will operate to Plaintiffs' detriment then. *Id.* at 497. The third prong also favors ripeness because a judgement will clarify Plaintiffs' rights and "the rights of all other who would seek to engage in similar activities." *Id.* (quoting *Presbytery of N. J. of Orthodox Presbytarian Church v. Florio*, 40 F.3d 1454,1470 (3d Cir. 1994). Thus, Plaintiffs have demonstrated that their claims are ripe.

5. Political Question Doctrine

Colabella argues that Plaintiffs' theory of diminution of votes presents a non-justiciable political question that should be dismissed under the reasoning of *Rucho v. Common Cause*, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019).

U.S. 466,473, 111 S. Ct. 880, 112 L. Ed. 2d 991 (1991) ("Respondent has run for office and may well do so again. The likelihood that the Union's rule would again present an obstacle to a preconvention mailing by respondent makes this controversy sufficiently capable of repetition to preserve our jurisdiction."). The State of New Jersey raises an interesting point about *Belitskus*, 343 F.3d at 649, and the Third Circuit's lack of jurisdiction with respect to a plaintiff who left the state with "no evidence in the record to suggest he will return in the future." Here, Candidate Plaintiffs live in New Jersey and have not expressed an intention to leave. Thus, the Court is satisfied that there is a reasonable expectation that Candidate Plaintiffs will be subject to the Bracketing Structure in a future election.

[13] County Clerk Defendants also make ripeness arguments. (Covello Motion Br. at 20; Hanlon Motion Br. at 31; Hogan Motion Br. at 16-17; McGettigan Motion Br. at 12-13.) For the same reasons as discussed in footnote 9, the Court will primarily consider the State of New Jersey's arguments.

(Colabella Motion Br. at 10-11; Colabella Reply Br. at 2-3.) In response, Plaintiffs provide a plethora of arguments for why Rucho does not preclude this matter as a non-justiciable political question. (Omnibus Opp'n Br. at 53-58.) In Rucho, the Supreme Court held that partisan gerrymandering claims present nonjusticiable political questions for want of identifying a "clear, manageable, and politically neutral" standard. 139 S. Ct. at 2498. The Court cannot find any justification **[*34]** in Colabella's brief for expanding Rucho from questions on redistricting so as to preclude the matter at hand.

6. Eleventh Amendment Immunity

Colabella briefly contends that he is entitled to Eleventh Amendment immunity because he "exercised his discretionary authority under New Jersey election law, the subject and enforcement of which emanates from the State, with the Secretary of State as the chief election official in the state." (Colabella Motion Br. at 7.) Despite bearing the burden of establishing his right to such immunity, *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995), Colabella offers no authority for his proposition and no argument beyond that statement.

Traditionally, counties do not enjoy state sovereign immunity under the Eleventh Amendment. *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 254 (3d Cir. 2010). There are exceptions to that rule and a three-factor analysis provided by the Third Circuit for identifying those exceptions. *See Orden v. Borough of Woodstown*, 181 F. Supp. 3d 237 (D.N.J. 2015) (applying *Fitchik* factors to county entities). Here, the Court need not engage in that analysis because, as Plaintiffs have correctly noted, the Third Circuit has already held that the Eleventh Amendment does not prohibit a suit against county officials seeking to restrain them from performing duties alleged to violate a plaintiff's Constitutional rights. *See Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980) (en banc) ("On the basis of the reasoning employed in *Ex Parte Young*, [209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)], we find **[*35]** that [the officials] are parties to [plaintiff's] dispute over the constitutionality of these rules and properly named as defendants in her suit."). Accordingly, the Court rejects Defendant Colabella's theory that he is entitled to Eleventh Amendment immunity.

C. Rule 12(b)(6)

Given that the Court has found Plaintiffs have standing, we move onto Defendants' Rule 12(b)(6) arguments. The Supreme Court has found it "beyond cavil that voting is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (citations and quotation marks omitted). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Id.* Hence, States may enact "comprehensive and sometimes complex election codes," where "[e]ach provisions of these schemes . . . inevitably affects - at least to some degree - the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983). Because "the rights of votes and the rights of candidates do not lend themselves to neat separation," the Supreme Court has "minimized the extent to which voting rights cases are distinguishable from ballot access cases." *Anderson*, 460 U.S. at 786.

We first discuss the relevant New Jersey Bracketing Structure **[*36]** and case law surrounding it in part to determine whether New Jersey state courts have already decided the issue.

1. Relevant New Jersey Statutes and Cases

The Bracketing Structure is created by the combined effect of three state statutes. N.J.S.A. 19:23-18 permits "several candidates for nomination to the same office" to "request that their names be grouped together, and that the common designation to be named by them shall be printed opposite their names." N.J.S.A. 19:49-2 requires that their names then be drawn for position together as a single unit on a primary ballot:

> 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 ....

Finally, N.J.S.A. 19:23-26.1 dictates which offices being elected should be placed in the first column or row on the ballot, *i.e.*, sets the pivot point:

> 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 **[*37]** 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. In the event that the nomination of candidates for both offices shall occur at the same primary election, the names of all candidates for the office of United States Senator shall be printed in the first column or horizontal row designated for the party of those candidates, and the names of all candidates for the office of Governor shall be printed in the second column or horizontal row. No candidate for nomination for any other office shall have his name printed in the same column or horizontal row as the candidates for nomination for the office of United States Senator or Governor.

As Plaintiffs and Defendants point out, New Jersey state courts have reviewed similar challenges to the Bracketing Structure. *See* *Quaremba v. Allan*, 67 N.J. 1, 334 A.2d 321 (N.J. Sup. Ct. 1975); *Schundler v. Donovan*, 377 N.J. Super. 339, 872 A.2d 1092 (N.J. Super. Ct. App. Div. 2005). The Court reviews two seminal cases to understand the contours of the Bracketing Structure under state court interpretations.

In Quaremba, unsuccessful primary candidates argued, in relevant part, that **[*38]** New Jersey's grouping provision "creates preferred classes of primary candidates," and "imposes an unequal burden on unaffiliated candidates and thus denies them their constitutional rights." 334 A.2d at 325. Judgment was entered for the defendant county clerk after a trial, and it was affirmed by the Appellate Division. On review, the New Jersey Supreme Court affirmed, reasoning that the plaintiffs had failed to show the "invidious discrimination" required by the United States Supreme Court to establish a constitutional violation. A.2d at 326 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 732, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963)). The New Jersey Supreme Court also noted that the scope of judicial review of a clerk's discretionary actions is properly limited to assessing whether he acted in good faith and did not intentionally discriminate against any candidate or group of candidates. *Id.* at 329. Thus, the clerk's discretion (as vested by the legislature) is to be upheld unless it is not "rooted in reason." *Id.* at 328.

