UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-2137

Caption [use short title]

Motion for: Emergency Motion For A Stay Pending Appeal And For An Administrative Stay

Meadors v. Erie County Board of Elections

Set forth below precise, complete statement of relief sought:

Appellant India B. Walton seeks an emergency stay pending appeal of the district court's injunction, as well as an immediate administrative stay to permit full consideration of this emergency stay request.

MOVING PARTY: India B. Walton

☐ Plaintiff ☑ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Carlanda D. Meadors, et al.

MOVING ATTORNEY: Raymond P. Tolentino

OPPOSING ATTORNEY: Bryan L. Sells

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Court-Judge/Agency appealed from: U.S. District Court for the Western District of New York, Buffalo Division/Hon. John L. Sinatra, Jr.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☑ Yes ☐ No (explain):

Opposing counsel's position on motion:

☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:

☑ Yes ☐ No ☐ Don't Know

Plaintiffs' counsel has advised that Plaintiffs "will file a response if the court wishes to have one ... before ruling on the motion."

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☑ No

Has this relief been previously sought in this Court? ☐ Yes ☑ No

Requested return date and explanation of emergency: Immediate (no later than 9/16)

Appellant seeks an emergency stay of the district court's ruling in light of the state's deadlines for the certification of ballots (on 9/9) and the mailing of certain ballots (on 9/17) for the upcoming Buffalo mayoral election. Appellant also seeks an immediate administrative stay.

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Raymond P. Tolentino **Date:** 09/07/2021 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Carlanda D. Meadors, *et al.*, Plaintiffs-Appellees, v. Erie County Board of Elections, *et al.*, Defendants-Appellants.	No. 21-2137

INTERVENOR-APPELLANT'S EMERGENCY MOTION FOR A STAY PENDING APPEAL AND FOR AN ADMINISTRATIVE STAY

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PRELIMINARY STATEMENT

Byron Brown, a four-term incumbent mayor, ran for re-election in the 2021 Democratic Primary for Mayor of Buffalo in June 2021. He lost to Appellant India Walton. Brown then waited several months after this historic defeat—and nearly three months after the relevant deadline—to file a petition seeking to be added to the general election ballot as an independent candidate. The Erie County Board of Elections rejected Brown's August 17 petition as untimely because it was not filed by the May 25 deadline established by N.Y. Election Law § 6-158(9).

That should have ended the matter: New York law prevents candidates from participating in the party primary (and losing), skipping the independent candidate process, then abruptly changing their minds and running as independents in the general election. But Brown refused to play by the rules. Instead, he and his supporters commenced two lawsuits—one in New York state court and the other in federal court—challenging the constitutionality of Section 6-158(9)'s filing deadline. Plaintiffs in this case, a group of Brown's supporters, filed a federal court action seeking an emergency order enjoining Section 6-158(9) and mandating that Brown be placed on the general election ballot.

In support of their late-breaking application, Plaintiffs assert that Section 6-158(9) severely burdens their associational and voting rights. But the only burden Plaintiffs identify is that the statutory filing deadline falls 28 days before the primary

election. That is not a severe burden. A mountain of precedent, from the Supreme Court and the Courts of Appeals, confirms as much. Regardless, Plaintiffs are not entitled to the extraordinary relief they seek because their unreasonable delay in bringing this suit has prejudiced Appellant and threatened the fairness and integrity of the electoral process.

Despite all this, the district court granted the disruptive injunction Plaintiffs requested. But the injunction rests on legal and factual error—and defies decades of precedent governing a state's authority to establish deadlines for the nomination of independent candidates. If upheld, the district court's ruling will sow electoral chaos; invite challenges like this one throughout the Second Circuit; create a split in judicial authority; and encourage prejudicial gamesmanship in election litigation. To make matters worse, the district court's errors infected the related state court proceedings, leading a state court to issue an equally flawed injunction invalidating Section 6-158(9).

None of this was right—and without swift action by this Court, the district court's injunction will force the Board to alter ballots at the last minute. We are just days away from the upcoming statutory deadlines for the certification of ballots (September 9) and the mailing of certain ballots (September 17) for the mayoral election. This Court must therefore stay the district court's injunction *immediately*, and at any rate, no later than September 16, to ensure that the County has sufficient

time to certify, finalize, and print the general election ballots before mailing them to any voters on September 17. For that reason, Appellant is concurrently pressing these points in the Appellate Division of the Fourth Judicial Department, where she seeks expedited relief from the relevant state trial court order. But only this Court can correct the district court's erroneous injunction, which is premised on a misapplication of federal law. If this Court does not act quickly, even if the Fourth Department stays the errant state court order, the district court's injunction will control the mayoral race—risking confusion for voters and disserving the people of Buffalo.

The Court should stay the district court's injunction pending appeal and immediately issue a temporary administrative stay while it resolves Appellant's emergency stay request. Although Plaintiffs oppose this motion, the Board has advised that it consents to this motion, intends to file a notice of appeal, and anticipates filing its own stay application.

BACKGROUND

I. New York's Election Law Regime

A. Securing A Spot on the General Ballot in Local Races

In New York, there are two ways a candidate for local office can secure a spot 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 petition

signed by a fixed number of registered voters belonging to their political party. *See* N.Y. Election Law § 6-134. To pursue the independent candidate process, a candidate must file an independent nomination petition signed by a fixed number of registered voters. *Id.* § 6-138.

These paths to the general ballot are not exclusive. If a candidate wants to maximize their odds of appearing on the general election ballot, they can compete in the party primary while also seeking nomination as an independent. New York's timing rules ensure candidates can make an informed choice about whether to pursue the party process, the independent process, or both: candidates must declare their involvement in the party primary process *two months* before they must declare their intent to seek nomination as an independent. *Compare id.* § 6-158(1), *with id.* § 6-158(9). So after a candidate learns who will compete against them in the party primary, they have plenty of time to decide whether they should also pursue the independent process (just in case they lose the primary).

There is one crucial limitation on these rules, however: New York does not allow candidates to participate in the party primary, skip the independent candidate process, but then abruptly change their minds and belatedly seek to run as independents after losing the party primary.

B. Deadlines Applicable to the 2021 Buffalo Mayoral Race

To ensure fairness, transparency, and the orderly administration of elections, New York imposes strict deadlines for its electoral processes. The following relevant deadlines govern the 2021 Buffalo mayoral primary and general elections.[1]

- **March 25, 2021:** Deadline for Designating Petition for Democratic Primary (§ 6-158(1))
- **May 25, 2021:** Deadline for Independent Nominating Petition (§ 6-158(9))
- **June 22, 2021:** Mayoral Primary Election (§ 8-100(1)(a))
- **September 9, 2021:** Deadline for Certification of Mayoral Ballots for General Election (§ 4-114)
- **September 17, 2021:** Deadline to Mail Ballots to Military/Special Federal Voters (§§ 10-108(1), 11-204(4))
- **November 2, 2021:** Mayoral General Election (§ 8-100(1)(c))

These dates follow from New York's election code, which provides that the deadline for a party primary designating petition is "the twelfth Thursday preceding the primary election," *id.* § 6-158(1), and that the deadline for an independent nominating petition is "twenty-three weeks preceding" the general election, *id.* § 6-158(9).

[1] 2021 Political Calendar, New York State Board of Elections (revised Aug. 4, 2021), https://on.ny.gov/38KJZrp.

II. Brown Loses to India Walton in the Democratic Primary

Brown is the four-term incumbent Mayor of Buffalo and former Democratic Party Chair. Earlier this year, he decided to participate *exclusively* in the Democratic Party primary process; he chose not to participate in the independent candidate process. On June 22, Brown lost the Democratic primary to Appellant. *See* Ex. A, Am. Compl. ¶¶ 24-25. Following this defeat, he launched a "write-in" campaign, which was the only remaining alternative under New York law for him to win re-election. *Id.* ¶ 26.

III. Plaintiffs Wait and Then Belatedly File This Lawsuit

Even after missing the May 25 deadline, losing the June 22 primary, and launching his write-in campaign, Mayor Brown initially abided by New York's well-known deadlines for independent candidates. It was not until August 17—84 days after the May 25 deadline—that Brown and his supporters submitted an untimely independent nominating petition to the Board. *Id.* ¶ 28. Adhering to New York law, the Board rejected Brown's petition as untimely under Section 6-158(9). *Id.* ¶ 30.

On August 30, Plaintiffs (several of Brown's supporters) filed an emergency lawsuit seeking to disrupt the status quo just two weeks before ballots are printed. Alleging that the deadlines codified in Section 6-158(9) violate their First and Fourteenth Amendment rights, they sought a TRO prohibiting the Board from enforcing Section 6-158(9) and compelling the Board to place Brown on the general

election ballot. *See* Ex. B. Appellant successfully moved to intervene and, alongside the Board, opposed Brown's TRO request. Ex. C; Ex. D.

The district court (Sinatra, J.) granted the TRO. Ex. E (ECF Nos. 26, 28). At the very start of the hearing—and before granting Appellant's motion to intervene—Judge Sinatra *sua sponte* raised the question whether he should recuse from the case. He stated that his Chambers had received phone calls seeking his recusal based on his brother Nick Sinatra's close political and financial relationship with Brown; media reports have since revealed that Nick Sinatra is a major donor to Brown, and that Brown appeared in an advertisement for Nick Sinatra's development company several years ago. Judge Sinatra stated his view (based partly on his consultation with another district judge and a review of the relevant rules) that his recusal was unnecessary. *See* Ex. F, at 4-5.[2]

Turning to the merits, Judge Sinatra concluded that Plaintiffs were likely to succeed on the merits of their claim that Section 6-158(9) violated the First and Fourteenth Amendments. *Id.* at 79-86. Applying the familiar *Anderson-Burdick* test, he determined that Section 6-158(9) imposed a severe restriction upon Plaintiffs' voting rights and was not narrowly drawn to advance any compelling state interest.

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[2] Judge Sinatra did not disclose to the parties that in years prior to his appointment to the federal bench, political contributions to Mayor Brown's campaign appear to have been attributed to him by virtue of his partnership at his former law firm. *See* New York State Board of Elections, Candidate/Committee Disclosures Search, https://on.ny.gov/3BQRpWC (last visited Sept. 7, 2021).

Id. In addition, he rejected the Board and Appellant's arguments that the equitable doctrine of laches barred Plaintiffs' emergency request for injunctive relief. *Id.*

On consent of the parties, Judge Sinatra converted the TRO to a preliminary injunction to enable immediate appellate review. As entered, the injunction prohibits the Board and its agents "from enforcing Section 6-158(9) … against Byron W. Brown" and directs the Board "to place Byron W. Brown on the 2021 Election Ballot as an independent candidate for Mayor of Buffalo." Ex. E.

On September 7, Appellant filed a notice of appeal.[3]

IV. Related State Court Proceedings

Plaintiffs' federal lawsuit is one of two separate proceedings challenging the constitutionality of Section 6-158(9). On August 28, Brown filed an emergency petition in New York Supreme Court requesting an order declaring Section 6-158(9) unconstitutional and directing the Board to place his name on the general election ballot. Ex. G. At its hearing on this petition, the state trial court referenced this federal action multiple times, noting expressly that Judge Sinatra had already granted a preliminary injunction requiring Brown to be placed on the ballot. Ex. H, at 2:17-

[3] In light of Judge Sinatra's decision concerning Plaintiffs' likelihood of success on the merits of their claim, his conversion of the TRO to a preliminary injunction for purposes of immediate appeal, and the upcoming ballot certification (September 9) and mailing (September 17) deadlines, an initial motion for a stay in the district court would be impracticable and therefore unnecessary. Fed. R. App. P. 8(a)(2)(A)(i).

3:4. The state court further emphasized that it was "paying attention to what Judge Sinatra did in Federal Court." *Id*. at 13:24-14:2. Consistent with these comments, the state court ultimately held (in agreement with the district court) that Section 6-158(9) was unconstitutional under the *Anderson/Burdick* framework. *Id.* at 84:21-85:12.

In the coming days, Appellant expects to perfect an appeal of the state trial court's ruling to the Fourth Department with preference for expedited review and has submitted an order to show cause requesting an immediate stay of enforcement of the state trial court's order pending appeal.

ARGUMENT

In determining whether to grant a stay pending appeal, this Court considers (1) whether the applicant has made "a strong showing that [s]he is likely to succeed on the merits"; (2) whether she "will be irreparably injured absent a stay"; (3) whether the stay "will substantially injure the other parties interested in the proceeding"; and (4) the public interest. *SEC v. Citigroup Global Mkts. Inc.*, 673 F.3d 158, 162 (2d Cir. 2012) (citation omitted). All four factors favor a stay here.

I. Appellant Is Likely to Succeed on the Merits of Her Appeal

The first (and most important) stay factor is whether Appellant has shown a "likelihood of success on the merits." *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002). Appellant meets that standard for two independent reasons: (1) Plaintiffs'

constitutional claim lacks merit; and (2) the doctrine of laches bars Plaintiffs' late-filed suit.

A. *Plaintiffs' Constitutional Claim is Meritless.*

Plaintiffs' claim is governed by the *Anderson-Burdick* framework. Under that framework, this Court must balance the "character and magnitude of the asserted injury" to Plaintiffs' associational and voting rights against the "precise interests put forward by the State as justification for the burden imposed by its rule." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Where a law imposes only a "reasonable, nondiscriminatory restriction[]" on the rights of voters, the state's "important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (cleaned up).

As confirmed by decisions from many Courts of Appeals, this case is not a close call. The *Anderson-Burdick* framework does not protect the right of primary losers to gain backdoor access to the ballot after willfully blowing a statutory deadline. And, in any event, Section 6-158(9) is a reasonable, non-discriminatory restriction that serves important state interests. In concluding otherwise, the district court misunderstood the facts and misapplied the law.

1. The district court's error arose partly from a failure to appreciate a core purpose of the *Anderson-Burdick* framework: to allow independent candidates to "enter[] the significant political arena." *Anderson*, 460 U.S. at 790.

That concern has no application here. Mayor Brown—the former Chair of the New York Democratic Party—is a sophisticated and experienced political operative who undoubtedly made a calculated decision not to participate in the independent candidate process. There is nothing improper, much less unconstitutional, about enforcing the state's filing deadlines (which apply to every other independent candidate) against him. Nor is there any basis for concluding that Section 6-158(9) functions to discriminate against candidates and voters "whose political preferences lie outside the existing political parties." *Id.* at 793-94.

Instead, as then-Judge Alito noted: "[B]y requiring alternative political party candidates to file nominating petitions before the results of the primary are available, [the State's] filing deadline serves the State's interest in preventing 'sore loser' candidacies … in which an individual loses in a party primary and then seeks to run in the same election as an independent or minor party candidate." *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 80 (3d Cir. 1999). Unlike many jurisdictions with laws that preclude candidates who lose party primaries from appearing on the general election ballot, New York law allows Brown to seek election in Buffalo as a write-in candidate, or as an independent candidate if he had pursued that option by May 25, 2021.

At bottom, Plaintiffs' attempt to belatedly add Brown to the general election ballot seeks nothing more than preferential treatment for a failed party candidate

who earlier turned down the option of running as an independent. For that reason, the concerns at the heart of *Anderson-Burdick* are not implicated here.

2. In any event, a straightforward application of *Anderson-Burdick* proves that Section 6-158(9) is constitutional. This analysis starts with an assessment of the burden resulting from Section 6-158(9)'s deadline. In weighing such asserted burdens, courts focus on the "sheer length of time" between the filing date and primary and general elections, and whether the law creates a "simultaneous filing deadlines for independents and primary candidates." *Wood v. Meadows*, 117 F.3d 770, 773 (4th Cir. 1997). These and other relevant factors make clear that any burden resulting from Section 6-158(9) is non-discriminatory and *de minimis*.

Length of Time: Under Section 6-158(9), 28 days elapse between the deadline for independent candidates (this year, May 25) and the date of the primary election (this year, June 22). Courts have *repeatedly* upheld statutes with a similar time interval between the independent registration deadline and the party primary.[4] That

[4] The parties below highlighted the primary deadline. Rightly so. Courts typically focus on the earlier primary date because "[d]eadlines early in the election cycle require minor political parties to recruit supporters at a time when the major party candidates are not known and when the populace is not politically energized." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006). Although the district court considered the general election deadline, that should not alter the analysis because "[t]he primary date itself must be set sufficiently in advance of the general election." *Anderson*, 460 U.S. at 800.

is no surprise: as then-Judge Alito noted, "some cut off period is necessary" and reasonable to maintain order in the electoral process. *Hooks*, 179 F.3d at 74.

The Supreme Court's decision in *Jenness v. Fortson* is instructive. There, the Supreme Court considered Georgia's requirement that independent candidates must submit a nominating petition in June preceding an August party primary. *See* 403 U.S. 431 (1971). Georgia's "June deadline for independents thus precluded signature gathering *not only* on the primary election date *but also* two months before the primary election date in August." *Swanson v. Worley*, 490 F.3d 894, 906 (11th Cir. 2007). On these facts, the Supreme Court upheld Georgia's signature requirement and observed that Georgia had "not fix[ed] an unreasonably early filing deadline for candidates not endorsed by established parties." *Jenness*, 403 U.S. at 438.

Following *Jenness*, courts have repeatedly upheld gaps much longer than New York's abbreviated 28-day period. *See Libertarian Party*, 462 F.3d at 590. For example, in *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, the Tenth Circuit upheld a May 31 independent filing deadline when the primary was scheduled for late August—and did so notwithstanding the *additional* burden of a "relatively high signature requirement." 844 F.2d 740, 744, 747 (10th Cir. 1988). The Seventh and Eighth Circuits have reached similar conclusions. *See McLain v. Meier*, 851 F.2d 1045, 1047 (8th Cir. 1988) (upholding requirement of 7,000 signatures 55-days before the primary); *Stevenson v. State Bd. of Elections*, 794 F.2d

1176 (7th Cir. 1986) (upholding requirement that independent candidates file between 92 and 99 days prior to primary); *cf. Hooks*, 179 F.3d at 75 n. 13 (collecting cases).

In contrast, courts ordinarily find a heightened burden—and apply strict scrutiny—only when laws require independent candidates to file qualifying petitions "substantially in advance of a primary election or nominating convention." *Graveline v. Benson*, 992 F.3d 524, 537 (6th Cir. 2021) (collecting cases where courts struck down deadlines of 60, 70, 75, 90, and 120 days before primaries). Many of these decisions involved not only a much earlier deadline than New York's modest 28-day period, but also involved additional burdens ranging from heightened signature requirements to demands that signatures come from across a wide geographic range. *See id.* at 536; *Lee v. Keith*, 463 F.3d 763, 770 (7th Cir. 2006).

That is not this case: Section 6-158(9) imposes a reasonable deadline that lands just 28 days before the party primary. Neither the district court nor Plaintiffs cited a *single* case in which such a short deadline alone has warranted constitutional invalidation. Nor have Plaintiffs cited any authority supporting their claim (endorsed by the district court) that independent candidates must be allowed to file nominating petitions months *after* the party primary and just weeks before the state's ballot certification deadline. The Constitution requires no such thing.

Simultaneous Filing Deadlines: The other "critical burden[]" on independent candidacies is "simultaneous filing deadlines for independents and primary candidates." *Wood*, 117 F.3d at 773. But New York does not maintain simultaneous filing deadlines that effectively disfavor independent candidates.

Under Section 6-158(1), the last day to file a *party* designation petition was March 25—a full 60 days before the May 25 deadline for independent nominating petitions set forth in Section 6-158(9). In that way, this case closely mirrors *Lawrence v. Blackwell*, where the Sixth Circuit rejected a challenge to a statute requiring independent candidates to file a nominating petition just before primary election day because the statute did not put independent candidates at a "disadvantage vis-à-vis the major parties' nominees" since they had to file a declaration of candidacy "sixty days before the primary election." 430 F.3d 368, 373 (6th Cir. 2005). The *Lawrence* court elaborated that "all candidates seeking a place on the ballot in November must engage in substantial campaign work before the early primary in order to obtain a space on the ballot." *Id.* at 373.

So too here. In New York, the deadline to file a party designation petition is 60 days before the deadline for an independent candidate to register. The fact that independent candidates know whom they are running against when they file their nominating petition eliminates any disparate burdens between them and major-party candidates. *See Wood*, 117 F.3d at 774; *Swanson*, 490 F.3d at 908.

If anything, Plaintiffs seek "a constitutional right to preferential treatment" for their preferred candidate. *Hooks*, 179 F.3d at 74. Allowing Brown onto the ballot at this late juncture—*months* after the party primary, *months* after the independent petition deadline, and *days* before the ballot certification deadline—would be a decided advantage over other candidates who either collected signatures months earlier or campaigned in (and actually won) primary elections. The Constitution "does not compel states to give independent or minor party candidates a substantial advantage over major party candidates." *Wood v. Meadows*, 207 F.3d 708, 711-12 (4th Cir. 2000).

Additional Factors: Section 6-158(9) imposes no serious burden on independent candidates or voters, and laws just like it (indeed, laws more onerous than it) have been upheld by courts throughout the country. The conclusion that Section 6-158(9) at most creates *de minimis* burdens is confirmed by two additional considerations: (1) independent candidates have in fact qualified for the general election, including in this very campaign cycle; and (2) the statutory scheme maintains permissive rules for independent nominating petitions.

First, the facts on the ground refute Plaintiffs' assertion that Section 6-158(9) burdens independent candidates—many of whom had no trouble complying with the deadlines to secure a spot on the general election ballot. *See Storer v. Brown*, 415 U.S. 724, 742 (1974) (noting that "it will be one thing if independent candidates

have qualified with some regularity and quite a different matter if they have not"). In fact, as the Board explained below, "several candidates will appear on independent nominating lines in the general election." Br. for Board of Elections (ECF No. 15-7) at 18. Thus, New York law does not discriminate against independents.

Second, any conceivable burden associated with New York's filing rule is "significantly lessened by the statute's alleviating factors." *Swanson*, 490 F.3d at 909. The district court focused only on the deadline set by Section 6-158(9), disregarding the admonition that "[c]onstitutional challenges to specific provisions of a State's election laws … cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson*, 460 U.S. at 789.

New York's electoral scheme is quite liberal: any registered voter who has not already signed a designating petition for an office and who is qualified to vote for the office may sign an independent nominating petition. *See* N.Y. Election Law § 6-138(1). Moreover, New York does not "restrict voters from signing petitions based on their party affiliation," or restrict voters who are already voting in the primary, or restrict "how many signatures may come from a specific geographic area" for the Buffalo mayoral election. *Swanson*, 490 F.3d at 901. And New York only required 700 signatures for the relevant independent nominating petition, a relatively minimal

burden. *See id.* at 903-05 (collecting cases upholding more restrictive signature requirements).

3. Because Section 6-158(9) imposes reasonable, nondiscriminatory rules that do not materially burden Plaintiffs' rights, it is subject to "less exacting review," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), and may be justified by a state's "important regulatory interests," *Burdick*, 504 U.S. at 434. Several such interests apply.

First, Section 6-158(9) furthers the critical state interest of "maintaining the integrity of the various routes to the ballot," *Storer*, 415 U.S. at 733, and "protect[s] the integrity and reliability of the electoral process," *Anderson*, 460 U.S. at 788 n.9. It does so by creating clear rules to ensure that it is known *ex ante* who is seeking office, through what form of candidacy, and with what public support.

Second, Section 6-158(9) "temper[s] the destabilizing effects of party-splintering and excessive factionalism." *Timmons*, 520 U.S. at 367. If Plaintiffs' view prevails, intraparty squabbles would always risk spilling over to the general election ballot, and city and state officials would be deprived of a well-recognized means of preventing "sore losers" from seeking to "sidestep … ballot access requirements." *Burdick v. Takushi*, 937 F.2d 415, 420 (9th Cir. 1991).

Finally, Section 6-158(9) has other salutary effects, including providing the electorate with "ample opportunity to examine the candidates' positions and

qualifications," *id*.; avoiding "confusion, deception, and even frustration of the democratic process at the general election" by ensuring that independent candidates make a "preliminary showing of a significant modicum of support," *Jenness*, 403 U.S. at 442; and compliance with the federal Military Overseas Voter Empowerment Act, *see* 2019 New York Assembly Bill No. 779, Committee Report.

B. *The Doctrine of Laches Bars Plaintiffs' Request for Injunctive Relief.*

Appellant is likely to succeed on the merits of her appeal for a second reason: Plaintiffs' claim comes far too late. Under the doctrine of laches, courts may deny equitable relief where the "plaintiff unreasonably delayed in initiating an action and a defendant was prejudiced by the delay." *Robins Island Preservation Fund, Inc. v. Southold Dev. Corp.*, 959 F.2d 409, 423 (2d Cir. 1992). Laches applies with special force in late-stage election litigation, where time is of the essence and eleventh-hour lawsuits (like this one) create "a situation in which any remedial order would throw the state's preparations for the election into turmoil." *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004); *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016). Courts have frequently invoked laches to dismiss last-minute attacks on election rules. *See, e.g.*, *William v. Rhodes*, 393 U.S. 23, 35 (1968). This includes challenges to ballot access. *See, e.g.*, *Perry v. Judd*, 471 F. App'x 219, 226 (4th Cir. 2012).

The district court erred in concluding that Plaintiffs' delay did not warrant application of laches and dismissal of their strategically timed claims.

For starters, Plaintiffs' delay in bringing this action was unreasonable. Under Section 6-158(9), the deadline to submit independent nominating petitions was May 25. Plaintiffs blew that deadline by *84 days* and failed to file Brown's independent nominating petition until August 17—at which point the Board promptly rejected it as untimely. Plaintiffs' request for "emergency" relief is therefore a crisis of their own making. *See Kishore v. Whitmer*, 972 F.3d 745, 751 (6th Cir. 2020).

As a result of Plaintiffs' inexplicable delay, this lawsuit was not filed until months after Section 6-158(9)'s deadline—thus forcing the federal courts to consider an emergency lawsuit on the eve of the upcoming ballot certification and mailing deadlines. Laches forecloses precisely this sort of dilatory gamesmanship. *See, e.g.*, *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 922-23 (D. Ariz. 2016).

Plaintiffs' unreasonable delay prejudiced Appellant, the County, the Board, and the voters of Buffalo. This lawsuit has sown chaos in the electoral landscape, injected confusion among the electorate, and unfairly afforded Brown a second bite at the apple that no other candidate enjoys. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections … can themselves result in voter confusion and consequent incentive to remain away from the polls.").

Beyond that, Plaintiffs' unwarranted delay has thrown the County's planning and administration of the upcoming mayoral election into disarray. In response to the district court's injunction, the Board of Elections was forced to schedule a public

meeting on September 7 to review the recent "Federal & State Court rulings" and determine next steps in the electoral process.[5] Plaintiffs' "lack of diligence [thus] clearly prejudiced the respondents, whose planning has been thrown into far greater confusion than would have been the case with a timely legal action." *Perry*, 471 F. App'x at 226; *see id.* at 225 ("If we were to find Movant's delay excusable … [o]nce a candidate learned he had been denied a place on the ballot, he would take his disappointment to the courthouse and hapless state election boards would be forced to halt their scheduled election processes to wait for a ruling.").

Accordingly, the district court erred in allowing Plaintiffs' lawsuit to proceed. Litigants lose any entitlement to equitable relief when they wait for months with no good explanation and then ambush their opponents (and the voting public) with last-minute lawsuits that sow chaos around election administration.

II. Appellant Will Suffer Irreparable Harm Absent a Stay

Absent a stay of the district court's injunction, Mayor Brown's name will appear on the mayoral ballot (even if the state court injunction is lifted). This would cause irreparable harm to Appellant. *First*, it would deny Appellant (and her supporters) the right to a fair and orderly election under existing state law. *Second*, because Appellant is a direct electoral competitor of Brown—indeed, she defeated

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[5] Agenda for Sept. 7, 2021 Meeting, Erie County Board of Elections, *available at* https://bit.ly/3DShRRN (last visited Sept. 7, 2021).

him in the Democratic primary—allowing him onto the general election ballot would give rise to irreparable injury. *Finally*, a stay is necessary to mitigate the significant risk of voter confusion resulting from the district court's last-minute modification to the ballot. *See Purcell*, 549 U.S. at 4-5.

III. The Balance of the Equities and Public Interest Strongly Support a Stay

The balance of the equities and public interest support a stay and restoration of New York's election deadlines. "The public interest [] served by developing and adhering to an election regulation regime developed by the New York State and City Boards of Elections and not by the Court. Simply, the elections authorities have more expertise in what measures constitute sufficient maintenance of the state's interest in running well-functioning elections." *Murray v. Cuomo*, 460 F. Supp. 3d 430, 449 (S.D.N.Y. 2020). Mayor Brown's proposed end-run around state election law would undermine that public interest. It would also inflict burdens on election officials who have to modify ballots at the last minute. These considerations strongly favor interim relief.

IV. The Court Should Grant an Administrative Stay

For the same reasons supporting a stay pending appeal, the Court should immediately grant an administrative stay pending its consideration of this application. An interim stay is necessary to preserve the status quo and prevent irreparable harm to Appellant until this Court can rule on her stay request—

especially given the upcoming statutory deadlines for the certification (September 9) and mailing (September 17) of ballots for the Buffalo mayoral election.

CONCLUSION

The Court should stay the district court's injunction pending appeal and grant an immediate administrative stay pending resolution of this stay motion.

September 7, 2021

Respectfully Submitted,

/s/ Joshua Matz
Roberta A. Kaplan
Joshua Matz
Raymond P. Tolentino
Harmann Singh
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Counsel for Intervenor-Appellant India B. Walton

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because this brief contains 5198 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

September 7, 2021

/s/ Raymond P. Tolentino
Raymond P. Tolentino
Counsel for Intervenor-Appellant
India B. Walton

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Raymond P. Tolentino
Raymond P. Tolentino
Counsel for Intervenor-Appellant
India B. Walton

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Carlanda D. Meadors, *et al.*, Plaintiffs-Appellees, v. Erie County Board of Elections, *et al.*, Defendants-Appellants.	Case No. 21-2137 **DECLARATION OF RAYMOND P. TOLENTINO IN SUPPORT OF INDIA WALTON'S EMERGENCY MOTION FOR A STAY PENDING APPEAL AND FOR AN ADMINISTRATIVE STAY**

I, Raymond P. Tolentino, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a member in good standing of the Bar of the State of New York and am admitted to practice before this Court. I am counsel at Kaplan Hecker & Fink LLP, and serve as counsel for India Walton ("Intervenor-Appellant") in the above-captioned action. I respectfully submit this declaration in support of India Walton's Emergency Motion for a Stay Pending Appeal and for an Administrative Stay. Unless stated otherwise, the facts stated herein are of my own personal knowledge, and if called as a witness I could competently testify thereto.

2. Attached hereto as **Exhibit A** is a true and correct copy of Plaintiffs' First Amended Complaint, filed as Docket Number 25 in *Meadors v. Erie County Bd. Of Elections*, No. 21-cv-982-JLS (W.D.N.Y.).

3. Attached hereto as **Exhibit B** is a true and correct copy of Plaintiffs' Motion for a Temporary Restraining Order, filed as Docket Number 2 in *Meadors v. Erie County Bd. Of Elections*, No. 21-cv-982-JLS (W.D.N.Y.).

4. Attached hereto as **Exhibit C** is a true and correct copy of Defendant India Walton's Motion to Intervene, filed as Docket Number 16 in *Meadors v. Erie County Bd. Of Elections*, No. 21-cv-982-JLS (W.D.N.Y.).

5. Attached hereto as **Exhibit D** is a true and correct copy of Defendant India Walton's Memorandum of Law In Opposition to Temporary Restraining Order, filed as Docket Number 18 in *Meadors v. Erie County Bd. Of Elections*, No. 21-cv-982-JLS (W.D.N.Y.).

6. Attached hereto as **Exhibit E** is a true and correct copy of the Docket Sheet in *Meadors v. Erie County Bd. Of Elections*, No. 21-cv-982-JLS (W.D.N.Y.).

7. Attached hereto as **Exhibit F** is a true and correct copy of the transcript of the hearing on September 3, 2021, before the Hon. John L. Sinatra, Jr., of the Western District of New York in *Meadors v. Erie County Bd. Of Elections*, No. 21-cv-982-JLS (W.D.N.Y.).

8. Attached hereto as **Exhibit G** is a true and correct copy of Plaintiff's Emergency Petition, filed as Docket Number 1 in *Brown v. Erie County Bd. Of Elections*, Index No. 811973/2021 (N.Y. Supreme Ct.).

9. Attached hereto as **Exhibit H** is a true and correct copy of the transcript of the hearing on September 3, 2021, before the Hon. Paul B. Wojtaszek of the Supreme Court of the State of New York in *Brown v. Erie County Bd. Of Elections*, Index No. 811973/2021 (N.Y. Supreme Ct.).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: September 7, 2021
Washington, DC

/s/ Raymond P. Tolentino
Raymond P. Tolentino

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
BUFFALO DIVISION

Carlanda D. Meadors, an individual, et al.,

Plaintiffs,

vs.

Erie County Board of Elections, et al.,

Defendants.

Case No. 1:21-cv-982-JLS

First Amended Complaint

The plaintiffs hereby amend their complaint under Rule 15(a)(1) of the Federal Rules of Civil Procedure. This amendment adds plaintiffs and defendants and makes no other substantive changes.

Nature of the Case

1. 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 Code, 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.

2. The plaintiffs are three individual supporters of an independent candidate for Mayor of Buffalo. They allege that New York's early deadline, as applied to the would-be candidate, violates their rights under the First and Fourteenth Amendments to the United States Constitution. They seek declaratory and injunctive relief prohibiting Erie County election officials from enforcing that deadline and requiring them to place the candidate's name on the 2021 general-election ballot.

Jurisdiction and Venue

3. This Court has original jurisdiction over this case under Article III of the U.S. Constitution and 28 U.S.C. §§ 1331 and 1343(a)(3).

4. This suit is authorized by 42 U.S.C. § 1983.

5. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper in the Western District of New York under 28 U.S.C. § 1391(b) and 28 U.S.C. § 112(d).

Parties

7. Carlanda D. Meadors is a resident of the City of Buffalo. She is a registered voter and a supporter of Brown's independent candidacy for Mayor of the City of Buffalo in 2021. She signed Brown's independent nominating petition and wants to vote for Brown on the general-election ballot.

8. Leonard A. Matarese is a resident of the City of Buffalo. He is a registered voter and a supporter of Byron W. Brown's independent candidacy for Mayor of the City of Buffalo in 2021. He signed Brown's independent nominating petition and wants to vote for Brown on the general-election ballot.

9. Jomo D. Akono is a resident of the City of Buffalo. He is a registered voter and a supporter of Brown's independent candidacy for Mayor of the City of Buffalo in 2021. He signed Brown's independent nominating petition and wants to vote for Brown on the general-election ballot.

10. Kim P. Nixon-Williams is a resident of the City of Buffalo. She is a registered voter and a supporter of Brown's independent candidacy for Mayor of the City of Buffalo in 2021. She signed Brown's

independent nominating petition and wants to vote for Brown on the general-election ballot.

11. Florence E. Baugh is a resident of the City of Buffalo. She is a registered voter and a supporter of Brown's independent candidacy for Mayor of the City of Buffalo in 2021. She signed Brown's independent nominating petition and wants to vote for Brown on the general-election ballot.

12. Defendant Erie County Board of Elections administers elections for Mayor of the City of Buffalo and is charged by law with enforcing New York's petition deadline for independent candidates in the 2021 mayoral election. The Board exercises its authority under color of state law within the meaning of 42 U.S.C. § 1983.

13. Defendant Jeremy J. Zellner is a member of the Erie County Board of Elections. As a Commissioner, he exercises his authority under color of state law within the meaning of 42 U.S.C. § 1983. He is sued in his official capacity only.

14. Defendant Ralph M. Mohr is a member of the Erie County Board of Elections. As a Commissioner, he exercises his authority under

color of state law within the meaning of 42 U.S.C. § 1983. He is sued in his official capacity only.

Background

I. New York's Petition Deadline for Independent Candidates

15. The State of New York first adopted a petition deadline for independent candidates in 1890. The law provided that independent candidates for local offices could appear on the general-election ballot by filing a petition containing the requisite number of signatures at least 12 days before the election. Act of May 2, 1890, ch. 262, § 8, 1890 N.Y. Laws 482, 484. c. 262 Sec. 8, p. 482, 484.

16. In 1892, the Legislature moved the deadline to 15 days before the general election. The Election Law, ch. 680, § 59, 1892 N.Y. Laws 1602, 1622.

17. In 1922, the deadline moved to four weeks before the general election. The Election Law, ch. 588, § 140, 1922 N.Y. Laws 1326, 1401-02.

18. In 1976, the Legislature changed the deadline to seven weeks before the general election, a date that fell in late September. Act of June 1, 1976, ch. 233, § 1, 1976 N.Y. Laws 1, 90-91.

19. In 1984, the deadline moved once again to 11 weeks before the general election, a date that fell in late August, and it stayed there until 2019. Act of July 19, 1984, ch. 433, § 8, 1984 N.Y. Laws 2592, 2594.

20. In 2019, 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 primary election, which is held on the fourth Tuesday in June, N.Y. Elec. Law § 8-100(a); and 107 days before the deadline—54 days before the general election—by which county boards of election are required to determine the candidates who will appear on the ballot, N.Y. Elec. Law § 4-114.

21. In 2020, because of the COVID-19 virus, Executive Order 202.46 (June 30, 2020) changed the deadline to July 30, 2020.

22. In 2020, incumbent Democratic Assemblywoman Rebecca Seawright, who had represented Manhattan's Upper East Side since 2015, missed the deadline 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, she was able to qualify for the general-election ballot as an independent candidate, and she won re-election by almost 20 percentage points.

23. In 2021, the general election is scheduled for November 2. N.Y. Elec. Law § 8-100(c). The petition deadline for independent candidates therefore fell on May 25, 2021. 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.

II. Erie County Rejects Brown's Independent Petition

24. Bryon W. Brown is the current mayor of the City of Buffalo, New York.

25. Brown sought re-election as the nominee of the Democratic Party but was defeated in the primary election.

26. Brown then launched a write-in campaign.

27. Brown's supporters also launched an effort to nominate him as an independent candidate for mayor in the general election.

28. 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, 2021.

29. The petition would have entitled Brown to a place on the ballot if it had been filed on or before May 25, 2021, and it would have been timely under all of New York's petition deadlines in force before 2019.

30. The Erie County Board of Elections rejected the nominating petition on Friday, August 27, 2021, because the petition had not been filed by the deadline set out in Section 6-158.9 of the New York Election Code.

Claim One

31. New York's petition deadline for independent candidates, as applied here to the candidacy of Byron W. Brown for Mayor of the City of Buffalo, violates rights guaranteed to the plaintiffs by the First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983.

Relief

32. A real and actual controversy exists between the parties.

33. The plaintiffs have no adequate remedy at law other than this action for declaratory and equitable relief.

34. The plaintiffs are suffering irreparable harm as a result of the violations complained of herein, and that harm will continue unless declared unlawful and enjoined by this Court.

WHEREFORE, the plaintiffs respectfully pray that this Court:

(1) assume original jurisdiction over this case;

(2) enter a declaratory judgment that New York's petition deadline for independent candidates, as applied here to the candidacy of Byron W. Brown for Mayor of the City of Buffalo, violates rights guaranteed to the plaintiffs by the First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983;

(3) enjoin the Erie County Board of Elections from enforcing New York's petition deadline for independent candidates against Brown's candidacy and from failing to place his name on the 2021 general-election ballot as an independent candidate for Mayor of the City of Buffalo;

(4) award the plaintiffs the costs of this action together with their reasonable attorneys' fees under 42 U.S.C. § 1988; and

(6) retain jurisdiction of this action and grant the plaintiffs any further relief which may in the discretion of the Court be necessary and proper.

Respectfully submitted this 3rd day of September, 2021.

/s/ Bryan L. Sells*
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FOR THE WESTERN DISTRICT OF NEW YORK
BUFFALO DIVISION

Carlanda D. Meadors, an individual, et al.,

Plaintiffs,

vs.

Erie County Board of Elections, et al.,

Defendants.

Case No. 1:21-cv-982-JLS

First Amended Complaint

Deleted: **Leonard A. Matarese**, an individual, and **Jomo D. Akono**, an individual,

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13. Defendant Jeremy J. Zellner is a member of the Erie County Board of Elections. As a Commissioner, he exercises his authority under color of state law within the meaning of 42 U.S.C. § 1983. He is sued in his official capacity only.

14. Defendant Ralph M. Mohr is a member of the Erie County Board of Elections. As a Commissioner, he exercises his authority under

Case 21-2107, Document 17, 09/07/2021, 3169923, Page49 of 308

color of state law within the meaning of 42 U.S.C. § 1983. He is sued in his official capacity only.

Background

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22. In 2020, incumbent Democratic Assemblywoman Rebecca Seawright, who had represented Manhattan's Upper East Side since 2015, missed the deadline 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, she was able to qualify for the general-election ballot as an independent candidate, and she won re-election by almost 20 percentage points.

