UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE BROOKLYN BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiff,

v.

PETER S. KOSINSKI, in his official capacity as Co-Chair of the State Board of Elections, et al.

Defendants.

STATE BOARD OF ELECTIONS DEFENDANTS' UPDATED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Case No. 1:21-cv-07667-KPF

PROPOSED FINDINGS OF FACT

Legislative History

1. In the colonial period, many elections were conducted by "the viva voce method or by the showing of hands." *Burson v. Freeman*, 504 U.S. 191, 200 (1992).

2. The open nature of these systems made them ripe for bribery and intimidation. *Id.*

3. This led to the widespread use of the paper ballot, which was initially a vast improvement, but eventually opportunistic political parties developed strategies to take advantage of the process. *Id.*

4. Parties "began to produce their own ballots," which "were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance." *Id.*

5. This allowed "vote buyers" to "place a ballot in the hands of the bribed voter and watch until he placed it in the polling box." *Id.*

6. At this time, the surroundings of a polling place were akin to "an open auction place," with numerous persons competing for the attention of "uncommitted or wavering voter[s]." *Id.* at 202.

7. The carnival-like atmosphere that had developed at or around the polls during an election that existed at the time created the need for significant legislative reforms to protect voters and the integrity of the voting process. *See* Exs. D-1, D-2, D-3, and D-4.

8. States began to adopt the Australian system of voting, which utilized "an official ballot, encompassing all candidates of all parties on the same ticket" and "provided for the erection of polling booths," and excluded the "general public from the entire polling room." *Burson*, 504 U.S. at 202.

9. In 1888, New York adopted this system, and added other restrictions, including the prohibition of "electioneering on election day within any polling-place, or within one hundred feet of any polling place." *Id.* at 204 (quotations omitted).

10. Prior to 1892, in New York it was illegal to "[t]o provide or furnish entertainment at his expense, to any meeting of electors, previous to or during the election and which he shall be candidate" or "[t]o pay for, procure, or engage to pay for any such entertainment," "with the intent to promote his election, of for any other person, with intent to promote the election of any such candidate." Ex. D-5 (John; Butler Duer, Benjamin F.; Spencer, John C., REVISED STATUTES OF THE STATE OF NEW-YORK, AS ALTERED BY SUBSEQUENT ENACTMENTS: TOGETHER WITH STATUTORY PROVISIONS OF A GENERAL NATURE, PASSED BETWEEN THE YEARS 1828 AND 1845 INCLUSIVE, at 475).

11. A predecessor statute to Section 17-140 was enacted on May 19, 1892. *See* Ex. D-6 (L. 1892, ch. 693, § 41o).

12. This predecessor statute applied to non-consumable goods by prohibiting the furnishing of "entertainment to electors" and the provision of "money or other property" to induce individuals to vote. *See id.*

13. In 1906, the statute was overhauled to instead prohibit a person from providing another "any meat, drink, tobacco, refreshment, or provision," thereby expressly limiting the items covered by the statute to consumable items. Ex. D-11 (L. 1985, ch. 154, § 1); Ex. D-7 (L. 1906, ch. 503, § 41n).

14. In 1992, the exception to Section 17-140 for such items "having a retail value of less than one dollar" was added to allow for the common practice in "most upstate communities" of "hav[ing] available for al[l] voters pieces of candy, cigars, coffee, soda and the like for voters." Ex. D-13.

15. Until the 1992 amendments, it was a standard practice for the Democratic and Republican parties to collectively provide cigars and candy to voters in polling places in upstate counties. *See id.*

16. The bill sponsors clarified that the amendment "would allow the age-old practice to continue," but would prohibit the mentioning of any political party or candidate. *Id.*; Ex. D-23, Connolly Decl.

17. There is no record whatsoever of any concern by the Legislature, in connection with Section 17-140, regarding the provision of non-consumable items.

18. The only subsequent legislative discussion concerning the items disallowed under the statute concerned consumable items.

19. N.Y. Election Law § 17-140 remains unchanged since the 1992 amendments.

Other Relevant Historical Background

20. Before the 2020 general election, the New York Attorney General expressed concerns about the "prospect of voter intimidation" due to "[r]ecent news reports." Ex. D-14.

21. Among the harassing conduct of concern was "individuals and groups patrolling outside of polling places and trying to scare people out of the voting line." *Id.*

22. Issues of long lines in some polling places in New York City was not a new phenomenon in 2020. *See* Trial Transcript at 38:18-20 (Williams Cross-Examination).

23. Long voting lines have been complained of in Brooklyn in connection with every general election since at least 2012. Trial Transcript at 38:21-24 (Williams Cross-Examination).

24. Additionally, complaints regarding long voting lines both in New York City and upstate were made during each presidential election cycle since 2012. Ex. D-23, Connolly Decl. ¶ 49; Trial Transcript at 38:21-39:5 (Williams Cross-Examination).

25. The issue of long lines also arose during municipal elections involving greater voter participation. Trial Transcript at 19:8-21 (Williams Cross-Examination).

26. The State Board received reports of voting lines longer than 30 minutes in New York City and in various upstate counties in connection with the 2012, 2016, and 2020 general elections. Ex. D-23, Connolly Decl. ¶ 49.

27. The City Board is also aware of such reports, but is unaware of any such reports since the 2020 general election. *See* Trial Transcript at 103:15-104:3 (Ryan Cross-Examination).

Prior Provision Of Food And Drink To Voters

28. In recent elections, organizations have formed whose entire mission is to provide food to voters waiting in line at the polls, including Pizza to the Polls and Chefs to the Polls. Ex. D-23, Connolly Decl. ¶¶ 56-57; Trial Transcript at 44:8-16, 84:19-20 (Williams Cross-

Examination), 101:20-102:11 (Ryan Cross Examination), 166:25-167:7 (Connolly Redirect Examination); *see also* Ex. D-17.

29. Pizza for the Polls provided pizza and other food items to voters waiting in line at polling places. Ex. D-23, Connolly Decl. ¶ 56; Trial Transcript at 166:25-167:3 (Connolly Redirect Examination); *see* Ex. D-17.

30. Another group, Chefs to the Polls, also provided food to voters waiting in line to vote in New York during the 2020 election. Ex. D-23, Connolly Decl. ¶ 57; Trial Transcript at 166:25-167:7 (Connolly Redirect Examination).

31. Both Pizza to the Polls and Chefs to the Polls were active during the 2020 election cycle in New York City, including Brooklyn. Ex. D-23, Connolly Decl. ¶¶ 56-57; *see* Trial Transcript at 101:20-102:4, 168:4-10; *see also* Ex. D-17.

32. There is also video evidence showing that this conduct took place throughout New York City on election day in 2020, including in Brooklyn. *See* Ex. D-17.

33. Additionally, Plaintiff has itself acknowledged that "many, many organizations" engage in "line warming." Ex. D-22; Trial Transcript at 65:16-25 (Williams Cross Examination).

Plaintiff's Lack Of Engagement In The Proposed Conduct

34. Plaintiff has never before engaged in the Proposed Conduct. Trial Transcript at 18:24-19:2 (Williams Cross Examination), 124:25-125:3 (Bakiriddin Cross-Examination).

35. During early voting in the 2020 general election, Plaintiff handed out hand sanitizer, face masks, and face shields to voters waiting in line to vote. Trial Transcript at 39:6-15 (Williams Cross-Examination).

