

No. 24-1594

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

ANDY KIM, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants,

CAMDEN COUNTY DEMOCRATIC COMMITTEE,

Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(No. 3:24-cv-01098, Judge Zahid N. Quraishi)

**BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES
UNION OF NEW JERSEY IN SUPPORT OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union of New Jersey (“ACLU-NJ”) is a private, nonprofit corporation organized under the laws of the State of New Jersey. ACLU-NJ states that it does not have a parent company, it does not issue stock, and no corporation owns 10% or more of its stock.

RULE 29 STATEMENTS

Amicus represents that (1) no party’s counsel authored this brief in whole or in part; (2) no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person or organization, other than *amicus curiae*, contributed money that was intended to fund preparing or submitting the brief. *Amicus* files this brief with the consent of all parties.

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INTERESTS OF *AMICUS CURIAE*

Amicus the American Civil Liberties Union of New Jersey (“ACLU-NJ”) is a non-partisan organization with hundreds of thousands of members and supporters that operates on several fronts—legal, political, cultural—to bring about systemic change and build a more equitable society. The ACLU-NJ is the state affiliate of the American Civil Liberties Union (“ACLU”), which was founded in 1920 for identical purposes, and has more than two million members and supporters nationwide.

The ACLU-NJ has participated in a wide variety of cases, directly representing parties or in an *amicus curiae* capacity, involving election law and voting rights issues. *See, e.g., Correa v. Grossi*, 458 N.J. Super. 571 (App. Div. 2019); *Save Camden Pub. Sch. v. Camden City Bd. of Educ.*, 454 N.J. Super. 478 (App. Div. 2018). The ACLU-NJ is also a frequent litigant and friend of the court in First Amendment cases. *See, e.g., ACLU of N.J. v. Grewal*, No. 3:19-cv-17807 (D.N.J. Mar. 11, 2020); *W.J.A. v. D.A.*, 210 N.J. 229 (2012); *State v. DeAngelo*, 197 N.J. 478 (2009).

In addition to directly representing parties, *see e.g., Curto v. A Country Place Condo. Ass’n, Inc.*, 921 F.3d 405 (3d Cir. 2019), the ACLU-NJ has a track record of helping to inform the resolution of cases before this Court and in the lower courts of this Circuit as *amicus curiae*. *Ocean Cnty. Bd. of Comm’rs v. Att’y Gen. of State of N.J.*, 8 F.4th 176 (3d Cir. 2021); *German Santos v. Warden Pike*

Cnty. Corr. Facility, 965 F.3d 203 (3d Cir. 2020); *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018); *Islamic Soc’y of Basking Ridge v. Twp. of Bernards*, 226 F. Supp. 3d 320 (D.N.J. 2016).

As a non-partisan advocacy organization, the ACLU-NJ is exclusively concerned with the constitutional issues presented in this matter and does not endorse or oppose any candidate for elected office. The special interest and expertise of the ACLU-NJ in these areas of constitutional law are substantial.

SUMMARY OF ARGUMENT

Political parties may be entitled to exercise associational rights by identifying their standard-bearers on primary ballots, but they cannot commandeer the state’s election administration apparatus to impose a ballot structure that privileges those standard-bearers. Stated differently, they cannot seek to vindicate their associational rights by demanding that the government act unconstitutionally.

Here, Appellant the Camden County Democratic Committee (“CCDC”) insists that it will suffer constitutional harm unless it has access to a unique-in-the-nation ballot bracketing system that happens to enable the organization to award its favored candidates enormous electoral advantages. CCDC fails to explain why its ability to endorse candidates and to identify those candidates with its chosen slogan on primary ballots is insufficient to satisfy its associational interests.

Even if CCDC were correct that those interests command protection through other or additional mechanisms, CCDC's argument faces two limitations fatal to its desire to retain New Jersey's primary bracketing system. *First*, a party's associational rights are circumscribed when the party's affairs become part of the machinery of the electoral process. In these circumstances, the party assumes the role of a state actor and its associational rights take on a different—and diminished—character. CCDC's association-based rationale for maintaining New Jersey's primary bracketing system withers in this context.

Second, the state has a paramount interest in regulating elections in conformity with the requirements of the First Amendment. That interest would readily justify infringing on CCDC's associational rights, even if the Court were inclined to recognize them in their most robust form.

The First Amendment requires the state to serve as a neutral referee in administering elections. The integrity of self-government depends on it. But in New Jersey, the "county line" forces the state outside this role. Through the county line, the government manipulates election outcomes by giving preferential treatment to candidates who have won the endorsement of county committees of state-recognized political parties. In so doing, the government engages in viewpoint discrimination.

