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The United States Court of Appeals FOR THE THIRD CIRCUIT

No. 24-1594

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/Appellants.

On Appeal from the United States District Court for the District of New Jersey
No. 3:24-cv-01098

Honorable Zahid N. Quraishi, United States District Judge

**BRIEF OF *AMICUS CURIAE* FULOP FOR GOVERNOR
IN SUPPORT OF PLAINTIFFS/APPELLEES**

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INTEREST OF *AMICUS CURIAE*¹

Steven M. Fulop is the current Mayor of the City of Jersey City, a position he has held since 2013. Fulop is also a leading candidate for the office of Governor of New Jersey, for which he will compete for the nomination of the Democratic Party in the June 3, 2025, primary election. This *amicus* brief is filed on behalf of his gubernatorial campaign, Fulop for Governor. As a gubernatorial campaign that will compete using either the county line or office-block balloting system, Fulop for Governor has a strong interest not only ensuring that this matter is quickly resolved, but that it is done so in a way that ensures consistency between New Jersey and all other states.

Moreover, Fulop, as an individual, has personally competed in nonpartisan elections that use office-block ballots, as well as ones that involve the county line. Given his upset election over a two-time incumbent in 2013 using office-block ballots, an election result that would be almost impossible if county line ballots were used, as well as his departure from the 2017 gubernatorial campaign because of those ballots, he has unique experience in this matter not addressed by any other party.

1. All parties have consented to this filing. *See* Fed. R. App. P. 29(a)(2). No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No person other than *amici* and their counsel contributed money related to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

PRELIMINARY STATEMENT

In 1937, the infamous Frank Hague, Mayor of Jersey City and one of the most important (and corrupt) political bosses in New Jersey history, was confronted by two delinquent youths who wanted to get a job rather than attend school. Hague asked a school administrator if they could do so, who informed Hague that they could not: it was the law that required the children to go to school. Hague responded with anger and said, “Listen, here is the law! I am the law! These boys go to work!” And so they did. *‘I Am The Law,’ Mayor Hague Tells 1,000 in Speech on Jersey City Government*, NEW YORK TIMES, Nov. 11, 1937, <https://tinyurl.com/mr2jfunx>. Whatever Hague wanted, Hague got. Such is the life of a political boss.

Whether it was Tammany Hall in New York or Nucky Johnson in Atlantic City, Frank Hague ran neither the first nor the last political machine in history, and the current county line system that is in place is just its latest version. Each of the various county parties (on both sides of the spectrum) serves as its steward and helps propagate its inequities. This system, through the combination of bracketing under *N.J.S.A. 19:49-2* and the preferential ballot placement awarded to such slates under *N.J.S.A. 19:23-24* and *N.J.S.A. 19:23-26.1* places a significant burden on voting rights, while failing to further any legitimate government interest.

ARGUMENT

I. The County Line System Places a Significant Burden on Voting Rights

Perhaps the most striking admission from the *amicus* brief submitted by the Middlesex County Democratic Organization (“MCDO”) is that preferential ballot placement comes with the benefit of a “windfall” of votes from “some low-information voters.” (Document 52, pg. 9).

The MCDO appears to justify its own “windfall” of these votes by indicating that it represents a “diverse and progressive organization.” (Document 52 at pg. 1). That may be true of its rank-and-file members, but it should be noted that the result of this power at the highest levels is anything but diversity. In the State Senate, the most important legislative body in New Jersey with control of nearly all statewide appointments and judicial nominations, there are five members who represent at least part of Middlesex County and are registered members of the Democratic Party (Greenstein, Zwicker, Smith, Diegnan, and Vitale). This is the largest county delegation in the state, and yet, all five are white, and four of the five are straight white men. In the Assembly, seven of the ten members are white, and six of them are straight white men. That can hardly qualify as “diverse and progressive” in a county that boasts one of the most diverse populations in New Jersey, with a 26% Asian population, 23% Hispanic population, and 13% Black population, far above the norm. *See* United States Census Bureau, *2022 Estimates*, <https://tinyurl.com/28nmyy98>.