In *Schundler v. Donovan*, 377 N.J. Super. 339, 872 A.2d 1092 (N.J. Super. Ct. App. Div. 2005), the Appellate Division reviewed a summary proceeding before a trial court that approved two county clerks' bracket-drawing for seven gubernatorial primary candidates. At the proceeding, one candidate claimed that there should not be a distinction between bracketed and non-bracketed candidates **[*39]** because non-bracketed candidates did not have a chance at the first slot or column. *Id.* at 1094. The clerks had randomly drawn names twice, once for the full-slate (*i.e.*, fully bracketed) candidates and a second time for the non-bracketed candidates. *Id.* Given that the ballot layout only included five columns, each gubernatorial candidate after the fourth name drawn was placed together, horizontally into the fifth and final bracket. *Id.* at 1095. Reasoning that the clerks were not mandated to place the candidates in any particular way and one would need at least eight columns to accommodate all slates, affiliations, and non-affiliated candidates, the trial court found the arrangement to be "rooted in reason." *Id.*

On review, the Appellate Division echoed the trial court's deference to the county clerks' discretion, but recognized that the clerks were also bound by the statutory standards of N.J.S.A. 19:23-16.1. Because the constitutionality of that statute had been called into question by a prior Superior Court decision and an opinion by the New Jersey Attorney General, the panel considered its constitutionality, particularly in the wake of the United States Supreme Court's decision in *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989). *Schundler*, 872 A.2d at 1098-99. The Schundler court interpreted Eu as prohibiting **[*40]** restrictions on First Amendment expressive rights based "on anything but a directly implicated, profoundly important public interest." *Id.* at 1098. In the specific context of an election, the restriction would have to be "necessary to the integrity of the electoral process." *Id.* (quoting *Eu*, 489 U.S. at 232). Applying that standard, the Appellate Division

reasoned that the first sentence of N.J.S.A. 19:23-26.1 was not unconstitutional and that "there can be no rights violation where a county clerk makes a fair effort to treat candidates for the highest office equally while making a good faith effort to "give effect to the expressive rights of all candidates." *Id.* at 1099. Ultimately, under the unique circumstances of the case, the Appellate Division instructed the county clerks to re-draw the names of the primary candidates in a single draw without regard to the candidates' bracketed or non-bracketed status, so that all candidates were afforded an equal opportunity to avoid the disfavored fifth column on the ballot. *Id.*

Quaremba and Schundler make clear that the state courts have been inclined to uphold the constitutionality of New Jersey's Bracketing structure. While these decisions may be persuasive, it is well-settled that this Court is not bound by their **[*41]** interpretation of rights under the United States Constitution. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *United States v. Bedford*, 519 F.2d 650, 654 (3d Cir. 1975). For further guidance, the Court looks to federal authority.

2. Facial vs. As-Applied Constitutional Challenges

A plaintiff bringing a facial challenge to the constitutionality of a statute must "establish that no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), or show that the law lacks a "plainly legitimate sweep." *Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008); *see Bruni v. City of Pittsburgh*, 824 F.3d 353, 362 (3d Cir. 2016). In the First Amendment context, the Supreme Court has recognized "a second type of facial challenge," whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (quotation marks omitted); *but see Washington State Grange*, 552 U.S. at n.6 ("We generally do not apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law."). "A significant consideration in overbreadth analyses is the likelihood and frequency of invalid applications of the statute compared to valid applications. *Free Speech Coalition, Inc. v. AG of the United States*, 677 F.3d 519, 538 (3d Cir. 2012). Facial challenges are disfavored for several reasons: they "rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten **[*42]** to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Stevens*, 559 U.S. at 473 (collecting cases); *see Washington State Grange*, 552 U.S. at 450-451.

Plaintiffs have not plausibly alleged that there is no set of circumstances under which the statutes involved in the Bracketing Structure would be valid. Plaintiffs do allege that an incumbent has not won in the past fifty years without gerrymandering and provide evidence that the primacy effect may affect election outcomes. (Am. Compl. ¶¶ 8, 96.) These allegations are sufficient to plausibly show that the law may lack a plainly legitimate sweep or may be invalidated as overbroad. Moreover, the reasons for disfavoring facial challenges are not apparent in this context; the Bracketing Structure has been in effect for more than seventy years, the Court's review does not seen to run contrary to the principle of judicial restraint, and the Court's ultimate decision will review laws that have been molded by the people's wills for the past seventy-odd years. *Stevens*, 559 U.S. at 473.

A plaintiff may also proceed on the theory that the law is unconstitutional as applied to the plaintiff's circumstances. *Fed. Election Comm'n*, 551 U.S. at 456-57. "An as-applied attack . **[*43]** . . does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right."[14] *Democratic-Republican Org. of N.J. v. Guadagno*, 900 F. Supp. 2d 447, 460

[14] The Court did reject a similar challenge to New Jersey's ballot placement. *See Democratic-Republican Org.*, 900 F. Supp. 2d at 457 (Wolfson, J.). On a motion for preliminary injunction, the plaintiff failed to provide evidence to demonstrate that certain ballot placements confer any benefit. *Id.* The Court noted that, in virtually all the cases concerning constitutional challenges to ballot placement, formatting, or layout, other courts have required evidence demonstrating that ballot placement confers a benefit prior to determining whether the plaintiffs have been burdened, let alone harmed. *Id.* at 458. Given the lack of

(D.N.J. 2012) (quoting *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010)). We review the as-applied challenge under the Anderson-Burdick test.

3. Anderson-Burdick Test

Formulated in Anderson and refined in Burdick, the Supreme Court provided a factoring test to determine the constitutionality of burdens on election-related First Amendment rights. *See Wash. State Grange*, 552 U.S. at 452-53 (applying *Anderson-Burdick* test to facial challenge of election law). "The Supreme Court has repeatedly [considered under *Anderson-Burdick*] . . . regulations that have the effect of channeling expressive activity at the polls." *Mazo*, 551 F. Supp. 3d at 502 (quoting *Burdick*, 504 U.S. at 438; *Storer*, 415 U.S. at 728). "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Grange*, 552 U.S. at 449-450.

The parties do not challenge the use of the *Anderson-Burdick* framework but do challenge the standard of review. (State Motion Br. at 20; Colabella Motion Br. at 13; Maldonado Motion Br. at 11-13; Covello Motion Br. at 20-22; Hanlon Motion Br. at 25-26; Hogan Motion Br. at 11-14; McGettigan Motion Br. at 9-12.) Defendants **[*44]** argue for rational basis review because the alleged burdens on each right are minimal. (Colabella Motion Br. at 12, 23, & 25-26; Covello Motion Br. at 24-35; Hanlon Motion Br. at 26; Hogan Motion Br. at 13 - 14; Maldonado Motion Br. at 11-13; McGettigan Motion Br. at 9-12; State Motion Br. at 28-30.) Plaintiffs argue for strict scrutiny because the burdens on their rights are severe. (Omnibus Opp'n Br. at 75-89.) As such, the Court will apply the *Anderson-Burdick test* to the claims at hand. *Cf. Mazo*, 551 F. Supp. 3d at 502; *Democratic-Republican Org.*, 900 F. Supp. 3d at 460.