36. Plaintiff informally decided that it would be fine to engage in that conduct, reasoning that "if somebody wants to say something about it, let them say it." Trial Transcript at 43:8-11 (Williams Cross-Examination).

37. Plaintiff did not warn any of its members that they could potentially be exposing themselves to criminal prosecution, fines, or jail time as a consequence of giving out hand sanitizer, face masks, and face shields to voters waiting in line to vote during the 2020 general election. *See* Trial Transcript at 62:22-63:18 (Williams Cross-Examination) ("We didn't warn our volunteers. . . . I believe I said . . . something to the effect of, This may or may not be able to be done because of the value, or you can't handout things. So if somebody tells you to stop, just stop and come and get me. Don't get into an argument."). Nor did Plaintiff consult with an attorney before engaging in such conduct. Trial Transcript at 135:19-21 (Bakiriddin Cross-Examination).

38. After engaging in this conduct, Plaintiff did not receive any reports of any volunteers being told that they could not hand out sanitizer, face shields, or masks to voters waiting in line, and no one was actually told to stop distributing those items. Trial Transcript at 43:25-44:7 (Williams Cross-Examination).

39. No one associated with Plaintiff was prosecuted or threatened with prosecution or criminal action for providing sanitizer, face shields, or masks to voters in New York during the 2020 Presidential Election. Trial Transcript at 43:18-24 (Williams Cross-Examination), 139:14-19 (Bakiriddin Cross-Examination).

40. Plaintiff has not proposed, approved, or set aside any resources to fund the Proposed Conduct. Trial Transcript at 38:1-13 (Williams Cross-Examination).

41. Plaintiff also has never budgeted any funds to engage in the Proposed Conduct, notwithstanding that an approved budget would be required to purchase food and beverages to

provide to voters and notwithstanding the fact that Plaintiff has budgeted to purchase food and beverages for other events. Trial Transcript at 37:13-38:13 (Williams Cross-Examination), 132:16-19, 133:13-134:17 (Bakiriddin Cross-Examination).

42. Notwithstanding the fact that meeting minutes, on their face, mention what has been talked about at each meeting, and require the Plaintiff to describe any highlights or accomplishments and list any proposed scheduling events, no discussion of Section 17-140 or the provision of food or drink to voters is even reflected in any meeting minutes of Plaintiff's Executive Committee or Plaintiff's Civic Engagement Committee. Trial Transcript at 26:18-28:17, 31:2-32:5, 33:22-34:9 (Williams Cross-Examination), 125:19-128:16 (Bakiriddin Cross-Examination); *see also* Exs. P-1, P-2, P-3. P-4, P-5, P-6, P-7, D-19, D-20. Further, the Plaintiff never generated any specific plans to provide food and drink to waiting voters or created any written materials that would accompany those actions. Trial Transcript at 35:25-36:12 (Williams Cross-Examination), 130:21-23 (Bakiriddin Cross-Examination).

The State BOE Defendants Lack Authority

43. Within the State Board, the chief enforcement counsel has "sole authority within the state board of elections to investigate on his or her own initiative or upon complaint alleged violations of" "article fourteen of [N.Y. Election Law] and other statutes governing campaigns, elections and related procedures." N.Y. Election Law § 3-104(b); Ex. D-23, Connolly Decl. ¶ 42.

44. All investigations conducted pursuant to N.Y. Election Law § 3-107 are conducted under the ambit of the chief enforcement counsel and the division of election law enforcement. *See* N.Y. Election Law § 3-104(b); Ex. D-23, Connolly Decl. ¶ 42.

45. However, the chief enforcement counsel and the division of election law enforcement lack authority to commence a criminal action upon a violation of a provision of the Election Law. *See* N.Y. Election Law § 3-104(b); Ex. D-23, Connolly Decl. ¶ 44.

46. Instead, upon a determination by the State Board's chief enforcement counsel and a vote by the State Board's commissioners that there is "reasonable cause to believe that a violation warranting criminal prosecution has taken place," the State Board's chief enforcement counsel must "refer such matter to the attorney general or district attorney with jurisdiction over such matter to commence a criminal action." N.Y. Election Law § 3-104(5)(b); Ex. D-23, Connolly Decl. ¶ 44.

47. This is the only avenue for enforcement of criminal law violations provided for in N.Y. Election Law. Ex. D-23, Connolly Decl. ¶ 44.

No Person Or Entity Has Been Prosecuted Under Section 17-140

48. Since 1976, when N.Y. Election Law § 3-107 was enacted, the State Board has not made a single arrest. Ex. D-23, Connolly Decl. ¶ 43.

49. The State Board and the Board of Elections in the City of New York have neither the ability to arrest nor prosecute individuals for violation of the election law. Trial Transcript at 109:25-110:5 (Ryan Redirect Examination).

50. Plaintiff and the State Board alike lack any evidence of any instance where any person or entity was prosecuted or threatened with prosecution for a violation of Section 17-140 in the statute's 140-year history or for a violation under any of its predecessor statutes.[1] Ex. D-23,

[1] While Plaintiff stated at trial for the first time that she had heard that the police were called to Skidmore College because college students had handed out pizza to voters in line, Plaintiff acknowledged that she had no personal knowledge regarding any of the individuals or their activities, was not present at the scene, did not see any arrest records, and only learned about the alleged incident from a news article that Plaintiff did not disclose in the course of discovery or present as evidence at trial. Trial Transcript at 70:18-72:4 (Williams Cross-Examination). Additionally, there is no evidence that the State Board had any knowledge of or took any enforcement action concerning the alleged

Connolly Decl. ¶ 46; Trial Transcript at 43:18-24, 45:17-21, 71:2-72:4 (Williams Cross-Examination), 169:22-24 (Connolly Redirect Examination).

51. The State Board has never referred any matter to the attorney general or any district attorney for prosecution of any perceived violation of Section 17-140. Ex. D-23, Connolly Decl. ¶ 47; Trial Transcript at 169:11-15 (Connolly Redirect Examination).

52. Additionally, the State Board need not be contemporaneously aware of conduct at the time it occurs in order to investigate it or make a referral to the New York Office of the Attorney General or district attorney regarding conduct in violation of Section 17-140. Trial Transcript at 161:7-11 (Connolly Cross-Examination), 167:9-16 (Connolly Redirect Examination). Rather, the State Board can investigate a potential violation of the election law after an election, and can refer a potential violation of the election law for prosecution after an election, if the State Board of Elections becomes subsequently aware of conduct in violation of relevant law. Trial Transcript at 161:7-11 (Connolly Cross-Examination), 167:17-21 (Connolly Redirect Examination).

53. The State Board is currently aware that individuals and organizations have distributed food and water to voters at the polls across the country, and is aware that individuals or organizations distributed food and water to voters at the polls in New York State. Trial Transcript at 156:3-12, 158:3-21 (Connolly Cross-Examination).

54. Despite the State Board being aware that individuals or organizations distributed food and water to voters at the polls in New York State, despite the existence of video evidence indicating that Pizza to the Polls and Chefs to the Polls might have violated the text of Election Law 17-140, and despite the Board of Elections having sufficient evidence to conduct an investigation as to whether the conduct of Pizza to the Polls and Chefs to the Polls was in violation

incident, called the police, or that a Board of Elections police department arrested the students. Trial Transcript at 78:7-22 (Williams Cross-Examination), 169:16-21 (Connolly Redirect Examination).

of Section 17-140, no investigation has been commenced or conducted by the State Board of Elections concerning any violation of Section 17-140. Trial Transcript at 160:15-25 (Connolly Cross-Examination), 168:4-14, 168:22-169:1 (Connolly Redirect Examination).

