No. 23-1054

In the
United States Court of Appeals
For the Second Circuit

CARLANDA D. MEADORS, an individual, LEONARD A. MATARESE, an individual, JOMO D. AKONO, an individual, KIM P. NIXON-WILLIAMS, FLORENCE E. BAUGH,

Plaintiffs – Appellants

v.

ERIE COUNTY BOARD OF ELECTIONS, RALPH M. MOHR, JEREMY J ZELLNER

Defendants – Appellees

Appeal from the United States District Court
For the Western District of New York

APPELLANTS' BRIEF

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Statement of Jurisdiction

This is an appeal from a final judgment of the district court entered on July 11, 2023. The appellants filed a notice of appeal eight days later. This Court therefore has jurisdiction under 28 U.S.C. § 1291.[1]

Because the plaintiffs' claims are based on the United States Constitution and involve the right to vote, the district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3)-(4).

Statement of the Issue

Are the defendants entitled to summary judgment on the plaintiffs' claim that New York's early petition deadline for independent candidates violates the First and Fourteenth Amendments?

Statement of the Case

This is a constitutional challenge to New York's petition deadline for independent candidates. The law at issue is Section 6-

[1] A dotted underline indicates a hyperlink to the cited authority.

158.9 of the New York Election Law, which requires independent candidates to file a nominating petition at least 23 weeks before a general election and 28 days before the Democratic and Republican parties hold their primary elections.[2]

The plaintiffs are Carlanda Meadors and four other voters in the City of Buffalo, New York ("Meadors"). They filed this action in the Western District of New York in August 2021. The defendants are the Erie County Board of Elections and two board members ("Erie County").

United States District Judge John L. Sinatra granted a temporary restraining order enjoining Erie County from enforcing the challenged statute in Buffalo's 2021 mayoral election. The defendants appealed, and a motions panel of this Court granted a stay with no discussion of the merits. (Order 2, ECF No. 45.)

After the election, the Court dismissed the appeal as moot, and it remanded the case to the district court for further

[2] The relevant statutes are reproduced in the special appendix.

proceedings. (Mandate 1-2, ECF No. 53.) Erie County then moved for summary judgment after the close of discovery.

United States Magistrate Judge Michael J. Roemer, hearing the motion by consent of the parties,[3] granted summary judgment. That ruling isn't reported but is available electronically at 2023 WL 4459601. (App. II:434.)[4]

I. New York's Independent Petition Deadline

New York law provides two ways for state and local candidates to appear on the general-election ballot: (1) the party-primary process; and (2) the independent-candidate process.

To pursue the party-primary process, a candidate files a designating petition signed by a fixed number of the party's registered voters. *See* N.Y. Elec. Law §§ 6-134, 6-136. The designating petition is due in late March, 36 days before county boards of election are required to determine the candidates who

[3] The parties consented only to have the magistrate judge resolve any dispositive motions. (Consent, ECF No. 71.) The parties haven't consented to trial of the matter before the magistrate judge.
[4] Citations to the two-volume appendix are in the form "Volume:Page."

will appear on the primary-election ballot and 90 days before the primary election on the fourth Tuesday in June. *See* N.Y. Elec. Law §§ 4-114, 6-158.1, 8-100.1(a) . The winner of the primary election then appears automatically on the ballot for the general election in November. *See* N.Y. Elec. Law § 6-160.1.

To appear on the general-election ballot as an independent candidate, a candidate must file an independent nominating petition signed by a fixed number of registered voters. *See* N.Y. Elec. Law §§ 6-138, 6-142. The nominating petition is due in late May, 28 days before the non-presidential primary election; 107 days before the deadline by which county boards of election are required to determine the candidates who will appear on the general-election ballot; and 161 days before the general election. *See* N.Y. Elec. Law §§ 4-114, 6-158.9, 8-100(a), (c).

These deadlines were last changed in 2019. Before then, the independent petition deadline had been in late August, 77 days before the general election, and had never been earlier than that since the state first adopted a petition deadline for independent candidates in 1890. (App. I:190-91.)

In 2019, New York moved the deadline from August to June as part of a bill designed to "ensure that New York's election law complies with the federal Military and Overseas Voter Empowerment (MOVE) Act." (App. I:144.) *See* Act of January 24, 2019, ch. 5, § 13, 2019 N.Y. Laws 9, 14 (codified at N.Y. Elec. Law § 6-158.9). The relevant provision of the MOVE Act requires states to begin sending ballots to military and overseas voters at least 45 days before federal elections, and New York's prior election calendar made that impossible. (App. I:147-48.) To bring the calendar into compliance, a federal court ordered the state to move its primary election for federal offices from September to June, and the 2019 bill merged the primary for state offices with the primary for federal offices. (App. I:148.) *See generally United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263 (N.D.N.Y. Jan 27, 2012) (altering New York's election calendar to comply with the MOVE Act). The bill passed the New York State Assembly on January 14 and then passed the Senate on the next day. (App. I:140.)