The ballot box, no less than the town square, is a site of public debate and ideological competition. Government neutrality in the regulation of these fora is essential to a fair and functioning marketplace of ideas, which is the cornerstone of the First Amendment and the foundation of democracy. When the government fixes the marketplace rules to influence the results of political contests, it distorts the democratic process. In New Jersey, the state, through primary ballot design procedures, boosts the electoral prospects of some candidates and hinders the prospects of others. It thereby privileges the viewpoints of some voters and devalues the viewpoints of others. Indeed, the county line subjects all voters to the state's improper ideological coercion, in glaring violation of the First Amendment.

New Jersey's primary ballot design procedures debase voters' rights to assert their independent political preferences at the polls. CCDC's thin associational interests cannot justify these unconstitutional procedures, and this Court should affirm the District Court's decision to preliminarily enjoin them.

ARGUMENT

- I. The Camden County Democratic Committee assumes the role of a state actor when it engages in ballot design functions in state-administered primary elections, and its associational rights in this context are weak.**

If political parties conducted primaries with private funds in private places, they would face minimal constitutional accountability and enjoy largely unconstrained power over their primary ballots. But state action pervades modern

major-party primaries. State laws define political parties and specify criteria for party committees and leadership. States also fund and operate primaries and grant parties automatic general election ballot access and ballot notation. “Because of these state-conferred benefits, the role the major parties play in the larger electoral system, and the duopoly power they exercise in the political system, the Democrats and Republicans are more like public utilities than like private associations.” Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 Geo. L.J. 2181, 2187 (2001). When political parties thus resemble state actors more, and private associations less, their associational rights take on a different quality and import.

Of course, a political party’s status as a public or private entity is not fixed, but depends on the functions the party is performing at any given time. At the heart of the inquiry is the distinction between wholly internal aspects of party administration and external activities related to participation in state-run, state-financed primary elections. “The Supreme Court’s jurisprudence has consistently reflected this difference between a party’s internal mechanisms and its external manifestations.” *Utah Republican Party v. Cox*, 892 F.3d 1066, 1078 (10th Cir. 2018).

At least as far back as the so-called “White Primary” cases, the Supreme Court has recognized that “the place of the primary in the electoral scheme makes

clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." *Smith v. Allwright*, 321 U.S. 649, 660 (1944). More recently, the Supreme Court confirmed that a political party's First Amendment rights "to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform" are "circumscribed . . . when the State gives the party a role in the election process" *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202-03 (2008). At that point, the party's conduct "may become state action" and the government acquires a keen "interest in ensuring the fairness of the party's nominating process." *Id.* at 203; *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 593, 594 (2000) (Stevens, J., dissenting) (calling primary elections "quintessential forms of state action" and noting that, accordingly, "the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations.").

By contrast, "the normal role of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices or the filling of these offices state action" *Lynch v. Torquato*, 343 F.2d 370, 372 (3d Cir. 1965); *see also Valenti v. Pa. Democratic State Comm.*, 844 F. Supp. 1015, 1017-18 (M.D. Pa. 1994) (unlike where "the state

ha[s] sufficiently involved political parties in the operation of primary elections so that the conduct of the party could be considered state action . . . the conduct of party leaders involving the internal affairs of the party is not state action”). “When a party selects its platform, its Chairman, or even whom it will endorse in the upcoming election, the state generally has no more interest in these internal activities than in the administration of the local Elks lodge or bar association.” *Cox*, 892 F.3d at 1078. Thus, “freedom of association . . . encompasses a political party’s decisions about the identity of, and the process for electing, its leaders.” *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989). Likewise, a party’s associational rights secure its ability to “identify the people who constitute the association and to select a standard-bearer who best represents the party’s ideology and preferences.” *Id.* at 214.

In the supposed furtherance of its associational rights, CCDC seeks to go well beyond choosing its standard-bearers and communicating candidate associations to voters. CCDC asserts that it is constitutionally entitled to participate in and benefit from the specific set of ballot design processes that produce the county line. Plainly, these ballot design processes are state functions. *See* Preliminary Injunction Opinion, DA16 (“The issue here is ballot design, over which Defendant County Clerks do, in fact, have custody and control.”). When CCDC takes part in this aspect of state-administered primary elections, when it

acts in concert with the government to determine the order and structure of the primary ballot, it is engaging in state action. As detailed in the section that follows, that action is unconstitutional. At the very least, CCDC’s election-related activity is a far cry from the type of internal party conduct that compels the strongest associational protections. If they are cognizable at all, CCDC’s associational interests in the county line are minimal.

