UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE BROOKLYN BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff, -against- PETER S. KOSINSKI, in his official capacity as Co-Chair of the State Board of Elections, et al., Defendants.	Case No. 21-CV-7667-KPF **PLAINTIFF'S POST-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiff, the Brooklyn Branch of the NAACP, by its attorneys Elias Law Group LLP and Emery, Celli, Brinckerhoff, Abady, Ward & Maazel LLP, hereby submits its Post-Trial Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

New York's Line Warming Ban

1. It has long been a crime in New York to provide food, drink, or other sundries to individuals waiting in line to vote—a practice known colloquially as "line warming." The current iteration of this restriction, enacted in 1992, is set forth in Section 17-140 of the New York Election Law ("Section 17-140" or the "Line Warming Ban"), which is titled "Furnishing money or entertainment to induce attendance at the polls." In full, Section 17-140 provides:

> Any person who directly or indirectly by himself or through any other person in connection with or in respect of any election during the hours of voting on a day of a general, special or primary election gives or provides, or causes to be given or provided, or shall pay, wholly or in part, for any meat, drink, tobacco, refreshment or provision to or for any person, other than 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, except any 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, is guilty of a Class A misdemeanor.

N.Y. Elec. Law § 17-140.

2. In New York, Class A misdemeanors are punishable by up to one year's imprisonment or up to three years' probation and a monetary fine. N.Y. Penal Law §§ 70.15(1); 65.00(3)(b)(i); 80.05(1).

Enforcement of the Line Warming Ban

3. The New York State Board of Elections, whose members and co-executive directors are sued here in their official capacities (the "State Board"), is a bipartisan agency responsible for enforcing New York's election laws, including the Line Warming Ban. N.Y. Elec. Law §§ 3-102, -104, -107; (Trial Tr. 151:1–3 (Connolly)).

4. The State Board's mission is to ensure the integrity of the electoral process in the state of New York, to provide oversight of county boards of elections, and to enforce state and federal laws as they pertain to elections. (Trial Tr. 151:1–18 (Connolly)).

5. The State Board also "shall have jurisdiction of, and be responsible for, the execution and enforcement of the provisions of article fourteen of [the Election Law] and other statutes governing campaigns, elections and related procedures." N.Y. Elec. Law § 3-104(1)(b).

6. New York Law grants the State Board authority to "appoint a special investigator to take charge of the investigation of cases arising under the election law," who "shall have all of the powers of a peace officer as set forth in section 2.20 of the criminal procedure law, for the purpose of enforcing the provisions of this chapter." *Id.* § 3-107.

7. The State Board is also empowered to make criminal referrals. N.Y. Elec. Law § 3-104(5)(b); (Trial Tr. 152:2–9 (Connolly); Ex. D-23, Decl. of Thomas Connolly ¶ 44 ("Connolly

Decl.")). The State Board's Chief Enforcement Counsel has the power to investigate alleged violations of the New York Election Law—including the Line Warming Ban. N.Y. Elec. Law § 3-104(1)(b); (Trial Tr. 167:22–168:3 (Connolly); Connolly Decl. ¶¶ 42, 44).

8. The State Board also provides oversight of the county boards of elections, including the New York City Board of Elections. (Trial Tr. 151:13–18 (Connolly)).

9. The New York City Board of Elections, whose members are sued here in their official capacities (the "City Board"), is a bipartisan administrative body composed of commissioners appointed by the city council of the City of New York. N.Y. Elec. Law § 3-200(3).

10. The City Board is tasked with administering elections and operating poll sites within New York City. *See id.* §§ 3-400(9), -402.

11. The City Board is responsible for monitoring compliance with election laws, including the Line Warming Ban, at the polling sites it manages. (Trial Tr. 151:19–152:1 (Connolly); Ex. P-27 at NYSBOE 000225).

12. The City Board has the power to make criminal referrals for violations of election laws. (Trial Tr. 152:2–9 (Connolly)). A criminal referral from the City Board of Elections is different from a call from a normal citizen to the police reporting a crime. (*Id.* at 159:21–23 (Connolly)). "[I]n order for a board to make a criminal referral," there would need to be "some level of investigation into the kind of specific fact pattern of a situation." (*Id.* at 159:24–160:2 (Connolly)).

13. The State Board provides guidance to county boards of elections, including the City Board, concerning election administration and election law enforcement. N.Y. Elec. Law § 3-102(1); (Trial Tr. 95:15–18 (Ryan); *id.* at 151:9–10 (Connolly: "[W]e try to make sure that county

boards follow all laws.")). That guidance includes the State Board's "Guide to Operating a County Board of Elections" ("Guide") (Ex. P-27; Trial Tr. 96:14–17 (Ryan); *id.* at 152:10–23 (Connolly)).

14. The State Board has specifically charged the City Board with enforcing the Line Warming Ban at the polls. The Guide charges County Boards with using their "[e]nforcement powers" to "prevent violations of the election process," (Ex. P-27 at NYSBOE 000121, 224), which includes violations of the New York Election Law—and specifically Section 17-140 (Trial Tr. 98:6–10 (Ryan); *id.* at 153:2–16 (Connolly)).

15. The Guide further specifies that the City Board "ha[s] the responsibility to accept, process, and resolve complaints related to the elective franchise." (Ex. P-27 at NYSBOE 000224; Trial Tr. 98:11–15 (Ryan)). It empowers the City Board to "refer[]" such complaints to the State Board. (Ex. P-27 at NYSBOE 000224; Trial Tr. 98:16–18 (Ryan)).

16. According to the Guide, "[c]omplaints relating to violation of the elective franchise may include," among other things, "[f]urnishing money or entertainment to induce attendance at the polls." (Ex. P-27 at NYSBOE 000225). This is a reference to Section 17-140, which is titled "Furnishing money or entertainment to induce attendance at the polls." N.Y. Elec. Law § 17-140; (Trial Tr. 99:8–22 (Ryan); *id.* at 153:2–16 (Connolly)).

17. The City Board's Executive Director, Mr. Michael Ryan, typically learns about issues at New York City poll sites through such complaints or through direct reports from poll workers or monitoring teams that are employed by the Board of Elections. (Trial Tr. 101:15–19 (Ryan)).

18. Since he has been executive director of the City Board of Elections, Mr. Ryan has never received a single complaint regarding food and drink being distributed on voting lines. (*Id.* at 102:18–21 (Ryan)). Nor has he received any reports of individuals distributing food or drink to

voters in line at the polls from staff, including poll workers and monitoring teams. (*Id.* at 101:20–23 (Ryan)).

19. And Mr. Ryan has never personally observed individuals distributing food or drink to voters at the polls. (*Id.* at 101:4–11 (Ryan)).

20. Similarly, Mr. Thomas Connolly, the Deputy Executive Director of the State Board, has never personally observed any conduct that would constitute a violation of the Line Warming Ban. (*Id.* at 155:6–20 (Connolly)). Nor has Mr. Connolly been contemporaneously aware of any distribution of food and water at the polls in New York State. (*Id.* at 158:8–13 (Connolly)).

21. Neither the State Board nor the City Board has disavowed enforcement of the Line Warming Ban. Quite the opposite. Mr. Connolly testified that the Ban is necessary because removing it would "take[] away our ability to have some standing in trying to provide that zone of repose for the voter." (Trial Tr. 166:12–19 (Connolly)). And the State Board's counsel described the Ban as "an important arrow in [the Board of Elections'] quiver to prevent some more offensive conduct." (*Id.* at 11:11–14 (Hallak)).

New York's Voting Lines

22. Long lines at the polls are a significant topic of public debate and discussion in New York City.

23. Long lines at the polls have long been an issue of concern in New York. New York law seeks to ensure that voters do not wait more than thirty minutes to cast their ballots. *See* N.Y. Elec. Law § 3-400(9); 9 N.Y.C.R.R. §§ 6210.19(c)(3), 6210.19(d)(1), 6211.1(b)(2). But, despite these regulations, state and city officials have reported wait times significantly longer than thirty minutes, particularly in high turnout presidential election years. (*E.g.*, Trial Tr. 104:1–13 (Ryan); Connolly Decl. ¶ 48; Ex. City-1, Decl. of Michael Ryan ¶ 8 ("Ryan Decl."); Joint Pre-Trial Order

at 11, ECF No. 80 (stipulating to reported wait times exceeding 30 minutes at some New York City and upstate polling locations during the 2012, 2014, 2016, and 2020 general elections)).

24. The State Board of Elections has received complaints from voters about long wait times dating back more than a decade. (Connolly Decl. ¶ 49; *see, e.g.*, Ex P-29; Ex. P-30; Ex. P-31; Ex. P-32; Ex. P-35; Ex. P-36; Ex. P-51; *see also* Ex. P-42 at NYSBOE 000416 (N.Y.C. Dep't of Investigation Report documenting reports of hours-long wait times during the 2012 election)).

25. Long wait times became a particularly prominent issue during early voting in 2020—the first presidential election for which early voting was available in New York. (*See* Ryan Decl. ¶ 9; Ex. P-28 at NYSBOE 000243, 250, 259 (Report and Findings of the N.Y. State Senate Elections Committee documenting hours-long wait times during early voting in 2020)).

26. The issue became so widespread that on October 29, 2020, the New York Attorney General issued an advisory to local boards of elections reminding them of their legal obligations with respect to individuals with disabilities waiting in long lines. (Ex. P-34). The Attorney General's letter reported receiving "a large volume of complaints from voters in counties across the State who have waited in long lines to cast their ballots, in some cases for as many as five hours." (*Id.* at NYSBOE 000299).

