23-1054

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

APPELLEES' BRIEF

JASON HARROW
GERSTEIN HARROW LLP
12100 Wilshire Blvd. Suite 800
Los Angeles, CA 90025
(323) 744-5293
jason@gerstein-harrow.com

JEREMY TOTH
ERIE COUNTY ATTORNEY
ERIE COUNTY DEPARTMENT OF LAW
95 Franklin St., 1634
Buffalo, NY 14202
(716) 858-2204
Jeremy.Toth@erie.gov

CHARLES GERSTEIN
(*counsel of record*)
GERSTEIN HARROW LLP
810 7th Street NE, Suite 301
Washington, DC 20002
(202) 670-4809
charlie@gerstein-harrow.com

Counsel for Defendants-Appellees

Dated: January 17, 2024
[original]

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF JURISDICTION 3

STATEMENT OF THE ISSUE 3

STATEMENT OF THE CASE 3

I. Statutory Background 3

II. This Case and Related Proceedings 9

III. Proceedings on Remand 13

STANDARD OF REVIEW 15

SUMMARY OF THE ARGUMENT 15

ARGUMENT 18

I. Summary Judgment Is Appropriate Because Plaintiffs' Only Complaint Is That The Independent Filing Deadline Predates The Party Primary Election 18

1. There are no disputes of fact, let alone genuine ones, because Brown *admits* that he had no inkling of an independent candidacy until he lost the Democratic primary 19

2. This is thus a sore-loser case and *Storer* controls 22

II. New York's Law Is Constitutional As Applied to People Who Actually Try to Comply With It 25

1. The reasonably-diligent-candidate test applies, and regardless Plaintiffs' alternative test reaches the same outcome 28

2. The burden on independent candidates is non-discriminatory and non-severe 30

3. The deadlines are justified by clear and important state interests 36

CONCLUSION 40

CERTIFICATE OF COMPLIANCE 42

TABLE OF AUTHORITIES

Cases

Anderson v. Celebrezze, 460 U.S. 780 (1983) 26, 38

Brown v. Erie County Bd. of Elections, 197 A.D.3d 1503 (4th Dep't 2021)...2, 12, 13, 17

Burdick v. Takushi, 504 U.S. 428 (1992) 26

Council of Alternative Pol. Parties v. Hooks, 179 F.3d 64 (3d Cir. 1999)...*passim*

Council of American Political Parties v. Hooks, 121 F.3d 876 (3d Cir. 1997)...23

Covington Specialty Ins. Co. v. Indian Lookout Country Club, Inc., 62 F.4th 748 (2d Cir. 2023) 15

Cromer v. Cinnamon, 917 F.2d 819 (4th Cir. 1990) 28, 29

Jenness v. Fortson, 403 U.S. 431 (1971) 18, 26, 30, 31

Lawrence v. Blackwell, 430 F.3d 368 (6th Cir. 2005)..................27, 28, 38

Libertarian Party of Arkansas v. Thurston, 632 F. Supp. 3d 855 (E.D. Ark. 2022) 35

Libertarian Party of Connecticut v. Lamont, 977 F.3d 173 (2d Cir. 2020)..17, 27, 36

Libertarian Party of Ohio v. Blackwell, 462 F.3d 579 (6th Cir. 2006)...35

Libertarian Party of Washington v. Munro, 31 F.3d 759 (9th Cir. 1994) 32

McClain v. Meier, 851 F.2d 1045 (1988) ....*passim*

Norman v. Reed, 502 U.S. 279 (1992) 26

SAM Party v. Kosinski, 483 F. Supp. 3d 245 (S.D.N.Y. 2020) 33

Stevenson v. State Bd. of Elections, 638 F. Supp. 497 (N.D. Ill. 1986) 32

Storer v Brown, 415 U.S. 724 (1974) .... *passim*

Swanson v. Worley, 490 F.3d 894 (11th Cir. 2007) .... *passim*

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 26, 38

Wood v. Meadows, 207 F.3d 708 (4th Cir. 2000) 29

Statutes

N.Y. Election Law § 4-114 11

N.Y. Election Law § 6-134 4

N.Y. Election Law § 6-136 5

N.Y. Election Law § 6-138 4

N.Y. Election Law § 6-142 5

N.Y. Laws 2019, Ch. 5 6

Online Authorities

New York State Board of Elections, Governor/Lt. Governor Election Returns November 4, 2014, *available at* https://perma.cc/LT5M-3B62 5

Rules

Fed. R. Civ. P. 26(a)(1)(A)(ii) 14

Fed. R. Civ. P. 56 18

PRELIMINARY STATEMENT

This is a sore-loser case. Plaintiffs are supporters of Mayor Byron Brown of Buffalo, who ran in a Democratic primary, lost, and came to court complaining (retroactively) that New York's election calendar did not permit him to put his name on the general election ballot anyway. In 2021, just before the election, an emergency motions panel of this Court essentially reversed the district court's incorrect order requiring that Brown's name appear on the ballot. Brown won anyway as a write-in, but his supporters still press on with this challenge.

