UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Carlanda D. Meadors, et al.,

Plaintiffs-Appellees,

vs.

Erie County Board of Elections,

Defendant-Appellant,

and

India B. Walton,

Intervenor-Appellant.

Appeal Nos.
21-2137 and 21-2145

Appellees' Response in Opposition to the Defendant-Appellant's Emergency Motion for a Stay Pending Appeal

Plaintiffs-Appellees Carlanda D. Meadors and others (hereinafter the "Voters") respectfully submit this response in opposition to Defendant-Appellant Erie County Board of Elections' emergency motion for a stay pending its appeal of the district court's preliminary injunction of September 3, 2021. The Voters oppose the motion for three reasons. First, the Board's motion is not properly before this Court

because it has disregarded the procedural requirements for seeking a stay. Second, the Board cannot establish that equity favors a stay in this case. And, third, the Supreme Court's decisions in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), and its progeny do not require a stay here.

Background

This is an as-applied constitutional challenge to New York's petition deadline for independent candidates. The law at issue is Section 6-158.9 of the New York Election Law, which requires independent candidates to file their nominating petition at least 23 weeks before a general election—a date that fell this year in late May.

Before 2019, New York's petition deadline for independent candidates was never more than 77 days before the general election. (Verified Compl. ¶¶ 11-15, ECF 1.)[1] In 2019, however, the Legislature changed the deadline to "not later than twenty-three weeks preceding" a general election. Act of January 24, 2019, ch. 5, § 13, 2019 N.Y. Laws 9, 14 (codified at N.Y. Elec. Law § 6-158.9). That date falls in late May, 161 days before the general election; 28 days before the non-presidential

[1] All ECF citations refer to the refer to the document number on the *district court's* docket.

primary election; and 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. (Verified Compl. ¶ 16.)

In 2021, the general election is scheduled for November 2. The petition deadline for independent candidates therefore fell on May 25. The non-presidential primary election was held on June 22. And the deadline for county boards of election to determine the candidates who will appear on the general-election ballot is September 9. (Verified Compl. ¶ 19.)

The Voters are five individual supporters of current Buffalo Mayor Byron W. Brown, who is running for re-election as an independent candidate. Brown first sought re-election in 2021 as the nominee of the Democratic Party but was defeated in the primary election. Brown's supporters then launched an effort to nominate him as an independent candidate for mayor in the general election. Brown's supporters gathered signatures of eligible voters in the City of Buffalo and filed their nominating petition containing more than the requisite number of signatures with the Erie County Board of Elections on August 17. 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. (Verified Compl. ¶¶ 19-24.)

The Erie County Board of Elections rejected the nominating petition on Friday, August 27, because the petition had not been filed by the deadline set out in Section 6-158.9 of the New York Election Law. The Voters filed this case in the district court on the following business day and immediately sought a temporary restraining order. Walton, who defeated Brown in the Democratic primary and will otherwise face no opposition on the general-election ballot, moved to intervene as a defendant.

The district court heard the motions on Friday, September 3. The court first granted intervention (Hr'g Tr. 10:24-25, ECF 31)[2] and then, after almost two hours of argument and a short recess, granted the Voters' motion in an oral ruling from the bench (*id.* 79:19-86:1). With the consent of all parties, the court also converted the temporary restraining order into a preliminary injunction for purposes of appeal.

[2] The hearing transcript is also attached to the Board's motion in Appeal No. 21-2137 at Doc No. 37-2.

(*Id.* 86:19-89:22.) Before adjourning, the court asked the parties whether they wished to raise anything else. (*Id.* 89:25-91:3.) The district court entered text orders memorializing its rulings later that same day. (Order, ECF 27; Order, ECF 28.)

The Board of Elections filed a notice of appeal in the district court on Tuesday, September 7. (Notice of Appeal, ECF 32.) The next day, it filed this emergency motion asking the Court to stay the district court's injunction "by the end of the day on Thursday, September 16." (Mot. Stay at 14, Doc. 37-1.)[3]

Argument

I. The Board's motion is procedurally barred.

Requests for a stay pending appeal are governed by Rule 8(a) of the Federal Rules of Appellate Procedure, which provides that a party seeking a stay "must ordinarily move first in the district court." Fed. R. App. P. 8(a)(1). A motion for relief may be made to the court of appeals, but the movant must "(i) show that moving first in the district court

[3] All Doc. citations refer to the document number in Appeal No. 21-2137 unless otherwise noted. The page number cited refers to the page number of the PDF document that appears in the header, not the page number at the bottom of the document.

would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested ….” Fed. R. App. P. 8(a)(2)(A). Stay motions that fail to comply with this requirement are routinely denied on that basis. *See, e.g.*, *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 38 (2d Cir. 1993) (denying a motion for a stay where the applicant made no genuine effort to comply with Rule 8); *see also Whole Woman’s Health v. Paxton*, 972 F.3d 649, 654 (5th Cir. 2020); *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930–31 (6th Cir. 2002); *SEC v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001); *Chem. Weapons Working Grp. v. Dept. of the Army*, 101 F.3d 1360, 1361 (10th Cir. 1996); *Ruiz v. Estelle*, 650 F.2d 555, 567 (5th Cir. June 26, 1981) (per curiam).

