No. 24-1594

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

ANDY KIM, in his personal capacity as a candidate for U.S. Senate, *et al.*,

Plaintiffs-Appellees,

v.

CHRISTINE GIORDANO HANLON, in her capacity as Monmouth County Clerk, *et al.,*

Defendants.

CAMDEN COUNTY DEMOCRATIC COMMITTEE,

Intervenor-Appellant.

ON APPEAL FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, NO. 3:24-CV-01098-ZNQ-TJB

BRIEF OF AMICUS CURIAE ELECTION LAW CLINIC AT HARVARD LAW SCHOOL IN SUPPORT OF APPELLEES

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April 9, 2024.

CORPORATE DISCLOSURE STATEMENT

The President and Fellows of Harvard College, acting through the Election Law Clinic at Harvard Law School ("ELC") is a non-profit organization under Section 501(c)(3) of the Internal Revenue Code. ELC neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of ELC.

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INTRODUCTION

New Jersey's county line system for primary election ballots is a national outlier, used by no other state. And for good reason. As appellees' filings make clear, the county line massively distorts election results, conferring an enormous advantage to candidates on the line and a nearly insurmountable handicap to all other candidates. Appellees' statistics about the magnitude of this skew are astonishing. Between 2002 and 2022, the difference between being on and off the county line for congressional candidates "ranged from 13 to 79 percentage points, with a median of 36 percentage points." Compl. Ex. C, at 3. The loss rate for incumbents running off the county line over this period (52.6%) was nearly 38 times higher than the loss rate for incumbents running on the line (1.4%). *Id.* at 4. In a novel experiment conducted for this litigation, congressional candidates placed on the county line in New Jersey's Seventh and Eighth Districts more than doubled their vote shares, drawing over twenty percentage points more support simply because of their ballot positions. Compl. Ex. B ¶ 175.

New Jersey's county line system is unique, but federal litigation over the constitutionality of electoral regulations is entirely familiar. The purpose of this brief is to compare the county line to other electoral practices that courts and scholars have previously analyzed. *First*, the distortive effect of the county line is far greater—at least an order of magnitude larger—than those of frequently

litigated measures like photo ID requirements for voting, proof-of-citizenship requirements for registering to vote, voter roll purges, and cutbacks to early and absentee voting. Yet these laws have often been subjected to heightened scrutiny, even invalidated, despite their much smaller impacts. *Second*, the county line is also far more distortive than the ballot design policy of automatically listing certain candidates first (like candidates from the governor's party). Yet numerous federal and state courts have nullified ballot primacy rules because they unjustifiably manipulate voters' choices at the polls.

Third, while the county line conveys party endorsements, its influence on election outcomes remains large even when it's disentangled from them. This shows that the county line's distortive effect is the product of ballot design, not the transmission of information about parties' preferred candidates to voters. And *fourth*, because the county line confuses voters and skews their choices, eliminating it would enable voters to express their preferences more accurately at the polls. This distinguishes the county line from most other policies that are challenged close to elections, whose revision might plausibly cause voter confusion.

Accordingly, this Court should affirm the district court's issuance of a preliminary injunction on the ground that the county line system is unconstitutional. As this brief stresses, the unlawfulness of the county line is

underscored by the many cases in which courts have struck down significantly *less* distortive electoral regulations.

STATEMENT OF INTEREST

Amicus curiae Election Law Clinic at Harvard Law School ("ELC") is a clinical legal program committed to protecting free and fair elections through litigation and legal advocacy.[1] Its mission is to train the next generation of election lawyers and to bring novel academic ideas to the practice of election law. ELC aims to build power for voters, not politicians, and recognizes that the struggle for voting rights is a struggle for racial justice. ELC has represented parties in partisan gerrymandering, racial gerrymandering, and voter suppression litigation. *See e.g.*, *Jacksonville Branch of the NAACP v. City of Jacksonville*, 635 F. Supp. 3d 1229 (M.D. Fla. 2022); *Citizens Project v. City of Colorado Springs,* No. 1:22-cv-01365 (D. Colo. 2022); *Clarke v. Wis. Elections Comm'n*, 998 N.W.2d 370 (Wis. 2023); *Mont. Democratic Party v. Jacobsen*, 518 P.3d 58 (Mont. 2022).