II. State actors are constitutionally prohibited from regulating electoral competition with their thumb on the scale.

Even if CCDC could articulate a robust associational right to place its endorsed candidates on the ballot in the county line formation, the state would have a compelling interest in infringing on that right. In other words, efforts to reform the county line ballot design procedures would withstand strict scrutiny.

A. Primary elections in New Jersey are not administered neutrally.

The county line is a feature of New Jersey’s primary elections that allows county committees of political parties to grant a slate of candidates an extravagant form of endorsement.¹ County clerks transmute that endorsement into ballot

¹ While many organizations may consider themselves political parties, for the purposes of New Jersey’s administration of elections, the definition of “political party” is limited to those that garner at least 10% of the total votes cast in regular elections for the General Assembly. N.J.S.A. 19:1-1. Only Democrats and Republicans have met the statutory threshold since it was enacted. *See, e.g., Council of Alt. Pol. Parties v. Hooks*, 179 F.3d 64, 68 (3d Cir. 1999) (“At present, the only recognized political parties in New Jersey are the Democratic and Republican parties.”).

advantages that are nearly impossible for challengers to overcome. No other state conducts its primary elections in this way. Brett M. Pugach, *The County Line: The Law and Politics of Ballot Positioning in New Jersey*, 72 Rutgers U. L. Rev. 629, 631 (2020).

The county line works as follows: By law, candidates who file a joint petition and “choose the same designation or slogan” for the primary election have their names “drawn for position on the ballot as a unit,” and “shall have their names placed on the same line” of the ballot by the county clerks. N.J.S.A. 19:49-2; *see also* N.J.S.A. 19:23-18. Candidates thus become “bracketed.” The county committee of a political party, N.J.S.A. 19:5-3, is empowered to endorse favored candidates. “The slogan used by county committee-endorsed candidates is often owned by a corporation” controlled by party insiders, which, in accordance with New Jersey’s slogan consent restrictions,² extends “permission for the slogan’s use to the slate of candidates endorsed by the county committee.” Pugach, *supra*, at 654. Thus, county committees may ensure that a handpicked set of candidates appear together as a group under the same slogan on primary ballots—a formation

² New Jersey law requires those who wish to use a ballot slogan containing the name of another person or an incorporated association to receive the written consent of that person or entity. N.J.S.A. 19:23-17.

known as the county line.³ Earning or failing to earn a place on the county line is frequently the most decisive factor in a primary candidate’s campaign.

Once petitions are filed and the bracketing deadline passes, the county clerks choose a specific office as the “pivot point.” The pivot point is the first column (or, less commonly, row, depending on the ballot design) on the primary ballot. When a primary ballot includes candidates for U.S. Senate, that office is treated as the pivot point; if the ballot includes gubernatorial candidates and no U.S. Senate candidates, the governorship is treated as the pivot point office. *See* N.J.S.A. 19:23-26.1. Otherwise, county clerks have discretion to select a pivot point, and do so with varied and unpredictable results. County clerks then draw by lottery all pivot point candidates’ names and place them on the ballot in the order drawn. N.J.S.A. 19:23-24. This is known as the “preferential ballot draw.” Once pivot point candidates are placed on the ballot in the preferential ballot draw, all candidates who are bracketed with the pivot point candidates are placed in the same column or row—i.e., on the line. Thereafter, unbracketed candidates are

³ County line primary ballots are used in nineteen of New Jersey’s twenty-one counties. Julia Sass Rubin, *The Impact of New Jersey’s County Line Primary Ballots on Election Outcomes, Politics, and Policy*, 48 Seton Hall J. Legis. & Pub. Pol’y 48, 49 (2023). Everywhere else around the country, primary ballots are organized by electoral position; most states list candidates beneath the position they are seeking, while a few list candidates to the right of the position. *Id.* These ballot structures make it relatively intuitive for voters to identify which candidates are running for which electoral position and to select their preferred candidates. *Id.*

arrayed on the ballot according to a series of non-preferential ballot draws. Unless competing for a “pivot point” office, unbracketed candidates never have a chance to appear in first position on the ballot.

