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January 14, 2022

VIA ECF
Hon. Katherine Polk Failla
U.S. District Court for the Southern District of New York
United States Courthouse
500 Pearl Street, Courtroom 14A
New York, NY 10007

Re: *The Brooklyn Branch of the National Association for the Advancement of Colored People v. Peter S. Kosinski, et al.*, Case No. 1:21-cv-07667-KPF

Dear Judge Failla:

This office represents Defendants, Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, Andrew J. Casale, Todd D. Valentine, and Robert A. Brehm[1] (collectively, the "State Board of Elections Defendants") in this matter. I write pursuant to Your Honor's Individual Rule 4(A) to request a pre-motion conference to discuss the State Board of Elections Defendants' intended motion to dismiss all claims pursuant to Fed. R. Civ. P. 12(b)(1) and (6) on the basis that (1) Plaintiff has not established standing, (2) the challenged statute—N.Y. Elec. Law § 17-140—does not restrict speech, (3) the State is entitled to restrict speech in or around a polling place, which is a non-public forum, and (4) the Law is not unconstitutionally vague or overbroad.

Plaintiff challenges N.Y. Elec. Law § 17-140 (the "Law"), which restricts the provision of "meat, drink, tobacco, refreshment or provision" in connection with an election on an election day. The State Legislature enacted these provisions to protect voters from intimidation and improper influence while casting their ballots and preventing a return to the carnival-like atmosphere at the polls that was previously present outside the polls on an election day.[2] Plaintiff alleges that it "hopes to support voters by offering food, water, and other modest refreshments" to voters waiting in line to vote, but has not done so out of concern for violating the Law. Compl. ¶¶ 13, 32-33. Although Plaintiff cites a "threat of prosecution" under the Law (*id.* ¶ 33), it does not mention that an iteration of this law has been in effect since 1909, and it has been in its current form since 1992. Notwithstanding this long history, and its allegation that the Law "completely undermines Plaintiff's mission" (Compl. ¶ 13), Plaintiff does not allege ever before providing food or beverages to voters. Plaintiff asserts two causes of action, seeking a declaratory judgment that (1) the Law violates Plaintiff's First Amendment rights and (2) is unconstitutionally vague and overbroad. For the reasons stated below, these claims are without merit and should be dismissed.

1. Plaintiff failed to adequately plead standing.

To establish Article III standing, a plaintiff must show: "(1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it

[1] Mr. Brehm retired as Co-Executive Director of the New York State Board of Elections, effective as of August 1, 2021, and, accordingly, is improperly named as a Defendant in this action.

[2] *See, e.g.*, Bramen, *Swilling the Planters With Bumbo: When Booze Bought Elections*, SMITHSONIAN MAGAZINE (October 20, 2010), available at https://www.smithsonianmag.com/arts-culture/swilling-the-planters-with-bumbo-when-booze-bought-elections-102758236/

is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quotations omitted). The central concept of "imminence" "cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes -- that the injury is 'certainly impending'". *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992). Moreover, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). To establish standing, an organization must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (quotations omitted). Here, Plaintiff did neither.

This case involves a challenge to a statute, formerly N.Y. Election Law § 457, and before that, N.Y. Penal Law § 767, which has been in effect in New York since 1909, and in its current form since 1992. Despite this long history, Plaintiff does not allege that it has ever conducted—or even attempted to conduct—the food-distribution activities that it now alleges are core to its mission. Plaintiff also makes no factual allegations regarding the enforcement of the Law over the last century to permit the assessment of whether Plaintiff has an actual, well-founded fear that its members would face prosecution if they performed the intended actions. Instead, Plaintiff merely alleges that it "hopes to support voters by offering food, water, and other modest refreshments," which it asserts is the "type of civic engagement and assistance Plaintiff would provide but for the [Law]." Compl. ¶ 13; *see also id.* ¶ 28 ("But for the [Law], [Plaintiff] would provide sundries such as bottles water, potato chips, or pizza to voters already waiting in line."); ¶ 30 (describing Plaintiff's "intention"). The only harm Plaintiff identifies is that it is allegedly "prevented from distributing food and water enduring long lines to vote," even though Plaintiff has never distributed food and water to voters in the past. *See* Compl. ¶ 33. Plaintiff also does not claim that the Law has caused it to divert its resources in any particular manner, nor could it, because Plaintiff is currently operating in the same manner as it always has. These vague allegations of future conduct are of the type that have been regularly rejected as a basis for standing. *See, e.g., Faculty Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ.*, 2021 U.S. App. LEXIS 25501, at *12 (2d Cir. Aug. 25, 2021). Under Plaintiffs' theory, any person who alleges a desire to give food to voters would have standing to challenge the Law. That limitless standing does not accord with established constitutional principles. Plaintiff has not met even the limited burden at the pleadings stage to "clearly allege facts demonstrating each of the elements that make up the irreducible constitutional minimum of standing". *Id.* at *8.