Under the *Anderson-Burdick* test, the Court considers "what burden is placed on the rights which [P]laintiffs seek to assert and then [the Court] balance[s] that burden against the precise interests identified by the [S]tate and the extent to which these interests require that [Plaintiffs' rights be burdened. Only after weighing these factors can [the Court] decide whether the challenged statute is unconstitutional." *Democratic-Republic Org.*, 900 F. Supp. 3d at 460 (quoting *Anderson*, 460 U.S. at 789). On a motion to dismiss under Rule 12(b)(6), the question is whether a plaintiff has stated a claim for relief. Where plaintiffs' claims assert a legal burden rather than a factual burden, dismissal at this stage would be warranted because further proceedings, *i.e.*, discovery, **[*45]** would not "benefit the resolution" of Plaintiffs' claims or "change the nature/magnitude of the burden imposed." *Id.* When reviewing a case under the *Anderson-Burdick*, courts tend to establish a robust factual record to characterize an alleged burden. *See Mazo*, 551 F. Supp. 3d at 508 n.12.

a. Measuring Burdens on First Amendment Rights

"Determining the magnitude of the burden [] requires considering its 'likely' consequences 'ex ante,' 'categorically,' and on' [candidates] generally'." *Id.* at 504 (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 206-208, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) (Scalia, J., concurring in the judgment) and *Storer v. Brown*, 415 U.S. 724, 738, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)). Rational basis review is warranted when a plaintiff's rights are minimally burdened in a nondiscriminatory manner. *Burdick*, 504 U.S. at 434; *see Munro v. Socialist Workers Party*, 479 U.S. 189, 199, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986) (rational basis review for slight effect on constitutional rights when state affords minor-party candidate easy access to the primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign). Strict scrutiny is warranted when plaintiffs First Amendment rights are severely burdened, such as when there is a prohibition on certain guaranteed rights. *See Eu v. S.FCnty. Democratic Cent. Comm.*, 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) (strict scrutiny warranted when state prohibited party from endorsing candidates in primary election).

Here, Plaintiffs argue that the Bracketing Standard violates their right to vote, dilutes their vote, violates **[*46]** the Equal Protection Clause, and burdens their freedom to associate.[15] (Am. Compl. ¶¶ 97, 169-208, 223-25.)

"persuasive empirical evidence," the Court was not convinced that "placement on the right of the ballot would result in any harm, much less one of constitutional magnitude." *Id.*

With respect to the right to vote, this Court has concluded that the position on a ballot is "a less important aspect of voting rights than access." *Democratic-Republican Org.*, 900 F. Supp. 2d at 456. How much less is generally a question of fact. *See id.* ("Plaintiffs, however, have not alleged or argued that placement elsewhere on the ballot would prevent voters from locating them."). Here, Plaintiffs provide a review of ballot design studies from other states; in those ballots with similar characteristics, the ballot position of candidates appeared to have provided them with positive benefits. (Am. Compl. P 96.)

With respect to vote dilution, the term has primarily been considered in the context of partisan gerrymandering. Plaintiffs have neither pled in their Amended Complaint nor argued in their briefing how the Court should construe this claim in terms of assessing any burden on their First Amendment rights. As such, the Court will assign no burden or a minimal burden to the vote dilution aspect of Plaintiffs' claims.

Plaintiffs allege that county clerks have violated the Equal Protection Clause by implementing varying and undisclosed standards in designing the ballot and in determining **[*47]** the pivot point, even within the same county and across party lines (Am. Compl. 1167 - 68, 72, 85, 88-89, 177) and provide *Bush v. Gore*, 531 U.S. 98, 106, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) as support for this point. However, the Supreme Court in Bush v. Gore expressly noted that it did not answer "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. The classification in this case is between bracketed and non-bracketed candidates, which is classification that does not fall into a suspect or quasi-suspect category. Accordingly, the the Court finds that the Bracketing Standard is nondiscriminatory for the purpose of the Equal Protection Clause. *See id.*

The Supreme Court has held that political parties have a right to choose "the standard bearer who best represents the party's ideologies and preferences." *See Eu*, 489 U.S. at 224. Yet, Plaintiffs argue that this freedom to associate impedes their rights to not associate or substantially burdens it. (Am. Compl. ¶¶ 80, 87, 95, 96.) There is a grain of truth in that statement: assuming there is at least one gubernatorial candidate, no non-gubernatorial or non-congressional candidate can be placed in the first column without bracketing and by operation of state law. Plaintiffs moreover provide **[*48]** evidence that, taken as true, implies that a candidate's choice not to bracket can have an impact on the total votes in counties that bracket candidates as opposed to counties that do not. (*See* Am. Compl. ¶ 125.) 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 cost to a candidate's right to not associate. As such, the Court finds that the Bracketing Structure imposes a moderate burden on the right to associate.

Having measured the burden, the Court turns to deciding what level of scrutiny is warranted. The Supreme Court has noted that strict scrutiny does not apply if the regulations require "nominal effort," *Crawford*, 553 U.S. at 205, or if the burdens are "ordinary" and "widespread." *Clingman v. Beaver*, 544 U.S. 581, 593 - 97, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005). Moreover, although the statutes underlying the Bracketing Structure seem to have a "plainly legitimate sweep," "[a] law may [still] be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *Grange*, 552 U.S. at 450 51. Accepting the allegations of the Amended Complaint as true, and drawing all reasonable inferences in favor of Plaintiffs as the non-moving parties, the Court **[*49]** finds that, collectively, the fundamental rights involved in this case are more than moderately infringed upon. The Court therefore will apply a moderate to severe level of scrutiny. *See Democratic-Republican Org.*, 900 F. Supp. 2d at 453 ("Ballot access cases should not be pegged into the [strict scrutiny, intermediate scrutiny, and rational basis] categories. Rather, following Anderson, [the Court's] scrutiny is a weighing process . . . .") (quoting *Rogers v. Corbett*, 468 F.3d 188, 194 (3d Cir. 2006)).

b. Compelling Interest of State

The State of New Jersey puts forth that the Bracketing Structure furthers important State interests because it: preserves candidates' rights to associate or not to associate; makes those associative characteristics of candidates

---

[15] Plaintiffs advance Freedom of Speech arguments for the first time in their Omnibus Opposition Brief. (Opp'n Br. at 87-89.) Given that Plaintiffs assert no claim for infringement of their Freedom of Speech, the Court will not address their unpled issue.

known to voters; provides a manageable and understandable ballot; and prevents voter confusion. (State Motion Br. at 25 - 29; State Reply Br. at 17.) "The state's interest in a timely and orderly election is strong." *Valenti v. Mitchell*, 962 F.2d 288, 301 (3d Cir. 1992). It is well-settled that the State has an interest in regulating elections to ensure that voters can understand the ballot. *Democratic-Republican Org.*, 900 F. Supp. 2d at 456. It is also well-settled, as recognized above, that states may not prohibit political parties from choosing their standard bearers. *See id.; Eu*, 489 U.S. at 224.

Political parties have the right to associate. This right, **[*50]** however, should not impede on a candidate's right to either associate or not associate. 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. (Am. Compl. ¶ 117.) Taking the standard into account and the presumption of truth under Rule 12(b)(6), the Court concludes that such interests are at least marginally compelling.

c. Balancing the Burdens Against the Interests

Accepting Plaintiffs' allegations as true, their First Amendment rights (right to vote, equal protection, and freedom to associate) have been meaningfully affected by the Bracketing Structure and the potential primacy effects it may be applying to certain elections. It is not clear at this stage that these burdens can be justified by the State's more generalized interests in preserving rights of bracketing candidates and in informing voters. This is a close call, but on balance the Court is satisfied that Plaintiffs have alleged a claim under Counts I, II, and III. This is not a case where aggrieved candidates have alleged legal **[*51]** burdens that can be measured at the motion to dismiss stage. *Cf Mazo*, 551 F. Supp. 3d at 508 n.12. Rather, in this case, 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. For these reasons, Court will deny the relevant portions of the Motions.