55. The State Board has not made any referral to the New York Office of the Attorney General or any other district attorney's office regarding the conduct of Chef to the Polls or Pizza to the Polls. Trial Transcript at 161:12-16, 169:6-10 (Connolly Redirect Examination).

56. The State Board is not aware of any criminal reports being made to law enforcement concerning line warming that occurred in 2020 at the Barclays Center. Trial Transcript at 161:12-16, 169:6-10 (Connolly Redirect Examination).

57. The State Board of Elections also did not direct any county or city board to take any action in connection with the activities of Pizza to the Polls and Chefs to the Polls, and the State Board of Elections has not issued any guidance to county boards as to how to deal with this activity if it is observed in the future. Trial Transcript at 161:1-6 (Connolly Redirect Examination).

58. The City Board has also not taken any enforcement actions of any kind pursuant to Section 17-140. Ex. CD-1, Ryan Decl. ¶ 12; Trial Transcript at 109:5-9 (Ryan Redirect Examination).

59. Plaintiff is also unaware of a single enforcement action ever taken for a violation of Section 17-140. Williams Dep. at 54:25-55:20; 150:12-18; *see* Trial Transcript at 67:9-17, 70:6-15 (Williams Cross-Examination).

60. Plaintiff has itself described Section 17-140 as a "dormant" law that has not been enforced, including in a presentation by Plaintiff's counsel to Plaintiff's general membership. Trial Transcript at 67:9-17 (Williams Cross-Examination); Ex. D-22.

61. Neither the Defendants nor the law enforcement officials with authority to prosecute violations of Section 17-140 have threatened to enforce the law against Plaintiff or anyone else. Ex. D-23, Connolly Decl. ¶¶ 43, 46-47; Trial Transcript at 70:6-15 (Williams Cross-Examination).

62. Plaintiff has acknowledged that no state or local attorney general's office in New York has ever advised Plaintiff or any of its members that they would be criminally charged for handing a bag of chips or a soft drink to voters waiting in line in New York. Williams Dep. at 54:25-55:6; *see* Trial Transcript at 72:8-73:14 (Williams Cross-Examination).

63. Despite the New York State Attorney General's Office being responsible for enforcing crimes within the State of New York and notwithstanding the fact that Plaintiff's Executive Director consulted for New York State Attorney General Letitia James and has a direct line to her, Plaintiff did not consult with the Attorney General's office, inform the Attorney General's office of the Plaintiff's intentions to provide refreshments to voters waiting in line, find out the position of the New York State Attorney General's office, or inquire as to whether Plaintiff or any of its participants would be prosecuted for providing refreshments to voters. Trial Transcript at 72:8-73:14 (Williams Cross-Examination), 136:8-10 (Bakiriddin Cross-Examination).

64. Further, no state or local board of elections in New York has ever advised the Brooklyn NAACP or any of its members that they would be criminal charged or subject to any sanctions for providing food or drink to voters waiting in long lines. Williams Dep. at 55:7-13; Trial Transcript 135:8-136:7 (Bakiriddin Cross-Examination).

Plaintiff's Actual Motivation for this Lawsuit

65. At a meeting of Plaintiff's general membership, Plaintiff's counsel stated, without any correction by Plaintiff's leadership, that the intention of this lawsuit was to collaterally challenge bans in place in other states regarding the act of providing food or drink to voters, and to cause a "domino effect" on those laws. Trial Transcript at 67:21-68:13 (Williams Cross-Examination); Ex. D-22.

The State's Interpretation

66. Given the State Board's role, the State Board has had occasion to interpret the meaning of N.Y. Election Law § 17-140. Ex. D-23, Connolly Decl. ¶ 17.

67. The State Board interprets the phrase "in connection with or in respect of any election" as only applying to voters actively engaged in the act of voting during the period from when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place. Ex. D-23, Connolly Decl. ¶ 18; Trial Transcript at 169:25-170:21 (Connolly Redirect Examination).

68. The State Board interprets the phrase "provision" to mean any similarly consumable substance, such as the other items listed in the statute, "meat," "drink," "tobacco," and "refreshment." Ex. D-23, Connolly Decl. ¶ 20.

69. The State Board interprets "persons who are official representatives of the board of elections or political parties and committees and persons who are engaged as watchers, party representatives or workers assisting the candidate" to refer to persons who are allowed to be in the polling place when not in the act of voting. Ex. D-23, Connolly Decl. ¶ 24; *see* Trial Transcript at 154:23-25. These identified persons are allowed to receive, but not give, the items covered by Section 17-140. Trial Transcript at 172:1-11 (Connolly Redirect Examination).

70. The State Board interprets the phrase "except such meat, drink, tobacco, refreshment or provision having a retail value of less than one dollar, which is given or provided to any person in a polling place without any identification of the person or entity supplying such provisions" to mean that consumable items of nominal value (*i.e.*, less than one dollar) may be provided to a voter inside the polling place without violating the statute, so long as the individual or entity providing the item does not disclose his or her identity or affiliation. Ex. D-23, Connolly Decl. ¶ 25.

The Zone Of Repose

71. Voters who are in the process of engaging in the franchise of voting are susceptible to both real and perceived interference and influence. Ex. D-23, Connolly Decl. ¶¶ 36-41.

72. New York intends to create a "zone of repose" for voters who are in the process of engaging in the franchise of voting to avoid such real or perceived interference or influence. *See* Ex. D-23, Connolly Decl. ¶¶ 36-37; Trial Transcript 162:2-9 (Connolly Redirect Examination).

PROPOSED CONCLUSIONS OF LAW

1. Plaintiff, The Brooklyn Branch of the National Association for the Advancement of Colored People ("NAACP"), alleges that N.Y. Election Law § 17-140 violates its and its members' rights under the First and Fourteenth Amendments.

Standing

2. Plaintiff failed to prove standing.

3. To prevail on its claim, Plaintiff must prove, by a preponderance of the evidence, that: (1) Plaintiff has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) Plaintiff's injury is fairly traceable to the challenged action of the State BOE Defendants; and (3) it is likely, as opposed to merely

speculative, that Plaintiff's injury will be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Plaintiff Failed to Prove An Injury In Fact Based Upon Concrete Plans To Engage In The Proposed Conduct

4. To demonstrate that Plaintiff's injury is concrete and particularized, it is not enough for Plaintiff "to plead a vague intention to expose [itself] to harm at an indeterminate time" because "some day intentions — without any description of concrete plans, or indeed even any specification of *when* the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564 (emphasis in original).

5. Standing is lacking where a plaintiff has made no concrete plans to engage in the conduct that would expose the plaintiff to potential injury. *See, e.g., Am. Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin*, 2000 U.S. App. LEXIS 3463, at *5 (2d Cir. Feb. 25, 2000) (charity lacked standing to challenge Connecticut law based upon the Court's factual finding that its "plans to engage in charitable solicitation in Connecticut are some-day intentions rather than concrete plans") (internal quotation marks omitted); *Kearns v. Cuomo*, 415 F. Supp. 3d 319, 329 (W.D.N.Y. 2019), *aff'd*, 981 F.3d 200 (2d Cir. 2020) (collecting cases for the "concrete plan" requirement).