The district court's grant of summary judgment rejecting the challenge to New York's carefully considered election calendar should be affirmed for multiple, independently sufficient reasons. *First*, as a factual matter, Mayor Brown and his supporters were not actually injured by the relatively early date of New York's primary, as it is undisputed that Mayor Brown formed no intention to run as an independent until *after* he lost the primary election; thus, he and his supporters would have been equally harmed by *any* primary date occurring after the independent filing deadline. Further, Plaintiffs can offer no evidence that Brown would have had any difficulty meeting the filing deadline if he had

attempted to do so. *Second*, relatedly, given Brown's failure to take any steps to run as an independent candidate, this is functionally a sore-loser challenge—that is, a claim by the loser of a major-party primary that a state must permit an alternative path to the ballot—but clear, binding law holds that states may prohibit sore-loser candidacies. *Storer v Brown,* 415 U.S. 724, 737 (1974) (so holding). And *third*, even assuming the Court could view the entire election calendar divorced from the facts of the case, the state's interest in maintaining an orderly election calendar outweighs any individual's interest in waiting until the last minute to mount a campaign and appear on the ballot. New York's Appellate Division has already reached the same conclusion in this very dispute, and there is no reason for this Court to depart from that conclusion. *See Brown v. Erie County Bd. of Elections*, 197 A.D.3d 1503, 1504 (4th Dep't 2021).

For these reasons, the Court should affirm and put to rest any possible uncertainty about the validity of New York's election calendar.

STATEMENT OF JURISDICTION

Defendants–Appellees join Plaintiffs–Appellants' statement of jurisdiction.

STATEMENT OF THE ISSUE

May a plaintiff defeat summary judgment on a claim that a state's independent-candidate filing deadline is too early without introducing any evidence that her preferred candidate was harmed by any feature of that deadline other than the fact that it falls before the major-party primary day, which many courts have held to be constitutional?

STATEMENT OF THE CASE

This Section explains New York's ballot-access regime, then the undisputed (and indisputable) facts of this case, and finally the procedural history of this case.

I. Statutory Background

There are two ways a candidate for local office in New York can qualify for a line on the general-election ballot: the party-primary process and the independent-candidate process. To pursue the party-primary process, candidates file designating petitions signed by a fixed number of registered voters belonging to their political party, which must have

already qualified as a political party under a separate process. *See* N.Y. Election Law § 6-134. To pursue the independent-candidate process, candidates file independent-nomination petitions signed by a fixed number of registered voters. *Id.* § 6-138. Independent candidates may designate an "independent body," which need not qualify as a political party, making the nomination. *Id.* § 6-138(3). Thus, independent candidates in New York essentially run as members of political parties of their own choosing, albeit parties that are not officially recognized by the State and do not have a primary process.

In New York, unlike all other states but Connecticut and Alabama, these two paths to the general-election ballot are not mutually exclusive—candidates may run on multiple ballot lines, as many as they qualify for. And New York, unlike all other states but Connecticut and Iowa, has no explicit so-called "sore loser" law forbidding primary losers from running as independents. Thus, if candidates want to maximize the odds of appearing on the general-election ballot, or express affiliation with multiple parties and groups, they can compete in the party primary while also seeking independent nominations, and if they lose the party primary they can still appear on the general-election ballot. All votes for

candidates who appear on multiple lines are added to the candidates' totals.

Candidates can and do take advantage of the flexibility to appear on multiple ballot lines. In 2014, Governor Andrew Cuomo appeared on the ballot for the Democratic Party, a political party; the Women's Equality Party, an independent body; and several other independent bodies. *See* New York State Board of Elections, Governor/Lt. Governor Election Returns November 4, 2014, *available at* https://perma.cc/LT5M-3B62. Byron Brown, too, appeared on the ballot for multiple parties in 2017 (Democratic, Working Families, Independence, Women's Equality) and 2013 (Democratic, Conservative, Working Families, Independence). App'x at 129.

To qualify for the general-election ballot as an independent for election to a political subdivision, a candidate must file a petition containing signatures equal to five percent of the number of people who voted for governor in that subdivision in the last election. *See* N.Y. Election Law § 6-142. Party candidates must file petitions containing signatures equal to five percent of the enrolled voters in their party. *Id.* § 6-136. As applied to the 2021 election, independent candidates must file

their petitions no later than May 25, which is two months after candidates must petition to appear in a primary election. All in all, the deadlines in 2021 were as follows:

Date	Deadline	N.Y. Election Law
March 25, 2021	Designating petition for Democratic primary due	§ 6-158(1)
May 25, 2021	Independent nominating petition due	§ 6-158(9)
June 22, 2021	Primary election	§ 8-100(1)(a)
September 9, 2021	Certification of candidates for general election	§ 4-114
September 17, 2021	Mail ballots to overseas voters mailed	§§ 10-108(1); 11-204(4)
October 23, 2021	First day of early voting for the general election	§ 8-600(1)
November 2, 2021	General election	§ 8-100(1)(c)

These deadlines were most recently altered by a comprehensive 2019 election law, N.Y. Laws 2019, Ch. 5. The stated impetus for the 2019 changes was to "ensure that New York State's election law complies with the federal Military and Overseas Voter Empowerment (MOVE) Act." App'x at 130. In particular, in 2012, New York was sued by the federal government because its timelines did not permit it to transmit general election ballots 45 days before the election, as was required for elections for federal office. The resulting injunction meant that, beginning in 2012 until the law's passage, New York had two different primaries: a federal

primary in June and a state and local primary in September. *Id.* The Legislature identified at least three clear benefits to creating earlier deadlines for all offices and "merging the federal non-presidential and state primaries": the earlier, unified primary would "[1] ensure that military personnel and New Yorkers living abroad have an opportunity to vote . . . [2] prevent New Yorkers from having to go out and vote in three separate primaries . . . and by reducing the number of primary days, county boards of elections throughout New York State will see a collective cost savings of approximately $25,000,000." *Id.* The bill received strong bipartisan support. It passed the Assembly 120–42 on January 14, 2019 and then passed the Senate 53–8 the next day. App'x at 131.