27. Civic organizations such as the New York Civil Liberties Union raised similar concerns with state and county elections officials. (*See* Ex. P-37; Ex. P-38; Ex. P-39).

28. The City Board's Executive Director, Mr. Ryan, testified that long wait times were an issue of concern for both voters and the Board of Elections in 2020, (Trial Tr. 104:19–105:2 (Ryan)), and that there were wait times longer than thirty minutes at election day and early voting locations around New York City that year, (*Id.* at 104:1–13 (Ryan)).

29. But long wait times are not an issue of concern solely in New York City. In 2020, while early voting was still ongoing, a group of voters and candidates sued the Ulster County Board of Elections for violation of 9 N.Y.C.R.R. § 6210.19(d)(1), a State Board regulation that requires: "If the voter waiting time at an early voting site exceeds 30 minutes the Board of Elections shall deploy such additional voting equipment, election workers and other resources necessary to reduce the wait time to less than 30 minutes . . . ." (Ex. P-49; Ex. P-56 at NYSBOE 000730). As a result of that lawsuit, the Ulster County Board of Elections was ordered to increase early voting hours. (*See* Ex. P-58).

30. Long wait times, specifically in New York City, have for many years also been a topic of intense discussion among the members of the State Board of Elections. As early as 2015, former State Board Co-Chair Douglas Kellner raised the issue of "bringing New York City into compliance with the thirty-minute rule for the November 2016 Election" at a meeting of the State Board's commissioners. (Ex. P-43 at NYSBOE 000465). The issue was raised again in a meeting following the 2016 general election. (Ex. P-25 at NYSBOE 000047–53). At a meeting in September 2017, Commissioner Kellner acknowledged that "New York City did many, many things to improve procedures for the last general election," but still had not come into compliance with the thirty-minute rule, prompting the State Board to discuss strategies for reducing lines in New York City. (Ex. P-26 at NYSBOE 000090–93). A few months later, Commissioner Kellner gave a statement to the New York City Council's Committee on Governmental Operations in which he emphasized that "New York City has not complied with [the thirty-minute rule] in its presidential general elections" and that he saw "no meaningful efforts for New York City to come into compliance in 2020." (Ex. P-53 at NYSBOE 000707). Commissioner Kellner gave another statement to the New York City Council's Committee on Governmental Operations and

Committee on Oversight and Investigations in November 2018, in which he raised the same concerns. (Ex. P-54 at NYSBOE 000712). In August 2020, Commissioner Kellner wrote a memorandum to his fellow State Board Commissioners, again noting that "New York City has never come close" to satisfying the thirty-minute rule in presidential general elections, and suggesting several steps that could be taken to alleviate long lines in New York City. (Ex. P-55 at NYSBOE 000723–24). And in September 2021, the full State Board gave testimony to the New York Senate's Standing Committee on Elections emphasizing the importance of "poll site preparedness," and noting that "unprepared" poll sites may develop "long lines" and struggle to "recover an acceptable wait time." (Ex. P-46 at NYSBOE 000527). Commissioner Kellner separately addressed the issue of New York City's failure to comply with the thirty-minute rule. (Ex. P-56 at NYSBOE 000729–30).

31. The State Board's staff continued to discuss wait times and capacity issues at poll sites in 2021. (Ex. P-40; Ex. P-41).

32. The 2024 presidential election will be the first such election since 2020. Presidential elections typically have higher voter turnout, resulting in longer lines than are seen in other elections. (Trial Tr. 105:5–10 (Ryan)).

33. Although New York has taken steps to reduce lines, such as enacting a recent vote-by-mail statute (*id.* at 105:14–17 (Ryan)), there are various reasons for long lines that are out of the Boards of Elections' control, (*id.* at 105:23-25, 106:16–18 (Ryan)). There may be, for instance, an unexpected volume of voters, or equipment failures. (*Id.* at 106:1–6 (Ryan)). Each voter's individual choice of when they show up to vote could also impact lines. (*Id.* at 106:7–9 (Ryan)). That variable "cannot be entirely predicted," and even with "previous statistical data," "cannot be entirely and accurately captured." (*Id.* at 106:19–24 (Ryan)).

34. Voting by mail was also widely available in 2020, and yet lines still exceeded 30 minutes in many places in New York. (*Id.* at 107:14–108:3 (Ryan)).

35. There is thus every reason to believe that long lines will continue to be an issue in future New York City elections.

Plaintiff's Mission and Activities

36. Plaintiff the Brooklyn Branch of the NAACP ("Plaintiff" or "Brooklyn NAACP") is a nonpartisan organization dedicated to "remov[ing] all barriers of racial discrimination through democratic processes, educat[ing] voters on their constitutional rights, and tak[ing] all lawful action to secure the exercise of those rights." (Ex. P-64, Decl. of L. Joy Williams ¶ 3 ("Williams Decl."); *see also* Ex. P-66, Decl. of Joan Alexander Bakiriddin ¶ 2 ("Bakiriddin Decl.")). Brooklyn NAACP is extremely active and well known among Brooklyn voters. (*See* Williams Decl. ¶¶ 5, 10, 20; Bakiriddin Decl. ¶¶ 5, 12, 18). For years, it has engaged in "voter outreach, education, and activism" to improve access to the franchise. (Williams Decl. ¶ 4; *see also* Bakiriddin Decl. ¶ 2; Trial Tr. 18:20 (Williams)).

37. These efforts include, among other things, educating voters by distributing literature with information about how to check one's voter registration, how to register to vote, how to find a polling site, and how to view a sample ballot. (Ex. P-9; Bakiriddin Decl. ¶ 11). Brooklyn NAACP also informs voters about relevant deadlines and eligibility requirements. (Ex. P-11; Bakiriddin Decl. ¶ 5).

38. Brooklyn NAACP also educates voters about the mechanics of voting. For example, it undertook significant outreach and education efforts to inform voters about ranked choice voting, which was used for the first time in New York City's 2021 municipal elections. (Ex. P-2; Ex. P-14; Ex. P-17; Williams Decl. ¶ 8). These educational communications are often

combined with a message encouraging voters to exercise the franchise. (*E.g.*, Ex. P-10 (encouraging voters to "Get 5 friends, family, and neighbors to vote with you Nov. 3rd!")).

39. In addition to voter education, Brooklyn NAACP has an active voter registration and "Get Out the Vote" ("GOTV") program aimed at encouraging voters to exercise their right to vote. (Bakiriddin Decl. ¶¶ 4–5; Williams Decl. ¶¶ 6–8; Ex. P-4; Ex. P-5 at NAACP000048; Ex. P-15). It accomplishes this through various outreach strategies, such as social media, "text banking," and phone banking. (Ex. P-2 at NAACP000026; Ex. P-4; Ex. P-12; Williams Decl. ¶ 7; Bakiriddin Decl. ¶ 5).

40. Brooklyn NAACP members also conduct in-person outreach activities at local churches, libraries, colleges, and YMCAs, and at community events such as parades and street fairs. (Ex. P-2 at NAACP000026; Ex. P-4 at NAACP000040; Ex. P-5 at NAACP000048; Williams Decl. ¶ 8; Bakiriddin Decl. ¶ 11).

41. In 2020 alone, Brooklyn NAACP reached out to tens of thousands of voters and organized "Souls to the Polls" events to encourage churchgoing voters to take advantage of early voting, as well as a "Power to the Polls Caravan." (Ex. P-18; Ex. P-19; Ex. P-20; Williams Decl. ¶ 19). Those efforts have continued through subsequent election cycles. (*See, e.g.*, Ex. P-13 (spreadsheet summarizing Brooklyn NAACP's 2021 GOTV and voter outreach activities); Bakiriddin Decl. ¶ 5).

42. As a result of its extensive work to support voters in Brooklyn, Brooklyn NAACP is well known and trusted by Brooklyn voters. (*See* Williams Decl. ¶¶ 5, 10, 20; Bakiriddin Decl. ¶¶ 5, 12, 18). When Brooklyn NAACP members conduct in-person voter outreach, they wear NAACP-branded apparel and are accompanied by NAACP-branded signage and literature. (Williams Decl. ¶¶ 10, 20, 37; Bakiriddin Decl. ¶¶ 11–12).

43. Brooklyn NAACP believes that when it "engage[s] in voter education, GOTV, or voter support activities, it is important that voters know the information and support they are receiving is coming from a recognized, trusted, and well-respected organization." (Williams Decl. ¶ 10; *see also* Trial Tr. 50:16–20 (Williams)).

44. Brooklyn NAACP often provides food at Branch events such as membership meetings and GOTV drives. (*E.g.*, Ex. P-1 (Branch holiday party); Ex. P-3 ("Celebration Picnic"); Ex. P-7 at NAACP000083–84 (membership meeting); Ex. P-6 at NAACP000213 ("Civic Engagement Session"); Ex. P-21 (Ballots & BBQ); Williams Decl. ¶ 6; Bakiriddin Decl. ¶¶ 6, 11; Trial Tr. 38:4–9 (Williams)).

45. Long lines at the polls are a significant issue of concern for Brooklyn NAACP. (Williams Decl. ¶¶ 3–5; *see also* Ex. P-24 (survey of Brooklyn NAACP members who experienced long voting lines); Trial Tr. 19:12–21 (Williams)). Brooklyn NAACP has been aware of complaints about long lines in Brooklyn, other parts of New York City, and upstate communities at every general election since at least 2012. (Trial Tr. 38:21–39:5 (Williams)). The Brooklyn NAACP is particularly concerned about long lines in the communities of color it serves, which have historically suffered disproportionately longer wait times. (Williams Decl. ¶¶ 31, 35).