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than the requisite number of signatures with the Erie County Board of Elections on August 17, 2021.

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Claim One

31. New York's petition deadline for independent candidates, as applied here to the candidacy of Byron W. Brown for Mayor of the City of Buffalo, violates rights guaranteed to the plaintiffs by the First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983.

Relief

32. A real and actual controversy exists between the parties.

Case 21-2107, Document 17, 09/07/2021, 3169923, Page53 of 308

33. The plaintiffs have no adequate remedy at law other than this action for declaratory and equitable relief.

34. The plaintiffs are suffering irreparable harm as a result of the violations complained of herein, and that harm will continue unless declared unlawful and enjoined by this Court.

WHEREFORE, the plaintiffs respectfully pray that this Court:

(1) assume original jurisdiction over this case;

(2) enter a declaratory judgment that New York's petition deadline for independent candidates, as applied here to the candidacy of Byron W. Brown for Mayor of the City of Buffalo, violates rights guaranteed to the plaintiffs by the First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983;

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(3) enjoin the Erie County Board of Elections from enforcing New York's petition deadline for independent candidates against Brown's candidacy and from failing to place his name on the 2021 general-election ballot as an independent candidate for Mayor of the City of Buffalo;

Case 1:21-cv-00982-JLS Document 17, 09/07/2021, 3160/23/21 Page 10 of 10

(4) award the plaintiffs the costs of this action together with their reasonable attorneys' fees under 42 U.S.C. § 1988; and

(6) retain jurisdiction of this action and grant the plaintiffs any further relief which may in the discretion of the Court be necessary and proper.

Respectfully submitted this 3rd day of September, 2021.

/s/ Bryan L. Sells*
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Deleted: 30th
Deleted: August
Deleted: *Application for admission*
Deleted: *forthcoming*
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Verification

Pursuant to 28 U.S.C. § 1746, I verify under penalty of perjury under the laws of the United States of America that the allegations in the foregoing Complaint are true and correct to the best of my knowledge, information, and belief.

Executed this 30th day of August, 2021.

____
Carlanda D. Meadors

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
BUFFALO DIVISION

Carlanda D. Meadors an individual, et al.,

Plaintiffs,

vs.

Erie County Board of Elections,

Defendant.

Case No. 21CV982 JLS

Notice of Motion for a Temporary Restraining Order

Expedited Consideration Requested

Moving Party: Carlanda D. Meadors, Leonard A. Matarese, and Jomo D. Akono

Nature of Action: This is a motion for a temporary restraining order prohibiting Erie County election officials from enforcing New York's petition deadline for independent candidates and requiring them to place the name of Byron W. Brown on the 2021 general-election ballot as an independent

candidate for Mayor of the City of Buffalo.

Directed To: Defendant Erie County Board of Elections

Date and Time: To be set by the Court upon judicial assignment.

Place: Western District of New York, 2 Niagara Square, Buffalo, NY 14202

Supporting Papers: Verified Complaint and Supporting Memorandum of Law

Answering Papers: To be set by the Court upon judicial assignment. Plaintiff intends to serve reply papers, if permitted by the Court.

Relief Requested: An order prohibiting Erie County election officials from enforcing New York's petition deadline for independent candidates and requiring them to place the name of Byron W. Brown on the 2021 general-election ballot as an independent candidate for Mayor of the City of Buffalo, and such further relief as the Court deems just and proper.

Grounds for Relief: Rule 65 of the Federal Rules of Civil Procedure and the First and Fourteenth Amendments to the United States Constitution as set forth in the supporting papers.

Oral Argument: Requested.

Respectfully submitted this 30th day of August, 2021.

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EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
BUFFALO DIVISION

Carlanda D. Meadors, an Individual, et. al., Plaintiffs, Vs. Erie County Board of Elections, Defendant.	Case No. 21 CV 982 JLS **Notice of Motion to Intervene** **Pursuant to FRCP Rule 24**

Moving Party: Defendant - Intervenor, India B. Walton

Nature of Action: Plaintiffs are requesting a temporary restraining order prohibiting Erie County election officials from enforcing New York's petition deadline for independent candidates and requiring them to place the name of Byron W. Brown on the 2021 general-election ballot as an independent candidate for Mayor of the City of Buffalo.

Directed to: Plaintiffs and Defendant Erie County Board of Elections

Date and Time: To be set by the Court.

Place:	Western District of New York, 2 Niagara Square, Buffalo, New York.
Supporting Papers:	Motion to Intervene, Submitted with Pleadings and Supporting Memorandum of Law.
Answering Papers:	To be set by the Court.
Relief Requested:	An order permitting the Defendant-Intervenor India-Walton to Intervene in this action as a matter of right pursuant to FRCP Rule 24(a) or, in the alternative, allowing her Permissive Intervention pursuant to FRCP Rule 24(b), and such further relief as the Court deems just and proper.
Grounds for Relief:	Rule 24 of the Federal Rules of Civil Procedure and as set forth in the supporting papers.
Oral Argument:	Requested.

Respectfully submitted this 2nd day of September, 2021.

By: s/Frank Housh, Esq.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
BUFFALO DIVISION

Carlanda D. Meadors, an Individual, et. al., Plaintiffs, Vs. Erie County Board of Elections, Defendant.	)))))))))))))	Case No. 21 CV 982 JLS

DEFENDANT-INTERVENOR INDIA WALTON'S

MOTION TO INTERVENE

PRELIMINARY STATEMENT

Defendant-Intervenor India Walton is the Democratic nominee for Mayor of the City of Buffalo, having received the most votes in the June 22, 2021 primary election. The election results are attached hereto as **Exhibit A.** Defendant-Intervenor India Walton seeks permission to intervene in this action as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the

alternative, she seeks permissive intervention in this matter pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure.

BACKGROUND

This action was commenced on August 31, 2021, by CARLANDA D. MEADORS, LEONARD A. MATARESE, AND JODO D. AKOMO, (hereinafter "Plaintiffs") who reside in the City of Buffalo and are making a constitutional challenge to New York State Election Law 6.158.9 which sets the filing date for independent candidates at least twenty-three (23) weeks before the November 2, 2021 election.

Plaintiffs seek to enjoin defendant Erie County Board of Elections from enforcing the twenty-three (23) week deadline and to place the name "Byron Brown" on the ballot for the office of Mayor of the City of Buffalo.

ARGUMENT

I. Defendant-Intervenor India Walton is Entitled to Intervention as of Right

Rule 24(a) of the Federal Rules of Civil Procedure provides in relevant part:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the

action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Courts have established a four-part test to determine if a party is entitled to intervene as of right under Rule 24(a)(2). Under this test, "[a]n applicant must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to this action." *New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992). As set forth below, the Defendant-Intervenor India Walton satisfies each element for intervention as of right.

A. **This Application Is Timely Filed.**

The timeliness of a motion to intervene is determined by considering: "(1) how long the applicant had notice of the interest before [he/she] made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *D 'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001); *See also, U.S. v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).

This motion to intervene was filed three (3) days after the Complaint was filed and within the time set by the Court for written responses from defendants on Plaintiff's motion for a temporary restraining order, see **Docket, Document 6**. This

motion has been filed with pleadings and written responses to the plaintiffs' case pursuant to Rule 24(c). Further, counsel for Defendant-Intervenor India Walton will be present and is prepared to argue the issues on September 3, 2021 at 10:30 am. Accordingly, this motion to intervene is made within days of commencement and will not delay the date of the scheduled hearing for a temporary restraining order. Additionally, Defendant-Intervenor India Walton will be prejudiced should this Court grant plaintiffs' requested relief.

B. Defendant-Intervenor India Walton Has An Interest In This Action.

Defendant-Intervenor India Walton is the endorsed Democratic candidate for the office of Mayor of the City of Buffalo. Accordingly, she has an interest in any other individual who seeks to be on the ballot for the general election scheduled for November 2, 2021. She has an interest in the plaintiffs' request for a temporary restraining order which would place another candidate on the ballot. Therefore, she has an interest in the outcome of this litigation.

C. Defendant-Intervenor India Walton's Interest May Be Impaired By The Disposition Of The Action.

Defendant-Intervenor India Walton interest's will be impaired if this application for intervention is denied. Like all candidates for public office in 2021, Defendant-Intervenor India Walton relied upon the official, New York State Board of Elections political calendar, attached hereto as **Exhibit B**, in planning her

campaign. She won Democratic primary election on June 22, 2021 by defeating incumbent Mayor Byron Brown.

Despite losing the primary election, Mayor Brown began a write-in campaign, as his right.

Following his loss in the primary election, Mayor Brown created the "Buffalo Party" which seeks to place Mayor Brown's name on the ballot for the general election. That effort to place Mayor Brown on the ballot was rejected by the defendant Erie County Board of Elections on August 31, 2021.

If the Court grants plaintiffs' requested relief, it would disrupt Defendant-Intervenor India Walton's public campaign for Mayor of the City of Buffalo by placing in jeopardy all of the noticed dates and election procedures upon which she (and all other candidates for office) relied on to their detriment. In one of the most on-point and expansive discussions of intervention in cases such as these, the Court in *Hoblock v. Albany County Board of Elections*, 233 F.R.D. 95 (2005), stated:

> … [T]his Court finds that, indeed, a protectable interest alone, even apart from any actual claim or the ability to file a separate action, may be sufficient for a court to grant intervention under Rule 24(a). See San Juan County, 420 F.3d 1197 (10th Cir.2005); Corps of Eng'r, 101 F.3d 503 (7th Cir.1996). "The strongest case for intervention is not where the aspirant for intervention could file an independent suit, but where the intervenor-aspirant has no claim against the defendant yet a legally protected interest that could be impaired by the suit." Corps of Eng'r, 101 F.3d at 507 (citing Shapiro, supra, at 726–27). "
>
> 'As the Rule's plain text indicates, intervenors of right need only an "interest" in the litigation—not a "cause of action" or "permission to

sue." ' " San Juan County, 420 F.3d at 1210 (addressing interest in federal Quiet Title Action; citing Jones v. Prince George's County, 348 F.3d 1014, 1018 (D.C.Cir.2003)). The Candidates here have shown that they have a direct, substantial and protectable interest in this litigation, see United States v. Peoples Benefit Life Ins. Co., 271 F.3d 411 (2d Cir.2001) (per curiam) (addressing requirement of interest to support motion to intervene); Corps of Eng'r, 101 F.3d at 506, and upon determination of the suit their interests will be impacted by the outcome of the election.

Although not required under Rule 24(a) intervention, this Court will, lastly, mention that the Amended Complaint was filed in September of 2005, with this decision being rendered in December of 2005, and with the case currently proceeding before the Honorable David R. Homer, United States Magistrate Judge, for pre-trial matters and Rule 16 scheduling—allowing Candidates to intervene at this juncture without causing undue delay or prejudice to the other parties in this action. *Hoblock, supra*, at 100.

D. **Defendant-Intervenor India Walton's Interest Is Not Adequately Protected By The Parties To This Case.**

Defendant-Intervenor India Walton has an interest in this action that is not adequately protected by any other party. Defendant-Intervenor India Walton is personally interested in the outcome of the race for Mayor of Buffalo; although the interests of the defendant Erie County Board of Elections and Defendant-Intervenor India Walton's voters may appear in unison, ultimately Ms. Walton has a personal interest in the ballot and the November 2, 2021 election for Mayor of the City of Buffalo.

Again, the decision of the Court in *Hoblock v Albany County Bd. Of Elections,*

233 F.R.D. 95 (2005), is instructive:

> Candidates have a right to run for office, and to hold office if elected. See Flinn v. Gordon, 775 F.2d1551, 1554 (11th Cir.1985). This Court accepts the argument advanced by Plaintiff Candidates that their interests and those of the voters are not aligned, since Candidates have a personal interest in winning and holding office, while the voters simply have an interest in having their votes counted and protected, regardless of who they actually voted for. See Mem. of Law in Support (Dkt. No. 21) at 4. The rights of candidates, after all, have been found to be related to, but distinct from, those of voters, see Griffin v. Burns, 570 F.2d 1065, 1072 (1st Cir.1978) (citing, inter alia, Bullock v. Carter, 405, U.S. 134, 142–143, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972)).
>
> Furthermore, "[w]here the interests of the original party and of the intervenor are identical—where in other words there is no conflict of interest—adequacy of representation is presumed." Solid Waste Ag. of N. Cook County v. United States Army Corps of Eng'r, 101 F.3d 503, 508 (7th Cir.1996) (Posner, C.J.) (citing cases). Although the burden to show inadequacy of representation of interests is on the intervenor, it is a minimal one, and not onerous. See San Juan County, 420 F3d at 1211(further citations omitted). *Hoblock, supra*, at 99.

Defendant-Intervenor India Walton, thus, is not part of the same class of persons and do not have the same interests as any other party. *See, Marble Hill Oneida Indians v. Oneida Indian Nation*, 62 Fed. Appx. 389, 390 (2d Cir. 2003). Therefore, Defendant-Intervenor India Walton's interests are not adequately protected by the existing parties. Her interests in the outcome of this litigation is separate and apart from the defendant Erie County Board of Elections.

Based on the foregoing, it is requested that this Court allow Defendant-Intervenor India Walton to intervene in this action as of right pursuant to FRCP 24(a).

II. In the alternative, Defendant-Intervenor India Walton requests Permissive Intervention

If a party seeking to intervene does not meet its burden under Rule 24(a), it may still be able to intervene under Rule 24(b), which provides for permissive intervention. Rule 24(b) of the Federal Rules of Civil Procedure provides in relevant part:

> (b) Permissive Intervention.
>
> (1) In General. On timely motion, the court may permit anyone to intervene who:
>
> (b) has a claim or defense that shares with the main action a common question of law or fact.

For the reasons set forth above and as set forth in the pleadings and written submissions submitted herewith, the Defendant-Intervenor India Walton has a defense to the main action that shares a common question of law or fact. Further, in addition to evaluating whether there is a common question of law or fact between the movant's claim or defense and the suit, the courts consider if such intervention would cause "'intolerable delay" and if such delay would cause prejudice to the plaintiff class." *D 'Amato*, 236 F.3d at 84; *Enviro Corp. v. Clestra Cleanroom, Inc.*, 2002 U.S. Dist. LEXIS 17917 (N.D.N.Y).

Defendant-Intervenor India Walton has a common defense to this action and permissible intervention would not cause delay, let alone "intolerable delay", as this case is only days old, issue has not yet been joined, Defendant-Intervenor has submitted pleadings and papers in support of her position on the merits of the case, and her counsel is fully prepared to argue the issues before this court at the hearing scheduled for September 3, 2021 at 10:30am.

CONCLUSION

For the foregoing reasons, Defendant-Intervenor India Walton requests an Order of this Court granting Intervention as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, an Order of this Court granting Defendant-Candidate India Walton permissive Intervention under Rule 24(b)(2) of the Federal Rules of Civil Procedure, together with such other and further relief as the Court deems just and proper.

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Mayor City of Buffalo 4 Year Term Vote for One	India B. Walton Democratic	Le'Candice M. Durham Democratic	Byron W. Brown Democratic	Blank	Void	Scattering	Total
2021							
City of Buffalo							
Delaware							
DEL 1 (2 & NOR 4)	157	4	103	0	0	0	264
DEL 3 (7 & UNI 1)	169	5	132	3	0	0	309
DEL 4 (5, 6)	131	8	96	2	2	0	239
DEL 8 (9, 10, 15)	297	6	195	4	0	2	504
DEL 11 (12)	144	9	98	2	0	1	254
DEL 13 (14 & NOR 10, 11)	175	4	117	1	0	2	299
DEL 16 (17)	212	8	128	0	0	2	350
DEL 18 (22, 26)	125	1	83	1	0	0	210
DEL 19 (23)	166	2	96	1	0	0	265
DEL 20 (21 & MAS 2)	178	4	114	3	0	0	299
DEL 24 (25, 28)	288	6	114	2	0	3	413
DEL 27	26	2	42	0	0	0	70
DEL 29 (NIA 5)	236	0	68	7	0	1	312
DEL 30 (31)	327	6	115	3	0	0	451
DEL 32 (33, 34 & NIA 15)	369	3	144	6	0	0	522
Delaware Total	**3000**	**68**	**1645**	**35**	**2**	**11**	**4761**
Ellicott							
ELL 1	173	8	110	0	0	2	293
ELL 2 (FIL 5)	120	1	60	2	0	0	183
ELL 3 (8, 9)	118	3	76	1	0	1	199
ELL 4 (5, 6, 10)	101	11	121	3	0	0	236
ELL 7 (MAS 30, 39, 40)	67	11	121	1	1	1	202
ELL 11 (12, 13, 17)	148	11	193	2	3	1	358
ELL 14	44	1	17	0	0	0	62
ELL 15 (FIL 1)	134	0	51	4	0	1	190
ELL 16	36	1	41	1	1	0	80
ELL 18 (FIL 3)	72	5	40	0	0	0	117
ELL 19 (20)	93	4	111	4	0	1	213
ELL 21	56	6	41	2	0	0	105
ELL 22 (23)	65	13	98	1	0	0	177
ELL 24 (FIL 2, 4, 6, 7)	203	4	72	2	1	0	282
ELL 25 (26)	90	7	136	2	0	1	236
ELL 27	38	0	43	1	0	1	83
ELL 28 (32)	44	3	76	3	0	0	126
ELL 29 (30, 31)	143	15	217	1	2	1	379
ELL 33 (FIL 8)	86	4	101	6	0	2	199
ELL 34 (35, 36)	85	3	83	0	3	1	175
Ellicott Total	**1916**	**111**	**1808**	**36**	**11**	**13**	**3895**
Fillmore							
FIL 9 (LOV 6, 7)	81	9	77	0	0	0	167
FIL 10 (15, 18)	85	10	104	4	0	3	206
FIL 11 (35)	70	8	117	3	1	0	199
FIL 12 (13)	46	2	82	3	0	0	133
FIL 14 (16)	42	5	33	1	0	0	81
FIL 17 (LOV 23)	11	2	26	0	0	1	40
FIL 19	19	3	40	0	0	2	64
FIL 20 (22, 34)	53	8	90	0	1	0	152

Mayor City of Buffalo 4 Year Term Vote for One	India B. Walton Democratic	Le'Candice M. Durham Democratic	Byron W. Brown Democratic	Blank	Void	Scattering	Total
2021							
FIL 21 (24)	26	1	28	0	0	1	56
FIL 23 (26, 27)	36	6	64	4	1	0	111
FIL 25 (28)	39	4	40	0	0	0	83
FIL 29 (30)	53	8	101	0	1	0	163
FIL 31	24	2	24	1	0	0	51
FIL 32 (33)	42	6	36	2	0	0	86
Fillmore Total	**627**	**74**	**862**	**18**	**4**	**7**	**1592**
Lovejoy							
LOV 1 (2, 3)	63	10	61	1	0	0	135
LOV 4 (5)	89	6	60	1	1	1	158
LOV 8 (9, 10)	67	8	62	2	0	0	139
LOV 11 (12, 13, 14)	128	12	175	1	1	0	317
LOV 15 (16, 17, 18, 19, 20, 21)	92	14	98	4	2	0	210
LOV 22	2	1	0	0	0	0	3
LOV 24 (28)	53	19	70	1	0	0	143
LOV 25 (26)	8	1	17	0	0	0	26
LOV 27 (31 & SOU 4)	59	3	66	3	0	0	131
LOV 29 (30, 32)	44	10	82	3	0	1	140
Lovejoy Total	**605**	**84**	**691**	**16**	**4**	**2**	**1402**
Masten							
MAS 1 (3, 8, 9, 10)	164	10	233	1	1	2	411
MAS 4 (11)	71	16	114	1	0	1	203
MAS 5 (6, 7 & UNI 15, 18)	147	21	160	5	4	1	338
MAS 12 (17, 18)	87	26	151	4	2	1	271
MAS 13 (20 & UNI 24)	143	9	190	1	0	0	343
MAS 14 (15, 21, 22)	75	7	162	2	2	0	248
MAS 16 (24)	93	9	114	2	0	0	218
MAS 19 (23, 25, 26)	138	19	197	3	0	3	360
MAS 27 (34)	94	4	89	1	0	0	188
MAS 28 (29)	67	10	114	2	0	0	193
MAS 31 (32)	51	6	74	2	0	0	133
MAS 33	46	7	43	1	0	0	97
MAS 35 (36, 37, 38)	110	10	141	5	0	1	267
MAS 41 (42)	33	2	67	2	0	0	104
Masten Total	**1319**	**156**	**1849**	**32**	**9**	**9**	**3374**
Niagara							
NIA 1 (2, 4 & NOR 25)	162	5	53	1	1	0	222
NIA 3 (NOR 26)	34	0	8	0	0	0	42
NIA 6 (9)	223	0	62	3	0	0	288
NIA 7 (8, 10, 11)	210	7	93	2	0	3	315
NIA 12 (13, 16, 20)	140	4	75	2	1	0	222
NIA 14 (18)	285	2	71	4	0	0	362
NIA 17 (24)	135	3	27	0	1	0	166
NIA 19 (25)	243	5	142	4	1	1	396
NIA 21 (22)	110	2	61	0	0	0	173
NIA 23 (27, 28)	148	0	36	1	0	0	185
NIA 26	49	0	22	0	0	0	71
Niagara Total	**1739**	**28**	**650**	**17**	**4**	**4**	**2442**

Mayor City of Buffalo 4 Year Term Vote for One	India B. Walton Democratic	Le'Candice M. Durham Democratic	Byron W. Brown Democratic	Blank	Void	Scattering	Total
2021							
North							
NOR 1 (2)	59	4	79	0	0	1	143
NOR 3	15	5	15	0	0	0	35
NOR 5 (6)	43	5	46	1	0	0	95
NOR 7 (13)	38	13	70	1	0	0	122
NOR 8 (9, 15, 16, 19)	80	7	82	1	0	0	170
NOR 12 (14)	37	8	72	1	2	0	120
NOR 17	17	5	34	0	0	0	56
NOR 18 (21)	37	7	55	4	0	0	103
NOR 20 (24)	154	4	100	1	0	1	260
NOR 22 (23, 27)	116	0	81	0	0	0	197
North Total	**596**	**58**	**634**	**9**	**2**	**2**	**1301**
South							
SOU 1 (3)	19	0	47	0	0	0	66
SOU 2 (8)	56	3	63	2	1	1	126
SOU 5 (6)	65	3	63	2	0	0	133
SOU 7 (9, 10, 14)	91	4	137	3	1	3	239
SOU 11	51	4	56	0	0	1	112
SOU 12	20	5	31	3	0	0	59
SOU 13 (17)	46	7	93	0	0	1	147
SOU 15 (16, 19, 20)	65	2	90	1	0	1	159
SOU 18 (21)	56	1	116	1	0	2	176
SOU 22 (23, 26, 27, 29)	115	5	184	6	0	3	313
SOU 24 (25)	74	0	179	2	0	0	255
SOU 28 (30)	72	13	185	1	0	3	274
South Total	**730**	**47**	**1244**	**21**	**2**	**15**	**2059**
University							
UNI 2 (3)	148	4	113	0	0	5	270
UNI 4 (6, 8)	105	2	67	2	1	0	177
UNI 5 (7)	137	6	121	3	0	1	268
UNI 9 (10)	107	10	110	0	1	0	228
UNI 11 (13)	109	15	135	1	0	0	260
UNI 12 (14)	120	6	147	8	2	0	283
UNI 16	59	9	57	0	0	1	126
UNI 17 (20)	96	12	117	2	2	0	229
UNI 19 (21)	101	4	135	3	0	0	243
UNI 22 (23)	80	15	96	2	0	0	193
UNI 25 (26, 27)	124	20	188	2	2	0	336
University Total	**1186**	**103**	**1286**	**23**	**8**	**7**	**2613**
Mayor Recapitulation							
Delaware District	**3000**	**68**	**1645**	**35**	**2**	**11**	**4761**
Ellicott District	**1916**	**111**	**1808**	**36**	**11**	**13**	**3895**
Fillmore District	**627**	**74**	**862**	**18**	**4**	**7**	**1592**
Lovejoy District	**605**	**84**	**691**	**16**	**4**	**2**	**1402**
Masten Total	**1319**	**156**	**1849**	**32**	**9**	**9**	**3374**
Niagara Total	**1739**	**28**	**650**	**17**	**4**	**4**	**2442**
North Total	**596**	**58**	**634**	**9**	**2**	**2**	**1301**
South Total	**730**	**47**	**1244**	**21**	**2**	**15**	**2059**
University Total	**1186**	**103**	**1286**	**23**	**8**	**7**	**2613**

Mayor City of Buffalo 4 Year Term Vote for One	India B. Walton Democratic	Le'Candice M. Durham Democratic	Byron W. Brown Democratic	Blank	Void	Scattering	Total
2021							
Office Total	11718	729	10669	207	46	70	23439

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VOTER REGISTRATION FOR PRIMARY

Feb 21	**List of Registered Voters:** Such lists shall be published before the twenty-first day of February
May 28	**Mail Registration for Primary**: Last day to postmark application for primary; last day it must be received by board of elections is June 2. §5-210(3)
May 28	**In person registration for Primary:** Last day application must be received by board of elections to be eligible to vote in primary election. §§5-210, 5-211, 5-212
June 2	**Changes of address** for Primary received by this date must be processed. §5-208(3)

CHANGE OF ENROLLMENT

Feb 14	A change of enrollment received by the BOE not later than Feb. 14th or after June 28th is effective immediately. Any change of enrollment made between Feb 15-June 28th, shall be effective on June 29th.

VOTER REGISTRATION FOR GENERAL

Oct. 8	**Mail Registration for General:** Last day to postmark application for general election; it must also be received by board of elections by Oct. 13. §5-210(3)
Oct. 8	**In person registration for General:** Last day application must be received by board of elections to be eligible to vote in general election. If honorably discharged from the military or have become a naturalized citizen since October 8th, you may register in person at the board of elections up until October 23rd. §§5-210, 5-211, 5-212
Oct. 13	**Changes of address** for General received by this date must be processed. §5-208(3)

ABSENTEE VOTING FOR PRIMARY

June 15	Last day to postmark, email or fax application or letter for primary ballot. §8-400(2)(c).
June 21	Last day to apply in person for primary ballot. §8-400(2)(c)
June 22	Last day to postmark primary election ballot. Must be received by the county board no later than June 29th.§8-412(1)
June 22	Last day to deliver primary ballot in person to your county board or your poll site, by close of polls. §8-412(1)

MILITARY/SPECIAL FEDERAL VOTERS FOR PRIMARY

May 7	Deadline to transmit ballots to eligible Military/Special Federal Voters. §10-108(1) & §11-204(4)
May 28	Last day for a board of elections to receive application for Military/Special Federal absentee ballot for primary if not previously registered. §10-106(5) & §11-202(1)(a)
June 15	Last day for a board of elections to receive application for Military/Special Federal absentee ballot for primary if already registered. §10-106(5) & §11-202(1)(b)
June 21	Last day to apply personally for Military ballot for primary if previously registered. §10-106(5)
June 22	Last day to postmark Military/Special Federal ballot for primary. Date by which it must be received by the board of elections is June 29th. §10-114(1) & §11-212

ABSENTEE VOTING FOR GENERAL ELECTION

* Oct. 18	Last day for board of elections to receive application or letter of application by mail, online portal, email or fax for general election ballot. §8-400(2)(c)
Nov. 1	Last day to apply in person for general election ballot. §8-400(2)(c)
Nov. 2	Last day to postmark general election ballot. Must be received by the county board no later than Nov. 9th. §8-412(1)
Nov. 2	Last day to deliver general election ballot in person to your county board or any poll site in your county, by close of polls on election day. §8-412(1)

MILITARY/SPECIAL FEDERAL VOTERS FOR GENERAL

Sept 17	Deadline to transmit ballots to eligible Military/Special Federal voters. §10-108(1) & §11-204(4)
Oct. 8	Last day for a board of elections to receive application for Special Federal absentee ballot for general if not previously registered. §11-202(1)(a)
Oct. 23	Last day for a board of elections to receive application for Military absentee ballot for general if not previously registered. §10-106(5)
Oct. 26	Last day for a board of elections to receive application for Military/Special Federal absentee ballot for general if already registered. §10-106(5) & §11-202(1)(b)
Nov. 1	Last day to apply personally for a Military absentee ballot for general if previously registered. §10-106(5)
Nov. 2	Last day to postmark Military/Special Federal ballot for general. Date by which it must be received by the board of elections is Nov. 15th. §10-114(1) & §11-212

VACANCY IN OFFICE

Aug 2	A vacancy occurring three (3) months before a General Election in any year in any office are authorized to be filed at a General Election. §6-158(14)

REFERENDUMS/PROPOSITIONS/PROPOSALS

Aug 2	For any election conducted by a BOE, the clerk of such subdivision shall provide the BOE with a certified text copy of any proposal, proposition or referendum at least three (3) months before the General Election. §4-108

2021 POLITICAL CALENDAR

40 NORTH PEARL STREET – SUITE 5,
ALBANY, NEW YORK 12207 (518) 474-6220
For TDD/TTY, call the NYS Relay 711
www.elections.ny.gov

***** CH. 273, LAWS OF 2021 *****

Primary Election
June 22, 2021

General Election
November 2, 2021

This political calendar is a ready reference to the significant dates pertaining to elections to be held in this State. For complete information consult the State's Election Law and Regulations and any relevant court orders.

All dates are based on statutory provisions in effect on the date of publication and may be subject to change. Final confirmation should be obtained from your county board of elections or the State Board.

FILING REQUIREMENTS: For 2021 Elections, all certificates and petitions of designation or nomination, certificates of acceptance or declination of such designations or nominations, certificates of authorization for such designations or nominations, certificates of disqualification, certificates of substitution for such designations or nominations and objections and specifications of objections to such certificates and petitions required to be filed with the State Board of Elections or a board of elections outside of the city of New York shall be deemed timely filed and accepted for filing if sent by mail or overnight delivery service, in an envelope postmarked or showing receipt by the overnight delivery service prior to midnight of the last day of filing, and received no later than two business days after the last day to file such certificates, petitions, objections or specifications. Failure of the post office or authorized overnight delivery service to deliver any such petition, certificate or objection to such board of elections outside the city of New York no later than two business days after the last day to file such certificates, petitions, objections or specifications shall be a fatal defect per NYS Election Law § 1-106.

Within NYC: all such certificates, petitions and specifications of objections required to be filed with the board of elections of the city of New York must be actually received on or before the last day to file. The New York City Board of Elections is open for the receipt of such petitions, certificates and objections until midnight on the last day to file.

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ELECTION DATES

June 22	Primary Election §8-100(1)(a)
June 12 – June 20	Days of Early Voting for the Primary Election. §8-600(1)

Feb 1	Certification of offices to be filled at 2021 general election by SBOE and CBOE. §4-106 (1&2)
Feb 16	PARTY CALLS: Last day for State & County party chairs to file a statement of party positions to be filled at the Primary Election. §2-120

CERTIFICATION OF PRIMARY

April 28	Certification of primary ballot by SBOE of designations filed in its office. §4-110
April 29	Determination of candidates; County Boards. §4-114

CANVASS OF PRIMARY RESULTS

July 6	Canvass of Primary returns by County Board of Elections §9-200(1)
July 6	Verifiable Audit of Voting Systems. §9-211(1)
July 12	Recanvass of Primary returns. §9-208(1)

Nov. 2	General Election §8-100(1)(c)
Oct. 23 – Oct. 31	Days of Early Voting for the General Election. §8-600(1)

CERTIFICATION OF GENERAL ELECTION BALLOT

Sept. 8	Certification of general election ballot by SBOE of nominations filed in its office. §4-112(1)
Sept. 9	Determination of candidates and questions; County Boards. §4-114

CANVASS OF GENERAL ELECTION RESULTS

Nov. 17	Recanvass of General Election returns to occur no later than Nov. 17. §9-208(1)
Nov. 17	Verifiable Audit of Voting Systems to occur no later than Nov. 17. §9-211(1)
Nov. 27	Certification and transmission of Canvass of General Election returns by County Board of Elections §9-214
Dec. 1-15th	State Board of Canvassers meet to certify General Election. §9-216(2)

DESIGNATING PETITIONS FOR PRIMARY

Mar 2	First day for signing designating petitions. §6-134(4)
Mar 22-Mar 25	Dates for filing designating petitions. §6-158(1)
Mar 29	Last day to authorize designations. §6-120(3)
Mar 29	Last day to accept or decline designations. §6-158(2)
April 2	Last day to fill a vacancy after a declination. §6-158(3)
April 6	Last day to file authorization of substitution after declination of a designation. §6-120(3)

PARTY NOMINATION OTHER THAN PRIMARY

Feb 9-Mar 2	Dates for holding state committee meeting to nominate candidates for statewide office §6-104(6)
Mar 2	First day to hold a town caucus. §6-108
July 22	Last day for filing nominations made at a town caucus or by a party committee. §6-158(6)
July 22	Last day to file certificates of nomination to fill vacancies created pursuant to § 6-116, §6-104 & §6-158(6)
July 26	Last day to accept or decline a nomination for office made based on § 6-116 & §6-158(7)
July 26	Last day to file authorization of nomination made based on § 6-116. § 6-120(3)
July 30	Last day to fill a vacancy after a declination made based on § 6-116. § 6-158(8)

INDEPENDENT PETITIONS

April 13	A signature made earlier than 6 weeks prior to the last day to file independent petitions shall not be counted.§6-138(4)
May 18-25	A petition for an independent nomination for an office to be filled at the time of a general election shall be filed not earlier than 24 weeks and not later than 23 weeks preceding such election. §6-158(9)
May 28	A certificate of acceptance or declination of an independent nomination for an office to be filled at the time of a general election shall be filed not later than the 3rd day after the 23rd Tuesday preceding such election. §6-158(11)
June 1	A certificate to fill a vacancy caused by a declination of an independent nomination for an office to be filled at the time of a general election shall be filed not later than the 6th day after the 23rd Tuesday preceding such election. §6-158(12
June 25	A candidate who files a certificate of acceptance for an office for which there have been filed certificated or petitions designating more than one candidate for the nomination of any party, may thereafter file a certificate of declination not later than the 3rd day after the primary election. §6-158(11)

OPPORTUNITY TO BALLOT PETITIONS

Per Chapter 69, Laws of 2021, Opportunity To Ballot Petitions have been suspended for 2021.

JUDICIAL DISTRICT CONVENTIONS

Minutes of a convention must be filed within 72 hours of adjournment. §6-158(6)

Aug 5 - Aug 11	Dates for holding Judicial conventions. §6-158(5)
Aug 12	Last day to file certificates of nominations. §6-158(6)
Aug 16	Last day to decline nomination. §6-158(7)
Aug 20	Last day to fill vacancy after a declination. §6-158(8)

SIGNATURE REQUIREMENT FOR DESIGNATING PETITIONS §6-136

1.5% of the active enrolled voters of the political party in the political unit or the following, whichever is less:

For any office to be filled by all the voters of the entire state....................15,000 (with at least 100 enrolled voters or 5% of enrolled voters from each of one-half of the congressional districts)

New York City 2,250
Any county or borough of New York City 1,200
A municipal court district within New York City 450
Any city council district within New York City....................270
Cities/counties having more than 250,000 inhabitants....................600
Cities/counties having more than 25,000 inhabitants, but not more than 250,000....................300
Any other city, county, or councilmanic district in any city other than New York City 150
any congressional district....................375
any state senatorial district 300
any assembly district....................150
any county legislative district....................150

For any office to be filled by all the voters of towns containing one hundred thousand (100,000) inhabitants or less, not to exceed the number of signatures required by [the following paragraph] or two times the number of elections districts in such town, whichever is less; For any political subdivision contained within another political subdivision, except as herein provided, requirement is not to exceed the number required for the larger subdivision; For any political subdivision containing more than one assembly district, county or other political subdivision, requirement is not to exceed the aggregate of the signatures required for the subdivision or parts of subdivision so contained.

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SIGNATURE REQUIREMENT FOR INDEPENDENT NOMINATING PETITIONS §6-142 and Chapter 90 of 2021

2.5% of the total number of votes excluding blank and void cast for the office of governor at the last gubernatorial election in the political unit except that not more than 1,750 signatures shall be required on a petition for an office to be filled in any political subdivision outside the City of New York, and not more than the following for any office to be voted for by all the voters of:

the entire state.....................................45,000 (with at least 500 or 1% of enrolled voters from each of one-half of the congressional districts) (Part V Public Financing Commission Report)

Any county or portion thereof outside NYC....................................750
*Notwithstanding city charter, NYC..3,750
*Notwithstanding city charter, Any county or borough or any two counties or boroughs within NYC..................................2,000
*Notwithstanding city charter, any municipal court district within NYC 1,500
*Notwithstanding city charter, any city council district within NYC 1,350
Any Congressional district.. 1,750
Any State Senatorial District 1,500
Any Assembly District...750

Any political subdivision contained within another political subdivision, except as herein provided, requirement is not to exceed the number for the larger subdivision.

***NOTE: Section 1057-b of the New York City Charter supersedes New York Election Law signature requirements for Designating and Independent nominating petitions with respect to certain NYC offices to the extent such section provides for a LESSER number.**

CAMPAIGN FINANCIAL DISCLOSURE

PRIMARY ELECTION §14-108(1)	
32 Day Pre-Primary	May 21
11 Day Pre-Primary	June 11
10 Day Post-Primary	July 15 9 NYCRR 6200.2(a)
24 Hour Notice §14-108(2)	June 8 through June 21

GENERAL ELECTION §14-108(1)	
32 Day Pre-General	October 1
11 Day Pre-General	October 22
27 Day Post-General	November 29
24 Hour Notice §14-108(2)	October 19 through November 1

Periodic Reports §14-108(1)
January 15th
July 15th

Additional Independent Expenditure Reporting	
24 Hour Notice §14-107(4) (a) (ii); (b)	Primary: May 23 through June 21 General: October 3 through November 1
Weekly Notice	Refer to §14-107(4)(a)(i); (b)

Revised: August 04, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
BUFFALO DIVISION

Carlanda D. Meadors, an Individual, et. al.,

Plaintiffs,

Vs.

Erie County Board of Elections,

Defendant.

Case No. 21 CV 982 JLS

AFFIDAVIT

I, India Walton, being duly sworn, deposes and states the following:

1. I reside at 815 7th Street #2, Buffalo, New York 14213.

2. On June 22, 2021 I appeared on the ballot of the Democratic Party Primary for the office of Mayor in the City of Buffalo.

3. One of the other candidates on the ballot was my opponent in that election was Byron W. Brown. Byron W. Brown appeared on the ballot as a candidate to be the Democratic Nominee for the same office.

4. Byron W. Brown filed Democratic Party designating petitions just like me and the other Democratic candidates for Mayor. Mr. Brown's Democratic Party designating petitions were filed in Erie County Board of Elections.

5. Byron W. Brown is the current Mayor of the City of Buffalo, currently seeking re-election for a fifth term. During the Democratic Primary, the Erie County Democratic Committee endorsed Byron Brown prior to the primary election. Byron Brown was a State Democratic Party Chairman from approximately 2016 to 2019 according my review news coverage of Mr. Brown's role with the State party.

6. As the Democratic nominee for the Office of Buffalo Mayor, I will appear on the ballot for the general election to be held on November 2, 2021. Since I won the Democratic primary, there are no other candidates who will appear on the Democratic line. No candidates filed valid independent nominating petitions for this office by the established New York State deadline.

7. During the campaign season I attempted to secure the placement on the Working Families line. My ability to appear on the ballot on the Working Families line for the November 2, 2021 general election was invalidated due to the failure to file a certificate of acceptance within the time period prescribed under New York State Election Law.

8. The enforcement of the time periods in the same political calendar is the reason that Byron W. Brown's August 17, 2021 independent nominating petitions were invalidated by the Erie County Board of Elections.

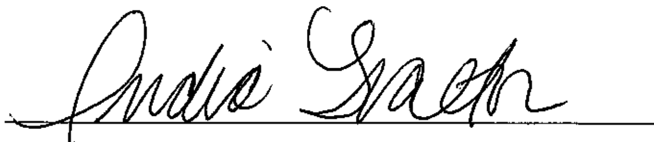
9. I am a party to a State special proceeding commenced by Byron Brown challenging the deadline under Election Law §6-158(9). I have stated and filed

objections to Mr. Brown's petition based upon the timely deadline and its failure to comply with the statutory prescribed form.

10. Mr. Brown's State Court proceeding is scheduled for Friday, September 3, 2021 at 11:00 a.m.

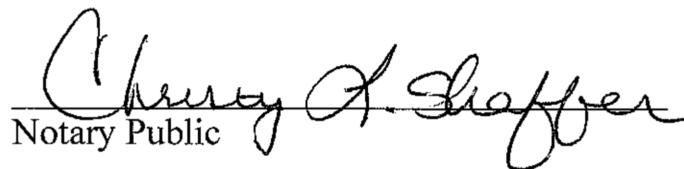
11. I respectfully request that this Court grant my Motion to Intervene, and deny the plaintiffs' request for a temporary restraining order and thus, allow the equal enforcement of the New York State Election Calendar for the 2021 election.