When the revised bill hit the desk of then-Governor Andrew Cuomo, he received near-universal messages of support. The State Board of Elections, which had been asked to evaluate the legislation, submitted an 11-page report that explained, in detail, the rationale for many of the changes, including the timing changes at issue here. The memo explained that moving up the deadlines, including the deadline for an independent nominating petition, would promote (1) "political stability," because it

"encourages independent nominations to be about independent ballot access and not about party candidate sore losers getting on the ballot or party candidate seeking an extra ballot position"—though, of course, candidates could still seek access on multiple lines; (2) it "promot[ed] a fair electoral process" by setting the independent-petition deadline relatively soon after the party deadline and not allowing "independent parties to file on a considerably later date" which could "unduly give independent candidates a significant advantage"; (3) it helped support an "informed electorate" because voters would know all those with ballot access around the same time, and major party nominees would not have several months more of an advantage; and (4) it would further "administrative need" because election officials "have a strong interest in ensuring that a ballot is constructed in a timely and orderly fashion," and it would also ensure litigation is settled early. *Id.*

By contrast, the Board concluded the "burdens on independent candidates are minimal" given "(i) the proximity to the party candidate petition process, (ii) New York's six-week period to collect independent nominating signatures from a larger population of voters than party candidate have available, and (iii) the relatively low signature

requirements for independent ballot access." App'x at 132. The New York City Bar Association had similar views and noted that "[u]nder the reformed calendar," signature gathering "can occur at a time when people are more available and accessible." App'x at 132.

There was a single dissenting voice, and it was Plaintiffs' expert here, Richard Winger. Winger is a Libertarian who is among the country's leading advocates for broad ballot access for independent and minor-party candidates, and he publishes the long running newsletter and website *Ballot Access News*. He wrote to Governor Cuomo and attached an article from his newsletter arguing that the new law "injures ballot access" because the deadline would be too early for "minor party and independent candidates." *Id.*

Governor Cuomo signed the bill on January 24, 2019. *Id.* The 2021 election was the first Buffalo mayoral election conducted under the new election calendar.

II. This Case and Related Proceedings

In 2021, the sitting Mayor of Buffalo, Byron Brown, lost the primary election to be the Democratic nominee for Mayor to India B. Walton. *Id.* Before the primary, Brown could have collected the

signatures necessary to appear on the ballot in a general election on a different party line. If he had won the Democratic primary, he would have then appeared on the ballot on multiple lines, as Brown had done in years past. Or, if he lost the Democratic primary, he could have appeared on the ballot for only those other parties. But he sought the nomination of only the Democratic Party in 2021. *Id.* Thus, when he lost the primary, he was faced with having to mount a write-in campaign or not pursuing a fifth term in office. Plaintiffs produced no evidence about why Brown chose to run only on the Democratic ballot line in 2021. *See generally id.*

After his primary loss, Brown launched a write-in campaign for the general election. App'x at 21. He also evidently began gathering signatures to appear as an independent candidate nominated by the "Buffalo Party," an independent body. *Id.* The record does not reveal how vigorous the signature campaign was, but it is undisputed that Brown did not even consider seeking signatures for an independent petition until he lost the Democratic primary. App'x at 398 (declaration of Byron Brown). Instead, on August 17, 2021, nearly two months after his primary loss, Brown filed an independent nominating petition with the Erie County Board of Elections to place him on the general election ballot

as a candidate. App'x at 132. The Board of Elections duly rejected this petition because the deadline under Election Law § 6-158(9) was May 25, 2021, making the petition 84 days late. *Id.* By statute, the Board is required "determine the candidates duly nominated for public office" in the jurisdiction, N.Y. Election Law § 4-114, and it is undisputed that Brown was not duly nominated. Because there were no other candidates, the Board of Elections prepared a general-election ballot with only Walton on it.

On August 30, 2021, several individual supporters of Brown brought this suit against the Board of Elections and two of its members (collectively "Board") and sought a temporary restraining order requiring the Board to place Brown's name on the ballot. The Complaint contained a single claim for relief: that enforcement of the deadline for independent candidates violates Plaintiffs' rights under the First and Fourteenth Amendment. App'x at 22 (complaint). Brown also brought a state-court action against the Board. Walton intervened in district court but has since voluntarily dismissed her action. App'x at 10.

On September 3, 2021—two weeks before the Board was required by law to mail ballots to certain overseas voters—the U.S. District Court

for the Western District of New York (Sinatra, *J.*) held an emergency hearing. The Court ruled from the bench that day, entering a preliminary injunction requiring Brown's name to appear on the ballot. New York Supreme Court ordered the same in Brown's case. *Brown v. Erie County Bd. of Elections*, 197 A.D.3d 1503, 1504 (4th Dep't 2021) (describing prior history).

Both Walton and the Board appealed in federal and state court. On September 16, one day before ballots were to be mailed overseas, this Court and the Fourth Department halted the entry of the respective injunctions. This Court's emergency order staying this Court's entry of an injunction was unreasoned. 2d Cir. Appeal Nos. 21-2137, 21-2145, Doc. No. 74.

The Fourth Department rejected Brown's claim on the merits and held that the deadline, as applied here, is constitutional. The court noted that a "'reasonably diligent candidate' could be expected to meet New York's requirements for independent candidates and gain a place on the ballot," and reasoned that the "combination of rules for independent candidates in New York . . . is similar to election regulations in other states that have been found not to impose a severe burden on the

constitutional rights of candidates and voters." *Brown*, 197 A.D.3d at 1506. The Fourth Department's conclusion was further supported by the fact that the constitutional challenge arose in the context of a "local election that does not implicate any national interests" and that Brown himself—the incumbent mayor who had run in but lost a Democratic primary—was "far from the archetypal 'independent candidate' whose interests [caselaw] seek[s] to protect." *Id.* Brown did not further appeal either decision, and his name did not appear on the ballot.

On election day, Brown won re-election as a write-in candidate with over 58% of the vote. App'x at 132. He is currently serving his fifth term as mayor of Buffalo.