46. Brooklyn NAACP began discussing ways to support voters waiting in line as early as 2012, including by providing food and drink. (Williams Decl. ¶ 14; *see also* Trial Tr. 21:20–22:11 (Williams)). However, whenever the issue has come up, Brooklyn NAACP has decided not to offer voters support with food or water because it has not been willing to put its volunteer members at risk of prosecution under the Line Warming Ban. (Williams Decl. ¶ 15; *see also* Trial Tr. 90:21–91:11 (Williams)).

47. Nevertheless, Brooklyn NAACP *has* provided support to voters through other means. During early voting in 2020—the height of the COVID-19 pandemic—Brooklyn NAACP volunteers held an "early vote kickoff rally" on the first day of in-person early voting at the Barclay's Center in Brooklyn. (Ex. P-8; Williams Decl. ¶ 19; Bakiriddin Decl. ¶ 14). Volunteers distributed face shields donated by a partner organization as well as cloth face masks bearing the NAACP logo to voters waiting in line. (Williams Decl. ¶ 21; Bakiriddin Decl. ¶ 14; Trial Tr. 134:20–135:3 (Bakiriddin)).

48. Brooklyn NAACP was wary of running afoul of the Line Warming Ban by distributing personal protective equipment (PPE) to voters waiting in line. (Willams Decl. ¶ 22; Bakiriddin Decl. ¶ 15; Trial Tr. 43:4–11 (Williams); *id.* at 135:4–21, 138:1–3 (Bakiriddin)). But its leadership decided to proceed given the significant public health concerns posed by COVID-19 and the lack of clarity about whether the Ban actually applied to PPE. (Willams Decl. ¶ 22; Bakiriddin Decl. ¶ 15; Trial Tr. 43:4–11 (Williams)). Brooklyn NAACP did not provide food, drink, or anything else that was explicitly proscribed by the Ban. (Willams Decl. ¶ 22; Trial Tr. 42:21–43:3 (Williams)).

49. By supporting voters waiting in line in 2020, Brooklyn NAACP members who participated in the event intended to communicate to voters that they value the voters' safety and health and celebrate their exercise of the right to vote under the difficult circumstances imposed by COVID-19. (Williams Decl. ¶ 23; Bakiriddin Decl. ¶¶ 14, 16).

50. Voters who received PPE indicated to Brooklyn NAACP volunteers that they understood and appreciated this message of support: In addition to verbal expressions of gratitude and solidarity, voters greeted the volunteers with a thumbs up or a raised fist, demonstrating that they understood Brooklyn NAACP's activity to communicate at least some message. (Williams

Decl. ¶ 29). Voters also approached Brooklyn NAACP members with questions about the voting process. (Bakiriddin Decl. ¶ 18).

51. Anticipating more unacceptable wait times at New York City polling locations during a high-turnout 2024 presidential election, Brooklyn NAACP has sought out new ways to express its message of solidarity and support and encourage voters to wait out long lines. (Williams Decl. ¶¶ 31–33; Bakiriddin Decl. ¶¶ 20–22).

52. Brooklyn NAACP's President and the Chair of its Civic Engagement Committee credibly testified that, to that end, Brooklyn NAACP has made plans to provide "nonpartisan support and assistance to voters waiting in line," "to convey the importance of them staying in line, the importance of voting, and emphasize that everyone's vote counts." (Williams Decl. ¶¶ 33, 38; Bakiriddin Decl. ¶ 21–22).

53. But the Line Warming Ban has thus far prevented Brooklyn NAACP from engaging in line warming. (Williams Decl. ¶¶ 32–33, 36, 39; Bakiriddin Decl. ¶ 21; *see also* Trial Tr. 21:20–22:11 (Williams)). Brooklyn NAACP President L. Joy Williams is "not willing, as the head of the organization, to put [her] members, . . . who are all volunteers, in the crosshairs of possibly being criminally prosecuted because somewhere down the line somebody wants to, you know, do that." (Trial Tr. 91:4–11 (Williams)). This is especially true given that Ms. Williams is aware of an incident where someone called the police in response to students at Skidmore College handing out pizza to voters waiting in line. (*Id.* at 70:21–71:1 (Williams)).

54. Ms. Williams credibly testified that, if not for the Line Warming Ban, Brooklyn NAACP and its members and volunteers "would provide sundries such as bottled water, granola bars, donuts, potato chips, or pizza to voters already waiting in the long lines that continue to plague the Branch's surrounding communities." (Williams Decl. ¶ 32).

55. By doing so, Brooklyn NAACP "seeks to convey a celebration of our democracy and of the dedicated voters who endure weather and long lines to have their voices heard, as well as the rejection of voter suppression through long lines and wait times that severely burden our most fundamental rights." (*Id.* ¶ 33; *see also* Trial Tr. 89:25–90:15 (Williams)).

56. For example, Joan Bakiriddin, the Chair of Brooklyn NAACP's Civic Engagement Committee, views line warming as a way to "remind [voters] that many people fought hard for their right to vote" and that "they should fight to exercise it even when it is hard or inconvenient." (Bakiriddin Decl. ¶ 23). Brooklyn NAACP "want[s] voters to know that they have support from Brooklyn NAACP volunteers" and "hope[s] that message encourages voters to exercise" their right to vote. (*Id.*).

57. To help convey this message of encouragement, Brooklyn NAACP plans to accompany its line warming activities with informational literature and signage, along with its well-recognized NAACP t-shirts and jackets. (Williams Decl. ¶¶ 10, 37; Bakiriddin Decl. ¶ 22; Trial Tr. 88:15–89:2 (Williams)). Brooklyn NAACP "hope[s] that providing water or a modest snack alongside literature and signage will further encourage voters to be informed and steadfast in their commitment to casting their ballot." (Williams Decl. ¶ 37; *see also* Bakiriddin Decl. ¶ 23).

58. Brooklyn NAACP's planned line warming is nonpartisan. "[T]he Brooklyn NAACP's message is *not* that voters should stay in line to vote in support of or against a particular candidate or ballot measure, but rather that they should exercise the franchise and have their own voices heard." (Williams Decl. ¶ 34; Bakiriddin Decl. ¶ 20).

59. Brooklyn NAACP does not "intend to participate in electioneering or other campaign activities while providing voters with free refreshments while they wait in line to cast their ballots." (Williams Decl. ¶ 34).

CONCLUSIONS OF LAW

Brooklyn NAACP has Standing

60. The Brooklyn Branch has standing under Article III of the Constitution to pursue its claims.

61. Article III of the Constitution "limits the jurisdiction of federal courts to Cases and Controversies," thereby "restrict[ing] the authority of federal courts to resolving the legal rights of litigants in actual controversies[.]" *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (cleaned up).

62. To establish standing, a federal plaintiff must prove (1) an "injury in fact," which is an "invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). An organizational plaintiff such as Brooklyn NAACP may "independently satisfy the requirements of Article III standing." *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015); *see also Havens Realty Corp. v. Coleman*., 455 U.S. 363, 379 n.19 (1982); *N.Y. C.L. Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 295 (2d Cir. 2012) (explaining that an organization may sue to "vindicate its own rights" by "establish[ing] that it (through its agents) suffered a concrete injury").

63. Brooklyn NAACP has established an injury in fact sufficient to confer Article III standing.

64. To establish an injury in fact, a plaintiff "must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016)

(quoting *Lujan*, 504 U.S. at 560). "To establish standing to obtain prospective relief, a plaintiff must show a likelihood that he will be injured in the future.'" *Carver v. City of New York*, 621 F.3d 221, 228 (2d Cir. 2010) (cleaned up). The plaintiff must face a "substantial risk" of injury, or the threat of injury must be "certainly impending." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). In the context of pre-enforcement challenges, a plaintiff can establish injury through a plausible allegation of its "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," for which "there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

65. Brooklyn NAACP has satisfied this burden. It has shown that it and its members intend to engage in conduct violative of the Line Warming Ban, and that it faces a credible threat that the Ban will be enforced against it.

66. Brooklyn NAACP has presented credible testimony describing in detail the line warming activities that it and its members intend to engage in. Brooklyn NAACP President Ms. Williams testified that "[b]ut for the Ban, Brooklyn NAACP's members and volunteers would provide sundries such as bottled water, granola bars donuts, potato chips, or pizza to voters" waiting in line. (Williams Decl. ¶ 32; *see also* Trial Tr. 88:17–22 (Williams)). The Chair of the Civic Engagement Committee, Ms. Bakiriddin, explained that Brooklyn NAACP plans to target polling locations that have experienced long wait times in recent election cycles. (Bakiriddin Decl. ¶ 22). Defendants do not dispute that Brooklyn NAACP's planned line warming activities are proscribed by the Line Warming Ban.

67. Further, as documented above, Brooklyn NAACP has a deeply vested interest in supporting voters and a long history of engaging in GOTV efforts. "Supporting voters braving long lines on election day is central to Brooklyn NAACP's mission and an extension of its existing

community engagement efforts to support all voters in gaining access to the franchise." (Williams Decl. ¶ 11; *see also* Trial Tr. 18:18–20 (Williams)). Brooklyn NAACP's planned activity is consistent with this long history, lending further credibility to its plans.