Here, the Board made no effort to comply with the requirements of Rule 8. Its motion papers give no explanation why the Board move first in this Court. The Board makes no showing of impracticability at all. Under these circumstances, the Board’s motion is procedurally barred by Rule 8 and should be denied for that reason. *See Hirschfeld,* 984 F.2d at 38.

The Board's motion also relies on new facts and evidence. Its motion is based in part on the stay issued by the Fourth Department in the parallel state proceeding, which occurred after the hearing in district court and was therefore not available to the district court when it ruled. The Board's motion also raises new arguments that it did not raise in the district court, including an argument based on the Supreme Court's decision in *Purcell*, and the Board cites many cases that it did not cite to the district court. This provides another reason to deny the motion. *See Ruiz*, 650 F.2d at 567 ("the district court should have the opportunity to rule on the reasons and evidence presented in support of a stay"); *Chemical Weapons*, 101 F.3d at 1362 (same).

Under these circumstances, the Court should deny the Board's motion without even considering its merits.

II. The equities favor the voters.

A stay pending appeal is "extraordinary" relief. *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). The legal standard requires a court to consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a

stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see also Hassoun v. Searls*, 968 F.3d 190, 195 (2d Cir. 2020). "The first two factors are the most critical, but a stay is not a matter of right, even if irreparable injury might otherwise result[;] it is an exercise of judicial discretion, and the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Uniformed Fire Officers Ass'n v. de Blasio*, 973 F.3d 41, 48 (2d Cir. 2020) (cleaned up); *see also Maldonado-Padilla v. Holder*, 651 F.3d 325, 328 (2d Cir. 2011) (Jacobs, J., in chambers) (explaining that "a stay is an intrusion into the ordinary process of administration and judicial review," which requires "the party requesting a stay [to] bear[ ] the burden of showing that the circumstances justify an exercise of the Court's discretion" (cleaned up)). The Board cannot make that showing here.

1. The Board is not likely to succeed on appeal.

The appeal is about a preliminary injunction. A district court "has wide discretion" in deciding whether to grant a preliminary injunction, and "this Court reviews the district court's determination only for abuse

of discretion." *New York by James v. Griepp*, ____ F.4th _____, 2021 WL 3777611 at *2 (2d Cir. Aug. 26, 2021). The Board offers several arguments on the merits of its appeal, but none of them make a strong showing that the district court abused its discretion here.

First, the Board argues that the district court applied the "wrong standard." (Mot. Stay at 17.) The Board concedes that the district court had to apply the balancing test set out *Anderson* and its progeny. *See Anderson*, 460 U.S. at 789. Under that 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 district court applied that framework, but the Board questions the Court's finding that New York's early filing deadline imposes a severe burden that warrants strict scrutiny. That finding, along with all of a district court's findings under the *Anderson-Burdick* framework, is subject to review only for clear error. *Lopez Torres*, 462 F.3d at 195; *Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411, 418-21 (2d Cir. 2004).

On this record, there is ample evidence to support the district court's findings. Indeed, the facts here parallel those in *Anderson*, where 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), 460 U.S. at 783 n.1, deserved strict scrutiny. *Id.* at 790-795. Brown, like John Anderson, is a genuine candidate "whose positions on the issues could command widespread community support." *Anderson*, 460 U.S. at 792. But New York's early filing deadline—four weeks before the state's primary elections and almost six months before the general election—cut off that opportunity before it began, "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). In practical terms, New York's deadline effectively precludes candidacies that respond to newly emerging issues, to shifts in the positions supported by the major parties, or to major-party nominees whose views lie outside the political mainstream. And it gives major parties the advantage of continued flexibility that is denied to all others. As the district court correctly observed, "[t]he deadline here has the same effect as the deadline in *Anderson*." (Hr'g Tr. 83:8-9.)

