No. 23-1054

In the
United States Court of Appeals
For the Second Circuit

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

Plaintiffs – Appellants

v.

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

Defendants – Appellees

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

APPELLANTS' REPLY

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Argument

Carlanda Meadors and four other independent-minded voters ("Meadors") brought this action because New York's independent petition deadline left them without a choice on the ballot in Buffalo's 2021 mayoral election. In a surprise result, the Democratic Party had just nominated a radical leftist. The Republican Party didn't nominate anyone at all. And even though more than five months remained before the general election, New York law cut off all opportunities for a more moderate candidate to emerge in response to those developments.

As it turned out, Meadors wasn't alone. She and other disaffected voters coalesced around the candidacy of Byron Brown, who ran an extraordinary write-in campaign and won the general election with a substantial majority of the votes. If it hadn't been for Brown's remarkable campaign and the accident that New York permits voters to cast write-in votes, New York's independent petition deadline would have disenfranchised the majority of Buffalo's voters.

That's precisely the harm that the Supreme Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), seeks to prevent. As the Court explained at length, early deadlines impinge upon First Amendment freedoms because they disenfranchise voters who are dissatisfied with the choices of the two major parties. *Id.* at 786-95. They exclude candidates "whose positions on the issues could command widespread community support," denying the disaffected "not only a choice of leadership but a choice on the issues as well." *Id.* at 792 (quoting *Williams v. Rhodes*, 393 U.S. 23, 33 (1968)). Early deadlines "reduce diversity and competition in the marketplace of ideas" and are thus antithetical to the "primary values protected by the First Amendment." *Id.* at 794.

Yet the appellees ("Erie County") and the State of New York as amicus curiae brush those values aside. They would have this Court focus on Brown—who is not a party to this case—rather than on Meadors and the tens of thousands of other Buffalonians whom their deadline nearly disenfranchised. Those efforts are but a distraction, though, because *Anderson* requires this Court to "focus

on the associational rights of independent-minded voters." *Anderson*, 460 U.S. at 791-92 n.12.

I. John Anderson was a very sore loser.

Erie County argues that Meadors' reliance on *Anderson* is "sophistry" because John Anderson was "not a *sore* loser." (Appellees' Br. 25.) The County suggests that Anderson wasn't a sore loser because he sought to run "in subsequent elections" after "he lost prior ones." (*Id.*) Not so.

Anderson was a sore loser many times over. *See Anderson*, 460 U.S. at 784 n.2. On June 8, 1979, Anderson announced his intention to seek the Republican nomination for President of the United States. At the time, he was a Republican member of the United States House of Representatives, and he had been elected to that body as a Republican every two years since 1960. Anderson entered 27 Republican presidential primaries, including Ohio's, and had lost nine of them before he announced on April 24, 1980, that he would be an independent candidate for President. Even after that point, Anderson still appeared on the Republican presidential

primary ballot in 12 states and the District of Columbia—and he lost them all. *See* 1980 Republican Party presidential primaries, Wikipedia, https://en.wikipedia.org/wiki/1980_Republican_Party_presidential_primaries (last visited February 4, 2024); Richard M. Scammon & Alice V. McGillivray, *America Votes 16: A Handbook of Contemporary American Election Statistics* 59 (1985); *see generally*, Jim Mason, *No Holding Back: The 1980 John B. Anderson Presidential Campaign* (2011); Mark Bisnow, *Diary of a Dark Horse: The 1980 Anderson Presidential Campaign* (1983). Anderson was thus a "sore loser" because he tried to run as an independent presidential candidate on the general-election ballot after entering and losing so many Republican primaries *in the same election cycle*. *See* Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 Geo. L. J. 1013, 1042 (2011) ("Sore loser laws, in various forms, prohibit losing candidates in one party's primary election from subsequently filing to run as the nominee of another party or as an independent candidate on the general election ballot in the same electoral cycle.")

In addition, the State of Ohio argued that its independent petition deadline was constitutional as applied to Anderson precisely *because* he was a sore loser. *See* Brief for Respondent, *Anderson v. Celebrezze,* 460 U.S. 780 (1983) (No. 81-1635), 1982 WL 1044642, at *37-40, *46 ("*Anderson* Respondent's Br."). But the Supreme Court rejected that argument—not because Anderson wasn't a sore loser but because the challenged deadline wasn't a sore-loser statute. *Anderson*, 460 U.S. at 804 n.31. Like New York's deadline here, it prevented sore-loser candidacies only by happenstance. *Id.*

Erie County's attempt to distinguish between Byron Brown ("sore loser") and John Anderson ("not a sore loser") thus fails. Both candidates were sore losers in that they sought the same office as an independent after losing a party primary. But neither candidacy was barred by a sore-loser statute. Anderson withdrew early enough to avoid triggering Ohio's sore-loser statute, and New York doesn't have one. Erie County's reliance on *Storer v. Brown*, 415 U.S. 724 (1974), which upheld a sore-loser statute, is therefore misplaced. If *Storer* meant that a state can constitutionally use a

filing deadline to prevent sore-loser candidacies, *Anderson* would have come out the other way.