On January 16, the two Democratic members of the State Board of Elections and the board's Democratic co-executive director

submitted a memo to the governor's counsel supporting the bill. (App. I:151-61.) Among other things, the Democratic memo asserts that the independent petition deadline was moved from August to May "to fairly effectuate MOVE Act compliance and enact early voting." (App. I:153.) The memo adds that the new deadline is "necessary in order to advance the state's interest in encouraging political stability, promoting a fair electoral process, ensuring an informed electorate and administrative need." (App. I:153-54.)

The memo then argues that the new deadline for independent candidates promotes political stability because it prevents "sore loser" candidacies. The memo contends that the new deadline promotes fairness because allowing independent candidates to file after the primary election "would unduly give independent candidates a significant advantage" over partisan candidates. Yet the memo also argues that independent candidates "would be highly disadvantaged" by filing after the primary election because the winners of those primaries would have "four months of additional exposure." The memo asserts that the new deadline "serves the workflow needs of the boards of elections." And, finally,

the memo argues that the burden of the new deadline on independent candidates will be "minimal" because the number of signatures required is relatively low and candidates have six weeks to gather them. (App. I:154-55.)

II. Buffalo's 2021 Mayoral Election

Buffalo Mayor Byron Brown sought re-election in 2021 as the nominee of the Democratic Party but was defeated in the Democratic primary by India Walton.[5] (App. II:373.) Because the independent-petition deadline had passed, and because no mayoral candidates had filed a designating petition with any other party, the result of the Democratic primary meant that Walton would appear unopposed on the general-election ballot. (App. II:347).

Meadors and other Brown supporters nonetheless launched an effort to nominate him as an independent candidate for mayor in the general election. Brown's supporters gathered signatures of eligible voters and filed their nominating petition containing more

[5] Walton intervened as a defendant in this case but has since been dismissed. (Order, ECF No. 58.)

than enough signatures with the Erie County Board of Elections on August 17. (App. II:289-90.) The petition would have entitled Brown to a place on the ballot if it had been filed on or before May 25, and it would have been timely under all of New York's petition deadlines in force before 2019. (App. II:290-92.)

The Erie County Board of Elections rejected the nominating petition because the petition hadn't been filed by the deadline set out in Section 6-158.9 of the New York Election Law. (App. II:396.) Meadors then filed this case on the following business day. (Verified Compl., ECF No. 1.)

The district court granted a temporary restraining order requiring the defendants to put Brown's name on the ballot. (Text Order, ECF No. 28.) The defendants appealed, and a motions panel of this Court granted a stay. (Order 2, ECF No. 45.)

Brown then ran a write-in campaign and won with over 58 percent of the vote. (App. II:374-81.)

III. Erie County's Motion for Summary Judgment

Erie County moved for summary judgment in December 2022 after the close of discovery. (App. I:126.) In accordance with the district court's local rules, the County submitted a statement of undisputed material facts (App. I:129) and an evidentiary appendix (App. I:136). The County's main argument was that the record contains "no evidence to illustrate how New York's deadline New York's petition deadline for independent candidates imposes a severe burden on the associational rights of independent candidates, candidates nominated by unqualified political parties, and the voters who support them." (Defs' Mem. Supp. Summ. J. 11, ECF No. 66-1.) Erie County acknowledged that Meadors had produced an expert declaration from Richard Winger—whom the County also deposed—but the County argued that Winger's testimony is "irrelevant" because his opinions about the impact of New York's deadline don't specifically address Buffalo's 2021 mayoral race. (*Id.* at 15-16.)

Meadors' responded by disputing some facts on which the County had relied and identifying other material facts in dispute based on materials in the summary-judgment record:

- New York's petition deadline for independent candidates imposes a discriminatory burden that weighs more heavily on the candidates of unqualified political parties, independent candidates, and the voters who support them.

- New York's petition deadline for independent candidates imposes a severe burden on the associational rights of independent candidates, candidates nominated by unqualified political parties, and the voters who support them.

- New York's petition deadline for independent candidates isn't justified by any state interests.

(App. II:390-91 (record citations omitted).) Meadors also submitted an evidentiary appendix containing, among other things, a declaration from Mayor Brown describing the impact of New York's independent petition deadline on him and his supporters during Buffalo's 2021 mayoral race. (App. II:394.)