III. Proceedings on Remand

The 2021 election mooted the emergency appeal in this Court, and so the parties returned to the district court. Under the scheduling order agreed to by the parties and entered by the court, the parties had until November 1, 2022 to complete discovery. During that time, the parties had ongoing obligations to disclose copies "of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or

defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(ii). Plaintiffs disclosed a single document: an expert report by Richard Winger, the aforementioned publisher of *Ballot Access News*. The Board deposed Winger, and Plaintiffs deposed the Board's Rule 30(b)(6) representative.

The Board moved for summary judgment, arguing, among other things, that Plaintiffs had produced no evidence from which a reasonable factfinder could conclude that they were burdened *at all* by the independent-petition deadline because Winger candidly admitted that he hadn't read the Complaint in this case and that he had no factual knowledge whatever of the burdens faced by Brown in *this* case. In response, Plaintiffs introduced a declaration produced by Brown after the Board's summary-judgment motion. Although that declaration was untimely and improper, the Board did not object to its consideration because it confirmed what everyone already knew: Brown did not even decide to run as an independent candidate until after he was defeated in the primary election. App'x at 398. Brown declared that he decided to run as an independent only "after [he] was defeated in the Democratic primary" because, at that point, he and his supporters "were left with no

other choices on the general-election ballot." *Id.* Thus, at "his supporters' urging, [Brown] agreed to stand as a write-in candidate" in the general election. *Id.*

The Court granted the Board's motion for summary judgment relying on facts entirely not in dispute, and Plaintiffs timely appealed to this Court.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*, 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. *Covington Specialty Ins. Co. v. Indian Lookout Country Club, Inc.*, 62 F.4th 748, 752 (2d Cir. 2023).

SUMMARY OF THE ARGUMENT

The core problem with Plaintiffs' case, in district court and here, is that they ignore what actually happened in the 2021 election. Mayor Brown ran in a primary, lost, and went to court complaining that the Constitution gave him a right to try again on the general-election ballot. Neither Brown nor any other witness or document in the record so much as hints that anything about New York's election laws harmed Plaintiffs

in any way other than by denying Brown a second chance to appear on the general-election ballot after losing the primary.

The law has a name for candidates like Brown: "sore losers." And the law is crystal clear that states may bar sore losers from the ballot, both explicitly, *Storer v Brown,* 415 U.S. 724, 737 (1974), and by setting deadlines that effectively prevent them from appearing, *Swanson v. Worley*, 490 F.3d 894, 911 n.17 (11th Cir. 2007) (addressing whether an independent filing deadline before the party primary day "serves an important state interest in discouraging 'sore loser' candidates" and concluding that "[t]he filing deadline on the primary election date clearly serves this interest because a losing candidate in a major party primary could not qualify on the same day as an independent candidate"); *Council of Alternative Pol. Parties v. Hooks*, 179 F.3d 64, 80 (3d Cir. 1999) (Alito, *J.*) (holding, in filing-deadline case, that "New Jersey's interest in preventing 'sore losers' rises to the level of a legitimate and important State interest" justifying independent deadline before party primary). That is alone sufficient for this Court to dispose of this appeal by summary order.

Regardless, New York's election laws would be constitutional as applied to challengers who—unlike the Plaintiffs here—were actually unable to support a candidate who tried to meet the deadline. Courts analyze the constitutionality of ballot-access laws using the familiar *Anderson–Burdick* framework under which courts ask whether a law imposes a discriminatory or severe burden on independent candidates and then compare that burden to the state's asserted interests in imposing it. *See Libertarian Party of Connecticut v. Lamont*, 977 F.3d 173, 177 (2d Cir. 2020) (explaining framework).

Here, the burden is non-discriminatory because it allows independent candidates to file a full two months *after* all party primary candidates have already publicly qualified for the primary election. *See Brown*, 197 A.D.3d at 1506. And the burden is not close to severe: "The hallmark of a severe burden is exclusion or virtual exclusion from the ballot," *Libertarian Party of Conn.*, 977 F3d at 177, and here not only could "reasonably diligent" candidates appear on the ballot, but—because of New York's nearly unique fusion-voting scheme—the could *also* take their chances in a primary. The State's concededly valid interests in political stability and administrative efficiency thus easily suffice to

sustain New York's ballot-access deadline. Holistically, New York's regime is far less restrictive the regimes upheld in *Jenness v. Fortson*, 403 U.S. 431 (1971), and *McClain v. Meier*, 851 F.2d 1045 (1988). This Court should affirm the district court's conclusion that New York's ballot-access regime is constitutional.

ARGUMENT

I. Summary Judgment Is Appropriate Because Plaintiffs' Only Complaint Is That The Independent Filing Deadline Predates The Party Primary Election

Plaintiffs' core argument in this appeal is that the district court erred by granting summary judgment in the face of supposed factual disputes raised by two pieces of evidence: A declaration from Brown and the testimony of Plaintiffs' expert Dr. Richard Winger.[1] But to defeat summary judgment plaintiffs must introduce evidence sufficient to create a genuine *dispute* of *material* fact, *see* Fed. R. Civ. P. 56, and neither

[1] Plaintiffs contend that the Complaint is competent evidence because they "verified" it with their own signatures. Appellants' Br. at 33. But the Complaint fails to create a dispute of fact for the same reason that Brown's declaration does—Plaintiffs complain only that they couldn't vote for Brown, and, as explained below, they couldn't vote for Brown only because Brown chose not to try to meet New York's deadlines.

Brown's declaration nor Winger's testimony do that. Everyone agrees on what happened, and Plaintiffs are simply wrong on the legal import of what happened.