68. Though Brooklyn NAACP has not previously distributed food and drink to voters waiting in line to vote, it has provided other forms of support to voters waiting in long lines. For example, during the 2020 early voting period, Brooklyn NAACP members and volunteers provided entertainment, face masks, hand sanitizer, information, and moral support to voters waiting in long lines at a polling site at Brooklyn's Barclays Center. (Ex. P-8; Williams Decl. ¶¶ 21–22; Bakiriddin Decl. ¶ 14; Trial Tr. 39:16–18 (Williams); *id.* at 134:20–135:3 (Bakiriddin)).

69. Brooklyn NAACP also regularly provides food and drink in conjunction with efforts to promote voting outside of election day. For example, in 2020, Brooklyn NAACP planned an event billed as "Ballots & BBQ." (Ex. P-21). Though this event was ultimately changed to a virtual event due to the COVID-19 pandemic, it was originally planned as a community barbecue supporting Brooklyn NAACP's efforts to register and educate voters. (Bakiriddin Decl. ¶ 6). Brooklyn NAACP also provided meals during a "Civic Engagement Session" in January 2023 (Ex. P-16 at NAACP000213; Bakiriddin Decl. ¶ 7). And Brooklyn NAACP regularly provides water and granola bars while "tabling" at public libraries and YMCAs. (Bakiriddin Decl. ¶ 11).

70. This evidence is a far cry from allegations of speculative injuries that courts have found insufficient to support standing. Unlike the plaintiffs in the canonical standing case of *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), Brooklyn NAACP has provided detail on when (during voting hours for upcoming elections) and where (at polling places) its injury would occur. And unlike the plaintiffs in *Faculty v. New York University*, 11 F.4th 68 (2d Cir. 2021), Brooklyn NAACP's injury does not depend on a "highly attenuated chain of possibilities," *id.* at

76–77. Brooklyn NAACP has credibly described concrete plans to engage in prohibited activity that is consistent with a long and well-documented history of voter engagement efforts. There is no requirement that such plans be reduced to writing. *Cf. Carney v. Adams*, 592 U.S. 53, 66 (2020) (explaining that a plaintiff need not support intent with a "formal" plan where doing so would be a "futile gesture"). Brooklyn NAACP would run afoul of the Line Warming Ban simply by executing on these credibly stated plans. "This level of detail more than suffices to establish [Brooklyn NAACP's] earnest desire to engage in [line warming] but for the [Ban]." *Vitagliano v. County of Westchester*, 71 F.4th 130, 137 (2d Cir. 2023) (internal quotation marks omitted), *cert denied*, 144 S. Ct. 486 (2023) (mem.).

71. Brooklyn NAACP has also established a credible threat that Plaintiff or its members will be prosecuted for their line warming activities. *See Babbitt*, 442 U.S. at 298. "[I]mminence does not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *Knife Rts.*, 802 F.3d at 384 (cleaned up). "[A] credible threat of present or future prosecution itself works an injury that is sufficient to confer standing, even if there is no history of past enforcement." *N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). Courts are "quite forgiving" to plaintiffs seeking pre-enforcement review and are "willing to presume that the government will enforce the law . . . in the absence of a disavowal by the government or another reason to conclude that no such intent existed." *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013).

72. This is particularly true in the First Amendment context. "A plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; *the threat is latent in the existence of*

the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (emphasis added); *see also Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006) ("Controlling precedent . . . establishes that a chilling of speech because of the mere existence of an allegedly vague or overbroad statute can be sufficient injury to support standing." (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965) & *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988))). "It is only evidence—via official policy or a long history of disuse—that authorities *actually reject* a statute that undermines its chilling effect." *281 Care Comm. v. Arneson*, 638 F.3d 621, 628 (8th Cir. 2011) (emphasis added).

73. It is Defendants' burden to show that the Ban will not be enforced against Brooklyn NAACP or its members. "Courts have not placed the burden on plaintiff to show an intent by the government to enforce the law against it but rather presumed such intent in the absence of a disavowal by the government." *Antonyuk v. Chiumento*, 89 F.4th 271, 334 (2d Cir. 2023) (cleaned up). "[W]here a statute specifically proscribes conduct, the law of standing does not place the burden on the plaintiff to show an intent by the government to enforce the law against it." *Vitagliano*, 71 F.4th at 138 (quoting *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 71 (2d Cir. 2019)). "While evidence that a plaintiff faced either previous enforcement actions or a stated threat of future prosecution is, of course, relevant to assessing the credibility of an enforcement threat, none of these cases suggest that such evidence is *necessary* to make out an injury in fact." *Antonyuk*, 89 F.4th at 334 (quoting *Vitagliano*, 71 F.4th at 139) (cleaned up). The Supreme Court has "sustained pre-enforcement standing without a past enforcement action or an overt threat of prosecution directed at the plaintiff." *Vitagliano*, 71 F.4th at 140.

74. Defendants have failed to overcome that presumption. They have not disavowed enforcement of the ban. *See Cayuga Nation v. Tanner*, 824 F.3d 321, 331–32 (2d Cir. 2016)

("Where, as here, there is reason to believe that the plaintiffs will be targets of criminal prosecution, and there has been no disavowal of an intention to prosecute those individuals, the plaintiffs have adequately alleged a credible threat of prosecution."). Nor have they "convincingly" demonstrated that the Ban—which was amended as recently as 1992—is moribund or of merely historical curiosity. *N.H. Right to Life*, 99 F.3d at 16; Act of July 17, 1992, ch. 414, § 1, 1992 N.Y. Laws 3132.

75. Quite the opposite. The State Board Defendants' counsel emphasized in his opening statement that the Line Warming Ban "gives the Board of Elections an important arrow in its quiver to prevent some more offensive conduct." (Trial Tr. 11:11–14 (Hallak)). As he put it, removing the Ban would take away election officials' ability to "see bad conduct and be able to tell somebody, hey, there is a law out there that says you can't do that[.]" (*Id.* at 166:20–22 (Hallak)). *See Barilla v. City of Houston*, 13 F.4th 427, 433 (5th Cir. 2021) (finding a substantial threat of enforcement where "the [Defendant] did not disclaim its intent to enforce the [challenged ordinances] to the district court, in its appellate briefing, or during oral argument, and instead stressed the Ordinances' legitimacy and necessity").

76. Mr. Connolly similarly testified that the Line Warming Ban continues to serve an important purpose, stating that removing it would "take[] away our ability to have some standing in trying to provide that zone of repose for the voter." (Trial Tr. 166:12–19 (Connolly)). Mr. Connolly further explained: "just the fact that it is against the law" is enough to allow county boards to dissuade would-be violators from prohibited conduct. (*Id.* at 164:21–165:9 (Connolly)). According to Mr. Connolly, "just having the law in place and having the ability to rely on it is effective without it actually resulting in any prosecutions." (*Id.* at 166:3–7 (Connolly)).

77. Far from "reject[ing]" the Ban, *281 Care Comm.*, 638 F.3d at 628, Defendants want to have their cake and eat it too. They simultaneously claim that (1) the Line Warming Ban's mere *existence* allows election officials to effectively deter individuals and organizations (like Brooklyn NAACP) from engaging in protected expression and (2) Brooklyn NAACP lacks standing to challenge the Ban because it is unlikely to be enforced against them. Defendants' admission that the existence of the Ban chills First Amendment-protected expression is fatal to their standing argument. *See Ctr. for Individual Freedom*, 449 F.3d at 660.

78. Nor have Defendants demonstrated that the statute is "moribund" based on a past lack of enforcement in the face of "ubiquitous, open" violation of the Ban. *Poe v. Ullman*, 367 U.S. 497, 501–02 (1961). The application of this exceedingly narrow exception requires a showing that "the relevant provisions have been 'commonly and notoriously' violated." *S.F. Cnty. Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 822 (9th Cir. 1987) (quoting *Poe*, 367 U.S. at 502). Absent "evidence of 'open and notorious' violations of the challenged statutes," courts "cannot assume the State's acquiescence in violations of the law." *Bryant v. Woodall*, 1 F.4th 280, 286 (4th Cir. 2021). The exception is so narrow that the U.S. Supreme Court has declined to apply it even to a statute that had never been enforced in its nearly 40 years of existence. *See Epperson v. Arkansas*, 393 U.S. 97, 109–110 (1968) (Black, J., concurring).

79. Neither Mr. Connolly nor Mr. Ryan—both experienced elections officials—have ever witnessed any distribution of food or drink at the polls. (Trial Tr. 101:4-11 (Ryan); *id.* at 158:8–13 (Connolly)). And neither the State Board of Elections nor the City Board of Elections has ever received any complaints or official reports of line warming activity. (*Id.* at 101:15–23, 102:18–21 (Ryan); *id.* at 158:8–22 (Connolly)).

80. Defendants instead rely on an out-of-context video posted by an organization called "Pizza to the Polls." (Ex. D-17). As an initial matter, the video evidence appears to show individuals distributing food items *near* the polls, but not directly to voters waiting in line. (*Id.*). According to the State Board's interpretation of the Ban, that activity would not constitute a violation. (Connolly Decl. ¶ 18).

81. Moreover, evidence of this activity came to light only during the course of this litigation. Mr. Connolly testified that, to his knowledge, neither he nor anybody else at the State Board was aware of Pizza to the Polls' activities in New York when they were occurring in 2020. (Trial Tr. 158:23–159:4 (Connolly)). It is thus unsurprising that the State Board never investigated this activity. Mr. Connolly testified that the State Board can still investigate a potential violation of the election law that it learns about after the fact and refer it for prosecution. (*Id.* at 167:17–21 (Connolly)). But the statute of limitations for misdemeanors in New York—including violation of Section 17-140—is two years. *See* N.Y. C.P.L. § 30.10(2)(c). Mr. Connolly did not learn of Pizza to the Polls' activities until sometime after his deposition on September 7, 2023—well over two years after the November 2020 election. (Trial Tr. 158:19–22 (Connolly)). And there is nothing in the record to suggest that any other State Board official became aware of the activity before that time.