Meadors argued that summary judgment is inappropriate because the record contains genuine issues of material fact about the character and magnitude of the burdens imposed by New York's independent petition deadline and because Erie County isn't

entitled to judgment as a matter of law. (Pls.' Resp. 7-10, ECF No. 68.) Meadors cited testimony about the petition deadline in the verified complaint; in the testimony of Winger and Brown; and in a deposition of the Board of Elections. (*Id.*)

The parties consented to have a magistrate judge decide the motion, and the court heard oral argument in January 2023. (App. II:406.) Following the argument, the magistrate judge asked for and received additional briefing on the questions of standing and mootness. (Minute Entry, ECF No. 72; Defs' Suppl. Br., ECF No. 76; Pls.' Supp. Br., ECF No. 77; Defs' Suppl. Reply, ECF No. 78; Pls.' Suppl. Reply, ECF No. 79.)

The magistrate judge granted summary judgment six months later. (App. II:434.) The court first concluded that the plaintiffs have standing and that the case isn't moot because it falls within the capable-of-repetition-but-evading-review exception to the mootness doctrine. (App. II:447-54.) Turning to the merits, the court concluded that summary judgment is warranted under the applicable law because "the material, undisputed facts in the record prove: (1) the petition deadline in Section 6-158.9 does not impose a

severe burden and (2) any burden imposed by the deadline is justified by New York's important regulatory interests." (App. II:456.) In reaching that conclusion, the court found that New York's petition deadline didn't discriminate against independent candidates and that a reasonably diligent candidate could meet the deadline. (App. II:457-58.) The court "disagree[d]" with Winger's testimony and found that Brown's testimony "offered no evidentiary support" for a finding that the petition deadline is discriminatory or burdensome. (App. II:459, 462.)

Applying rational-basis review to the deadline, the court found that the deadline advances "important regulatory interests" in "(1) ensuring the integrity and reliability of the electoral process; (2) promoting political stability at the expense of factionalism; and (3) upholding the state's administrative duty to meet the federal deadlines for the mailing of overseas and military ballots." (App. II:465.) The court found "no evidence in the record upon which a reasonable jury could conclude" that the state's regulatory interests did not outweigh any reasonable and nondiscriminatory burden imposed by the deadline. (App. II:465-66.)

This appeal followed.

Standard of Review

This Court reviews *de novo* a district court's decision to grant summary judgment, construing the evidence in the light most favorable to the party against whom summary judgment was granted and drawing all reasonable inferences in that party's favor. *Horn v. Medical Marijuana, Inc.*, 80 F. 4th 130, 135 (2d Cir. 2023).

Under Rule 56 of the Federal Rules of Civil Procedure, a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if the evidence would allow a reasonable factfinder to find for the nonmoving party. *Id.*

In determining whether to grant or deny summary judgment, a court's role is not to weigh the evidence or to determine the truth

of the matter, but rather to determine only whether a genuine issue exists for trial. *Id.* at 249.

Summary of the Argument

Summary judgment isn't appropriate here because there are genuine disputes about several material facts:

- How much does New York's petition deadline burden independent candidates and their supporters?
- Does the petition deadline give major-party candidates an advantage?
- How much do the state interests asserted to justify the deadline make it necessary to burden independent candidates and their supporters?

The record contains ample evidence from which a reasonable factfinder—here, the district judge—could find in Meadors' favor on all of these issues.

The magistrate judge's conclusion to the contrary is riddled with errors.

First, the magistrate judge improperly weighed the evidence and failed to draw all reasonable inferences in Meadors' favor. He "disagree[d]" with an expert's testimony and found that a lay

witness "offered no evidentiary support" for Meadors' position because he found other factors to be more probative. (App. II:459, 462.) But the weight of Meadors' evidence should have been a matter for the district judge to determine at trial. It wasn't the province of the magistrate judge on summary judgment.

Second, the magistrate judge used the wrong standards to measure the burden that New York's deadline imposes on independent candidates and their supporters. The "reasonably diligent candidate" standard that he applied is incompatible with early-deadline cases from the Supreme Court and other courts of appeals, and it simply doesn't measure the kind of harm that Meadors alleges here. And the seven cases on which the magistrate judge relied don't support his finding that a deadline substantially before the primary, like New York's deadline here, imposes only a minimal burden.

Third, the magistrate judge used the wrong standard to determine whether New York's deadline is discriminatory. He compared the petition deadline for independent candidates to appear on the *general-election ballot* to the petition deadline for

party candidates to appear on the *primary-election ballot*. (App. II:457-58.) But the Supreme Court and other federal courts measure whether a filing deadline for independent candidates is discriminatory by comparison to the date on which the major parties select their nominees at a primary or convention. Because he used the wrong comparison, the magistrate judge reached the wrong conclusion.

Ultimately, Erie County hasn't shown that it's entitled to summary judgment on this record. The Court should therefore vacate the judgment below and remand the case to the district court for further proceedings.