ELC writes in order to compare New Jersey's county line system for primary election ballots to other electoral policies assessed by courts and scholars. ELC hopes this comparative perspective will prove useful to the Court by

[1] All the parties to this appeal have consented to the filing of this brief. No party's counsel or other person authored this brief, in whole or in part, or made a monetary contribution to fund its preparation or submission.

illuminating how much more distortive the county line is than essentially all other modern electoral practices.

ARGUMENT

I. Courts Have Routinely Applied Heightened Scrutiny to, and Invalidated, Electoral Regulations with Far Smaller Effects than the County Line.

In courtrooms across the country, litigants frequently allege that electoral regulations violate the First and Fourteenth Amendments and their state constitutional analogues. *See, e.g.*, Richard L. Hasen, *Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 Election L.J. 150 (2022). Some of these suits succeed and some fail. But almost all of them have one thing in common: They involve policies whose effects on election results pale compared to the impact of the county line. This section addresses "generic" measures pertaining to issues other than ballot design. The next section zeroes in on ballot primacy rules, arguably the litigated provisions most similar to the county line. The third section distinguishes the county line from party endorsements that are communicated *without* warping ballots. And the fourth section explains that eliminating the county line—unlike amending most electoral provisions—would avoid, not create, voter confusion.

To be sure, the empirical evidence emphasized by most of this litigation relates to voter turnout (or other metrics of voter participation), not voters' choices

among candidates. But it's plain that a regulation's distortive effect on voters' choices is an aspect of "the character and magnitude" of the voting burden it imposes. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Consider a policy (not unlike the county line) that prevents no one from casting a ballot but guarantees that a favored candidate will win a supermajority of the vote. This policy levies a heavy burden on both the voters who support other candidates and those inevitably defeated candidates. Indeed, for them, the policy is indistinguishable in operation from one overtly disenfranchising all backers of unfavored candidates.

Over the last couple decades, photo ID requirements for voting have likely been the most controversial voting restrictions. Despite the furor over these measures, most studies find that their effects on election outcomes are minor: less than one percentage point. *See, e.g.*, Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2018*, 136 Q.J. Econ. 2615, 2637, 2645 (2021); Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. Pol. 363, 372 (2016). The reason for this marginal impact is that, while many eligible voters lack valid photo IDs, few individuals who *do* vote (in states without photo ID laws) or *would* vote (in states with these laws) are missing proper identification. *See, e.g.*, Bernard L. Fraga & Michael G. Miller, *Who Do Voter ID Laws Keep from Voting?*, 84 J. Pol. 1091, 1103 (2022); Phoebe Henninger et al., *Who Votes Without Identification? Using*

Individual-Level Administrative Data to Measure the Burden of Strict Voter Identification Laws, 18 J. Empirical Legal Stud. 256, 258 (2021).

Notwithstanding these small electoral effects, numerous courts have applied heightened scrutiny to, and invalidated, photo ID laws, especially under state constitutional counterparts to the First and Fourteenth Amendments. These courts have reasoned that even small electoral effects are cognizable voting burdens. These courts have also found no state interests that could justify these burdens since in-person voter impersonation—the main evil sought to be prevented by photo ID laws—is practically nonexistent today. *See, e.g.*, *Martin v. Kohls*, 444 S.W.3d 844 (Ark. 2014); *Applewhite v. Pennsylvania*, No. 330 M.D.2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012); *Weinschenk v. Missouri*, 203 S.W.3d 201 (Mo. 2006).

Proof-of-citizenship requirements for registering to vote are similar to photo ID laws in that they too demand documentation to participate in the electoral process. These requirements make it more difficult for eligible voters to be placed *on* the voter rolls. In turn, voter purges—the terminations, sometimes erroneous, of individuals' voter registrations—make it easier for eligible voters to be taken *off* the voter rolls. Both proof-of-citizenship requirements and voter purges can result in eligible voters being unable to cast ballots. But both policies have negligible electoral impacts. This is because they affect too few people to make a difference

in all but the closest elections. *See, e.g.*, Gregory A. Huber et al., *The Racial Burden of Voter List Maintenance Errors: Evidence from Wisconsin's Supplemental Movers Poll Books*, Sci. Advances, Feb. 17, 2021, at 5. It's also because "today's registration laws," in general, have minimal "partisan implications." Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 Persps. on Pol. 507, 510 (2004).

