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 MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiff Brooklyn Branch of the NAACP (the "Brooklyn Branch"), by and through its undersigned counsel, submits this Memorandum of Law in Opposition to the Motion to Dismiss filed by the Defendants Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, Todd D. Valentine, Robert A. Brehm, and Anthony J. Casale (the "State Defendants").[1]

PRELIMINARY STATEMENT

For one hundred years, the Brooklyn Branch has worked to celebrate and encourage participation in our democracy and tear down barriers to the franchise. It has held rallies at polling sites, engaged in voter registration efforts, and held get-out-the-vote events to encourage political participation in New York, especially among voters of color. At the same time, the Brooklyn Branch has worked to combat voter suppression through nonpartisan legislative and political advocacy.

New York's notoriously long lines at the polls are one of the barriers that disproportionately affect Black, brown, poor, and elderly voters, which the Brooklyn Branch has sought to remove. Long lines to vote are always unacceptable, but in the 2020 general election the wait times in New York's poor and minority communities reached record highs. And the Brooklyn Branch expects that trend to continue in future elections.

In furtherance of its mission to support and celebrate political participation in the face of significant and unnecessary burdens imposed by long lines, the Brooklyn Branch would distribute snacks, water, and other sundries to voters forced to endure hours-long lines to cast their ballots, but for New York Election Law § 17-140 (the "Line Warming Ban" or the "Ban"). Through this

[1] Defendants Frederic M. Umane, Miguelina Camilo, Jose Miguel Araujo, Gino A. Marmorato, Michael Michel, Rodney L. Pepe-Souvenir, Simon Shamoun, Patricia Anne Taylor, Tiffany Townsend, and John Wm. Zaccone (the "City Defendants") have separately moved to dismiss, joining in the arguments made by the State Defendants. ECF Nos. 42, 43. Their motion should also be denied for the same reasons discussed below.

expressive act, the Brooklyn Branch intends to celebrate the determination of voters, shed light on long wait times in Black and brown communities, and rebuke the systematic de-prioritization of those communities which causes long lines.

The Line Warming Ban criminalizes the Brooklyn Branch's planned expressive activity. Under the Ban, it is a Class A misdemeanor to provide food or other items to "any person" "in connection with or in respect of any election." N.Y. Elec. Law § 17-140. As the Brooklyn Branch alleges in the governing Amended Complaint, the Ban is unconstitutional for several reasons. First, the Ban's unjustifiable burden on the Brooklyn Branch's core First Amendment activity is subject to strict scrutiny, an exacting standard that Defendants cannot overcome. Second, the Ban is facially overbroad because, even assuming it has some constitutional application—such as the prevention of vote-buying or voter intimidation—it prohibits expressive activity far beyond its legitimate sweep. Third, the Ban is unconstitutionally vague—both facially, and as applied—because it contains cryptic and convoluted language that invites arbitrary enforcement and lays traps for the unwary.

Defendants' motion to dismiss misapprehends the Amended Complaint's allegations and is wrong on the law. It should be denied.

STATEMENT OF FACTS

The following facts are alleged in the Amended Complaint. In the 2020 general election, voters in some counties in New York waited in hours-long lines to cast their ballots. Pls.' Am. Compl. ("Am. Compl.") ¶¶ 1, 3-4 (Mar. 22, 2022), ECF No. 38. Wait times in some areas were up to four hours—far above the state-mandated maximum of 30 minutes. *Id.* ¶ 26; N.Y. Elec. Law § 3-400(9). These long wait times are significant barriers to the franchise and disproportionately affect communities with large Black, brown, and elderly populations. Am. Compl. ¶ 1. Poor and

minority voters also routinely wait in lines three to four times longer than voters in more affluent or majority-white communities. *Id.* ¶ 27. Elderly and disabled voters are especially susceptible to the hazards of standing for extended periods of time and are severely disadvantaged by long wait times. *Id.* Recognizing the burdens that long voting lines impose, nonprofit organizations and community activists in New York, including the Brooklyn Branch, have worked to bring attention to the unacceptably long lines these communities have experienced and advocate for reforms to New York's voting systems. *Id.* ¶¶ 28, 30.

The Brooklyn Branch is a nonpartisan organization committed to removing barriers to the franchise. *Id.* ¶¶ 13, 33-34. It has a long history of assisting and supporting voters and advocating for reforms to reduce wait times and improve access to the polls, particularly in New York's Black and brown communities. *Id.* ¶¶ 30, 33. For over one hundred years, the Brooklyn Branch has engaged in voter outreach, education, and activism aimed at improving access to the franchise. *Id.* ¶ 29. The Brooklyn Branch's get out the vote ("GOTV") efforts have included rallies where the Branch educates voters about their rights and how to exercise them. *Id.* The Brooklyn Branch provides food, refreshments, and entertainment to convey its message of support for voters at these events. *Id.* For example, the Brooklyn Branch held information sessions explaining ranked choice voting and candidate forums ahead of the 2021 New York City primary elections. *Id.*

In furtherance of its mission and in anticipation of even longer wait times in future elections, the Brooklyn Branch has set aside resources and, but for the Ban, would support voters waiting in long lines at the polls by offering modest refreshments such as water, donuts, potato chips, or pizza. *Id.* ¶¶ 30, 32. This activity of providing refreshments and support to voters is an expression of the Brooklyn Branch's "celebration of our democracy and of the dedicated voters who endure weather and long waits 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.* ¶ 22.