6. Here, Plaintiff has not suffered an injury in fact that is concrete because Plaintiff has never before engaged in the Proposed Conduct and has no concrete plans to engage in the Proposed Conduct in the future. Trial Transcript at 18:24-19:2, 35:25-36:12 (Williams Cross-Examination), 124:25-125:3, 130:21-23 (Bakiriddin Cross-Examination).

7. Specifically, Plaintiff had never budgeted any funds to engage in the Proposed Conduct, notwithstanding that an approved budget would be required to purchase food and

beverages to provide to voters. Trial Transcript at 37:13-38:13 (Williams Cross-Examination). Moreover, no discussion of Section 17-140 is reflected in any meeting minutes of Plaintiff's Executive Committee or Plaintiff's Civic Engagement Committee, and the Plaintiff never generated any specific plans to provide food and drink to waiting voters or created any written materials that would accompany those actions. *See* Trial Transcript at 26:18-28:9 (Williams Cross-Examination).

8. Contrary to Plaintiff's assertions, the Plaintiff's behavior leading up to the lawsuit's filing indicates little more than "a desire to vindicate [its] views of the law" rather than being "able and ready" to engaged in the Proposed Conduct "in the reasonably imminent future." *Carey v. Adams*, 592 U.S. 53, 63-64 (2020). There is simply no credible, contemporaneous evidence that Plaintiff ever considered engaging in the Proposed Conduct before this action was commenced. Plaintiff did not produce a single writing of any kind referencing the Proposed Conduct or Section 17-140. *See* Trial Transcript at 26:18-28:9 (Williams Cross-Examination). Indeed, it appears that Section 17-140 was first raised to Plaintiff's attention by their trial counsel. *See* Ex. D-22.

9. Thus, Plaintiff has not proven an injury in fact.

Plaintiff Failed to Prove An Injury In Fact Based Upon A Credible Fear Of Prosecution

10. There is also no evidence to support Plaintiff's allegation that the presence of Section 17-140 on the books is what "chilled" it from engaging in the Proposed Conduct. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013) (a "real and imminent fear" is required for standing in the pre-enforcement First Amendment context).

11. In order for a dispute to be susceptible to resolution by the Court, Plaintiff must claim that it has been threatened with prosecution or that a prosecution is likely. *See Babbitt v.*

UFW Nat'l Union, 442 U.S. 289, 298-99 (1979) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)).

12. While "courts are generally willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund," *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016) (quotations omitted), this "conventional background expectation of enforcement may be overcome where the law is moribund or of purely historical curiosity," *Johnson v. District of Columbia*, 71 F. Supp. 3d 155, 159-60 (D.D.C. 2014) (quotations omitted, collecting cases).

13. In other words, "the mere existence of a law prohibiting intended conduct does not automatically confer Article III standing," *Adam v. Barr*, 792 F. App'x 20, 22 (2d Cir. 2019), and a "credible threat of prosecution . . . cannot rest on fears that are imaginary or speculative," *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 384 (2d Cir. 2015).

14. In cases where a credible threat of prosecution was found, the Defendants and/or law enforcement officials with authority to prosecute violations had threatened to enforce the law against Plaintiff and/or someone else. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014) (credible threat of prosecution found where, not only had the relevant commission not disavowed enforcement of the statute, but also had issued a letter threatening enforcement proceedings); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (credible threat of prosecution found where plaintiff "told by the police that if he again handbills at the shopping center and disobeys a warning to stop he will likely be prosecuted"); *see also Kearns v. Cuomo*, 981 F.3d 200, 210 (2d Cir. 2020) ("The government's unwillingness or inability to prosecute a single county clerk for not verifying an applicant's immigration status in the 34 years that § 1324 has prohibited harboring is a reason to conclude that no such intent [to prosecute] exists.") (quotation omitted).

15. Here, there is a history of "ubiquitous, open" violation of Section 17-140 by Pizza to the Polls, Chefs to the Polls, and the "many, many organizations" who, Plaintiff admits, have previously engaged in "line warming" in New York. *See Poe v. Ullman*, 367 U.S. 497, 502 (1961); Ex. D-23, Connolly Decl. ¶¶ 56-57; Trial Transcript at 44:8-16, 84:19-20 (Williams Cross-Examination), 101:20-102:4 (Ryan Cross-Examination), 160:15-161:16 (Connolly Cross-Examination), 166:25-167:7, 168:4-14, 168:22-169:10 (Connolly Redirect Examination); *see* Exs. D-17, D-22.

16. Plaintiff cannot prove a credible fear of prosecution because there is no record of either the State Board or the City Board prosecuting or threatening to prosecute any person or entity for a violation of Section 17-140 or any of its predecessor statutes, or referring any matter to the attorney general or any district attorney for prosecution of any perceived violation of Section 17-140. Ex. D-23, Connolly Decl. ¶¶ 43, 46-47; Ex. CD-1, Ryan Decl. ¶ 12; Trial Transcript at 43:18-24, 45:17-21, 70:6-15, 71:2-5, 84:4-12 (Williams Cross-Examination), 109:5-9 (Ryan Redirect Examination), 169:11-24 (Connolly Redirect Examination). There is also no evidence whatsoever of any enforcement action, actual or threatened, taken by the State Board or the City Board at any time in Section 17-140's history. Ex. D-23, Connolly Decl. ¶¶ 43, 46-47; Ex. CD-1, Ryan Decl. ¶ 12; Trial Transcript at 43:18-24, 45:17-21, 70:6-15, 71:2-5, 84:4-12 (Williams Cross-Examination), 109:5-9 (Ryan Redirect Examination), 169:11-24 (Connolly Redirect Examination).

17. Further, Plaintiff has engaged in conduct similar to the Proposed Conduct without apprehension by handing out sanitizer, face masks, and face shields to voters waiting in line to vote during early voting in the 2020 general election. Trial Transcript at 39:6-15, 43:25-44:7 (Williams Cross-Examination).

18. Despite Plaintiff now professing that it believed this conduct may have violated Section 17-140, Plaintiff did not warn any of its members that they could potentially be exposing themselves to criminal prosecution, fines, or jail time as a consequence of giving out hand sanitizer, face masks, and face shields to voters waiting in line to vote during the 2020 general election. *See* Trial Transcript at 62:22-63:18 (Williams Cross-Examination) ("We didn't warn our volunteers. . . . I believe I said . . . something to the effect of, This may or may not be able to be done because of the value, or you can't handout things. So if somebody tells you to stop, just stop and come and get me. Don't get into an argument."). Nor did Plaintiff consult with an attorney before engaging in such conduct. Trial Transcript at 135:19-21 (Bakiriddin Cross-Examination).

19. If Plaintiff were actually fearful, Plaintiff's Executive Director would have used the direct line she had to Letitia James to obtain clarification concerning the New York Attorney General's position regarding the application of Section 17-140. Trial Transcript at 72:8-73:14 (Williams Cross-Examination), 136:8-10 (Bakiriddin Cross-Examination). The fact that Plaintiff did not even take that step demonstrates that it did not have any actual, much less credible, fear.