4. Elections Clause

When the regulation involves the time, place, and manner of primary elections, the only question is whether the state system is preempted by federal election law on the subject. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995). However, when the 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 by, for example, "dictat[ing] electoral outcomes, favor[ing] or disfavor[ing] a class of candidates, or evading] important constitutional restraints. *Cook v. Gralike*, 531 U.S. 510, 523, 121 S. Ct. 1029, 149 L. Ed. 2d 44 (2001). The Supreme Court has struck down such regulations when they "attach[] a concrete consequence to noncompliance" rather than informing voters about some topic. *Id.* at 524. The timing of such a "label" may also add to the gravity of injury, especially when it occurs "at the **[*52]** most crucial stage in the election process — the instant before the vote is cast." *Id.* at 525 (quoting *Anderson v. Martin*, 375 U.S. 399, 402, 84 S. Ct. 454, 11 L. Ed. 2d 430 (1964)).

Here, the State conferred its power to regulate the "manner" of federal elections to the county clerks, including the County Clerk Defendants, by requiring them to design and print ballots. N.J.S.A. 19:23-26.1, 19:42-2. In Defendants' view, the Bracketing Structure is a pettnissible regulation on the "manner" of federal elections. (State Motion Br. at 30; State Reply Br. at 22-23; Colabella Motion Br. at 26-30; Covello Motion Br. at 35-38.) Plaintiffs argue that the Bracketing Structure exceeds the State's authority by dictating electoral outcomes and favoring or disfavoring a class of candidates, *i.e.*, favoring candidates who bracket with incumbents and disfavoring candidates who do not. *Cook*, 531 U.S. at 523. The concrete consequence here is that less established candidates are deprived of the primacy effect, which Plaintiffs allege has occurred and will continue to occur in New Jersey elections. Given that Plaintiffs allege that no non-incumbents have won a federal election without gerrymandering in the past fifty years (Am. Compl. ¶ 8) and referred to evidence suggesting that ballot position impacts voting (Am. Compl. ¶ 90-98), Plaintiffs **[*53]** sufficiently allege that the Bracketing Structure may favor or disfavor a class of

candidates or may dictate electoral outcomes. *Cf.* *Cook*, 531 U.S. at 525 ("the instant before the vote is cast" is the "most crucial stage in the election process").

Prospective candidates brought a § 1983 claim challenging the constitutionality of an initiative amending the Missouri Constitution (titled "Article VIII") to require that any failure of United States Senators or Representatives, or nonincumbent candidates, to support term limit provisions be noted on the ballots. *Id.* at 510. The Supreme Court considered the question of whether "the State may use ballots for congressional elections as a means of giving its instructions binding force." *Id.* at 522. To answer the question, the Supreme Court noted that the "manner" of elections includes matters like "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Id.* at 523 - 24 (quoting *Smiley v. Holm*, 285 U.S. 355, 366, 52 S. Ct. 397, 76 L. Ed. 795 (2001)). "In short, Article VIII [was] not among 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental **[*54]** right involved,' ensuring that elections are 'fair and honest,' and that 'some sort of order, rather than chaos, is to accompany the democratic process.' *Id.* at 524 (citations omitted). Given that the labels imposed "substantial political risk" and implied that the issue "is an important — perhaps paramount — consideration in the citizen's choice which may decisively influence the citizen to cast his ballot against candidates branded as unfaithful," the Supreme Court held that Article VIII was facially unconstitutional. *Id.* at 525.

Taking the allegations as true and drawing all inferences in favor of the non-moving party, Conforti, Kreibich, and Spezakis provide sufficient allegations to show 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. For these reasons, the Court will deny the relevant portions of the Motions

5. Section 1983

As a final matter, the Court finds that Plaintiffs' Count V, baldly alleging a § 1983 claim cannot survive because the section itself does not confer a right. *See* *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979) ("[O]ne cannot go into court and claim a violation of § 1983 — for § 1983 by itself does not protect anyone from anything.") **[*55]** Moreover, Plaintiffs' constitutional claims are already addressed by Counts I-IV. The Court will therefore dismiss Count V.

IV. CONCLUSION

The Court recognizes the gravitas of its decision to allow this case to move forward. The undersigned does not take it lightly. However, it is the Court's duty and imperative to protect the democratic process. Here, all Plaintiffs have met their burden to show standing for Counts I, II, and III. Plaintiffs Conforti, Spezakis, and Kreibich have demonstrated their standing to pursue claims for Elections Clause violations under Count IV. All Plaintiffs have pled plausible claims for relief in Counts I, II, and III. Plaintiffs Conforti, Spezakis, and Kreibich have also pled plausible claims for relief in Count IV, the Elections Clause claims. For the reasons stated above, Defendants' motions to dismiss will be GRANTED IN PART and DENIED IN PART. An appropriate order follows.

/s/ Zahid N. Quraishi

ZAHID N. QURAISHI

UNITED STATES DISTRICT JUDGE

Date: **May 31, 2022**

ORDER

OURAISHI, District Judge

THIS MATTER comes before the Court upon Motions to Dismiss filed by the State of New Jersey ("State Motion," ECF No. 53); Scott M. Colabella in his official capacity as the Ocean County clerk ("Colabella **[*56]** Motion," ECF No. 55); Junior Maldonado in his capacity as the Hudson County clerk ("Maldonado Motion," ECF No. 57); Sollami Covello in her official capacity as the Mercer County clerk ("Covello Motion," ECF No. 58); Christine G. Hanlon in her official capacity as the Monmouth County clerk ("Hanlon Motion," ECF No. 59); John S. Hogan in his official capacity as the Bergen County clerk ("Hogan Motion," ECF No. 60); and Edward P. McGettigan in his official capacity as the Atlantic County clerk ("McGettigan Motion," ECF No. 63). For the reasons set forth in the accompanying Opinion,

IT IS on this **31st** day of **May 2022**,

ORDERED that the Maldonado Motion (ECF No. 57), Hanlon Motion (ECF No. 59), Covello Motion (ECF No. 58), Hogan Motion (ECF No. 60), and McGettigan Motion (ECF No. 63) are hereby **DENIED**; and it is further

ORDERED that the State Motion (ECF No. 53), Colabella Motion (ECF No. 55), and Covello Motion (ECF No. 58) are hereby **GRANTED IN PART** and **DENIED IN PART** as set forth below; and it is further

ORDERED that Plaintiffs' Count V is dismissed with prejudice and the State Motion, Collabella Motion, and Covello Motion are otherwise **DENIED**; and it is further

ORDERED that Plaintiffs' Count **[*57]** IV with respect to Plaintiffs Lucide, McMillan, and Marchica is dismissed *sua sponte* and with prejudice for lack of standing; and it is further

ORDERED Plaintiffs' Count IV with respect to Plaintiff New Jersey Working Family, Inc. is dismissed *sua sponte* and without prejudice for lack of standing.