Argument

To determine whether New York's petition deadline for independent candidates violates the First and Fourteenth Amendments, this Court must apply the balancing test set out by the Supreme Court in *Anderson v. Celebrezze*:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and

> evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). Under this test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of the scale, the law "imposes only 'reasonable, nondiscriminatory restrictions' upon First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). But when the law places discriminatory or "severe" burdens on the rights of political parties, candidates, or voters, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance." *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). *See, e.g., Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 177 (2d Cir. 2020) (discussing "the *Anderson-Burdick* framework").

The plaintiff bears the burden of proof on the first step in the *Anderson-Burdick* framework, and the defendant bears the burden on the second and third. *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Moore v. Martin*, 854 F.3d 1026 (8th Cir. 2017); *Nader v. Brewer,* 531 F.3d 1028, 1039-40 (9th Cir. 2008); *Lopez-Torres v. N.Y. State Bd. of Elections,* 462 F.3d 161, 203 (2d Cir. 2006), *rev'd on other grounds* 552 U.S. 196 (2008); *Patriot Party v. Allegheny Cnty. Dep't of Elections*, 95 F.3d 253, 267-68 (3d Cir. 1996). In this framework, "the burden is on the state to 'put forward' the 'precise interests … [that are] justifications for the burden imposed by its rules,'" and to "explain the relationship between these interests" and the challenged provisions. *Fulani v. Krivanek,* 973 F.2d 1539, 1544 (11th Cir. 1992) (quoting *Anderson*, 460 U.S. at 789). "The State must introduce evidence to justify both the interests the State asserts and the burdens the State imposes on those seeking ballot access." *Bergland v. Harris*, 767 F.2d 1551, 1554 (11th Cir. 1985).

Under the *Anderson-Burdick* framework, the character and magnitude of the burdens and the state's justifications for those

burdens are matters of material fact. *Lopez-Torres*, 462 F.3d at 195; *Green Party of Conn. v. N.Y. State Bd. of Elections*, 389 F.3d 411, 418-21 (2d Cir. 2004).

I. There are genuine issues of material fact about the character and magnitude of the burdens imposed by New York's petition deadline for independent candidates.

Beginning with *Anderson*, the Supreme Court and many others have recognized that early filing deadlines impose burdens on candidates and their supporters. For candidates, the burdens are obvious: they cut off the ability to enter a race "even if intervening events create unanticipated political opportunities." *Anderson*, 460 U.S. at 786. But early deadlines also harm voters, who "can assert their preferences only through candidates or parties or both." *Id.* at 787. As a result, "the right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot." *Id.* (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974)). The exclusion of candidates also burdens the voters' freedom of association, "because an election campaign is an

effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Id.*

In analyzing the character and magnitude of those burdens in *Anderson*, the Court placed particular emphasis on the fact that Ohio's deadline was discriminatory: it gave major parties "the political advantage of continued flexibility" to develop their candidates and positions even after the independent-candidate deadline. *Id.* at 791. Early deadlines also restrict an independent candidate's opportunity to garner support from voters who are dissatisfied with the positions of the major parties because those voters rarely become "a cohesive or identifiable group until … [the] major parties stake[] out their positions and select[] their nominees." *Id.* at 791-92 (quoting *Williams v. Rhodes*, 393 U.S. 23, 33 (1968)).

Early deadlines burden independent-minded voters in a similar fashion, "den[ying] the 'disaffected' not only a choice of leadership but a choice on the issues as well." *Anderson*, 460 U.S. at 792 (quoting *Williams*, 393 U.S. at 33). Ohio's deadline also

harmed voters by excluding candidates "whose positions on the issues could command widespread community support." *Anderson*, 460 U.S. at 792. "By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Id.* at 794.

For these reasons, the Supreme Court found that Ohio's deadline for independent candidates 75 days before the major parties' primary election (a date that fell on March 20), *id.* at 783 n.1, deserved strict scrutiny. *Id.* at 790-95.

Relying explicitly on the concerns about early deadlines expressed in *Anderson*, the Ninth Circuit found that Arizona's deadline for independent candidates 90 days before the state's primaries—a date that fell in early June—imposed "severe" burdens that warranted strict scrutiny. *Nader*, 531 F.3d at 1039. The district court had held that *Anderson* wasn't controlling because some of facts present in *Anderson* weren't present there: Arizona's presidential preference primary had already taken place;

the major-parties' candidates and platforms were already well known; and the level of public interest was already high by the June deadline. *Id.* at 1038. But the Ninth Circuit reversed, concluding that the Supreme Court's concerns in *Anderson* controlled even though those facts weren't present in the specific election at issue. *Id.*

In *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997), the Third Circuit addressed New Jersey's filing deadline for independent and third-party candidates 54 days before the primary election. In reversing the district court's denial of a preliminary injunction, the court noted that the deadline imposed "a substantial burden on both candidates and voters" that outweighed the state's asserted justifications. *Id.* at 880 n.3; *see also id.* at 881. "*Anderson* suggests that a state must be able to point to a particularly strong countervailing interest in order to justify a filing deadline that requires alternative candidates to file nominating petitions before the major political parties have chosen their candidates for the general election." *Id.* at 880 n.3.