Dated: September 2, 2021
Buffalo, New York



India B. Walton

Subscribed and sworn to before me
this 2 day of September, 2021



Notary Public

CHRISTY L. SHAFFER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 21, 2024

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
BUFFALO DIVISION

Carlanda D. Meadors, an Individual, et. al.,	
Plaintiffs,	Case No. 21 CV 982 JLS
Vs.	**MEMORANDUM OF LAW IN OPPOSITION TO TEMPORARY RESTRAINING ORDER**
Erie County Board of Elections,	
Defendant.	

s/Sean E. Cooney, Esq.
Sean E. Cooney, Esq
Dolce Firm
Attorney for Defendant-Intervenor India B. Walton
1260 Delaware Avenue
Buffalo, New York
(716) 852-1888
scooney@dolcefirm.com

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
BUFFALO DIVISION

Carlanda D. Meadors, an Individual, et. al.,	)	
	)	Case No. 21 CV 982 JLS
Plaintiffs,	)	
	)	**MEMORANDUM OF LAW IN OPPOSITION TO TEMPORARY RESTRAINING ORDER**
	)	
Vs.	)	
	)	
Erie County Board of Elections,	)	
	)	
Defendant.	)	
	)	

PRELIMINARY STATEMENT

As set forth in the accompanying motion to intervene Defendant-Intervenor India Walton is seeking permission to intervene in this action as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, permissive intervention in this matter under Rule 4(b)(2) of the Federal Rules of Civil Procedure. Further, Defendant-Intervenor India B. Walton has filed a motion for expedited hearing as it relates to her motion to intervene consistent with the

Order granting expedited hearing relating to Plaintiffs' motion for a temporary restraining order

The Defendant-Intervenor, India B. Walton, respectfully submits this Proposed memorandum of law in opposition to Plaintiffs' Motion for a Temporary Retraining Order.

This action was commenced on August 30, 2021, by CARLANDA D. MEADORS, LEONARD A. MATARESE, AND JODO D. AKOMO, (hereinafter "Plaintiffs") residing in the City of Buffalo, making a Constitutional challenge to New York State Election Law Section 6-158.9 which sets the filing date for independent candidates at least twenty-three (23) weeks before the November 2, 2021 election.

Plaintiffs are seeking an order prohibiting defendant Erie County Board of Elections from enforcing the petition deadline and requiring them to place the name of Byron W. Brown on the 2021 general election ballot as an independent candidate for the Mayor of the City of Buffalo.

The plaintiffs' motion for a temporary retraining order should be denied.

Background

Buffalo's Mayor, Byron W. Brown, is running for re-election seeking a 5th term, as Mayor.

In 2021, Mr. Brown again sought re-election in 2021 as the nominee of the Democratic Party. Mr. Brown was the endorsed candidate by the Erie County Democratic Committee in 2021 Buffalo Mayoral Democratic Primary and was designated as candidate in the primary by filing of Democratic Designating Petitions with the Erie County Board of Elections. Mr. Brown appeared on the ballot in the June 22, 2021 primary along with other Democratic Party candidates, including Defendant-Intervenor India B. Walton and other Democratic party members. Mr. Brown was defeated in the Democratic Primary and India B. Walton was declared the winner. These facts are well known and within the Affidavit of India B. Walton filed in support of her motion to intervene.

Shortly after the Democratic Party primary was over, Mr. Brown announced to the media and others that he was launching a write-in campaign for the November 2, 2021 general election.

Mr. Brown's then supporters launched an effort to nominate him as a purported "independent candidate."

While the subject deadline under New York Election Law §6-158(9) was moved in 2019 from August to May, it was and remains after the time to file party designating petitions and before the primary date which was moved to June in 2019. Had the election calendar not been changed in 2019, Mr. Brown's

supporters would have simply waited until after he lost the September primary and the former August deadline would have been passed just like this year's May deadline. In other words, the deadline at issue is not the reason Mr. Brown's supporters failed to timely circulate and file the Independent Nominating Petition.

Legal Standard For Temporary Restraining Order

The four factors a Plaintiff seeking a temporary restraining order must demonstrate are (1) there is a substantial likelihood of success on the merits; (2) it will suffer irreparable injury if relief if the relief is not granted; (3) the threatened injury outweighs any harm the requested relief would inflict on the non moving party; and (4) enter of relief would serve the public interest. Winter v. Nat. Res. Def. Council, Inc, 555 U.S. 7 (2008).

Courts have acknowledged how rare a temporary restraining order is specifically relating to a New York State Election. "[T]he temporary restraining order the Plaintiff seeks here, is an "extraordinary and drastic remedy" that is "unavailable except in extraordinary circumstances." Murray v. Cuomo, 460 F. Supp. 3d 430, 442 (S.D.N.Y. 2020)

Discussion

I. The Plaintiff's Cannot Show A "Clear" or "Substantial" likelihood of success on the merits

Just last year the Southern District the Court denied a Temporary restraining order seeking to place the name of a candidate on a ballot after petitions were invalided by the Board of Elections.

The Court noted "since Plaintiff here seeks a mandatory injunction against the government that would change the status quo existing when the case was filed (*i.e.* by adding her name to the ballot), she is subject to a heightened standard. Namely, she must show "a 'clear' or 'substantial' likelihood of success on the merits." Murray v. Cuomo, 460 F. Supp. 3d 430, 442 (S.D.N.Y. 2020).

As discussed below, Plaintiffs' specific request to extend the deadline for nominating petitions to over 50 days passed a party primary has been specifically rejected as the Constitution *does not guarantee preferential treatment*. Council of Alternative Pol. Parties v. Hooks, 179 F.3d 64, 67 (3d Cir. 1999).

Thus, Plaintiffs cannot meet the heightened standard on the request for injunctive relief to show a "clear" or "substantial" likelihood of success on the merits.

A. The Standard of Review

The Plaintiffs' challenge to the New York State deadline for the filing of Independent Nominating Petitions based on violations of First and Fourteenth Amendments requires the Court to apply a balancing test of the asserted injury and

the state's interest justifying the burden as set out by the Supreme Court in Anderson v. Celebrezze, 460 U.S. 780, 789, (1983). Through conducting the balancing test the Court can apply the necessary standard of review in each case.

At one end of review are regulations that are discriminatory or place severe burdens on plaintiffs' rights which must be narrowly tailored and advance a compelling state interest. Id. See also Party of Michigan v. Johnson, 905 F. Supp. 2d 751, 758–59 (E.D. Mich. 2012), aff'd, 714 F.3d 929 (6th Cir. 2013). Applying the Anderson balancing test, the Ninth Circuit held "the burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, "reasonably diligent" candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so." Nader v. Brewer, 531 F.3d 1028, 1035 (9th Cir. 2008).

There is no allegation that the candidate Byron W. Brown was unable to get on the ballot by the May deadline with some reasonable diligence. Instead, it is admitted that the supporters did not attempt until after he lost the primary election. Further, there is no allegation made by plaintiffs that independent candidates are unable to obtain ballot access under the May deadline. In fact, other candidates did successfully obtain access to the ballot by way of Independent Nominating Petitions timely filed on or before May 25, 2021.

Where there is no discriminatory or severe burden, "[l]esser burdens, however, trigger less exacting review, and a State's " 'important regulatory interests' " will usually be enough to justify " 'reasonable, nondiscriminatory restrictions." Party of Michigan v. Johnson, 905 F. Supp. 2d 751, 758–59 (E.D. Mich. 2012), aff'd, 714 F.3d 929 (6th Cir. 2013).

Here, the New York State May deadline for filing of Independent Nominating Petitions is neither discriminatory, nor severe, thus the standard of review is the less exacting review where a State's important regulatory interests are enough to justify the reasonable, non discriminatory deadline.

The Sixth Circuit recently noted the deadlines where the Courts applied strict scrutiny and struck deadlines required independent candidates (or minor parties) to file qualifying petitions "substantially in advance" of a primary election or nominating convention. Graveline v. Benson, 992 F.3d 524, 536–37 (6th Cir. 2021). The Graveline Court noted the following examples, Anderson, 460 U.S. at 783 n.1, 103 S.Ct. 1564 (deadline **seventy-five days before primary**); New Alliance Party of Ala. v. Hand, 933 F.2d 1568, 1570 n.3 (11th Cir. 1991) (deadline **sixty days before primary**); Cromer v. South Carolina, 917 F.2d 819, 822 (4th Cir. 1990) (deadline **seventy days before primary);** McLain v. Meier, 637 F.2d 1159, 1164 (8th Cir. 1980) (deadline **ninety days before primary);** Cripps v. Seneca Cnty. Bd. of Elections, 629 F. Supp. 1335, 1338 (N.D. Ohio 1985)

(deadline **seventy-five days** before primary); Stoddard v. Quinn, 593 F. Supp. 300, 306 (D. Maine 1984) (68 day deadline); Bradley v. Mandel, 449 F. Supp. 983, 985 (D. Md. 1978) (deadline **seventy days before primary**).

On the other hand, "Courts around the country have similarly noted that a filing deadline that falls on or around the date of the primary election is not burdensome under *Anderson.*" Whittaker v. Mallott, 259 F. Supp. 3d 1024, 1036 (D. Alaska 2017), upholding deadline on the date of the primary election. Swanson v. Worley, 490 F.3d 894, 905–06, 910 (11th Cir.2007) (upholding Alabama's **primary-day filing deadline**); Lawrence v. Blackwell, 430 F.3d 368, 370, 375 (6th Cir.2005) (upholding Ohio's ***primary-eve filing*** **deadline** for unaffiliated congressional candidates); Wood v. Meadows, 207 F.3d 708, 713 (4th Cir. 2000) (upholding **Virginia's primary-day filing deadline** for unaffiliated candidates in local and statewide elections). See also, Pisano v. Strach, 743 F.3d 927, 935 (4th Cir. 2014), upholding a North Carolina deadline just after a Presidential primary and before the major party Presidential Conventions.

Here the New York deadline is May 25, 2021 is 28 days prior to the major party primary election of June 22, 2021. Plaintiffs cite no authority that a 28 day deadline is a severe burden or that the Anderson test renders it unreasonable. This burden is not severe as independent candidates do reach the ballot and the May 25, 2021 independent nominating petition deadline is not sever since it is actually later

than the major party designating petition deadline of March 25, 2021. See Election Law §6-158(1). The Third Circuit noted that this later deadline actually favored the independent candidates and held that the State's interests in a fair electoral process, voter education, and political stability are sufficient to outweigh the small burden imposed upon the plaintiffs' rights under the First and Fourteenth Amendments. Hooks, 179 F.3d 64, 80 (3d Cir. 1999).

None of the Plaintiffs authority suggests the Constitution requires what Plaintiffs' actually seek here, that is preferential treatment for Independent candidates with an August 17, 2021 deadline for independent candidacies that is 56 days after the major party primary is over on June 22, 2021. As mentioned above, the Courts applying Anderson test struck similar deadlines of fifty days or more due to its unequal treatment. Yet here, Plaintiffs' wish this Court to require by temporary restraining order a 54 day discriminatory deadline to their advantage despite the clear legal authority prohibiting such unequal burdens on ballot access. See Graveline v. Benson, 992 F.3d 524, 536–37 (6th Cir. 2021), which struck a 50 day earlier deadline. "Nor do we see any support in any other Supreme Court decision for the plaintiffs' claim of right to preferential treatment. Rather, the Supreme Court's election jurisprudence suggests that no candidates should be given any relative advantage over the other." Council of Alternative Pol. Parties v. Hooks, 179 F.3d 64, 75 (3d Cir. 1999)

The preferential treatment over major party candidates that plaintiffs claim here is required by the Constitution was precisely rejected by the Third Circuit in the 1999 decision, Council of Alternative Pol. Parties v. Hooks, 179 F.3d 64, 74 (3d Cir. 1999). Notably, Plaintiffs' cite to Council of Alternative Pol. Parties v. Hooks, 121 F.3d 876 (3d Cir. 1997), an earlier decision in the same case noting New Jeresey's 54 day pre primary deadline was a severe burden. Yet, they do not cite to the 1999 decision which upheld New Jersey's amended after the 1997 decision to a primary day deadline. After the 1997 decision, with an interim consent order, the parties agreed to extend the 1998 filing deadline from April 9 to July 27, 1998 which is after the June party primaries. Hooks, 179 F.3d 64, 67 (3d Cir. 1999). Then, the New Jersey Legislature amended the deadline, so that nominating petitions are no longer due 54 days before the June primary, as they were under the version of the law examined by the 1997 Hooks decision, and provided a new deadline of the day of the primary. Council of Alternative Pol. Parties v. Hooks, 179 F.3d 64, 67 (3d Cir. 1999). Thus during the 1998 interim consent order the deadline was after the June party primaries.

The 1999 Hooks decision rejected the precise relief sought here, where Plaintiffs challenged amened New Jersey's primary day deadline with an attempt to extend the deadline until after party deadlines and after the primary itself. The 1999 Hooks court held:

Plaintiffs fail to recognize that, unlike in *Anderson,* they are able to respond to the events taking place in the political landscape during the 54–day interval between the political party and the alternative political party deadlines. Therefore, what the plaintiffs wish to enjoy on a permanent basis—and what they obtained in 1998 under the interim consent order—is a petition deadline that is substantially later than the date of the primary, when the major party candidates are nominated. (In 1998, their deadline was July 27.) Accordingly, what they are seeking cannot be termed equal treatment. On the contrary, they are asserting a constitutional right to *preferential treatment*.

Council of Alternative Pol. Parties v. Hooks, 179 F.3d 64, 74 (3d Cir. 1999)(emphasis added.)

The Plaintiffs argued that New Jersey's filing deadline burdens them by "prevent [ing] alternative political parties and their supporters from responding to disaffection with the candidates chosen by the recognized political parties at their June primaries." Council of Alternative Pol. Parties v. Hooks, 179 F.3d 64, 74 (3d Cir. 1999). The Court rejected this claim outright. "To order the relief that plaintiffs request would tip the scales in their favor and provide them with a relative advantage over their political party counterparts. We therefore reject the plaintiffs' claim that they are constitutionally entitled to file their nominating petitions after the major party candidates are chosen so that they can recruit and nominate candidates who can capitalize on disaffection with the major political parties' nominees. Id at 75.

B. Election Law 6-§158(9) as applied here is a Constitutionally justified "Sore Loser" statutory design

A "sore loser" candidacy is one in which an individual loses in a party primary and then seeks to run in the same election as an independent or minor party candidate. Council of Alternative Pol. Parties v. Hooks, 179 F.3d 64, 80 (3d Cir. 1999).

The US Supreme Court has recognized the validity of a State's interest to limit names on the general election ballot in order prevent party primary losers from continuing the struggle into the general.

> The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified

Storer v. Brown, 415 U.S. 724, 735, (1974).

Indeed, a "State may impose restrictions which settle intraparty competition before the general election." Nat'l Comm. of U.S. Taxpayers Party v. Garza, 924 F. Supp. 71, 74 (W.D. Tex. 1996). "The Supreme Court recognized, in *Clingman,* that preventing sore-loser candidacies serves an important state interest in preventing "party splintering and excessive factionalism," as well as "the organized switching of blocs of voters from one party to another." Libertarian Party of Michigan v. Johnson, 905 F. Supp. 2d 751, 760 (E.D. Mich. 2012), aff'd, 714 F.3d 929 (6th Cir. 2013).

Even the main authority relied upon by Plaintiffs acknowledges the validity of a "sore loser" statute. Anderson v. Celebrezze, 460 U.S. 780, 804, (1983).

New York Election Law §6-158(9) provides for the deadline for the filing on Independent Nominating Petitions. Of course, in 2019 the deadline was moved from August (11 weeks before the general election) to May (23 weeks before the general election.) Importantly, this change coincided with moving the primary election date from September to June. Thus, the deadline imposed by Election Law §6-158(9) has been prior to Primary day in New York State.

Plaintiffs' admit they are "three individual supporters of current Mayor Byron W. Brown" and that "Brown initially sought re-election in 2021 as the nominee of the Democratic Party but was defeated in the primary election." Plaintiff's Memorandum of Law, Document 3 at page 3. Further, Plaintiffs admit that "Brown's supporters **then** launched an effort to nominate him as an independent candidate." Id.

Heavy reliance on the rationale behind Anderson is misplaced since there the Supreme court "found two factors to be significant" which do not apply here. See Council of Alternative Pol. Parties v. Hooks, 179 F.3d 64, 72 (3d Cir. 1999), where the Anderson decision was discussed. "First, the Court stressed that the Ohio statute regulated *presidential* elections and not *state or local* elections." Id.

Second, the Court noted that the early filing deadline did not apply "equally" to all candidates and placed independent candidates at a relative disadvantage." Id.

The Court in Anderson repeatedly noted the importance that underlying candidate was independent who was not one of the major parties had ballot access. The Court noted concern for the "impact on independent-minded voters." Anderson, 460 U.S. at 790. The Court also expressed concern of restricting "persons who wish to be independent candidates from entering the significant political arena." Id Additionally, the Court relied up possible disadvantage "for independents," or a "a newly-emergent independent candidate," Id at 791, or "candidate outside the major parties." Id at 792. Further, the Court sought to prevent "[a] burden that falls unequally on new or small political parties or on independent candidates." Id at 793.

Ultimately, the Court held that the Ohio deadline "discriminates against those candidates and—of particular importance—against those voters whose political preferences lie *outside the existing political parties*. Anderson v. Celebrezze, 460 U.S. 780, 794, (1983).

This principle of the Anderson decision was that the earlier deadline had a discriminatory impact on independent minded voters and independent candidates. "In *Anderson*, the Court struck down an Ohio statute that imposed a March

deadline for filing an application to run as an independent candidate for President. (citation omitted) The Court found that the early deadline imposed a substantial and discriminatory burden on the rights of independent-minded voters and independent candidates. Kennedy v. Cascos, 214 F. Supp. 3d 559, 563 (W.D. Tex. 2016)

A comparison of this Brown candidacy to that of the others is telling. "The Court finds that the Defendants' stated reasons for the "sore loser" statute are valid, legitimate justifications for the restriction. There is no question that the present situation presents an example of intraparty feuding. Pat Buchanan is now, and at all relevant times has been, a Republican. It is well known that he would like to be in the place of the likely Republican nominee for President, Bob Dole, and that he has sought, in a spirited contest, the Republican Party's Presidential nomination in 1996. The "sore loser" statute is designed to address this very type of intra-party conflict." Nat'l Comm. of U.S. Taxpayers Party v. Garza, 924 F. Supp. 71, 74–75 (W.D. Tex. 1996).

Hardly an independent candidate, perhaps unsure of the political landscape at the current May deadline, the candidate here is an enrolled member of the Democratic Party, was the endorsed Democratic candidate in the primary, was a four term incumbent Mayor, and former chair of the statewide Democratic Party, seeking a record 5th term as Buffalo Mayor.

C. **The State's Interest in providing the deadline meet either standard of Review**

As discussed above, New York State Election Law §6-158(9) provides for a minimal burden on the independent nominating process and is subject to the less strict review as it is not discriminatory or severe. Accordingly, the State's "important regulatory interests' " will usually be enough to justify.

Nonetheless, the deadline here also meets the higher standard of review.

Federal Courts have recognized a "State's interest in avoiding political fragmentation in the context of elections wholly within the boundaries of [the state]." . Anderson v. Celebrezze, 460 U.S. 780, 804, (1983).

A similar Vermont deadline was upheld based in Trudell v. State, 2013 VT 18, ¶¶ 22-25, (2013). Like New York, the Vermont deadline for independent candidacies was before the major party primary winner was known but candidates could simultaneously qualify as an independent or major party nominee. Id.

There the Vermont Supreme Court noted "the State has a legitimate interest in complying with the federal MOVE Act." Id.

When New York Amended its election calendar in 2019 it provided as justification its desire to comply with the federal Military Overseas Voter Empowerment (MOVE) Act and provide ballots to military members and their families for federal, state and local elections. The committee report on the 2019

amendments to the Election Law provided "The MOVE Act was designed to provide greater protections of the voting rights of military personnel, their families, and other overseas citizens." 2019 New York Assembly Bill No. 779, New York Two Hundred Forty-Second Legislative Session. The report continued, "the overall structure of the deadlines and due dates in New York State election law mean that that changing the time-frame in which military and overseas ballots must be mailed necessitates various changes to numerous interdependent sections of the election law, culminating in moving the primary date."

In sum, the report noted "The benefits of merging the federal non-presidential and state primaries are threefold: such a merger will ensure that military personnel and New Yorkers living abroad have an opportunity to vote, it will prevent New Yorkers from having to go out and vote in three separate primaries in 2016, 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. New York State's primary was held in June until 1974 when it was changed to its current date of the first Tuesday after the second Monday in September."

In addition to merging the primaries to comply and advance the interests of the MOVE act, New York also had an interest in the political stability of preventing "sore loser" candidacies.

While like New York, Vermont does not have a pure sore loser statute that outright prohibits a candidate from being a party and independent candidate, it has "a legitimate interest in creating a system that precludes so-called sore losers and prevents intra-party feuding." Trudell v. State, 2013 VT 18, ¶¶ 22-25, (2013). The Court explained the similar process in Vermont used to accomplish, "a legitimate interest in creating a system that precludes so-called sore losers and prevents intra-party feuding. Two of the legislators testifying at trial thought it "unfair" to give such candidates "two bites at the apple." Id.

The Court continued by stating the "deadline will generally deter the sore-losers, party candidates are still permitted to register simultaneously for primaries as well as independents. Nonetheless, these individuals registered as both party and independent will be known in advance, and there will no longer be any surprise when the candidate who describes himself or herself as a major party candidate runs as an independent after losing the primary. Based on the supporting case law, the State-claimed desire to prevent sore-loser candidacy finds support."

New York's similar interest in preventing sore loser candidacies justifies the deadline.

Additionally, New York State has a valid interest and obligation not to create an unlawful advantage to independent candidates by leaving the August

deadline in place more than fifty days after the major party primaries and six months after party petitioning begins.

As discussed above, this preferential treatment is the relief plaintiffs seek here in this motion for temporary restraining order. "To order the relief that plaintiffs request would tip the scales in their favor and provide them with a relative advantage over their political party counterparts." Hooks, 179 F.3d 64, 75 (3d Cir. 1999). Just as this relief is unwarranted as it creates disadvantage, the state had a compelling interest not to discriminate against the other candidates by leaving the deadline under Election Law §6-158(9) 11 weeks prior to the general election when it moved the primary to June.

II. Plaintiff will not suffer irreparable harm

The Plaintiff contends its irreparable harm is simply that there candidate will not appear on the ballot if the temporary retraining order is not granted. This harm is not irreparable given their candidate commenced a special proceeding in New York State Supreme Court under Article 16 of the New York State Election Law, titled Brown v. Erie County Board of Elections, Erie County Index Number 811973/2021 which is returnable at 11:00 am on September 2, 2021. The legal basis relied upon in Mr. Brown's validation proceeding in State Court is the same constitutional challenge to Election Law §6-158(9).

Article 16 of the Election Law provides the statutory framework to for candidates to obtain judicial relief related to the Defendant Erie County Board of Elections determination invalidating the nominating petition.

In fact, defendant-intervenor requests that this Court exercise its right to decline jurisdiction under the doctrine of abstention and remand this local election dispute with a related state action be remanded after denial of the motion for temporary restraining order. Federal courts have the power to refrain from hearing cases that would interfere with certain types of state civil proceedings. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716, (1996).

The Supreme Court has noted "federal courts may decline to exercise their jurisdiction, in otherwise " 'exceptional circumstances,' " where denying a federal forum would clearly serve an important countervailing interest, *(citation omitted)*, for example, where abstention is warranted by considerations of "proper constitutional adjudication," "regard for federal-state relations," or "wise judicial administration." Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716, (1996).

The Second Circuit has held "New York Election Law § 16–102 provides an adequate post-deprivation remedy for random and unauthorized deprivations of due process in disputes over failure to list a candidate's name on the ballot in a New York election." Dekom v. Nassau Cty., 595 F. App'x 12, 14 (2d Cir. 2014). See also, "A review of New York law suggests that constitutional claims may be asserted in New York State Article 16 proceedings. The statute setting forth the jurisdiction of Article 16 judicial proceedings grants broad jurisdiction to the New York Supreme Court." Murray v. Cuomo, 460 F. Supp. 3d 430, 440–41 (S.D.N.Y. 2020).

The State Court special proceeding will allow the constitutionality of the deadline to be resolved on the merits one way or the other without the need for drastic temporary injunctive relief enjoining the defendant from following the law while the dispute is in litigation in State Court.

Importantly, the defendant-intervenor is a party in the State Court proceeding and has asserted issues related to whether the subject nominating petition otherwise complies the State Law. Specifically that the petition fails to conform to Election Law §6-140 that sets forth the requirements for the form of the petition.

III. The harm to the Defendant and to Defendant-Intervenor

The third Winter factor is whether the threatened injury outweighs any harm the requested relief would inflict on the non moving party. As discussed above, the Plaintiffs harm is not irreparable due to the special proceeding in state court.

Additionally, Byron W. Brown and his supporters have launched a well covered write in campaign so that Plaintiffs and others will be able to support and vote for Mr. Brown on November 2, 2021.

If the temporary relief sought by Plaintiffs is entered and the defendant is enjoined from enforcing the Election Law's deadline despite a lack of finding on the underlying merits, it will be forced to print and mail ballots with Byron W. Brown's name. This will in all reality grant Plainitffs' the ultimate remedy they seek and deprive Defendant-Intervenor of her right to an election conducted fairly under the existing State Election Law.

Granting the temporary relief so broadly as requested may harm the defendant-intervenor if her objections in the State Court to the nominating petitions form are rendered moot.

The defendant Erie County Board of Elections may also be harmed by the temporary relief Plaintiffs seek while they wait for an further proceedings before printing and mailing additional ballots, beginning early voting and providing ballots for Election Day. The temporary relief will cause cost, confusion, and perhaps error in the defendant's task of conducting the general election.

IV. The public interests will be best served with equal enforcement of Election Law

"The public interest is also served by developing and adhering to an election regulation regime developed by the New York State and the City board of elections." Murray v. Cuomo, 460 F. Supp. 3d 430, 449 (S.D.N.Y. 2020).

Here the Election Law gives rise to the political calendar that both candidates and the public operate under through the campaign.

If the temporary relief is granted it will undermine the public's right to a fair election where the time periods under the Election Law are enforced equally and adhered to. Notably, defendant-intervenor was removed from another line on the ballot due a similar missed timing deadline.

Moreover, if the temporary relief is granted and the name of Byron Brown appears on the ballot, he may continue on to win the general election without the public's right and confidence that the election was fairly won. This will be especially true when ultimately the constitutionality of the deadline is upheld.

Conclusion

The Defendant-Intervenor respectfully requests that if the motion to intervene is granted, the Court consider this Proposed Memorandum of Law in Opposition to Plaintiffs' motion for a temporary restraining order.

Further, Defendant-Intervenor requests that this Court deny Plaintiffs' request for drastic and rare temporary restraining order.

DATED: Buffalo, New York
September 2, 2021

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EXHIBIT E

Case: 1:21-cv-00982-JLS As of: 09/06/2021 01:54 PM EDT 1 of 5

MEDIATION

U.S. DISTRICT COURT
U.S. District Court, Western District of New York (Buffalo)
CIVIL DOCKET FOR CASE #: 1:21−cv−00982−JLS

Meadors et al v. Erie County Board of Elections
Assigned to: Hon. John L. Sinatra, Jr.
Cause: 42:1983 Civil Rights Act

Date Filed: 08/30/2021
Jury Demand: Defendant
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

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Date Filed	#	Docket Text
08/30/2021	1	COMPLAINT against Erie County Board of Elections, filed by Carlanda D. Meadors, Leonard A. Matarese, Jomo D. Akono.(SG) (Entered: 08/30/2021)
08/30/2021	2	MOTION for Temporary Restraining Order by Jomo D. Akono, Leonard A. Matarese, Carlanda D. Meadors.(SG) (Entered: 08/30/2021)
08/30/2021	3	MEMORANDUM in Support re 2 MOTION for Temporary Restraining Order filed by Jomo D. Akono, Leonard A. Matarese, Carlanda D. Meadors. (SG) (Entered: 08/30/2021)
08/30/2021	4	MOTION to Expedited Hearing by Jomo D. Akono, Leonard A. Matarese, Carlanda D. Meadors.(SG) (Entered: 08/30/2021)
08/30/2021	5	DECLARATION signed by Bryan Sells re 4 MOTION to Expedite filed by Jomo D. Akono, Leonard A. Matarese, Carlanda D. Meadors. (SG) (Entered: 08/30/2021)
08/30/2021		Filing fee: $402.00, receipt number BUF073220 (SG) (Entered: 08/30/2021)
08/30/2021		AUTOMATIC REFERRAL to Mediation The ADR Plan is available for download at http://www.nywd.uscourts.gov/alternative−dispute−resolution.(SG) (Entered: 08/30/2021)

08/30/2021		Notice of Availability of Magistrate Judge: A United States Magistrate of this Court is available to conduct all proceedings in this civil action in accordance with 28 U.S.C. 636c and FRCP 73. The Notice, Consent, and Reference of a Civil Action to a Magistrate Judge form (AO−85) is available for download at http://www.uscourts.gov/services−forms/forms. (SG) (Entered: 08/30/2021)
08/30/2021		Summons Issued as to Erie County Board of Elections. (SG) (Entered: 08/30/2021)
08/30/2021	6	ORDER granting Plaintiffs' 4 motion to expedite. The plaintiffs shall serve their motion and a copy of this order on counsel for the defendant no later than August 31, 2021. Defendant's response is due by September 2, 2021 at 4:00 PM. Motion Hearing set for September 3, 2021 at 10:30 AM in the Chautauqua Courtroom, US Courthouse, 2 Niagara Square, Buffalo, NY 14202−3350 before Hon. John L. Sinatra, Jr. Signed by Hon. John L. Sinatra, Jr. on 8/30/2021. (KLH) (Entered: 08/30/2021)
09/01/2021	7	AFFIDAVIT of Service for Order with all motion papers and commencement documents served on Erie County Board of Elections on August 31, 2021, filed by Jomo D. Akono, Leonard A. Matarese, Carlanda D. Meadors. (Callocchia, Frank) (Entered: 09/01/2021)
09/01/2021	8	AFFIDAVIT of Service for All motion and commencement documents served on Michael A. Siragusa, Erie County Attorney, Counsel for Defendant Erie County Board of Elections on August 31, 2021, filed by Jomo D. Akono, Leonard A. Matarese, Carlanda D. Meadors. (Callocchia, Frank) (Entered: 09/01/2021)
09/01/2021	9	AFFIDAVIT of Service for Order with all motion papers and commencement documents served on Jeremy C. Toth, First Assistant Erie County Attorney, Counsel for Defendant Erie County Board of Elections on August 31, 2021, filed by Jomo D. Akono, Leonard A. Matarese, Carlanda D. Meadors. (Callocchia, Frank) (Entered: 09/01/2021)
09/01/2021	10	AFFIDAVIT of Service for Order with all motion papers and commencement documents served on Michael A. Siragusa, Erie County Attorney, Counsel for Defendant Erie County Board of Elections on August 31, 2021, filed by Jomo D. Akono, Leonard A. Matarese, Carlanda D. Meadors. (Callocchia, Frank) (Entered: 09/01/2021)
09/01/2021	11	Emergency MOTION to appear pro hac vice (Filing fee $ 200 receipt number 0209−4347468.) by Jomo D. Akono, Leonard A. Matarese, Carlanda D. Meadors. (Attachments: # 1 Exhibit Petition for attorney admission, # 2 Exhibit Sponsoring Attorney Affidavit, # 3 Exhibit Attorney's Oath, # 4 Exhibit Civility Oath, # 5 Exhibit Attorney Database and Electronic Case Filing Registraiton Form, # 6 Exhibit Certificate of Good Standing)(Callocchia, Frank) (Entered: 09/01/2021)
09/01/2021	12	TEXT ORDER granting 11 emergency motion to appear *pro hac vice*, as to attorney Bryan L. Sells. Issued by Hon. John L. Sinatra, Jr. on 9/1/2021. (KLH) −CLERK TO FOLLOW UP− (Entered: 09/01/2021)
09/01/2021	13	NOTICE of Appearance by Jeremy C. Toth on behalf of Erie County Board of Elections (Toth, Jeremy) (Entered: 09/01/2021)
09/02/2021	14	AFFIDAVIT of Service for Affidavit of Service *Order with motion papers and commencement documents* served on New York State Attorney General on September 1, 2021, filed by Jomo D. Akono, Leonard A. Matarese, Carlanda D. Meadors. (Callocchia, Frank) (Entered: 09/02/2021)
09/02/2021	15	AFFIDAVIT in Opposition re 2 MOTION for Temporary Restraining Order filed by Erie County Board of Elections. (Attachments: # 1 Exhibit B − List of Candidates in Erie County, # 2 Exhibit C − Newspaper Articles, # 3 Exhibit E − Declaration of Attorney from State BOE, # 4 Exhibit F − Federal Orders, # 5 Exhibit G − 2021 NYS political calendars, # 6 Exhibit H − Verified Petition in State Court, # 7 Memorandum in Support Memo of Law in Opposition to Application for TRO, # 8 Certificate of Service)(Toth, Jeremy) (Entered: 09/02/2021)
09/02/2021	16	MOTION Intervene by India B Walton. (Attachments: # 1 Motion to Intervene, # 2 Exhibit A, # 3 Exhibit B, # 4 Affidavit Inda B. Walton)(Cooney, Sean) (Entered: 09/02/2021)

09/02/2021	17	MOTION to Expedite *Hearing for Motion to Intervene* by India B Walton. (Attachments: # 1 Affidavit, # 2 Text of Proposed Order)(Cooney, Sean) (Entered: 09/02/2021)
09/02/2021	18	MEMORANDUM in Opposition re 2 MOTION for Temporary Restraining Order filed by India B Walton. (Cooney, Sean) (Entered: 09/02/2021)
09/02/2021	19	CONTINUATION OF EXHIBITS by Erie County Board of Elections. to 15 Affidavit in Opposition to Motion,, *EXHIBIT C − Independent Nominating Petition* filed by Erie County Board of Elections. (Toth, Jeremy) (Entered: 09/02/2021)
09/02/2021	20	ANSWER to 1 Complaint by India B Walton.(Cooney, Sean) (Entered: 09/02/2021)
09/02/2021	21	CONTINUATION OF EXHIBITS by Erie County Board of Elections. to 15 Affidavit in Opposition to Motion,, *EXHIBIT A Bill Jacket* filed by Erie County Board of Elections. (Attachments: # 1 Exhibit, # 2 Exhibit)(Toth, Jeremy) (Entered: 09/02/2021)
09/02/2021	22	Letter filed by Erie County Board of Elections as to Erie County Board of Elections *requesting relief from Local Rule 7.1(f)*. (Toth, Jeremy) (Entered: 09/02/2021)
09/02/2021	23	ORDER granting 17 Motion to Expedite. Proposed Intervenor India Walton shall serve the motion for expedited hearing and motion to intervene, as well as a copy of this order, on counsel for Plaintiffs and Defendant no later than September 3, 2021 at 10:30 a.m. Proposed Intervenor India Walton shall also send courtesy copies by email to counsel for Plaintiffs and Defendant no later than September 2, 2021 at 8:00 p.m. Motion hearing set for September 3, 2021 at 10:30 am in the Chautauqua Courtroom, US Courthouse, 2 Niagara Square, Buffalo, NY 14202−3350 before Hon. John L. Sinatra, Jr. Issued by Hon. John L. Sinatra, Jr. on 9/2/2021. (CJG) (Entered: 09/02/2021)
09/02/2021	24	NOTICE of Appearance by Frank T. Housh on behalf of India B Walton (Housh, Frank) (Entered: 09/02/2021)
09/03/2021	25	AMENDED COMPLAINT against All Defendants, filed by Carlanda D. Meadors, Leonard A. Matarese, Jomo D. Akono, Kim P Nixon−Williams, Florence E Baugh. (Attachments: # 1 redline version of first amended complaint)(Sells, Bryan) (Entered: 09/03/2021)
09/03/2021	26	Minute Entry for proceedings held before Hon. John L. Sinatra, Jr.: Motion Hearing held on 9/3/2021 re 2 Motion for Temporary Restraining Order and 16 Motion to Intervene. Court grants Defendant−Intervenor India Walton's motion to intervene in this action. Text order to follow. For reasons stated on the record, the Court grants Plaintiffs' motion for Temporary Restraining Order and, with consent of the parties, converts the Temporary Restraining Order to an Order for Preliminary Injunction. Court transcript will constitute the written decision of the Court. Text Order to follow. Appearances. For plaintiffs: Frank Callocchia and Bryan Sells. For defendant Erie County Board of Elections: Jeremy Toth. For Intervenor−Defendant India Walton: Sean Cooney and Frank Housh. (Court Reporter Bonnie Weber) (KLH) (Entered: 09/03/2021)
09/03/2021	27	TEXT ORDER: Defendant−Intervenor India B. Walton's 16 Motion to Intervene is GRANTED. SO ORDERED. Issued by Hon. John L. Sinatra, Jr. on 9/3/2021. (KLH) (Entered: 09/03/2021)
09/03/2021	28	TEXT ORDER: Upon consideration of the briefing and arguments of counsel, and for good cause shown, it is ordered that the motion for preliminary injunction (Dkt. #2) is GRANTED. Accordingly, the Erie County Board of Elections, along with its officers, agents, servants, employees, attorneys, and all those in active concert with them, are hereby enjoined from enforcing Section 6−158(9) of the New York Election Law against candidate Byron W. Brown and from failing to put his name on the 2021 general election ballot as an independent candidate for the Mayor of Buffalo. The Board of Elections is ordered to place Byron W. Brown on the 2021 Election Ballot as an independent candidate for Mayor of Buffalo. IT IS SO ORDERED. Issued by Hon. John L. Sinatra, Jr. on 9/3/2021. (KLH) (Entered: 09/03/2021)
09/03/2021	29	TEXT ORDER: Pursuant to 28 U.S.C. § 2403(b) and Federal Rule of Civil Procedure 5.1(b), the Court hereby certifies that a civil action has been filed wherein the

		constitutionality of N.Y. Election Law § 6−158(9) has been questioned. The Clerk of Court is directed to cause the United States Marshals Service to serve a copy of this Text Order upon the State of New York as follows: Attention Michael J. Russo Assistant Attorney General In Charge Main Place Tower Suite 300A 350 Main Street Buffalo, NY 14202 and Office of the Attorney General The Capitol Albany, NY 12224−0341 Attention: A&O/Personal Service Additionally, the Clerk of Court is directed to forward a copy of this Text Order by email to Michael Russo, Assistant Attorney General in Charge, Buffalo Regional Office: Michael.Russo@ag.ny.gov. IT IS SO ORDERED. Issued by Hon. John L. Sinatra, Jr. on 9/3/2021. (KLH) −CLERK TO FOLLOW UP− (Entered: 09/03/2021)
09/03/2021		Copy of Doc. No. 29, TEXT ORDER, emailed to Michael Russo, Assistant Attorney General in Charge. The Clerks Office has forwarded the TEXT ORDERS to the US Marshal for service. (JLV) (Entered: 09/03/2021)

EXHIBIT F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

Defendants,

v.

INDIA B. WALTON,

Intervenor Defendant.

* * * * * * * * * * * * * * *

Docket Number:
21-CV-00982-JLS

Buffalo, New York
September 3, 2021

10:34 a.m.

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN L. SINATRA, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: By FRANK C. CALLOCCHIA, ESQ.,
16 Bidwell Parkway,
Buffalo, New York 14222,
And
The Law Office of Bryan L. Sells, LLC,
BRYAN L. SELLS, ESQ.,
P.O. Box 5493,
Atlanta, Georgia 31107.

Case 21-2137, Document 17, 09/07/2021, 3169122, Page122 of 308

1 For the Defendants: ERIE COUNTY ATTORNEY'S OFFICE,
By JEREMY C. TOTH, ESQ.,
2 95 Franklin Street,
16th Floor,
3 Buffalo, New York 14202.

4 For Intervenor Defendant: DOLCE FIRM, P.C.,
By SEAN E. COONEY, ESQ.,
5 1260 Delaware Avenue,
Buffalo, New York 14209,
6 And
FRANK T. HOUSH, ESQ.,
7 70 Niagara Street,
Buffalo, New York 14202.
8
The Courtroom Deputy: KIRSTIE L. HENRY
9
Court Reporter: BONNIE S. WEBER,
10 Notary Public,
Robert H. Jackson Courthouse,
11 2 Niagara Square,
Buffalo, New York 14202,
12 Bonnie_Weber@nywd.uscourts.gov.

13
Proceedings recorded by mechanical stenography,
14 transcript produced by computer.

15

16 (Proceedings commenced at 10:34 a.m.)

17

18 **THE CLERK:** All rise.

19 The United States District Court for the Western

20 District of New York is now in session. The Honorable John

21 Sinatra presiding.

22 **THE COURT:** Please be seated.