Despite these muted electoral effects, courts have repeatedly blocked both proof-of-citizenship requirements and voter purges. The Tenth Circuit recently enjoined Kansas's proof-of-citizenship law, finding that it "imposed a significant burden on the right to vote" and that the state lacked any sufficient "interest [that] made it necessary to burden voters' rights here." *Fish v. Schwab*, 957 F.3d 1105, 1132-33 (10th Cir. 2020); *see also, e.g.*, *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, ___ F. Supp. 3d ___, 2024 WL 862406 (D. Ariz. Feb. 29, 2024) (striking down Arizona's proof-of-citizenship law). Likewise, the Seventh Circuit twice nullified Indiana policies that would have made possible largescale voter purges. *See League of Women Voters of Indiana, Inc. v. Sullivan*, 5 F.4th 714 (7th Cir. 2021); *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019); *see also, e.g.*, *Wisconsin ex rel. Zignego v. Wis. Elections Comm'n*, 957 N.W.2d 208 (Wis. 2021) (refusing to compel a voter purge requested by an activist group).

Cutbacks to early voting and absentee voting are two more common voting restrictions in modern American politics. These curbs likely reduce voter turnout, just as the adoption of convenience voting boosts participation. *See, e.g.*, Paul Gronke et al., *Convenience Voting*, 11 Ann. Rev. Pol. Sci. 437, 443 (2008). But these curbs *don't* have substantial electoral consequences. "In terms of the partisan composition of the electorate," changes to early voting and absentee voting "seem neither to help nor to hurt political parties." *Id.* at 444-45; *see also, e.g.*, Daniel M. Thompson et al., *Universal Vote-by-Mail Has No Impact on Partisan Turnout or Vote Share*, 117 Proc. Nat'l Acad. Sci. 14052, 14054 (2020). The explanation is that the individuals prevented from voting by these policies politically resemble the voters who remain able to cast ballots. That is, the policies influence the size, but not the makeup, of the electorate. *See, e.g.*, Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 Am. Pol. Rsch. 471, 482 (2005); Gronke et al., *supra*, at 444.

Even though cutbacks to early voting and absentee voting are mostly inconsequential, in electoral terms, courts have often stopped them from going into effect. The Sixth Circuit first invalidated an Ohio law that would have barred non-military voters from voting in person during the three days before election day, concluding that this change "unjustifiably burdened" the franchise. *Obama for America v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012). The same court later struck

down another Ohio law that would have eliminated five days of early voting, reasoning that "none of the [state's] interests . . . sufficiently justify the significant [voting] burden." *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 549 (6th Cir. 2014), *vac'd as moot*, 2014 WL 10384647 (6th Cir. 2014). With respect to absentee voting, when the coronavirus pandemic increased its volume and complicated election administration, the Supreme Court allowed a district court order to go into effect extending by six days the deadline for receiving absentee ballots. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1206 (2020). Also in this period, a federal district court enjoined United States Postal Service policy shifts that slowed mail delivery and thus hindered absentee ballots from being received and returned on time. *See Richardson v. Trump*, 496 F. Supp. 3d 165 (D.D.C. 2020).

Of course, none of these electoral regulations is equivalent to New Jersey's county line system. But that's precisely the point. None of these electoral regulations materially distorts election outcomes. Yet each of these measures was carefully scrutinized and then declared unlawful by a court, typically for violating the First and Fourteenth Amendments of the federal Constitution. If this was the fate of each of these measures, then the same verdict should await the county line. The county line, after all, is both more distortive than any of the policies discussed

above and unsupported by any legitimate state interest. Its unconstitutionality follows logically from the illegality of the above policies.

II. Courts Have Frequently Struck Down Ballot Primacy Laws Far Less Impactful than the County Line.

New Jersey's county line system is, at its core, a kind of ballot design. To date, the most frequently litigated aspects of ballot design have been ballot primacy rules: rules requiring certain favored candidates to be listed first on ballots. These favored candidates can be candidates from the governor's party, candidates from the party of local officials, candidates from the party receiving the most votes in the last election, or incumbent candidates. In the academic literature, it's well established that the top position on a ballot confers a small but statistically significant advantage to a candidate. This edge, known as the primacy effect, has been studied for at least half a century. *See, e.g.*, W. James Scott Jr., *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 S. Cal. L. Rev. 365, 376 (1972) (foundational study of the primacy effect). As appellees' experts correctly note, the primacy effect has been demonstrated across a wide array of elections and geographies. *See* Compl. Ex. B ¶ 41 ("Evidence of benefits for candidates listed first on the ballot has been shown across the United States in elections in California, Florida, Illinois, New Hampshire, New York, Ohio, Texas, North Dakota, Vermont, and Wyoming." (internal citations omitted)).