/s/ Zahid N. Quraishi

ZAHID N. QURAISHI

UNITED STATES DISTRICT JUDGE

End of Document

N.J. Press Ass'n v. Guadagno

United States District Court for the District of New Jersey

November 13, 2012, Decided; November 13, 2012, Filed

Civil Action No. 12-06353 (JAP)

Reporter
2012 U.S. Dist. LEXIS 161941 *; 2012 WL 5498019

NEW JERSEY PRESS ASSOCIATION et. al, Plaintiffs, v. KIM GUADAGNO, et. al, Defendants.

Notice: NOT FOR PUBLICATION

Core Terms

Election, voters, polling place, polling, feet, photographs, exit, interviews, voting, zone, preliminary injunction, rights, solicitation, media, restrictions, regulation, gather, irreparable harm, public interest, right to vote, injunction, compelling interest, injunctive relief, organizations, distance

Counsel: **[*1]** For NEW JERSEY PRESS ASSOCIATION, a New Jersey not for profit corporation, individually and on behalf of its Newspaper Members, NEWARK MORNING LEDGER CO., doing business as THE STAR LEDGER, GANNETT SATELLITE INFORMATION NETWORK, INC., doing business as ASBURY PARK PRESS, HOME NEWS TRIBUNE, COURIER NEWS, THE DAILY RECORD and THE DAILY JOURNAL, NORTH JERSEY MEDIA GROUP INC., doing business as THE RECORD and THE HERALD NEWS, THE PRINCETON PACKET INC., doing business as PACKET PUBLICATIONS, RECORDER PUBLISHING CO., doing business as RECORDER COMMUNITY NEWSPAPERS, SEAWAVE CORP. OF RIO GRANDE, doing business as CAPE MAY COUNTY HERALD TIMES, Plaintiffs: THOMAS JOSEPH CAFFERTY, LEAD ATTORNEY, GIBBONS, P.C., Newark, NJ.

For KIM GUADAGNO, in her official capacity as the Secretary of State of the State of New Jersey, JEFFREY CHIESA, in his official capacity as the Attorney General of the State of New Jersey, Defendants: DONNA KELLY, LEAD ATTORNEY, OFFICE OF ATTORNEY GENERAL OF NEW JERSEY, TRENTON, NJ; SUSAN MARIE SCOTT, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, TRENTON, NJ.

Judges: JOEL A. PISANO, UNITED STATES DISTRICT JUDGE.

Opinion by: JOEL A. PISANO

Opinion

PISANO, District Judge.

This matter is presently before **[*2]** the Court on an Order to Show Cause by plaintiffs New Jersey Press Association, individually and on behalf of its Newspaper Members; Newark Morning Ledger Co. d/b/a The Star Ledger; Gannett

Satellite Information Network, Inc. d/b/a Asbury Park Press; Home News Tribune; Courier News; The Daily Record and The Daily Journal; North Jersey Media Group Inc. d/b/a the Record and The Herald News; The Princeton Packet, Inc. d/b/a Packet Publications; Recorder Publishing Co. d/b/a Recorder Community Newspapers; Seawave Corp. of Rio Grande d/b/a Cape May County Herald Times (collectively, the "Plaintiffs") seeking a preliminary injunction against Defendants Kim Guadagno, in her official capacity as the Secretary of State of the State of New Jersey and Jeffrey Chiesa, in his official capacity as the Attorney General of the State of New Jersey (the "Defendants").

Plaintiffs, a collection of newspaper organizations, seek to enjoin Defendants from enforcing three New Jersey statutes (the "Election Laws") and a Directive of the New Jersey Attorney General that collectively prohibit individuals from engaging in expressive activity within 100 feet of a polling place in the State of New Jersey on an election **[*3]** day. In particular, Plaintiffs request that they be permitted to take photographs of voters and conduct interviews of voters who are leaving a polling place within 100 feet of such polling place. Defendants oppose the request, arguing that the First Amendment does not require the State to permit solicitation of voters within 100 feet of a polling place and the balance of equities weighs in favor of the State. The Court heard oral argument on the Order to Show Cause on October 23, 2012. For the reasons set forth below, the Court finds that the Election Laws are reasonable restrictions under the First Amendment. Accordingly, the Plaintiffs' request for a preliminary injunction is denied.

I. Background

Plaintiffs are newspaper organizations which seek to take photographs and conduct interviews of voters leaving polling places in the State of New Jersey at the general election on November 6, 2012, as well as at future elections. Plaintiffs commenced this action on October 9, 2012, seeking declaratory and injunctive relief to enable them to take photographs and conduct interviews within the 100-foot barrier currently imposed by the Election Laws, which, among other things, make it unlawful **[*4]** for any person to speak to or solicit a voter in that zone. In particular, the Election Laws direct that voters will have a 100-foot free unobstructed passage to polling places, without interference from any person. [1] Plaintiffs allege that to the extent Defendants enforce the Election Laws to prohibit taking photographs and conducting interviews of voters within 100 feet of the entrance to New Jersey's polling places, the Election Laws impermissibly restrict Plaintiffs' free speech rights under the First and Fourteenth Amendments of the United States Constitution and Article I, Paragraph 6 of the New Jersey Constitution.

A. Evolution of New Jersey Election Laws

The State of New Jersey has long prohibited any interaction with or solicitation of voters within 100 feet of a polling place. *See* N.J. Stat. Ann. 19:34-6 (prohibiting interference with a voter within 100 feet of a polling place), N.J. Stat. Ann. 19:34-7 (criminalizing solicitation within 100 feet of a polling place), and N.J. Stat. Ann. 19:34-15 (prohibiting the distribution of any printed materials or solicitation within 100 **[*5]** feet of a polling place). Beginning in 1988, the Attorney General of New Jersey permitted news media to conduct exit polling within the 100-foot exclusionary zone and in 2007, the Attorney General issued a Directive on Exit Polling: Media and Non-partisan Public Interest Groups (the "Directive"), which permitted both media and non-partisan entities to conduct exit-polling within the 100-foot zone. However, a 2009 New Jersey Supreme Court ruling construed the Election Laws to prohibit all expressive activity, including exit polling, in the 100-foot zone. *See* *In re Attorney General's 'Directive on Exit Polling: Media and Non-Partisan Public Interest Groups,"* 200 N.J. 283, 297, 981 A.2d 64 (2009) (hereinafter, "*Exit Polling"*) (holding that "*all expressive activity* within 100 feet of a polling place on Election Day" is prohibited, including exit polling) (emphasis added). In reaching that conclusion, the Court rejected the Attorney General's determination, in effect since 1988, that exit polling within the 100-foot zone was constitutionally protected. *Id.* at 310-11.

---

[1] The Election Laws are N.J. Stat. Ann. 19:34-6, N.J. Stat. Ann. 19:34-7, and N.J. Stat. Ann. 19:34-15.

Following the New Jersey Supreme Court's ruling in *Exit Polling*, several broadcast news media organizations filed suit in this Court, before **[*6]** the Honorable Peter Sheridan, seeking an injunction so that they could continue the exit polling that they had been conducting since 1988. Holding that the prohibition of exit polling within the 100-foot zone would severely impact the ability of the news organizations to accurately conduct such exit polling, Judge Sheridan granted their request and entered a preliminary injunction. *See* *ABC v. Wells*, 669 F. Supp. 2d 483, 486 (D.N.J. 2009). Plaintiffs in this case were not parties to *Exit Polling* or *ABC.* Several years later, on October 9, 2012, Plaintiffs commenced this action.