23 **THE CLERK:** In the matter of Meadors and Others versus

24 Erie County Board of Elections, case number 21-CV-982, this is

25 the date set for a motion hearing.

1 Counsel for the plaintiff, please state your
2 appearances for the record.
3 **MR. SELLS:** Your Honor, this is Bryan Sells for the
4 plaintiffs.
5 **MR. CALLOCCHIA:** Frank Callocchia, local counsel for
6 the plaintiffs, Your Honor.
7 **THE CLERK:** Counsel for the defendants, please state
8 your appearances for the record.
9 **MR. TOTH:** Jeremy Toth for the Erie County Board of
10 Elections.
11 **MR. COONEY:** Good morning, Your Honor. Sean Cooney
12 for the proposed intervenor, India Walton.
13 **MR. HOUSH:** Frank Housh, co-counsel with Sean Cooney
14 for proposed intervenor, India Walton, Your Honor.
15 **THE COURT:** Thank you. Can you spell your last name
16 for me?
17 **MR. HOUSH:** Your Honor, it is H-O-U-S-H.
18 **THE COURT:** Yeah. I know I saw it on the docket, but
19 I just couldn't remember it. Thank you.
20 And, Counsel, if you are going to be talking today,
21 feel free to take your mask off, if you like. You are at
22 liberty to do so. You can also leave it on, if you like.
23 And I think we can probably accomplish everything
24 today with you seated at the microphone. If you need to, pull
25 the microphone a little bit closer, but there is no real need

1 for you to get up to the podium, unless you feel like you are
2 better on your feet, so I will let you do it however you feel
3 like you would like to do it, okay?
4 We're here today for oral argument on plaintiff's
5 motion for a temporary restraining order, as well as the motion
6 to intervene by India Walton.
7 Does anyone have any preliminary issues before I start
8 with the intervention motion, Counsel?
9 **MR. SELLS:** No, Your Honor.
10 **THE COURT:** Okay.
11 Yep --
12 **MR. TOTH:** Your Honor, I suppose that at some point
13 there was an amended complaint that was filed today, but I don't
14 know if that was a preliminary matter or we'll get to that
15 later.
16 **THE COURT:** Right. I think there is a spot where that
17 naturally comes up, so we'll talk about that later.
18 **MR. TOTH:** Thank you.
19 **THE COURT:** All right. I do have one preliminary
20 issue and I'll start with that.
21 Yesterday, we received a couple of phone calls
22 suggesting that I recuse from this case on account of my
23 brother's support over the years for Mayor Brown.
24 Although there is no motion for recusal, judges always
25 have the obligation to police these issues and to resolve them

1 carefully.
2 I have considered the issue even well before those
3 phone calls; I have consulted with the Code of Conduct for
4 United States Judges, the recusal statute and even another judge
5 in this district, and there is no basis for recusal.
6 As Federal judges, we must hear the cases that are
7 randomly assigned to us and recuse when appropriate. We don't
8 pick and choose our cases.
9 And it bears noting that one feature of this job,
10 which is life tenure, is designed specifically for hard cases
11 where many in the public, one side or the other, may not like a
12 judge's decision, and that's to insulate the judge from public
13 pressure.
14 Mayoral elections will come and go. At the end of
15 this case and at the end of my career, I will have my integrity,
16 so I don't think anyone here, in front of me, doubts that.
17 I will find the applicable law. I think it's been
18 adequately supplied to me by all sides here and I will apply
19 that law to the facts, as best I can.
20 Like all judges, I won't get it right a hundred
21 percent of the time, but be sure of this, I wake up every day
22 and go to bed every night trying to get it right every time.
23 So lets start with the motion to intervene. I've read
24 it; studied it; and looked at the rule, so I don't need to hear
25 it from her yet.

1 Instead, I will ask the existing parties if they would
2 like to comment on the motion to intervene.
3 **MR. TOTH:** I have no objection to the motion to
4 intervene, Your Honor.
5 **MR. SELLS:** Your Honor, the fact that --
6 **THE COURT:** You can stay seated. That way you are
7 closer to the microphone.
8 **MR. SELLS:** Gotcha.
9 **THE COURT:** I understand, as lawyers, we like to stand
10 up when we talk, but if you need to stand up and talk, just do
11 it at the podium, where the microphone is.
12 **MR. SELLS:** I think I will do that, Your Honor.
13 **THE COURT:** Sure.
14 **MR. SELLS:** Habit. The plaintiffs do object to the
15 motions to intervene for reasons that I will explain, but we do
16 not object to Ms. Walton's participation in the hearing this
17 morning as an amicus curiae.
18 I think the Court could construe her memorandum of law
19 as an amicus brief and allow her to argue as long as, of course,
20 the argument is allocated equitably.
21 The reason why we object to and oppose the motion to
22 intervene is because we don't think she qualifies for
23 intervention as of right, in that she hasn't identified a
24 cognizable interest here, that is, as a candidate.
25 Although, she certainly has an interest as a

1 Buffalonian, as all Buffalo voters do. And she hasn't
2 demonstrated that the Erie County Attorney will not represent
3 her interests as a Buffalo voter adequately, such that the
4 intervention of right would be triggered.
5 So that leaves the question of permissive intervention
6 and we don't think the Court should grant permissive
7 intervention here, because looking at her papers, particularly,
8 her proposed answer, it is apparent that Ms. Walton seeks to
9 interject a number of extraneous issues.
10 And I think, frankly, frivolous disputes of fact, that
11 are likely to bog down this court, particularly, when the Erie
12 County Board of Elections concedes at the very beginning of
13 their brief that the facts are basically not in dispute.
14 So we think permissive intervention is a bad idea,
15 because it could bog down this case. While, still, we think
16 that Ms. Walton can participate in this hearing, as I know she
17 would like.
18 **THE COURT:** One of the -- one of the facts that you
19 allege in your complaint is that this petition would have been
20 valid, but for the untimeliness.
21 And her answer doesn't dispute that. It says that she
22 doesn't have any way to say yes or no to that.
23 What other factual disputes are you afraid of here?
24 **MR. SELLS:** Well, Your Honor, we're not afraid of any
25 factual disputes, but she does not admit matters that, I think,

1 the County Board of Elections concedes -- a whole host of
2 matters.
3 And in particular, she denies the paragraph that is at
4 the heart of the complaint regarding the enactment of the 2019
5 change in the law.
6 **THE COURT:** Okay. All right. Let's hear from -- who
7 is going to speak?
8 Mr. Cooney?
9 **MR. COONEY:** Yes, Your Honor. Thank you. If it's all
10 right, I will abide by your instructions and remain seated.
11 **THE COURT:** I would sit. I'm comfortable sitting.
12 **MR. COONEY:** Thank you. Obviously, the Court has
13 recognized that a candidate does have an interest in the ballot,
14 when they are seeking election.
15 So Ms. Walton certainly has rights related to the
16 outcome of this temporary application, but the allegations
17 within the complaint as well.
18 Whether or not she has the right to intervene as a
19 matter of right or permissive, I think either way it would be
20 prudent for the court to allow her to intervene.
21 Specifically, the factual dispute at issue regarding
22 the constitution of the deadline is denied by Ms. Walton and is
23 denied by the Board of Elections.
24 But the outcome and the different remedies that may be
25 available differ between the Board of Elections' positions and

1 Ms. Walton's, potentially.
2 Additionally, I think that when you look at the other
3 factors, particularly timeliness and the lack of prejudice, this
4 TRO application was expedited.
5 Ms. Walton has filed a motion to intervene in an
6 expedited fashion. We're here, prepared to argue the issue
7 that's substantively in front of Your Honor.
8 As far as Ms. Walton's rights, she also has the same
9 rights as the plaintiffs, as a voter in the election. To say
10 that one voter has a right to see who is on the ballot, but
11 another voter's right is somehow inferior is not supported by
12 logic or the case law.
13 When the voter is the actual candidate, herself, the
14 outcome of this proceeding and the complaint -- the merits of
15 the complaint will impact her right to appear.
16 That's not disputed. It can't be disputed and it is
17 supported in the cases we provided to Your Honor.
18 The frivolous -- the claims of frivolous facts and
19 things are not relevant for today. Even if they were frivolous
20 in the answer, today's application is related to the TRO.
21 I would just lastly say, Your Honor, that there is no
22 prejudice to the plaintiff from Ms. Walton's participation.
23 There are -- the papers that Ms. Walton submitted related to the
24 TRO were submitted in accordance with the deadline set by the
25 Court for the defendants in the action, so they have no

1 prejudice for today's proceeding.
2 Additionally, the defendants, the main defendant has
3 not had to file their answer to the complaint yet, so the
4 intervenor for these other -- for the rest of the action in
5 these purported allegations that there is going to be frivolous
6 denials in the answer is not even before us today. It's not
7 going to impact these proceeding.
8 So for those reasons, I think we should be granted the
9 right to intervene as matter of right, if not permissively.
10 And I would agree that at a minimum, the Court could
11 take the argument and the papers and receive them as an amicus
12 brief and give them the same weight, as if she were to
13 intervene. Which, that ability to do that demonstrates the real
14 lack of prejudice in her right to intervene.
15 The subject matter today can be -- could be received
16 by Your Honor, no matter whether she is intervening or not, so
17 it won't impact the plaintiffs either way.
18 **THE COURT:** The Second Circuit has held that Rule
19 24(a), intervention as a right, requires that the purposed
20 intervenor file a timely motion, show an interest in the
21 litigation, show that it's interest may be impaired by the
22 disposition of the action and show that its interest is not
23 adequately protected by the parties to the action.
24 Under these facts and on the papers, I'm going to
25 grant the application under that rule.

1 **MR. COONEY:** Thank you, Your Honor.
2 **THE COURT:** Next, we're going to discuss a series of
3 topics and I'll lead by asking some questions.
4 I assure you I have read everything; my clerks have
5 read everything, including all relevant a case law and that
6 means me, too, sometimes two and three times, so I don't really
7 need you to rehash what was in the papers, unless you think it's
8 relevant to a question.
9 If it is obviously relevant or if I'm missing
10 something, then say what you need to say, okay?
11 But here are the relevant standards that I'm bound to
12 follow: In this circuit, the standard for entry for a TRO is
13 same as for that a preliminary injunction.
14 To obtain a preliminary injunction or a TRO against
15 Government action taken pursuant to a statute, the movant must
16 demonstrate irreparable harm, absent injunctive relief, the
17 likelihood of success on the merits and public interest weighing
18 in favor of granting an injunction.
19 And that's the Libertarian Party versus Lamont, Second
20 Circuit case. It's also stated in other cases.
21 The moving party also must show that the balance of
22 equity tips in his or her favor. The standard for issuing a
23 mandatory injunction is particularly exacting.
24 A district court may enter a mandatory preliminary
25 injunction against the Government, only if it determines that in

1 addition to demonstrating irreparable harm, the moving party has
2 shown a clear or substantial likelihood of the success on the
3 merits.
4 And that was the Lamont case, as well as the
5 Mastrovincenzo case from the Second Circuit.
6 Regarding the Supreme Court's decision in Anderson
7 versus Celebrezze, the question there was whether Ohio's early
8 filing deadline placed an unconstitutional burden on the voting
9 and associational rights of Anderson supporters, so I'm going to
10 go through a little bit about Anderson versus Celebrezze here to
11 set up some of the questions.
12 The Ohio law at issue in Anderson, imposed a deadline
13 of 75 days before the primary election for the submission of a
14 nominating petition and statement of candidacy for an
15 Independent candidate.
16 And that was, in that case, in that year, March 20,
17 1980. And that was a date 229 days in advance of the general
18 election.
19 Valid access laws, like the one in Anderson, place
20 burdens on two different, though overlapping, kinds of rights;
21 the right of individuals to associate for the advancement of
22 political views and the rights of qualified voters, regardless
23 of political persuasions, to cast their votes effectively. And
24 that's from Anderson at 787.
25 As the Supreme Court has recognized -- recognized both

1 of these rights rank among our most precious freedoms -- same --
2 same page.
3 The primary concern cited by the Court in Anderson was
4 the tendency of ballot access restrictions to limit the field of
5 candidates to which voters might choose. And that's at page
6 786.
7 Thus, in approaching candidate restrictions, the Court
8 stated that it is essential to examine in a realistic light the
9 extent and nature of their impact on voters. Also, at 786.
10 A voter naturally hopes to find on the ballot a
11 candidate who comes near to reflecting his or her policy
12 preferences on contemporary issues.
13 The right to vote is heavily burdened, if that vote
14 may be cast only for major party candidates at a time when other
15 parties or other candidates are clamoring for a place on the
16 ballot. And that's, again, at 786.
17 Voters freedom of association is also burdened by the
18 exclusion of candidates, in that an election campaign is an a
19 effective platform for the expression of views on the issues of
20 the day; and a candidate may serve as a rally point for like
21 minded citizens. And that's Anderson at 787 to 788.
22 These rights, however, are not absolute, as recognized
23 by the same Supreme Court in Burdick in 1992. Common sense and
24 Constitutional law, most notably, in Article I, Section four,
25 clause one, require that the Government will be actively

1 involved in structuring elections.
2 Practically, there must be a substantial regulation of
3 elections, if there are to be fair and honest and in some
4 sort -- if they are to be fair and honest and if some sort of
5 order, rather than chaos, is to accompany the democratic
6 process. And that's a quote from Anderson at 788.
7 It follows that not all restrictions imposed by the
8 states on candidates' eligibility for the ballot impose
9 Constitutionally suspect burdens on voters' rights to associate
10 or to choose among candidates.
11 In the context of Constitutional challenges to
12 specific provisions of State election laws, there is no litmus
13 paper test that will separate valid from invalid restrictions.
14 And that's at 789 of Anderson.
15 Instead, courts must resolve these challenges
16 according to the analytical framework set forth in Anderson and
17 Burdick. And a quote for that from the Second Circuit is
18 Lamont, 977 F.3d at 177.
19 First, this court must consider the character and
20 magnitude of the asserted injury to the rights protected by the
21 1st and 14th Amendments that the plaintiff seeks to vindicate.
22 Then the Court must identify and evaluate the precise
23 interests put forward by the State as justifications for the
24 burden imposed by its rule, considering not just the legitimacy
25 and strength of those interests, but also the extent to which

1 those interests make it necessary to burden the plaintiff's
2 rights. And all of that at Anderson, page 789.
3 As the Second Circuit recently explained, the level of
4 scrutiny to be applied depends on the severity of the burden
5 State law imposes on the 1st and 14th Amendment rights of
6 voters. And that's stated in Lamont at 177.
7 When a State's election regulations impose severe
8 restrictions of 1st and 14th Amendment rights, the State statute
9 or regulation must be narrowly drawn to advance a State interest
10 of compelling importance. And that's from Burdick, 504 US 428.
11 But when a State election regulation imposes only a
12 reasonable amount of discriminatory restrictions upon the 1st
13 and 14th Amendments rights of voters, the State's important
14 regulatory interests are generally sufficient to justify the
15 restrictions. And that's from the same page of Burdick.
16 In Lamont, the Second Circuit affirmed the denial of a
17 motion for a preliminary injunction in a case challenging the
18 Constitutionality of a Connecticut ballot access law requiring a
19 party and candidates to gather a certain number of signatures
20 before they could appear for the general election ballot.
21 The Court of Appeals held that the strict scrutiny
22 standard under Anderson did not apply in that case, and the
23 Ballot Access Law did not violate the 1st and 14th Amendments.
24 In Nader versus Brewer, which is 531 F.3rd 1028, the
25 Ninth Circuit determined that strict scrutiny did apply to

1 determine the Constitutionality of an Arizona nominating
2 petition deadline law and concluded that the nomination petition
3 deadline was unconstitutional.
4 And in that case, in Nader, the deadline was 146 days
5 before the general election.
6 In the Ninth Circuit's analysis, in Nader, following
7 in Anderson, the Court concluded the Arizona deadline imposed a
8 severe burden and the State's justifications did not demonstrate
9 the deadline was narrowly tailored to further compelling
10 administrative needs. And that's at page 1040 of Nader.
11 The Court remarked in that case that election cases
12 are difficult and the historical background for such litigation
13 changes rapidly, leaving the Court with a serious challenge to
14 ballot access requirements that have proved difficult for courts
15 to evaluate.
16 As the Supreme Court noted in Anderson, the results of
17 this evaluation will not be automatic and there is no substitute
18 for the hard judgments that must be made and will be made here
19 today. And that's Anderson, 460 at 789 to 90.
20 So let's begin with the Board's standing argument.
21 How would -- again, I read that, so I don't need you to preview
22 it, but I'm going to ask the plaintiff how the plaintiff
23 responds to the standing argument.
24 **MR. SELLS:** Your Honor, the standing argument lacks
25 merit entirely. Anderson makes clear that the fundamental

1 rights of the voters are at issue in these cases.
2 All of the plaintiffs are voters and so the early
3 petition deadline infringes upon their rights, creating injury
4 that establishes standing.
5 If you look at Anderson, on page 783, you -- you will
6 see that the plaintiffs included a supporter of John Anderson.
7 If you look at Nader, the case that you just cited, the
8 plaintiffs there included a supporter of Ralph Nader.
9 In another case that we cited, Cromer versus South
10 Carolina, there again, the plaintiffs included supporters of a
11 candidate and not just the candidate themselves.
12 So it's pretty clear from the case law, all the way
13 down from the Supreme Court, that supporters of a candidate or
14 party suffer an injury in these kinds of cases.
15 **THE COURT:** Mr. Toth?
16 **MR. TOTH:** Yes, Your Honor. Just very briefly, I
17 would -- my understanding of those cases, while they may have
18 included the supporters, they were primarily driven by the
19 candidate. Nader was the candidate. That's why it's called
20 Nader.
21 The other thing I would point out in terms of the
22 injury to the voters, these voters and indeed all voters of the
23 City of Buffalo, do have the opportunity to write down Byron --
24 Byron Brown.
25 That is the campaign slogan and has been for several

1 months, so it's not as if their injury is absolute. They want
2 the opportunity to fill in a bubble, as opposed to write down
3 Byron Brown.
4 I don't think that meets the standard of an injury
5 under the -- sort of, essential concepts of standing.
6 **THE COURT:** The plaintiffs in Anderson wanted that,
7 too, right?
8 I mean, there is a footnote in Anderson that said the
9 write-in opportunity wasn't sufficient to address that concern.
10 How does that impact the standing, in any event?
11 **MR. TOTH:** So what I would say about Nader is that the
12 principal distinction and why --
13 **THE COURT:** I was asking about Anderson. There is a
14 footnote in Anderson.
15 **MR. TOTH:** I'm sorry.
16 **THE COURT:** Did I say Nader? I'm sorry if I did.
17 **MR. TOTH:** Yeah. I'm sure I misheard.
18 **THE COURT:** There is a footnote in Anderson that says
19 that the fact that there was the ability to write-in a candidate
20 really didn't -- you know, impact the outcome.
21 **MR. TOTH:** Well, but, again, the distinction there is
22 that the candidate themselves was pursuing the complaint.
23 And so from the candidate's perspective, certainly, I
24 think everybody would concede that a candidate has less ability
25 or is less likely to win a write-in campaign than the ability to

1 have an actual bubble. That's the candidate's perspective.
2 The perspective here, these plaintiffs want the
3 opportunity to vote for their candidate. They are voters. They
4 want to be able to vote.
5 They are claiming their injury is that they can't vote
6 for Byron Brown. That's not true. They can. It is less likely
7 that their preferred candidate will be successful in November,
8 but that does not mean they don't have the opportunity to write
9 down.
10 So I would argue that the difference in plaintiffs,
11 between the candidate, the candidate's injury is different than
12 what the injury is for the plaintiffs.
13 **THE COURT:** Mr. Cooney, I didn't see a written
14 standing argument in your papers, but would you like to comment
15 on that topic right now?
16 **MR. COONEY:** I wouldn't, Your Honor. I will rely on
17 Mr. Toth's argument.
18 **THE COURT:** Okay.
19 Let's talk about the laches argument that defendant
20 makes as well.
21 **MR. SELLS:** Your Honor --
22 **THE COURT:** Yeah.
23 **MR. SELLS:** May I respond to Mr. Toth's argument?
24 **THE COURT:** On standing?
25 **MR. SELLS:** On standing.

1 **THE COURT:** Okay. Go ahead.
2 **MR. SELLS:** Before you move on.
3 **THE COURT:** Sure.
4 **MR. SELLS:** Very quick. I won't rehash the footnote
5 in my brief that you have already drawn Mr. Toth's attention to.
6 Both in Anderson and Lubin, the Court has made clear
7 that a write-in candidacy is not an adequate substitute for
8 appearing on the ballot.
9 But there is another reason I want to bring to the
10 Court's attention and that is we have just learned from the 2020
11 census that Buffalo's population has grown for the first time in
12 a long time.
13 And a big part of the reason is the influx of
14 immigrants. And I understand that there are a lot of immigrant,
15 newly, naturalized citizens.
16 You have probably welcomed some of them into this
17 country, who don't read or write or speak English, such as --
18 such as the Bangladesh -- Bangladeshian community, whose paper
19 I'm holding up here in court, for the record.
20 Their script doesn't look like standard Arabic
21 English -- American English. And writing down the name of any
22 candidate is an extra burden on them.
23 So that provides this court with an extra reason for
24 concluding that a write-in candidacy is no substitute for having
25 a candidate's name appear on the ballot this year in Buffalo.

1 **THE COURT:** Mr. Toth, do you want to talk about that
2 last topic only?
3 **MR. TOTH:** Yeah. Your Honor, as far as I know -- and,
4 you know, I'm relatively new to this area of law,
5 Constitutional, but as far as I know, the opportunity to win an
6 election is not the standard.
7 Byron Brown has certainly a decreased likelihood of
8 success in November, because of the write-in campaign versus
9 having an actual line.
10 But it is my belief that the case law doesn't stand
11 for the proposition that candidates are entitled to equal
12 opportunity to win an election. That's just not the standard.
13 And in terms of the Bangladeshian community, I don't
14 believe the petitioners or the plaintiffs represent anybody in
15 the Bangladeshian community, so I don't -- I'm not sure if that
16 argument is any more than extremism.
17 I can't really respond to it, because there is nothing
18 in the record.
19 **THE COURT:** Okay. Let's move on to the Board's laches
20 argument.
21 Mr. Sells, what would you like to say in response to
22 that?
23 **MR. SELLS:** Your Honor, in response to the laches
24 argument, I would say that laches is an equitable defense, and
25 Mr. Toth has the burden of proof on that. And he has failed to

1 meet that burden with respect to either the undue delay or
2 prejudice here.
3 And now as to delay, I would urge you to compare the
4 timeline of this case with the timeline in Anderson. If you
5 will look at the Anderson case, the plaintiffs there filed their
6 complaint three days after the State of Ohio rejected John
7 Anderson's petition.
8 And in this case, the plaintiffs filed their complaint
9 one day -- one business day after the Board of Elections
10 rejected Byron Brown's petition.
11 And if we had filed as -- even a day sooner, on Friday
12 morning, this issue would not have been ripe for the Court, so
13 we really had to wait until the Board of Elections acted on the
14 petition.
15 **THE COURT:** What about the Board's argument that it
16 took the -- it took the supporters of Byron Brown too long to
17 get their petition filed in the first place?
18 **MR. SELLS:** Well, I guess I would say on that
19 question, a movement to coalesce around a candidacy -- an
20 Independent candidacy, such as Byron Brown's, in reaction to
21 what has happened in other primaries, takes some time to develop
22 and signatures don't gather themselves overnight.
23 And I would certainly say there is no prejudice here.
24 Certainly, no evidence of prejudice.
25 Mr. Toth claims that the timeline in this case will

1 affect the timely administration of the elections, but he hasn't
2 identified a single deadline that the Erie County Board of
3 Elections won't be able to meet.
4 There's no affidavit from the election officials in
5 Erie County. He hasn't explained how the timeline in this case
6 will affect his client's ability to meet the deadlines that are
7 in the case.
8 And I would point out that the deadlines here are
9 essentially the same ones that have been in New York law for
10 many years now and that have not presented any difficulty -- at
11 least there is not any evidence of difficulty.
12 The Move Act has been in effect since 2009. It first
13 took effect for the 2010 election. And the deadline since then,
14 for Independent candidates, was the middle of August.
15 And the Move Act, which requires that ballots go out
16 to military and overseas voters 45 days in advance of the
17 election was complied with, not withstanding the August -- mid
18 August Independent candidate deadline, so there is really no
19 evidence in the record for either prejudice or delay.
20 And there is -- there is a reason to think that a mid
21 August submission of a petition does not, in fact, prejudice the
22 County or the State's ability to meet the Move Act deadline.
23 **THE COURT:** Mr. Toth, three questions. And if you
24 forget any of them, just let me know.
25 First, tell me, but undue prejudice -- the undue delay

1 and prejudice.
2 And then third, is this laches argument a complete
3 defense or is it something that I need to consider as I balance
4 the equities on a motion for TRO or preliminary injunction?
5 **MR. TOTH:** Okay, Your Honor. I will start with undue
6 delay.
7 As we discussed moments ago, plaintiffs here are
8 voters. They are not ostensively part of the campaign or the
9 campaign or the candidacy themselves.
10 As such, they did not eval themselves of Article 16,
11 under the State Election Law.
12 They could have filed objections or they could have
13 somehow participated in the court case that is going on across
14 the street, but they chose to challenge the Constitutionality of
15 that State imposed deadline here, in Federal court.
16 There is nothing that prevented them from making that
17 exact same argument the day after Byron Brown lost the primary.
18 In other words, their standing before Your Honor is not
19 conferred upon them because of Article 16 of the Election Law.
20 It's conferred by basic Constitutional principals.
21 They could have come into this court in June and said, we want
22 another opportunity for our candidate.
23 And this deadline of May 28th is unconstitutional.
24 And, Court, you should impose the same deadline that existed two
25 years ago.

1 **THE COURT:** And they didn't do that, so what's the
2 prejudice?
3 **MR. TOTH:** So the prejudice is -- you know, I do have
4 some experience in defending the Board of Elections in State
5 court.
6 And the prejudice is administering an election is a
7 very difficult and very complicated matter that essentially
8 begins at the beginning of the year.
9 But what's happening right now, as we speak, is we are
10 one week away from ballot certification that has to go to the
11 State board.
12 The next step after that is designing the ballot. The
13 next step after that is mailing out ballots overseas, to our
14 military personnel.
15 While it is true that the Move Act has been in place
16 since 2012, New York State was sued by the United States
17 Government for failing to meet Move Act deadlines.
18 And I provided the docket and some of the judgments in
19 that court and -- and so the supervision of the United States
20 was over New York State, because it was so difficult to meet
21 these deadlines.
22 New York State had to move the June primary for
23 Congressional candidates because of a Federal order, because we
24 couldn't meet the deadlines.
25 And, ultimately, the State legislature decided, we're

1 going to shift the whole thing to June, so that we are no longer
2 running afoul of overseas military ballots, because the process
3 to get from where we are right now to where we need to be in two
4 weeks is very difficult.
5 The other prejudice here, Your Honor, is that the
6 ballot -- we don't mail a ballot or send a ballot just for the
7 mayor of Buffalo. Every voter in the City of Buffalo receives a
8 ballot and that has a multitude of races on it.
9 So if we are in a position -- and this has happened
10 where we are litigating this matter, and it drags on a little
11 bit or there is an appeal process, and then we get changes in
12 the ballot, we have to mail out new ballots. And then we have
13 to decide, well, which ballots are acceptable?
14 What happens if -- and this is all from experience --
15 what happens if one court tells us to put a candidate on, we
16 have to mail out the ballot.
17 And then the Appellate court says, no. Take that
18 candidate off. That happened with Cynthia Nixon.
19 So we were forced -- not just Erie County -- to mail
20 out multiple ballots and explain to voters which ballots counts,
21 which ballot doesn't. It's just very, very complicated.
22 And, I mean, from my standpoint, who is sort of in the
23 trenches, the prejudice is clear. The prejudice is absolutely
24 clear. And I believe that the delay is clear -- the undue
25 delay.

1 In terms of your last question, is it an absolute bar?
2 I certainly believe at the very least, it should prevent the --
3 the temporary restraining order on the preliminary injunction.
4 I mean, it is just -- it's close enough, in my
5 opinion. And I do think ultimately it is -- it is an ultimate
6 part of the case, but I realize this is sort of a preliminary
7 hearing, but at the very least, I think it should -- it should
8 forestall the TRO.
9 **THE COURT:** The certification deadline is in six days.
10 If I were to order that Byron Brown's name be added to the
11 ballot today, isn't there time to get it on the ballot, to
12 certify it, and move along in the process?
13 I understand you are in the process and you are in the
14 middle of it, you are not early, but you're not late either,
15 right?
16 You are somewhere in the middle.
17 **MR. TOTH:** That's correct. Although, obviously, we
18 would have to explore any sort of Appellate process that may or
19 may not be available to us.
20 That understanding that today may be the whole -- the
21 whole ball game --
22 **THE COURT:** Right. And I've kind of anticipated that
23 here, in how I've set this up and accelerated things so that you
24 would both have a decision.
25 And then the aggrieved party can bring the case to the

1 Second Circuit in enough time to potentially have an outcome
2 from the Second Circuit, in time for next Thursday.
3 So, Mr. Sells, what would you like to say in reply on
4 undue prejudice -- excuse me, undue delay and prejudice?
5 **MR. SELLS:** Your Honor, I would say number one,
6 argument of counsel is not evidence. There is still no evidence
7 of prejudice in the record.
8 Yes. The deadlines were moved in 2019, because of the
9 Move Act, no dispute there. But they weren't moved because of
10 the Independent petition deadline.
11 There is not a word in the 300 and plus pages of
12 legislative history that Mr. Toth has put into the record that
13 identifies any member of the legislature or the governor or
14 anyone involved in actually enacting the legislation, pointing
15 total Independent candidate deadline as the source of any
16 problem.
17 And, in fact, it wasn't the source of the problem that
18 led my colleagues at the Department of Justice. I was in the
19 voting section at the time, to sue the State of New York and to
20 prevail through a consent decree.
21 **THE COURT:** Mr. Cooney --
22 **MR. COONEY:** Your Honor, could I speak to your
23 specific question about the way the laches impacts the TRO?
24 **THE COURT:** Sure.
25 **MR. COONEY:** Ms. Walton has different prejudice than

1 the Board of Elections.
2 The question that Your Honor posed to Mr. Toth about
3 could the Board of Elections put Mr. Brown's name on the ballot
4 by Thursday, that may not prejudice the Board of Elections'
5 opportunity to get that ballot out.
6 That certainly would prejudice Ms. Walton's right to
7 have the ballot appear consistent with New York State law.
8 The laches argument that you mentioned in your very
9 first question to plaintiff's counsel about the delay in
10 circulating the petition in 2021, is particularly relevant to
11 the TRO.
12 What I mean is that the legal authority regarding the
13 application of the Anderson verdict test sets forth a series of
14 preprimary deadlines that are severe, but it also says,
15 routinely, that a primary day or preprimary deadline is not
16 severe.
17 The plaintiffs in this case want the Court, by
18 application of the TRO, to enter a new calendar that would
19 unconstitutionally provide preferential treatment, because that
20 would give Independent nominating candidates additional time
21 from the major party candidates, like my client, Ms. Walton, to
22 obtain ballot access.
23 So by effect, the reason this laches argument is so
24 important for the TRO is that the TRO would, in fact, establish
25 a new election calendar, that the courts have already said would

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1 provide unconstitutional preferential treatment.

2 **THE COURT:** A new election calendar is not really what

3 happens every time a plaintiff is successful in one of these

4 cases, though, is it?

5 I mean, it is just this plaintiff or this group of

6 plaintiffs is allowed to proceed. It's not -- it's not

7 retrospectively amending State law.

8 **MR. COONEY:** It is not retrospectively amending State

9 law.

10 But for the application of the TRO, in the 2021

11 Buffalo mayoral race, it would in effect permit an August 17th

12 filing deadline for a purportedly Independent candidate.

13 The courts -- the -- the second Hooks decision from

14 1999 specifically dealt with this issue and said that that type

15 of deadline actually sends the pendulum from what we were

16 worried about in Anderson -- which is discriminating against

17 Independent candidates, it sends the pendulum all the way to the

18 other side and discriminates against the major party candidates.

19 Particularly in this election, Ms. Walton was on that

20 primary. She abided by that calendar and that was the result of

21 the election.

22 **THE COURT:** Isn't that really a gripe with Anderson,

23 though?

24 **MR. COONEY:** I'm sorry, Your Honor?

25 **THE COURT:** Isn't that really just a gripe with

1 Anderson, that you don't like the way that case was decided?
2 **MR. COONEY:** It's not, Your Honor. I believe in -- in
3 the rationale behind Anderson was to protect that Independent
4 candidate, who was forced to make a decision to give ballot
5 access 75 days before that primary process was over with, before
6 people were paying any attention to it. And it really did
7 eliminate Mr. Anderson's right for that Independent candidacy.
8 What we know from a number, of course, is that the
9 deadline that's around the primary day, the primary day itself,
10 before a winner is declared or just before it or just after it,
11 those deadlines have been upheld.
12 The TRO that the plaintiffs are seeking, is a deadline
13 that's approximately 50 plus days after the primary.
14 Anderson says that type of delay is discriminatory.
15 What's the difference between the TRO relief in Anderson, is who
16 it discriminates against.
17 A TRO that allows a 2021 Buffalo mayoral Independent
18 nominating deadline to be 50 plus days after the primary, will
19 discriminate against the rest of the candidates in the field.
20 That's from the Third Department decision in Hooks,
21 where that court looks specifically at a change in election
22 calendar over a number of years by the State of New Jersey that
23 resulted in a deadline, through consent order, of 50 plus days
24 after the primary.
25 And the Court said that does not -- not only does

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1 that -- is that not an unconstitutional discrimination against
2 the Independent candidates, worse, if we were to allow it, it
3 would be an unconstitutional discrimination against the major
4 party candidates, which is what the TRO the plaintiffs seek
5 would accomplish.
6 Which is why the laches argument about when they
7 circulated and filed petitions in 2021 -- they, being the
8 Buffalo Mayor Brown supporters -- if they filed this on primary
9 day or even the day after and said the deadline of New York
10 State of May -- of 12 days before early voting is so -- is so
11 severe, like in Anderson, it -- they would be in front of the
12 Court, consistent with what has been held as an equal treatment
13 under the law, which is around primary day.
14 By waiting and arbitrarily choosing a former deadline
15 of August, that applied to a different election calendar, they
16 have essentially asked the Court to put in a discriminatory
17 calendar.
18 **THE COURT:** The case law that you are talking about
19 that upholds early filing deadlines, upholds them when they are
20 plus a day, minus a day, same day.
21 There aren't any cases that uphold one that is 28 days
22 before a primary, are there?
23 **MR. COONEY:** There are not. And I would say our
24 deadline is, I think, 12 days before early voting, so it is
25 close to the primary voting process.

1 And the substantive date of that, Your Honor, is that
2 if it's a primary day, you don't know the outcome of the
3 primary, which is really at heart of what is plaintiffs'
4 complaint with the deadline in this particular case.
5 They -- if they -- if we were using the 20 -- the
6 pre2019 calendar, the August deadline for Independent nominating
7 petitions would have passed and the Brown supporters, who would
8 have expected to win the September primary, and then said --
9 wait. Now, we want to be an Independent candidate, which is why
10 the laches argument is something that is so detrimental to their
11 request for the TRO.
12 **THE COURT:** And I understand this number of days to
13 the primary consideration; and it's out there. It's discussed
14 and Anderson talks about it, too.
15 But, I mean, isn't Anderson really concerned with, at
16 least in part -- or at least just as much, the number of days
17 before the general election in total?
18 **MR. COONEY:** Yes, Your Honor. And so was the Nader
19 case that you mentioned earlier, with that long delay before the
20 general election.
21 They were -- what they also said -- and so was the
22 other cases, is that the State's interest in regulating a local
23 election, that's not a presidential election is much different
24 and greater.
25 And the reason, obviously, is that a national

1 presidential election has conventions in other primaries and
2 caucuses around the country, which give rise for greater need
3 for independent voices that have time to emerge. And Anderson
4 recognizes that distinction.
5 **THE COURT:** Let's save the rest of -- let's save the
6 rest of that until we talk about likelihood of success on the
7 merits, because we are kind of bleeding out of laches at this
8 point, so I am going to move on.
9 **MR. COONEY:** Thank you, Your Honor.
10 **THE COURT:** And probably get driven by some of my
11 questions, so let's talk about the sovereignty immunity
12 argument.
13 The Board raises an argument about sovereign immunity.
14 And so, Mr. Sells, how do you respond to that?
15 I'm working this way, because the Board's papers came
16 in yesterday and the plaintiffs, by my schedule, did not have a
17 chance to submit a reply, so this is their chance to reply.
18 **MR. SELLS:** Your Honor, we do not agree with the
19 sovereign immunity argument. It is a question of State law as
20 to whether a county Board of Elections is an arm of the State,
21 such that sovereign immunity would attach.
22 Between last night and this morning, I don't have a
23 definitive answer on that. I can tell you from what I have been
24 able to find, I don't think that Mr. Toth's argument on that is
25 correct and I would cite Election Law, Section 3-208 and 3-204.

1 Those sections make it clear that Boards of -- that
2 commissioners on Boards of Elections at the county level are
3 appointed by the county legislature and are funded by the county
4 legislature, and I think that takes them out of being an arm of
5 the State.
6 Now, given that I didn't have a definitive answer on
7 that, and that I was going to amend my complaint anyway, I
8 accepted Mr. Toth's invitation to sue the commissioners and so
9 we have added them as defendants.
10 And I think that resolves the sovereign immunity
11 argument either way, because the suit could proceed against them
12 under Ex parte Young and I don't think there is any dispute
13 about that.
14 **THE COURT:** Right. And I assume that since that
15 amended complaint was filed this morning, those two individual
16 defendants haven't been served yet?
17 **MR. SELLS:** Not yet, but Mr. Toth represents them.
18 **THE COURT:** Okay. And you haven't asked him to accept
19 service -- and I am not going to put that pressure on him. You
20 litigate your case how you wish, but I understand the issue and
21 I understand where we're going.
22 I've looked at -- and I will get to you, Mr. Toth, to
23 respond.
24 I have looked at McMillan, which is the Second Circuit
25 case, and a few District Court cases and so I can give you

1 cites; and it looks to me like this is not a valid argument in
2 this situation.
3 In McMillan versus New York State Board of Elections,
4 the Second Circuit affirmed a District Court dismissal against a
5 State board as barred by the 11th Amendment.
6 But it went on to address dismissal against the City
7 Board of Elections for other reasons, a similar kind way it was
8 handled elsewhere.
9 So McMillan is 449 F. App’x 79. Murawski is similar,
10 285 F.Supp.3d 691, from the Southern District. And they did it
11 the same way.
12 Sloan versus Michel, 2016 Westlaw 1312769, from the
13 Southern District; and there is Sloan V Schulkin, 689 F. App’x
14 101.
15 So, Mr. Toth, you want to talk more about the
16 sovereign immunity question?
17 **MR. TOTH:** Your Honor, it sounds like you have
18 researched the matter pretty well and have concluded that it's
19 not a valid defense. There is no reason to belabor the point.
20 **THE COURT:** I don't -- yeah. And I don't think it is,
21 but if it is, we -- you know, that's something that will be
22 rectified if we move to the next level on preliminary injunction
23 as well in terms of timing and all of that, so --
24 **MR. TOTH:** Thank you, Your Honor.
25 **THE COURT:** -- so let's move on to the Rule 5.1 issue.