While the magnitude of the primacy effect varies with the unique contours of each election, the thrust of the research is this: Candidates placed at the top of the ballot can expect, on average, an electoral advantage between one and five percentage points. *See* Compl. Ex. D, at 14-15. This edge is larger in primary elections and in lower-level races appearing further down ballots: both contexts in which voters have less information about candidates. *See id.* An effect of this size can swing a close election but doesn't change most election outcomes. An effect of this size is also about an order of magnitude smaller than the huge distortive impact of the county line.

Notwithstanding the relatively minor electoral implications of ballot primacy rules, many courts have invalidated these policies. The supreme courts of New Hampshire and California subjected ballot primacy laws to strict scrutiny based on the burden they pose to voters. New Hampshire formerly had two ballot primacy policies: one requiring all candidates for certain offices to be listed in alphabetical order, the other (somewhat like the county line) establishing "party columns" grouping candidates by party and assigning the first column to the party with the most votes in the last election. The court decided that the federal *Anderson-Burdick* framework applied; and that, under this framework, the burden on "candidates running in minority parties and against candidates whose surnames do not begin with letters located near the beginning of the alphabet" warranted strict scrutiny,

which the policies couldn't survive. *Akins v. Sec'y of State*, 904 A.2d 702, 707 (N.H. 2006). California also used to have two ballot primacy practices, one favoring incumbents and the other ordering candidates alphabetically. The court applied strict scrutiny to, and then struck down, both practices, explaining that "any procedure which allocates such advantageous positions to a particular class of candidates inevitably discriminates against voters supporting all other candidates." *Gould v. Grubb*, 536 P.2d 1337, 1338-39 (Cal. 1975).

Consistent with the logic of these cases, the district court correctly determined that New Jersey's county line triggers—and fails—strict scrutiny because of its enormous and unjustified distortive impact. *See Kim v. Hanlon*, 2024 WL 1342568, at *17 (D.N.J. Mar. 29, 2024). Notably, multiple courts have nullified ballot primacy rules even under less stringent standards of review. The Eighth Circuit, for instance, held that a North Dakota law that assigned top ballot positions to incumbents was unconstitutional under rational basis review. *See McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980). The court reasoned that mere "convenience" for voters backing incumbents couldn't justify "burden[ing] the fundamental right to vote possessed by supporters of the last-listed candidates." *Id.* The New York Supreme Court likewise ruled that a ballot primacy law benefiting incumbents had no rational basis. The state lacked a valid interest in "affording such favoritism to a candidate merely on the basis of his having been

successful at a prior election," thereby "preserving for only the remaining candidates the competition heretofore required for all." *Holtzman v. Power*, 313 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. 1970), *aff'd*, 311 N.Y.S 2d 824 (N.Y. App. Div. 1970); *see also, e.g.*, *Graves v. McElderry*, 946 F. Supp. 1569, 1581 (W.D. Okla. 1996) (Oklahoma law providing that Democratic candidates are always listed first "cannot survive even this Court's lowest level of scrutiny, the rational basis test); *cf. Sangmeister v. Woodard*, 565 F.2d 460, 467 (7th Cir. 1977) (Illinois county clerks' practice of placing candidates from their party in top ballot positions amounts to intentional discrimination); *Weisberg v. Powell*, 417 F.2d 388, 392 (7th Cir. 1969) (similar).

Unsurprisingly, not all challenges to ballot primacy laws have succeeded. In some cases, the plaintiffs failed to present "competent statistical evidence or expert testimony" documenting the primacy effect. *Green Party of Tenn. v. Hargett,* No. 3:11-cv-692, 2016 WL 4379150, at *38 (M.D. Tenn. Aug. 17, 2016). In others, the disputed policy was neutrally structured such that it "neither systematically advantage[d] incumbents nor advantage[d] the state's most popular party." *Pavek v. Simon*, 967 F.3d 905, 908 (8th Cir. 2020). But neither of these defenses can rescue New Jersey's county line system. As the district court found, the empirical evidence that the county line dramatically benefits candidates appearing on the line is overwhelming. *See Kim*, 2024 WL 1342568, at *16-17. And the system is

structured the opposite of neutrally—it advantages whomever party insiders choose. Since ballot primacy rules to which these defenses are inapplicable have been invalidated time and again, the same result should follow for the far more distortive county line.