20. Thus, Plaintiff has not proven a credible fear of prosecution.

Plaintiff Failed To Prove That Any Alleged Injury Is Traceable To Any Action By The State BOE Defendants Or Would Be Redressed By A Favorable Decision In This Action

21. To prove traceability, Plaintiff must prove that its injury is traceable to the State BOE Defendants and is not the result of independent action by a third party not before the court. *Lujan*, 504 U.S. at 561.

22. However, Plaintiff cannot prove that its injury is traceable to the State BOE Defendants because the State BOE Defendants have no jurisdiction to enforce or prosecute any criminal law, let alone a violation of Section 17-140. Ex. D-23, Connolly Decl. ¶¶ 44-45. Moreover, there is no evidence whatsoever of any enforcement action, actual or threatened, taken

by the State Board at any time in the statute's history. Ex. D-23, Connolly Decl. ¶¶ 43, 46-47; Ex. CD-1, Ryan Decl. ¶ 12; Trial Transcript at 43:18-24, 45:17-21, 70:6-15, 71:2-5, 84:4-12 (Williams Cross-Examination), 109:5-9 (Ryan Redirect Examination), 169:11-24 (Connolly Redirect Examination).

23. To prove redressability, "it must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (quotations omitted).

24. Here, Plaintiff seeks (1) a declaration that Section 17-140 is unconstitutional and (2) enjoining Defendants from "enforcing [Section 17-140]." *See* Am Compl., at p. 18.

25. Since a judgment against the State BOE Defendants "would only bind them" and not any other non-party governmental officials or entities not before the Court, an injunction against the State BOE Defendants would not provide meaningful relief to Plaintiff because the State BOE Defendants do not prosecute violations of criminal law, including Section 17-140. Ex. D-23, Connolly Decl. ¶¶ 44-45.

26. Thus, Plaintiff has not proven that any alleged injury is traceable to any action by the State BOE Defendants or would be redressed by a favorable decision.

Section 17-140 Does Not Restrict Expressive Conduct

27. "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

28. "To determine whether conduct is sufficiently expressive, the Court asks whether it was 'intended to be communicative' and, 'in context, would reasonably be understood by the

viewer to be communicative.'" *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1742 (2018) (quotations omitted).

29. There must be, "at the very least, an intent to convey a particularized message along with a great likelihood that the message will be understood by those viewing it." *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) (quotations omitted).

30. "It is possible to find some kernel of expression in almost every activity a person undertakes–for example, walking down the street or meeting one's friends at a shopping mall–but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

31. Here, there is no evidence that Plaintiff's message would be understood by New York voters, the intended recipient of the Proposed Conduct.

32. Plaintiff's reliance on the testimony of a single voter from Georgia, Kayla Hart, in support of the expressive nature of the conduct is insufficient because that voter's proposed testimony regarding her experience in Georgia involved a different organization and a different historical context.

33. Ms. Hart has never waited in line to vote anywhere in New York State, has never voted anywhere in New York State, and has never been registered to vote in the State of New York. Trial Transcript at 112:21-113:13 (Hart Cross-Examination). Ms. Hart only experienced receiving food or drink while waiting in line during the 2018 primary election in Georgia, where there is a particularly significant history of disenfranchisement of minority voters, which history she acknowledged was important to the message she took away from the experience. Trial Transcript at 115:8-15, 116:10-12, 116:18-20 (Hart Cross-Examination). Further, Ms. Hart has no personal knowledge regarding Plaintiff, whether New York voters would be receptive to the same

offers of food or drink while waiting in line, or what message would be understood by New York voters receiving food or drink in line. Trial Transcript at 115:16-21, 117:8-16 (Hart Cross-Examination).

34. Plaintiff has itself acknowledged that "Ms. Hart has experienced line warming in a way that New York voters necessarily have not," "Georgia is not New York," and "Ms. Hart was at an early voting location where . . . the majority of the voters were Black" and "the volunteers . . . were members of the community." Plaintiff's Response to State BOE Defendants' Pre-Trial Memorandum of Law, pp. 12-13.

35. Suffice it to say, the testimony by Ms. Hart does not aid the Court in its "examination of the context in which the activity was conducted" because Ms. Hart has no knowledge of such conduct. *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003).

36. Despite Plaintiff calling upon its members to come forward to testify about their experiences waiting in long lines, the impact it had upon them, and how difficult it was, Plaintiff failed to present any New York State voter as a witness at trial to testify about their experience. Ex. D-22; Trial Transcript at 66:11-22.

37. Furthermore, Plaintiff's failure to introduce such evidence is more telling given that Plaintiff previously provided face shields, masks, and hand sanitizer to voters waiting in line for early voting in Brooklyn in 2020. Trial Transcript at 39:6-15 (Williams Cross-Examination). If there were a message that could be deciphered from that conduct, one would expect that Plaintiff would be able to identify at least a single voter who could testify as such.

38. The declaration of Joy Williams also does not establish that Plaintiff's Proposed Conduct is decipherable by New York voters, but rather merely shows that certain voters were happy to receive masks and face shields in the midst of the COVID-19 pandemic. *See* Ex. P-64,

Williams Decl. ¶¶ 28-30. Ms. Bakiriddin's declaration merely shows that voters had questions about voting logistics. *See* Ex. P-66, Bakiriddin Decl. ¶¶ 18-19. These declarations do not reflect what the voters understood Plaintiff's message to be, let alone what a voter's understanding would be in the different context of receiving food and drinks from Plaintiff while waiting in line to vote, which conduct Plaintiff has never before engaged in.

39. Finally, where accompanying or explanatory speech is necessary to convey a message, that is considered "strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection." *Forum for Acad. & Institutional Rights*, 547 U.S. 47, 66 (2006).

40. Moreover, the materials that Plaintiff has distributed during different get-out-the-vote activities do not convey the same message that Plaintiff's purports to have intended to convey.

41. The State BOE Defendants reiterate their position that the Proposed Conduct is equivalent to the type of get-out-the-vote activities that courts have consistently ruled are not expressive conduct. *See, e.g.*, *Feldman v. Reagan*, 843 F.3d 366, 392 (9th Cir. 2016), (ballot collection not sufficiently communicative); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) ("smorgasbord of activities comprising voter registration drives" not communicative); *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 773 (M.D. Tenn. 2020) (distribution of absentee ballot applications not expressive conduct); *Wise v. City of Portland*, 483 F. Supp. 3d 956 (D. Or. 2020) (service as medics at protest not protected conduct). The Proposed Conduct is functionally the same as delivering ballots to voters or delivering filled-out ballots to elections officials.

42. Thus, N.Y. Election Law § 17-140 restricts conduct, not speech.

The State's Interests in Preserving a Zone of Repose at a Polling Place During an Election Satisfy Even Strict Scrutiny

43. Section 17-140 furthers the State interest of insulating voters from real or perceived interference, undue influence, and intimidation during the voting process. Ex. D-23, Connolly Decl. ¶ 27; Trial Transcript at 153:17-23 (Connolly Cross-Examination), 162:2-9 (Connolly Redirect Examination).

44. Plaintiff itself acknowledges that the purpose of Section 17-140 is to combat corruption and prevent bribery. Ex. D-22; Trial Transcript at 69:3-10 (Williams Cross-Examination).