Following *Anderson*, courts have routinely struck down early filing deadlines for independent candidates—particularly those deadlines that fall more than a day before the major parties select their nominees. 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 v. Brewer*, 531 F.3d 1028, 1039 (9th Cir. 2008). The district court had held that *Anderson* was not controlling because some of facts present in *Anderson* were not present there. *Id.* at 1038. But the

Ninth Circuit reversed, concluding that the Supreme Court's concerns in *Anderson* controlled even though those facts were not present in the specific election at issue. *Id.*

In *Cromer v. South Carolina*, 917 F.2d 819, 823-24 (4th Cir. 1990), the Fourth Circuit also relied heavily on *Anderson* in striking down South Carolina's March 30 filing deadline for independent candidates for the state legislature. Although the burden of filing a simple notice 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. *Id.* 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.*

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.*, *New Alliance Party of Ala. v. Hand,* 933 F.2d 1568, 1570 (11th Cir. 1991) (per curiam) (striking down an independent-candidate deadline two months before the major parties' primaries); *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*, Civ. 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 Board nonetheless argues that "a deadline to file independent candidate petitions of May 25 before a November 2 election—161 days—is similar to those regularly upheld by the Supreme Court and Circuit courts." (Mot. Stay at 18.) Even if that were true, it would not establish

clear error here. But it is not a fair characterization of the five cases on which the Board relies: *Jenness v. Fortson*, 403 U.S. 431 (1971); *American Party of Texas v. White*, 415 U.S. 767 (19); *Swanson v. Worley*, 490 F.3d 894 (11th Cir. 2007); *Lawrence v. Blackwell*, 430 F.3d 368 (6th Cir. 2005); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988).

In *Jenness*, the plaintiffs did not challenge the petition deadline. *See Mandel v. Bradley*, 432 U.S. 173 at 181 n.* (1977) (Stevens, J., dissenting) (noting that the constitutionality of the petition deadline "was neither raised nor decided by the Court in *Jenness*"). Rather, they challenged only Georgia's filing fee and signature requirement. *See Jenness*, 403 U.S. at 432. It is thus misleading to assert that the Supreme Court "upheld" Georgia's deadline. It did nothing of the sort.

It is also misleading for the Board to say that the Supreme Court upheld a Texas deadline in *American Party* that was 120 days before the general election. That deadline applied only to third parties. 415 U.S. at 776-788. The deadline for independent candidates was "30 days after the second or runoff primary election." *Id.* at 788. And the independent-candidate plaintiffs did not challenge it. They challenged

only the 500-signature requirement, which the Supreme Court upheld because of a failure of proof. *Id.* at 790. *American Party* thus offers the Board no help.

Neither do *Swanson* or *Lawrence*. In *Swanson*, Alabama's deadline for independent candidates fell on the same day as the party primary election. 490 F.3d at 905. It was not "two months" before the primary, as the Board claims. (Mot. Stay at 19.) The deadline at issue in *Lawrence* was one day before the primary election. 430 F.3d at 370. Neither *Swanson* nor *Lawrence* suggest that a deadline that is substantially before the primary, like New York's deadline here, would pass constitutional muster.

Lastly, *Rainbow Coalition* is totally inapposite because it did not involve the petition deadline for independent candidates to obtain ballot access for the general election. Rather, it concerned the petition deadline for third parties to obtain recognition as a political party. *See Rainbow Coal.*, 844 F.2d at 741. The Tenth Circuit upheld that deadline, which was before the party primaries, largely because Oklahoma law required newly recognized political parties to hold a primary election at the same time as other parties. *See id.* at 744-45.

That is simply not the case here. *Rainbow Coalition* thus says nothing about the constitutionality of an early deadline for an independent candidate.

The Board has ultimately identified no cases in which a federal court has upheld a similar statute—one that cuts off all opportunity for an independent candidate to appear on the general-election ballot almost six months before the general election and substantially before the major-parties' primary. That does not add up to clear error.

The Board next argues that the district court placed "undue weight" on *Anderson* because that case involved a presidential election. But courts have since rejected that distinction. *See, e.g.*, *Cowen v. Georgia Sec'y of State*, 960 F.3d 1339, 1344 (11th Cir. 2020); *see also*, *e.g.*, *Nader*, 531 F.3d at 1039 (reversing because *Anderson* controlled even though some facts differed). And, in any event, the district court did not rely only on *Anderson* or on cases involving presidential elections. The Board thus fails to establish that the district court's reliance on *Anderson* constitutes an abuse of discretion.

Finally, the Board argues that the district court's "incorrect description of Brown's candidacy" somehow requires the Board to place

the names of other late-filing candidates on the ballot. Not so. This is an as-applied challenge. (Verified Compl. ¶ 1.) The district court's ruling opens the door only to Brown. (Order, ECF 28.) It applies to no other candidates. But even if it did, the Board fails to explain how that would independently constitute an abuse of discretion by the district court.