1. There are no disputes of fact, let alone genuine ones, because Brown *admits* that he had no inkling of an independent candidacy until he lost the Democratic primary

Plaintiffs rely primarily—indeed almost exclusively—on Mayor Brown's declaration to argue that this case should go to trial on the question whether New York's petition deadline imposes a "real world burden" on Brown and his supporters. Appellants' Br. at 31. The problem with this argument is that Brown provides no evidence that whatever burdens he and his supporters felt were anyone's fault but his.

Brown declares that after losing the Democratic Primary he "launched a write-in campaign," App'x at 398, and that the write-in campaign was annoying, *id.* at 399, and expensive, *id.*, more so than a printed-ballot campaign would have been, *id.* Sure. But Brown says only this about the *source* of that irritation and expense: "*After I was defeated* in the Democratic primary by a little-known far-left candidate, the May 25 deadline prevented any independent candidates from entering the race in response to that development." *Id.* (emphasis added). As

explained below, that complaint—that New York law denied Brown a second chance to be on the ballot after losing his first try—is one that cannot help his case, because both the U.S. Supreme Court (in *Storer*, 415 U.S. at 737) and the Courts of Appeals (in, *Swanson*, 490 F.3d at 911, and *Council of Alternative Political Parties*, 179 F.3d at 80, among others) have rejected all manner of challenges to laws that prohibit losers of major-party primaries from getting a second chance to appear on the general election ballot. Indeed, as applied to this very dispute, the Fourth Department has also rejected a version of the same argument. *Brown*, 197 A.D.3d at 1506.

That leaves Brown and his supporters with nothing to complain about other than Brown's own choice not to take advantage of the liberal ballot-access regime New York law provides. After all, Plaintiffs offer *no* evidence that Brown would have faced *any* obstacles to complying with the May 25 deadline *had he tried*. He chose not to, even though New York law would have allowed him to qualify for the ballot on as many lines as he wanted and even though he had appeared on several lines in prior elections.

The Supreme Court has been clear that candidates who wish to challenge an election law on constitutional grounds must have actually been harmed by the feature of the law that they or their supporters challenge. In *Storer*, the Court explained that, where two candidates challenged a requirement that they change parties no less than one year before running for election in another party, "neither . . . is in position to complain that the waiting period is one year, for each of them was affiliated with a qualified party no more than six months prior to the primary." 415 U.S. at 734. Thus the Court held that "[a]s applied to them [the deadline] is valid." *Id.* So too here. There is no evidence that Brown even considered running as an independent candidate until he lost the primary.

This undisputed factual record makes Plaintiffs' appeal somewhat strange. Plaintiffs did not move for summary judgment in the district court, and they ask this Court is only to vacate the district court's order and remand for trial. Appellants' Br. at 48. But there is nothing to be tried: all agree that Mayor Brown never took any steps to meet the May 25 deadline for independent candidates and never even thought to run as an independent until his unexpected loss in the Democratic primary. So

there will be no additional facts about how the specific deadline burdened Mayor Brown and his supporters. Plaintiffs and Mayor Brown will say that they wished the deadline for independent candidates were after the Democratic primary, not before it, but that particular burden is legally insufficient to sustain a constitutional challenge. *See infra*, § I.2. As applied to Brown's supporters, the law is constitutional.

2. This is thus a sore-loser case and *Storer* controls

Plaintiffs' real complaint, then, is that New York law denied them the chance to vote for Brown on a ballot line after he both lost the Democratic primary and chose not to qualify as an independent before losing. Brown is a sore loser. And states may—and all but two do—bar sore losers from appearing on the ballot.

In *Storer*, the Court upheld a California ballot-access regime under which "[a] candidate in one party primary may not now run in that of another; if he loses in the primary, he may not run as an independent; and he must not have been associated with another political party for a year prior to the primary." *Storer*, 415 U.S. at 734–35.

> It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not

> only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.

Id. at 735.

In response, Plaintiffs contend that the Board may not rely on New York's interest in barring sore losers because "New York law permits sore-loser candidacies"—that is, sore-loser candidacies are not expressly barred, as they are in some other states—but "the deadline merely prevents candidacies by so-called sore losers who don't launch their independent candidacies before late May." Appellants' Br. at 47. Plaintiffs' argument hinges on the novel proposition that when states want to bar sore losers from the ballot, they must do so explicitly and completely. *Id.* In support of this unusual proposition, Plaintiffs rely on *Anderson*, arguing that because John Anderson had lost primary elections in *other years*, he was a "sore loser" and the Supreme Court's conclusion that he was constitutionally entitled to ballot access applies here too. And, relying on the *first* panel opinion in *Council of American Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997), Plaintiffs argue that "a state must be able to point to a particularly strong countervailing

interest in order to justify a filing deadline . . . before the major parties have chosen their candidates . . . .” Appellants’ Br. at 29.

Plaintiffs’ argument is wrong for many independently sufficient reasons. First, courts have explicitly held that states may rely on their interest in barring sore losers to justify filing deadlines, *Swanson*, 490 F.3d at 911 n.17; *Council of Alternative Pol. Parties v. Hooks*, 179 F.3d at 80, and Plaintiffs cite exactly zero authority to the contrary—other than the first panel opinion in *Hooks*, which dealt with a an interlocutory appeal of a non-final decision; the final opinion (authored by now-Justice Alito) clearly rejects this reasoning, *id.* Second, in *Storer*, the Court explained that if candidates are “properly barred from having their names placed on the . . . ballot” as sore losers, then “there is no need to examine the constitutionality of the other provisions of the Elections Code as they operate singly or in combination as applied to these candidates.” *Storer*, 415 U.S. at 736. Here, that means that once this Court concludes that Brown, who sought nothing other than a chance to appear on the ballot after losing a primary, was properly barred as a sore loser, his supporters may not complain about other features of the deadline regime that may also have barred his access (and indeed he

identifies none). Finally, the analogy to John Anderson is sophistry: Anderson was a loser, not a *sore* loser. No state has ever barred a candidate from appearing on the ballot in subsequent elections merely because he lost prior ones.