III. The County Line Is Distinct from a Party Endorsement, Which a Party Would Remain Free to Give if the County Line Were Eliminated.

Next, the county line might be analyzed relative not to generic electoral regulations, nor to aspects of ballot design like ballot primacy rules, but rather to party endorsements. Appellees' experts explain how the consequences of the county line and of party endorsements can be distinguished in New Jersey. (This distinction can be difficult to make based on election results from county line ballots alone, since the county line itself indicates which candidates a county party endorses.) First, experimentally, party endorsements can be conveyed to voters on conventional office-block ballots. Any advantage enjoyed by an endorsed candidate must then be attributable to the endorsement—not to the county line system, which isn't used in the experiment. This approach reveals that "the presence of an endorsement benefit is inconsistent across contests," appearing in two surveyed races out of three. Compl. Ex. B ¶ 134. Second, observationally, since some New Jersey counties don't use the county line, the performance of endorsed candidates in these counties can be compared to their performance in county line counties. In 35 of 37 races from 2012 to 2022, endorsed candidates did

better in county line than in non-county line counties. The edge attributable to the county line—controlling for party endorsement—was a median of eleven percentage points, rising to a median of fifteen percentage points for non-incumbent candidates. Compl. Ex. C, at 4.

The other key point about party endorsements is that parties remain free to make them following the district court's decision. Parties can endorse, nominate, and otherwise support candidates as they see fit without encroaching on the design of ballots themselves. If the state thinks it's important to communicate party endorsements to voters on actual ballots, that can also be done without use of the county line. On standard office-block ballots, it can be specified which candidates are endorsed by which parties (or which candidates are associated with which slogans). *See* Compl. ¶¶ 180, 196, 209.

This possibility of disentangling party endorsements from the county line negates any claim that the county line's elimination infringes parties' associational rights. A party has no First Amendment entitlement to transmit the identity of its endorsed candidate to voters via a state-sponsored ballot. And even if a party did implausibly possess this entitlement, the party's preference could be shared with voters, on the ballot, without reliance on the county line. *Cf. Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (rejecting a party's First

Amendment challenge to an electoral system that prevented the party from conveying on the ballot whom it endorsed or nominated).

IV. Eliminating the County Line Would Avoid, Not Create, Voter Confusion.

Finally, because New Jersey's primary election is roughly two months away, it's necessary to determine whether the so-called *Purcell* principle bars a preliminary injunction at this point. A critical factor in the *Purcell* analysis is whether changing an electoral practice would cause more or less voter confusion. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections . . . can themselves result in voter confusion . . . ."). If the elimination or amendment of the challenged policy would confuse voters, pre-election relief is disfavored. Conversely, if "the changes in question are at least feasible before the election without significant . . . confusion," "the *Purcell* principle thus might be overcome." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays).

This case is unusual, from a *Purcell* perspective, in that New Jersey's county line system is itself highly confusing to voters. The district court found that the county line "adversely affects the named parties by . . . leading to voter confusion." *Kim*, 2024 WL 1342568, at *8. The court explained that candidates on the same line often espouse different positions and would prefer not to be bracketed together. This situation is "confusing to voters" who may not understand why such

candidates are nevertheless grouped on ballots. *Id.* at *19. The court added that the county line raises the "concern of overvoting" when multiple candidates for the same office share the line. *Id.* at *20 n.5. In one race, for example, almost one-third of voters cast invalid overvotes because of this stacking of the line. *See id.* Moreover, voters may be unsure how to vote for candidates *not* on the line and thus "relegated to obscure portions of the ballot in Ballot Siberia." *Id.* at *19.

In contrast, regular office-block ballots—the remedy mandated by the district court—are far less confusing. Office-block ballots are the means through which voters cast ballots in all states other than New Jersey. Office-block ballots are also how voters vote in primary elections in Salem and Sussex Counties in New Jersey and in many local elections throughout the state. *See id.* at *22-23. Critically, office-block ballots lack all the puzzling aspects of the county line system. There's no line as to whose meaning voters may be uncertain. There's no possibility of multiple candidates for the same office crowding the line and inducing overvoting. There's no forlorn region of the ballot known as Ballot Siberia. There's only the random listing of candidates by office sought, an intuitive, easily understandable ballot format.