Another example is Joseph Egan, who previously served for 22 years in the Assembly. Egan, a white man, initially sought reelection in 2023 and won in the primary. After doing so, he “changed his mind,” and decided not to seek reelection,

instead passing the seat on to his son, Kevin Egan. David Wildstein, *Egan Passes Democratic Assembly Nod On to His Son*, NEW JERSEY GLOBE, Jul. 31, 2023, <https://tinyurl.com/2ckcmvbs>. The younger Egan had previously replaced his father on the New Brunswick City Council in 2010 and worked for his father at the International Brotherhood of Electrical Workers Local 456. But because of how his father “changed his mind,” Kevin Egan was able to bypass the primary process entirely, entirely sanctioned by the MCDO. As a result, the 17th Legislative District continues to be represented by three straight white men, even though it is a minority-majority district, with 29% white people and 71% minorities.

Amidst a statewide stagnation in minority representation in the Legislature, it is difficult to comprehend the MCDO’s position that they are at the vanguard of diversity and progressive values when their actions are anathema to actual democratic actions. See Colleen O’Dea, *Will the New Legislature Be Any More Diverse Than the Last?*, NJ SPOTLIGHT NEWS, Jan. 9, 2024, <https://tinyurl.com/2yx2ygos> (discussing how the county line process is a barrier to diversity and how the Legislature, after redistricting, is less diverse than before). Similarly, the MCDO cannot claim to utilize a democratic process when the nomination process they used to award the county line in the ongoing race for Senate was a *literal non-binding show of hands*, with the County Chairman, Kevin McCabe, being the sole individual with the authority to award the line in statewide races. See David Wildstein, *Tammy Murphy Wins Middlesex Democratic Convention*, NEW JERSEY GLOBE, Mar. 14, 2024, <https://tinyurl.com/2bh5ku5g>.

Nevertheless, in a transparent attempt to downplay the benefit shown by the county line system, MCDO absurdly indicates that the Plaintiffs' only loss is merely those votes from individuals who "reflexively cast their ballots for the candidate in the first position." (*Id.*, pg. 2). This is, to put it mildly, an understatement, and further ignores that the harm is not just that some candidates are not receiving first ballot position, but that some cannot possibly receive first ballot position due to how the bracketing and preferential placement laws interact. *N.J.S.A.* 19:23-24; *N.J.S.A.* 19:23-26.1. That is the entire point of this lawsuit, and the MCDO glosses over it like it does not matter. This also ignores other harms cited by Plaintiffs, like those related to associational rights and the harms stemming from placement in Ballot Siberia. Even so, the "loss" here is staggering. As Plaintiffs demonstrated by way of expert testimony, Dr. Pasek's study of Senatorial and certain Congressional races in connection with the upcoming 2024 primary found that the county line provided, on average, a 24.7% improvement in performance, and he indicated that candidates more than doubled their vote share by being on the county line. (ECF No. 1, ¶ 119).

Studies have indicated that the positional bias effect on a ballot has an even greater impact in primary elections than it does in general elections, as such races often receive less media coverage, and voters generally have less substance and information upon which to base their decisions. *See, e.g.*, Laura Miller, Note, *Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 373, 388 (2010) ("In primary and non-partisan elections, the effect [of ballot order] is larger both in magnitude and statistical significance for all types of candidates."); Jonathan GS Koppell & Jennifer A. Steen, *The Effects of Ballot Position*

on Election Outcomes, 66 J. POL. 267, 268 (2004) (“We find that the effect of name order on primary election outcomes is significantly larger than Miller and Krosnick’s estimate for general elections.”). For a discussion of the impact of positional bias in primary elections as compared to the bulk of authorities dealing with general elections, *see* Darren Grant, THE BALLOT ORDER EFFECT IS HUGE: EVIDENCE FROM TEXAS (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777761.

Fulop himself provides one of most clarifying demonstrations of the unfair power of the county line system and how it burdens candidates and voters alike, resulting in pre-determined elections often without voter input at all.