82. Finally, even if election officials *were* contemporaneously aware of Pizza to the Polls's activities during the 2020 election (or those of any other organization), a single instance of non-enforcement, or even a few instances, does not suffice to demonstrate that violations of the Ban are "ubiquitous" or "common[]." *Poe*, 367 U.S. at 501–02; *Eu*, 826 F.2d at 822.

83. Because Brooklyn NAACP has established (1) an "intention to engage in a course of conduct arguably affected with a constitutional interest," that is (2) undisputedly "proscribed

by" the Line Warming Ban, and (3) that "there exists a credible threat of prosecution thereunder," it has demonstrated an injury in fact under *Babbitt*. 442 U.S. at 298.

84. Brooklyn NAACP also satisfies the remaining elements of standing—traceability and redressability. These two requirements "often travel together." *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1201 (11th Cir. 2021) (citing 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.5 (3d ed. 2021)).

85. Traceability requires that the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (cleaned up). This requirement "does not create an onerous standard." *Ateres Bais Yaakov Acad. of Rockland v. Town of Clarkstown*, 88 F.4th 344, 352–53 (2d Cir. 2023). Even "[a] defendant's conduct that injures a plaintiff but does so only indirectly, after intervening conduct by another person, may suffice for Article III standing." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 55–56 (2d Cir. 2016). Likewise, a plaintiff can show traceability where the injury suffered is "produced by [the] determinative or coercive effect" of the defendant's conduct "upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997); *see also id.* at 168–69 (admonishing that courts should not "equate[] injury 'fairly traceable' to the defendant with [an] injury as to which the defendant's actions are the very last step in the chain of causation").

86. "To satisfy the redressability element of Article III standing, a plaintiff must show that it is 'likely, as opposed to merely speculative, that the alleged injury will be redressed by a favorable decision.'" *Soule v. Conn. Ass'n of Schs., Inc.*, 90 F.4th 34, 47 (2d Cir. 2023) (en banc) (quoting *Lujan*, 504 U.S. at 561) (internal alteration omitted). A plaintiff makes this showing when "it is likely that granting the . . . relief would eliminate *some* effects of the alleged legal violation that produced the injury in fact." *Id.* at 48 (emphasis added) (cleaned up) (quoting *Steel Co. v.*

Citizens for a Better Env't, 523 U.S. 83, 105–06 (1998)). Article III therefore requires only that a judgment in favor of Brooklyn NAACP "'would at least partially redress' the alleged injury." *Id.* at 48 (quoting *Meese v. Keene*, 481 U.S. 465, 476 (1987)).

87. The State Board and the City Board each have the responsibility and authority to enforce the Line Warming Ban. The State Board's mission is to ensure the integrity of the electoral process in the State of New York, to provide oversight of County Boards of Elections, and the enforcement of state and federal laws as they pertain to elections. (Trial Tr. 151:1–18 (Connolly)). New York law grants the State Board authority to "appoint a special investigator to take charge of the investigation of cases arising under the election law," who "shall have all of the powers of a peace officer as set forth in section 2.20 of the criminal procedure law, for the purpose of enforcing the provisions of this chapter." N.Y. Elec. Law § 3-107; (*see also* Connolly Decl. ¶ 42). The State Board "shall have jurisdiction of, and be responsible for, the execution and enforcement of the provisions of article fourteen of this chapter and other statutes governing campaigns, elections and related procedures," including the Line Warming Ban. N.Y. Elec. Law § 3-104(1)(b). The State Board is also empowered to make criminal referrals. (Trial Tr. 152:2–9 (Connolly); Connolly Decl. ¶ 44).

88. Pursuant to its power to "issue instructions . . . relating to the administration of the election process," N.Y. Elec. Law § 3-102(1), the State Board has directed county boards, one of which is the City Board, to use their "[e]nforcement powers" to "prevent violations of the election process," (Ex. P-27 at NYSBOE 000224), including the Line Warming Ban, (*id.* at NYSBOE 000225); N.Y. Elec. Law § 17-140; (*see also* Trial Tr. 151:13–152:9, 153:2–15 (Connolly)). And the City Board, like the State Board, is empowered to make criminal referrals. (Trial Tr. 152:2–9 (Connolly)).

89. Those powers and obligations suffice to establish that the State and City Boards are the proper defendants here—and that both traceability and redressability are satisfied. *See Frank v. Lee*, 84 F.4th 1119, 1135 (10th Cir. 2023) (in a challenge to Wyoming's statute prohibiting electioneering within 300 feet of a polling place, holding "the Secretary of State and County Clerk are the proper state officials for suit because they have a sufficient connection to the enforcement of the challenged statute. They are the chief elections officials responsible for ensuring compliance with the elections laws and they have authority to refer violators for prosecution."). It is irrelevant that Defendants "lack the authority to issue citations or prosecute" violations of the Line Warming Ban so long as they have "some connection to the enforcement of the challenged statute." *Id.* at 1132, 1135 (internal quotation marks omitted). That requirement is satisfied because the Defendants, as explained, have "statutory duties to administer elections consistent with [New York's] elections laws." *Id.* at 1132; *cf. Antonyuk v. Bruen*, 624 F. Supp. 3d 210, 231 (N.D.N.Y. 2022) (holding that superintendent of state police was proper defendant based on general duty to "prevent and detect crime and apprehend criminals").

90. The First Amendment chill that Brooklyn NAACP suffers as a result of the Line Warming Ban is therefore traceable to both sets of Defendants. And the declaratory and injunctive relief that Brooklyn NAACP seeks here "would at least partially redress" its injury. *Meese*, 481 U.S. at 476.

Line Warming is Expressive Conduct

91. Brooklyn NAACP has shown that its planned line warming activities are expressive conduct protected by the First Amendment.

92. The First Amendment's protection extends to symbolic or expressive conduct in addition to the spoken or written word. *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 (2d Cir. 2004); *see also Texas v. Johnson*, 491 U.S. 397, 404 (1989). Conduct is

entitled to constitutional protection if it is "sufficiently imbued with elements of communication[.]" *Johnson*, 491 U.S. at 404 (quoting *Spence v. State of Washington*, 418 U.S. 405, 409 (1974)). To establish that conduct is expressive, a plaintiff must show both (1) "an intent to convey a 'particularized message'" and (2) "a great likelihood that the message will be understood by those viewing it." *Zalewska v. Cnty. Of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) (quoting *Johnson*, 491 U.S. at 404). But an activity need not communicate "a narrow, succinctly articulable message" to satisfy this test. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 569 (1995); *see also Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437–38 (S.D.N.Y. 2014) ("[T]he First Amendment's protections apply whether or not a speaker articulates, or even has, a coherent or precise message, and whether or not the speaker generated the underlying content in the first place."). As this Court has already held, "[t]he law tolerates some variation in how a message is communicated and perceived: 'a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.'" MTD Opinion and Order at 23, ECF No. 50 (quoting *Hurley*, 515 U.S. at 569–70).

93. Brooklyn NAACP has shown that it intends to communicate a message through line warming. Its president, Ms. Williams, testified that the organization intends "to convey the importance of [voters] staying in line, the importance of voting, and to emphasize that everyone's vote counts." (Williams Decl. ¶ 33; *see also* Trial Tr. 50:12–15 (Williams)). Ms. Bakiriddin, the Chair of Brooklyn NAACP's Civic Engagement Committee, similarly testified that she "want[s] voters to know that they have support from NAACP volunteers" and "hope[s] that message encourages voters to exercise" their right to vote. (Bakiriddin Decl. ¶ 23). This message is sufficiently particularized to warrant First Amendment protection.

94. Plaintiff has also shown a sufficient likelihood that its message will be understood by those viewing it. "[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410. Factors such as the location and timing of expressive conduct are relevant to how that conduct is likely to be perceived.

95. The Eleventh Circuit has developed a multi-factor test to determine whether conduct is likely to be perceived as expressing a message in the specific context of food sharing. *See Fort Lauderdale Foot Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018). In *Food Not Bombs*, the Eleventh Circuit concluded that a nonprofit's distribution of food in a public park was protected by the First Amendment because a reasonable person would understand the event to convey an anti-hunger message. *Id.* at 1238–42. The court considered five factors: (1) that the nonprofit set up tables and banners and distributed literature at its events; (2) that its food sharing events are open to everyone and all are invited to participate and share in the meal; (3) that the events were held in a traditional public forum; (4) that the subject of the intended message related to an "issue of concern in the community," and (5) that the means of conveying the message—sharing food—has a "significance" that "dates back millennia." *Id.* at 1242–43. Each of these factors is also present in this case, establishing that, in context, a reasonable observer is likely to perceive Brooklyn NAACP's line warming as expressive conduct.

96. *First*, Brooklyn NAACP plans to pair its food sharing with literature and signage. As at past volunteer events, NAACP members will be identified by t-shirts and jackets bearing the organization's logo. (Williams Decl. ¶¶ 10, 37; Bakiriddin Decl. ¶ 22). Brooklyn NAACP plans to have literature and signage available in conjunction with its line warming activities so that voters standing in line will know that the support they are receiving comes from a trusted and respected

source, and that Brooklyn NAACP supports voters exercising their right to vote. (Williams Decl. ¶ 37; *see also* Bakiriddin Decl. ¶ 22; Trial Tr. 88:15–89:2 (Williams)).