Other cases abound. *See, e.g., Cromer v. South Carolina*, 917 F.2d 819, 823-24 (4th Cir. 1990) (March 30 deadline unconstitutional under *Anderson*); *Populist Party v. Herscher*, 746 F.2d 656, 661 (10th Cir. 1984) ("The June 1 deadline … appears to run counter to the views in *Anderson*"); *Moore v. Martin*, No. 4:14-cv-65, 2018 WL 10320761, at *3 (E.D. Ark. Jan. 31, 2018) (March 1 deadline unconstitutional); *Nader 2000 Primary Cmte., Inc. v. Hazeltine*, 110 F. Supp. 2d 1201, 1208 (D.S.D. 2000) (deadline on "the third Tuesday" in June is unconstitutional under *Anderson*). The general principle that emerges from these cases is that early filing deadlines for independent candidates—particularly those that fall substantially before the major parties select their nominees—impose heavy constitutional burdens.

Here, the character and magnitude of the burdens imposed by New York's petition deadline are disputed based on "materials in the record." Fed. R. Civ. P. 56(c)(1)(A). These materials include the verified complaint, an expert declaration by Richard Winger, a transcript of Winger's deposition, and a declaration by Mayor Brown. Together, these materials provide more than ample basis

for a reasonable factfinder to find that New York's petition deadline for independent candidates is discriminatory and imposes a severe burden on the plaintiffs' First Amendment rights.

Brown's declaration, for example, provides compelling testimony about the real-world burden that he and his supporters faced because of the petition deadline in 2021. (App. II:397-400.) Brown testified, for example, that his write-in campaign cost approximately $1.5 million more than he would have spent if he had been on the ballot and required about 13,000 more volunteer hours than he would have needed if he had been on the ballot. (App. II:399-400.) Despite the difficulty of a write-in campaign, Brown agreed to do it because he and his supporters—who included Democrats, Republicans, Conservatives, and Independents, faced the prospect of having to vote for a candidate whose views they disagreed with or having no choice at all. (App. II:399.) Brown's declaration alone creates a genuine issue of material fact about the magnitude of the burdens of the challenged statute.

So does Winger's declaration. He offers his expert opinion that New York's petition deadline is discriminatory in that it

weighs more heavily on independent candidates and the voters who support them. (App. I:193-94.) He also explains at length why he believes those burdens are severe. (App. I:195-204.) For instance:

- Over the course of American history, many significant independent candidacies and political parties have emerged in the late spring or summer of election years. (App. I:197-203.)

- The petition deadline forces independent candidates to organize their petitioning efforts in the winter or very early spring, when the general election is remote and interest is low. (App. I:203.)

- The signature deadline comes before many of the most popular outdoor fairs and festivals where petition circulators commonly gather signatures. (App. I:203-04.)

- In 2020, incumbent Democratic Assemblywoman Rebecca Seawright, who had represented Manhattan's Upper East Side since 2015, failed to qualify for the June primary election. Because she faced no intra-party opposition, that left the Democratic line open and only a Republican on the general election ballot in the heavily Democratic district. But because of Executive Order 202-46, which extended the independent petition deadline due to COVID-19, she was able to qualify for the general election ballot, and she won re-election by almost 20 percentage points. (App. I:196-97.)

- In 2022, which was the first year that the new petition deadline was in place for statewide races, none of the statewide petitions for Governor succeeded. The Unite NY Party, the Libertarian Party, the Green Party, the People's Party, the Freedom Party, the Independence Party, and the

> New Vision Party all fell short in their petitioning efforts. (App. I:204.)

Winger's deposition reinforces those points. (App. I:234-37, 248-49.)

The verified complaint is also "in the record" for purposes of Erie County's motion. Fed. R. Civ. P. 56(c)(1)(a). *See, e.g., Taylor v. City of Rochester*, 458 F. Supp. 3d 133, 140 (W.D.N.Y 2020). Meadors verified the complaint, and her testimony goes to the heart of the burden here: she wanted to vote for Brown in the general election but couldn't do so because of New York's petition deadline. (Verified Compl. 2-3, ECF No. 1.)

Construing the evidence in the light most favorable to Meadors and drawing all reasonable inferences in her favor, a reasonable factfinder could conclude from materials in the record that the burden is discriminatory and severe and that heightened scrutiny applies under the *Anderson-Burdick* framework. As a result, summary judgment isn't appropriate here, and the magistrate judge erred when he concluded otherwise.