In these circumstances—where the challenged policy is itself confusing and judicial intervention would lessen voter confusion—courts have frequently held that *Purcell* doesn't bar pre-election relief. In *U.S. Student Association v. Land*,

546 F.3d 373 (6th Cir. 2008), for example, the Sixth Circuit declined to stay a district court's preliminary injunction of a Michigan law removing individuals from local precinct lists if their voter ID cards were returned as undeliverable. The court reasoned that the law itself "cause[d] confusion, leaving recently registered voters who have not received their original voter ID cards unsure of their status and of what they need to do in order to exercise their right to vote." *Id.* at 388. By comparison, the injunction of the law increased voter confidence by "ensur[ing] that each individual who has properly registered to vote . . . will be able to cast a ballot on election day." *Id.*

In *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11 (1st Cir. 2020), similarly, the First Circuit left in place a district court's suspension of a Rhode Island requirement that a voter casting a ballot by mail sign the ballot in the presence of two witnesses or a notary. The court observed that, under this requirement, "it is likely that many voters will be surprised when they receive ballots, and far fewer will vote." *Id.* at 17. On the other hand, the suspension of the requirement wouldn't "create any problems for the state['s] voters." *Id.* at 16. This was apparent from the fact that none of "the elected constitutional officers charged with ensuring free and fair elections" appealed the district court's ruling. *Id.*; *see also Republican Nat'l Comm. v. Common Cause R.I.*, 141 S. Ct. 206, 206 (2020) (since "no state official has expressed opposition," "the applicants lack a

cognizable interest" in the requirement's enforcement). Of course, the same is true here, where no County Clerk contests the abolition of the county line. These officials' acquiescence indicates that office-block ballots will alleviate, not aggravate, voter confusion in New Jersey.

In *La Unión del Pueblo Entero v. Abbott*, ___ F. Supp. 3d ___, 2023 WL 8263348 (W.D. Tex. Nov. 29, 2023), too, a district court ruled that *Purcell* was no obstacle to a permanent injunction of a Texas law adding an identification number-matching procedure to voting by mail. The court found that "[c]ounty officials reported voter confusion and frustration" because of the law, "including cases of voters discarding carrier envelopes that election officials had returned due to a failure to meet S.B. 1 requirements rather than taking additional steps to overcome the ballot rejection." *Id.* at *6; *see also id.* (describing "the pervasive confusion" generated by the law). Conversely, the court's order wouldn't "lead to the kind of voter confusion envisioned by *Purcell*." *Id.* at 28. It wouldn't "affect the procedures for voting by mail from a voter's perspective," and it would mean that voters could "apply for and cast mail-in ballots regardless of their ability to provide a matching ID number." *Id.*; *see also, e.g.*, *Rose v. Raffensberger*, 143 S. Ct. 58 (2022) (vacating a stay granted by the Eleventh Circuit on *Purcell* grounds where voters wouldn't be confused by an election's postponement); *Memphis A. Randolph Inst. v. Hargett*, 977 F.3d 566, 568 (6th Cir. 2020) (declining to stay a

preliminary injunction of a Tennessee law requiring voters who registered online or by mail to vote in person because "the injury to potential voters" from a stay "is great"); *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 368 (9th Cir. 2016) (en banc) (enjoining an Arizona law criminalizing third-party mail-in ballot collection where, "in contrast to *Purcell*, an injunction will not confuse election officials or deter people from going to the polls").

It's true enough that, in many cases, voter confusion cuts the other way—against, not for, pre-election relief. But those cases usually involve situations where the electoral status quo isn't particularly unclear and court-imposed remedies run a serious risk of perplexing a substantial number of voters. New Jersey's county line system differs on both counts. It's bewildering to many voters. And the office-block ballots that would replace it are the essence of simplicity. Under these uncommon conditions, *Purcell*'s voter confusion factor weighs strongly in favor of the district court's preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's preliminary injunction on the ground that New Jersey's county line system is unconstitutional. The county line is far more distortive than many electoral regulations—including aspects of ballot design—that courts have previously struck down because of their unjustified voting burdens.

Dated: April 9, 2024

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local R. 28.3(d), I certify that I am admitted to the Bar of the United States Court of Appeals for the Third Circuit.

/s/ Ronald Chen
Counsel of Record

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(g) and Local Rule 31.1, I certify the following:

1. This brief complies with Rule 29(5) because it contains 4,712 words, excluding those parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because the brief has been prepared in Times New Roman 14-point font using Microsoft Word.

3. This brief complies with the electronic filing requirements of Local R. 31.1(c) because a virus detection program, Microsoft Defender Antivirus has been run on the electronic version of the brief and no viruses were detected.

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