But New York law prohibits this expressive activity. Specifically, New York Election Law § 17-140 criminalizes the provision of food, water, and other refreshments to voters waiting in long lines at polling places. In its entirety, the Ban 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.

More simply stated, "during the hours of voting," no person may provide "any meat, drink, tobacco, refreshment or provision" to "any other person in connection with or in respect of any election." *Id.* The only two exceptions are: (1) for items provided *to* "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," or (2) if the "meat, drink, tobacco, refreshment or provision [has] a retail value of less than one dollar" ***and*** it is provided "in a polling place" and "without any identification of the person or entity supplying such provisions." *Id.* Accordingly, under the Ban, no one may provide any item of value to anyone waiting in line to vote. Any person who violates the Ban is guilty of a Class A misdemeanor punishable by up to one year in jail or three years' probation and a fine of up to $1,000. Am. Compl. ¶ 23.

In the 2020 general election and prior elections in other states with long voting lines, local organizations that share the Brooklyn Branch's mission successfully supported voters waiting in long lines by providing free food and drinks, in an expression of solidarity with those voters. *Id.* ¶ 20. But for the Ban, the Brooklyn Branch, in furtherance of its mission, would do the same in future elections.

Although it is an expressive act, the sharing of food and drink is *not* an inherently partisan exercise. *Id.* ¶¶ 25, 33. Here, the Brooklyn Branch would distribute food and water to *all* voters waiting in line, without regard to who or what issues the individuals waiting in line might support. *Id.* ¶ 21. To be clear, the Brooklyn Branch, a *nonpartisan* nonprofit organization, has no intention or desire to engage in electioneering while supporting voters. *Id.* ¶¶ 13, 21, 25 31. Moreover, electioneering to voters waiting in line to vote, or through the provision of any consideration in exchange for one's vote, is already prohibited under New York law. *See* N.Y. Elec. Law § 8-104(a) (prohibiting electioneering at the polls); *id.* §§ 17-142, 17-144 (prohibiting providing or receiving consideration in exchange for one's vote); N.Y. Const. art. III, § 3 (same).

LEGAL STANDARD

Defendants moved to dismiss the Amended Complaint for lack of standing and failure to state a claim under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Where, as here, a Rule 12(b)(1) motion is "based solely on the allegations of the complaint[,] . . . [t]he task of the district court is to determine whether the Pleading alleges facts that affirmatively and plausibly suggest that the plaintiff has standing to sue." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016) (quotations and alterations omitted). In evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court must decide "whether the complaint's allegations, taken as true and afforded all reasonable inferences, state a plausible claim for relief."

Henry v. Cnty. Of Nassau, 6 F.4th 324, 331 (2d Cir. 2021); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

Defendants' motion should be denied. None of their arguments warrants dismissal.

First, the Brooklyn Branch has standing to pursue its claims because it will suffer a concrete and particularized First Amendment injury if the Ban is enforced against it. The Amended Complaint alleges that the Brooklyn Branch has made plans and set aside resources to engage in line warming in future elections. Am. Compl. ¶ 32. Absent any disavowal of an intent to prosecute any line warming activities, the Court should assume that the Ban will be enforced.

Second, the Brooklyn Branch has sufficiently alleged that the Line Warming Ban significantly burdens its expressive conduct, and its well-pled allegations must be taken as true on a motion to dismiss.

Third, the Line Warming Ban burdens the Brooklyn Branch's core political speech and therefore is subject to strict scrutiny. The Ban fails to satisfy this demanding standard because it is not narrowly tailored to advance the state's purported interest in preventing vote buying and voter intimidation. Furthermore, even under the *O'Brien* test that Defendants mistakenly rely on, the Ban still violates the First Amendment because it is not narrowly tailored.

Finally, the Line Warming Ban is unconstitutional for the independent reasons that it is overbroad and vague. The Ban criminalizes expressive conduct—including the Brooklyn Branch's intended nonpartisan expressive conduct—that goes far beyond any legitimate sweep. And the Ban is so vaguely written that it: (1) fails to put a person of ordinary intelligence on notice as to what conduct it prohibits and (2) invites arbitrary enforcement.

I. The Brooklyn Branch has suffered and will continue to suffer a concrete injury in fact as a result of the Line Warming Ban.

The Brooklyn Branch has Article III standing to pursue its First Amendment claims. An organization such as the Brooklyn Branch "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). To meet Article III's standing requirements, the Brooklyn Branch "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

Defendants only challenge the first of these elements—injury in fact. An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotation marks omitted). "An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quotation marks omitted).

The Brooklyn Branch clears that bar because it has alleged (a) an intent to engage, at a particular time and place, in conduct that is undisputedly prohibited by the Line Warming Ban and (b) that it faces a credible threat of prosecution for that conduct.

a) The Complaint alleges a concrete intent to engage in conduct prohibited by the Line Warming Ban.