1 The plaintiff -- plaintiffs have served the Attorney
2 General with their papers, but I don't know that that's strict
3 enough compliance with 5.1.
4 Let's talk about that and let's talk about how that
5 impacts where we are today. I think we will start with you,
6 Mr. Sells.
7 **MR. SELLS:** Thank you, Your Honor. The advisory
8 committee notes to Rule 5.1 make it clear that the Court retains
9 the authority to issue interlocutory relief during the 60 day
10 period, so we think Rule 5.1 has virtually no impact here,
11 today.
12 We can get that buttoned up in the days ahead, but I
13 will say that we think that what we did by serving the Attorney
14 General satisfies Rule 5.1.
15 **THE COURT:** Right. And I don't know if we even need
16 to get into the advisory comments.
17 I think 5.1 itself is up here on my bench somewhere,
18 but the provision indicates that I can't issue final relief
19 until the Attorney General has had a chance -- and we're not
20 here to talk about final relief at that point -- at this point.
21 And that's 5.1(c), that I may not enter a final
22 judgment holding the statute unconstitutional. So I think -- I
23 think the answer is that we're talking preliminary relief right
24 now, and 5.1 is not an obstacle.
25 Mr. Toth --

1 **MR. TOTH:** Yeah, Your Honor. Just sort of a broad
2 comment. You know, served Monday night; have to be here on
3 Friday; served similar papers Monday; have to be across the
4 street on Friday.
5 Plaintiffs here have amended their complaint today.
6 They, you know -- they are going to get 5.1 buttoned up at some
7 point. You know, it does feel like the Board is being
8 prejudiced by the quick turnaround.
9 Some of the -- I don't want to call them mistakes, but
10 some of the pleading issues that we're dealing with here -- and
11 I think all of that should really weigh in Your Honor's
12 decision, if they are going to -- if you are going to actually
13 grant a TRO.
14 The granting of that TRO is likely to be, for all
15 practical purposes, the end of this matter. As we see in
16 Anderson -- I mean, they are talking about votes that were cast
17 three, four, five, six years later.
18 You know, it's good for -- you know, the lawyers to go
19 over them many years later and to have intellectual
20 conversations about it.
21 But in terms, you know, of Mr. Anderson and Mr. Nader,
22 I'm not sure it really mattered to them the success or failure
23 so many years after the election.
24 So if -- if -- if strict compliance with Rule .5 --
25 5.1 is not a barrier to relief, it should at least be viewed --

1 I would hope, with a little skepticism, because the relief that
2 the plaintiffs are asking is called drastic and it is against a
3 Government.
4 And there is a heightened level -- a heightened
5 standard that is applicable to these situations. And, you know,
6 amending the complaint on the day of the hearing; not complying
7 entirely with Rule .51 (sic), it -- it just feels prejudicial,
8 Your Honor.
9 **THE COURT:** It would be better regardless of, you
10 know -- and I do think that the subsection C answers it for the
11 purposes and the purposes of injunctive relief.
12 But in terms of compliance with the rule, it would be
13 better if we had something more overt than just filing the
14 papers or sending the papers.
15 And then that's where the prompt typically comes to
16 the Court, so the Court can then comply and certify, which is
17 the requirement in subsection B, which we have yet to do,
18 because we haven't been prompted as well.
19 So, obviously, there is -- remains of this litigation
20 going forward, so we should button it -- we should button that
21 up.
22 **MR. SELLS:** Your Honor, I just want to add that Rule
23 5.1 does not require personal service.
24 And if we had complied with it to the letter, the
25 Attorney General may not yet have received the notice that is

1 required under that statute, so I think we went actually above
2 and beyond what is required by Rule 5.1.
3 **THE COURT:** And your affidavit of service -- I think
4 you did indicate personal service, didn't it?
5 **MR. SELLS:** Yes.
6 **THE COURT:** Right. Let's move to the next topic.
7 Defendants -- well, the Board's submission indicated,
8 first sentence, that there are no factual disputes here. And
9 that bears somewhat on the TRO cost here, whether we're talking
10 TRO or preliminary injunction, et cetera.
11 So what do you say to that, Mr. Sells, are there
12 factual disputes?
13 And then I'll ask you the same question, Mr. Cooney.
14 **MR. SELLS:** I'm not aware of any, Your Honor.
15 **THE COURT:** Okay.
16 Mr. Cooney --
17 **MR. COONEY:** I think there is a dispute over the
18 characterization of Mr. Brown, as the type of Independent
19 candidate that the Anderson verdict test is designed to protect.
20 **THE COURT:** That's a legal question, though, isn't it?
21 **MR. COONEY:** I was --
22 **THE COURT:** Are there factual disputes, like this
23 happened; that happened; the light was red; the light was green?
24 **MR. COONEY:** What I would say, Your Honor, is that it
25 is predominantly a legal question. There may be some mixed

1 questions of fact in law regarding the -- either the plaintiffs'
2 or Mr. Brown's, sort of, true nature of an Independent versus a
3 Democrat.
4 I think the underlying facts that the -- that I would
5 point to and the underlying facts that plaintiffs' counsel would
6 point to are probably not in dispute.
7 So the answer is: I think it's a mixed question of
8 fact and law. It is about perspective, almost, of what makes
9 someone Independent, which is inherently factual.
10 But at the end of the day, when we apply those tests,
11 I do think it is a legal question for Your Honor, whether he is,
12 in fact, the type of candidate.
13 **THE COURT:** Right. And I think these sorts of
14 things -- keep them working in the back of your mind -- because
15 I think they are some of the sorts of things we are going to
16 talk again about later.
17 You know, are we talking about a TRO or are we talking
18 about a preliminary injunction? Do the parties care?
19 So I'm going to preview that and we will talk about it
20 later, because I think it matters to you, more than anyone --
21 both parties -- all three parties.
22 Because if you -- if we're talking preliminary
23 injunction, then I have to ask myself, do I need an evidentiary
24 hearing on that or are the facts -- are the facts the same? Are
25 they agreed to in terms of the historical facts -- so just think

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1 about that.

2 So now we'll get into the bigger picture question for

3 the Board and for Ms. Walton, doesn't Anderson control here and

4 why not?

5 **MR. TOTH:** Your Honor, I don't believe Anderson

6 provides anything more than a framework upon which -- you know,

7 you have to make the hard judgment, as the Court said.

8 It's not a bright-line rule, and there are a number of

9 factors that go into the Election Law. This cannot be viewed as

10 simply a deadline that the candidate missed.

11 It has to be taken into account, all of the other

12 deadlines and all of the other complexities of New York State

13 Election Law.

14 Mr. Cooney earlier was referring to the primary date

15 and -- and I didn't know you were involved in the case against

16 New York State. Good work on that.

17 So in response to that, the legislature decided to

18 move the entire calendar up. So Independent nominating

19 petitions in New York State have always, always, always been

20 before major party primaries. Always.

21 There has never been a race that Byron Brown has run

22 in, where Independent nominating petition deadlines were after

23 his primary.

24 There is a brief period of time when the Congressional

25 primary appeared before the Independent nominating deadline and

1 that lasted six years, I think.
2 The legislature decided to keep the basic framework of
3 New York State's election law -- the basic idea of the calendar,
4 and move it up.
5 Anderson does not stand for the proposition that a
6 certain date on the calendar is unconstitutional and another
7 date is Constitutional. There is no bright-line rule.
8 So, Your Honor has to weigh all of the various dates
9 that are imbued in the Election Law.
10 As Mr. Cooney said, May 28th, this year, was -- if I'm
11 doing my math right -- 25 --
12 **THE COURT:** The other way around. May 25th, 28 days.
13 **MR. TOTH:** Yeah. 28 days. 28 days before the
14 primary. But only if you reduce the 12 days of early voting,
15 then that starts about 12 days before, so you can reduce that.
16 And then absentee ballots are sent in -- so Anderson
17 does not control in the sense that this date is too early, this
18 date is too late.
19 **THE COURT:** In 2019, the legislature moved the date
20 for the filing to 161 days, as it applies this year. 161 days
21 before the general election.
22 But before that amendment, the delta between
23 Independent nominating filing deadline to the general election
24 had never been longer than 77 days, plaintiffs point out, and
25 it's doubled here.

1 So how does the State justify that change? We are not
2 just shifting -- we're not keeping the delta the same and moving
3 the whole party backwards in time. We're actually expanding the
4 delta.
5 **MR. TOTH:** Because New York State's rationale -- and,
6 again, it is this whole concept of a sore loser.
7 There is -- they make the Independent nominating
8 petition deadline after the deadline for petitioning for major
9 parties and that is critically important.
10 Well after -- which I think it was around April 8th
11 this year. This is the way it is set up. The major parties --
12 the four major parties circulate your petitions. Let's see who
13 qualifies.
14 The Board posts who qualifies. There is some
15 litigation to see who qualifies. Independent nominating
16 parties, voters, can then determine -- you know, I don't like
17 any of these candidates. I don't like any of these Republicans.
18 I don't like any of these Democrats.
19 I don't know who is going to win the primary, because
20 that's four weeks from now, but I know I don't like any of
21 these, so we're going to create our own party.
22 That is perfectly Constitutional. And it prevents
23 what courts have upheld, the concept of preventing sore loser
24 candidacies and that is exactly what we have here.
25 We have a major party candidate, who knew about the

1 Independent nominating petition deadline; thought he was going
2 to win the primary; lost the primary and still wants to continue
3 with a candidacy, aside from the write-in.
4 The courts have allowed the prohibition of sore loser
5 candidacies.
6 **THE COURT:** There is no sore loser statute in New
7 York, however.
8 **MR. TOTH:** There is no sore loser statute, but the
9 effect of putting the Independent nominating petition prior to
10 the results of the primary is, in fact, in practice, a sore
11 loser statute.
12 But you are correct, Your Honor. There is no statute
13 that says: If you are a major party candidate, you may not be
14 an Independent nominee.
15 However, in New York State, again, critically
16 important, we allow fusion voting, as a concept. We allow
17 candidates to have multiple parties.
18 Many states that have enacted sore loser statutes, if
19 not all of them, do not allow fusion voting. So it's sort of a
20 continuation of the anti-fusion voting in those other parties.
21 Here, in New York, we allow the fusion voting. But by
22 setting the deadline before the primary, we are still attempting
23 to deny the sore loser candidacies.
24 And what's most important, Anderson does not say that
25 that's unconstitutional. And even if you take Anderson at just

1 it's barebones, and say, 75 days before primary or March 20th or
2 the hundred and whatever days before, and you just take that
3 number -- well, New York State is considerably after March 20th.
4 It's April, May -- two and a half months later. So,
5 again, you can't apply Anderson in a vacuum.
6 I suppose what I would concede is that there is some
7 date under our Constitutional framework that is too early. And
8 then at some point, I think everybody would concede, there needs
9 to be a date.
10 So where on that sliding scale does that -- does it
11 become Constitutional to unconstitutional? And that's where you
12 have to make the hard --
13 **THE COURT:** And it's not just --
14 **MR. TOTH:** -- analytical --
15 **THE COURT:** -- it's not just looking at the date,
16 right?
17 I have to look at all the facts and circumstances
18 that --
19 **MR. TOTH:** You have to look at --
20 **THE COURT:** And it's not just about the sore loser
21 concept and setting things up and following the schedule, is it?
22 I have to look at what developments are there that
23 would make it important for there to be voter choice, right?
24 Isn't that one of the things that Anderson is looking
25 at?

1 **MR. TOTH:** The developments along -- and just as an
2 aside, the developments in a presidential race.
3 **THE COURT:** So the longer period of time we have got,
4 the more developments would occur and the more of shifting of
5 things and the more new issues become important, right?
6 **MR. TOTH:** Absolutely. But as Mr. Cooney pointed out,
7 I think we have clear case law that shows something before the
8 primary is acceptable.
9 Again --
10 **THE COURT:** A day or two?
11 **MR. TOTH:** Well, you know, again -- if that's your
12 decision, Your Honor, that's your decision.
13 **THE COURT:** Well, I mean, that's what the cases are --
14 a day or two before, a day or two after, on the primary day,
15 that sort of thing.
16 **MR. TOTH:** Correct. But then there is nothing --
17 there is really nothing in between.
18 **THE COURT:** That's right.
19 **MR. TOTH:** And that's the analysis that you are going
20 to have to --
21 **THE COURT:** Right. We are kind of applying Anderson
22 blindfolded in that zone, aren't we?
23 Mr. Cooney --
24 **MR. COONEY:** Your Honor, I think the first point I
25 want to make is the issue of whether or not we are looking at

1 the comparison to the general election, in this case, versus the
2 primary election.
3 Because I know Your Honor is -- as did I, when I was
4 looking at this, was the date from August to May is considerably
5 different from the general election. I, obviously, would
6 concede that.
7 The Anderson decision provides explicitly that they
8 are analyzing this in the context of a presidential election.
9 In further, that they say that the State's imposed restrictions
10 in a presidential election implicate a uniquely important
11 national interest.
12 The portion of the Anderson decision continues to
13 reference what I was alluding to earlier, which are elections
14 outside of that particular State's boundaries, and, importantly,
15 the national presidential conventions, where the nominees are
16 ultimately selected.
17 A national presidential convention is akin to what we
18 have a primary for in a local election, where one major party
19 selects their nominee.
20 So a deadline in March, in Anderson, when compared to
21 the general is very far. But what the Anderson court was
22 looking at was really where it was in relation to the national
23 election and when the major parties were picking their national
24 candidate, and not the actual date from the general election.
25 Because while Your Honor is correct, that the longer

1 deadline, the more opportunity for new and independent things
2 could emerge, that is true.
3 What is also true is that the Supreme Court has said
4 that the States have a right to make general elections about
5 general issues, not about a rehashing party disputes in the
6 primary.
7 It is undisputed here, that what is at issue in this
8 case is the rehashing of a party nomination.
9 **THE COURT:** Right. And I'm hearing, you know, kind of
10 a similar to the sore loser concept, even though there is no
11 statute, but it's the same argument.
12 You know, isn't that the losing argument in Anderson?
13 Doesn't the descent in Anderson take John Anderson to task
14 for -- hey, look, he started out in the primary. And when he
15 saw that he was going to lose, he left and tried to get on the
16 Independent line.
17 Isn't that what happened there?
18 **MR. COONEY:** Yeah.
19 **THE COURT:** And the descent took the majority to task,
20 but they lost. They were the four votes.
21 **MR. COONEY:** They did because Mr. Anderson did not
22 participate in the primary. He was a true Independent
23 candidate.
24 **THE COURT:** He started out in the primary and left
25 when he thought he would lose.

1 **MR. COONEY:** He did.
2 **THE COURT:** Right.
3 **MR. COONEY:** And Mr. Brown could have done that by
4 May 25th. So that decision, that relatione, is not applicable
5 to what is happening in the 2021 Buffalo mayoral race with
6 regard to the general election. That is my first point.
7 The best demonstration of why that distinction is so
8 important is the other Circuit decisions that analyzed in
9 Independent nominating deadlines in elections purely within
10 states.
11 And when they sum up the two bookends of what's
12 Constitutional and what's not, they are universally referring to
13 primary dates.
14 That's what they are referring to; 75 days, 90 days,
15 50 days is on the unconstitutional end for an Independent
16 candidate. We know that.
17 Those other cases that you have alluded to, the dates
18 of primary date, right before, they are before we know the
19 winner of the primary. That is clear, just like New York's.
20 **THE COURT:** Right.
21 **MR. COONEY:** So there is no right to have it after the
22 primary.
23 In fact, that would be against what the Supreme Court
24 has said that the State has an interest in exploring.
25 **THE COURT:** Right.

1 **MR. COONEY:** The most important decision on the facts
2 that we're faced with is the Third Department -- the Third
3 Circuit decision in Hooks, which you recall from the Hooks case,
4 it was originally a 1997 decision, where a preliminary
5 injunctive relief was granted because New Jersey had a 54 day
6 deadline before the primary.
7 The Court said you can't do that. Then, after that
8 preliminary injunctive relief is in place, the underlying merits
9 are still being litigated.
10 There is a consent order in place that moves that
11 Independent nominating deadline to July, after the primary.
12 Now, importantly, that July date is actually less time than the
13 date this TRO would impose for the 2021 election.
14 After that consent order was in place, with a July
15 deadline, a month after the primary -- so now we are way at the
16 other end of that pendulum -- the parties went and argued it.
17 And after the case was argued, New Jersey amended it
18 to the primary day deadline, before anyone knows the outcome,
19 but much better than the deadline was before, but less than what
20 we are seeing here, which is significantly or substantially
21 after the primary.
22 When that case went in front of the Second Panel in
23 Hooks, in 1999, the decision was 54 days before the primary was
24 wrong. We know that.
25 But the plaintiffs who wanted to move it from a date

1 on or around, in that case, at the actual primary, before a
2 winner, they wanted to move it from the new New Jersey law to
3 exactly what the plaintiffs want to do here, to after --
4 substantially after the primary, so they can determine who wins,
5 who loses, and decided what's their best recourse at that point.
6 That's the only decision from a Federal Court in the
7 papers that controls what it is that the plaintiff wants this
8 court to order, by TRO, for the 2021 Buffalo mayoral race.
9 So whether Anderson applies, Burdick applies, all the
10 tests applies. And as you said, we're operating a little bit in
11 the dark for what should -- should happen between New York's 28
12 deadline day and the primary, we are not operating in the dark.
13 **THE COURT:** Right.
14 Let's hear from Mr. Sells on that point.
15 **MR. SELLS:** I'm sorry, Judge, did you want --
16 **THE COURT:** On -- on --
17 **MR. SELLS:** -- a specific point?
18 **THE COURT:** Does Anderson control? We're going to
19 back to the original question --
20 **MR. SELLS:** The original question.
21 **THE COURT:** -- that started that conversation. Yeah.
22 **MR. SELLS:** Yes.
23 **THE COURT:** And then you can respond to anything that
24 you heard from the other side.
25 **MR. SELLS:** So, Your Honor, I would say Anderson

1 pretty much controls. You don't have to look much beyond
2 Anderson, but the cases that we cite help to illuminate what
3 Anderson means.
4 And we think the factual parallels of this case are
5 striking with Anderson. Not only in that there was a shift in
6 the party position during the primary that led John Anderson to
7 run as an Independent candidate, but as the Court notes, John
8 Anderson was a candidate who could command strong support and
9 that's factually present here as well.
10 Byron Brown is going to be a competitive candidate if
11 he is on the ballot and that makes, we think, the 1st Amendment
12 interest here really at their zenith.
13 **THE COURT:** Let me pause you and ask you both to
14 comment on that. Is he going to be a competitive candidate and
15 how do I and should I take that into account?
16 And I have done some back of the envelope thinking
17 here and I'm just going to tell you what I've got and then you
18 tell me whether I should be considering this or not.
19 There are approximately 156,000 registered voters in
20 the City. 106,000 Democratic registered voters. That means
21 49,500 are others, not entitled to vote in the Democratic
22 primary -- okay.
23 23 of those registered Democratic voters voted in the
24 primary -- 23,000. That leaves 83,000 or so registered
25 Democratic voters who didn't vote in the primary.

1 All right. In 2017, 43,000 votes cast in the November
2 general election, Byron Brown gets 29,000 votes -- ball parking
3 things here, okay -- 68 percent. 2013, 36,000 votes casts, he
4 gets 26,000, 71 percent.
5 Isn't it fair to say that he's going to be a
6 competitive candidate and is that a factor I should be
7 considering?
8 So, Mr. Sells -- and I'll ask everybody the same
9 question.
10 **MR. SELLS:** Yes, Your Honor. You absolutely should
11 consider it. We would not be here today if I were representing
12 Bugs Bunny or some other frivolous candidate who --
13 **THE COURT:** Well, I understand that you would not be
14 here, but under the case law, does it matter?
15 **MR. SELLS:** It does. The Supreme Court in Anderson
16 mentions that John Anderson was a candidate who could command
17 substantial support.
18 And I think this is -- again, this is writing in 1983,
19 looking backwards, Mr. Anderson didn't actually do that well in
20 the general.
21 He definitely presented an alternative view, a more
22 moderate, conservative, stance compared to the eventual winner
23 of the Republican primary, President Reagan.
24 But I think, in this case, comparatively, Byron
25 Brown's level of support is off the charts. And that makes a

1 huge difference as to the interests of my clients, the voters of
2 Buffalo.
3 I think you are also correct that you should take into
4 account the reasons why a choice might be important. And the
5 Supreme Court mentions that in footnote 12 of Anderson.
6 Particularly, that there are changes that can happen
7 during the campaign that give rise to the candidacy and make
8 that Independent candidacy different, say, from a Socialist
9 Party candidate -- candidacy or a Communist Party candidacy or a
10 Libertarian Party candidacy.
11 And that's what we have here, of course, is a shift in
12 the politics in Buffalo, right around that Democratic primary,
13 that have caused there the need to be a choice.
14 And without action here, of course, Buffalo voters
15 will have only one choice, and that is India Walton. And that
16 we think also adds to the 1st Amendment interests here.
17 I'll let Mr. Toth respond, if he wishes, on that
18 point, but I do have more to say about Anderson, in general.
19 **THE COURT:** Let's go to Mr. Toth -- Toth or Toth?
20 Help me out.
21 **MR. TOTH:** Toth. Toth.
22 **THE COURT:** Okay.
23 **MR. TOTH:** So the way I read these cases is that the
24 ultimate likelihood of success of a candidacy is not nearly as
25 important -- and maybe not important at all, as much as the

1 ideas that that campaign is bringing.
2 The idea of the 1st Amendment protecting the
3 marketplace of ideas is fundamental to all of these cases. It's
4 one of the reasons why when you use Anderson and you use Nader,
5 you have to be careful, because those are presidential
6 elections, which are completely different in scope and scale,
7 importance.
8 I mention that as a caution. So many of the arguments
9 that are applicable to Anderson and Nader as candidates, simply
10 aren't applicable to Byron Brown, as a candidate.
11 This isn't some new movement. He's been the mayor for
12 whatever -- 16 years, 17 years, whatever it is. You know,
13 voters know him. He's not offering some new political idealogy.
14 I think what is more --
15 **THE COURT:** Is his -- is his opponent offering
16 something new that he needs to respond to and isn't that
17 important?
18 **MR. TOTH:** Again, you know, that's an interesting
19 question. So does Byron Brown get the Constitutional
20 protections of the 1st Amendment, such that he can change the
21 calendar in order to respond to the new ideas presented by a new
22 type of candidate?
23 You know, Your Honor, I -- honestly, I hadn't thought
24 about that. Sort of turned the whole thing on its -- on its
25 head.

1 **THE COURT:** Let's hear from Mr. Cooney. He looks like
2 he has an answer to that question.
3 **MR. COONEY:** I'll try to have an answer, Your Honor.
4 I think if you do consider it -- let me -- your question is
5 should you, so let me answer the Court's question.
6 I would say no. It's not that it's not in all our
7 minds. It's that under Anderson, if we were providing some type
8 of viability or likelihood of viability test, we would undermine
9 the real point of it, which is that you need to have a right to
10 get on the ballot in order to become viable.
11 But if you do consider it, I think, interestingly, it
12 actually lends against the TRO. And the reason I say that is I
13 think that Byron Brown believes he is going to win a write-in
14 campaign.
15 So, in fact, he's -- it's well documented that he's
16 running that campaign. It's in some of the papers. The voting
17 numbers that Your Honor mentioned have been an issue in the
18 campaign.
19 He's seeking to do that. He's already accomplishing
20 what it is that the Anderson test is supposed to make sure can
21 happen.
22 He is a successful -- he's running a successful
23 write-in campaign. Whether or not he wins or not -- obviously,
24 if I knew that answer or if any of us did, we would be running
25 campaigns.

1 We don't know. He's there. He's running. So all of
2 these Constitutional rights that this deadline is supposedly
3 prohibiting are not at issue, substantively, practically
4 speaking.
5 I don't think we should go down that road as litigants
6 in courts to consider viability. I think it poses some -- it
7 could be reversed, you know, in a negative way for ballot
8 access. However, here, if you do, he has all those ideas.
9 And then your question to Mr. Toth about whether or
10 not Ms. Walton's successful primary candidacy somehow elevates
11 Mr. Brown's and his supporters' Constitutional rights, I would
12 say of course not.
13 But I would also say, when we look at the -- I know,
14 of course I'm going to say that, but the reason I'm saying that
15 is important.
16 When we look at the point that I have continued to
17 make -- and I'm not going to make it in as much detail, is that
18 applying the TRO and extending the deadline, we're actually
19 going to do the opposite of Anderson.
20 We're doing to discriminate against -- discriminate
21 against a new Independent movement that Anderson is trying to
22 make happen.
23 We want people like a India Walton, no matter of her
24 politics, but our new, emerging, independent ideas that are
25 admittedly different. We want them to actually be treated

1 equally under the law. Not discriminated against.
2 So that if someone loses the primary, they can get a
3 new deadline that is discriminatory against the new candidate,
4 which is fundamentally what's happened.
5 **THE COURT:** Yeah. I don't think there is distinction
6 in the case law about who is bringing the new ideas, though.
7 **MR. COONEY:** Right.
8 **THE COURT:** Let me read to you from Anderson: But
9 under the Ohio statute, a late emerging -- I know it's
10 presidential and there is nothing I asked him that limits the
11 outcome of the presidential -- a late emerging presidential
12 candidate outside of the major parties, whose positions on the
13 issues could command widespread community support is excluded
14 from the Ohio general election ballot.
15 The Ohio system thus denies the disaffected not only a
16 choice of leadership, but a choice of issues as well.
17 I think it's a factor. Doesn't it -- doesn't it lend
18 itself to consideration here?
19 **MR. COONEY:** The Independent -- the new, emerging idea
20 definitely does, Your Honor. I agree with that.
21 What I meant is that whether or not a candidate is
22 viable or not, that can't -- I don't know that that's a factor.
23 **MR. TOTH:** Your Honor -- and I would just exactly add
24 that what's more relevant to who can actually win the
25 election -- you know, it's under -- it's throughout all these

1 cases is this idea that Libertarians and Communists and
2 Conservatives and the U.S. Taxpayer Party, whatever that is,
3 needs a seat at the table and should not be discriminated
4 against and unfairly disadvantaged from gaining ballot access,
5 to present their ideas, as opposed to major party candidates,
6 which is what we have here.
7 So I don't think that there is -- there is support for
8 assessing who can win and who can lose. It's really more about
9 the nature of the candidate and the campaign.
10 **THE COURT:** Let's -- you know -- and I'll hear from
11 you, Mr. Sells, as well, but why don't we do it in the context
12 of you tell me.
13 I saw the Board's submission and its declaration and
14 then from the letter from the State Board to the Governor about
15 the 2019 legislation, identifying what the four State interests
16 were.
17 Why don't you comment on the four State interests.
18 And like I said, I heard from the Board on that. And why don't
19 I hear from you about why those interests -- I'm assuming you
20 will say they are not compelling and in any event, that the
21 statute is not narrowly tailored to meet them.
22 **MR. SELLS:** Well, the first thing I will say, Your
23 Honor is that that was not a letter from the State Election
24 Board.
25 That was a letter from the Democratic members of the

1 State Election Board. It does not even purport to be on behalf
2 of the State Election Board.
3 The Democratic members, plus the Democratic co-chair
4 executive director -- I forget exactly what his title was, so it
5 was roughly half of the State Board of Elections.
6 And so I think there is actually a complete failure of
7 evidence as to the State's asserted interest. The State hasn't
8 asserted any interest.
9 There is no evidence of an interest asserted in the
10 legislative history. And that letter and the affidavit that
11 comes along with it, which is also not on behalf of the State
12 Election Board, does not amount to a hill of beans when it comes
13 to identifying what the State interests were.
14 So you really don't have much to weigh against the
15 injury, but I will address the ones that -- two Democratic
16 members of the State Election Board identify, okay?
17 The -- the first is political stability. Poor loser,
18 we have heard that term a lot. And Mr. Toth is absolutely
19 correct that Anderson does not say that sore loser statutes are
20 unconstitutional.
21 However, footnote 31 of Anderson, which appears on
22 page 804 of that decision, says that sore loser statutes
23 can't -- can't occur by happenstance.
24 And the Supreme Court notes that -- that the law at
25 issue in Ohio, in the Anderson case, was a petition filing

1 deadline.
2 The fact that it may have operated as a quasi sore
3 loser statute was of no moment to the Court and was not part of
4 the legislative design. So I think the sore loser arguments go
5 out the window under Anderson, in that footnote 31.
6 The other thing I will say is you pointed out New York
7 doesn't have a sore loser statute. It's famously one of three
8 states that don't have one. It still doesn't have one.
9 This deadline does not prevent sore losers. It
10 prevents this particular kind of candidacy, but it does not
11 prevent sore losers.
12 The next argument that was raised in the Democratic
13 letter is fair -- fairness of the elections process. And I
14 think that gets at Mr. Cooney's argument.
15 And I would simply say that the deadline structure
16 that the general -- that the New York State Assembly passed does
17 not level the playing field.
18 It does not equalize anything, because the Independent
19 deadline is four weeks before, and 161 days before the general
20 election.
21 And their attempts to say, well, it is not that much
22 before absentee ballots are distributed, I think is of no
23 moment.
24 I think Anderson instructs on to measure whether a
25 petition deadline is discriminatory. And under Anderson, this

1 is a discriminatory petition deadline.
2 That level of discrimination is measured by the day on
3 which the major parties select their candidates. That's what
4 the Supreme Court did in Anderson.
5 That's how Courts of Appeals have understood Anderson,
6 as evidenced by the Hooks case, that we cite in our brief, the
7 earlier version, where the Third Circuit is explaining the
8 Anderson case.
9 So we would say that the fair elections rationale
10 doesn't really have any weight to it. We think they have it
11 backwards, that this is a discriminatory law. And because it's
12 discriminatory, under the Anderson/Burdick test, gets strict
13 scrutiny.
14 The next State interest that the Democratic letter
15 asserts is the need for an informed electorate. And I would
16 point out that in Anderson, in 1983, the Supreme Court said
17 modern technology undermines the States' asserted interest in
18 needing that long to inform the electorate.
19 1983 was a long time ago and technology has advanced
20 somewhat. And I think there is really no evidence that the
21 State of New York and the County of Erie needs 161 days to
22 educate the public about who is going to be an Independent
23 candidate on the general election ballot.
24 And then the last interest that's asserted in the
25 Democratic letter is administrative need. And we have touched

1 on that already, I think. I don't want to rehash it too much.
2 There is no evidence of administrative need here.
3 Again, the mid August deadline, 77 days, worked for years,
4 compatibly with the Move Act in the last decade, and there is no
5 evidence in the record of an administrative need.
6 Under the second and third steps of the Anderson test,
7 Erie County has the burden, and they have failed to meet their
8 burden with any evidence whatsoever.
9 So we think that under Anderson, it's quite an easy
10 balancing test for this court, given the state of the record at
11 this point.
12 I do want to respond to a couple of points that
13 Mr. Cooney made, if I might. And he first asserted that
14 Anderson was different, because Mr. Anderson didn't participate
15 in the primary, so he wasn't really a sore loser.
16 But, in fact, he lost 20 primaries. He was very much
17 a sore loser, as that term is described. He didn't participate
18 in Ohio's, but he did participate in the Republican primaries
19 elsewhere.
20 And he just happened to get out in Ohio in time to
21 avoid Ohio's actual sore loser statute, but not in time to
22 get -- to avoid the petition deadline.
23 And that, I think, is a matter that is common
24 knowledge and subject to judicial notice, if you would like to
25 rely on that.

1 I don't have a citation on that, but the 1980
2 presidential election results are widely available and not
3 subject to reasonable dispute.
4 And, lastly, I want to respond to Mr. Cooney's
5 argument about the second Hooks case, that approved of New
6 Jersey's deadline -- that that was, I think, within a day of the
7 primary.
8 And, yes. It approved a deadline that was within a
9 day of the primary. It didn't say that the deadline had to be
10 within a day of the primary, but that's where New Jersey said
11 it -- and the Third Circuit said we think that is
12 Constitutional, at least as applied to the plaintiffs in that
13 case.
14 Now, the plaintiffs in that case were alternative
15 parties. The first part of that caption of that case is counsel
16 of the Alternative Political Parties versus Hooks.
17 So this is the Libertarians, the Communist, the
18 Socialists, and the Greens and all -- an amalgam of those kinds
19 of candidacies.
20 And footnote 12 of Anderson says, yeah, yeah. We
21 understand those candidacies, but they are different from the
22 Independent candidacies and especially Independent candidacies
23 that respond to things that happened during the primary election
24 process.
25 And the reason for that, as explained in footnote 12,

1 is that a Communist candidate has a certain political
2 perspective beforehand, just like a Democratic or Republican
3 candidate does, so that the party label, the ballot label says
4 something.
5 And an Independent candidacy is different, because an
6 Independent candidacy can fill voids, if you will, in -- in the
7 marketplace of ideas.
8 And so whatever Hooks says, that Mr. Cooney relies on,
9 it doesn't really speak to what -- the facts that we have here,
10 which are much, much, much closer to Anderson.
11 We have got a major shift in the middle of the
12 election cycle; and an Independent candidacy bubbling up to
13 demand another choice. And that choice happens to be Byron
14 Brown, but it could have been somebody else.
15 It -- another candidate in Buffalo politics could have
16 taken up that mantle and we would be here and we would be
17 talking about somebody else, but it happens to have been Byron
18 Brown that the -- those disaffected with the Democratic nominee
19 have chosen to coalesce around this candidate and he has strong
20 support.
21 **THE COURT:** Mr. Toth, anything in response on the
22 State's asserted interests, without telling me something that
23 you already told me in your papers yesterday?
24 **MR. TOTH:** No. I just want to underscore again, sort
25 of, the -- from my -- from where I'm sitting in this little

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1 chair, how prejudicial this feels.
2 The Board of Elections is sued for following a statute
3 that the plaintiffs argue is unconstitutional. The State
4 Board's not sued, as they are in many of the cases that we're
5 talking about.
6 We are left -- we don't entirely button up our
7 compliance with 5.1, so we don't exactly know where the Attorney
8 General is right now.
9 They have 60 days to respond, but we are going to
10 apply for a TRO four days into the process and we're going to
11 make a County attorney, who has never defended a State's
12 statutes Constitutionality defend the State's statutes
13 Constitutionality.
14 So I spend the whole week running around trying to do
15 that. I find documents within the red jacket from State
16 officials. Those are not the right State officials.
17 Apparently, those are to be disregarded, the bill
18 jacket, with laying out the compelling State interests.
19 Again, this feels like a orchestration to get quick
20 relief, irrespective of what the ultimate outcome may be several
21 years down the road.
22 **THE COURT:** Well, election law cases are always fast
23 moving, late breaking and difficult and that's why the decision
24 law -- decision of law is sloppy and unsatisfactory, right?
25 **MR. TOTH:** That's certainly true. And I regularly

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1 handle these matters in State court, under Article 16, and the
2 various provisions.
3 **THE COURT:** I mean, you've been up to the Court of
4 Appeals, too, right? And you sit in front of the judge in
5 library and you try to get -- try to convince the judge to take
6 the case. I understand all that.
7 **MR. TOTH:** Yeah.
8 **THE COURT:** They are always like this, though.
9 **MR. TOTH:** But they -- they are never -- all those
10 cases, absolutely.
11 But they are never in Federal Court, questioning the
12 Constitutionality of the State statute, where the State is not
13 sitting at the table.
14 **THE COURT:** Mr. Cooney, do you want to respond to
15 Mr. Sells?
16 **MR. COONEY:** I do, Your Honor. I think the original
17 question was really regarding what the State's interests are, so
18 I will try to focus on your question, so I don't go off.
19 The sore loser statutes that are known as pure sore
20 loser statutes don't exist in New York State. I don't dispute
21 that.
22 There is no prohibition. We have fusion voting. But
23 under that Hooks case in 1999, and a case from the Supreme Court
24 in Vermont, a State's interest in preventing, minimizing or
25 deterring those types of candidacies and deterring intra-party

1 feuding from spilling into the general election is a valid State
2 interest.
3 And I know that in the papers, obviously, there is
4 some undisputed facts, which give rise to Mr. Brown really,
5 truly being a Democratic candidate.
6 **THE COURT:** Well, run with that argument. If that's a
7 valid State interest, then how is this early filing deadline
8 narrowly tailored to mete it.
9 And if it were a compelling --
10 **MR. COONEY:** So the way that it is, Your Honor, is
11 that the deadline that we have is close to the primary, where
12 those voters that are actually -- have filed their party
13 designating petitions a month earlier have gone through the
14 Board of Elections.
15 We know who they are, who is running for primary. So
16 if a candidate is running in a primary by this May 25th
17 deadline, we know who they are.
18 Additionally, the -- in New York State, if you are a
19 candidate like Byron Brown, who is running against a candidate
20 with ideas that some people perceive as different -- even though
21 just for the record, Ms. Walton is an enrolled member of the
22 Democratic party. She's not a Communist or a Socialist. She's
23 an enrolled member of the Democratic party.
24 Even if at that point, Mr. Brown perceived or other
25 people perceived that her ideas or her candidacy was somehow

1 unique in that there was going be some broader coalition, her
2 ideas, her campaign, the discussion of who she was was certainly
3 occurring in May, after she was on the ballot and then removed
4 from another line under the election calendar, by the way.
5 And then -- so at that point, when we talk about how
6 does the statute actually narrowly accomplish that, those
7 candidates and those people who perceived that independent need
8 for some Independent coalition, even if it happens to be around
9 the former Democratic state chair and the incumbent Democratic
10 mayor, that still could happen while that -- under the deadline,
11 because the primary process is underway.
12 So New York State has basically done the best job of
13 saying, we want Independent candidates to have the time to know
14 what's happening in an election, a primary election, so we're
15 going to put a deadline close.
16 But, additionally, we're going to give people like
17 Mr. Brown the right to do both. So Mr. Brown and his
18 supporters, they really have it both ways.
19 They can be in the Democratic primary and they can run
20 and hopefully win, but if they don't, by the time that campaign
21 is full season, petitioning is done, there is mail happening.
22 The messages are out there, which is -- of course, it
23 was widely known what was happening in May, in Buffalo, in the
24 Buffalo mayoral race. You may not have known who won, but you
25 knew what the ideas were.

1 Mayor Brown and his supporters could have also ran as
2 an Independent candidate at that point. So that deadline is, in
3 fact, narrowly drawn to protect both the independent minded
4 people during the election season, who should know what their --
5 what issues and what campaigns are in the election season.
6 And it provides protection to the major party
7 candidates, who could actually still run in both, and that's why
8 it is so narrowly tailored, and while that interest in saying,
9 but it's not a free second bite of the apple.
10 Our deadline is not going to be, like in the Hooks
11 case, or what was deterred in the case from Vermont, Trudell
12 case, it's not going to be long after the primary, where
13 candidates who, in fact, lost, get to basically just rehash
14 those fights.
15 New York State's deadline has really appropriately
16 resolved a lot of these potential disputes by letting them do
17 both.
18 The other State interest, I just wanted to point out,
19 was in True dell, the Vermont decision, there is a mention of
20 the Move Act.
21 And they reference a State's desire to comply with the
22 Move Act is also a valid interest. That is the justification
23 here.
24 And, in fact, Mr. Toth mentioned earlier -- I think it
25 was in 2018, there was ballot litigation that prevented

1 compliance with -- in a New York State election, in the
2 gubernatorial election in 2018.
3 The implication of that is that the State interests in
4 complying with the Move Act for Federal elections is also an
5 interest that they think military members, who live in Buffalo,
6 may want to vote for mayor on the -- on the proper ballot.
7 **THE COURT:** Isn't it -- isn't its interest in
8 complying with the Move Act in a more broadly -- addressed here
9 than necessary?
10 In other words, we have no problem with complying with
11 the Move Act here, today, do we?
12 **MR. COONEY:** We do. Because if the relief that is
13 granted today, ultimately -- or in the other -- the State court
14 proceeding, if that relief affects the ballot and then
15 subsequently, the people exercise Constitutionally protected
16 rights to expand their judicial review to the Appellate level,
17 that could alter that ballot.
18 And then we could have, in the 2021 Buffalo mayoral
19 election, a set of ballots to be provided, both absentee and
20 military members, that a subsequent court or two competing
21 courts make different rulings that then have to be reconciled
22 and resent.
23 And the State has an interest in a deadline that is
24 going to make that process not jeopardize the timely, accurate
25 and smooth administration of ballot provisions.

1 The only other interest that I wanted to mention was
2 besides the -- preventing the sore loser candidacy, as well as
3 the Move Act, is the State has an interest in the public's
4 integrity over the election process and they have a right to put
5 deadlines in place.
6 And that's particularly relevant in this interest,
7 because if the deadline is changed, what could happen to the
8 State's -- the people's belief that the election calendar was
9 not equally applied, would affect the actual ballot state --
10 compelling State interest of the public's belief in the
11 electoral process.
12 And the reason is -- to go back to the point that I've
13 made over and over again, that the new deadline would, in fact,
14 discriminate against one of the candidates in this race.
15 **THE COURT:** Mr. Cooney, have issues on the voters'
16 minds remained static since May of this year?
17 **MR. COONEY:** I don't know, is an honest answer. I
18 think people's perception -- campaigns' perception of voters'
19 minds -- what's on voters' minds, which voters?
20 I mean, there is a lot of different ways that that
21 could be answered. I think that is a concern that people have
22 that what is -- that what people are thinking about has changed.
23 What's important is what made people -- what
24 potentially has made voters change was the outcome of a primary.
25 It wasn't that Byron Brown didn't know he was running

1 or his supporters weren't supporting him against those ideas.
2 Whatever new ideas that people have in the 2021, are
3 connected not to what was happening in the campaign; in some
4 idea that we need to protect and make sure it flourishes.
5 They were trying to successfully win in the context of
6 a major party primary. That didn't happen.
7 That's not the same as we need to let Byron Brown and
8 his supporters see what happens between some other candidates
9 and then have an opportunity to get on the ballot. It's just
10 factually not what's happened.
11 **THE COURT:** Mr. Sells, why don't you respond to that,
12 if you like, and then I'm going to change the topic.
13 Have things in voters' minds remained static since
14 May?
15 **MR. SELLS:** I don't believe so, Your Honor. I think
16 this mayoral contest has attracted nationwide attention and
17 issues have developed over the course of the campaign.
18 I'm not an expert on Buffalo politics, but this
19 Independent candidacy and the movement behind it certainly did
20 spring up in reaction to the Democratic nominee and her
21 positions on various issues.
22 I would remind the Court that New York has closed
23 primaries, and so very few of Buffalo's -- let me say, not all
24 of Buffalo's voters even had an opportunity to participate in
25 the Democratic primary.