Brown is a sore loser, states may bar sore losers from the ballot, and New York has done so here. This Court may thus summarily affirm the decision of the district court without even considering the question (discussed below) whether New York's law might be unconstitutional as applied to someone who actually tried to comply with it.

II. New York's Law Is Constitutional As Applied to People Who Actually Try to Comply With It

As explained above, this Court need not reach the question whether New York's ballot-access regime is constitutional as applied to hypothetical candidates or their supporters who were in fact harmed by it because Brown was not. But because Plaintiffs focus much of their brief on such a hypothetical case and ignore this one, the Board explains below that New York's law would be constitutional anyway because the reasonably-diligent-candidate test applies here, the burdens imposed by New York's regime are neither severe nor discriminatory, and those burdens are easily justified by many state interests. Examined

holistically, New York's regime is far less restrictive the regimes upheld in *Jenness v. Fortson*, 403 U.S. 431 (1971), on which courts have continued to rely in cases like these even after *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *McClain v. Meier*, 851 F.2d 1045 (1988). This Court should thus affirm if it decides to treat this case as though Brown and his supporters were in fact harmed by New York's regime.

Courts analyze ballot-access deadlines under the familiar *Anderson–Burdick* framework. This Court has explained that

> Under that framework, the level of scrutiny we apply depends on the severity of the burden state law imposes on First and Fourteenth Amendment rights. When a state's election regulation imposes "'severe' restrictions" on First and Fourteenth Amendment rights, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). By contrast, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). "Review in such circumstances will be quite deferential, and we will not require 'elaborate, empirical verification of the weightiness of the State's asserted justifications.'" *Price v. New York State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)) (internal citation omitted).

Libertarian Party of Conn., 977 F.3d at 177.

In ballot-access-deadline cases, courts compare independent-candidate and third-party deadlines to both primary- and general-election dates, asking whether the independent deadline is severe or discriminatory with respect to both comparisons. *E.g.*, *Swanson*, 490 F.3d at 911; *Council of Alternative Pol. Parties*, 179 F.3d at 80. Although "an earlier deadline does impose more of a burden than a later deadline, the Supreme Court has held that little weight is given to 'the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.'" *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005) (quoting *Storer*, 415 U.S. at 736). A "vital distinction" in such cases is whether a deadline "put[s] independent candidates at a disadvantage vis-a-vis the major parties' nominees." *Id.* Whether a burden is discriminatory, then, is the key factor in determining whether strict scrutiny applies, because, after all, deadlines are "necessarily arbitrary and once a date has been established, it would probably be impossible to defend it as either compelled or least drastic." *McClain*, 851 F.2d at 1050 (cleaned up and citations omitted).

1. The reasonably-diligent-candidate test applies, and regardless Plaintiffs' alternative test reaches the same outcome

Plaintiffs first complain that the "reasonably diligent candidate" standard on which the district court relied "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.'" Appellants' Br. at 38 (citing *Cromer v. Cinnamon*, 917 F.2d 819, 824 (4th Cir. 1990)). There are two core problems with this argument: first, it's wrong; second, it doesn't change the outcome.

First, Courts regularly explain that a filing deadline is not severe or discriminatory when a reasonably diligent candidate could meet it. *Lawrence*, 430 F.3d at 373 ("There is no reason for this Court to conclude that the burden Ohio has placed on all candidates to engage in significant campaign efforts prior to March in order to obtain a place on the ballot is severe or inherently unreasonable. The filing deadline for independent candidates is not so early that a diligent candidate cannot meet the requirement."); *Council of Alternative Pol. Parties v. Hooks*, 179 F.3d 64, 77 (3d Cir. 1999) (describing, in a paragraph about filing deadlines, *Storer* as "stating that the appropriate question is whether under the

statutory scheme a 'reasonably diligent' minor party candidate could gain a place on the State's general election ballot"); *McClain*, 851 F.2d at 1050 ("Do the challenged laws [which set the primary date and filing deadlines for that primary] freeze the status quo by effectively barring all candidates other than those of the major parties could a reasonably diligent third party candidate be expected to satisfy the filing requirements?" (citations and quotation marks omitted)).

Second, Plaintiffs' proposed alternative test—which, it appears, asks only whether an independent-candidate deadline "premature[ly] cuts off opportunity," Appellants' Br. at 38 (quoting *Cromer*, 917 F.2d at 824)—makes no difference here. Because Brown only decided to run as an independent because he lost the Democratic primary, *any* deadline occurring before the primary would have "cut off" his opportunity to the same degree. But a filing deadline is not premature just because it requires a decision before the primary. *See Wood v. Meadows*, 207 F.3d 708 (4th Cir. 2000) (upholding an independent filing deadline requiring petition and signatures to be filed by the day of the primary); *Council of Alt. Political Parties*, 179 F.3d 64 (same). And even if Brown had been burdened by the earlier filing deadline, that burden would not have been

severe enough to rise to the level of a constitutional violation under any standard, as explained below.

2. The burden on independent candidates is non-discriminatory and non-severe

The first question this Court asks under the *Anderson–Burdick* framework is whether the burden imposed by New York's law, taken in the context of its entire ballot-access regime, either discriminates against independent candidates or imposes a severe burden on them. And this question is a question of law.