The Brooklyn Branch's Amended Complaint alleges an injury in fact that is both "concrete and particularized" and "actual or imminent." *Lujan*, 504 at 560. "In a pre-enforcement challenge, imminent injury can be established by a plausible allegation of 'an 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.'" *Open Soc'y Just. Initiative v. Trump*, 510 F. Supp. 3d 198, 209 (S.D.N.Y. 2021) (quoting *Susan B. Anthony List*, 573 U.S. at 159). Here, the Amended Complaint repeatedly alleges that, but for the Ban, "Plaintiff would offer water and other refreshments to voters at polling places, particularly to those voters who face some of the longest lines to vote." Am. Compl. ¶ 2; *see also id.* ¶ 28. The Amended Complaint further specifies that the Brooklyn Branch "has set aside resources and plans to provide nonpartisan support and assistance to those voters already in line and waiting to cast their ballot . . . ." *Id.* ¶ 32.[2]

Defendants do not dispute that, as alleged, this activity would violate the Line Warming Ban. Instead, they argue that the Brooklyn Branch lacks standing because it did not allege it has *previously* engaged in the type of expressive line warming activities it intends to perform in future elections. *See* Mot. at 10-11.[3] That is irrelevant. A plaintiff in a pre-enforcement challenge need not allege past activity to establish a likelihood of future injury. *See, e.g.*, *Roe v. City of New York*, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001) ("[T]here is no per se rule requiring more than one past act, or any prior act, for that matter, as a basis for finding a likelihood of future injury."). If Defendants' view of the law were correct, no party would have standing to challenge the Ban without admitting to past criminal conduct. That would turn the law of pre-enforcement challenges on its head and effectively immunize longstanding prohibitions from constitutional challenge.

Further, the Brooklyn Branch has alleged a concrete, specific intent to engage in a particular proscribed activity—the distribution of food and water—at a particular place and time—

[2] Defendants' discussion of "diversion of resources" is a red herring. *See* Defs.' Mot. to Dismiss Am. Compl. ("Mot.") at 12-13 (Apr. 26, 2022), ECF No. 41-1. The Brooklyn Branch's standing is based upon the Ban's injury to its First Amendment rights as an organization and those of its members.

[3] The Brooklyn Branch has, however, alleged that it regularly provides refreshments at voter outreach and education events. Am. Compl. ¶ 29. Voting lines of the length seen in the 2020 election are a relatively recent phenomenon, requiring the Brooklyn Branch to adapt its voter outreach strategies. As alleged, average wait times skyrocketed in 2020 far above times seen in previous years. Am. Compl. ¶ 26.

at polling places in New York during voting hours for subsequent general elections. And when it does so, the Brooklyn Branch's members and volunteers, as well as the Brooklyn Branch itself, will risk criminal prosecution for defying the Ban. That distinguishes this case from the ones cited by Defendants. In *Faculty, Alumni & Students Opposed to Racial Preferences v. New York University*, 11 F.4th 68 (2d Cir. 2021) ("*FASORP*"), allegations that members of the plaintiff organization "intended" to apply for teaching positions at NYU Law School or submit scholarship to the NYU Law Review were insufficient to establish standing because "there is uncertain future action that would need to occur before the plaintiffs could arguably suffer the harm alleged." *Id.* at 77. In *Lujan v. Defenders of Wildlife*, the individuals in question had in the past attempted to travel abroad to view endangered species, and generally intended to return—though they could not say exactly when. 504 U.S. at 564. Unlike those plaintiffs, the Brooklyn Branch has alleged more than "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be." *Id.* The Amended Complaint specifically alleges both the when (during voting hours for upcoming elections) and the where (at polling places) of the Brooklyn Branch's planned activity. [4]

Finally, in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the Court concluded that the plaintiffs lacked standing because the challenged regulations "neither require nor forbid any action on the part of [plaintiffs]." *Id.* at 492. The Ban, in contrast, undisputedly forbids the line warming in which Brooklyn Branch intends to engage and would have already engaged, but for the Ban.

[4] *Kempner v. Town of Greenwich*, 562 F. Supp. 2d 242 (D. Conn. 2008), is similarly unhelpful to Defendants. There, plaintiffs challenged Greenwich's beach access policy, but in their depositions they gave no indication that they intended to engage in protected activity at the beach. *Id.* at 246. They lacked standing because they "d[id] not demonstrate a sincere intention to visit the Greenwich beach parks *to exercise rights under the First Amendment* in the future." *Id.* (emphasis added).

On this facial challenge to subject matter jurisdiction, the Court should decline Defendants' invitation to "view skeptically" the Brooklyn Branch's well-pled allegations of future intent to engage in prohibited conduct. *See* Mot. at 11.

b) The Complaint alleges a credible threat of prosecution.

A plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quotations omitted). The Supreme Court has carved out a limited exception to this principle for "persons having no fears of state prosecution except those that are imaginary or speculative." *Id.* (quotations omitted). That exception applies only where plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, *or even that a prosecution is remotely possible*." *Id.* at 298-99 (quotations omitted) (emphasis added). This standard "sets a low threshold and is quite forgiving to plaintiffs seeking such preenforcement review." *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016) (citation omitted).

There is nothing "imaginary or speculative" about the Brooklyn Branch's fears of prosecution for itself and its members. Mot. at 9 (quoting *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 384 (2d Cir. 2015)). As the Second Circuit has summarized, the Supreme Court

> appears willing to presume that the government will enforce the law as long as the relevant statute is 'recent and not moribund.' Thus, in numerous preenforcement cases where the Supreme Court has found standing on a showing that a statute indisputably proscribed the

> conduct at issue, it did not place the burden on the plaintiff to show an intent by the government to enforce the law against it. Rather, it presumed such intent 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) (quoting *Doe v. Bolton*, 410 U.S 179, 188 (1973)). Defendants do not dispute that the Ban proscribes the conduct at issue. In fact, they assert there is "no question" that the Brooklyn Branch's planned activity would violate the Ban. Mot. at 24. And, despite arguing that Plaintiff does not face a credible threat of prosecution, Defendants have not disavowed any intent to prosecute future violations of the Line Warming Ban. *See Cayuga Nation*, 824 F.3d at 331-32 ("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."); *cf. Brown v. Buhman*, 822 F.3d 1151, 1168 (10th Cir. 2016) (plaintiff lacked standing to challenge anti-bigamy statute where state Attorney General and county attorney submitted sworn declarations disavowing intent to prosecute polygamists under the bigamy statute). The court should therefore presume, absent any indication to the contrary, that the state will enforce the Ban.

Defendants suggest, but do not directly argue, that the Line Warming Ban is "moribund or of purely historical curiosity." Mot. at 9 (quoting *Johnson v. District of Columbia*, 71 F. Supp. 3d 155, 159-160 (D.D.C. 2014)). But, having refused to disavow any intent to prosecute violations of the Ban, Defendants cannot hide behind an historical lack of enforcement. Far from writing off the Ban as an irrelevant historical vestige, Defendants argue that "without it, the State's overall election law regime would be less effective at assuring that voters are left alone to cast their vote without outside influence." *Id.* at 21. Defendants cannot have it both ways. They cannot claim there is no threat of enforcement as a mere historical holdover while reserving the right to enforce

the Ban in the future and arguing for its present-day importance and utility. That is precisely the sort of catch-22 that pre-enforcement challenges are meant to avoid. *See N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("The rationale that underlies this rule is straightforward: 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.").

Finally, Defendants argue that the Amended Complaint fails to allege a likelihood that the Brooklyn Branch, separate and apart from its members or volunteers, will be prosecuted for distributing food and drink to voters.[5] That argument ignores both the allegations of the Amended Complaint and the plain text of the statute. The Brooklyn Branch plans to "provide sundries such as bottled water, donuts, potato chips, or pizza to voters already waiting in line." Am. Compl. ¶ 30. The Ban provides that "Any person who directly *or indirectly* by himself *or through any other person* . . . 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 "any person" "in connection with an election" is guilty of a Class A misdemeanor. N.Y. Elec. Law § 17-140 (emphasis added). Thus, by its plain terms, the Ban exposes the Brooklyn Branch to criminal liability for the line warming activities of its members and volunteers.

In fact, the only case cited by the Defendants on this point, *ACLU of Ill. v. Alvarez*, No. 10 C 5235, 2010 WL 4386868 (N.D. Ill. Oct. 28, 2010), was reversed by the Seventh Circuit. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 593 (7th Cir. 2012) ("The ACLU's status as an advocacy

[5] Defendants incorrectly state that the Brooklyn Branch's "alleged fear of prosecution does not concern its members, but the organization itself, since there are no allegations in the Amended Complaint concerning Plaintiff's individual members." Mot. at 14. But the Amended Complaint specifically alleges that the Brooklyn Branch's "members and volunteers—identified as such—would provide sundries such as bottled water, donuts, potato chips, or pizza to voters already waiting in line." Am. Compl. ¶ 30. The Brooklyn Branch has standing to assert its own First Amendment rights as well as those of its members. *See Warth*, 422 U.S. at 511.

organization hardly defeats its standing. The organization intends to use its employees and agents to audio record on-duty police officers in public places . . . but the eavesdropping statute prohibits it from doing so. The ACLU itself, and certainly its employees and agents . . . will face prosecution for violating the statute.").

II. The Line Warming Ban violates the First Amendment.

a) The provision of food and water to voters waiting in line is an expressive act.