A. The magistrate judge improperly weighed the evidence and failed to draw all permissible inferences in Meadors' favor.

The magistrate judge's grant of summary judgment was based on factual findings that New York's petition deadline (a) "does not impose a severe burden," and (b) "does not impose a discriminatory burden." (App. II:456, 457.) But the court's process in reaching those factual conclusions conflicts with the principles that govern motions for summary judgment.

A motion for summary judgment may not properly be granted unless the movant shows that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). In assessing the record to determine whether there is a genuine issue of material fact, a court must resolve all ambiguities and draw all factual inferences in favor of the non-moving party. *See, e.g., Liberty Lobby,* 477 U.S. at 255; *Balderman v. U.S. Veterans Admin.,* 870 F.2d 57, 60 (2d Cir. 1989). In ruling on the motion, the court isn't entitled to weigh the evidence. *See, e.g., Liberty Lobby*, 477 U.S. at 255*; Heyman v. Com. & Indus. Ins. Co.,* 524 F.2d 1317, 1319–20 (2d Cir. 1975). Rather, if

there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. *See, e.g., Brady v. Town of Colchester,* 863 F.2d 205, 211 (2d Cir. 1988).

Although the magistrate judge mentioned some of these principles (App. II:454-55), he didn't apply them.

First, the court improperly discounted Mayor Brown's declaration testimony about the severity of the burden on him and his supporters. The magistrate judge wasn't persuaded by Brown's testimony because, for example, "Brown and his supporters never even tried to timely comply with the petition deadline." (App. II:461.) And he found—without citing anything in the record—that the logistical and financial burdens imposed by the deadline "have nothing to do" with the petition deadline. (App. II:462.) Based on those factors, the magistrate judge concluded that "Brown's affidavit offers no evidentiary support" for a finding that the burdens imposed by the petition deadline are discriminatory or severe. (App. II:462.)

Second, the court improperly discounted the testimony of Meadors' expert, Richard Winger, who offered a declaration and a deposition in which he explained why, in his view, New York's petition deadline imposes a heavy burden on independent candidates and their supporters. The magistrate judge, "disagree[d]" with Winger's view, pointing to the fact that the deadline for independent candidates to file petitions to appear on the general-election ballot is "two months after those individuals seeking major party nominations have filed their designating petitions [to appear on the primary-election ballot]." (App. II:459.) The magistrate judge also observed—again, without citing to any evidence in the record—that independent candidates "would presumably" know who would likely win the major-party primaries at the time of their deadline. (App. II:459.) Finding those factors more persuasive, the magistrate judge discounted Winger's testimony and "[found]" that it "fails to create a triable issue of fact as to the severity of the burden" imposed by the petition deadline. (App. II:461.)

Third, the magistrate judge apparently discounted Meadors' testimony about the burden in the verified complaint, as his order makes no mention of the testimony in his analysis.

The weight of Meadors' evidence should have been a matter for the finder of fact—here, the district judge—at trial. It wasn't the province of the magistrate judge on summary judgment. This alone warrants reversal. *See, e.g, Wright v. Sumter Cnty. Bd. of Elections and Registration*, 657 F. App'x 871, 873 (11th Cir. 2016) (per curiam) (reversing and remanding a grant of summary judgment after finding that the district court improperly weighed the evidence).

B. The magistrate judge applied the wrong standards to measure the magnitude of the burden.

The magistrate judge measured the magnitude of the burden here in two ways. First, he asked "whether a 'reasonably diligent candidate' could be expected to meet the requirements to gain a place on the ballot." (App. II:456 (quoting *Lamont*, 977 F.3d at 178).) Second, he compared New York's petition deadline to other cases in which federal courts have upheld ballot-access restrictions.

(App. II:460-61.) But neither standard would be appropriate here even if the facts were undisputed.

The "reasonably diligent candidate" standard may be appropriate in some kinds of ballot-access cases, such as those that challenge the number of petition signatures required to get on the ballot. *See, e.g, Lamont*, 977 F.3d at 177-78. But it doesn't apply to cases like this one where the principal harm lies not in the effort required but in "the premature cutting off of opportunity." *Cromer*, 917 F.2d at 824 (discussing *Anderson*). In *Anderson*, for example, five people were able to qualify as independent Presidential candidates in Ohio in 1980, and yet the Supreme Court noted that "their inclusion on the ballot does not negate the burden imposed on the associational rights of independent-minded voters." *Anderson*, 460 U.S. at 791-92 n.12. Had the Supreme Court applied the "reasonably diligent candidate" standard to the petition deadline in *Anderson*, the case would have come out the other way.