II. John Anderson wasn't a reasonably diligent candidate.

Erie County and the State of New York also argue that the reasonably-diligent-candidate standard should apply here. (Appellees' Br. 28-30; Amicus Br. 18-22.) Under this standard, they contend, "a filing deadline is not severe or discriminatory when a reasonably diligent candidate could meet it." (Appellees' Br. 28; *see also* Amicus Br. 19.) A reasonably diligent candidate could meet New York's deadline, they suggest, and Byron Brown wasn't reasonably diligent.

But neither was John Anderson. At the time, Ohio required independent presidential candidates to file only 5,000 signatures—a number that represented about .12 percent of the presidential vote cast in Ohio in 1976. *See Anderson* Respondent's Br., 1982 WL 1044642, at *20. Ohio didn't prohibit primary voters from signing independent-candidate petitions, and the state imposed no time limit on signature gathering. *Id.*

Five independent presidential candidates had satisfied Ohio's petition requirements in 1980, including one candidate who filed over 11,000 signatures three months before the deadline. *Id.* at *22. Five independent presidential candidates had also satisfied the requirements in 1976. *Id.* Between 1974, when Ohio established its March deadline, and 1980, 11 independent candidates for other statewide offices had also met the deadline. *Id.* at *22-23.

Anderson, like Brown, didn't even try to meet the deadline because he didn't launch his independent presidential bid until April 24, 1980—a month after the deadline had passed. *Id.* at *2. Anderson gathered 16,000 signatures—more than three times the number required—in only five days. *Id.* On May 16, 1980, Anderson submitted his petition to Ohio's Secretary of State, who rejected it as untimely. *Id.* There was never any dispute in *Anderson* that Anderson could have met Ohio's deadline if he had actually tried to comply with it.

Ohio argued that the reasonably-diligent-candidate standard should apply. *Id.* at *21. The Supreme Court had articulated that standard in *Storer v. Brown*, 415 U.S. at 742, and the Court

reiterated the standard in *Mandel v. Bradley*, 432 U.S. 173, 177 (1977). Applying that standard, Ohio argued, required the Court to affirm: "The success of these independent candidates in appearing on the Ohio ballot convincingly demonstrates that the filing deadline is no impediment to a reasonably diligent candidate." *Anderson* Respondent's Br., 1982 WL 1044642, at *23.

But the Supreme Court reversed. Although the Court acknowledged that five presidential candidates had met Ohio's deadline in 1980, it noted that "their inclusion on the ballot does not negate the burden imposed on the associational rights of independent-minded voters." *Anderson*, 460 U.S. at 791-92 n.12. The Court's "focus on the associational rights of independent-minded voters distinguishes the burden imposed by Ohio's early filing deadline from that created by the California disaffiliation provision upheld in *Storer v. Brown*." *Id.* The reasonably-diligent-candidate standard was thus inapplicable because the Court's focus in *Anderson* was on the rights of the voters—not the candidate. Had the Supreme Court applied the reasonably-diligent-candidate

standard to the petition deadline in *Anderson*, the case would have come out the other way.*

III. New York's attempts to distinguish *Anderson* fail.

New York attempts to distinguish *Anderson* with two more legal arguments. First, the State points out that New York's deadline is "only twenty-eight days" before the primary election, which is "far less than in *Anderson*." (Amicus Br. 14-15.) Second, New York points out that *Anderson* and one of the other cases on which Meadors relies—*Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008)—involved presidential elections. But these distinctions also fail.

Although it's true that New York's deadline is closer to the primary election than Ohio's was in *Anderson*, nothing in *Anderson* suggests that the outcome of the case depended on any particular number. Rather, the problem with Ohio's deadline was that it

* Four dissenting Justices agreed with Ohio that the reasonably-diligent-candidate standard should have applied and would have foreclosed Anderson's claim. *See Anderson*, 460 U.S. at 809-10 (Rehnquist, J., dissenting).

burdened "the voting and associational interests of voters whose independent political leanings crystallized as a result of developments in the course of the primary campaigns." *Anderson*, 460 U.S. at 791-92 n.12. That's why courts have read *Anderson* to require heightened scrutiny of early filing deadlines for independent candidates that fall substantially before the major-party primaries. *See, e.g., Council of Alt. Pol. Parties v. Hooks*, 121 F.3d 876, 880 n.3 (3d Cir. 1997).