First, New York's law does not discriminate against independent candidates because, under well-established precedent, it does not require them to declare their candidacies unreasonably early relative to the major-party schedule. On this point *Swanson*, 490 F.3d 894, is instructive. The court in *Swanson* addressed a challenge to Alabama's requirement that an independent candidate collect signatures and file a petition no later than the date of the first primary election, *id.*, and held that *Jenness*, 430 U.S. at 440–42, rather than *Anderson*, 460 U.S. at 795, controlled. "[I]n *Jenness*," the *Swanson* court explained, "the June filing deadline for independent candidates to appear on the November general election ballot . . . precluded signature gathering . . . [anytime after] two

months before the primary election date in August." *Swanson*, 490 F.3d at 906. The difference between *Anderson*, where the challengers won, and *Jenness*, where the challengers lost, was that "the Ohio statute at issue in *Anderson* placed independent candidates at a relative disadvantage" by requiring them to *declare* their candidacies on the same date even though major parties conducted primary elections and therefore could *choose* their candidates much later. *Id.* at 907.[2]

Jenness controls here just as it did in *Swanson*, *a fortiori* in fact. Plaintiffs complain only about Brown being required to file his nominating petition no later than 25 days before the primary election; *Jenness*, which, according to several courts, is good law on the point, upheld a deadline *more than two months* before primary day. *Id.* at 906. Remarkably, just like the challengers in *Swanson*, Plaintiffs do not cite, let alone distinguish, *Jenness*. *See* Appellants' Br. at 4–6 (table of authorities).

---

[2] The *Swanson* court also noted that *Anderson* addressed an election for federal office and *Jenness* did not. *Swanson*, 490 F.3d at 906. So too here.

Second, the burden imposed by New York's independent filing deadline is not severe. In *McClain*, the court addressed a challenge to a ballot-access regime that allowed independent candidates to declare their candidacies 55 days before the general election but required *third parties* to declare their candidates 55 days before *the major party primaries*. 851 F.3d at 1045; *see also Libertarian Party of Washington v. Munro*, 31 F.3d 759 (9th Cir. 1994) (upholding third-party deadline four- to five-weeks before primary election); *Stevenson v. State Bd. of Elections*, 638 F. Supp. 497 (N.D. Ill. 1986) (same, but 92–99 days before the primary), *aff'd* 794 F.2d 1176 (7th Cir. 1986). Here, as explained above, Brown's candidacy is more akin to a third-party candidacy than a true independent candidacy—Brown sought to have his name appear on the ballot as a candidate from the "Buffalo Party." *E.g.*, App'x 278.

Regardless, Plaintiffs' only attempt to distinguish this authority relies on the observation that in *McClain*, *Munro*, and *Stevenson*, non-major-party candidates had alternative routes to the ballot. Appellants' Br. at 42. But this is true in New York too. New York's fusion voting system makes any filing deadline far less severe because candidates need not forfeit their right to take their chances in the major-party primaries

to run on third-party lines or as genuine independents. *See SAM Party v. Kosinski*, 483 F. Supp. 3d 245, 260 (S.D.N.Y. 2020) ("That New York, unlike Kentucky, allows for fusion voting, further underscores that the Party Qualification Method leaves open to the SAM Party and the [Working Families Party] a sufficient number of channels for political opportunity . . . ."), *aff'd sub nom. SAM Party of New York v. Kosinski*, 987 F.3d 267 (2d Cir. 2021).

Third, Plaintiffs' principal response to this legal authority appears to be to argue that the declaration of Richard Winger, Plaintiffs' expert, is alone sufficient to create a triable issue of fact on "the character and magnitude of the burdens imposed by New York's petition deadline." Appellants' Br. at 30.[3] But all Winger offers are general observations about *other* elections and other independent candidacies. *Id.* at 32. Indeed, in a deposition, Winger admitted that his view of the burdens imposed this law were generalized to independent candidates, and had nothing to do with these Plaintiffs or the 2021 election for mayor of Buffalo:

---

[3] Plaintiffs also contend that Brown's declaration is sufficient to go to trial. That declaration is discussed in Part I above.

Q: What information did you use to analyze the scope of those burdens that you discussed?

A: My knowledge of the history of minor parties and independent presidential candidates. And to a lesser extent, I've had many conversations over the years with groups that were petitioning people who were heading up petition drives. And I learned, I haven't done much petitioning myself, but I've learned a lot from them about the importance of having access to large gatherings of voters outdoors. Which are more common in the summer.

Q: And did you ask anyone about the burden specific to Mayor Brown's voters in 2021?

A: No.

Q: Did you ask anyone about the burden specific to the plaintiffs in this case in 2021?

A: No.

. . .

Q: . . . Have you—do you recall reviewing the complaint in this case before you prepared your declaration?

A: No, I didn't.

Q Okay. How about the amended complaint—

A: No.

Q: —Before you prepared your declaration?

A: No.

Q: Okay. How about any of the materials, the

> factual materials or record materials submitted by either party in support or against the preliminary injunction and TRO motions in September of 2021?
>
> A: No.

App'x at 298–32 (Winger Tr. 34:20–35:7).

The question of the "character and magnitude" of burdens imposed by filing deadlines on candidates generally—and Brown's supporters, as explained above, cannot challenge the application of the deadline to them specifically because Brown chose not to try to comply with it—are issues of law for the court, and cases challenging deadlines are routinely resolved on summary judgment, indeed even in the face of materially similar declarations from Winger himself. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006) (affirming ruling for plaintiffs on summary judgment in case where Winger submitted declaration); *Libertarian Party of Arkansas v. Thurston*, 632 F. Supp. 3d 855, 876 (E.D. Ark. 2022) (same). If Plaintiffs were correct, every independent-candidate deadline in the country would force a trial because Winger believes that early deadlines always burden independent candidates more heavily. App'x at 298–32. That is not the law.