The Fourth Circuit's decision in *Cromer* illustrates this point. At issue was a South Carolina law that required independent candidates to file a one-page declaration of candidacy by March 30

of an election year. Although the effort required to file a simple declaration of candidacy was minimal, the court found that the character and magnitude of the injury to the voters was "practically total" because of the timing. 917 F.2d at 824. "It effectively cuts off the opportunity for such candidacies to develop at a time that pre-dates the period during which the reasons for their emergence are most likely to occur." *Id.* The burden was thus heavy even though a reasonably diligent candidate could have satisfied the requirement with ease.

The "reasonably diligent candidate" standard simply doesn't measure the kind of harm that the courts recognized in *Anderson* and *Cromer* and that Meadors alleges here. It measures a different kind of harm altogether. It is thus the wrong measure to use.

The magistrate judge also measured the magnitude of the burden by comparing New York's deadline to seven other cases in which federal courts have upheld state ballot-access laws: *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007); *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005); *Wood v. Meadows*, 207 F.3d 708 (4th Cir. 2000); *Council of Alternative Political Parties v. Hooks*, 179

F.3d 64 (3d Cir. 1999) ("*Hooks II*"); *McLain v. Meier*, 851 F.2d 1045 (8th Cir. 1988); *Libertarian Party of Washington v. Munro*, 31 F.3d 759 (9th Cir. 1994); and *Stevenson v. State Board of Elections,* 638 F. Supp. 547 (N.D. Ill. 1986). (App. II:460-61.)

Only four of those cases address petition deadlines for independent candidates, and none of those four upheld a deadline as early as New York's deadline 28 days before the primary election. In *Swanson*, for example, Alabama's deadline for independent candidates fell on the same day as the party primary election. 490 F.3d at 905. The deadline at issue in *Lawrence* was one day before the primary election. 430 F.3d at 370. The deadline in *Wood* was on the same day as the primary election. 207 F.3d at 709, 712. The deadline in *Hooks II* was on the same day as the primary election. 179 F.3d at 68. The earliest deadline upheld in these cases was one day before the primary election. These cases therefore don't suggest that a deadline substantially before the primary, like New York's deadline here, would pass constitutional muster.

The other three cases on which the magistrate judge relied upheld very different election schemes. *McLain* involved a third-party deadline in a state that required those parties to participate in the primary election. *See* 851 F.2d at 1047. The Eighth Circuit upheld a third-party deadline that was 55 days before the primary election. *Id.* at 1051. *McLain* also addressed North Dakota's filing deadline for independent candidates, but that deadline was 55 days before the *general election*. *Id.* at 1047. That deadline is significantly later than the deadline here, so the magistrate judge's assertion that *McLain* upheld a petition deadline "for independent candidates" that was earlier than New York's is plainly mistaken. (App. II:461 n.11.)

Munro involved a third-party deadline in a state that required those parties first to hold a nominating convention and then to participate in a subsequent primary election. 31 F.3d at 760-61. In that context, the Ninth Circuit upheld a July 15 petition deadline that was 64 days before the primary election and was mainly justified by the state's need to verify petition signatures in time to print the ballots. *Id.* at 761 n.2. But New York doesn't

require independent candidates to hold nominating conventions or to participate in primaries, and its deadline for independent candidates is 23 weeks (161 days) before the general election.

Under the Illinois law at issue in *Stevenson*, an independent candidate could obtain ballot access either by filing an independent nominating petition 323 days before the general election *or* by filing a petition to establish a new political party 92 days before the general election. *See* 638 F. Supp. at 552. The plaintiff challenged only the former deadline, but the district court upheld the statutory scheme as a whole because of the availability of the latter deadline. *See id.* at 553-55. But, unlike Illinois, New York doesn't have an alternative route to the ballot that offers a later deadline.

Taken together, the seven cases on which the magistrate judge relied don't establish that a deadline substantially before the primary, like New York's deadline, imposes only a minimal burden. Those cases simply aren't the right measure to use here.

The magistrate judge's use of the wrong standards to measure the magnitude of the burden led the court to measure it incorrectly. That also warrants reversal.

C. The magistrate judge applied the wrong standard to determine whether the petition deadline is discriminatory.

To determine whether New York's petition deadline is discriminatory, the magistrate judge compared the petition deadline for independent candidates to appear on the *general-election ballot* (late May) to the petition deadline for party candidates to appear on the *primary-election ballot* (late March). (App. II:457-58.) But that, too, is the wrong measure.

In *Anderson*, Ohio's deadline for independent candidates fell "on the same date" in late March as the deadline for major-party candidates. *Anderson*, 460 U.S. at 799. But the Supreme Court rejected Ohio's argument that these deadlines were equivalent: "both the burdens and the benefits of the respective requirements are materially different, and the reasons for requiring early filing for a primary candidate are inapplicable to independent candidates in the general election." *Id.* Instead, the Supreme Court found that Ohio's deadline discriminated against independent candidates because it gave major parties "the advantage of continued

flexibility" until they selected their nominees and platform five months later. *Id.* at 791.