The Line Warming Ban criminalizes an expressive act that the First Amendment protects. The Brooklyn Branch and its volunteers intend to "provid[e] support to voters who suffer long or uncomfortable waits in their commitment to exercising the franchise." Am. Compl. ¶ 22. This expressive act is a "celebration of our democracy and of the dedicated voters who endure weather and long waits to have their voices heard," as well as a "rejection of voter suppression through long lines and wait times that severely burden our most fundamental rights." *Id.*

"The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003). "In determining whether particular conduct is sufficiently expressive to implicate the First Amendment . . . the test is whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 (2d Cir. 2004) (quotations marks and alterations omitted); *see also Texas v. Johnson*, 491 U.S. 397, 404 (1989). But "a narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

Defendants do not dispute that the Brooklyn Branch subjectively intends to convey a particularized message. As alleged in the Amended Complaint, the Brooklyn Branch intends

through its actions to convey a message of solidarity with voters and opposition to unacceptable wait times that suppress voting in New York's Black, brown, poor, and elderly communities. Instead, Defendants make the argument that the expressive act of food sharing would not "reasonably be understood by the viewer to be communicative." Mot. at 15 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1742 (2018)).

Courts have recognized, however, that food sharing can be an expressive act protected by the First Amendment. This was the conclusion of the Eleventh Circuit in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018) ("*FLFNB I*"). There, the plaintiff organization, Fort Lauderdale Food Not Bombs ("FLFNB"), "host[ed] weekly events at a public park . . . sharing food at no cost with those who gather to join in the meal." *Id.* at 1237. The Eleventh Circuit agreed with FLFNB that "the surrounding circumstances would lead the reasonable observer to view the conduct as conveying some sort of message." *Id.* at 1242. The court specifically noted that: (1) the plaintiff set up tables and banners and distributed literature; (2) the food sharing events were open to the public; (3) the food sharing was done in a traditional public forum; (4) homelessness was an issue of concern in the community; and (5) the historical significance of food sharing, noting that "the significance of sharing meals with others dates back millennia." *Id.* at 1242-43.

Similarly, the "surrounding circumstances" alleged here "distinguish[] [the Brooklyn Branch's] sharing of food with the public from relatives or friends simply eating together in the park." *Id.* at 1242. As in *FLFNB I*: (1) participants would be identified as Brooklyn Branch volunteers, Am. Compl. ¶ 30; (2) "the food sharing events are open to everyone," *FLFNB I,* 901

F.3d at 1242;[6] (3) the food sharing takes place in public streets outside of polling places, which are a public forum, *see Burson v. Freeman*, 504 U.S. 191, 196-97 (1992) (plurality op.); (4) long polling lines, and voter suppression more generally, are significant issues of public concern in New York, Am. Compl. ¶¶ 26-28;[7] and (5) as the Eleventh Circuit noted, the act of food-sharing itself has an expressive significance that "dates back millennia," 901 F.3d at 1243.

Like FLFNB, the Brooklyn Branch's support of voters' access to and participation in the franchise is well known and understood in the community, and its message would be readily discernible to a reasonable viewer. The Brooklyn Branch is a one-hundred-year-old organization with a long and well-understood history of advocating for voting rights and the removal of barriers to the franchise, particularly for voters of color. Am. Compl. ¶¶ 13, 29, 34. The Brooklyn Branch has long engaged in outspoken advocacy in support of voters and against policies and practices that lead to long lines at the polls. *Id.* ¶¶ 2, 13, 29. These activities include, but are not limited to, rallies where the Brooklyn Branch educates voters about their rights and how to lawfully exercise them, virtual information sessions explaining ranked choice voting, and candidate forums. *Id.* ¶ 29. The Brooklyn Branch often provides food, refreshments, and entertainment at these events to convey its message of encouragement and support. *Id.* Voters and community members in Brooklyn know this history and understand the Brooklyn Branch's food sharing activities to be in

[6] Although the Brooklyn Branch's food sharing is primarily directed at voters waiting in line, it would not be limited to voters.

[7] *See also*, Kevin Quealy, *Election Day Voting in 2020 Took Longer in America's Poorest Neighborhoods*, N.Y. Times (Jan. 4, 2021), https://www.nytimes.com/interactive/2021/01/04/upshot/voting-wait-times.html; *see also* The Black Institute, *Mississippi on the Hudson*, (2018), https://d3n8a8pro7vhmx.cloudfront.net/theblackinstitute/pages/1448/attachments/original/1516814612/Mississippi_on_the_Hudson_%28TBI_Report%29.pdf?1516814612; Chisun Lee & Hazel Millard, *Why are New York Voting Lines So Long? Blame the Incompetent Board of Elections*, Slate (Nov. 2, 2020, 11:50 AM), https://slate.com/news-and-politics/2020/11/why-are-new-york-voting-lines-so-long-blame-board-of-elections.html.

furtherance of its longstanding encouragement of participation in our democracy and to tear down barriers to the franchise.

A court in the Northern District of Florida similarly recently found, after an extensive trial, that distributing food and drink to voters waiting in line "communicate(s) to . . . voters that their determination to exercise the franchise is important and celebrated." *League of Women Voters of Fla., Inc. v. Lee*, No. 4:21-cv-00186-MW, 2022 WL 969538, at *64 (N.D. Fla. Mar. 31, 2022).[8] Defendants' attempt to distinguish *League of Women Voters* based on the context of the activity misses the mark. Here, as in *League of Women Voters*, the context surrounding the Brooklyn Branch's line warming activities would lead a reasonable observer to view the conduct as expressive.