45. Section 17-140 is necessary to fully protect these interests.

46. Although other provisions of N.Y. Election Law partially advance some of the interests furthered by Section 17-140, there are actions that are not covered by those provisions that Section 17-140 uniquely protects against. *See* Ex. D-23, Connolly Decl. ¶¶ 36-37; Trial Transcript at 162:10-163:4 (Connolly Redirect Examination).

Intermediate Scrutiny Applies

47. The proper standard of review in this case is the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

48. Section 17-140 does not constitute a content-based restriction on speech.

49. Although Section 17-140 restricts the provision of certain consumable items to voters in a voting line or polling place, that law must viewed within the full framework of New York's election laws, wherein many other interactions with voters are also prohibited. *See, e.g.*, N.Y. Election Law §§ 8-104; 17-142(1); 17-212. Viewed through this broader lens, New York intends to create a "zone of repose" for voters who are in the process of engaging in the franchise

of voting to avoid even perceived interference or influence. *See* Ex. D-23, Connolly Decl. ¶¶ 36-37.

50. The content of the messages of those who would seek to interact with voters who are in the process of voting—if such message is comprehensible at all—is irrelevant and not targeted by Section 17-140 or the N.Y. Election Law more broadly.

51. The justification of Section 17-140 does not depend on "the content of the regulated speech," and there is no evidence it was "adopted . . . because of disagreement with the message the speech conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (alterations and quotations omitted).

52. Thus, intermediate scrutiny applies.

Regardless, Section 17-140 Passes Strict Scrutiny

53. Even if the Court were to apply strict scrutiny, Section 17-140 survives.

54. "To survive strict scrutiny, . . . a State must . . . demonstrate that its law is necessary to serve the asserted interest." *Burson*, 504 U.S. at 199.

55. A law is constitutional if it is "reasonable and does not *significantly impinge* on constitutionally protected rights." *Id.* at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)) (emphasis in original).

56. The Supreme Court has recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 187 (1999) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

57. Here, the State has a compelling interest of "insulating voters from real or perceived interference, undue influence, and intimidation during the voting process." Ex. D-23, Connolly

Decl. ¶ 27; *see Burson*, 504 U.S. at 199 ("a State indisputably has a compelling interest in preserving the integrity of its election process.") (quotation omitted); *see also Citizens for Police Accountability Political Comm. V. Browning*, 572 F.3d 1213, 1220 (11th Cir. 2009) ("The State wants peace and order around its polling places, and we accord significant value to that desire for it preserves the integrity and Dignity of the voting process and encourages people to come and to vote.").

58. As the Eleventh Circuit correctly reasoned in upholding Florida's restriction on exit solicitation of voters:

> The State wants peace and order around its polling places, and we accord significant value to that desire for it preserves the integrity and dignity of the voting process and encourages people to come and to vote. Given the example of history, if exit solicitation must be allowed close to the polls, it takes little foresight to envision polling places awash with exit solicitors, some competing (albeit peacefully) for the attention of the same voters at the same time to discuss different issues or different sides of the same issue. And we accept it as probable that some – maybe many – voters faced with running the gauntlet will refrain from participating in the election process merely to avoid the resulting commotion when leaving the polls.

Citizens for Police Accountability Political Comm., 572 F.3d at 1220 (citations omitted); *see also N.J. Press Ass'n v. Guadagno*, 2012 U.S. Dist. LEXIS 161941, at *18 (D.N.J. Nov. 13, 2012) (concluding that plaintiffs were unlikely to succeed in their challenge of New Jersey's exit solicitation law).

59. The Supreme Court has recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 187 (1999) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

60. Plaintiff even acknowledges that, if Section 17-140 were stricken down, other groups would be permitted to provide food or drink to voters at polling sites, including groups

hoping to intimidate voters and/or those marketing themselves or their businesses. Trial Transcript at 55:17-22, 59:18-24 (Williams Cross-Examination).

61. Section 17-140 applies only to the period from when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place, at which point the voter has completed the act of voting and, therefore, any provision of "meat, drink, tobacco, refreshment, or provision" would no longer be "in connection with or in respect of any election." Ex. D-23, Connolly Decl. ¶ 18; Trial Transcript at 169:25-170:21 (Connolly Redirect Examination).

62. Contrary to Plaintiff's proposed interpretation of Section 17-140, it does not potentially reach the entirety of New York's geographic territory.

63. Section 17-140 is inapplicable to any actions until a voter initiates their engagement in the act of voting because the phrase "in connection with or in respect of any election" applies to voters actively engaged in the act of voting. Ex. D-23, Connolly Decl. ¶ 18; Trial Transcript at 153:24-154:1 (Connolly Cross-Examination).

64. Before a voter has initiated their engagement in the act of voting, the underlying State interests—insulating voters from real or perceived intimidation, harassment, and interference—are not implicated. Ex. D-23, Connolly Decl. ¶ 19; Trial Transcript at 154:2-10 (Connolly Cross-Examination).

65. Further, the canon of constitutional avoidance aids in reaching this interpretation of the scope of the restriction under Section 17-140. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."). *Doyle v. United States Dep't*

of Homeland Sec., 959 F.3d 72, 77 (2d Cir. 2020) (The Court is "bound to avoid deciding the constitutional question if the ambiguous statutory text to be interpreted . . . fairly admits of a less problematic construction.") (quotations omitted).

66. Plaintiff's suggestion that the canon of constitutional avoidance is of more limited application when a federal court is interpreting a state law is without merit. Federal courts frequently studiously employ this doctrine in cases involving state statutes. *See Hettler v. Entergy Enters.*, 15 F. Supp. 3d 447, 452 (S.D.N.Y. 2014) ("[T]he Court follows the canon of constitutional avoidance and declines to interpret [N.Y. Labor Law] Section 740(7) as supplanting claims arising under federal law."); *Humphrey v. RAV Investigative & Sec. Servs.*, 169 F. Supp. 3d 489, 501 (S.D.N.Y. 2016) (collecting cases for this same proposition); *see also 1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 260-61 (2d Cir. 2014) (in the context of analyzing a state statute, recognizing that "statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score") (citations and quotations omitted).

67. Regarding the tailoring of Section 17-140, a law is constitutional if it is "reasonable and does not *significantly impinge* on constitutionally protected rights." *Burson*, 504 U.S. at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)) (emphasis in original).

68. Section 17-140 is necessary, in the broader context of the N.Y. Election Law, to fully insulate voters from real or perceived influence and interference. *See* Ex. D-23, Connolly Decl. ¶ 27.

69. The other restrictions set forth in N.Y. Election Law regarding interactions with voters, including Election Law §§ 8-104 (electioneering ban within 100-foot radius); 17-142(1) (ban on giving consideration for franchise); 17-212 (ban on certain acts of intimidation, deception,

or obstruction) are insufficient to protect voters from all unnecessary interactions when waiting to vote or cast their ballots because any such encounters may be interpreted by a particular voter as harassment and/or intimidation. Ex. D-23, Connolly Decl. ¶¶ 36-37; Trial Transcript at 162:10-163:4 (Connolly Redirect Examination).

70. Furthermore, Plaintiff's criticism on the basis that the State BOE Defendants have not adduced evidence of actual interference or intimidation misses the mark. It is well-established that, in the election law context, a state has no such burden before it can impose election regulations. As the Eleventh Circuit recognized:

> [T]he State need not wait for actual interference or violence or intimidation to erupt near a polling place for the State to act. The State may take precautions to protect and to facilitate voting; and the pertinent history is broad enough to provide the proof of reasonableness for a zone of order around the polls.