97. Although Brooklyn NAACP has not yet prepared literature specifically for line warming, it has submitted into evidence examples of the types of literature it has distributed at other pro-voting events in the past. (Ex. P-22; Ex. P-23). Brooklyn NAACP's President and Civic Engagement Chair both testified that their volunteers will make similar literature available in conjunction with their planned line warming activities. (Williams Decl. ¶ 37; Bakiriddin Decl. ¶¶ 11, 22; Trial Tr. 88:15–89:2 (Williams)).

98. *Second*, Brooklyn NAACP's line warming support will be open to all voters waiting in lines outside of their polling place. (Williams Decl. ¶ 35). That is, the events are "open to everyone." *Food Not Bombs*, 901 F.3d at 1242.

99. *Third*, Brooklyn NAACP's planned activity will take place in voting lines on public streets outside polling places—a traditional public forum. *See Burson v. Freeman*, 504 U.S. 191, 196–97 (1992) (plurality op.).

100. *Fourth*, long wait times at polls in the City of New York and around the state are significant issues of public concern in New York. As the evidence showed, the State and City Boards have received voluminous complaints about long wait times from voters and community advocates, including during the most recent presidential election. The issue became so widespread in 2020 that the Attorney General issued an advisory to local boards of elections reminding them of their legal obligations with respect to disabled individuals waiting in long lines. And long wait times, specifically in the City of New York, have been a topic of intense discussion among the members of the State Board of Elections.

101. *Fifth*, historical context shows that sharing food is a form of expression. As the Eleventh Circuit recognized in a case following *Food Not Bombs*:

> Two millennia ago, Jesus ate with sinners and tax collectors to 'demonstrate that they were not outcasts in his eyes.' In 1621, Native Americans and the pilgrims shared the first thanksgiving to celebrate the harvest. Over two hundred years later, President Lincoln established thanksgiving as a national holiday to express gratitude for the country's blessings of 'fruitful fields and healthful skies.' And Americans continue to celebrate the holiday with traditional foods and family and friends. Both the long history of significant meal sharing and what those meals conveyed—messages of inclusion and gratitude—put an observer on notice of a message from a shared meal.

Burns v. Town of Palm Beach, 999 F.3d 1317, 1345 (11th Cir. 2021) (quoting *Food Not Bombs*, 901 F.3d at 1243). Brooklyn NAACP's planned food sharing is no less expressive.

102. Taken together, these factors demonstrate a great likelihood that observers will understand Plaintiff's line warming activities as expressing some sort of message.

103. Two other courts have reached the same conclusion. Applying the *Food Not Bombs* factors, a Georgia district court concluded that line warming activity similar to what Brooklyn NAACP intends here is expressive. *In re Ga. Senate Bill 202*, No. 1:21-CV-01229-JPB, 2023 WL 5334617, at *7–8 (N.D. Ga. Aug. 18, 2023) ("*S.B. 202 II*"); *see also In re Georgia Senate Bill 202*, 622 F. Supp. 3d 1312, 1327–29 (N.D. Ga. 2022) ("*S.B. 202 I*"). A Florida district court similarly found line warming to be expressive conduct and thus subject to the protections of the First Amendment following a bench trial. *League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1129 (N.D. Fla. 2022) ("*LOWV*"), *reversed in part on other grounds sub nom. League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905 (11th Cir. 2023). The *Food Not Bombs* factors apply to the present case in substantially the same way they applied to the line warming at issue in those two cases.

104. In addition to satisfying the five *Food Not Bombs* contextual factors, Plaintiff has presented direct evidence that voters do in fact subjectively perceive line warming as an expressive act.

105. Brooklyn NAACP presented testimony from Kayla Hart, a voter who has received food and drink while waiting in line at the polls in Atlanta, Georgia. (Ex. P-65, Decl. of Kayla Hart, ¶ 10). In the May 2018 primary election in Georgia, Ms. Hart stood in line for over three hours on a sweltering hot day. (*Id.* ¶¶ 6–8). She was grateful for the snacks, water, and chicken sandwiches being handed out to voters in line. (*Id.* ¶¶ 10–13). She "got the message that the volunteers cared about [her] right to vote, appreciated that [she] was [] exercis[ing] that right, and wanted to make sure that [she] was able to cast [her] ballot." (*Id.* ¶ 13). Ms. Hart has "seen people leave long voting lines" in the past and "know[s] firsthand how important it is to ensure that people feel solidarity while waiting to vote, especially in communities of color that feel disenfranchised to begin with." (*Id.* ¶ 14; *see also* Trial Tr. 113:20–115:3 (Hart)). Ms. Hart's testimony concerning her experience in Georgia further supports the conclusion that a reasonable voter is likely to perceive Brooklyn NAACP's similar line warming conduct as expressing a similar message of solidarity and support. *See S.B. 202 II*, 2023 WL 5334617, at *8 (crediting similar testimony from voters); *S.B. 202 I*, 622 F. Supp. 3d at 1327–29 (same); (*see also* Bakiriddin Decl. ¶ 10 (testifying that she herself has experienced food sharing as a "sign of welcome")).

106. Additionally, the record shows that, as a result of Brooklyn NAACP's activity supporting and educating voters in Brooklyn, its pro-voting message is well-understood and well-received in the local community. As documented above, Brooklyn NAACP has engaged in extensive voter outreach and education efforts through in-person events, social media campaigns, and direct voter outreach. Some of these events have involved the distribution of food. This

context, combined with the fact that Brooklyn NAACP plans to support its line warming message with NAACP-branded apparel, signage, and literature, increases the likelihood that voters receiving food and drink from Brooklyn NAACP will understand its message of solidarity and support.

107. For example, voters responded to Brooklyn NAACP's distribution of hand sanitizer, face shields, and masks with "welcoming smiles and expressions of gratitude." (Williams Decl. ¶ 28). Voters also demonstrated that they understood Brooklyn NAACP's intended message of solidarity and support with nonverbal gestures such as a thumbs up or a raised fist. (*Id.* ¶ 29). Several voters recognized Brooklyn NAACP members through their apparel and signage and their presence at earlier voter registration and GOTV events. (Bakiriddin Decl. ¶¶ 12, 18). The fact that New York voters understood the message of Brooklyn NAACP's similar activity in the past further demonstrates that voters are likely to understand the expressive meaning of Brooklyn NAACP's planned line warming activities. *See LOWV*, 595 F. Supp. 3d at 1129 (crediting similar testimony).

108. Because Brooklyn NAACP's planned line warming activity communicates a particularized message that is likely to be understood by voters, it is expressive conduct that is protected by the First Amendment. And the Line Warming Ban, which undisputedly proscribes that expressive conduct, therefore restricts Brooklyn NAACP's First Amendment rights and those of its members.

The Line Warming Ban is Not Sufficiently Tailored to Withstand Strict or Intermediate Scrutiny

109. Having determined that the Line Warming Ban restricts expressive conduct protected by the First Amendment, the Court must next consider whether the Ban is a justified restriction on that expression. To do so, the Court must first determine what level of scrutiny applies.

110. Strict scrutiny, and not intermediate scrutiny, is the appropriate standard here. But, in any event, the Line Warming Ban cannot survive either level of scrutiny.

111. Laws that target speech "because of the topic discussed or the idea or message expressed"—that is, content-based restrictions—are presumptively unconstitutional and subject to the strictest scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). Laws that limit only the "time, place, or manner" of protected speech, without regard to the content of that speech, are reviewed under an intermediate level of scrutiny. *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) (quoting *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984)). And laws that do not burden expression at all will withstand judicial review if justified by a rational basis. *See Ku Klux Klan*, 356 F.3d at 208.

112. Here, strict scrutiny applies because the Line Warming Ban is a content-based restriction on speech. The Line Warming Ban prohibits only a certain category of expression: gifting "any meat, drink, tobacco, refreshment or provision" to persons other than specified election and campaign officials "in connection with . . . any election." N.Y. Elec. Law § 17-140. It does not prohibit all communication with voters, but instead selectively carves out line warming. Brooklyn NAACP could, for example, express its support for voting through written or spoken word, or could sell voters the same snacks it presently wishes to gift to them without running afoul of the Line Warming Ban. Notably, New York law permits electioneering to voters waiting in line outside a 100-foot radius from the polls but prohibits the expressive act of line warming to those same voters. *See* N.Y. Elec. Law § 8-104; (Trial Tr. 162:19–22 (Connolly); Connolly Decl. ¶¶ 18, 24). Because the Ban uniquely targets Brooklyn NAACP's intended communication but permits expression on other topics, it is a content-based regulation. *See Burson*, 504 U.S. at 197–98.

113. The Line Warming Ban is also subject to strict scrutiny for the independent reason that it restricts core political speech. "Core political speech" is that which "involves . . . interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988). Although Brooklyn NAACP, through its line warming activity, does not support or oppose candidates or ballot measures, its intended message nonetheless concerns "political change"—specifically, encouraging voters to express their voice through the ballot and rejecting policies that have led to long wait times. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477–78 (2007) (explaining that "issue advocacy" is "core political speech"). "Core political speech" need not involve advocacy for or against candidates or ballot issues. *Id.* at 456 (explaining that "issue advocacy" as used in this context refers to "speech about public issues more generally," as distinguished from "express advocacy" for or against a particular candidate or ballot measure). "Encouraging others to vote or engage in the political process is the essence of First Amendment expression. At a minimum, discussing the right to vote and urging participation in the political process is a matter of societal concern because voting brings about 'political and social changes desired by the people.'" *VoteAmerica v. Raffensperger*, No. 1:21-CV-01390-JPB, 2023 WL 6296928, at *9 (N.D. Ga. Sept. 27, 2023) (quoting *Meyer*, 486 U.S. at 421) (applying strict scrutiny to restriction on sending pre-filled absentee ballot applications to voters); *see also VoteAmerica v. Schwab*, No. CV-21-2253-KHV, 2023 WL 3251009, at *15–18 (D. Kan. May 4, 2023) (finding that sending personalized mail ballot applications constitutes core political speech and applying strict scrutiny).