Each of the cases cited by Defendants to argue that the Brooklyn Branch's conduct is not expressive is distinguishable. Defendants principally rely on cases dealing with restrictions on ballot collection, voter registration drives, or the distribution of absentee ballots, including *Feldman v. Arizona Secretary of State's Office*, 843 F.3d 366, 393 (9th Cir. 2016). But as another district court has recognized, "the portion of [*Feldman*] that these Defendants cite has nothing to do with 'line warming activities' or solicitation bans in buffer zones around polling places, but instead addressed whether 'ballot collection is expressive conduct protected under the First Amendment.'" *League of Women Voters*, 2022 WL 969538, at *62. Defendants appear to suggest that "means of facilitating voting" cannot be expressive conduct. Mot. at 17 (citation omitted). But sharing food and drinks with voters in line at the polls is *both* a means of assisting voters *and* an

[8] Although the Eleventh Circuit stayed the district court's order pending appeal, it did not question the district court's conclusion that line warming is expressive conduct. *League of Women Voters of Fla. v. Fla. Sec'y of State*, --- F.4th ---, 2022 WL 1435597, at *5-*6 (11th Cir. May 6, 2022). Acknowledging it was a "close[] call," *id.* at *5, the Eleventh Circuit granted a stay because "the underlying merits of the vagueness and overbreadth challenges" to Florida's law "aren't entirely clearcut." *Id.* at *6 (quotation omitted).

expressive act. The two are not mutually exclusive. Whether ballot collection or voter registration may be understood as expressive conduct has no bearing on whether line warming would be.

The Brooklyn Branch's claims also differ substantially from those of the protest medics in *Wise v. City of Portland*, 483 F. Supp. 3d 956 (D. Or. 2020). In that case, the plaintiffs alleged that they provided "support, comfort, and medical aid to protesters." *Id.* at 961. The plaintiffs did not allege that, as medics, they intended to convey a particularized message through the act of providing medical care. Instead, they argued that they could invoke the protections of the First Amendment simply by supporting the exercise of the *protesters'* First Amendment rights. *Id.* at 966-67. The district court rejected that argument, concluding that protest medics "have no unique status under the First Amendment that allows them to disregard lawful orders." *Id.* at 967. Here, the Brooklyn Branch is not seeking any "unique" First Amendment protections for helping *others* exercise their First Amendment rights. Instead, it seeks to vindicate *its own* First Amendment rights through the expressive conduct of line warming.[9]

Finally, Defendants' attempt to justify the Ban confirms that the provision of food and water to voters waiting in line is indeed an expressive act. Defendants argue that the Ban is designed to "prevent[] voter intimidation, harassment, undue influence, and vote buying." Mot. at 19. An act that expresses nothing can neither intimidate nor influence.[10]

[9] Additionally, as the court noted, the plaintiffs in *Wise* did not allege any of the "context" that the Eleventh Circuit relied upon in *FLFNB I*. *See* 483 F. Supp. 3d at 967 n.6.

[10] If any question remained that the Brooklyn Branch's line warming activity is expressive conduct, the question is more appropriately reserved for determination after trial. *See League of Women Voters*, 2022 WL 969538, at *62-*65 (relying on extensive trial testimony to conclude that line warming is an expressive act); *FLFNB I*, 901 F.3d at 1239-40 (summary judgment); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, --- F. Supp. 3d ---, No. 1:21-cv-01284-JPB, 2021 WL 6495360, at *12 (N.D. Ga. Dec. 9, 2021) (whether line warming is expressive conduct is not appropriately resolved on a motion to dismiss); *see also Hurley*, 515 U.S. at 567 (determination of whether conduct is expressive requires a "fresh examination of crucial facts" because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace").

b) The Line Warming Ban is subject to and fails strict scrutiny.

Because the Ban burdens the Brooklyn Branch's core political speech, it is subject to strict scrutiny, meaning it must serve a compelling government interest and be narrowly tailored to achieve that interest. *Hotel Emps. & Rest. Emps. Union v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 545 (2d Cir. 2002). To satisfy strict scrutiny, the government must adopt "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). The Ban fails this exacting standard.

The Brooklyn Branch's volunteer efforts at polling places, including providing food, water, and other assistance, as well as their conversations and interactions with voters surrounding voting, are precisely "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421 (1988); *see FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477-81 (2007) ("issue advocacy," like "express advocacy" is "core political speech"); *Ragbir v. Homan*, 923 F.3d 53, 70 (2d Cir. 2019) (advocacy for reform of immigration policies and practices is "core political speech"), *vacated on other grounds sub nom. Pham v. Ragbir*, 141 S. Ct. 227 (2020) (mem.). Such limitations on core political speech invariably trigger strict scrutiny. *See Meyer,* , 486 U.S. at 421; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 n.10 (1995) (noting that the *Meyer* Court "unanimously applied strict scrutiny" to a limitation on political expression); *Lerman v. Bd. of Elections in City of N.Y.*, 232 F.3d 135, 146 (2d Cir. 2000) (applying strict scrutiny to limitation on core political speech).