Citizens for Police Accountability Political Comm., 572 F.3d at 1220-21. Therefore, the State need not "offer its own evidence demonstrating that the [restriction] is necessary to serve its compelling interests" *Id.*; *Munro*, 479 U.S. at 195, (1986) (the State is not subject "to the burden of demonstrating empirically the objective effects on political stability that [are] produced" by the voting regulation in question); *see also Burson*, 504 U.S. at 200 (plurality) ("While we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places.").

71. This "restricted zone around the voting compartments" is necessary to "serve the State['s] compelling interests in preventing voter intimidation and election fraud." *Burson*, 504 U.S. at 206 (plurality).

72. Plaintiff's argument that Section 17-140 is underinclusive does not undercut the State BOE Defendants' argument that it is necessary to achieve a compelling state interest. It is

well-established that "'[a] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." *Ognibene v. Parkes*, 599 F. Supp. 2d 434, 453 (S.D.N.Y. 2009) (quoting *Blount v. S.E.C.*, 61 F.3d 938, 946 (D.C. Cir. 1995)); *see also Buckley v. Valeo*, 424 U.S. 1, 105, (1976) (explaining the longstanding principle that "a statute is not invalid under the Constitution because it might have gone farther than it did," and "that a legislature need not strike at all evils at the same time") (citations and quotations omitted).

73. Plaintiff's argument that the "moribund" nature of Section 17-140 necessarily means that the State does not having a compelling state interest that it advances is incorrect and ignores the practicalities of administering an election. As Mr. Connolly explained, all of the various election laws that protect voters from outside influence, including Election Law §§ 8-104, 17-140, 17-142, and 17-212, provide the State Board and County boards of election with "tools that can be used depending on the situation to . . . maintain what we have termed the zone of repose for voters, a way of providing them a safe space as they engage in the act of voting." Trial Transcript at 161:24-162:9 (Connolly Redirect Examination). In other words, Section 17-140 has significant utility short of engaging in enforcement actions or prosecutions—it can be used as a legal basis to instruct persons who are invading the zone of repose to interact with voters engaged in the voting process. *See* Trial Transcript 164:18-165:9, 166:3-19 (Connolly Redirect Examination). Both recent and ancient history instruct that one of the main justifications for such unnecessary encounters is to provide food and drink to voters. *See* Exs. D-17, D-22; Trial Transcript at 65:16-25 (Williams Cross-Examination), 166:26-167:8 (Connolly Redirect Examination).

Section 17-140 Is Not Unconstitutionally Vague

74. The vagueness doctrine ensures that statutes are drafted "with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them." *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007) (quotations omitted).

75. The Supreme Court has not clearly defined how courts should evaluate vagueness challenges to criminal prohibitions that implicate the First Amendment, but has cautioned that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

76. After all, not every statute that implicates speech is unconstitutionally vague. *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 21 (2010) (rejecting a vagueness challenge to a criminal law that implicated First Amendment activities near schools).

77. In reviewing statutes for vagueness, courts employ a number of tools, including the examination of the words of the statute itself. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

78. However, courts do not look at statutory language in isolation; rather, courts also "consider[] the language in context, with the benefit of the canons of statutory construction and legislative history." *Commack Self-Serv. Kosher Meats v. Hooker*, 860 F.2d 194, 213 (2d Cir. 2012) (citing *United States v. Farhane*, 634 F.3d 127, 142 (2d Cir. 2011)).

79. Additionally, courts consider "the interpretations the relevant courts have given to analogous statues," as well as "the interpretation of the statute given by those charged with enforcing it." *Id.* (quoting *Grayned*, 408 U.S. at 110).

80. Plaintiff specifically takes issue with only two specific phrases contained within Section 17-140: (1) "in connection with or in respect of any election," and (2) "provisions." Neither renders Section 17-140 unconstitutionally vague.

"In Connection With Or In Respect Of Any Election" Contains Clear Limitations

81. "[I]n connection with or in respect of any election" contains clear territorial and temporal limitations.

82. Territorially, Section 17-140 applies only to the period from when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place. Ex. D-23, Connolly Decl.¶ 18; Trial Transcript at 169:25-170:21 (Connolly Redirect Examination).

83. After all, any voter in line by the time of poll closing is entitled to cast a vote, and as such is engaged in the act of voting despite their physical presence outside of the polling place. *See* N.Y. Election Law § 8-104(5).

84. As the state agency charged with administering elections under N.Y. Election Law, the State Board's interpretation is to be afforded deference "so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute." *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418-19 (1996) (quotations omitted).

85. Plaintiff's sprawling interpretation—that Section 17-140 might apply to voters sitting in their homes or otherwise not engaged in the voting process—ignores the legislative history of Section 17-140 that is available, which reflects a consistent understanding that Section 17-140 was limited to actions during the voting process itself. *See, e.g.*, D-13, at 000008 (reflecting the bill sponsor's understanding that Section 17-140 applied "at the polls"). It also ignores the

context of the other sections of the Election Law, such as N.Y. Election Law § 8-104(5), which afford legal significance to a voter's presence in a voting line.

86. Temporally, Section 17-140 expressly states that it applies "during the hours of voting," and is thus appropriately limited to apply only to the period of time from when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place. *See* N.Y. Election Law § 17-140; Trial Transcript at 169:25-170:21 (Connolly Cross-Examination).

87. Undoubtedly, voters who cast their vote on early voting days are acting "in connection with or in respect of any election" to the same degree as voters who cast their vote on "election day," and as such as protected by the same election laws. *See* N.Y. Election Law § 8-102 ("Voting at each polling place for early voting shall be conducted in a manner consistent with the provisions of this article"); 9 N.Y.C.R.R. § 6211.6 ("the manner of voting on days of the early voting period shall be the same as the manner of voting on the day of election").

88. Consequently, from the time a voter steps in line to vote—regardless of whether the location of that line may fall outside the 100-foot radius surrounding a polling place—until the time the voter has cast his or her vote and exited the polling place, he or she is acting "in connection with or in respect of any election" under Section 17-140.

89. Thus, Section 17-140's reference to "in connection with or in respect of any election" is not vague, but rather is clearly defined both territorially as the 100-foot radius around polling places and any voting line where voters have congregated to participate in the franchise (even if such lines extend past the 100-foot radius around polling places), and temporally to the period of time from when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place.

"Provision" Refers To Consumable Goods

90. With respect to the word "provision" in the statutory phrase "meat, drink, tobacco, refreshment or provision," the meaning is readily apparent: "provision," as referred to in Section 17-140, refers only to consumable items. Ex. D-23, Connolly Decl. ¶¶ 19-20, 22-23.

91. The foregoing interpretation is consistent with the interpretive canons of *ejusdem generis* and *noscitur a sociis*, which hold that, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001) (quotations omitted).

92. Using this common interpretive tool, the term "provision" should be read as consistent with the other listed items of meat, drink, tobacco, and refreshment, each of which are consumable goods.

93. Further, this interpretation is consistent with Section 17-140's legislative history.

94. A predecessor statute to Section 17-140, enacted in 1892, applied to non-consumable goods by prohibiting the furnishing of "entertainment to electors" and the provision of "money or other property" to induce individuals to vote. *See* Ex. D-6.