Since 1961, Jersey City has operated under a nonpartisan form of government pursuant to the Optional Municipal Charter Law, *N.J.S.A.* 40:69A-67.1 (the “Faulkner Act”). As a nonpartisan election pursuant to the Uniform Nonpartisan Elections Law, *N.J.S.A.* 40:45-5, *et seq.*, ballots must be designed in such a way as to eliminate any indication of partisan alignment of candidates. *N.J.S.A.* 40:45-7.2. Candidates are also prevented from bracketing with each other if running for separate offices. *N.J.S.A.* 40:45-10. As a result, only office-block ballots are permitted.

Fox, *A Brief Electoral History of Steve Fulop*, NEW JERSEY GLOBE, Apr. 14, 2023, <https://tinyurl.com/nhkcsbjs> (noting that Fulop was a “leading critic” of the Hudson County Democratic Organization and that he had a “track record of defying” them, making it unlikely he would receive their support over an incumbent).

In other words, because the county line system is strictly forbidden in these elections, Fulop’s ideas and policies took center stage, and he was able to win a victory over Healy by a 52-38% margin.

In contrast, Fulop’s initial attempt to run for Governor of New Jersey in 2017 demonstrates the power of the county line system and how it places an unreasonable burden on candidates. At the time, Mayor Fulop had spent approximately three years considering whether he should run for higher office. *See* Brent Johnson, *Fulop Won’t Run for N.J. Governor, a ‘Game-Changer’ for 2017 Race to Succeed Christie*, STAR LEDGER, Sep. 28, 2016, <https://tinyurl.com/yt88u4fu>. He was “one of three people considered most likely to be New Jersey’s next governor.” Joey Fox, *A Brief Electoral History of Steve Fulop*, NEW JERSEY GLOBE, Apr. 14, 2023, <https://tinyurl.com/nhkcsbjs>. Notwithstanding significant press coverage that touted Fulop’s qualifications and experience, Fulop determined that he did not have a path to the nomination without the support of the various county parties, i.e., the county line on their ballots, and would not get that support. As a result, he decided not to run and risk a “very, very bloody primary.” *Id.*

It should not be considered coincidental that the moment Fulop withdrew from the race, now-Governor Phil Murphy was immediately endorsed by the chairman of the New Jersey State Democratic Committee, all county chairs, and “a slew of party

leaders.” Carl Golden, *How the 2017 N.J. Democratic Gubernatorial Nomination Looks Right Now*, WHYY, Dec. 5, 2016, <https://tinyurl.com/2p9d2bmj>. As even the nonpartisan Public Broadcasting Service acknowledged, “primaries are party elections, controlled [in New Jersey] by organizations that bestow their favor on a pre-selected candidate by placing him or her at the head of the organization-supported ticket—the so-called county line, a much sought-after ballot position that is as close to a guarantee of victory as is possible to attain.” *Id.* At that point, the election became a *fait accompli*, with Governor Murphy all but assured a victory despite a crowded primary field. See Daniel Yadin, *How Democratic is the Democratic Party Primary for Governor?*, NEW BRUNSWICK TODAY, Jun. 5, 2017, <https://tinyurl.com/277ehuk9> (discussing how the race was “preordained”).

II. No Government Interest is Advanced by the County Line System

All that is left, then, is for the CCDC and MCDO to argue that there is some vague and amorphous “legitimate government interest” in utilizing an obviously biased and prejudicial system. But no such interest exists, and the lack of that interest is demonstrated by the refusal of the New Jersey Attorney General (the “AG”) to defend the relevant statutes, as well as the withdrawal by every County Clerk of their appeal. (ECF No. 149). In fact, the only remaining party is the Camden County Democratic Committee (“CCDC”), and the only *amici* who have filed in support of the CCDC’s position are the Morris County Republican Committee, the New Jersey Republican Chairs Association, and the MCDO. Using basic deductive reasoning, the Court can reasonably assume that they are the only interested parties because the only interests being advanced are that of partisan political committees.