The Line Warming Ban is not narrowly drawn to serve a compelling state interest. The only state interest that Defendants cite in defense of the Ban is an interest in "protecting the integrity of elections by preventing voter intimidation, harassment, undue influence, and vote buying." Mot. at 19. The Ban is far from the "least restrictive means" of achieving that goal.

McCullen, 573 U.S. at 478. There are several less restrictive means available, including some that the state has already enacted. New York already has a prohibition on electioneering within 100 feet of polling places as well as prohibitions on displaying a marked ballot and vote buying. *See* N.Y. Elec. Law §§ 8-104[1], 17-130[10], 17-142. Defendants do not explain what kind of intimidation or harassment might be covered by the Line Warming Ban that is not already subject to criminal penalties under these other laws. Defendants have failed to offer any justification for the additional burdens imposed by the Line Warming Ban which, by their own reckoning, reaches conduct that the electioneering and vote-buying bans do not. *See* Mot. at 21. The Supreme Court has made clear that a restriction on speech cannot be supported by a putative interest in preventing conduct that is already prohibited under state law and "generic criminal statutes." *McCullen*, 573 U.S. at 490–92 (holding that Massachusetts law creating abortion clinic "buffer zones" could not meet the tailoring requirement because the challenged law had a separate provision that already prohibited much of the conduct the state's asserted interest sought to address, as did other "generic criminal statutes"). The Line Warming Ban is a superfluous prophylactic that criminalizes far more protected conduct than is necessary to achieve the state's aims.

For the same reason, Defendants' reliance on *Burson* and other cases involving electioneering activity is misplaced. The Tennessee law upheld by the Supreme Court in *Burson*, much like New York's ban on electioneering, directly prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question" within 100 feet of polling places. 504 U.S. at 193-94; *compare* N.Y. Elec. Law § 8-104. After an extensive examination of the history of election regulation in the United States, a plurality of the Supreme Court found a "widespread and time-tested consensus demonstrates that some restricted zone is necessary in

order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Burson,* 504 U.S. at 206.

The Line Warming Ban is far less tailored to the purported governmental interest than the statute upheld in *Burson*. Among other things, the Ban lacks any geographic limitation such as the 100-foot radius in *Burson*. *See* Mot. at 22. More importantly, it prohibits both partisan and non-partisan expressive conduct—including the non-partisan line warming planned by the Brooklyn Branch. The state's interest in preventing voter intimidation and election fraud is not implicated by expressive conduct, like Plaintiff's, that encourages the act of voting, as opposed to advocating for or against a particular candidate or measure.

c) The Line Warming Ban fails the *O'Brien* test.

Without any analysis, Defendants assume that the Ban is subject to the test articulated by the Supreme Court in *United States v. O'Brien* for "incidental" burdens on First Amendment rights. 391 U.S. 367, 376-77 (1968). But the *O'Brien* 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). "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." *Id.* The stated purpose of the Line Warming Ban is to "prevent[] voter intimidation, harassment, undue influence, and vote buying." Mot. at 19. That purpose is, at the very least, "related" to the content of the expression. *See Burson*, 504 U.S. at 197.

Even if the Defendants were correct that *O'Brien* provides the proper analytical framework, the Ban fails to pass constitutional muster under that test as well. Under *O'Brien*, a law that burdens First Amendment freedoms will be upheld *only* if it furthers an important or substantial

governmental interest that is "unrelated to the suppression of free expression" and if the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. *O'Brien* requires that the Ban be "narrowly tailored" to serve the government's interests. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1996). The state "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799. A "complete ban" on expressive activity "can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Defendants do not argue that the type of line warming activity in which the Brooklyn Branch plans to engage is an "appropriately targeted evil." *Id.* And indeed, it is not. Defendants instead avoid this requirement altogether and contend that any burden on the Brooklyn Branch's protected First Amendment activity is acceptable collateral damage under *O'Brien*. But, as described above, the Ban unnecessarily reaches a substantial amount of expressive conduct having nothing to do with the legislature's stated purpose. And that purpose is already served by laws that specifically target the evils at which the Ban is supposedly aimed.

III. The Line Warming Ban is unconstitutionally overbroad and vague.

The Line Warming Ban is also unconstitutionally overbroad and vague under the First Amendment and the Due Process Clause of the Fourteenth Amendment. It is unconstitutionally overbroad because it proscribes a substantial amount of constitutionally protected activity, going well beyond the limited restrictions on partisan campaigning at polling places that the Supreme Court has upheld. The Ban is unconstitutionally vague because it provides no guidance to individuals or law enforcement on what conduct is prohibited.

a) The Line Warming Ban is overbroad.

The Line Warming Ban's expansive breadth restricts an unacceptably large amount of constitutionally protected speech. *See United States v. Williams*, 553 U.S. 285, 292 (2008). The Supreme Court has recognized that First Amendment "freedoms need breathing space to survive," because "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521-22 (1972) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1965)). As a result, the "government may regulate in the area only with narrow specificity," and speech regulations must "be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Id.* at 522. "[T]he 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." *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999). The Ban is unconstitutional under this doctrine because it "create[s] a criminal prohibition of alarming breadth," pulling within its prohibitions a significant amount of protected speech. *United States v. Stevens*, 559 U.S. 460, 474 (2010).