1 Very few voters took advantage of that opportunity.
2 And it's not really that surprising that given that there are no
3 other choices on the ballot, a movement has sprung up to get
4 another choice that's different from the Democratic party's
5 nominee in this instance.
6 **THE COURT:** Tell me about the State court litigation.
7 There, it seems to me, that the relief requested is a
8 declaration that the statute is unconstitutional, period. Hard
9 stop, on its face.
10 Here, we're dealing with an as-applied challenge, it
11 seems to me. And the State litigation, obviously, has State
12 issues that come up all the time, as Mr. Toth has been
13 explaining to me.
14 What do I need to know about that State court
15 litigation right now, as I decide the TRO motion?
16 I'll start with you. I'm going to ask everyone.
17 **MR. TOTH:** Yeah. I mean, obviously, I don't know
18 what's happening across the street. I'm not there, so I don't
19 know what to tell you.
20 The only -- I mean, there are some issues that are
21 being hashed out over there having to do with election law that
22 are ultimately not dispositive of the issue.
23 Judge Wojtaszek ultimately is going to pass judgment
24 on whether or not the State Constitution or the State statute is
25 unconstitutional.

1 And beyond that, I'm not sure what else Your Honor
2 would like me to --
3 **THE COURT:** I'm not really hearing an abstention
4 argument. I'm not really seeing one, but I just raise it
5 because if someone is going to make it, I need to hear it.
6 **MR. TOTH:** Your Honor, I did research abstention and
7 it just didn't feel like, in the time that I had, that I could
8 adequately brief it.
9 **THE COURT:** Right.
10 **MR. TOTH:** I did request from the State court a -- an
11 adjournment to handle this matter and that was denied, and so I
12 sort of ran out of avenues.
13 **THE COURT:** Mr. Cooney, what do I need to know about
14 the State court case, that wasn't in the papers already?
15 **MR. COONEY:** The only thing in our -- in addition to
16 the papers was that Ms. Walton was a party there.
17 At the time, I wasn't, you know -- the intervenor
18 motion had not been granted, so -- so this decision could have
19 affected her rights in that case.
20 Specifically, for the TRO, it is in my papers, Your
21 Honor. But just -- if I could just make the point clearly,
22 because I don't know how clearly it was made in the papers,
23 quite honestly, the TRO relief is really what's related to the
24 State court action.
25 Because if the TRO or the preliminarily injunctive

1 relief, I think, in pointing to your very earlier point this
2 morning, was if that relief is so broad, but Ms. Walton
3 ultimately prevails on a State court argument, that some other
4 defect in that petition -- no matter the deadline at issue in
5 this case, the Board of Elections should not put him on the
6 ballot -- should not put Mr. Brown's name on the ballot.
7 So if -- which I don't think you should, of course,
8 but if you do grant some injunctive relief, maybe preliminary,
9 because there aren't factual disputes, but if you do, I would
10 request that it be narrowly tailored, so that if the State court
11 invalidates the petition -- the nominating petition or some
12 other basis under State law, that -- that this relief does not
13 preclude the Erie County Board of Elections from not including
14 Mr. Brown's name on the ballot.
15 Specifically, there are some allegations related to
16 the compliance -- the petitions' forms compliance with the
17 Election Law -- State Election Law.
18 I think that -- is that what Your Honor's question
19 was?
20 **THE COURT:** Thank you.
21 Mr. Sells --
22 **MR. SELLS:** Your Honor, I'm not sure how much I can
23 say about the State court litigation, because I'm not involved
24 in it whatsoever.
25 I think I've read all of the filings or most of all

1 the filings in that case.

2 **THE COURT:** Do I need to be concerned about the State

3 court litigation, I guess may be another way to focus your

4 attention.

5 **MR. SELLS:** Yeah. I think the answer is no. I

6 researched abstention as well and I think the answer is there

7 are no abstention doctrines that apply.

8 The closest one is Pullman. But under the Second

9 Circuit's Pullman decision, it's rather clear that the Pullman

10 abstention doesn't apply and I can run through that, if you

11 would like.

12 **THE COURT:** I don't need you to, no. I did the same

13 thing.

14 **MR. SELLS:** The other thing I will say is I believe in

15 the reply papers filed last night, the Brown campaign, which is

16 involved in that case across the street, took issue with

17 Mr. Cooney's last statement about possible other defects in the

18 petition.

19 Noting that Ms. Walton hasn't filed a cross claim and

20 so her issues are not before the Court across the street. I

21 don't know if --

22 **THE COURT:** Can't I fashion relief that works around

23 any State court adjudication of State law issues?

24 **MR. SELLS:** Absolutely.

25 **THE COURT:** Let me take a few minutes. I'm going to

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1 stretch my legs. I'll be back out here -- not that long. Five
2 or six or seven minutes, okay?
3 Use the bathrooms, if you like; make a phone call, if
4 you like. I will come back out here and we'll wrap things,
5 okay?
6 Thank you.
7
8 **(Recess at 12:24 p.m., until 12:40 p.m.)**
9
10 **THE CLERK:** All rise.
11 **THE COURT:** Please be seated.
12 **THE CLERK:** We are back on the record in the matter of
13 Meadors and Others versus Erie County Board of Elections, case
14 number 21-cv-982.
15 **THE COURT:** Well, I reexamined Pullman again and I
16 still believe that there is no impediment to proceed and so I
17 will get you a decision right now.
18 I'm going to do that. I'm going to go through that.
19 We'll issue a text order and this transcript here, today, will
20 be my written decision setting forth the reasons.
21 Upon consideration of the briefing and arguments of
22 counsel and for good cause shown, it is ordered that the motion
23 is granted.
24 Accordingly, the Erie County Board of Elections, along
25 with its officers, agents, servants, employees, attorneys and

1 all of those in active concert with the Board are hereby
2 enjoined from enforcing Section 6-158.9 of the New York Election
3 Law against candidate Byron Brown and from failing to place his
4 name on the 2021 general election ballot, as an Independent
5 candidate for the mayor of Buffalo.
6 As such, the Board is ordered to place Byron W. Brown
7 on the 2021 election ballot as an Independent candidate for
8 mayor of Buffalo.
9 We will do some housekeeping at the end, so let me get
10 through the reasons here.
11 First, standing is sufficient here. And that's set
12 forth quite readily on -- in Anderson, on multiple pages, 460 US
13 780 at 782, 86, 87 and 94 and 806, so I think standing is no
14 impediment here.
15 Laches does not bar this claim either, and I have
16 considered the equitable arguments there in fashioning the
17 equitable relief.
18 The claims are not barred by sovereign immunity, and I
19 cited the case law there.
20 Rule 5.1 is not an impediment to proceeding. I have
21 cited the TRO and preliminary injunction standard. I won't
22 recite it again.
23 Plaintiffs have made their required showing under
24 Anderson versus Celebrezze. Anderson and other cases make clear
25 that an early filing deadline may have a substantial impact on

1 independent minded voters.
2 During election campaigns, the candidates and issues
3 presented evolve and are not static. Candidate's rise and fall
4 in popularity in certain events, and developments may bring new
5 issues to the mainstream, as well as creating opportunities for
6 new candidacies. And that's a concern identified in Anderson as
7 well, 460 US at 790.
8 As the Sixth Circuit has observed, the hallmark of a
9 severe burden is exclusion or virtual exclusion from the
10 ballot -- and that's our Lamont case, from the Second Circuit,
11 quoting the Libertarian Party of Kentucky, which is 835 F.3d
12 570.
13 The most decisive injury to Independent candidates and
14 their interests is simply the premature cutting off of
15 opportunity.
16 In Anderson, Ohio's filing deadline prevented
17 individuals who wanted to be Independent candidates from
18 entering the political arena.
19 That at any time after March 20th, which was 229 days
20 before the 1980 general election, the effect of Ohio's filing
21 deadline in that case, which is relevant here, meant that a late
22 emerging candidate outside of the major parties -- and I
23 understand the dynamics here are a little bit different, but the
24 quote is that: Whose positions could command widespread
25 community support is excluded from the general election, thus

1 denying disaffected voters not only a choice of leadership, but
2 a choice on the issues as well. And that's Anderson citing
3 Williams versus Rhodes.
4 As stated in Anderson, the burden that falls unequally
5 on new or minor political parties or on Independent candidates
6 impinges, but its very nature, on associational choices
7 protected by the 1st Amendment and so it is here.
8 The deadline imposed by Section 6-158.9 of the New
9 York Election Law creates a deadline that in this year, this
10 election year, approximately 161 days before the general
11 election and 28 days before the primary election.
12 Application of this deadline here prevents a late
13 emergent candidate from being on the general election ballot.
14 The -- a contrary outcome here, application of the
15 statute as written, means that the New York law would preclude
16 candidacies that respond to newly emerging issues, to shifts in
17 positions and to other nominees, whose views may or may not fall
18 within the political mainstream -- and that's also from
19 Anderson.
20 There is some case law where courts have routinely
21 applied strict scrutiny and struck down laws that have required
22 Independent candidates or minor parties to file petitions
23 substantially in advance of a primary election or nominating
24 convention.
25 We have talked about some of them here, today.

1 Anderson is one. In the 11th Circuit, there is New Alliance
2 Party of Alabama. There is Cromer, out of the Fourth Circuit.
3 Cromer is 917 F.2nd 819.
4 And we have discussed some of the other case law here
5 as well, dealing with deadlines that were close to primary
6 deadlines. I don't have to repeat those cases. They are in
7 your briefs.
8 The deadline here has the same affect as the deadline
9 in Anderson and, therefore, it's a significant State imposed
10 restriction and burdens the associational rights of Independent
11 voters and candidates.
12 On this record, the Court concludes that plaintiffs
13 have demonstrated that Section 6-158.9 of the New York Election
14 Law severely burdens plaintiffs' rights.
15 Such a regulation is subject to strict scrutiny and
16 will be upheld only if it's narrowly tailored to serve a
17 compelling State interest.
18 We have discussed what the proposed State interests
19 are; political stability, promoting a fair electoral process;
20 ensuring an informed electorate, and administrative need.
21 The first and third were somewhat addressed in
22 Anderson, and then Anderson's somewhat relevant.
23 Regarding the fair electoral process, I'm not seeing
24 the issue and how it plays out here and how it is compelling.
25 And regarding administrative need, I still think we're

1 in a zone of time here that the administrative need, by applying
2 the statute, is not narrowly tailored to a compelling interest.
3 So I think in sum, the proffered State interests are
4 not compelling. Even if they are, the State statute is not
5 narrowly tailored to meet those interests.
6 The State's interests in the application of the
7 statute here, while important, is not -- are not sufficiently
8 tailored to survive strict scrutiny.
9 Regarding irreparable harm, plaintiffs present two
10 crucial reasons that they will suffer irreparable harm in the
11 absence of an injunction.
12 First, harms affecting Constitutional voting rights
13 are of special importance and cannot be compensated with money
14 damages.
15 Second, that practically it is nearly impossible to
16 undo the effects of an election and election procedures, such as
17 the Board of Elections' printing the ballot without Brown's name
18 on it, once done.
19 Irreparable harm is injury that is neither remote nor
20 speculative, but active and imminent and cannot be remedied by
21 an award of money damages.
22 Where a plaintiff alleges injury from a rule or
23 regulation that directly limits 1st Amendment rights, the
24 irreparable nature of the harm may be presumed, in any event.
25 And the cite there is Bronx Household, 331 F.3d at 349.

1 In the Second Circuit and others, courts consistently
2 find irreparable harm in matters where voters have alleged
3 violations of their right to vote -- Yang versus Kellner, 458
4 F.Supp.3d 199 and that is affirmed 805 F. App'x 63. Also,
5 League of Woman Voters of North Carolina, 769 F.3rd 224, out of
6 the Fourth Circuit.
7 Here, plaintiffs would similarly be deprived of the
8 right to cast a vote for a qualified candidate and the political
9 views expressed by that candidate. Therefore, plaintiffs have
10 shown irreparable injury, absent injunctive relief.
11 Regarding the public interest, securing 1st Amendment
12 rights is in the public interest. And the public also has an
13 interest in being presented with several viable options in an
14 election. Plaintiffs have also shown that injunctive relief
15 would serve the public interests.
16 Regarding the balance of the equities, we've talked
17 about a lot of that here, today. And the balance of the
18 equities, in my judgment, tip strongly in plaintiffs favor for
19 the reasons that we have discussed on the record today.
20 As the analyses under Anderson and Burdick shows,
21 plaintiffs injuries arising from the deadlines set forth in the
22 New York statute are substantial.
23 Further, defendants haven't shown serious cost or
24 harms in light of the deadline for the County Boards of
25 Election, not having past yet to certify. In sum, the TRO

1 motion is granted.

2 Some housekeeping items, does anyone want to be heard

3 on whether there should be a bond or security?

4 I don't -- I don't see it. I don't see how that makes

5 any sense here, but I'm going to give you the chance to talk

6 about it.

7 Defense?

8 **MR. TOTH:** Your Honor, earlier in proceedings you had

9 discussed the opportunity or to determine whether or not it was

10 going to be a TRO or a preliminary injunction.

11 And so maybe I'm -- I'm quite honestly not too

12 concerned about a bond, but I am concerned about whether this is

13 fashioned as a TRO or preliminary injunction.

14 **THE COURT:** Anyone else on the bond?

15 Mr. Cooney?

16 **MR. COONEY:** No, Your Honor.

17 **THE COURT:** Okay. So I'll waive any bond requirement

18 here under 65(c).

19 So I granted the motion for a TRO. In my judgment,

20 under the case law -- and the Second Circuit is going to read

21 this and make its own judgment, but a TRO application and TRO

22 outcome that is on a full record, where there aren't factual

23 disputes, and everyone has had a chance to come and argue and

24 the ultimate relief requested in the complaint and would be

25 preliminary injunction motion is the same, as granted in the

1 TRO, the case law that I'm looking, at least, is telling me that
2 the Second Circuit is going to look at that as a preliminary
3 injunction, when it decides whether to hear an interlocutory
4 appeal.
5 Because if it were just a TRO, you are not getting
6 there under an interlocutory appeal, so I raise that.
7 I don't know where this needs to go yet. You are the
8 parties. You are the litigants. The TRO, if it's granted, as
9 is, it remains in effect for 14 days.
10 And if it stays the way it is, we have got to schedule
11 a preliminary injunction hearing pretty quickly.
12 So plaintiffs --
13 **MR. SELLS:** Your Honor, I think the ball on this
14 question is in the defendant and defendant intervener's court as
15 to whether they wish to dispute any of the facts that are
16 alleged in our complaint and that might necessitate a hearing.
17 Now, as I've noted, Ms. Walton's answer does dispute
18 facts in the complaint, specifically disputing whether the
19 legislature -- paragraph 16 of our complaint, which is whether
20 the legislature adopted the statute that's at issue here. And I
21 don't know if that dispute will remain or not.
22 **THE COURT:** I'll wait to hear from the parties then --
23 Mr. Toth, if you want to be heard on this issue as well, but I
24 will wait to hear from the parties on whether there will be a
25 forthcoming preliminary injunction motion; whether the parties

1 demand a hearing on that motion; whether there is going to be
2 motion of summary judgement; those types of things in terms of
3 what is next.
4 But suffice it to say under the rule -- unless I
5 extend it, the TRO is in effect for 14 days.
6 Mr. Toth --
7 **MR. TOTH:** Yeah. And that's obviously our biggest
8 concern. I also have to discuss our options with both
9 commissioners, but I think our options are -- I mean, if it's a
10 TRO and it's in place for 14 days, then, obviously, the issue is
11 settled.
12 There is no recourse, because 14 days gets us to when
13 we're mailing out military ballots.
14 So my preference, based on what Your Honor is saying,
15 in my limited understanding with Second Circuit procedure, and
16 recognizing it really doesn't appear there are facts in
17 dispute -- certainly no material facts, that this should be
18 fashioned as a final preliminary injunction and then we are done
19 here.
20 **THE COURT:** Well, I'll wait to be prompted on that
21 issue.
22 Mr. Cooley (sic) --
23 **MR. COONEY:** Your Honor, our position on it is that
24 the -- Your Honor's decision was based on undisputed facts for
25 this TRO and, therefore, we would ask that it be immediately

1 converted to a preliminary injunction.

2 **THE COURT:** Mr. Toth?

3 **MR. TOTH:** Exactly, Your Honor.

4 **THE COURT:** Okay. Well, that's fine because in my

5 judgement -- I'll give you the cases, it's Brooks -- Brook

6 Beverage, 2021 Westlaw 568266 and then Riddick, 730 F. App’x 34,

7 Second Circuit and then In Re: Criminal contempt proceedings

8 321 -- 329 F.3rd 131.

9 I think it's -- I think it -- whether we call it that

10 or not, we kind of got there -- the preliminary injunction

11 basis, so I think that that's what the order will be fashioned

12 as.

13 And I think that probably is for the betterment of the

14 parties anyway, when you try to get this thing to the Second

15 Circuit.

16 **MR. COONEY:** Thank you, Your Honor.

17 **THE COURT:** So the order will read as a preliminary

18 injunction, therefore, it will not have an expiration date of

19 14 days.

20 Therefore, it will be in effect until resolution of

21 the -- any motion for permanent injunction, or, obviously,

22 unless modified or reversed by the Second Circuit.

23 So let's see what else I have on my housekeeping --

24 okay. I don't have anything else.

25 Counsel, does anyone -- any of you?

1 **MR. SELLS:** No, Your Honor.
2 **MR. TOTH:** No, Your Honor.
3 **THE COURT:** Very good. Have a good day.
4 **MR. COONEY:** Your Honor -- I'm sorry, Your Honor --
5 **THE COURT:** Hold on.
6 Cooley --
7 **MR. COONEY:** I'm sorry, Your Honor. Earlier, you did
8 grant the motion --
9 **THE COURT:** Cooney. I'm sorry.
10 **MR. COONEY:** No problem.
11 **THE COURT:** Yep.
12 **MR. COONEY:** I know you granted Ms. Walton's motion to
13 intervene.
14 Earlier, I wasn't sure if you were reading it into the
15 final decision or if it would be in a text order, but I --
16 **THE COURT:** It will be in the text order.
17 **MR. COONEY:** I just wanted to point that out, because
18 I may need to ask procedurally for whatever we end up doing.
19 **THE COURT:** I'm going to ask -- why don't you,
20 Ms. Henry, when we do the text orders, do the intervention text
21 order separately and then we will address the -- everything else
22 in the second text order.
23 **MR. COONEY:** Thank you, Your Honor.
24 **THE COURT:** Okay. Thank you. Everybody have a great
25 day.

1 **MR. COONEY:** Thank you, Your Honor.
2 **MR. TOTH:** Thank you.
3 **MR. SELLS:** Thank you.
4
5 (Proceedings concluded at 12:56 p.m.)
6 * * *
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2 "I certify that the foregoing is a correct transcript, to the

3 best of my ability, from the record of proceedings in the

4 above-entitled matter."

5

6

7 *s/ Bonnie S. Weber* — September 7, 2021

Signature — Date

8

9 BONNIE S. WEBER

10 Official Court Reporter

United States District Court

11 Western District of New York

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EXHIBIT G

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE
---x
In the Matter of the Application of

BYRON W. BROWN

Petitioner-Candidate- Aggrieved,
-against-

ERIE COUNTY BOARD OF ELECTIONS, Index No.

Respondent,

VERIFIED PETITION

INDIA B. WALTON,

Respondent-Objector-Candidate,

JOAN L. SIMMONS,

Respondent-Objector.

For and Order and Judgment pursuant to the New York State Election Law, the New York State Constitution and the United States Constitution, to validate the independent nominating petition of Petitioner herein as a candidate for Mayor of the City of Buffalo on behalf of the independent entity known as the Buffalo Party in the General Election to be held on November 2, 2021, and to place his name on the ballot for said election.
,
---x

TO THE SURPREME COURT OF STATE OF NEW YORK, COUNTY OF ERIE:

Petitioner-Candidate-Aggrieved BYRON W. BROWN**,** by his undersigned attorneys, respectfully alleges as follows:

1. At all times hereinafter mentioned, Petitioner-Candidate-Aggrieved BYRON W. BROWN ("Petitioner") is a candidate within the meaning of Section 16-102 of the Election Law, having duly filed a Nominating Petition with Respondent ERIE COUNTY BOARD OF ELECTIONS ("Board of

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Elections") naming Petitioner as a candidate for MAYOR OF THE CITY OF BUFFALO for the General Election to be held on the November 2, 2021 ("Nominating Petition").

2. Respondent Board of Elections is charged with the responsibility of the supervision of the conduct of official elections held in THE CITY OF BUFFALO including the duties of receiving Nominating Petitions for public office and party position in political subdivisions located entirely within THE CITY OF BUFFALO, the review and determination of Objections and Specifications of Objections to such Nominating Petitions, notification of a determination of non-compliance, maintaining the permanent personal voter registration poll records of voters and official maps for all election districts located within THE CITY OF BUFFALO, and the preparation of official General Election ballots for use in THE CITY OF BUFFALO.

3. On or about August 17, 2021, the said Nominating Petition was filed with Respondent ERIE COUNTY BOARD OF ELECTIONS naming Petitioner as a candidate for MAYOR OF THE CITY OF BUFFALO on the Buffalo Party in the General Election to be held on the November 2, 2021.

4. Petitioner is, in all respects, duly qualified for said nomination and to hold said public office.

5. The Nominating Petition is in due and proper form as prescribed by law, and contains more than the minimum number of signatures of duly enrolled voters of the City of Buffalo for which said nomination was made, and the Nominating Petition is otherwise valid, proper, sufficient and legally effective.

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6. After the filing of the Nominating Petition, written General Objections to the Nominating Petition were filed with Respondent Board of Elections by the following persons referred to herein as the Respondent-Objector and Respondent-Objector-Candidate, whose purported respective residences were indicated on said written Objections, and Petitioner is therefore aggrieved:

NAME OF OBJECTOR(S)	ADDRESS OF OBJECTOR SET FORTH ON OBJECTIONS
JOAN L. SIMMONS (Objector)	65 HOLLING DRIVE, BUFFALO, NY14216
INDIA B. WALTON (Objector-Candidate)	815 7TH STREET, #2, BUFFALO, NY 14213

7. Subsequent to the filing of said General Objections, said Respondent-Objectors filed Specifications of Objections with Respondent Board of Election in support of the aforesaid written General Objections. Petitioner served and filed with Respondent Board of Elections his response to said Objections on or about August 24, 2021, urging the Board not to sustain said Objections on the ground that its jurisdiction is limited to the review of the face of the Nominating Petition and that the filing deadline violated Petitioner's and the Nominating Petition signers' First and Fourteenth Amendment rights under the United States Constitution and parallel rights under the New York State Constitution.

8. The aforesaid General Objections and Specifications of Objections were deficient as a matter of law and the allegations contained therein were without merit in law or in fact.

9. Nevertheless, Respondent Board of Elections erroneously acted beyond its limited jurisdiction

and sustained said Objections and improperly invalidated Petitioner's Nominating Petition, invalidating his candidacy therein, on the specific ground that the Nominating Petition was not timely filed.

10. Pursuant to Article 16 of the Election Law of the State of New York, Petitioner commences the within Validating Petition so that this Court may review the pertinent issues of law and fact with regard to said Nominating Petition and Petitioner's candidacy therein, and determine that Respondent Board of Elections erroneously invalidated said Nominating Petition and Petitioner's candidacy therein.

11. Specifically, Respondent Board of Elections erroneously determined that the Nominating Petition was filed late, basing its conclusion on § 6-158(9) that nominating petitions were due twenty-three weeks prior to the General Election.

12. The statute that Respondent Board of Elections relied upon in making its erroneous determination is unconstitutional and should not have precluded the filing of said Nominating Petition and its validation. It is unconstitutional based upon well-established law, as articulated by the United States Supreme Court and a variety of federal courts, that a deadline for independent nominating petitions twenty three weeks before a general election is not rationally based, infringes upon the rights of candidates and those who have signed their nominating petitions in support of their candidacy, and violates the candidate's equal protection rights under the federal and state constitutions.

13. The pertinent statute also lacks any rational basis in that, until 2019, the deadline for submitting

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nominating petitions to obtain a ballot line for a general election has been only eleven weeks, not twenty three weeks. Said Nominating Petition was filed eleven weeks prior to the General Election to be held on November 2, 2021.

14. Even when the primary election for congressional candidates was moved from September to June in 2012, 2014, 2016 and 2018, the deadline for the submission of nominating petitions for congressional office (and all other offices) was not changed. This retention of the deadline for nominating petitions as eleven weeks prior to a general election was supported by the New York State Board of Elections.

15. Accordingly, it was arbitrary and capricious and without any rational basis for the state legislature to simply change the date nominating petitions were due from eleven weeks to twenty three weeks prior to a general election. As such the new statute is unconstitutional.

16. Petitioner was not harmed by the unconstitutional change of the date nominating petitions were due until he lost the Democratic Party primary election and determined to continue to run for re-election. Accordingly, Petitioner circulated petitions and filed the Nominating Petition by the deadline of eleven weeks prior to this year's General Election.

17. For these reasons, this Court is requested to declare the statute requiring that nominating petitions be filed twenty three weeks prior to the General Election to be unconstitutional, reverse Respondent Board of Elections' erroneous decision to invalidate the Nominating Petition and Petition's candidacy, and order that Petitioner's name, under the Buffalo Party, be placed on all ballots

used in the General Election to be held on November 2, 2021.

18. It is respectfully requested that the within Order to Show Cause be granted so that this proceeding may be commenced in a timely fashion.

19, In accordance with prior decisions of this and other Courts, whose decisions are controlling, Petitioner requests the right to submit proof establishing the validity of the Nominating Petition and validity of Petitioner's candidacy.

20. Petitioner requests that Respondent Board of Elections produce upon the argument and hearing of this application the aforesaid Nominating Petition; and the minutes and proceedings of any meeting of Respondent Board of Elections made for the purpose of ruling upon said General Objections and Specifications of Objections filed by said Objectors herein

21. Petitioner request that the within Order to Show Cause be signed and issued forthwith because in an Election Law proceeding such as the instant one, commencement of the proceeding requires not only the filing of the petition, but the actual service of the Order to Show Cause and Petition upon all necessary parties before the expiration of the Statute of Limitations, which is three business days after the Respondent Board of Elections' adverse determination – in this case, September 1, 2021. Because of the highly truncated Statute of Limitations period, request is made for liberal service provisions requested, as is routinely provided as reflected in the Order to Show Cause. Furthermore, this election proceeding has a preference over all other matters. Accordingly, it is requested that the annexed Order to Show Cause be signed and issued today.

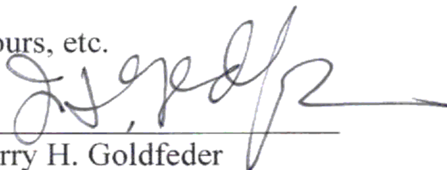
22. Petitioner has no adequate remedy at law.

23. No previous application has been made for the relief sought herein or for the Order to Show Cause hereto annexed, or for any similar relief.

WHEREFORE, Petitioner respectfully prays that the annexed Order to Show Cause be granted, for a final Order and Judgment granting the relief prayed for in the Order to Show Cause, and for such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 27, 2021

Yours, etc.



Jerry H. Goldfeder
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VERIFICATION

JERRY H. GOLDFEDER, an attorney duly admitted to practice law before the Courts of the State of New York, affirms under the penalties of perjury:

I am Special Counsel to Stroock & Stroock & Lavan LLP, attorneys for Petitioner BYRON W. BROWN in this proceeding. I am not a party to this proceeding. I have read the within Petition and know the contents thereof and the same are true to my knowledge; as to matters therein alleged on information and belief, I believe them to be true. The basis of my belief is that I have reviewed the pertinent law as well as the within Petition, as well as records of the Board of Elections, and have had communications with individuals with knowledge of the facts. The reason I am making this verification is that my office is in the County of New York and Petitioner is located in the County of Erie.

Dated: New York, New York
August 27, 2021

JERRY H. GOLDFEDER

EXHIBIT H

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE : VIRTUAL PROCEEDINGS : PART 16

In the Matter of the Application of

BYRON W. BROWN,
Petitioner-Candidate-Aggrieved,

-against-

ERIE COUNTY BOARD OF ELECTIONS, INDEX NO. 811973/2021

Respondent,

INDIA B. WALTON,
Respondent-Objector-Candidate,

JOAN L. SIMMONS,
Respondent-Objector.

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25 Delaware Avenue
Buffalo, New York
September 3, 2021

B e f o r e:

HONORABLE PAUL B. WOJTASZEK
Supreme Court Justice

A p p e a r a n c e s:

STROOCK & STROOCK & LAVAN, LLP
BY: JERRY H. GOLDFEDER, ESQ.,
Appearing for Petitioner Byron Brown via Teams.

JEREMY C. TOTH, ESQ.,
Appearing for Respondent Erie County
Board of Elections via Teams.

DOLCE FIRM
BY: SEAN E. COONEY, ESQ.,
Appearing for Respondent India Walton via Teams.

LAW OFFICES OF JESSICA A. KULPIT
BY: JESSICA A. KULPIT, ESQ.,
Appearing for Respondent India Walton via Teams.

1 THE CLERK: This is the matter of Byron W.
2 Brown against the Erie County Board of Elections, India
3 B. Walton and Joan L. Simmons, and that's Index Number
4 811973 of 2021. Please state your appearances for the
5 record.
6 MR. GOLDFEDER: Good afternoon. For the
7 petitioner Byron W. Brown, this is Gary H. Goldfeder,
8 Stroock & Stroock & Lavan, 180 Maiden Lane, New York,
9 New York.
10 MR. TOTH: Jeremy Toth for the Erie County
11 Board of Elections and the Commissioners.
12 MR. COONEY: Good afternoon, Your Honor.
13 Sean Cooney on behalf of India Walton.
14 MS. KULPIT: Good afternoon, Judge. Jessica
15 Kulpit also on behalf of and as co-counsel to
16 Mr. Cooney for Ms. Walton.
17 THE COURT: All right. Good afternoon. We
18 all know this matter has been delayed. It was
19 scheduled for eleven o'clock this morning; however,
20 you, Mr. Cooney, and you, Mr. Toth, were engaged in
21 Federal Court before the Honorable John Sinatra on a
22 case involving some of the same parties and what I
23 believe to be the same issue.
24 A preliminary injunction was granted
25 requiring Mr. Toth's client, the Erie County Board of

1 Elections, to place Byron Brown's name on the ballot
2 for the general election for Mayor of Buffalo, and I
3 don't know what the parties are going to do relative to
4 that, whether there will be appeals or not.
5 I asked the parties how they believed I
6 should proceed, but before I get there, just so
7 everybody that is on this link, whether they be the
8 media or parties, representatives, whosever on this,
9 there is a prohibition on recording this proceeding.
10 The only recording that's official is by the court
11 reporter, who is in the courtroom with me today. So
12 there will be no electronic recording of this
13 proceeding.
14 With that, Mr. Goldfeder, now, you were not
15 present nor involved in the federal proceeding; is that
16 accurate?
17 MR. GOLDFEDER: That is accurate, Your Honor.
18 THE COURT: All right. And you, of course,
19 have been waiting patiently, along with Ms. Kulpit and
20 others, while we had this virtual courtroom link open
21 and ready to conduct business. However, because
22 Mr. Toth and Mr. Cooney were not able to join us, we
23 delayed that and we return at this time.
24 So what is your position relative to the
25 significance or the binding effect on Judge Sinatra's

1 ruling relative to how we can proceed here?
2 MR. GOLDFEDER: Your Honor, my feeling is
3 that this proceeding ought to be adjourned for a short
4 period of time. As you indicated, there is a
5 preliminary injunction directing the Board of Elections
6 to put my client on the ballot. That's the relief we
7 seek here. And unless that is stayed or overturned, it
8 seems to me that this proceeding shouldn't go forward.
9 We should have a short adjournment simply because my
10 understanding is that the ballot will be fixed,
11 certified next week, and if anything is going to
12 interfere with this preliminary injunction, it's going
13 to have to be done by the United States Court of
14 Appeals before the Board of Elections acts, I believe
15 on September 8th and 9th. So I think it makes sense
16 from a judicial economy point of view to adjourn until
17 then.
18 THE COURT: Mr. Toth, on behalf of the Erie
19 County Board of Elections.
20 MR. TOTH: There's no objection to a brief
21 adjournment. I'm also prepared to proceed today. You
22 know, I don't take a strong position one way or the
23 other. If we do have an adjournment, I would just
24 request that it be, you know, brief because, as
25 Mr. Goldfeder said, the process really begins next 8th

1 and 9th. We have had circumstances where changes were
2 made to the ballot by courts after the certification
3 and we have no choice but to follow those court
4 rulings, but Mr. Goldfeder's right. I mean, 8th, 9th,
5 those are the days for the certification, and then the
6 following week we really start sending actual ballots
7 out to voters. So any adjournment would really need to
8 be quick, but there's no objection from the Board to a
9 brief adjournment.
10 THE COURT: And with respect to the parties
11 in the federal proceeding, some of them are identical;
12 do you agree?
13 MR. TOTH: Well, so the parties in the
14 federal proceeding, really, no, the only party -- well,
15 India Walton is now an intervenor, so that is the same,
16 and the Board of Elections. The plaintiffs are
17 different.
18 THE COURT: But the statute being challenged
19 is the same statute.
20 MR. TOTH: Yeah. Identical, identical
21 statute, and it's the same set of arguments.
22 THE COURT: And it's the same relief
23 requested.
24 MR. TOTH: And the same relief requested,
25 correct.

1 THE COURT: Thank you. Mr. Cooney, on behalf
2 of your client, Ms. Walton.
3 MR. COONEY: Thank you, Your Honor. Of
4 course, as I said off the record, this State Court
5 proceeding will impact the ballot, the ability of the
6 Board of Elections to properly design, print and
7 distribute ballots. No matter the Federal Court
8 posture today, it could change as a result of appeal.
9 Additionally, there are State Court
10 allegations in this action that are separate from the
11 constitutional challenges from which a different
12 outcome could make the federal injunctive relief moot
13 regarding Mr. Toth's obligations to put Mr. Brown's
14 name on the ballot. They're not required to put him on
15 the ballot if the petition is otherwise invalid. They
16 are right now enjoined from enforcing the
17 constitutionally challenged deadline. So that's
18 number one.
19 Additionally, there are appellate rights for
20 Mr. Goldfeder's client and for my client and for the
21 Board of Elections regarding both the State Court and
22 Federal Court outcomes. Those rights need to play out
23 simultaneously because nobody could have the benefit of
24 that constitutional due process of judicial review if
25 we wait.

1 This, in fact, was the position of
2 Mr. Goldfeder several days ago when Mr. Toth asked for
3 an e-mail. Mr. Goldfeder e-mailed Mr. Hickey and a
4 number of other people and described the legal issues
5 is somewhat different. Just for the record, the e-mail
6 from Mr. Goldfeder to Mr. Hickey, August 31st, 2021, at
7 3:15 in the afternoon. Mr. Goldfeder said the issues
8 were somewhat different at that point and he could not
9 consent to an adjournment. He also said, I don't think
10 it is a good idea for litigants to throw up their hands
11 in a State proceeding and simply rely on the Federal
12 Court to make a decision. At that point it was the
13 position of Mr. Goldfeder that this Court should hear
14 it.
15 That was my position then, although at that
16 point my client hadn't even been served with the
17 proceeding. I didn't object to the adjournment,
18 despite the volume of work it took to put us in this
19 situation, and the idea now that there has been some
20 injunctive relief that is not on the merits should give
21 rise to us as a State Court not addressing the rest of
22 the claim is only gonna accomplish, further accomplish
23 the delay in the ballot, which is by design, quite
24 frankly, from the beginning of the filing of the
25 petition and contemporaneous action.

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1 So I don't know how we could adjourn it
2 without jeopardizing, further jeopardizing the rights
3 of all of the parties, no matter the outcome, to
4 actually accomplish both judicial review and the proper
5 administration of an election. And I don't think that
6 the issues are identical, most importantly, and neither
7 did Mr. Goldfeder a few days ago.
8 THE COURT: And that's based on not only the
9 constitutionality of the statute being challenged, but
10 you've also alleged there's defects in the petitions
11 themselves.
12 MR. COONEY: That's correct.
13 THE COURT: And if the Court finds that
14 that's the basis to reject them, then that's different
15 than the constitutionality of the statute, in which
16 case, you may be entitled to different relief.
17 MR. COONEY: Correct. The other only thing I
18 would add is that part of the reason that we didn't
19 adjourn this matter, I don't know the Court's
20 reasoning, but part of the reason that was discussed in
21 e-mails between counsel, including Mr. Goldfeder, was
22 the statement that September 8th is pushing up against
23 the time the ballots are required to be printed. It's
24 already going to be difficult, I think, for any federal
25 review by September 8th. If we then accomplish that

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1 somehow, we then have to come in and have what we're
2 all right here ready to do today before we do that. I
3 just don't know how we can practically accomplish that
4 without -- regardless of the outcome of the merits
5 perhaps inadvertently having the Board of Elections
6 distribute ballots that are ultimately inconsistent
7 with the rules of either Court, no matter the outcome.
8 I don't know how we -- I think not resolving it in
9 today's proceeding and immediately thereafter, if we
10 need, to with another Court is putting a lot of
11 pressure on the Board of Elections --
12 THE COURT: Well, I have a --
13 MR. COONEY: -- to properly do this.
14 THE COURT: Mr. Cooney then, Judge Sinatra,
15 did he schedule a hearing on the merits?
16 MR. COONEY: No. The injunctive relief was
17 converted immediately to preliminary injunctive relief.
18 It will remain there until there is a motion to render
19 it permanent relief is my understanding anyway, or an
20 Appellate Court modifies or otherwise reverses that
21 decision.
22 THE COURT: So you have no further date in
23 front of Judge Sinatra. It's going to be an
24 Appellate -- strike that, a Circuit Court of Appeals
25 decision modifying or vacating it, in which case the

1 importance of this decision could not be stressed
2 enough.
3 MR. COONEY: Correct. I don't know if the
4 timing of -- there's no appeal filed, just to be clear,
5 Your Honor. I mean, I got the decision after this
6 proceeding began, the actual Order electronically, so
7 I'm going to get right on it, but I haven't yet. So I
8 don't know the timing of the Second Circuit yet at all,
9 but you're correct generally.
10 THE COURT: All right. And with respect to
11 the urgency of this matter, as you stated, time is of
12 the essence because of the schedule that's been
13 announced relative to when the State certifies, when
14 the County certifies and when the ballots have to be
15 mailed and prepared. Is there any harm if the return
16 date was prior to the 9th, if I did grant the
17 adjournment?
18 MR. COONEY: If it was -- you mean, if you
19 grant Mr. Goldfeder's request for an adjournment today?
20 THE COURT: Right.
21 MR. COONEY: And schedule this proceeding for
22 the 9th?
23 THE COURT: Right, next week.
24 MR. COONEY: Yeah. I just -- I was just
25 making sure I understood. I think that would cause

1 prejudice because if there's a decision today -- I know
2 that it's not easy to make decisions quickly, but
3 Election Law cases, often they come within the same day
4 or from the bench or immediately thereafter -- that
5 would give us next week on either side to seek some
6 option of appellate review if necessary. I don't mean
7 to presume that that's what I'm going to do, Your
8 Honor, I hope you understand that, but I do -- I
9 don't -- if we're trying to meet a September 8th
10 deadline, resolving it today would give us next week to
11 make other applications to try to get some relief from,
12 if necessary, from this action prior to September 8th
13 or immediately thereafter.
14 It's also, the delay is an accumulating
15 effect of hardship potentially because absentee ballots
16 may go out, but also if the ballot changes, the Board
17 of Elections may then have to do a new ballot, which
18 they had to do when this deadline was in place during
19 the DOJ years because it's so unreasonably late. But
20 if that happens again because of this proceeding and
21 Mr. Brown's name is on the ballot and removed at an
22 appellate level, what's gonna happen is the Board of
23 Elections is going to resend ballots to military
24 members and families overseas with some description of
25 how to vote on the new ballots, so if we then have

1 to -- if they do that and then Your Honor makes a
2 decision that is different than that, we could go back
3 to the third one or the original one or a third version
4 potentially, so I don't know how we can put off
5 anything one day at this point without jeopardizing all
6 of these competing rights.
7 THE COURT: All right. And I've asked you
8 about the doctrines of res judicata and collateral
9 estoppel, and you've argued that they don't apply here
10 by virtue of it being only preliminary relief,
11 injunctive relief and not on the merits.
12 MR. COONEY: Additionally, they are not
13 raised. They have not been raised in this petition.
14 Mr. Brown and those that commenced the proceedings, his
15 local counsel in the Federal Court is the same attorney
16 who provided service in the State Court action, so he
17 proceeded with this return date, declined to consent to
18 an adjournment and did not raise the issue of res
19 judicata or collateral estoppel. The Order is not
20 before you. The issue hasn't been briefed.
21 More importantly, injunctive relief is not a
22 resolution on the merits. Ultimately, what may happen
23 is the constitutionality of that deadline under
24 applicable law, it could be upheld by Your Honor, by
25 Judge Sinatra even still, or by the some Appellate

1 Court or both Appellate Courts, and ultimately what we
2 could have is a resolution on the merits, despite this
3 current injunctive relief. We're not there on the
4 merits yet. There's no estoppel effect from what
5 happened this morning, even if it were raised.
6 THE COURT: Well, we also have the
7 possibility that two different sovereigns, a Federal
8 District Court and a State Supreme Court, could have
9 contrary rulings, which would then create a dilemma of
10 conflict of law and that same issue of the supremacy
11 clause of the U.S. Constitution, Article 6 Section 2,
12 which gives me pause to proceed today.
13 MR. COONEY: That will be an issue if Your
14 Honor reaches a decision that's contrary. Perhaps that
15 could be an issue. It depends on the basis of your
16 ruling. Ultimately, I don't think that there is a
17 reason to not rule. That question of that immunity
18 would be resolved in enforcement of the decision, not
19 in Your Honor's statutory right to make a decision as
20 your own elected -- independently elected body.
21 THE COURT: All right. Anything else
22 relative to how to proceed today, Mr. Cooney?
23 MR. COONEY: No, Your Honor. Thank you.
24 THE COURT: As a preliminary matter, I have
25 reviewed the extensive papers filed by the parties and

1 have, of course, been paying attention to what Judge
2 Sinatra did in Federal Court.
3 Based on everything I've heard, I am going to
4 grant the brief adjournment, but we do need to schedule
5 our return date prior to the State certification and/or
6 the County certification.
7 Mr. Goldfeder, are you available next week?
8 You have to unmute.
9 MR. GOLDFEDER: Sorry, Your Honor. By the
10 way, just for the record, I was here at eleven a.m.,
11 here virtually, prepared to go forward. I wanted to go
12 forward irrespective of the federal lawsuit. I have
13 nothing to do with the federal lawsuit. I'm not even
14 certain what the arguments were because, as Mr. Cooney
15 I'm sure is well aware, if there is a connection
16 between a State Court proceeding and a related Federal
17 Court proceeding, there are issues that can be raised
18 that could negate the parties' interests in both State
19 Court and Federal Court, so I made certain to stay away
20 from the Federal Court proceeding.
21 I am available only in the latter part of the
22 week because it's Rosh Hashanah on Tuesday and
23 Wednesday.
24 THE COURT: Well, Wednesday is the 8th. The
25 9th is Thursday. That's when the State certification

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1 is done.