B. Plaintiffs' Complaint

Plaintiffs assert that if they are not permitted to conduct voter interviews and take voter photographs within 100 feet of polling places in New Jersey on election days, they "will be severely restricted in their efforts to gather and report truthful and significant information about the political process to the public." Compl. ¶ 42. Plaintiffs' reporters generally attempt to gather such information by approaching voters as they leave a polling place after having voted and asking them if they would be willing to pose for a photograph and/or speak with a reporter. Borg Aff. ¶¶ 10-11. [2] The **[*7]** reporters stand near the exit of the building and wear credentials identifying themselves as representatives of Plaintiffs' news organizations. *Id.* ¶¶ 13, 22. Voter participation is strictly voluntary and the reporters are instructed to be courteous and businesslike and not to hinder voters or interfere with the election process in any way. *Id.* ¶¶ 12-14. Plaintiffs use the information they collect from the interviews to analyze and report on voters' feelings about the political process, as well as to analyze and report on who voted for particular candidates and what factors influenced their votes. *Id.* ¶¶ 8, 15. Plaintiffs contend that they have conducted interviews and taken photographs of voters at polling places throughout New Jersey for many years and that they are unaware of any complaint from State election officials that their reporters have hindered voters or interfered with the voting process. *Id.* at ¶¶18-22.

Plaintiffs argue that the further away a reporter is located from the entrance to the polling place, the more difficult it is to conduct interviews and take photographs of voters. They claim that as the distance from the polling place increases, the more likely it is that the reporter will not be able to approach the voter before he/she gets into his or car and drives away or starts talking on a cell phone or disappears into a crowd. *Id.* ¶ 24. Also, as the distance increases, it becomes more difficult to determine which individuals are voters and to differentiate those who are exiting the polling place from those who are arriving to vote. *Id.* Plaintiffs contend that the Election Laws impermissibly infringe upon their First Amendment Rights and ask the Court to grant an injunction to prevent the State from enforcing them.

III. Standard of Review

In evaluating a motion for a preliminary injunction, a court considers whether: **[*9]** "'(1) [] the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest.'" *P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC*, 428 F.3d 504, 508 (3d Cir. 2005) (quoting *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir.1999)) (applying standard on motion for preliminary injunction); *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (same). Because a preliminary injunction is an extraordinary remedy, "[t]he burden lies with the plaintiff to establish every element in its favor, or the grant of a preliminary injunction is inappropriate." *P.C. Yonkers*, 428 F.3d. at 508. Moreover, the plaintiff, carrying the burden, must clearly show the four required prongs. *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed.

[2] Plaintiffs submitted affidavits by executives at two of the plaintiff news organizations in support of their motion. Specifically, Jennifer A. Borg, the corporate secretary and general counsel of North Jersey Media Group Inc. d/b/a The Record and The Herald News submitted **[*8]** an affidavit (the "Borg Aff."), as did James Kilgore, the CEO of The Princeton Packet, Inc. c/b/a Packet Publications. Because Ms. Borg's and Mr. Kilgore's Affidavits are virtually identical, the Court refers only to Ms. Borg's affidavit in its recitation of the facts.

2d 162 (1997). If disputed issues of fact exist, a court cannot issue a preliminary injunction. *Gruntal & Co. v. Steinberg*, 843 F. Supp. 1, 16 (D.N.J. 1994).

IV. Legal Discussion

Plaintiffs argue that although the State has a compelling interest in securing the **[*10]** right to vote, the Election Laws are unconstitutional because there are no alternative channels through which Plaintiffs can gather the information they seek and because the Election Laws are not narrowly tailored to protect the government interests in avoiding voter intimidation or solicitation. Defendants argue that the First Amendment does not require the State to permit solicitation of voters within 100 feet of a polling place and that Plaintiffs will still have ample opportunity to gather the information. They further assert that granting an injunction would create substantial harm for Defendants, who would have to rework election preparations and procedures days before the Presidential election; and the State's interest in protecting the right to vote is paramount. Applying the four factors to Plaintiffs' request, the Court finds that Plaintiffs do not carry their burden to establish that injunctive relief is warranted.

A. Likelihood of Success on the Merits

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press ..." [3] U.S. Const. amend. I. A "major purpose of [the First] Amendment was to protect "the free discussion governmental **[*11]** affairs," which "includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 219, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966). There is no dispute that the "First Amendment protects the media's right to gather news." *ABC*, 669 F. Supp. 2d at 487. However, the rights protected by the First Amendment are subject to reasonable restrictions. *See Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) ("The protections afforded by the First Amendment ... are not absolute and, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution."). The standard to determine whether a state regulation restricting speech, such as voter interviews and photographs, is constitutional "depends on whether the speech occurs in a traditional public forum ... and whether the statute is content-based or content neutral." *ABC*, 669 F. Supp. 2d at 487 (citing *The Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988)).

Here, it is undisputed that the public areas within 100 feet of a polling place are traditional public forums. *See Burson v. Freeman*, 504 U.S. 191, 196, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992) (finding that 100-foot zone around a polling place, which included sidewalks and streets adjacent to such polling place, was a traditional public forum); *see also Daily Herald*, 838 F.2d at 384 ("[P]ublic areas within 300 feet of the entrance to the polling place are traditional public forums because they traditionally are open to the public for expressive purposes").

With respect to the second prong of the constitutionality analysis, the Court finds that the Election Laws as originally drafted were content-neutral, since they forbid all types of expressive speech within the 100-foot zone. *See Exit Polling*, 200 N.J. at 304-05 (finding that the Election Laws were content-neutral because they prohibited all expressive **[*13]** activity and did not discriminate between permissible and non-permissible forms of speech). However, both parties agree that the Election Laws in their current form constitute content-based restrictions, which

---

[3] The First Amendment applies to the states through the Fourteenth Amendment. *See Thornhill v. Alabama*, 310 U.S. 88, 95, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). **[*12]** The New Jersey Constitution also guarantees freedom from government suppression of speech. It provides, in pertinent part: "Every person may freely speak, write and publish his sentiments on all subjects . . . . No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. art. I, para. 6.

are subject to strict scrutiny. [4] Thus, the Court will analyze the Election Laws under the rubric of content-based speech regulations.

For a content-based speech regulation to pass constitutional muster, "[t]he State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Burson*, 504 U.S. at 198 (internal citations and quotations omitted). Here, both parties agree that protecting the right to vote is of the upmost importance and there can be no doubt that the State has a compelling interest in ensuring the integrity of the electoral process. *See* *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society."); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) (Other rights, even the most basic, are illusory if the right to vote is undermined."); *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006) ("A State indisputably **[*15]** has a compelling interest in preserving the integrity of its election process.").