3. The deadlines are justified by clear and important state interests

Because the Board has established that New York law imposes only "reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify' the restrictions." *Libertarian Party of Connecticut*, 977 F.3d at 170 (citations and quotations omitted). "Review in such circumstances will be quite deferential, and we will not require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Id.* (citations and quotations omitted). At least two categories of state interests here justify the scheme: the state's interest in preventing voter confusion and political instability, and the state's interest in orderly administration of its elections. Each easily clears this hurdle here.

First, as explained in more detail above, because of fusion voting New York's election law functions to deny ballot access to a very specific category of sore losers—those who chose not to petition for a line on another party or group's ticket prior to the qualified-party primary date. New York's law, then, serves an additional, crucial function that other election laws (which have been *upheld* by courts as constitutional) do not:

New York law enables qualified-party voters to know which candidates are truly committed to their primary process and which are not, and which candidates are committed to the interests of which political groups. This case is itself an excellent example of that interest. Here, Brown was not committed to honoring the decision of his party; instead, when he lost to Walton, he decided to put his own policy preferences or political ambition above his commitment to the decision his party made. That attempt failed because it is forbidden by New York law. Under New York's fusion-voting system, then, an independent-candidate deadline far enough before the major-party primaries is necessary to ensure voters know important information about the candidates for office—namely, which are committed Democrats or Republicans and which are members of those parties but also, say, the Working Families Party, the Conservative Party, the SAM Party, or the "Buffalo Party," as Brown put it. *See Storer*, 415 U.S. at 736 (interest in political stability sufficient).

Second, New York's law is easily justified by a suite of other legitimate interests. The Fourth Department, addressing Brown's challenge to the deadline, also identified three additional interests in the deadline more broadly: "ensuring the integrity and reliability of the

electoral process" (citing, among others, *Anderson*, 460 U.S. at 788 n.9); "promoting political stability at the expense of factionalism" (citing, among others, *Timmons*, 520 U.S. at 366–67), "and upholding the state's administrative duty to meet federal deadlines for the mailing of overseas and military ballots" (citing *Lawrence*, 430 F.3d at 375). *Id.* at 1507. As mentioned above, other state interests were identified during the legislative process, including the need to resolve election contests early because of their increasing frequency and the summer break of the New York judiciary, the costs saved by unifying the federal and state primaries, and the possible advantage to gathering signatures in the spring rather than the fall. *See supra* Statement of the Case (citing New York State Assembly's Memorandum in Support of Legislation and memos by New York State Board of Elections and New York City Bar Association).

It is beyond dispute that New York's considered scheme furthers these objectives. As Defendants' representative testified at a deposition, the Erie County Board of Elections administers hundreds of elections each year with a relatively minimal staff. Thus, if, in the ordinary course, "a petition was filed as late as this petition, it would just create pure

chaos at the Board." App'x at 299 (MacKinnon Tr. 36:2–4). That is because the Board had "38 different items that go to 851 election districts that all need to be sorted and put together." App'x 133. Giving election officials more time to do their work, as the 2019 law did, helps them do their jobs better.

In response, Plaintiffs simply contend that the Board *could* have done their jobs faster if the deadline were moved later because the Board's staff can count a lot of signatures in a day and there are generally few independent petitions. Appellants' Br. at 46 ("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 . . . ."). But independent petitions are not the only petitions the Board receives—they administer elections in 851 districts, each with its own candidates. More fundamentally, this is not a strict-scrutiny case. And that makes sense here because "deadlines are necessarily arbitrary and once a date has been established, it would probably be impossible to defend it as either compelled or least drastic." *McClain*, 851 F.2d at 1050 (cleaned up and citations omitted). The Board of course *could* tolerate a *slightly* earlier deadline, but the Legislature has leeway to consider all

interests and pick some reasonable deadline. That is what the Legislature did here. There is no authority that permits this Court (or a jury) to second-guess that considered choice.

* * *

The issues presented by this appeal are not novel. The question of whether a candidate who loses a major party primary has a constitutional right to appear on the ballot as an independent has already been answered in the negative. Weeks before the election at issue here in 2021, a merits panel of this Court adhered to that position when it granted the stay that kept Mayor Brown off the ballot. The Fourth Department reached the same conclusion. Nothing has changed in the interim: both courts reached the correct outcome. Because the scheme here is constitutional, the Court should affirm the district court's judgment.

CONCLUSION

The district court's judgment should be affirmed.

Dated: January 17, 2024 [original]

Respectfully submitted,

<u>*/s/ Charles Gerstein*</u>
CHARLES GERSTEIN
GERSTEIN HARROW LLP

810 7th Street NE, Suite 301
Washington, DC 20002
(202) 670-4809
charlie@gerstein-harrow.com

JASON HARROW
GERSTEIN HARROW LLP
12100 Wilshire Blvd. Suite 800
Los Angeles, CA 90025
(323) 744-5293
jason@gerstein-harrow.com

JEREMY TOTH
ERIE COUNTY ATTORNEY
ERIE COUNTY DEPARTMENT OF LAW
95 Franklin St., 1634
Buffalo, NY 14202
(716) 858-2204
Jeremy.Toth@erie.gov

Attorneys for Defendants–Appellees

CERTIFICATE OF COMPLIANCE

Counsel certifies that this brief complies with the word limitation set forth in the Federal Rules of Appellate Procedure because it contains 7,979 words, according to the word-processing system used to prepare this brief, calculating by the word processing system used in its preparation, and excluding the parts of the brief exempted by Fed. R. App. P. 32(f)

This brief 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 it has been prepared in Century Schoolbook 14-point font.

/s/ Jason Harrow

Attorney for Defendants–Appellants