New York also points out that the post-*Anderson* cases cited by Meadors struck down deadlines that were earlier than New York's. (Amicus Br. 15 n.4.) The State suggests that a deadline 28 days before a primary election doesn't impose a severe burden even if a deadline 44 days before a primary election does. (*Id.*) But the State doesn't reckon with all of Meadors' cases. The State fails to mention *Graveline v. Benson,* 992 F.3d 524, 538-39 (6th Cir. 2021), which struck down a deadline that fell five weeks before major-party nominations. The State also fails to identify any principled basis for drawing a constitutional line between four and five weeks

before a primary election, and it cites no cases that have ever drawn such a line. This distinction makes no difference.

New York's second distinction fares no better. The Supreme Court's opinion in *Anderson* doesn't restrict its holding to presidential elections. It emphasizes the "uniquely important national interest" involved in presidential elections, 460 U.S. at 794-95, and it explains that "the State has a less important interest in regulating Presidential elections than statewide or local elections," *id.* at 795. But the Supreme Court makes those points in the context of discussing how to weigh the State's interests. The unique nature of a presidential election alters how courts should weigh those interests, placing "a thumb on the scale in favor of ballot access" for presidential candidates. *Cowen v. Ga. Sec'y of State*, 960 F.3d 1339, 1344 (11th Cir. 2020). The unique nature of a presidential election doesn't change, as New York suggests, how courts should determine the character and magnitude of the burdens on the voters' associational rights. *See, e.g., Norman v. Reed*, 502 U.S. 279, 288 (1992) (applying *Anderson* in the context of a local election).

IV. Factual disputes preclude summary judgment.

This Circuit has been very clear that the elements of the *Anderson* test are issues of fact. *See Lopez-Torres v. N.Y. State Bd. of Elections,* 462 F.3d 161, 195 (2d Cir. 2006), *rev'd on other grounds* 552 U.S. 196 (2008); *Green Party of Conn. v. N.Y. State Bd. of Elections*, 389 F.3d 411, 418-21 (2d Cir. 2004). "The clear error standard applies both to the District Court's ultimate finding of severity as well as the findings underlying that determination." *Lopez-Torres*, 462 F.3d at 195. The clear error standard also applies to the district court's ultimate findings of discrimination and tailoring. *See id.* at 203; *cf. Deegan v. City of Ithaca*, 444 F.3d 135, 142 (2d Cir. 2006) (stating that a tailoring determination "involves a fact specific and situation specific inquiry"). As a result, summary judgment is inappropriate when there are genuine factual disputes about severity, discrimination, or tailoring under the *Anderson* test.

New York doesn't dispute this standard. (Amicus Br. 12.) Erie County asserts, however, that severity and discrimination are "question[s] of law." (Appellees' Br. 30.) The County offers no citations to support its bald assertion, and it fails to address *Lopez-*

Torres, *Green Party*, or any other cases of this Circuit involving similar constitutional balancing tests. The County's assertion isn't the law in this Circuit; it's wishful thinking.

The County engages in this fantasy because there is more than enough evidence in the record for a reasonable factfinder to decide in Meadors' favor. (*See* Appellants' Br. 31-33.) The magistrate judge simply ignored, discounted, or "disagree[d]" with it. (App. II:459.) Weighing the evidence like that is improper on summary judgment, and that alone warrants reversal. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986); *Heyman v. Com. & Indus. Ins. Co.*, 524 F.2d 1317, 1319–20 (2d Cir. 1975).

New York's brief underscores the fact-dependent nature of this case. In support of its argument that the burden here isn't severe, the State offers several new fact-based arguments citing evidence that isn't even in the record. The State argues, for example, that the burden here isn't severe because an independent mayoral candidate got on the ballot in 2021 and 2023. (Amicus Br. 16-17, 20.) This is apparently intended to dispute Meadors'

evidence that the burden is severe because seven petitioning efforts failed in 2022. (App. I:204.)

The State also argues that New York's early deadline gives independent candidates an advantage over partisan candidates "because public, media and supporter interest is primed by the petitioning and campaigning activities of primary candidates." (Amicus Br. 17-18.) While the State offers no evidence to support this factual assertion, it is apparently intended to dispute Meadors' evidence that New York's early deadline forces independent candidates to organize their petitioning efforts in the winter or very early spring, when the general election is remote and interest is low, and comes before many of the most popular outdoor fairs and festivals where petition circulators commonly gather signatures. (App. I:203-04.)

Neither the magistrate judge nor this Court can resolve these and other genuine factual disputes at this point. The law reserves that function for the trier of fact who, in this case, is the district judge.

Conclusion

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

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This brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because, excluding parts of the brief exempted by Rule 32(f), it contains 2,453 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in the 14-point Century Schoolbook typeface in roman style.

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