Why is the county line so influential? First, simply appearing in a group with other candidates produces a cognitive bias described as the “weight of the line.” The “weight of the line” encourages straight-ticket voting for the grouped (“bracketed”) candidates. See Samuel S.-H. Wang, *Three Tests for Bias Arising from the Design of Primary Election Ballots in New Jersey*, 48 Seton Hall J. Legis. & Pub. Pol’y 24, 38 (2023). What’s more, the county line will often feature high-profile candidates running for the highest offices at the top of the ballot. Voters are much more likely to vote down the line for all candidates who are associated with the recognized names at the top of the ballot than they are to vote for a candidate on a different line. Pugach, *supra*, at 655.

Second, New Jersey allows bracketed candidates to participate in the preferential ballot draw, which means that they receive more prominent ballot positioning. *Id.* at 658. Thus, while party-backed candidates typically get placed on the first row or column, unbracketed candidates are often relegated to “ballot Siberia.” Alexander J. Law, *The Restoration of Anti-Corruption as a Constitutional Principle*, 14 Alb. Gov’t L. Rev. 144, 174 (2021).

Evidence of the line’s influence is overwhelming. Researchers have examined races in which a candidate appears on the line in some counties and off the line in others. There were forty-five such instances between 2002 and 2022. Rubin, *supra*, at 58. “The average margin in performance for those forty-five candidates between being on the county line and having their opponent on the county line was thirty-eight percentage points.” *Id.* Being on the line confers a stronger advantage than incumbency. *Id.* at 60. In other words, even strong name recognition does not appear to counter the impact of the line. When a candidate runs with both the power of incumbency and the line, the candidate is essentially invulnerable to challenge; since 2009, no incumbent on the line in all counties in their district has lost a primary. *Id.* at 57.

B. County clerks in New Jersey, through non-neutral primary ballot design procedures, unconstitutionally engage in viewpoint-based discrimination.

Just as the First Amendment requires the government to remain neutral when it regulates the competition of ideas in public fora, so too does it demand that the government act neutrally in administering the ideological competition of elections. After all, “[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). The democratic process retains legitimacy only insofar as elections reflect the will of voters, and not of the state. *See Cal. Democratic Party*

v. Jones, 530 U.S. at 590 (Kennedy, J. concurring) (“In a free society the State is directed by political doctrine, not the other way around.”).

The state, therefore, must make itself ideologically invisible in this process, or else taint the electoral proving ground and constrain individual political expression and agency. “The First Amendment is designed and intended to remove governmental restraints from the arena of public discussion . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.” *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 203 (2014) (internal quotation marks omitted). In this way, “[t]he First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference.” *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. at 208. This open marketplace is instrumental to free elections, “[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government,” *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (internal quotation marks omitted). “Without such a marketplace, the public could not freely choose a government pledged to implement policies that reflect the people’s informed will.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 583 (2011).

The state’s power to regulate the time, place, and manner of elections under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, “does not extinguish the State’s responsibility to observe the limits established by the First Amendment rights of

the State’s citizens.” *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. at 222 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). The government, therefore, may impose only “*evenhanded* restrictions that protect the integrity and reliability of the electoral process itself.” *Anderson v. Celebrezze*, 460 U.S. 780, 788, n. 9 (1983) (emphasis added). These regulations must be structured with “the aim of providing a just framework within which the diverse political groups in our society may fairly compete . . . ,” *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring).

The county line is not an evenhanded restriction, and it dramatically upsets the competitive mechanisms of the electoral process. The county line operates as a form of viewpoint discrimination—the most “egregious” variety of First Amendment violation. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Through the county line, county clerks in New Jersey embed favored viewpoints in primary ballots. Distorting and disabling competition among electoral candidates in this way is at odds with the proper role of government in administering elections and with foundational tenets of First Amendment law.

Viewpoint discrimination occurs when the government “targets not subject matter, but particular views taken by speakers on a subject.” *Id.* Regulations that elevate the viewpoints of certain speakers over others are subject to strict scrutiny

and presumptively unconstitutional. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015); *Rosenberger*, 515 U.S. at 829-830.

The state’s obligation to observe viewpoint neutrality applies—indeed, is at its pinnacle—when designing and disseminating ballots. Ballots function as instruments of public debate in the political marketplace of ideas. When the government designs ballots that advantage some candidates and disadvantage others, it warps the marketplace. *See Matal v. Tam*, 582 U.S. 218, 249 (2017) (Kennedy, J., concurring) (reasoning that “[t]he First Amendment’s viewpoint neutrality principle . . . protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses” and that violating the neutrality principle can “distort the marketplace of ideas.”). This distortion injures not only disadvantaged candidates, but all voters, who are constitutionally entitled to participate in the democratic process free from the government’s ideological coercion.