114. The intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), does not apply here. *O'Brien*'s intermediate scrutiny test applies only when "the governmental purpose in enacting the regulation is unrelated to the suppression of expression."

City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000). That is, it applies only to content-neutral regulations. *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 27 (2010). "If the government interest is related to the content of the expression, . . . then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard." *City of Erie*, 529 U.S. at 289.

115. The precise level of scrutiny is immaterial here, however, because the Line Warming Ban fails constitutional muster under *either* standard. Intermediate scrutiny requires that the challenged restriction must be "narrowly tailored," meaning it is "no greater than essential" to achieving the state's substantial interest. *Young v. N.Y.C. Trans. Auth.*, 903 F.2d 146, 157 (2d Cir. 1990) (quoting *O'Brien*, 391 U.S. at 377). In other words, the regulation "need not be the least restrictive or least intrusive means" of achieving the state's goal, as strict scrutiny would require, but the state still must show that its interest "would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (internal quotation marks omitted).

116. The Line Warming Ban is not narrowly tailored because it criminalizes a vast amount of conduct that does not implicate the state's interest in shielding voters from undue influence. For one, the Line Warming Ban potentially reaches the entirety of New York's geographic territory. The State may have a legitimate interest in protecting voters from being intimidated or influenced near the polls. But at some distance from the polls, that interest is outweighed by speakers' rights to advocate for candidates and issues. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

117. The State Board of Elections attempts to place a temporal and geographic limit on the Ban by interpreting it to apply only to "voters actively engaged in the act of voting," i.e., the

period from when a voter enters a line to vote at a polling place until after the voter has cast his/her vote and exited the polling place. (Connolly Decl. ¶ 18). But that limiting construction lacks any support in the statute's text, and federal courts "may not rewrite a state law to conform it to constitutional requirements." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (cleaned up); *see also Boos v. Barry*, 485 U.S. 312, 330 (1988) ("[F]ederal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent."). The statute, which restricts conduct related to "any person" "in connection with or in respect of any election," does not on its face contain the State Board's proposed limitation. N.Y. Elec. Law § 17-140. While the Ban provides some narrow exceptions for the provision of refreshments to election officials and administrators, it contains no limitations that support the State Board's assertion that the Ban exempts anyone who is not a "voter."

118. Nor does the text of the statute contain any geographic limitation. N.Y. Elec. Law § 17-140. If the Legislature meant to restrict the application of the Ban to only "voters" and only while they were in line at a polling place, it could easily have done so. Instead, it made the Ban broadly applicable to "any person" "in connection with or in respect of any election," with only narrow, defined exceptions. Indeed, the State Board's proposed limiting construction contradicts the plain language of the statute. *Compare* (Connolly Decl. ¶ 18 ("act of voting" begins "when a voter enters a line to vote") *and* Trial Tr. 154:2–6 (Connolly testifying that voters standing in line to vote before the polls open are "engaged in the act of voting")) *with* N.Y. Elec. Law § 17-140 (the Ban applies only "during the hours of voting").[1]

[1] The State Board's proposed limiting construction is also contradicted by Mr. Connolly's declaration. According to Mr. Connolly, in September 1860, the "Douglas Democrats" allegedly hosted a "Grand Political Carnival and Ox-roast." (Connolly Decl. ¶ 5). In October 1876, "there

119. Even under the State Board's limiting construction, the Line Warming Ban fails the narrow tailoring required by strict or intermediate scrutiny. Although the Supreme Court has not established a geographic "litmus-paper test" to "separate valid from invalid restrictions," it has held that "at some measurable distance from the polls," government regulation of First-Amendment-protected conduct becomes an "impermissible burden." *Burson*, 504 U.S. at 210–211. Here, because the geographic zone in which the Line Warming Ban applies "is tied to the position of the voter in line and fluctuates based on the location of the voter, it has no fixed line of demarcation and no limit." *S.B. 202 I*, 622 F. Supp. 3d at 1338. Thus, in practice, the geographic limit "could easily extend thousands of feet away from the polling station . . . given the documented hours-long lines that voters at some polling locations have experienced." *Id.* at 1338–39. As the *S.B. 202* court found in addressing a similar ban, "it is improbable that a limitless [geographic scope] would be permissible." *Id.* at 1339; *see also Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004) (finding that a 500-foot buffer zone was unconstitutional where the state's evidence was "glaringly thin . . . as to why the legislature . . . ultimately arrived at a distance of 500 feet"); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1053 (6th Cir. 2015) (rejecting a 300-foot buffer zone because the state "did not present any evidence . . . justifying a no-speech zone

---

was a 'grand Republican barbecue'" held in Brooklyn. (*Id.* ¶ 6). Neither of these events were held in the vicinity of the polls—or indeed, even on election day. *Id.* Neither event, therefore, would be covered by the phrase "in connection with or in respect of any election," as the State Board interprets it. And yet Mr. Connolly testified that both events were held "*in connection with*" the 1860 and 1876 presidential elections. (*Id.* ¶¶ 5, 6 (emphasis added)). Although Mr. Connolly's statements are not based on his personal knowledge and therefore not admissible for their truth, the Court may consider them to show the contradictions in the State Board's interpretation of the Ban.

nine times larger than the one previously authorized by the Supreme Court [in Burson] and offer[ed] no well-reasoned argument" for a restricted area of that size).

120. The Line Warming Ban's broad substantive reach further demonstrates that it is not narrowly tailored to the State's asserted interest in protecting voters from intimidation, influence, or interference. (*See* Trial Tr. 153:17–23 (Connolly listing State's interests); Connolly Decl. ¶ 27). In addition to banning gift-giving with partisan intention, the Line Warming Ban bars nonpartisan expression like that contemplated by Brooklyn NAACP. Offering a voter a bottle of water and a granola bar, with no mention of any candidate or issue on the ballot, does not impair a citizen's ability to vote freely for the candidates of their choice. Nor is there any evidence in the record to suggest that such conduct would be taken as "intimidation" or as expressing a preference for any candidate, party, or issue. And New York Law already prohibits electioneering with 100 feet of a polling place, displaying marked ballots, vote buying, and voter intimidation. *See* N.Y. Elec. Law §§ 8-104(1), 17-130(10), 17-142; 17-212.

121. The Line Warming Ban is also both overinclusive and underinclusive. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 805 (2011) (laws affecting First Amendment rights "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive" (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993))). The Ban permits many types of interactions with voters while prohibiting a vast array of innocent, protected expression. For example, New York law permits partisan organizations to approach voters waiting in line to engage in electioneering, so long as the electioneering occurs outside a 100-foot radius from the poll site. N.Y. Elec. Law § 8-104; (Trial Tr. 162:19–22 (Connolly)). But the Line Warming Ban forbids even nonpartisan line warming directed to those same voters. Defendants cannot explain

how nonpartisan line warming is more likely to influence or intimidate voters than *partisan* electioneering.

122. The Ban also applies only "during the hours of voting"—meaning it does not forbid distributing food and drink to voters waiting in line before the polls open. N.Y. Elec. Law § 17-140; (Trial Tr. 153:24–154:10, 169:25–170:8 (Connolly)). That is no mere hypothetical. In 2020, the City Board saw voters lining up hours before the polls opened for early voting. (*Id.* at 104:14–18, 108:17–19 (Ryan)). But the State Board acknowledges that voters are no more or less likely to experience undue intimidation or influence before the hours of voting. (*Id.* at 154:7–10 (Connolly)). There is thus no rational reason to *permit* line warming during pre-voting hours but *prohibit* it while the polls are open.

123. Perhaps most bizarrely, the Line Warming Ban appears to permit the distribution of food and drink having a retail value *under* $1 as long as it occurs *inside* a polling place. *See* N.Y. Elec. Law § 17-140 (excepting "any 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"). This exception appears to allow even *partisan* actors, including party representatives and workers assisting candidates, to distribute such items to voters *inside* a polling place—so long as they are not identified. (Trial Tr. 154:11–155:2 (Connolly)). And yet the Ban prohibits that same activity *outside* a polling place. (*Id.* at 169:25–170:8 (Connolly)).

124. In sum, the Line Warming Ban is a sweeping prohibition that criminalizes significantly more expression than is necessary to protect the integrity of the franchise. And it is not narrowly tailored to effectively address the State's purported interest in preventing voter

harassment and intimidation. It therefore cannot withstand even intermediate scrutiny under *O'Brien*.

125. Because the Line Warming Ban fails under *O'Brien*'s intermediate scrutiny, it certainly does not withstand strict scrutiny. For the same reasons that the Ban is insufficiently tailored under *O'Brien*, it cannot satisfy this more demanding standard. A speech restriction survives strict scrutiny only if it is "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). And a law is not the least restrictive means of achieving the state's goal if the only conduct it legitimately proscribes is already criminalized by other state laws. *Id.* at 490–92. Defendants cannot explain how the Line Warming Ban prevents voter intimidation, interference, or influence that is not already regulated by New York's prohibitions on electioneering with 100 feet of a polling place, displaying marked ballots, vote buying, and voter intimidation. *See* N.Y. Elec. Law §§ 8-104(1), 17-130(10), 17-142; 17-212; (*see also* Ex. P-44 (the Attorney General citing several provisions of law that protect voters from intimidation and not including the Line Warming Ban)).