But not only has the AG refused to defend the county line system, he expressly stated that there is no evidence “showing that these laws advance the relevant government interests,” the record “confirms that they do not.” (ECF No. 149, pg. 3). “Both observational and randomized experimental evidence alike show that voters are more likely to make errors when encountering grid ballots with bracketing than standard office-block ballots.” *Ibid.* And because New Jersey is the *only* state in the nation to use a county line system, the argument that the county line “is necessary” to advance government interests holds no weight. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224, 226 (1989); *cf. Holt v. Hobbs*, 574 U.S. 352, 368-69 (2015). To be sure, as the AG recognized, and as seen in Jersey City’s own elections, the fact that there are numerous elections even within New Jersey in which office-block balloting is used means that governmental interests can be accomplished without the challenged statutes.

III. *Amici* Make Numerous Dubious Assertions That Underscore Their Partisan Interests

It bears repetition that the only party remaining in the appeal, and the only other *amici*, are partisan political organizations that very clearly have the most to lose should the preliminary injunction be affirmed, and office-block ballots permitted. *Amici*, most notably the MCDO, make numerous assertions that are either flagrantly untrue or badly conflate the issues to the Court.

First, the MCDO understates benefits they receive as a political organization. The fact is, the county line makes them near unbeatable, and that is why they are fighting so hard to preserve it. Considering the costs involved and the fact that only these

partisan political organizations are left to defend the county line, for the CCDC's decision to intervene in the lawsuit to make any financial sense, to say nothing of the MCDO's decision to hire one of our country's most prominent appellate lawyers at its sole cost and expense, (Document 52, pg. 1, n. 1), the benefits associated with the county line must be staggering. If the saying is, as Shakespeare wrote, that "the lady doth protest too much," then the CCDC and MCDO's protest here is a bloodcurdling scream.

Second, the MCDO argues that "bracketing and allocating position in the first instance among bracketed candidates reduces voter confusion and makes voting more efficient by allowing primary voters to easily identify and quickly vote for all candidate belonging to a single political organization or affiliating with a single slogan." (Document 52, pg. 3). Even if, for the sake of argument, that were true, it only addresses bracketing, not preferential placement for all such candidates. But more importantly, the MCDO, like the CCDC before it, is just making grand, sweeping assertions that they declare as fact when there is no evidence to support them: indeed, the AG explicitly acknowledged that the actual evidence in the record controverts these assertions. (ECF No. 149, pg. 3). Notably absent from the MCDO's filing (or the CCDC), is any semblance of a response to the AG's assertions that the State's interest in the bracketing and preferential placement system, to the extent it even exists at all, is dwarfed by the harm to Plaintiffs.

Third, the MCDO attempts uses a red herring to distract the Court into thinking that to uphold the preliminary injunction for the primary, it also must prohibit bracketing in the general election. Not only is this not an actual case or controversy

before the Court, either in this appeal or in Plaintiffs' underlying complaint, but there are critical distinctions between the primary and general election in terms of bracketing. Research has borne out the falsity of the MCDO's accusations, as bracketing (which again, does not encompass the full harm identified by the Plaintiffs in the form of the preferential placement of said brackets) has demonstrably less affect in the general election than in the primary. *See Grant, supra*, pg. 4.

Fourth, the MCDO indicates that their endorsements are critical when dealing with "low-salience" elections like surrogate, county commissioner, and county clerk, due to a lack of information about candidates who are competing. (Document 52, pg. 4). But what the MCDO fails to explain is if the "low-salience" of an election is because of the nature of the office or because uncompetitive elections do not give candidates any reason to disclose anything more than they have to (or spend any more resources than needed). If anything, creating more competitive primary elections will force candidates to actually, you know, campaign, rather than simply rely on the strength of the line. That will undoubtedly compel candidates to educate voters.

Fifth, the MCDO argues that "in New Jersey, bracketing has served as an effective means of communicating a party organization's endorsements to organization loyalists." (Document 52, pg. 4). It is telling that the MCDO qualifies this assertion by noting that it only applies in New Jersey, which is a mildly clever way ignoring that there is no other state in the country that has a system even remotely like as confusing or dominating as this one. But the assertion also fails to distinguish the benefit created by allowing candidates to have identical slogans, which is not contested by the Plaintiffs, versus the physical bracketing of names and the

associated preferential placement on the ballot. Additionally, the MCDO’s (again, completely unsupported) assertion is silly to make **when the county parties are the ones determining if it is effective.** If the standard is, “it is an effective system because the county party’s endorsements win in nearly every instance,” then while their statement is true, it is also further proof of the inherent unfairness in the system.