None of the Board's arguments establish that the district court's finding of a severe burden here is clear error, and the Board does not even address the district court's analysis of the second and third steps of the *Anderson* test. The Board has therefore failed to make a strong showing of likely success.

2. The Board has not established irreparable harm.

The Board asserts, without explanation, that it will suffer irreparable harm without a stay because it will have to re-design the ballots and to allow more independent candidates onto the ballot. (Mot. Stay at 22.) But it is far from clear how adding one name to the ballot constitutes irreparable harm here. And, as explained above, the Board's concern about needing to add more candidates to the ballot this year is overblown.

The Board also argues that the voters will be harmed by a late-breaking change in the ballot and that the Legislature will be harmed by having its "careful scheme" disrupted. (Mot. Stay at 22-23.) The former harm is one that goes to the public interest. *Cf. Hirschfeld*, 984 F.2d at 39 n.2. The latter is one that affects the State Assembly, not the Board, and neither the Assembly, the Governor, nor the Attorney General have sought to assert it here.

Under these circumstances, the Board has not established irreparable harm.

3. The Voters will suffer substantial harm if the stay is granted.

The Board argues that the Voters will suffer no harm here because they can simply write Brown's name on the ballot. Not so. The Supreme Court has repeatedly stated that the availability of a write-in candidacy "is not an adequate substitute for having the candidate's name appear on the printed ballot." *Anderson*, 460 U.S. at 799 n.26. *See also Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) ("The realities of the electoral process, however, suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the

ballot ...."); *Williams*, 393 U.S. at 37 (Douglas, J., concurring) ("write-ins are no substitute for a place on the ballot").

The harm to the Voters here is obvious. If a stay is issued, the Board of Elections will not print Brown's name on the ballot, and his supporters—and anyone else dissatisfied with the Democratic Party's nominee—will see no other candidates on the ballot when they go to vote. Their right to associate will have been diminished, and it cannot later be undone.

The reason for this is simple: you can't unring a bell. A court simply cannot undo, by a special election or otherwise, all the effects of an invalid election. Tremendous practical advantages accrue to those who win even tainted elections, and a court simply has no way to re-level the playing field. If the election goes forward while this appeal remains unresolved, the rights of the Voters will have been permanently damaged. *Cf. Hirschfeld*, 984 F.2d at 39.

4. A stay would not serve the public interest.

Although the Board does not address the fourth stay factor, the public interest in this case is clear. "[S]ecuring First Amendment Rights is in the public interest." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d

483, 488 (2d Cir. 2013). The public also has a vital interest in a broad selection of candidates, *Hirschfeld*, 984 F.2d at 39, and a stay would mean that Buffalonians would have but one choice.

III. The *Purcell* principle does not apply.

The Board's final argument—and one that it did not present to the district court—is that the *Purcell* principle provides an independent basis for granting a stay here. (Mot. Stay at 24-28.) In a line of cases beginning with *Purcell*, the Supreme Court has urged courts to be wary of last-minute changes to election laws, and it has applied that principle to stay federal court orders that changed deadlines for initiative petitions, altered witness requirements for absentee ballots, and extended absentee ballot deadlines. (*See* Mot Stay at 25 (citing cases)). But the Supreme Court has not applied the *Purcell* principle in cases like this one, when a court has determined that a filing deadline for independent candidates is unconstitutional. In fact, no court of which the Voters are aware has ever applied the *Purcell* principle in deciding whether to add or remove a party or candidate from a ballot, and the Board cites none.

Adding and removing candidates at the last minute is also routine. *See, e.g.*, *Norman v. Reed*, 502 U.S. 279, 287 (1992) (October 25); *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, J., in chambers) (September 30); *Hadnott v. Amos*, 394 U.S. 358, 360 (1969) (October 11); *Williams v. Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (September 10); *Libertarian Party v. Dardenne*, 294 F. App'x 142 (5th Cir. 2008) (September 26); *Daly v. Tennant*, 216 F. Supp. 3d 699 (S.D.W.V. 2016) (September 22); *Barr v. Galvin*, 584 F. Supp. 2d 316 (D. Mass 2008) (September 22). The Board, whose powers include ruling on ballot challenges, knows this even if its attorneys do not.

The Board has thus failed to establish that *Purcell* requires a stay here.

Conclusion

The Court should deny the Board's motion for a stay.

Dated: September 10, 2021

/s/ Bryan L. Sells

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