Following *Anderson*, courts have routinely measured whether a filing deadline for independent candidates is discriminatory by reference to the date on which the major parties select their nominees at a convention or primary. *See Council of Alt. Pol. Parties*, 121 F.3d at 880 n.3 ("*Anderson* suggests that a state must be able to point to a particularly strong countervailing interest in order to justify a filing deadline that requires alternative candidates to file nominating petitions before the major political parties have chosen their candidates for the general election."); *see also, e.g., Graveline v. Benson,* 992 F.3d 524, 538-39 (6th Cir. 2021) (five weeks before major-party nominations); *New All. Party of Ala. v. Hand,* 933 F.2d 1568, 1570 (11th Cir. 1991) (per curiam) (two months before the major parties' primaries); *Populist Party*, 746 F.2d at 661 ("The June 1 deadline … appears to run counter to the views in *Anderson*"); *Moore*, 2018 WL 10320761, at *3 (March 1 deadline unconstitutional); *Nader 2000 Primary Cmte.*, 110 F.

Supp. 2d at 1208 (deadline on "the third Tuesday" in June is unconstitutional under *Anderson*).

The magistrate judge's use of the wrong standard to measure inequality led the court to measure it incorrectly. That, too, warrants reversal.

II. Erie County hasn't shown that New York's petition deadline would satisfy strict scrutiny.

Because there's a genuine dispute about the character and magnitude of the burdens imposed by New York's petition deadline for independent candidates—facts that are necessary to determine the level of scrutiny that the Court should apply under the *Anderson-Burdick* framework—Erie County can only show that it is entitled to summary judgment notwithstanding that dispute if it can show that the challenged statute would satisfy the highest level of scrutiny anyway. In the district court, the County didn't even suggest that the statute is 'narrowly drawn to advance a state interest of compelling importance." *Burdick,* 504 U.S. at 434. The County argued only that the state's interests "outweigh" the burdens." (Defs' Mem. Supp. Summ. J. 16, ECF No. 66-1.) And the

magistrate judge made no finding that New York's deadline would satisfy strict scrutiny if it applied here.

The connection between the petition deadline and the asserted state interests is also disputed as a matter of fact. Erie County argued and the magistrate judge found, for example, that the petition deadline advances the state's interest in "ensuring the integrity and reliability of the election process" and "upholding the state's administrative duty to meet federal deadlines for the mailing of overseas and military ballots." (App. II:465.) But deposition testimony from the Board of Elections shows that election officials don't need anywhere near 107 days to verify the small number of signatures on the small number of independent petitions submitted each year when those same officials are able to process the signatures on a large number of party designating petitions in 36 days. (App. II:297-333.) In fact, the Board of Elections testified that it could have reviewed the 3,700 signatures on Brown's petition in a single day (App. II:306), and it receives only five to ten independent petitions each year (App. II:307). The Democratic memo suggests, moreover, that the reason for moving

the petition deadline in 2019 wasn't any good-government policy but an intent to shield Democratic candidates from competition. (App. I:153-54.)

The magistrate judge also found that the petition deadline is justified by a state interest in "promoting political stability at the expense of factionalism,"—in other words, barring sore-loser candidacies. (App. II:465.) But New York law permits sore-loser candidacies, and the petition deadline doesn't prevent them. The deadline merely prevents candidacies by so-called sore losers who don't launch their independent candidacies before late May. It prevents sore losers only by happenstance—not by legislative design—and the Supreme Court expressly rejected this justification in *Anderson*. 460 U.S. at 804 n.31.[6] Thus, while a state might have

[6] Presidential candidate John Anderson was a sore loser nine times over. *See Anderson*, 460 U.S. at 784 n.2. He had entered 26 Republican presidential primaries and had already lost nine of them, including the one in his home state, before he decided to run for President as an independent. *See generally,* John B. Anderson, Wikipedia, https://en.wikipedia.org/wiki/John_B._Anderson (last visited January 1, 2023).

an interest in preventing sore-loser candidacies *if it chose to do so*, New York chooses not to do so.

Erie County thus hasn't met its burden under the second and third parts of the *Anderson-Burdick* framework and therefore isn't entitled to judgment as a matter of law.

Conclusion

Because Erie County isn't entitled to summary judgment, the Court should vacate the judgment and remand the case to the district court for further proceedings.

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This brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because, excluding parts of the brief exempted by Rule 32(f), it contains 7,169 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in the 14-point Century Schoolbook typeface in roman style.

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