By way of example as to the absurdity of the MCDO’s argument that the county line ballot is “less confusing” than office-block ballots, the Court need not look any further than the MCDO’s own ballots to see that this is not true. In 2017, during the gubernatorial campaign, there were six candidates competing in the primary for the Democratic Party’s nomination. For some unknown reason, Middlesex refused to create six columns on their ballot and only used five columns. Given the excess candidates, Middlesex stacked one candidate, State Senator Raymond Lesniak, on top of another candidate, Assemblyman John Wisniewski, within the same column:

OFFICE TITLE CARGO	DEMOCRATIC DEMOCRÁTICO	A	DEMOCRATIC DEMOCRÁTICO	B	DEMOCRATIC DEMOCRÁTICO	C	DEMOCRATIC DEMOCRÁTICO	D	DEMOCRATIC DEMOCRÁTICO	E	PERSONAL CHOICE SELECCIÓN PERSONAL
Governor 4 Year Term, Vote For One Gobernador Término de 4 Años, Votar por Uno 4 personas para elegir uno	Jim JOHNSON The Progress Leader For All Families	1A	Phil MURPHY Middlesex County Democratic Organization	1B	Mark ZINNA Let's Reform New Jersey Together	1C	Raymond J. LESNIAK Democrat For Governor	1D	William BRENNAN Progress With Integrity	1E	Write In Escriba
							John S. WISNIEWSKI Main Street For Wall Street	2B			Write In Escriba
State Senator 4 Year Term, Vote For One Senador del Estado Duración 4 años Término de 4 Años, Votar por Uno 4 personas para elegir uno			Joseph F. VITALE Middlesex County Democratic Organization	3B							Write In Escriba
Members of the General Assembly 2 Year Term, Vote For Two Miembros de la Asamblea General Duración 2 años Término de 2 Años, Votar por Dos 4 personas para elegir dos			Colin J. COUGHLIN Middlesex County Democratic Organization	6B							Write In Escriba
			Yanni LOPEZ Middlesex County Democratic Organization	7B							Write In Escriba
Surrogate 5 Year Term, Vote For One Jefe de Testamento Término de 5 Años, Votar por Uno 5 personas para elegir uno			Kevin J. HOAGLAND Middlesex County Democratic Organization	9B							Write In Escriba
Members of the Board of Chosen Freeholders 3 Year Term, Vote For 3 Miembros de la Junta de Proprietarios Electos Término de 3 Años, Votar por Tres 3 personas para elegir tres			Charles TOMARO Middlesex County Democratic Organization	11B	Alf NAZIR Central Jersey Progressive Democrats	11C					Write In Escriba
			John KOPPEL Middlesex County Democratic Organization	12B	Catherine HUNT Central Jersey Progressive Democrats	12C					Write In Escriba
Members of the Board of Chosen Freeholders One Unexpired Term, Vote For One Miembros de la Junta de Proprietarios Electos Duración de 1 Año Sin Expirar, Votar por Uno Una persona para elegir una			Shari NABRA Middlesex County Democratic Organization	13B							Write In Escriba

ECF No. 1-3, pg. 24.

Are Lesniak and Wisniewski running together, or separately? How can they campaign on what column they can be found in, if identical to another? Given that Lesniak and Wisniewski were the only candidates to have this layout and the associational nature of the layout, in that a vertical layout necessarily indicates an association between candidates, it is difficult to imagine a more confusing ballot.