Having identified the State's compelling interests, the Court must determine whether the Election Laws are necessary to serve those interests. Plaintiffs argue that they have conducted interviews and taken photographs of voters at polling places in New Jersey for many years without incident and that they are unaware of any complaints of New Jersey election officials relating to their conduct. However, "the State need not wait for actual interference or violence or intimidation to erupt near a polling place for the State to act. The State may take precautions to protect and to facilitate voting; and the pertinent history is broad enough to provide the proof of reasonableness for a zone of order around the polls." *Citizens for Police Accountability Political Comm. et al. v. Browning*, 572 F.3d 1213, 1220-21 (11th Cir. 2009); *Burson*, 504 U.S. at 208 (holding that "*some* restricted zone around the voting area is necessary to secure the State's compelling interest" in preventing voter intimidation).

Here, a history of voter intimidation and obstruction in New Jersey is what led the legislature to enact the Election **[*16]** Laws in the first instance. *See* *Exit Polling*, 200 N.J. at 299-302 (discussing history of election regulation in New Jersey and noting that "New Jersey, like many other states, experienced corrupting and corrosive practices outside polling precincts that undermined the right to vote."). Although there is no evidence that these Plaintiffs have disrupted the voting process in the past, "[t]he cost of a disturbed election is too high to allow the State only to react to disturbances, but not to prevent disturbances." *Citizens*, 572 F.3d at 1221. Therefore, the Court concludes that the State's long history of election regulation and the practical need to prevent disturbances at the polls all prove that the Election Laws are necessary to protect the State's interest in ensuring the right to vote.

Accordingly, the only remaining question is whether the Election Laws are narrowly tailored to serve the State's interests. To prove that the Election Laws are narrowly tailored, the State must show that the statutes are "reasonable and do[] not *significantly impinge* on constitutionally protected rights." *Burson*, 504 U.S. at 209 (internal citation and quotation omitted, emphasis added in *Burson*). The **[*17]** Supreme Court's ruling in *Burson* is instructive here. In that case, the Court addressed the facial constitutionality of a Tennessee statute that prohibited campaign activity within

---

[4] In their brief, Plaintiffs apply the standard for content-neutral speech restrictions in arguing that the Election Laws are unconstitutional. See Pl.'s Br. at 13-14. Under that standard, the government may regulate the time, place and manner of content-neutral speech, so long as such restrictions are "narrowly tailored to serve a significant interest, and leave open ample alternatives for communication." *Burson*, 504 U.S. at 197 (citing *United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983)). However, Plaintiffs argued at oral argument that the Election Laws are in fact content-based because the New Jersey Supreme Court's decision in *Exit Polling* specifically exempted "de minimis speech, such as casual banter between voters about trivial subjects, *e.g.,* the weather" from the Election Laws' prohibitions. *See* *Exit Polling*, 200 N.J. at 305 fn. 9. While **[*14]** the Court does not find this argument particularly persuasive, it notes that as a result of the ABC decision exit polling is now treated differently than other types of protected speech in New Jersey. And in any event, the State concedes in its brief that the Election Laws should be analyzed under the standard of content-based speech regulations. See Def.'s Br. at 10-11.

100 feet of a polling place. [5] *Id.* at 193. In upholding the Tennessee statute, the Court found that the 100-foot zone around a polling place was a "minor geographic limitation" and restrictions in that zone did not constitute a "significant impingement" of First Amendment rights. *Id.* at 210.

Plaintiffs argue that *Burson* is not applicable here because the facts are materially different. In *Burson*, a campaign worker wanted to solicit votes of voters entering a polling place, whereas Plaintiffs aim to conduct interviews and take photographs of voters only *after* they have already voted. While the facts in Burson are indeed **[*18]** different and it may not be binding on the Court in this case, the Court nonetheless finds the *Burson* opinion to be highly persuasive and applies its reasoning here. The New Jersey Election Laws create the same size restrictive zone as the Tennessee statute that was upheld in *Burson* and the Court concludes that the Election Laws are sufficiently tailored to meet the State's needs without significantly impinging on Plaintiffs' constitutional rights. Other federal courts have applied *Burson* in cases involving restrictions against approaching voters after they have voted and have reached the same conclusion. *See, e.g., Citizens*, 572 F.3d at 1218-19 (applying *Burson* and holding that Florida statute, which prohibited solicitation of voters *exiting* a polling place within 100 feet of such polling place, was constitutional). [6] Therefore, the Court finds that Plaintiffs are unlikely to succeed on the merits of their claim.

B. Irreparable Harm

A plaintiff seeking a preliminary injunction must establish that he is likely to suffer irreparable harm in the absence of preliminary relief. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The possibility of some remote future injury is insufficient to justify injunctive relief. *Id.; see also Acierno v. New Castle Cnty.*, 40 F.3d 645, 653 (3d Cir. 1994). **[*20]** With respect to First Amendment rights, the Supreme Court has recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). Relying on *Elrod*, Plaintiffs argue they will suffer irreparable harm as a result of the loss of their First Amendment rights. Plaintiffs assert that they have no alternative method to gather the information they desire and that the farther away the reporters and photographers must stand from a polling place, the fewer voters there are and the more difficult it becomes to identify them. The Court does not find these arguments compelling.

As discussed above, the Election Laws constitute reasonable restrictions under the First Amendment and Plaintiffs have not suffered an unconstitutional loss of their First Amendment rights. Moreover, there are ample alternative methods of obtaining the desired information. Reporters and/or photographers can operate at a distance of 101 feet from a polling site or conduct their interviews through alternate means, such as over the phone. On the presidential election day, some five million people are expected to **[*21]** vote at more than 3,400 polling places in operation in New Jersey. Even if some of those voters leave the polling place or become unavailable before they reach the 100-foot barrier, thousands — if not millions — of others will not. Plaintiffs surely can find sufficient numbers of such voters

---

[5] The Tennessee statute banned "the display of campaign posters, signs or other campaign materials, distributions of campaign materials, and solicitation of votes for or against any person or political party of position on a question" within 100 feet of a polling place. *Id.* at 193. The Court considered the statute to be a content-based restriction on protected speech and applied strict scrutiny.

[6] The Court is aware that the *ABC* Court found that *Burson* was distinguishable on the facts and that the Election Laws could not prohibit exit polling within the 100-foot exclusionary zone. *See ABC*, 669 F. Supp. 2d at 488 (finding that *Burson* was not applicable because it dealt **[*19]** with the state's interest in prohibiting certain activity *at the entrance* to a polling place, as opposed to exit polling, which takes place as voters *leave* a polling place). Although this Court does not find the reasoning in *ABC* persuasive, it does not need to reach the issue of whether exit polling should be permitted within the 100-foot zone at this time because exit polling differs substantially from the activities that Plaintiffs wish to conduct. In particular, exit polling involves the collection of data from a random sample of voters in a manner that satisfies polling experts, so as to ensure the accuracy of the data. *Id.* at 484. Here, Plaintiffs simply wish to conduct voter interviews and take photographs and there is no need for Plaintiffs to select voters in any particular manner for the interviews or photographs to be useful.

that are willing to be interviewed and/or photographed. [7] Likewise, modern photographic technologies enable Plaintiffs to take photos from a substantial distance and Plaintiffs will be able to approach voters for close-up shots outside of the 100-foot zone. [8] If there is any confusion about who is in fact a voter, Plaintiffs can simply ask the individual if he or she just voted prior to asking whether he or she will consent to an interview.