2 MR. GOLDFEDER: Yeah. I could be

3 available -- so I could be available on Thursday,

4 Thursday morning.

5 THE COURT: Mr. Toth.

6 MR. TOTH: Your Honor, and I -- it's my fault

7 for forgetting about, you know, my own religion's

8 calendar, but yeah, you know, when I said I was

9 agreeable to a brief adjournment, I was thinking

10 Monday.

11 THE COURT: Well, Monday is a holiday.

12 MR. TOTH: Tuesday, or Wednesday at the

13 latest with of course total, total forgetfulness about

14 Rosh Hashanah. Yeah, I mean, so if we come back here,

15 you're gonna be grappling with these issues on the day

16 that we are certifying our ballot. That's -- that gets

17 very sticky. But yeah, I'll make myself available

18 whenever Your Honor -- I'll show up on a Saturday if

19 you need to, but I am, you know, I am now more mindful

20 of Sean Cooney's arguments about the problems for my

21 client if we're pushing this off actually all the way

22 to the end of next week.

23 THE COURT: And this Court as well.

24 MR. GOLDFEDER: I could be --

25 THE COURT: Go ahead, Mr. Goldfeder.

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1 MR. GOLDFEDER: I could be available on
2 Wednesday afternoon.
3 THE COURT: What time in the afternoon on
4 Wednesday?
5 MR. GOLDFEDER: I'm sorry? Say again.
6 THE COURT: Any time on Wednesday afternoon?
7 MR. GOLDFEDER: Yes.
8 THE COURT: Two o'clock and beyond?
9 MR. GOLDFEDER: Yes.
10 THE COURT: And that's the 8th. That's still
11 a problem for Mr. Cooney and you, Mr. Toth, I
12 understand that, but if that's the soonest we can do
13 it, and I want to accommodate the parties because time
14 is of the essence, why don't we do that.
15 COMMISSIONER MOHR: Your Honor, this is Ralph
16 Mohr. If I may, I want to try to clear up what may be
17 a misconception. The State Board on the 8th will
18 certify the State candidates and any State questions.
19 They will not be bringing up an issue of local
20 candidates. That's done by the County Board on the
21 9th. So when you're talking about when this has to be
22 certified by, it's not -- the 8th is not a critical
23 date, the 9th is.
24 THE COURT: So if we return on Wednesday
25 afternoon, the 8th, then we'll be able to, with a

1 timely decision, not interfere with the calendar and
2 the certification?
3 MR. TOTH: I think that's fair, Your Honor,
4 yeah.
5 THE COURT: All right. Let's do that. All
6 right. Let's return at say 2:30. I'll devote the
7 entire afternoon on Wednesday, the 8th. And if there's
8 any other developments with the federal case, you'll be
9 able to advise me accordingly. All right. Let's say
10 two p.m. I want to give you as much time as I possibly
11 can. So two o'clock Wednesday, September 8th.
12 MR. TOTH: Your Honor, just one matter for
13 housekeeping.
14 THE COURT: Yes.
15 MR. TOTH: So Mr. Goldfeder has filed several
16 various things over the last couple days. Truthfully,
17 I haven't had an opportunity --
18 MR. GOLDFEDER: Things?
19 MR. TOTH: Yeah, things, because I don't know
20 what they were. At some point -- you know, the Order
21 to Show Cause doesn't provide for responding papers or
22 other things. I'm not sure when -- well, I guess my
23 question to Your Honor is, should I be responding to
24 the things that Mr. Goldfeder has submitted? And will
25 Mr. Goldfeder be submitting more things as brilliant

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1 ideas occur to him?
2 THE COURT: Well, one of them was -- one of
3 them was a one-page affirmation wherein he argued that
4 you didn't have standing to argue the constitutionality
5 of the statute. You simply represent a board that is
6 tasked with a ministerial duty as to whether or not to
7 accept the filing. So that, you can argue orally.
8 Mr. Goldfeder, do you have anything else that
9 you are planning on filing?
10 MR. GOLDFEDER: Well, you know what? Maybe I
11 am going to withdraw my application and let's argue
12 this so it can be dispensed with. I'm not interested
13 in any more papers, filing. We know what the issues
14 are. If this Court renders a decision -- when this
15 Court renders its decision, we will have a clearer path
16 as to what the parties will have to do. Let's just --
17 I'm just suggesting that I -- I changed my position on
18 this. Let's go forward.
19 THE COURT: You want to go forward right now?
20 MR. GOLDFEDER: I don't see why not. I mean,
21 it seems a little -- it seems a little bizarre to do
22 so. There is a Federal Order. It's going to be in
23 place unless they get a stay or a quick reversal.
24 That's going to be the law of the land with regard to
25 this candidacy. But let's just clear this up because I

1 believe that this Court is going to rule similarly on
2 the constitutional issue and I also believe that this
3 additional issue is a bogus one relating to the
4 committee on vacancies, committee to fill vacancies,
5 and I'm happy for the Court to rule that it's an
6 invalid decision -- invalid argument, so I'm not overly
7 concerned here, and let's just dispense with this so
8 that we get on with this election.
9 THE COURT: And Mr. Goldfeder, again, I have
10 not made a ruling, nor have I heard the arguments, and
11 I am sure will have some questions. In the event I
12 disagree with you at the end of the arguments and I
13 deny you your relief, could that not cause issues with
14 what Judge Sinatra might do or what the Second Circuit
15 Court of Appeals might do?
16 MR. GOLDFEDER: No, not going to -- it's not
17 going to change his decision.
18 THE COURT: Mr. Toth, are you ready to
19 proceed?
20 MR. TOTH: Sure, Your Honor, why not.
21 THE COURT: Mr. Cooney, I know what your
22 position is.
23 MR. TOTH: I think I'm the only one here,
24 Your Honor, I want it noted for the record, who's had a
25 consistent position on the adjournment. I think that

1 should be noted for the record. No, Mr. Cooney. Not
2 you, Mr. Cooney. You've been all over the place on
3 this adjournment, back and forth, back and forth. I'm
4 just making jokes, Your Honor. Yeah, whatever Your
5 Honor wants to do. I'm exhausted.
6 THE COURT: And again, you have -- you did --
7 so everybody's clear, you promptly asked me to consider
8 an adjournment because you yourself could not be in two
9 places at the same time and you had concerns about the
10 identical proceeding being tried or being heard in two
11 different forms and potential pitfalls of that. But
12 knowing what you know now, you're ready to proceed?
13 MR. TOTH: I'd love to, Your Honor.
14 THE COURT: All right. Mr. Goldfeder, the
15 floor is yours. It's your petition.
16 MR. GOLDFEDER: Thank you, Your Honor. I
17 just want to make a few preliminary remarks. Mr. Toth
18 may not be impressed with the things that I've
19 submitted, but I think the arguments are pretty clear
20 as to what's before you. The constitutional issue is
21 clear, the arguments have been made and I welcome
22 whatever questions you have, although I will address it
23 very briefly.
24 So my preliminary points are, number one, as
25 I said in one of my affirmations, the Board of

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1 Elections doesn't have a right to argue the
2 constitutionality of this statute. The Board of
3 Elections made it quite clear at the Board of Elections
4 hearing that it's a ministerial duty, that it has a
5 ministerial duty. It decides as to whether or not a
6 petition in this case, a nominating petition is correct
7 in form and complies with the law, which includes the
8 deadline of when it's due. I disagreed with them, but
9 that was their ruling, and they were pretty clear that
10 they do not deal with constitutional issues. Well,
11 that was true at the Board of Elections hearing and
12 that's true here. The Board of Elections and its
13 counsel doesn't have the jurisdiction to argue whether
14 or not a statute is constitutional. That's number one.
15 So I believe that all the arguments made by Mr. Toth in
16 his papers ought to be disregarded. Not that they're
17 not good arguments in terms of good lawyering. They
18 are. But the Board of Elections does not have the
19 jurisdiction to make that argument here. And there's
20 been legion of cases, as they pointed out to me, that
21 the Board of Elections does not get involved with
22 regard to whether or not a statute is constitutional.
23 That's number one.
24 Number two. As the Court is aware and as my
25 colleagues are aware that the Anderson decision and its

1 progeny evaluates a challenge as to whether or not a
2 statute is constitutional by looking at the potential
3 infringement, looking at the character and magnitude of
4 the infringement. Every statute infringes in some way
5 on some voters, but when it's challenged, when a
6 statute is challenged, then the character and magnitude
7 of that infringement is evaluated, and the way it's
8 evaluated is by weighing the State's interest, the
9 State's alleged compelling interest in enacting a
10 particular statute that has an adverse impact on some
11 voters. There is no compelling State interest here in
12 fact. As I pointed out in my papers, there is no State
13 interest articulated whatsoever. The fact that two
14 democratic commissioners and a democratic co-executive
15 director commented in the legislative history, and you
16 have -- it's been e-Filed -- the complete legislative
17 history relating to this statute, as well as the
18 omnibus Election Law Bill that was before the
19 Legislature at the time. The only comment in support
20 were by two commissioners, two democratic commissioners
21 and a co-executive director of the Board of Elections.
22 That is not the Board of Elections.
23 And by the way, the Board of Elections does
24 not speak for the State in articulating what an alleged
25 compelling interest is. Neither the Governor, nor any

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1 Legislator, either in a memorandum or during colloquy
2 when they were debating these issues even mentioned
3 6-158(9)'s amendment. In fact, no government group or
4 any other entity that submitted a memorandum touched on
5 6-158(9)'s amendment.
6 So the only thing we have is two
7 commissioners and a co-executive director speaking for
8 themselves, not even for the Board. There is no
9 compelling State interest. There is no State interest
10 articulated whatsoever. So when this Court looks at
11 the infringement on the independent voters -- excuse
12 me, the independent nominating petition candidate and
13 his supporters, there's nothing to weigh it against.
14 That said, let's look at what those two
15 democratic commissioners said. They used the same
16 exact arguments -- political stability, educating the
17 voters -- as was rejected out of hand by the Supreme
18 Court of the United States in the Anderson case.
19 That -- and the Supreme Court made it clear that was
20 just a cloak for supporting the two major parties, the
21 two existing major parties, and it wasn't a rationale
22 that deserved to support an infringement such as was
23 the case in Anderson and is the case here, an
24 excessively early deadline.
25 THE COURT: Well, the deadline in Anderson

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1 was March. This deadline is May.
2 MR. GOLDFEDER: The deadline in Anderson was
3 March 20th.
4 THE COURT: And the one here is May.
5 MR. GOLDFEDER: And here it's May. And we've
6 had deadlines, and if you look at the one comment that
7 was submitted to the Legislature and to the Governor
8 was by Richard Winger, who is a national expert on
9 independent nominating petitions, he puts in his
10 legislative -- in his comment, and I've reproduced it
11 here as an exhibit to one of my submissions, what all
12 the deadlines are. So March 20th of 1980 was an early
13 deadline, but May is also an early deadline, and we've
14 had recent Courts strike down excessively early
15 deadlines when they were in June.
16 The question is if -- whether six months
17 before a general election is an early deadline because
18 that's what -- that's what's at issue here. And I
19 submit that six months before a general election is an
20 excessively early deadline, especially in light of the
21 fact that we've had that, we have had an eleven-week
22 deadline for many years. We've had it for since 1985.
23 Before that, it was less than eleven weeks. And if you
24 look at what Mr. Winger said, and it's in my papers,
25 the eleven-week deadline was longer than it had been

1 and it's been in effect for fifteen -- thirty-five
2 years. So what's the rationale for putting it back to
3 six months to twenty-three weeks? Well, we don't have
4 an articulation of any real compelling State interest
5 or any real rationale, except from those two democratic
6 commissioners who submitted that it's good for
7 political stability and oh, yes, voters need to be
8 educated and that's why twenty-three weeks is a good
9 idea.
10 Well, March 20th during -- for the Anderson
11 case, that was excessively early, according to the
12 Supreme Court. And by the way, they took that case,
13 they took that case in 1982 and they decided in '83
14 because they thought that that kind of thing, that the
15 rights of independent candidates were so important even
16 though Anderson had run and lost years before, several
17 years before.
18 So we have had that kind of argument before
19 the Supreme Court in Anderson. They are making the
20 same argument in 2019, the two democratic
21 commissioners. Voters don't need six months to educate
22 themselves. The Anderson case, the Supreme Court in
23 Anderson said with modern technology, you don't need
24 all that time. Well, modern technology is even more
25 modern today. We certainly -- voters certainly don't

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1 need from May through November to educate themselves.
2 And as with regard to political stability,
3 I'm not certain that I even understand what that means.
4 And if I do understand it, it's really a bogus argument
5 that was made in Anderson and it's a bogus argument
6 made now. But I will say that what the Court, what you
7 ought to say is that there's no compelling interest
8 even articulated.
9 Now, there's one other important fact with
10 regard to the -- that the way we find ourselves bereft
11 in understanding this so-called compelling State
12 interest. 2012, 2014, 2016, 2018, we had congressional
13 primaries in June, and we still had an eleven-week
14 period. We still had a mid-August time for independent
15 nominating petitions to be filed. It has nothing to do
16 with the MOVE Act, the independent nominating
17 petitions, because we moved the congressional primary
18 and we didn't move the independent nominating petition
19 filing deadline during those four election cycles.
20 And by the way, the reason I submitted the
21 affirmation with the exhibit for Mr. Toth's Exhibit F
22 where he submits to the Court my submission to the
23 Board of Elections is he forgot to include the
24 attachment, the exhibit to that submission. And the
25 reason it's significant is because in that submission,

1 which is now part of the record before this Court, the
2 same two democratic commissioners who argued that we
3 need political stability and independent -- I'm sorry,
4 voter education and that's why we need twenty-three
5 weeks, those same two democratic commissioners signed
6 off on moving the congressional primary to June for
7 2012, 2014, 2016 and '18, and they signed off with an
8 independent nominating petition being retained, that
9 deadline being retained on the eleven-week schedule
10 that had been in effect since 1985.
11 So for those four election cycles, they
12 didn't feel compelled in any way to move the deadline
13 for when independent nominating petitions need to be
14 filed, yet in 2019, for some inexplicable reason, now
15 that the primaries were moved by legislation as opposed
16 to by a court, then we need to move the independent
17 filing deadline. Well, that just doesn't -- that just
18 undercuts whatever rationale they were trying to submit
19 to the Governor and to the Legislature by changing the
20 deadline from eleven weeks to twenty-three weeks
21 because for those four elections they didn't think it
22 was necessary.
23 So I don't think that they are -- that there
24 was any articulation of any State interest. It's -- it
25 was -- it's not by the State, it's not even by the full

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1 Board of Elections, and in any event, it was a reversal
2 as to what they signed off on during those four
3 election cycles. So I don't think it has any real
4 basis and it doesn't give the Court any reason to
5 decide that the infringement needs to be weighed
6 against some State interest.
7 Now, let's look at the infringement because
8 the argument is that this is going to minimally affect
9 independent voters. Minimally affect? It keeps you
10 off the ballot. That's not a minimal adverse impact.
11 It's a question of being able, for a candidate and his
12 supporters or her supporters to be able to get on the
13 ballot. That's not a minimal impact. That's as much
14 of an impact as can possibly be. That negates their
15 interests and their free associational rights totally.
16 So I think that's not an argument really that has very
17 much merit either. So here we have --
18 THE COURT: So associational rights, these
19 associational rights are what you claim under the
20 Anderson case are based on the First and Fourteenth
21 Amendments?
22 MR. GOLDFEDER: That's correct, Your Honor.
23 THE COURT: And they are fundamental
24 constitutional rights.
25 MR. GOLDFEDER: That's correct, Your Honor.

1 THE COURT: Which require the strict scrutiny
2 analysis where they have to be --
3 MR. GOLDFEDER: We don't even need strict
4 scrutiny analysis. All you need -- you can have -- and
5 by the way, Anderson is not strict scrutiny. Anderson
6 is somewhere -- it's a -- it was a new model in 1983
7 when it rendered its decision. It wasn't strict
8 scrutiny, it wasn't rational basis, it was something --
9 it was a hybrid, if you will. It was let's look at the
10 character and magnitude of that infringement and weigh
11 it against the so-called compelling State interest.
12 So there's no rational basis that we know of
13 to move the timeline from eleven weeks to twenty-three
14 weeks because the State doesn't say anything. And the
15 two commissioners who say, oh, it's for political
16 stability, well, it's not clear what that means
17 whatsoever. And for voter education, that's just
18 malarkey really. So one really doesn't need to go to
19 strict scrutiny in order to declare that this statute
20 is unconstitutional.
21 And when you asked me the question about the
22 free associational rights and the constitutional issues
23 that are involved here, let's look at this from ten
24 thousand feet. That's what we're talking about here.
25 We're talking about voters having an opportunity.

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1 We're talking about candidates being -- and his
2 supporters being able to get on the ballot and voters
3 having an opportunity to vote for them. Now, that's
4 true no matter how many candidates are on the ballot,
5 but in this case there's only one. There's only one
6 candidate on the ballot. She won her primary fair and
7 square. She's on the ballot. I don't have any problem
8 with that whatsoever, but apparently she has a problem
9 with another candidate being on the ballot just because
10 he lost the Democratic Party primary. And this relates
11 to the issue of the sore loser statute. That doesn't
12 exist in New York. Many States have a sore loser
13 statute. Forty-seven States have a sore loser statute.
14 New York is one of three that does not. Sore loser
15 statute means if you run in a primary and you lose, you
16 can't run as an independent. Great. Fine. States can
17 do that. Ohio had that. John Anderson decided not to
18 engage in a Republican Party primary because he knew,
19 or his election lawyer told him, if you go in that
20 primary and you lose, you can't run as an independent,
21 so he actually didn't run in the primary and ran as an
22 independent. But here we don't have that sore loser
23 statute. You can run in a primary and lose and also
24 run as an independent. It's not a question of making
25 the choice before or after the primary. The issue here

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1 is not that because we don't have a sore loser statute,
2 the issue is, is this an excessively early deadline.
3 The question is not whether it's before a primary or
4 after a primary. The question is whether or not this
5 is excessively early, six months, especially in the
6 absence of any reason why they moved it from eleven
7 weeks to twenty-three weeks.
8 Now, one may argue that -- and I think it's
9 in Mr. Toth's papers if I recall correctly. It talks
10 about the write-in campaign that my client is waging.
11 Well, a write-in campaign is different than being on
12 the ballot. As a matter of fact, in the Anderson case
13 in footnote twenty-six, it says, and I'm reading from
14 it, it's true, of course, that Ohio permits write-in
15 votes for independents. We have previously noted that
16 this opportunity is not an adequate substitute for
17 having the candidate's name appear on the printed
18 ballot. And then it quotes from a Supreme Court of
19 United States, another Supreme Court case, Lubin v.
20 Panish, 415 U.S. 709.
21 So the fact that there is a write-in campaign
22 is interesting politically, but it doesn't go to the
23 issue of -- the legal issue that's before the Court.
24 There's one candidate on the ballot and that candidate
25 doesn't want my client on the ballot. I understand

1 that politically, but as a legal matter, the only issue
2 here is, as I say, it's not whether or not the deadline
3 is before or after a primary. The deadline -- and the
4 issue is not, well, should he have made that decision
5 in advance or should he have not. John Anderson could
6 have made a decision in advance and made that
7 March 20th deadline, but he didn't do that. And the
8 Supreme Court of the United States didn't mind that he
9 made up his mind to go as -- to compete as an
10 independent candidate after the deadline. The deadline
11 was March 20th. He announced that he was running as an
12 independent in April. He submitted his petitions in
13 May. The Supreme Court of the United States didn't
14 have any problem with that. So this Court ought not to
15 be misled into thinking that this has to do with the
16 primary election, before or after, anything like that.
17 The only issue is whether or not it's too early.
18 And related to that, I want to say that I
19 believe, I believe it was in Mr. Cooney's papers, but
20 I'm not a hundred percent sure. I can't remember which
21 one was which. This is not about whether or not the
22 eleven-week deadline, the August 17th deadline is too
23 close to the time that the Board of Elections has to do
24 the ballots or whatnot. It hasn't been a problem for
25 so many years. But I'm not asking the Court to rule on

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1 whether or not August 17th is a perfect deadline or
2 even a good deadline. All I'm asking this Court to
3 rule on is that May 25th is excessively early.
4 Now, why do I phrase it this way? The
5 Supreme Court of the United States when it dealt with
6 John Anderson said that March 20th was too early. It
7 didn't say what the deadline ought to have been.
8 That's not the Court's job. The Court's job wasn't to
9 say, well, he submitted his petitions on May 16th,
10 that's a good deadline, or he should have done it in
11 June, or he should have done it in April. That's not
12 the Court's job. That wasn't the Court's job in
13 Anderson, that's not the Court's job here. We are not
14 asking you to say that the original eleven-week
15 deadline that was in effect for so many years that was
16 changed is perfect or good. All we're asking you to
17 rule on is that the twenty-three-week deadline of
18 May 25th is excessively early, especially in light of
19 the fact that there's really no articulated rationale
20 for having moved it, again within the context of the
21 fact that it wasn't moved when there was a
22 congressional change for those four election cycles.
23 So that's the narrow question that I'm asking the Court
24 to rule on.
25 And if I may, I just want to just check my

1 notes to see if I wanted to make another point with
2 regard to this particular issue.
3 I did include in my papers, we're not only
4 talking about the candidate, but we're also talking
5 about the three thousand signers, the over three
6 thousand signers who submitted the petitions on
7 Mr. Brown's behalf.
8 THE COURT: And also the voters, you've
9 argued, are affected because of their choice.
10 MR. GOLDFEDER: Yes, that is correct.
11 THE COURT: All right. You've cited this
12 Anderson case, which of course is the principal case
13 and its progeny that you believe requires me to find in
14 your favor. But there's a case that's been cited by
15 Mr. Toth and Mr. Cooney, the Burdick, the Takushi case
16 at 504 U.S. 428 from 1992, which follows that case, and
17 in that case a similar issue with a deadline, and that
18 case distinguished Anderson by stating it's a minor but
19 non-trivial issue and the same scrutiny was not
20 required. Is there not a rational basis, because in
21 this instance the local, the state primary was moved to
22 coincide with the federal, and whether it's the
23 seventy-seven or a hundred sixty-one days, the
24 twenty-three weeks or the eleven weeks, it always
25 preceded the primary. Now, you say that that's of no

1 moment, it's the early classification, it's just too
2 early, it prejudices all these people and their
3 associational rights. Isn't that enough under Burdick?
4 MR. GOLDFEDER: Your Honor, I'm not saying
5 that Anderson requires you automatically to find that
6 twenty-three weeks is excessive. I'm saying that the
7 analysis of Anderson has been followed. And courts
8 differ with regard to whether or not a set of
9 circumstances are unconstitutional or not, so you are
10 free to analyze the situation as you see fit based upon
11 the Anderson analysis. You are, I believe, required to
12 follow the Anderson analysis, but that's the analysis.
13 You're not required to render a decision one way or the
14 other because of Anderson. There are different dates,
15 there are different circumstances.
16 But you raised the issue with regard to --
17 and by the way, the Burdick case. What the Burdick
18 case really is about is whether or not the State of
19 Hawaii doesn't have to have a write-in because not all
20 States have write-ins. Now, we have write-ins, and
21 Hawaii decided that they didn't want a write-in, and
22 that's really what that case stands for. That's what
23 that case is about. So we have all sorts of States
24 rendering all sorts of -- passing all sorts of rules
25 with regard to ballot access, campaign finance and

1 whatnot. And I'm suggesting to you that the analysis
2 of Anderson and its progeny requires you to use that
3 analysis, and my belief is that twenty-three weeks,
4 that change -- twenty-three weeks in 2019 has really no
5 basis articulated by the State in any way, and just
6 because we moved the primary, we moved the primary in
7 2012, 2014, 2016, 2018, the independent nominating
8 petition deadline wasn't changed, and those same
9 democratic commissioners signed off on it. So it's not
10 just a question of moving the primary. I'm not arguing
11 that when -- that the deadline must be before the
12 primary to give potential -- I'm sorry, after the
13 primary to give potential independent nominating
14 candidates a choice to see how the primary turned out.
15 What I'm saying is, irrespective of that issue, it
16 shouldn't be too early.
17 Now, you take into effect the practicality of
18 it, one can say, well, Mr. Brown could have thought in
19 advance as to whether or not he wanted to run as an
20 independent as well as on the democratic line. Well,
21 that's true. So could have Mr. Anderson. But that's
22 not the issue. The issue is, is that too early? What
23 makes it smart or rational or efficacious in any way to
24 have a deadline that's six months before a general
25 election? That's the issue that's before the Court.

1 And I believe that as a matter of law, as a matter of
2 First Amendment, Fourteenth Amendment, Free
3 Associational Law, Constitutional Law, that
4 independents ought to have the opportunity to run and
5 support their candidates and not have to do it so far
6 in advance. That's what's at issue here. I don't know
7 exactly what the Federal Court, how its opinion is
8 going to read, but I think that your opinion ought to
9 read that that's excessively early and, in light of the
10 fact that there's really no basis for it, should be
11 struck.
12 I do want to address the issue of this
13 committee to fill vacancies.
14 THE COURT: Well, before we do that, there's
15 also an argument about laches.
16 MR. GOLDFEDER: Oh, yes.
17 THE COURT: That your client waited until
18 August, let alone the twenty-three weeks. He waited
19 until two months after the primary before he even filed
20 these petitions so he could be an independent. What
21 about that? Here's a guy that's been a four-term
22 mayor, who has been in the New York State Senate, he's
23 run successful primaries, who has a staff, who has the
24 savvy to understand what these deadlines mean, and he
25 simply ignored them, and deadlines should apply to

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1 everybody equally and this is the sore loser analysis.
2 What about that?
3 MR. GOLDFEDER: Well, there could be a sore
4 loser analysis, but we don't have a sore loser statute,
5 Your Honor.
6 THE COURT: So that's of no moment?
7 MR. GOLDFEDER: I think it's not.
8 THE COURT: The experience of your client.
9 MR. GOLDFEDER: I think it's not. It's --
10 the decision that he made, he could have made the
11 decision at any time, so could John -- so could have
12 John Anderson. Why didn't John Anderson submit his
13 petitions earlier than May? Why didn't he? He could
14 have. Why didn't he decide in advance to make the
15 March 20th deadline? He could have. The point is that
16 what Mr. Brown did was utilize the eleven-week deadline
17 that had been in effect for so many years and decided
18 to submit his petitions. The election lawyer who
19 advised John Anderson undoubtedly said to him, you
20 better submit signatures. Even though you're gonna be
21 late, you better submit signatures so at least you have
22 standing to argue that the statute is unconstitutional.
23 Similarly, Byron Brown submitted petitions.
24 Yes, they were late. I get that. And the scholar
25 Mr. Goldfeder, as Mr. Toth has referred to me, says

1 that a deadline is a deadline is a deadline and the
2 Court and the -- excuse me, the Board of Elections
3 considers those deadlines in a very strict way. That's
4 true. That's true, except when you're, when you're
5 challenging the constitutionality of that statute.
6 THE COURT: So this is the advocate
7 Goldfeder.
8 MR. GOLDFEDER: I beg your pardon?
9 THE COURT: You're switching hats to the
10 advocate Goldfeder.
11 MR. GOLDFEDER: No. They're consistent.
12 THE COURT: Okay. Well, let me ask you.
13 Now, in the citation from your book that Mr. Toth
14 cited, he said whether or not the elevator is broken or
15 the petitions were stolen, you're still not gonna
16 prevail because those deadlines mean something.
17 MR. GOLDFEDER: Those deadlines mean
18 something, that's right. And that's why the Board
19 ruled him off the ballot. But when you're challenging
20 the constitutionality of that deadline, it takes you --
21 it takes you into a whole different sphere. So those
22 two statements are quite consistent and my two roles
23 are quite consistent. It's not the first time somebody
24 has referred to something I've written to try to use it
25 against me. But in this case, I can say with a

1 straight face that it's not inconsistent at all. If we
2 didn't have a constitutional argument, then we wouldn't
3 have any argument; but because we have a constitutional
4 argument, the Board did what it's supposed to have
5 done, which was to treat the deadline as a deadline,
6 period, end of story. But this Court is being asked to
7 look at that deadline and say, sure, it's a deadline,
8 but it's an unconstitutional deadline for the reasons
9 I've tried to explain.
10 THE COURT: All right. Let's get to the
11 committee to fill vacancies.
12 MR. GOLDFEDER: Committee to fill vacancies
13 is Mr. Cooney's, what he has in his back pocket to try
14 to overcome what the Federal Court has done and what
15 he's hoping you would do, which is to deal with the
16 constitutionality. But number one, as I pointed out,
17 no matter how he characterizes it, it's a cross-claim
18 against the Board of Elections, and he can't do that
19 without the permission of this Court, which he has not
20 asked for. He's essentially saying to the Board that
21 the committee to fill vacancies was required and
22 therefore the Board should have ruled the petition
23 invalid on that ground. And by the way, the Board of
24 Elections swatted that one away and not because of the
25 fact that he was making an improper cross-claim, but on

1 the merits.
2 So number one, procedurally this is a
3 cross-claim, however he characterizes it. And there
4 are a legion of cases that say no matter what you say,
5 if it's against the Board -- an individual respondent
6 is moving against the Board of Elections for not having
7 rejected a petition because of an alleged fault, it's a
8 cross-claim and you need permission of the Court in
9 order to do so, and therefore those kinds of
10 affirmative defenses, counterclaims, however they
11 characterize it, are rejected. But substantively,
12 substantively he's wrong. There's no case that throws
13 out a nominating petition because it doesn't have a
14 committee to fill vacancies. The statute says, the
15 statute relating to nominating petitions says that
16 nominating petitions should be treated exactly the same
17 as designating, as the designating petition statutes
18 unless we say otherwise. He's right in quoting that.
19 But he's wrong, I must say, in the way he concludes as
20 to what it means. He says, well, there's a form in the
21 statute that has a place for committee to fill
22 vacancies on the nominating petition. Well, that's
23 true. But there's also, in the designating petition
24 statute, there's a place for committee to fill
25 vacancies. The designating petition statute says we

1 don't need a committee to fill vacancies, and yet they
2 include that in their form. But substantively, the
3 statute says you don't need a committee to fill
4 vacancies for a designating petition even though in the
5 form we put it in to see where it should go.
6 Similarly, the substantive statute with
7 regard to nominating petitions does not say you need a
8 committee to fill vacancies, and what it does say is we
9 follow the substantive statute with regard to what is
10 required for a designating petition unless we say
11 otherwise, and they do not say otherwise. So this
12 argument, it's a novel argument, but it's wrong that a
13 nominating petition needs a committee to fill
14 vacancies, and I cite exactly to the statute that --
15 the substantive statute that deals with that in my
16 submission.
17 Now, I'm gonna return to my notes to see if
18 there's any other thing that I'd like to add, and I
19 think that -- oh, with regard to laches, because you
20 asked me that and I think that I didn't address it as
21 directly as I should have. The laches argument is not
22 about when he submitted his petitions. You can say he
23 could have submitted his petitions in July, in June,
24 but he submitted them when he submitted them. That's
25 not the issue. The issue is should he have submitted

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1 them in May. And I'm obviously arguing that May is too
2 early and I'm not asking you to rule that August 17th
3 is a valid statute. That's for the Legislature. If
4 you, if this Court is consistent with the Federal Court
5 and Mr. Brown gets on the independent -- the Buffalo
6 Party line on the general election ballot, the import
7 of that is that the 6-158(9) that says twenty-three
8 weeks deadline is unconstitutional. It's up to the
9 Legislature to choose a different one, to choose an
10 alternative deadline for the independent nominating
11 petitions. It can go back to eleven weeks, it could go
12 to fourteen weeks, it can even go to primary day.
13 We do have a case, the New Jersey case, the
14 Council case, which I do cite, Mr. Toth, because in
15 19 -- what happened was in 1997, the independent
16 nominating petition deadline in New Jersey was
17 fifty-four days before the primary, and it was
18 enjoined as excessively early under the Anderson rule.
19 While this case was being litigated, the Legislature
20 amended the statute to make it on the same day as the
21 primary, and that was approved by the Court. So the
22 Legislature, if in fact you, this Court, is consistent
23 with the Federal Court and decides that the
24 twenty-three-week deadline is too early, it's up to the
25 Legislature to choose a new deadline, and that could be

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1 even on primary day, pursuant to the Council case. So
2 it's not a question of before the primary, after the
3 primary, on the primary, it's a question of is it too
4 early because it's six months before the general.
5 The issue of laches is not that. The issue
6 of laches is, well, why did we bring this case now?
7 Well, in an Article 16 proceeding, a candidate can only
8 bring a case when the candidate is harmed by having his
9 or her nominating petitions or designating petitions
10 invalidated.
11 THE COURT: So you weren't aggrieved until
12 the Board of Elections rejected them.
13 MR. GOLDFEDER: That's exactly right.
14 THE COURT: So there's no laches. In your
15 opinion, there's no laches.
16 MR. GOLDFEDER: That's correct.
17 THE COURT: All right.
18 MR. GOLDFEDER: That's correct. And the
19 other thing I want to say is, again, I'm not sure which
20 one of them raised the Purcell issue. The Purcell
21 issue is you can't make -- the Supreme Court has ruled,
22 and they've held this consistently, both in decisions
23 on the merits and on the shadow docket, you can't
24 change the -- an election rule right before an
25 election. It's confusing to the voters and whatnot.

1 Well, we are not right before the election. We are in
2 fact before the ballot has been certified. So this
3 Court, just like the Federal Court, is not violating
4 this Purcell principle by rendering a decision at this
5 point. There's plenty of time. And as Mr. Toth
6 suggested before, even if this went a few weeks after
7 September 8th and 9th, ballots have been changed at the
8 very last moment. It's not optimal, but it has
9 happened. In fact, there's a federal case of Gold when
10 somebody was running for Surrogate in Brooklyn about
11 twenty-five years ago and they changed the ballot the
12 day before the election. That's not ideal. I'm not
13 suggesting that. But we are way beyond, we are way
14 before that kind of a situation. So the Purcell
15 principle is really not relevant here because there's
16 still time to put Mr. Brown on the ballot. The Federal
17 Court recognized that and this Court should as well.
18 And I think that I've addressed as much as I
19 can at this point, but if you'll just give me a moment,
20 I would like to just check my notes, please.
21 (Brief pause in proceedings.)
22 MR. GOLDFEDER: Thank you very much, Your
23 Honor.
24 THE COURT: Mr. Toth, we'll go in the order
25 of the respondents listed in the action. You're first,

1 the Board of Elections.
2 MR. TOTH: Okay. Thank you, Your Honor.
3 It's been a long day. I'm a little punchy.
4 THE COURT: I know it has been, and I read
5 your thoughtful papers.
6 MR. TOTH: They were very, very thoughtful.
7 At this point I'm reduced to nothing other than quips,
8 Your Honor. So let me just start by addressing the
9 first position or the first thing Mr. Goldfeder raised,
10 which was my submission, and I think it underscores
11 just how prejudicial, how inequitable, how really the
12 games of the -- the orchestration of the multiple
13 cases, quick turnaround, don't name the State, it is
14 all for one, one purpose, which is to get a quick
15 ruling with as little analysis as possible from a judge
16 somewhere so that Byron Brown can sneak himself onto
17 the ballot, which will be printed in about, and I keep
18 looking over here because that's where my calendar is,
19 but we're talking about printing ballots in about ten
20 days, so we don't have a lot of time.
21 So I've been running around, I've been doing
22 the best I can to defend this matter because
23 Mr. Goldfeder sued my clients. What I am hearing today
24 from Mr. Goldfeder is, yes, I sued your clients, but
25 you can't respond.