Finally, the MCDO argues that “The office-block format ballot commanded by the District Court a few months before the primary election leaves too little time for primary voters—who for decades have grown accustomed to voting on a party-line basis—to adjust their patterns.” (Document 52, pgs. 4-5). The MCDO further claims that because voters have used the county line system for the last 70 years,² they will be “confused” by a sudden switch to office-block ballots. (Document 52, pg. 24). As discussed *supra*, pgs. 5-6, this assertion is simply false. The MCDO seems to believe voters outside the two counties who do not use the county line system, Salem and Sussex, who they just seem to pretend do not exist, have never experienced anything else other than ballots containing the county line. Voters in those two full counties regularly vote using *only* office-block ballots in their primary elections. Virtually all November elections use a hybrid of office-block and party line ballots. *See* DE95-1, Exhibit D and ECF No. 95, Exhibit A (providing examples of fully or hybrid office-block ballots). And numerous municipalities elsewhere are voting *right now* using office-block ballots in February fire district elections, April

2. The MCDO’s implication that an unconstitutional process should continue because it is “how things have always been done” is a deeply flawed analysis. Using the MCDO’s logic, one could conclude that voting should be limited to landowning men, schools should remain segregated, and children should be working in sweatshops. This assertion does not survive even the barest scrutiny.

school board elections, and May municipal elections. *See, e.g.*, New Jersey Division of Elections, *Chronological Election Timelines*, <https://tinyurl.com/293bwn9h>. In Middlesex County itself, there are school board races that will take place on April 16, 2024, four days after oral argument in this appeal, which use office-block ballots:

Office Title Cargo आह्वानित पद/पदा	Nomination by Petition Nominación por Petición A	Nomination by Petition Nominación por Petición B	Nomination by Petition Nominación por Petición C	Nomination by Petition Nominación por Petición D	Nomination by Petition Nominación por Petición E	Nomination by Petition Nominación por Petición F	Personal Choice Selección Personal व्यक्तिगत चयन
Members of the Board of Education 3 Year Term Vote for Three Miembros del Consejo de Educación Período de 3 Años Vote por Tres शिक्षण बोर्डना सभस्यो उ वसुधनी मुहुरत वाटे हेर वुरी	Raghunath CHITTURI Voice for Progress	Peter S. PIRO, Jr. Accountability Safety Transparency	Charles ZEICHNER	Usha SHARMA	Christine SKURBE Continuing the Change	Matthew GORHAM Passion for Education	Write In Escriba वचन
							Write In Escriba वचन
							Write In Escriba वचन

Middlesex County Clerk, *Sample Ballot 2024*, <https://tinyurl.com/2yqs73lz>.

As this appeal is being heard, votes are already being cast using office-block ballots for numerous positions and have been for decades, preliminary injunction or not. Far from reinventing the wheel, using office-block ballots for primaries will simply conform to the vast majority of other elections held in the State of New Jersey. If anything, voters will be less confused about their ballots than they were before.

CONCLUSION

One of the most legendary political machines in American history was run by William “Boss” Tweed, of Tammany Hall fame. More than 150 years ago, he gave us an ominous warning of which this Court should take heed, when he said, “I don’t care who does the electing, so long as I get to do the nominating.” Susan Welch, *UNDERSTANDING AMERICAN GOVERNMENT: THE ESSENTIALS* 181 (2009). In other words, he who controls the nomination process controls the electorate. It is long past time for the nomination process to be returned to the people, where it belongs, and the age of Boss Tweed, Frank Hague, and all other political machines put to rest.

The appeal should be denied.

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CERTIFICATIONS OF COUNSEL

1. I, Scott D. Salmon, certify under penalty of perjury that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,849 words.

3. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced 14-point serif font (Equity), using Microsoft Word.

4. Pursuant to Local Rule 31.1(c), the text of the electronic version of this document is identical to the text of any paper copies filed with the Court.

5. Pursuant to Local Rule 31.1(c), Windows Defender, Version 1.407.905.0, has been run on this electronic file and no virus was detected.

Dated: April 9, 2024

By: /s/Scott D. Salmon
SCOTT D. SALMON

CERTIFICATE OF SERVICE

I hereby certify that, on April 9, 2024, I filed the foregoing using this Court's CM/ECF system, which effectuated service on all parties.

Dated: April 9, 2024

By: /s/Scott D. Salmon
SCOTT D. SALMON