Again, the Ban sweeps in expressive conduct far beyond the Defendants' stated targets of voter intimidation or harassment. It criminalizes not just attempts to provide refreshments for the purpose of *influencing voters to support particular candidates or issues* (something otherwise illegal under New York law, *see* N.Y. Elec. Law § 8-104), but *any* form of food or beverage sharing, regardless of message or intent. The Ban is not limited to partisan speech in the immediate vicinity of polling places that the Supreme Court has allowed states to restrict. *See, e.g.*, *Burson*, 504 U.S. at 211. It is, instead, an unnecessarily blunt instrument that criminalizes any expressive

conduct related to the provision of food or beverage to voters, such as the nonpartisan expression planned by the Brooklyn Branch, that has no discernable relation to its stated goals.[11]

b) The Line Warming Ban is vague.

The Line Warming Ban also must be struck down for the independent reason that it is unconstitutionally vague under the Fourteenth Amendment. *See Farrell v. Burke*, 449 F.3d 470, 484-85 (2d Cir. 2006). The Ban does not provide sufficient notice of what conduct is prohibited, and it leaves the Brooklyn Branch and others to guess at what activities could land them in jail. The Ban thus burdens the Brooklyn Branch's and its members' fundamental rights of free speech and association.

"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." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). "[V]agueness in the law is particularly troubling when First Amendment rights are involved." *Farrell*, 449 F.3d at 485. Thus, "a statute that interferes with the right of free speech or of association is held to a more stringent vagueness test than other criminal and regulatory statutes challenged as vague." *United States v. Lahey*, 967 F. Supp. 2d 731, 742 (S.D.N.Y. 2013) (quotation marks and alteration omitted).

In its inscrutable entirety, the Ban 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,

[11] The statute challenged in *Broadrick v. Oklahoma*, which Defendants rely on, was interpreted as "prohibiting 'clearly partisan political activity' only." 413 U.S. 601, 617 (1973). Having separately concluded that prohibiting state employees from engaging in partisan political activity was constitutionally permissible, the Court determined that the statute, so construed, was not overbroad. *Id.* Here, the Ban is not capable of such a limiting construction.

> 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. The entire statute consists of a single run-on sentence, with a series of nested dependent clauses defining narrow exceptions, and exceptions to the exceptions. It fails to give "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill*, 530 U.S. at 732. A citizen should not need to perform "the lawyer-like task of statutory interpretation" to know whether their expressive conduct might subject them to criminal liability. *Chatin v. Coombe*, 186 F.3d 82, 89 (2d Cir. 1999).

Further, several terms of the statute leave Plaintiff and others to guess at its outer bounds at the risk of criminal exposure. The phrase "in connection with or in respect of any election," in particular, fails to provide those of ordinary intelligence a reasonable opportunity to understand what conduct the Ban prohibits. Defendants do not attempt to construe this phrase, instead offering incomplete answers to some, but not all, of the illustrative examples raised in the Amended Complaint. They argue, for example, that the statute plainly applies outside the 100-foot radius where electioneering is prohibited, but they do not offer any limiting principle. How far away must one go before one can offer food and drink to passersby?

According to Defendants, there is *no territorial limitation* so long as the offering is made "in connection with or in respect of any election." Mot. at 22 (citing N.Y. Elec. Law § 17-140). Yet, again, Defendants make no attempt to define "in connection with or in respect of any election." Defendants also seem to suggest that, based on a literal interpretation of the statute, it

would be permissible to share food with persons waiting in line to vote before the polls officially open, or after they have officially closed. *Id.* That makes little sense, given that Defendants allege that the State's interest in the Ban is only in avoiding voter intimidation and vote buying. *Cf. Dickerson v. Napolitano*, 604 F.3d 732, 746 (2d Cir. 2010) (a statute may be vague where "a literal meaning would mandate an application far beyond what was plausibly intended"). And Defendants never answer, for example, whether the line warming ban applies to election officials.

The term "provision" is also undefined by the statute. And the ordinary meaning of the term offers no clarity as to what is prohibited under the Ban. Merriam-Webster defines "provision" as "a stock of needed materials or supplies," especially "a stock of food."[12] But the Ban plainly is not limited to food. Defendants rely on the interpretive canons *noscitur a sociis* and *ejusdem generis* to conclude that in context, "provision" means "consumable items." But even that phrase, which is of Defendants' creation and appears nowhere in the statute, is remarkably imprecise.[13]

Finally, Defendants are wrong to assert that the Ban's vagueness in no way implicates the Brooklyn Branch's proposed activities. Although the Ban clearly prohibits food sharing at the polls, the precise geographic and temporal scope of the Ban is uncertain and fails to provide the Brooklyn Branch the information necessary to protect itself from criminal prosecution.

CONCLUSION

Defendants' motion to dismiss should be denied.

[12] *See Provision*, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/provision (last visited May 23, 2022).

[13] *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 May 23, 2022).

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Respectfully submitted,

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