The Line Warming Ban is Impermissibly Overbroad

126. The Line Warming Ban must also be struck down for the independent reason that it is unconstitutionally overbroad.

127. "[I]mprecise laws can be attacked on their face under two different doctrines." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). "First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612–15 (1973)). "Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be

impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.*

128. "Overbreadth challenges are a form of First Amendment challenge and an exception to the general rule against third-party standing." *Farrell v. Burke*, 449 F.3d 470, 498 (2d Cir. 2006). Accordingly, "[a] plaintiff claiming overbreadth need not show that the challenged regulation injured his or her First Amendment interests in any way to bring [an] overbreadth challenge." *Id.* at 499. "The first step in overbreadth analysis is to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). The second step is to determine whether the challenged statute "criminalizes a substantial amount of protected expressive activity." *Id.* at 297.

129. The Line Warming Ban is facially invalid under the First Amendment because, for the reasons just described, it punishes a substantial amount of protected speech, judged in relation to its legitimate sweep. *See Virginia v. Hicks*, 539 U.S. 113, 122 (2003). The Ban restricts the expressive act of offering food and water to voters in encouragement of their exercise of the franchise. Even if some limitations on this protected right may be permissible, such as prohibiting partisan line warming within a narrow radius of polling places, the Line Warming Ban extends far beyond those limitations. It prohibits both partisan and nonpartisan line warming within potentially all of New York State. Thus, like the similar ban in Florida, it "consumes vast swaths of core First Amendment speech," *LOWV*, 595 F. Supp. 3d at 1138, and is unconstitutionally overbroad.

The Line Warming Ban is Impermissibly Vague

130. The Line Warming Ban also fails constitutional scrutiny for the independent reason that it is impermissibly vague. *See Morales*, 527 U.S. at 52. The Due Process Clause of the Fourteenth Amendment ensures that "no one may be required . . . to speculate as to the meaning of penal statutes." *Farrell*, 449 F.3d at 484–85 (cleaned up). It requires that parties who enforce criminal laws *and* the parties who are regulated by them have fair notice of what conduct is

permitted and what conduct is criminal. *Williams*, 553 U.S. at 304. In other words, 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) (cleaned up).

131. Thus, "[a] statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) (internal citation omitted). The first basis for finding vagueness—lack of warning to regulated parties—is an "objective one" that requires courts to assess "'whether the law presents an ordinary person with sufficient notice of or the opportunity to understand what conduct is prohibited or proscribed,' not whether a particular plaintiff actually received a warning that alerted him or her to the danger of being held to account for the behavior in question." *Dickerson v. Napolitano*, 604 F.3d 732, 745–46 (2d Cir. 2010) (quoting *Thibodeau*, 486 F.3d at 67). The second basis for finding vagueness—lack of sufficient enforcement guidance—invalidates laws that accord "unfettered discretion" to enforcers, *Hayes v. New York Attorney Grievance Committee of the Eighth Judicial District*, 672 F.3d 158, 169 (2d Cir. 2012) (quoting *Chatin v. Coombe*, 186 F.3d 82, 89 (2d Cir.1999)), or task enforcers with interpreting unclear statutory text without the aid of "statutory definitions, narrowing context, or settled legal meanings," *Williams*, 553 U.S. at 306.

132. "[V]agueness in the law is particularly troubling when First Amendment rights are involved." *Farrell*, 449 F.3d at 485. Where, as here, the statute at issue is "capable of reaching expression sheltered by the First Amendment, the vagueness doctrine would demand a greater

degree of specificity than in other contexts." *Melendez v. City of New York.*, 16 F.4th 992, 1015 (2d Cir. 2021) (cleaned up). That is because "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (cleaned up). Statutes that restrict protected speech or association are therefore held to a "more stringent" vagueness test than statutes that do not implicate fundamental rights. *Humanitarian L. Proj.*, 561 U.S. at 19.

133. Applying these principles, the Line Warming Ban is facially vague because it fails to provide persons of reasonable intelligence notice of what conduct it prohibits, and it invites arbitrary and discriminatory enforcement.

134. The statute consists of a single run on sentence, with a series of nested exceptions and qualifications to the exceptions. Indeed, the statute's confusing structure is incomprehensible as to what is and is not allowed under the Ban. The result is to "authorize[] or even encourage[] arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The First Amendment demands more clarity.

135. Two statutory terms in particular lack the specificity required of criminal statutes. First, the phrase "in connection with or in respect of any election" is indeterminate because it does not provide any territorial limitation. It is not apparent on the face of the statute whether it would apply to an individual who offers snacks to voters in the polling place parking lot before they get in line to vote, or whether it bars Plaintiff from distributing snacks to New York voters on election day at its Brooklyn headquarters. And, as explained above, the State Board's proposed limiting construction of this term is not "reasonable and readily apparent." *Boos*, 485 U.S. at 330.

136. Second, the meaning of the term "provision" in the statutory phrase "meat, drink, tobacco, refreshment or provision" is also not readily apparent. Defendants' proposed limiting construction of the phrase "provision" as applying only to "consumable goods" similarly fails to cure the term's vagueness. The dictionary definition of the term "provision" includes all "needed materials or supplies." *See Provision*, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/provision (last visited Apr. 12, 2024). And even the phrase "consumable" does little to delineate the scope of the statute's prohibition. The dictionary definition of that phrase embraces both food and non-food items. *See Consumable*, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/consumable (defining "consumable" as "something (such as food or fuel) that is consumable") (last visited Apr. 12, 2024). That is exactly the sort of vague terminology that "authorizes or even encourages arbitrary and discriminatory enforcement." *VIP of Berlin*, 593 F.3d at 186 (internal citation omitted).

137. Indeed, the lack of precision in the term's definition, even under the State Board's limiting construction, is apparent from the State Board's own interpretation of the statute. The State Board's Deputy Director testified that, as the State Board interprets the statute, "chewing gum" is a "consumable substance" within the Ban's prohibition, but hand sanitizer, paper masks, or a pack of tissues—all single-use items—are not. (Connolly Decl. ¶ 23).

138. To the extent that the State Board of Elections interprets the term "provisions" to apply only to substances that are "consumable" in the sense that they are ingestible—i.e., food and drink—that interpretation is not readily apparent from the statute's text. The Ban specifically prohibits the distribution of "meat, drink, tobacco, [and] *refreshment*." N.Y. Elec. Law § 17-140 (emphasis added). Defendants' construction of the term "provision" would be duplicative of the term "refreshment," thus rendering the term superfluous. *See People v. Galindo*, 38 N.Y.3d 199,

205 (2022) (It is a "core principle of statutory construction that effect and meaning must, if possible, be given to the entire statute and every part and word thereof." (internal quotation marks and citation omitted)); *United States v. Harris*, 838 F.3d 98, 106 (2d Cir. 2016) ("[C]ourts must give effect to all of a statute's provisions so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks and citation omitted)).

139. Brooklyn NAACP has struggled with the Ban's imprecision. Ms. Williams and Ms. Bakiriddin testified that, when Brooklyn NAACP was planning to distribute items such as hand sanitizer and face masks to voters, its members were concerned that such items might be considered "provisions," or might be valued at more than one dollar. (Williams Decl. ¶ 22; Bakiriddin Decl. ¶ 15; Trial Tr. 135:4–14 (Bakiriddin)). Although Brooklyn NAACP nonetheless chose to move forward with its plans, the uncertainty they faced demonstrates how vaguely written criminal laws may chill protected First Amendment activity.

140. In short, neither the term "in connection with or in respect of any election" nor the term "provision" is "readily susceptible" to any narrowing construction that saves the Ban from vagueness. *Sorrell*, 221 F.3d at 386. And as the Court "may not rewrite a state law to conform it to constitutional requirements," *id.* (cleaned up), the Line Warming Ban is unconstitutionally vague.

CONCLUSION

Based upon the above Findings of Fact and Conclusions of Law, Plaintiff respectfully requests that the Court:

1. DECLARE that Section 17-140 of the New York Election Law violates the First Amendment right to free speech and expression;

2. DECLARE that Section 17-140 of the New York Election Law violates the First and Fourteenth Amendments to the United States Constitution because it is impermissibly overbroad;
3. DECLARE that Section 17-140 of the New York Election Law violates the First and Fourteenth Amendments to the United States Constitution because it is impermissibly vague; and
4. ENJOIN Defendants, their respective agents, officer, employees, and successors, and all persons acting in concert with each or any of them, from enforcing Section 17-140 of the New York Election Law.

Dated: April 12, 2024

Respectfully submitted,

By: */s/ Lalitha D. Madduri*

Lalitha D. Madduri*
Jyoti Jasrasaria*
Richard A. Medina
Meaghan Elysia Mixon*
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Washington, DC 20001
Tel: 202.968.4490
Fax: 202.968.4498
LMadduri@elias.law
JJasrasaria@elias.law
RMedina@elias.law
MMixon@elias.law

Abha Khanna*
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
Tel: 206.656.0177
Fax: 202.968.4498
AKhanna@elias.law

Andrew G. Celli
EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL LLP
600 Fifth Avenue, 10th Floor
New York, NY 10020
Tel: 212.763.5000
Fax: 212.763.5001
ACelli@ecbawm.com

Attorneys for Plaintiff Brooklyn Branch of the NAACP

* Admitted *pro hac vice*