That is not to say that Plaintiffs might not have to work harder to achieve their ends and it may well be that from a distance of 101 feet, Plaintiffs' efforts will not achieve their maximum desired effect. Standing alone, however, that does not constitute a constitutional violation. *See* *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000) ("An adequate alternative does not have to be the speaker's first or best choice, or one that provides the same audience or impact for the speech.") (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 802, 109 S. Ct. 2746, 105 L. Ed. 2d 661) (1989)). The Court also notes that these restrictions have been in effect since 2007, yet Plaintiffs have proffered absolutely no evidence that they were hindered in their efforts to gather the information they needed in either the 2008 or 2010 national elections. While Plaintiffs argue that they will encounter difficulty in this election cycle, the mere possibility of some remote future injury is insufficient to justify the imposition of injunctive relief. See *Winter*, 555 U.S. at 22.

Finally, **[*23]** as discussed below, even if Plaintiffs were able to demonstrate irreparable harm from the requirement that they remain at least 100 feet away from the entrance of polling places while conducting voter interviews and taking photographs, any such injury is outweighed by the public interest and the State's interest in an orderly and efficient voting process.

C. Harm to the Defendants

In weighing Plaintiffs' request for a preliminary injunction, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. The Court finds that granting Plaintiffs' request could cause irreparable harm to Defendants.

Plaintiffs' request seeks, in part, for the Court to modify the State's practices and procedures with respect to the 100-foot exclusionary zone around polling places less than two weeks before a presidential election, at a time when the State's preparations for the election are well underway. Impinging upon the State's administrative and regulatory process for overseeing elections at this late date could cause a substantial burden on Defendants. Any order changing the operations **[*24]** of New Jersey's Election Laws would cause significant hardship for the 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. In addition, it could cause hardship for the voters who would be subjected to new and potentially confusing regulations on the eve of the election. *See* *Purcell*, 549 U.S. at 4-5 (Court orders affecting elections ... can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.").

Plaintiffs have had ample opportunity in the three years since the *Exit Polling* and *ABC* cases were decided to bring this action, yet they waited until the eleventh hour to seek emergent relief from this Court. While Plaintiffs are of course entitled to decide when best to bring an action in federal court, the potential harm to Defendants is significantly increased at this stage. By comparison, as discussed above, Plaintiffs will still be able to gather the information they need. Accordingly, the balance of equities favors Defendants.

---

[7] In contrast to exit polling, which requires that pollster approach voters according to a certain sampling methodology to ensure accuracy, *see* *ABC*, 669 F. Supp. 2d at 484, Plaintiffs' activities have no such requirement. In other words, there is no reason to believe that approaching Voter A as opposed to Voter B for the purposes of taking photographs and/or conducting interviews would make any difference whatsoever in the accuracy of the information gathered.

[8] Plaintiffs **[*22]** argued at oral argument that although technology allows them to take photographs from greater distances, they also wish to take close-up and candid shots of voters.

D. [*25] Injunction is not in the Public Interest

Finally, the Court determines that public concerns warrant that the Court deny Plaintiffs' request. In reaching this decision, the Court considers two principle interests: (1) 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; and (2) the public's interest in obtaining information from the media about the results of the election and ensuring that the media's rights to free speech are not unduly abridged.

While the Court does not doubt the Plaintiffs' good intentions to report on stories of public interest without interfering with the voting process, "it takes little foresight to envision polling places awash with exit [reporters], some competing (albeit peacefully) for the attention of the same voters at the same time to discuss different issues or different sides of the issue." *Citizens*, 572 F.3d at 1221. This would not only create unnecessary confusion, but creates the likelihood that "some — maybe many — voters faced with *running the gauntlet* will refrain from participating in the election **[*26]** process merely to avoid the resulting commotion when leaving the polls." *Id.* (emphasis in original). And although the media's right to free speech is vitally important, "voting is about the most important thing there is." *Id.* at 1221. Ultimately, considering the implicated concerns and according them due weight, the Court determines that public interest weighs in favor of denying Plaintiffs' request. Therefore, the Court concludes that injunctive relief would be inappropriate.

V. Conclusion

For the reasons above, the Plaintiffs' request for a preliminary injunction is denied. An appropriate order follows.

/s/ Joel A. Pisano

JOEL A. PISANO, U.S.D.J.

Dated: November 13, 2012

End of Document

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 **ATTORNEY AFFIRMATION**

1. I am an attorney authorized to practice law in the District of New Jersey. I represent Defendant Christine Giordano Hanlon, Monmouth County Clerk.
2. Attached hereto is a link to the Washington Post article cited in Footnote 1 of the attached Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction: https://www.washingtonpost.com/politics/2023/09/23/bob-menendez-andy-kim-primary/. This link leads to a true and correct copy of the article cited to show that Plaintiff Andy Kim announced his candidacy for U.S. Senate on September 23, 2023.
3. Attached hereto is a link to the New Jersey Globe article cited in Footnote 6 of the attached Brief in Opposition to Plaintiffs' Motion for a Preliminary

Injunction: https://newjerseyglobe.com/congress/kim-says-he-wants-to-end-the-county-line/. This link leads to a true and correct copy of the article cited to show that Plaintiff Andy Kim stated, "I'll work within the system we have, seek county endorsements, and respect the contribution structures and limits that are currently in place."

4. Attached as Exhibit A is a true and correct copy of an email request in *Conforti* to delay the exchange of discovery responses. Plaintiffs' counsel sought a nearly two-month extension to the exchange of discovery responses from February 20, 2024 to April 12, 2024.

Dated: March 6, 2024

/s/ Jason C. Spiro
Jason C. Spiro
SPIRO HARRISON & NELSON LLC

Attorney for Defendant Christine Giordano Hanlon

EXHIBIT A

Fiona Dugan

From: Brett Pugach <bpugach@weissmanmintz.com>
Sent: Monday, February 12, 2024 2:55 PM
To: Edward J. Florio; William Tambussi; Nicole Adams; Jaime Placek; Angelo J. Genova; mnatale@malamutlaw.com; ussrecount@aol.com; wpalatucci@mccarter.com; jmorison@bskb-law.com; Henal Patel; mmakhail@mccarter.com; Mathew Thompson; William W. Northgrave; rhaygood@njisj.org; Joshua H. Raymond; hclewell@genovaburns.com; jborek@genovaburns.com; Main; Alyssa I. Lott; Robert Renaud; Cohen_Alan J.; lstuart@msbnj.com; adam@malamutlaw.com; Ryan Renzulli; Flavio Komuves; Yael Bromberg, Esq.; George Cohen; Jack Sahradnik; Jason Spiro
Subject: [External Email] Conforti v. Hanlon Request for Extension of Time to Respond to Written Discovery Requests

Counsel,

Response to interrogatories and RFPs are currently due February 20. Plaintiffs are requesting an extension of the deadline to respond to written discovery requests in light of a medical and case scheduling issues of counsel. The AG's office has already provided consent. Please advise of your consent on behalf of your clients to move the date to April 12, 2024 for all parties.

Best regards,
Brett

Brett M. Pugach, Esq.
Of Counsel
Weissman & Mintz LLC
*****Please note our new mailing address*****
220 Davidson Avenue, Suite 410
Somerset, New Jersey 08873
Office: 732-563-4565
Direct: 732-361-4038
Fax: 732-560-9779