In *Cook v. Gralike*, for example, the Supreme Court held unconstitutional Article VIII of the Missouri Constitution, which required that labels be placed on the ballot next to the names of certain candidates who had failed to take legislative action to support congressional term limits or failed to take a pledge committing to such action. 531 U.S. 510, 514-15, 526-27 (2001). The ballot labels read: “DISREGARDED VOTERS’ INSTRUCTION ON TERM LIMITS” or

“DECLINED TO PLEDGE TO SUPPORT TERM LIMITS,” respectively. *Id.* at 514-15. The majority opinion confined its analysis to the Elections Clause, determining that the Article VIII ballot labels were not an authorized form of election regulation thereunder. *Id.* at 525-26. But in concurrence, Justice Rehnquist, joined by Justice O’Connor, offered another reason to invalidate them: Article VIII “discriminates on the basis of viewpoint.” *Id.* at 531-32 (Rehnquist, J., concurring). Only candidates who did not conform to the state’s policy preferences received “derogatory” ballot treatment. *Id.* at 532.

The result is that the State injects itself into the election process at an absolutely critical point—the composition of the ballot, which is the last thing the voter sees before he makes his choice—and does so in a way that is not neutral as to issues or candidates.

Id. The candidates were free to advertise their positions on term limits “with speech of their own,” the concurrence explained, “[b]ut the State itself may not skew the ballot listings in this way without violating the First Amendment.” *Id.*

Analogously, county clerks in New Jersey inject themselves into the election process at the ballot composition stage in a biased and prejudicial manner. The clerks amplify the county committees’ ideologically motivated candidate endorsements through ballot composition choices and preferential draws.⁴

⁴ To be clear, the parties’ ability to denote candidate endorsements on ballots, through slogans or otherwise, is not at issue here; at issue is the state’s ability to

Candidates favored by the committees receive advantageous ballot placement, while disfavored candidates are sent to “ballot Siberia”—treatment akin to a derogatory label. Indeed, Plaintiffs’ experts show that “the magnitude of the biases we observe . . . amounts to an enormous handicap in favor of candidates who are featured on the county line.” *See* Expert Report by Dr. Josh Pasek, at 79, DA287.

Primary elections should measure the electorate’s needs, priorities, and values. Voters assert those needs, priorities, and values through candidate selection. In New Jersey, the state, through primary ballot design procedures, boosts the electoral prospects of some candidates and hinders the prospects of others. It thereby privileges the viewpoints of some voters and demeans the viewpoints of others. Importantly, *all* voters are denied the chance to express their political attitudes in a neutral forum, free from government interference and influence. The county line offends the First Amendment.

confer ballot advantages that typically correspond with party endorsements. These advantages would be unconstitutional even if they were entirely divorced from party endorsements, as they would still reflect the government’s improper role in skewing the ballot to favor certain candidates, thus distorting the electoral marketplace of ideas. Plaintiffs’ experts have demonstrated that candidates derive “a specific benefit from being on the county line that is separate from party endorsement.” *See* Expert Report by Dr. Samuel S.-H. Wang, at 13, DA383. The county line confers an average additional seventeen percentage points over party endorsement alone for nonincumbent candidates. *Id.* at 12.

CONCLUSION

For the forgoing reasons, *amicus curiae* urges the Court to affirm the District Court's preliminary injunction.

Dated: April 9, 2024

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local R. 28.3(d) and Local R. 46.1(e), I certify that I, Liza Weisberg, am admitted as an attorney and counselor of the United States Court of Appeals for the Third Circuit.

Dated: April 9, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(g) and Local Rule 31.1, I Liza Weisberg, hereby certify that:

1. this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 4,454 words, exclusive of the portions exempted by Rule 32(f);
2. this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman;
3. the text of the electronic and hard copies of this brief are identical;
4. the electronic copy of this brief was scanned with Windows Defender for Endpoint software, and no virus was detected.

Dated: April 9, 2024

/s/ Liza Weisberg

Liza Weisberg

American Civil Liberties Union
of New Jersey Foundation

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CERTIFICATE OF SERVICE

I hereby certify that I am filing the foregoing Brief of *Amicus Curiae* electronically via this Court's CM/ECF system and am serving the same upon all counsel of record via the CM/ECF system. All counsel of record are registered to use the Court's CM/EFC system.

Dated: April 9, 2024

/s/ Liza Weisberg
Liza Weisberg
American Civil Liberties Union
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