1 THE COURT: That was going to be my first
2 question. You can't respond to the constitutionality
3 of the statute being challenged because your client is
4 relegated to a ministerial role of either certifying or
5 not certifying, accepting or rejecting, and they've
6 done that and now that's the end of it. What's your
7 position?
8 MR. TOTH: So my position on that is, if it
9 underscore -- if that position is adopted by this
10 Court, understand the implications. You sue a
11 governmental agency responsible for carrying out State
12 Law, which, by the way, is just about every one of my
13 clients, you sue them and claim that a constitution --
14 a State Law is unconstitutional. You don't name the
15 State, you only name the local agency. You get a
16 turnaround time of five days, you put the Attorney
17 General on notice, but they generally take -- there's a
18 bureaucratic process about whether or not they're gonna
19 get involved. But you sue the County, you say this
20 State Law that you're implementing is unconstitutional,
21 and, County, you can't argue otherwise, which means it
22 is a path to victory, because if my papers are to be
23 disregarded, well, then there's no opposition from the
24 Board of Elections. It's clever, but it's not fair.
25 It's not right. It's completely inequitable based

1 largely upon the election calendar because of the
2 turnaround time.
3 If this was not an Election Law matter or,
4 and we'll get to laches, if this had been filed in June
5 or July, which Mr. Goldfeder just conceded, that it
6 could have been, we would have had a month, two months
7 to get the Attorney General involved, to figure out our
8 options. Instead, I had three days to respond to two
9 lawsuits naming my clients for constitutional
10 deprivations that they had no choice but to follow.
11 And if I can't respond, who can? Because I'm the only
12 one that was named. India Walton is not in a position
13 to articulate what State compelling interests there
14 are.
15 But my frustration doesn't end there because
16 I spent a lot of time this week trying to find
17 compelling interests, not documents that I wrote. I
18 attached the bill -- Mr. Goldfeder attached the bill
19 jacket that included some State officials. My papers
20 include a declaration from an attorney at the State
21 Board of Elections who has personal knowledge of the
22 reforms that were underway. That's not good enough
23 either. They don't represent the State. So
24 Mr. Goldfeder's position is, I'm gonna sue the Erie
25 County Board of Elections, I'm gonna say my client's

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1 constitutional rights were violated by the State -- by
2 the Erie County Board of Elections, but the Erie County
3 Board of Elections is not allowed to respond to that,
4 nor are they allowed to submit any paperwork that
5 articulates a State compelling interest. I mean, if
6 that's the law, then I guess that's the law, and now I
7 know how to -- now I know how to proceed if I ever want
8 a State Law deemed unconstitutional. I just will
9 cleverly not name the State and I'll have an Order to
10 Show Cause that turns around in five days and so then I
11 can get in and out and, you know, no harm, no foul, I
12 guess is the approach here.
13 You know, and I just -- you know, you can see
14 I'm a little worked up. I find that unfair. I just
15 don't -- I don't think it's right. And Your Honor
16 certainly can disregard my papers. They are all based
17 on public documents and my reading of these cases,
18 which, quite frankly, a week ago I had never heard of.
19 And I think we and Ms. Walton put together a very
20 cogent argument as to why Mr. Goldfeder is wrong, why
21 Anderson is not as simply read as he believes. But I
22 think it's important for Your Honor to recognize the
23 orchestration that has gone on here by a four-term
24 democratic incumbent who is by definition, under
25 constitutional principles, a sore loser. There is no

1 contest to that. This is exactly what we talk about
2 when we talk about sore losers.
3 Now, Mr. Goldfeder is right. I know, I see
4 he's getting all jumpy. New York State doesn't have a
5 sore loser statute. Forty-seven States apparently do.
6 But New York State has fusion voting and, you know, I'm
7 sure Mr. Goldfeder knows exactly which States have
8 fusion voting and which don't, and he can probably put
9 them together with the sore loser statute. But in New
10 York State we allow fusion voting. You can grab as
11 many lines as you want. So the fact that we don't have
12 a sore loser statute is in some ways addressed by the
13 primary -- by the independent nominating petition
14 deadline which occurs after major party deadlines for
15 petitioning significantly after, almost two months
16 after, Your Honor, not April, but at the end of May but
17 before party primaries. And the party primary this
18 year was June 22nd. I would point out to the Court
19 that early voting began roughly on June, let's say
20 10th. So the May 28th deadline is less than two weeks
21 before we are conducting elections. Less than two
22 weeks. But what we don't want in New York, what the
23 Legislature clearly doesn't want in New York, what the
24 declaration from Brian Quail says in New York is we
25 don't want democrats in this case losing a primary and

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1 then creating some fake line that they made through
2 their considerable political machine at City Hall.
3 That's exactly what we don't want.
4 THE COURT: And in your papers to support
5 that point, you cited to several candidates in this
6 year's general election, for sheriff for instance, in
7 the local races who did what they were supposed to do
8 in a timely way. They weren't prejudiced by the early
9 twenty-three weeks, so why should Mr. Brown claim that
10 protection. He wants preferential treatment, not equal
11 treatment.
12 MR. TOTH: And again, that's why I get worked
13 up here. We've got candidates here who followed the
14 rule. That's just Erie County. You know, if
15 Mr. Goldfeder had actually named the New York State
16 Board of Elections, they would have somebody here and
17 they would probably be able to tell Your Honor that in
18 two years we've had six hundred and thirty-five
19 independent candidates across New York State. Over
20 seventy-nine thousand people have signed those
21 petitions. All of those people have followed the law.
22 Today we have a four-term incumbent who has been an
23 elected official since I got out of law school, who
24 lost a primary, who now wants Your Honor to change the
25 law and give him preferential treatment, and it is

1 absolutely preferential treatment as articulated in
2 Hooks, the second Hooks case, not the first Hooks case,
3 where the Court said accordingly what they are seeking
4 cannot be termed equal treatment. On the contrary,
5 they are asserting a constitutional right to
6 preferential treatment. That is exactly what Mr. Brown
7 is looking for. He's looking for a leg up because he
8 got caught napping in May.
9 Also, I gotta talk about -- I don't want to
10 get into all the Anderson nuance, I mean, because it's
11 late in the day and you've read the papers.
12 THE COURT: Well, let me -- just on that
13 issue. I asked Mr. Goldfeder if the experience and
14 prior successes of his client have any bearing on this
15 case and he said no, it's nothing to do with that.
16 It's just that this arbitrary early date is a
17 constitutional violation of his rights. And then you
18 cited something to the effect the Anderson case is to
19 protect candidates that maybe are unpopular or a grass
20 roots, somebody that's been shut out of the political
21 process, and Mr. Brown in this case is certainly not
22 that type of candidate at all. And you believe that's
23 consistent with your position here.
24 MR. TOTH: Absolutely. I think the nature of
25 the candidate in question has influenced, time and time

1 again has influenced the Supreme Court and Circuit
2 Courts, you know, what ideology they bring, what new
3 ideas. And the whole idea about major parties
4 suppressing access to the ballot by minor parties and
5 independent candidates, it's all in sort of the milieu,
6 to use a word I can't pronounce, of all of these cases.
7 But what I would say even more importantly,
8 Your Honor, even more importantly, what that experience
9 means is that my laches argument is absolutely spot on.
10 If there is a case that cries for laches and a
11 dismissal and a barring to recovery, it is this case.
12 I have not used a laches argument in my life. But
13 Mr. Goldfeder misstates what laches is about. Laches
14 is not about when Mr. Brown filed his petition.
15 Mr. Goldfeder just conceded, and he's right, Byron
16 Brown could have circulated these petitions June 28th,
17 July 2nd, July 5th, July 12th, July 28th, August 2nd,
18 and so on and so on. But he didn't. And the reason he
19 didn't was 'cause he waited because he knew we're
20 running up against a deadline and if he could just -- I
21 mean, it's all orchestrated. It is all painfully
22 obvious that it is orchestrated. He files a lawsuit,
23 cloaks it in Article 16, but Mr. Goldfeder just said
24 this isn't Article 16, this is about the constitutional
25 rights of my client. And if they're about the

1 constitutional rights of his client, we could have done
2 this argument on July 10th, and Your Honor would be
3 faced with, you know, a few days to actually consider
4 the merits. Wow, just imagine that. Instead, Your
5 Honor is in a place where you have to decide incredibly
6 complicated area of law. I have to respond in less
7 than three days. My clients have to certify the ballot
8 next week. We just went through an hour discussion
9 about an adjournment because of those deadlines that
10 are right around the corner.
11 Now, Mr. Goldfeder says, well yeah, but even
12 if Your Honor issues an Order, we can just change the
13 ballot. That's not the laches argument. It's not that
14 can we handle a late, a late Order. I mean,
15 mechanically we have in the past. Mr. Goldfeder said
16 it's not ideal. Well, what was the delay? Why was
17 there delay? Why was there undue delay? And my
18 clients are prejudiced by that delay because I'm
19 sitting here right now. They're sitting here right
20 now. They're not preparing for the election. I'm not
21 doing any of my other work. We are prejudiced. And if
22 Your Honor issues a ruling, it's gonna get appealed,
23 and so we don't know what's gonna happen, how that's
24 gonna play out. This is exactly what laches is
25 designed to prevent, an ambush, and this is what's

1 happening. The Board of Elections is being ambushed at
2 the eleventh hour to quickly get September 8th or 9th
3 with Byron Brown's name on the ballot because they
4 don't care what happens on September 20th because the
5 ballot's already out.
6 You know, three years from now we may have a
7 ruling from the United States Supreme Court that says
8 May 28th is great, you know, totally constitutional.
9 Well, nobody cares about that. It's all about what's
10 happening over the next ten days, and that's exactly,
11 exactly what laches was designed to prevent.
12 And the other point, Your Honor, is this is
13 an area where if you were to follow my laches argument,
14 that would not be in contradiction to the federal
15 law -- or the federal decision from Judge Sinatra
16 because that is a different set of plaintiffs. So the
17 laches argument is different as it applies to those
18 plaintiffs than it is as it applies to Mr. Goldfeder's
19 client. And I think the laches argument, particularly
20 since Mr. Goldfeder conceded they could have submitted
21 petitions at any time this summer, the laches argument
22 is binding and this action should be barred from
23 proceeding. It is inequitable.
24 The final thing that I will say, we talked a
25 lot about dates. Anderson, what we know is that the

1 Anderson date of March 20th seems unconstitutional. We
2 also know from the Third Circuit that I cited in Hooks
3 that having a -- that having a independent nominating
4 petition date fifty to sixty days after the primary is
5 also no good, and that is the preferential treatment
6 that Hooks was talking about. What we don't know,
7 quite frankly, is where is that bright line between
8 March 20th and primary day. Somewhere in there. And I
9 think Mr. Goldfeder's argument is that March -- or
10 May 28th is just too early. But even if that were
11 true, that should not entitle his client to the one off
12 remedy of appearing on this year's ballot. This is a
13 matter of importance. State Law and the Legislature
14 should address it. Your Honor should not simply change
15 the rules for this one candidate, this one sore loser
16 candidate to get him on the ballot just so he can
17 attempt to win reelection to a fifth term. That's
18 really, it's just the height of inequity at this point.
19 I'm happy to answer any other questions.
20 I've been talking a while.
21 THE COURT: I don't have any questions,
22 Mr. Toth. Thank you very much.
23 MR. TOTH: Thank you.
24 THE COURT: Mr. Cooney, Ms. Kulpit, on behalf
25 of your client.

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1 MR. COONEY: Thank you, Your Honor. If it's
2 okay, I'll address some of the constitutional arguments
3 and then Ms. Kulpit is prepared to address the
4 committee to fill vacancies argument. Would that be
5 all right with Your Honor?
6 THE COURT: That would be fine.
7 MR. COONEY: Thank you. There's been a
8 number of points made, and I want to follow what I
9 think is the appropriate constitutional test of the
10 statute from the beginning because I think when we get
11 to the end, we see not only that the May deadline is
12 constitutional, but what Byron Brown did is
13 unconstitutional in filing in August, and therefore,
14 there's no way your Court could grant the petitioner's
15 request without committing a further, an actual
16 constitutional deprivation of rights this political
17 calendar.
18 The Anderson decision from the Supreme Court
19 sets out a test in order to look at the entire
20 electoral scheme. When looking at that test, we have
21 to determine whether or not the burden from the
22 deadline is severe or reasonable. If a deadline is
23 severe or discriminatory, you apply a strict standard.
24 If it's not severe or discriminatory, which New York is
25 not, you apply a lesser standard where the ordinary

1 administration of electoral process is a valid State
2 interest.
3 The decisions like Anderson that talk about
4 severe, which are in the brief in a number of them,
5 there are seventy-five, fifty, ninety days pre-primary.
6 The primary date is important, Your Honor, because
7 there's been discussion about the general election as
8 it relates to Anderson. Within this Supreme Court
9 decision in Anderson, they're worried about a general
10 election because the Presidential Election is subject
11 to national elections around the whole state, so one
12 particular State's primary for independent ballot
13 access in a presidential year could change when another
14 State conducts a primary caucus. In fact, it could
15 change at the time of the National Convention, which
16 occurs in August. Importantly, the Anderson decision
17 specifically said Presidential Elections are unique and
18 a State's right to control their local or state
19 elections is much greater than Ohio's interest in
20 controlling the 1980 Presidential Election. So this
21 notion that we somehow moved far from the general
22 election in New York State and Anderson suggests that
23 that's a factor is a misrepresentation of a legion of
24 case law that deals with elections that occur within
25 states.

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1 And while Mr. Goldfeder cites Hooks from 1997
2 and in passing references the 1999 one, he does not
3 demonstrate the legion of cases that I provided from
4 Alaska, from Hawaii, again subsequently from North
5 Carolina where they discussed what type of deadlines
6 are close to the primary and require only a rational
7 type review because it's a lower burden. And those
8 dates we know are at the primary day itself,
9 importantly before a winner's known, which is what we
10 have here, before a winner's known or around the
11 primary. New York State's date is twelve days before
12 voting begins. It's not significantly or substantively
13 different than if the deadline were on primary day or
14 the day before. At the New York deadline, it is after,
15 this is critical, it is after the designating petition
16 deadline in April for filing designated party
17 petitions, so at the time of New York's deadline,
18 people know who is running in the primary. Obviously,
19 Mr. Brown knew that he was running against India
20 Walton, and people that perceived her candidacy as
21 something warranting a independent movement knew back
22 in May that that was already the dynamic. It wasn't
23 like India Walton's campaign emerged on August 1st. It
24 existed at the time of -- in April when the parties'
25 designating petitions were filed. That's what Anderson

1 was trying to prevent. A March deadline in a
2 presidential year before a August National Convention
3 is harsh. It was struck down. The cases that provide
4 for state elections and local elections, the
5 elections -- there could be federal elections that are
6 wholly within one state, like a congressional election,
7 those deadlines are uniquely different, and States have
8 a stronger interest to regulate them, including New
9 York State.
10 So then we say, all right, well, if primary
11 day is valid and the May 28th day is close to twelve
12 days before primary voting begins, I think that's
13 pretty clearly not a severe or discriminatory burden.
14 But how do we know that? Mr. Toth has said in Erie
15 County everyone who wanted to get on the ballot on an
16 independent line did. So one of the things that courts
17 look at, it's in Anderson and other cases, they look at
18 the whole scheme, sort of the Williams v. Rhodes
19 Doctrine. You look at the whole scheme to determine
20 whether or not the deadline is severe. It wasn't
21 severe for the sheriffs candidates, it wasn't severe in
22 Amherst. It wasn't severe in all these other places
23 where people got on the ballot. And as Mr. Toth said,
24 if we had a State Board of Elections representative
25 here, they would tell us, look at all the people around

1 the state who were able to get on the ballot. That is
2 not only evidence of laches, which of course it is.
3 It's directly relevant to the level of scrutiny the
4 Court has to engage in under the Anderson-Burdick
5 Doctrine. The test is not one that requires heightened
6 scrutiny because the deadline is not severe or
7 discriminatory. Ordinary State interest in regulating
8 elections are sufficient. That's precisely what we
9 have here.
10 Then if we go one step further down the sort
11 of pendulum of what's unconstitutional or not, we know
12 in the beginning seventy-five, ninety days before a
13 primary, clearly discriminatory against independent
14 candidates. You move closer to the primary, a day or
15 two, I would submit twelve days before voting, you're
16 right around the primary, you're after the designating
17 petition, courts have said that's okay.
18 Let's go further to when we get to a
19 situation where we're in right now because what
20 Mr. Brown and his supporters have done is filed a
21 petition with an old deadline. Now, Mr. Goldfeder will
22 try to ignore the obvious illegality of that deadline
23 by saying that Your Honor doesn't have to pick the new
24 deadline, that's up to the Legislature. Well, maybe
25 the Legislature will amend it, but if you allow him to

1 use the deadline, that will be the deadline. In other
2 words, if you grant the petitioner's relief, invalidate
3 a petition with an August 17th deadline, you will act
4 at Mr. Goldfeder and Mr. Brown's urging, you will enact
5 a deadline that the Third Circuit has said is an
6 unconstitutional discrimination. This is the
7 perversion of this entire proceeding. It is cloaked in
8 ballot excess and constitutional deprivation, the very
9 act of which constitution -- deprive the constitutional
10 rights of Ms. Walton. And the entire doctrine is
11 premised on nonestablishment independent candidates
12 that are shut out of the party, as Your Honor said.
13 The Board of Elections letter that advocated for this
14 was written at a time when Byron Brown was the State
15 Democratic Chairman. He was literally the leader of
16 the democrats. He was also a four-term mayor running
17 for reelection. He additionally had the endorsement of
18 the Erie County Democratic Committee. And we're trying
19 to say that we need to give him preferential treatment
20 under the Constitution to protect the rights of India
21 Walton as if she somehow has the inside track on the
22 major party electoral system? We can't ignore these
23 obvious perversions of rights at issue in this case.
24 But it's not just me making that argument for
25 Ms. Walton. In the Third Circuit in the New Jersey

1 case, it could not be more factually on all fours with
2 this situation. In 1997, the New Jersey Court, the
3 Federal Court struck down a New Jersey statute
4 fifty-four days before the primary. That's too early,
5 you're discriminating against independent party
6 candidates. The pendulum then moved a little bit. The
7 case continued and they entered what's called an
8 Interim Consent Order. In that Order, the pendulum
9 swung all the way to fifty-four days I think after the
10 primary. I'm sorry, not fifty-four, more than a month.
11 That date went to July, the primary in New Jersey was
12 in June, very similar to what Mr. Goldfeder is asking
13 the Court to uphold. So they went from fifty-four days
14 before to sometime a month or so after the primary.
15 The Third Circuit New Jersey then heard the argument.
16 In the interim, the State of New Jersey passed a new
17 law changing the deadline to the primary day itself.
18 Maybe it might have been the day before, but right at
19 the primary, so very similar to our twelve days before
20 voting. And at that point the case was still going on,
21 so the Third Circuit heard argument again based on the
22 new deadline, and that Third Circuit panel had to
23 analyze exactly what we're talking about here. We know
24 a really long early date is a problem, but you guys
25 fixed that. But the plaintiff, in this case it was

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1 just like the petitioner Mr. Brown, we want a date
2 after the primary. We might lose, we might change our
3 mind, we need a leg up. The Court said there is no
4 constitutional right to preferential treatment. It
5 explicitly said a candidate who loses a primary
6 doesn't -- the Constitution doesn't give you a right to
7 go try to get on the ballot then.
8 And more importantly, in that same case they
9 discuss the notion of a sore loser candidacy. To say
10 that New York State does not have a sore loser statute
11 is an accurate statement; however, it is misleading.
12 It's misleading because that case from New Jersey in
13 the Third Circuit said just because you don't have a
14 pure sore loser statute, that doesn't mean the State
15 doesn't have an interest in deterring and preventing
16 sore loser candidacies. And what that means is that
17 when New York State put the deadline in the end of May
18 before the primary, it doesn't mean that some
19 candidates can't choose to run both as a major
20 candidate and as an independent candidate, but you do
21 have to make a decision. You gotta make a decision
22 before the primary. You could be an independent, you
23 could be a democrat, you could be a republican, you can
24 be whatever you want, but you gotta do it at the same
25 time. Because in some great genius idea, New York

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1 State thought maybe we should just give everyone an
2 option to do whatever they think. But what ends up
3 happening in the New Jersey decision is that deadline
4 in July after the primary is struck down.
5 Then there's another case in my brief that's
6 incredibly instructive for what's actually happening
7 here. It happened in the State of Vermont, a State
8 with a long -- right in the decision recognizes a State
9 with a long history of embracing independent
10 candidates, presidential nominees, almost nominees,
11 presidential candidates. They want independent there.
12 In the State of Vermont, they recognize that when they
13 moved the Vermont primary from September to August,
14 they wanted to comply with the MOVE Act. Well, in my
15 papers I cited the bill from New York State. Even
16 though Ms. Walton is not the State Board of Elections
17 and has no obligation to demonstrate its interests, I
18 found some evidence of it, which includes they want to
19 comply with the MOVE Act. Mr. Goldfeder will say this
20 has nothing to do with the MOVE Act. That's absurd.
21 It's an absurd statement. The MOVE Act required the
22 moving of the primary in order to make sure that New
23 York State didn't have to run a primary election across
24 the state every other week. They wanted to save people
25 money and let voters all engage collectively on

1 different elections and have one statewide primary. In
2 order to do that, they picked up the whole calendar and
3 they moved the whole calendar back. The idea that the
4 independent nominating petition was not moved in the
5 interim, first of all, is total irrelevant.
6 Secondly, during that time period, there was
7 ballot problems, and I think Mr. Toth will have to
8 point in his papers, but there is a 2018 Gubernatorial
9 Election that had a problem with ballots going overseas
10 that were held up because of litigation. But we don't
11 have to look at 2018 to figure it out. Think about
12 that one-hour conversation we had about adjournments
13 and why it is this deadline, the New York State's
14 interest in this deadline should be earlier than the
15 August deadline Mr. Brown filed. If we were able to
16 resolve my client's constitutional due process rights
17 for judicial review of a untimely petition and
18 Mr. Brown's constitutional right to challenge the
19 petition and the Board of Elections' constitutional
20 right to defend this matter, if we want to fully give
21 those rights, we need to move the date to allow for the
22 judicial and appellate review, which is already
23 truncated under the Election Law. It is not possible
24 for this case to continue the judicial proceeding of
25 constitutional rights for appellate review prior to the

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1 time period that Mr. Toth's client has to certify the
2 election. People are gonna file motions, a whole
3 series of things are gonna happen. We're not
4 exhausting them.
5 This deadline -- this case, I'm sorry, is a
6 demonstration of the State's interest. All of the
7 questions that everyone is asking, how will we get this
8 done in time, that's a valid State interest. They
9 don't want judges forced to figure out, how do I drop
10 everything, make people skip holidays, give
11 adjournments, don't, so that we can engage in
12 constitutionally protected litigation over a ballot.
13 New York State wanted a deadline early enough to allow
14 that to happen. In addition, they wanted to deter sore
15 loser candidacies. They also want -- compliance with
16 the MOVE Act is the New York State's obligation to have
17 federal elections reach military families. New York
18 State also wants people that live in the City of
19 Buffalo that may be overseas to vote in the Mayoral
20 Election and their County Legislative Election, for
21 Supreme Court Judge. It's not only compliance with the
22 MOVE Act that's an interest. It's we also want our New
23 York State election and local election to have the same
24 voter participation that we -- that the MOVE Act
25 required for federal elections.

1 The last thing I'm going to say on the
2 constitutional argument, Your Honor, is this. At the
3 very core of the argument is the claim that the
4 constitutional rights of Mr. Brown were violated. This
5 is a special proceeding commenced via Your Honor's
6 Order. If Mr. Goldfeder just filed, as Jeremy said he
7 filed some things, well, what he filed were
8 supplemental pleadings articulating constitutional
9 deprivation. In his initial pleading which commenced
10 this action, he failed to actually allege the
11 constitutional violations. He didn't allege anything
12 other than it's unconstitutional, we should win. He
13 didn't demonstrate anything about why it is that
14 Mr. Brown's rights back in May when this deadline
15 expired were violated. He didn't say we tried, we
16 couldn't get on, we didn't know whether or not it was
17 the right time. He didn't plead any of that. Instead,
18 what he said is, as Mr. Toth explained, you don't have
19 the right party, we win, you can't justify it, and by
20 the way, here's a three-hundred-page bill jacket that I
21 didn't present to the Court at the time of commencing
22 and never served the client, the respondents with those
23 papers as part of the -- as required under the Order to
24 Show Cause. He filed them in NYSCEF, but he didn't
25 actually commence a special proceeding with proof that

1 Your Honor put in the record and required him to serve.
2 He did not do that. So none of his allegations are
3 adequately pled.
4 And then one other point I wanted to make on
5 Anderson is, and it's been referenced. I don't think
6 these facts are in dispute. The Anderson decision is
7 about an independent candidacy. That is the whole
8 rationale. It's about a discriminatory effect on an
9 independent candidate. This is very similar to some of
10 the arguments with a little more -- it's a little more
11 different point. The Anderson, the harm in Anderson
12 was discrimination against a particular class of
13 people, independent candidates. Mr. Brown is not in
14 that class. He is not factually in that class. The
15 entire remedy, which in constitutional rights is about
16 an independent person's First Amendment and Fourteenth
17 Amendment rights. Mr. Brown's rights as a democrat, as
18 a person who ran as a democrat, as a Democratic Party
19 Chairman, as an incumbent were and are provided in the
20 Election Law under the Democratic Party designating
21 petition structure. He is not an independent candidate
22 like John Anderson or Ralph Nader or the other names
23 that we see cited in those cases. He is not. He is
24 more like Pat Buchanan, who is referenced in those
25 cases, as a sore loser who was not able to change those

1 deadlines for no reason other than trying to get
2 constitutional preferential treatment.
3 THE COURT: Mr. Cooney, does that conclude
4 your arguments?
5 MR. COONEY: It does, Your Honor. Thank you.
6 THE COURT: And you wanted Ms. Kulpit to
7 address the defects in the petitions themselves.
8 MR. COONEY: Yes, Your Honor. Thank you.
9 THE COURT: Ms. Kulpit.
10 MS. KULPIT: Judge, in a way, despite my
11 opponent's characterization as bogus, I have the
12 easiest argument here, because even if you were to say
13 that we ignore the constitutional claims, the
14 independent nominating petition by law is insufficient.
15 The committee to fill vacancies Your Honor
16 doesn't need to interpret, Your Honor doesn't need to
17 pontificate. Simply read the law. 6-141 states the
18 committee to fill vacancies is necessary for
19 independent nominating petitions. We're not talking
20 about designating petitions. Independent nominating.
21 They provide the example. They state it's necessary.
22 Then despite the claims made here, the Court of
23 Appeals, and I quote, since 1981, says it's necessary.
24 Insert the names and addresses of at least three
25 persons, all whom shall be registered voters within

1 said political unit for committee to fill vacancies.
2 It's necessary, Judge. It's required. It's mandated.
3 This isn't a cross-claim, this is a counterclaim.
4 CPLR 402 allows the counterclaims in special
5 proceedings. We won at the Board of Elections. I
6 would disagree with, I think it was in our motion of
7 Mr. Goldfeder that that's what the Board of Elections
8 did. I was there. I never saw Mr. Mohr or Mr. Zellner
9 do that.
10 But with respect to the committee to fill
11 vacancies, it wasn't -- the petition wasn't timely
12 filed. We didn't have to argue. I believe we would
13 have won if we got to that issue. It's required here.
14 It's mandated by law. The Court of Appeals says it's
15 required and this is a counterclaim, which absolutely
16 the Court can consider, should consider, must consider.
17 It's not a cross-motion. I didn't have to file an
18 invalidation proceeding. I'm here asserting it in the
19 answer, which is what the law allows and asks the Court
20 to consider.
21 If you have specific questions, Judge, all of
22 my esteemed colleagues have gone on long. I have the
23 easy thing to plead here. The law is clear on what it
24 is. So as Your Honor knows, I love to hear my own
25 voice, but I'm gonna let it be, unless you have

1 something specific.

2 THE COURT: Well, Mr. Goldfeder argued the

3 distinction between designating and nominating

4 petitions and that there is a form that includes the

5 committee to fill vacancies. He says it's not

6 required, it's simply part of the content of what is

7 filed. You're saying that the statute you referred to

8 and the Court of Appeals case says otherwise and that's

9 binding on them?

10 MS. KULPIT: Judge, I don't -- I mean, I

11 don't have as much experience as any of the colleagues

12 on here, but I can read the law, and it is clear. And

13 I know Your Honor and your wonderful court clerk can do

14 the same.

15 THE COURT: So in terms of whether or not

16 that issue was even raised before the Board of

17 Elections, you're saying the grounds upon which Mayor

18 Brown's petitions were rejected was the timing, was the

19 deadline being missed and not any other ground?

20 MS. KULPIT: Judge, they didn't have to go

21 past that ground because it wasn't timely filed. We

22 made it clear that the failure of the committee to fill

23 vacancies was acknowledged in this specific objection.

24 Everybody was aware that was our argument. It was in

25 the specific objections as well. So I mean, ultimately

1 the Board of Elections says this independent nominating
2 petition is outside the filing deadline and so it's
3 dismissed, as they should do, as this Court should do.
4 But in addition, even if they filed it properly back in
5 May, back when we were litigating independent
6 nominating petitions, it would fail because it didn't
7 identify the committee to fill vacancies.
8 THE COURT: And it's of no moment that
9 Mr. Toth didn't object to the content on behalf of the
10 Board of Elections? You, your client still reserves
11 her right to challenge that based on it being raised in
12 her objections.
13 MS. KULPIT: Absolutely, Judge. Reserves.
14 It's a counterclaim. It's properly before this Court.
15 And even if you allowed this petition on constitutional
16 grounds, which I absolutely don't think you should do
17 based on all of the wonderful arguments of Mr. Cooney
18 and Mr. Toth, it fails anyway. They screwed it up.
19 THE COURT: Anything else?
20 MS. KULPIT: Not unless the Court has
21 questions.
22 THE COURT: All right. It's now
23 four o'clock. You've been waiting patiently to argue
24 the merits of the petition. What I'm going to do is
25 take a short recess and review my notes.

1 MR. GOLDFEDER: Your Honor.
2 THE COURT: Mr. Goldfeder.
3 MR. GOLDFEDER: May I take a few minutes to
4 make a few points?
5 MR. TOTH: Your Honor, it's four o'clock. If
6 he gets more time, we all get more time. I mean --
7 THE COURT: Mr. Goldfeder, you do have the
8 burden here, so I -- if you can confine them and be
9 very brief.
10 MR. GOLDFEDER: I will.
11 THE COURT: Very specific issues.
12 MR. GOLDFEDER: So first of all, on the
13 committee to fill vacancies, there's no other way of
14 saying it except that she's wrong. Counsel is wrong.
15 6-140 is the form of the committee to -- of the
16 nominating petition. That includes the committee to
17 fill vacancies, just like the 6-132 of the designating
18 petition form includes the committee to fill vacancies.
19 It's not the form that's included -- the form that's
20 included in the statute includes that, but the statute
21 itself regarding the rules for filling out the
22 designating petitions states, irrespective of the form,
23 states the committee to fill vacancies is not
24 necessary. And it's -- and they didn't, they didn't
25 change the form because if you have -- it may not be

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1 necessary, but if you are going to include a committee
2 to fill vacancies in your designating petition, that's
3 the form. And the rules regarding the nominating
4 petition says clearly that whatever the rules are for
5 designating petition, including it's not necessary to
6 have a committee to fill vacancies, the same is true
7 for nominating petitions. The 1981 case -- and that
8 was before the law was changed, eliminating this
9 requirement. The law was changed way after that. I
10 just want to say that that's on that point.
11 With regard to Mr. Brown, his experience as a
12 mayor and leader of the Democratic Party and so on,
13 Congressman Anderson was a congressman for many years,
14 a Republican Party congressman. Congressman Anderson
15 ran in other States' Republican Party primaries, so he
16 was not exactly a novice himself. Moreover, the
17 argument that Mr. Cooney raised on its face seems valid
18 that, well, so many other people submitted independent
19 nominating petitions on a timely basis, two points.
20 The same argument was made in the Anderson against
21 Celebrezze case. Other candidates, other presidential
22 candidates followed the March 20th deadline in Anderson
23 against Celebrezze. That didn't stop the Supreme Court
24 from ruling that the early deadline was
25 unconstitutional. And those other candidates didn't

1 claim that it was unconstitutional. Similarly here we
2 have -- we've had people who got bounced, but they
3 didn't claim the unconstitutionality of the claim. So
4 that doesn't take away our rights to claim that it's
5 excessively early as a constitutional matter just
6 because other people didn't do it.
7 So this argument about that he has special
8 knowledge, he has experience, on its face seems
9 tenable, but it's really not, because it doesn't take
10 away from the actual ability for him to raise it. So
11 he's not really seeking preferential treatment, just
12 like John Anderson wasn't seeking preferential
13 treatment. This is the treatment that he's seeking for
14 himself, John Anderson, even though other candidates
15 got on the ballot. This is the remedy that Mr. Brown
16 is seeking for himself even though other candidates got
17 on the ballot because he's raising the constitutional
18 issue, and he should not be barred from raising that
19 issue or characterized as orchestrating it and he's so
20 unique and so on. All I'm saying is that the Court
21 needs to look at this issue in an honest and forthright
22 way, and I know that you will, relating to his rights
23 to raise this issue.
24 The other thing I want to say is that it's
25 really about the general election. The cases that are

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1 cited by my adversaries relate to primaries. This is
2 not about whether -- and I said this before, that it's
3 not really about whether the deadline is before the
4 primary or after the primary or, as in New Jersey in
5 that case, on the date of the primary. It only relates
6 to is it too early for the general because that's
7 really what we're talking about. You can look at the
8 whole view of what's going on, but this is not about
9 the constitutional right of Ms. Walton to run as the
10 only candidate on the ballot. This is about whether or
11 not a candidate and his supporters and voters have an
12 opportunity to vote for them. And Mr. Cooney gave
13 short shift to the fact that the Legislature -- to my
14 point that I'm only asking you to declare your view as
15 to the six-month deadline and it's up to the
16 Legislature to fix a correct deadline, but that's the
17 way it works, and I don't think anybody should have a
18 problem with that.
19 The last thing I want to say is that -- two
20 last things I want to say is our pleadings were -- we
21 pled our -- the pleadings are perfectly appropriate and
22 give them notice that we are challenging the
23 constitutionality of the statute. That's what's
24 required and that's what was done.
25 And despite everything -- my last point is a

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1 reiteration of what I started with. Despite what
2 Mr. Toth said and what Mr. Cooney said, and they both
3 gave very good arguments for their positions, but the
4 truth of the matter is the State has articulated no
5 compelling interest, no rational interest, has
6 articulated no interest, has not explained itself at
7 all in terms of why this was done. It wasn't done in
8 2012, 2014, 2016, 2018, but it was done in 2018 in a
9 manner that is inexplicable except for in the words of
10 the democratic commissioners, but that is not the
11 State.
12 And my actual final point is we didn't have
13 to sue the State of New York. That's just not the
14 case. We didn't have to sue the State Board of
15 Elections. That's just not the case. The Erie Board
16 of Elections is a necessary party, so we had to do it.
17 But frankly, all we needed to do is what we did was to
18 notify the Attorney General that we were challenging
19 the constitutionality of a particular statute, and for
20 some reason she -- reasons that they didn't give, they
21 decided not to intervene, which means that nobody with
22 any authority can articulate what the State's
23 compelling or rational basis or any kind of interest
24 was.
25 And my really last point is, despite the fact

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1 that they characterize -- that counsel characterized
2 the committee to fill vacancies as a counterclaim,
3 there's lots of cases that say you can characterize it
4 any way you want, but it's really a cross-claim,
5 respondent against respondent, and that's not permitted
6 without the permission of the Court.
7 I appreciate your listening to all of our
8 arguments and I thank my fellow lawyers for their
9 terrific work as well.
10 THE COURT: Mr. Toth, last word.
11 MR. TOTH: Yeah, a couple, and I'll actually
12 only keep it to a couple. I think again Mr. Goldfeder
13 underscores my laches argument. The experience of
14 Byron Brown, the resources that he brings to bear, even
15 if you disregard that has any constitutional
16 implication, there has been absolutely no reason given
17 why this case was not brought sometime sooner than now.
18 And Mr. Goldfeder has said it again and again, that it
19 could have been brought earlier in the summer. That is
20 exactly what laches seeks to prevent, particularly,
21 particularly against a governmental agency on the eve
22 of administering an election. I know everybody thinks,
23 oh, what's hard about administering elections, just
24 send out the ballots, count them up, done, done, done.
25 Well, that's not true.

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1 THE COURT: But notwithstanding
2 Mr. Goldfeder's argument about standing and ripeness,
3 he had not been aggrieved by the application of the
4 statute unless your client rejected his petition.
5 That's his argument.
6 MR. TOTH: But he admitted during oral
7 argument today that he could have submitted petitions
8 earlier in the summer. They chose, they chose, his
9 words, they chose to abide by the old deadline.
10 MR. GOLDFEDER: That's not laches.
11 MR. TOTH: That is exactly laches. Because
12 we could have been here July 10th. That is one
13 hundred -- read my papers, Your Honor. It is one
14 hundred percent laches. You're lying in ambush. You
15 have a cause of action, but you wait to draw prejudice
16 against your opponents. That's exactly what laches is
17 designed to protect.
18 Finally, Mr. Goldfeder has submitted some
19 things. I keep saying that because I haven't had time
20 to read them. I would -- if Mr. Goldfeder is going to
21 quibble about the pleading requirements of Ms. Kulpit,
22 I would suggest that nothing that he submitted after
23 the Order to Show Cause, which did not permit him to
24 submit various things at various times as the opinion
25 struck him, nothing he submitted post Order to Show

1 Cause should be considered by this Court and it should
2 not be part of the record for the Fourth Department.
3 Now I'm done. Thank you.
4 THE COURT: Mr. Cooney.
5 MR. COONEY: Your Honor, I just want to
6 address Mr. Goldfeder's characterization of the
7 constitutional rights of Ms. Walton. Mr. Goldfeder
8 suggested the constitutional right was that she have
9 the right to be the only one on a ballot. That is not
10 the constitutional right that his client's actions are
11 depriving her of. What she and the public have a right
12 to is an election run under current law that treats
13 every candidate equally. Ms. Walton and every other
14 candidate had to abide by that May deadline. They did.
15 In fact, when we have enforced deadlines in this
16 election on other filings like the Certificate of
17 Authorization, Ms. Walton was removed from the Working
18 Families. So the idea that he is getting preferential
19 treatment is that every other candidate in every other
20 election, including Ms. Walton, wants to have the law
21 applied equally. That is a classic constitutional
22 deprivation.
23 He says that I glossed over the idea that by
24 granting his relief, you would not be instituting the
25 August 17th deadline. That is exactly what will be

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1 done. You don't have to decide it for next year. He
2 is asking you by commencing this action to decide it in
3 this election for this -- for these candidates for this
4 year. There is no mistake about that. The reason that
5 that is so important is the fact that everyone else had
6 to abide by the May deadline. Every other candidate
7 did. You go to use the August deadline, you are
8 depriving them not of the right to be the only one on
9 the ballot. Ms. Walton didn't tell them not to go
10 petition on time, Ms. Walton didn't tell them not to
11 seek other parties. They chose to do that.
12 The reason that that is so important is that
13 when they chose the August deadline, we know that's
14 illegal, so that whole laches argument is connected to
15 what rights you're depriving Ms. Walton and the other
16 candidates who abided by that. The idea that Mr. Toth
17 is saying that they could have filed in, you know,
18 June 23rd, June 27th and any time after the primary,
19 they could have filed May 26th, May 27th, May 28th.
20 They didn't file in any at that point. That is why
21 their relief would install a deadline all the way in
22 August that the Courts have already said fifty days,
23 seventy-five, ninety days, those are illegal
24 discriminatory deadlines. They just want it to
25 discriminate against someone else. That's what

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1 preferential treatment is.
2 THE COURT: Ms. Kulpit, anything else?
3 MS. KULPIT: Judge, it pains me to say no,
4 unless you have a question, but I'm gonna do it.
5 THE COURT: All right. And I will echo the
6 sentiments of Mr. Goldfeder with respect to the quality
7 of work that has been presented and the cogent
8 arguments and the demonstration of knowledge and
9 expertise on these areas. I need to take a few minutes
10 to review my notes and I'll give you a ruling.
11 MR. COONEY: Thank you, Your Honor.
12 MS. KULPIT: Thank you, Judge.
13 MR. GOLDFEDER: Thank you, Judge.
14 (A short recess was then taken.)
15 THE COURT: All right. Back on the record.
16 And I will preface my ruling and my statements by
17 saying once again that I have reviewed the papers, the
18 case law submitted in support of your respective
19 positions and I've listened carefully to your arguments
20 today, and I have already commended all of the
21 attorneys for their work product.
22 The petitioner commenced this proceeding
23 pursuant to Article 16 of the New York State Election
24 Law. As an initial matter, this Court has considered
25 all arguments by all parties, including notably that of

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1 the Board of Elections and Mr. Toth, which is properly
2 before this Court to defend this underlying ruling.
3 Petitioner alleges that the Erie County Board
4 of Elections erroneously invalidated the petitioner's
5 nominating petition and as a consequence, the
6 petitioner's candidacy. More succinctly, the Board of
7 Elections ruled against the petitioner and found that
8 his nominating petition was filed late because New York
9 State Election Law Section 6-158(9) requires the
10 nominating petition to be filed twenty-three weeks
11 prior to the general election. It's actually no sooner
12 than twenty-four and no later than twenty-three. It is
13 uncontested the nominating petition here was filed
14 August 17th, 2021, well past the statutory deadline,
15 and in fact, Mr. Goldfeder during oral argument today
16 said yes, they were late. This leaves the question:
17 Is New York State Election Law Section 6-158(9)
18 unconstitutional such that a filing deadline
19 twenty-three weeks prior to the general election is an
20 excessively early deadline?
21 The Court heard extensive oral argument today
22 and has reviewed at length extensive papers submitted
23 by all parties on this and other legal issues. The
24 Court has reviewed and analyzed all of the cited cases,
25 and most notably I have scrutinized the case of

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1 Anderson vs. Celebrezze, that's C-E-L-E-B-R-E-Z-Z-E,
2 460 U.S. 780, 1983 U.S. Supreme Court case. Frankly,
3 all of the attorneys argued Anderson as apparent
4 controlling authority, and all of the attorneys argued
5 in a very persuasive, compelling and logical manner in
6 an effort to convince this Court that Anderson supports
7 their respective position.
8 Under the analysis dictated by the United
9 States Supreme Court case of Anderson, this Court finds
10 that New York State Election Law Section 6-158(9) is
11 unconstitutional in that the deadline presented to this
12 Court to review is excessively early.
13 As relates to three additional defenses
14 raised by the respondents in their papers and during
15 their arguments today, namely, that laches bars this
16 proceeding, petitioner failed to name a necessary party
17 and that the petitioner failed to comply with the
18 statutory requirements of the Election Law as relates
19 to listing registered voters as the committee to fill
20 vacancies. This Court has considered all arguments by
21 the parties on these issues and finds these defenses
22 raised by the respondents to be unavailing and
23 insufficient to defeat the verified petition. As such,
24 the verified petition is granted in all respects. That
25 is my decision.

1 (PROCEEDINGS CONCLUDED.)

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5 **C E R T I F I C A T I O N**

6 The foregoing is certified to be a true and accurate

7 transcript of the official court reporter's minutes of the

8 virtual proceedings in the matter of Byron W. Brown vs. Erie

9 County Board of Elections, India B. Walton and Joan L.

10 Simmons.

11

9/5/21

12 DATE

Kerry A. Meegan, CSR, NYRCR
Official Supreme Court Reporter

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