95. In 1906, the statute was overhauled to instead prohibit a person from providing another "any meat, drink, tobacco, refreshment, or provision," thereby expressly limiting the items covered by the statute to consumable items. Ex. D-7.

96. The New York Legislature's subsequent redrafting of the statute signals the Legislature's clear intention to remove the statute's prior prohibition on non-consumable goods and, in its place, impose a restriction on the gifting of consumable goods. There is no record whatsoever of any concern by the Legislature, in connection with Section 17-140, regarding the

provision of non-consumable items. The only subsequent legislative discussion concerning the items disallowed under the statute concerned consumable items. In 1992, the exception to Section 17-140 for such items "having a retail value of less than one dollar" was added to allow for the common practice in "most upstate communities" of "hav[ing] available for al[l] voters pieces of candy, cigars, coffee, soda and the like for voters." Ex. D-13.

97. There is also no support in Section 17-140's legislative history for Plaintiff's far-reaching interpretation of the word "provision" as covering all "needed materials or supplies," including but not limited to both consumable and non-consumable goods. *See* Decision, at 46-47.

98. Indeed, Plaintiff's own conduct reveals its disagreement with this strained interpretation. As noted above, during early voting in the 2020 general election, Plaintiff handed out hand sanitizer, face masks, and face shields to voters waiting in line to vote, and its behavior reveals that it had no real fear that by so doing it would be at risk of prosecution under Section 17-140. *See supra*, ¶¶ 17-19.

99. Consequently, Section 17-140 applies to any food or drink items, tobacco products, and other consumable items, such as chewing gum. However, Section 17-140 does not apply to physical non-consumable items, such as hand sanitizer, umbrellas, tissues, and other inedible goods. *See* Ex. D-23, Connolly Decl. ¶ 23.

100. Thus, Section 17-140's reference to "provision" is not vague, but rather is clearly limited to consumable goods.[2]

[2] To the extent the Court disagrees and determines that the inclusion of the phrase "provision" renders Section 17-140 unconstitutionally vague, the Court should sever the phrase "provision" from the statute and let the remainder stand. *801 Conklin St. Ltd. v. Town of Babylon*, 38 F. Supp. 2d 228, 245 (E.D.N.Y. 1999) ("It is a fundamental rule that an unconstitutional part of a statute may be severed and rejected, while the valid portion may stand.") ((quotations omitted). This is particularly the case since "[t]he trend is to apply severance doctrine liberally in order to save a statute." *Id.*

Section 17-140 Is Not Unconstitutionally Overbroad

101. The overbreadth doctrine applies where a statute punishes a substantial amount of protected speech, judged in relation to the statute's "plainly legitimate sweep". *See Virginia v. Hicks*, 539 U.S. 113, 122 (2003).

102. A statute cannot be declared overbroad if it "regulates a substantial spectrum of conduct that is . . . manifestly subject to state regulation." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The overbreadth inquiry begins and ends with measuring the statute's "plainly legitimate sweep." *Id.* at 616.

103. Here, Section 17-140, together with other provisions of the statute, serves to insulate waiting voters from either actual or perceived intimidation, harassment, and undue influence. Ex. D-23, Connolly Decl. ¶¶ 27, 36; Trial Transcript 162:2-9 (Connolly Redirect Examination).

104. Undoubtedly, this goal is within the purview of permissible State election regulation. *See Burson*, 504 U.S. at 199 ("a State indisputably has a compelling interest in preserving the integrity of its election process.") (quotation omitted); *see also Browning*, 572 F.3d at 1220 ("The State wants peace and order around its polling places, and we accord significant value to that desire for it preserves the integrity and dignity of the voting process and encourages people to come and to vote.").

105. Section 17-140 accomplishes this purpose by, among other things, preventing the giving of food, drink, and other consumable goods of value to voters, regardless of the giver's motivations, from the time when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place. Trial Transcript at 169:25-170:21 (Connolly Redirect Examination).

106. In so doing, New York intends to create a "zone of repose" for voters who are in the process of engaging in the franchise of voting to avoid even perceived interference or influence. *See* Ex. D-23, Connolly Decl. ¶¶ 36-37; Trial Transcript 162:2-9 (Connolly Redirect Examination).

107. Plaintiff's argument that Section 17-140 could potentially reach the entirety of New York State's geographical territory is unfounded and ignores the reasonable limits inherent in the statute's text. Section 17-140 erects a zone of repose within the polling place itself, as well as in the area outside of the polling place, not only extending 100 feet from the door of a polling place, but until the end of any voting line where voters have congregated to participate in the franchise. Past this point, Section 17-140 does not apply. To conclude otherwise would be to ignore Section 17-140's text and the established doctrine of constitutional avoidance. *See supra*, at ¶¶ 62-66; *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"); *Doyle v. United States Dep't of Homeland Sec.*, 959 F.3d 72, 77 (2d Cir. 2020) ("We are bound to avoid deciding the constitutional question if the ambiguous statutory text to be interpreted . . . fairly admits of a less problematic construction.") (quotations omitted).

108. Plaintiff's second argument—that Section 17-140 does not distinguish among the possible intentions of people who might provide food or drink to voters on an election day—is also unavailing and based upon a misunderstanding of the State interest underlying Section 17-140.

109. The State's interest is to insulate voters from real or perceived interference, undue influence, and intimidation during the voting process. Ex. D-23, Connolly Decl. ¶¶ 27, 36. This interest cannot be achieved by restricting only overtly partisan speech. Indeed, within the 100-

foot zone outside a polling place, such speech is already covered by the State's electioneering ban. *See* N.Y. Election Law § 8-104; Trial Transcript at 162:2-163:4 (Connolly Redirect Examination). Section 17-140 is necessary to address more subtle voter interference, undue influence, and intimidation, including perceived interference, undue influence, and intimidation, that results from encounters with voters in the critical moments before a ballot is cast. Ex. D-23, Connolly Decl. ¶ 36.

110. Plaintiff's suggestion is also not workable, as it would be impossible to apply this restriction only to non-partisan actors since such a statute would attempt to police the motivation of the person providing food and drink to voters. Such motivations are often not readily apparent. Instead, Section 17-140 is not "directed at particular groups or viewpoints," but rather applies to partisan and non-partisan groups alike because doing so achieves the goal of "regulat[ing] political activity in an even-handed and neutral manner." *Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973).

111. Section 17-140 is necessary to address more subtle voter interference, undue influence, and intimidation, including perceived interference, undue influence, and intimidation, that result from encounters with voters in the critical moments before a ballot is cast. Ex. D-23, Connolly Decl. ¶ 36; Trial Transcript at 153:17-23 (Connolly Cross-Examination).

112. Rather than being "directed at particular groups or viewpoints," Section 17-140 applies to partisan and non-partisan groups alike because doing so achieves the goal of "regulat[ing] political activity in an even-handed and neutral manner." *Broadrick*, 413 U.S. at 616.

113. Thus, Section 17-140 is not overbroad, but rather is limited to a specifically defined geographical region that applies evenly to partisan and non-partisan groups alike in order to insulate waiting voters from both actual and perceived intimidation, harassment, and undue influence.

114. Therefore, N.Y. Election Law § 17-140 does not violate the rights of Plaintiff, The Brooklyn Branch of the National Association for the Advancement of Colored People, and its members under the First and Fourteenth Amendments.

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Respectfully submitted,

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