2. The Law restricts conduct, not speech.

The Law does not restrict speech, but rather prohibits the provision of "meat, drink, tobacco, refreshment or provision" "in connection with . . . an election," subject to stated exceptions. N.Y. Elec. Law § 17-140. Plaintiff's attempt to convert the act of providing food or beverages to a voter into an expressive act—which it refers to as an "expression of solidarity" (Compl. ¶ 24)—is unavailing. The Supreme Court has expressly rejected "the view that conduct can be labeled 'speech" whenever the person engaging in the conduct intends thereby to express an idea." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006)

(quotations omitted). Instead, protection extends only to conduct that is "inherently expressive." *Id.* Plaintiff concedes that the primary purpose of providing food and beverages would be to "support voters" in their exercise of their own right to vote. *See* Compl. ¶ 20. Conduct intended to support another person's exercise of their own constitutional rights is not inherently expressive. *See Wise v. City of Portland*, 483 F. Supp. 3d 956, 967 (D. Or. 2020) (rejecting the First Amendment argument advanced by medics who were "providing care and support to the protesters"); *Feldman v. Arizona Sec'y of State's Office*, 840 F.3d 1057, 1084 (9th Cir. 2016) (ballot collection is not inherently expressive). Therefore, even if the Plaintiff has standing to challenge the Law, its First Amendment challenge is without legal merit.

3. The State is entitled restrict speech at polling places, which are non-public forums.

Even if the Law targeted speech, the State has wide discretion to enact laws in and around polling places on an election day. It is well-established that a polling place qualifies as a non-public forum, which is "a special enclave, subject to greater restriction." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018) (quotations omitted). This zone of protection extends beyond the physical polling place building. *See Burson v. Freeman*, 504 U.S. 191, 209 (1992) (upholding Tennessee's 100-foot boundary for political speech). In a non-public forum, a State need only "articulate some sensible basis for distinguishing what [speech] may come in from what must stay out". *Minn. Voters*, 138 S. Ct. at 1888. Here, the State's legitimate concern of voter intimidation/interference justifies preventing gift-giving to waiting voters, regardless of the source or the loftiness of their intentions. Therefore, the Law's content-neutral restrictions are well within the State's authority to regulate elections.

4. The Law is clear and unambiguous, not unconstitutionally vague.

Plaintiff's Complaint confirms that the Law is unambiguous. As is evident from the statutory text, and recited by Plaintiff, the Law prohibits (a) any person, (b) "in connection with or in respect of any election," (c) "during the hours of voting on a day of a general, special or primary election," (d) from providing another person with "any meat, drink, tobacco, refreshment or provision," subject to two exceptions: (1) that such provisions may be provided to "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" and (2) that provisions valued at less than one dollar are permissible, so long as they are "given within a polling place . . . without any identification of the person or entity supplying such provisions." The fact that Plaintiff questions the wisdom of the Law, or whether its provisions are "necessary," does not render it unconstitutionally vague, so long as they have a "core meaning," which they clearly do. *See Brache v. Cty. of Westchester*, 658 F.2d 47, 51 (2d Cir. 1981). Moreover, the "strong medicine" of the overbreadth doctrine is inappropriate to second-guess legitimate State election regulations. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008).

Given the above, we believe that Plaintiff's claims in this action are subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and (6). Plaintiff has indicated that they will oppose any motion to dismiss. We also request that the initial conference scheduled for January 27, 2022 be adjourned pending the motion. We appreciate the Court's consideration.

Respectfully submitted,

/s/ Elliot A. Hallak

Elliot A. Hallak

cc: Counsel of record (via ECF)