**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| THE BROOKLYN BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,<br><br>Plaintiff,<br><br>v.<br><br>PETER S. KOSINSKI, in his official capacity as Co-Chair of the State Board of Elections, et al.<br><br>Defendants. | Case No. 1:21-cv-07667-KPF |



**STATE BOARD OF ELECTIONS DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

**HARRIS BEACH PLLC**
677 Broadway, Suite 1101
Albany, New York 12207
T: 518.427.9700
F: 518.427.0235

*Attorneys for the State Board of Elections Defendants*

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Defendants Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, Todd D. Valentine, Robert A. Brehm, and Anthony J. Casale (the "State BOE Defendants") respectfully submit this reply memorandum of law in further support of their motion to dismiss Plaintiff's Amended Complaint (ECF No. 38) in the above-captioned action.

## PRELIMINARY STATEMENT

Since 1906, New York has restricted persons from providing food or drink to voters during voting hours on Election Day. N.Y. Election Law § 17-140 (the "Law"), enacted to prevent the bacchanalian scenes that had previously been commonplace, has succeeded, together with the State's other election regulations, in restoring the calm and allowing voters to cast their ballots in peace. Plaintiff, The Brooklyn Branch of the National Association for the Advancement of Colored People ("Plaintiff"), has been in existence for most of this history—since 1922—yet, has never before provided, or sought to provide, free food to voters waiting in line. There is also no history of enforcement of the Law against anyone, much less organizations like Plaintiff. The foregoing demonstrates that Plaintiff lacks an injury-in-fact sufficient to seek invalidation of the Law.



Plaintiff's claims also fail on the merits. It is clear from the face of the Law that it prohibits conduct, not speech, and was enacted in furtherance of government interests deemed compelling by the U.S. Supreme Court. Plaintiff's attempts to portray the Law as vague and overbroad ignore the statutory text or rely upon implausible hypotheticals that the Court need not engage with. The Law's "plainly legitimate sweep" dwarfs the few implausible examples that Plaintiff poses to attempt to manufacture questions regarding the Law's reach.

## ARGUMENT

### I. PLAINTIFF FAILED TO ADEQUATELY PLEAD STANDING.

Plaintiff's opposition clarifies that its only alleged basis for standing is the alleged threat of prosecution of the organization or its members. At the outset, Plaintiff has not established

organizational standing based upon the threat of prosecution of its members. To establish standing on this basis, it is well established that a plaintiff-organization must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992) (requiring that plaintiff "submit affidavits or other evidence showing, through specific facts, . . . that one or more of respondents' members would thereby be 'directly' affected"). Plaintiff shrugs off this requirement, pointing to its vague and conclusory allegation that its unnamed members "would provide sundries such as bottled water, donuts, potato chips, or pizza to voters already waiting in line." Pl's Opp. at 12 n.5 (quoting Am. Compl. ¶ 30).[1] As the Supreme Court has expressly held, the requirement of an organization to identify by name the allegedly affected members is only dispensed with "where all the members of the organization are affected by the challenged activity." *Summers*, 555 U.S. at 499. That narrow exception is inapplicable here.



This leaves Plaintiff's argument that the organization itself fears prosecution, which fails for two reasons: (1) Plaintiff's alleged injury is purely speculative since it has never before engaged in the proposed activity and (2) Plaintiff's alleged fear of prosecution against the organization itself is not credible, particularly given the lack of enforcement over the last century.

First, Plaintiff failed to establish with sufficient certainty that they will engage in the proposed activity. A version of the challenged Law has been in effect for Plaintiff's entire 100-year history, yet Plaintiff does not allege in its Amended Complaint or opposition that it has ever before provided refreshments to waiting voters. The closest Plaintiff comes are its carefully-worded allegations that Plaintiff has engaged in "get out the vote" efforts and, separately, that it "provides food, refreshments, and entertainment to convey its message of support" (*see* Am. Compl. ¶ 29),

[1] Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint (ECF. No. 44) is referred to as "Pl's Opp.".

which are not the same as the activities Plaintiff proposes here. Contrary to Plaintiff's suggestion, there is no difference between Plaintiff's alleged intentions in this case and the future intentions of the "faculty members and legal scholars" who "intend[ed] to continue submitting their scholarship" to NYU's law journal, or the applicants who "intend[ed]" to apply for positions at the school. *See Faculty Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ.*, 11 F.4th 68, 76-77 (2d Cir. 2021) ("FASORP"). In *FASORP*, the members had at least previously submitted articles and applied for positions, lending some credibility to their proposed actions. *Id.* However, even with such history, the Second Circuit held "that there is uncertain future action that would need to occur before the plaintiffs could arguably suffer the harm alleged." *Id.* at 77.

Likewise, here, Plaintiff merely alleges that it intends to distribute food to voters in line, with no other allegations to substantiate Plaintiff's purported plans. Am. Compl. ¶ 32. Given Plaintiff's 100 years of inactivity in this area, more was required to establish a "concrete injury" sufficient to confer standing. *FASORP*, 11 F.4th at 77 (citing *Summers*, 555 U.S. at 496). Indeed, in nearly all of the decisions Plaintiff relies on, where a credible threat of prosecution formed the basis for standing, the plaintiff had a prior history of engaging in the conduct in question. *See, e.g.*, *Babbitt v. Farm Workers*, 442 U.S. 289, 301 (1979) (the plaintiffs had "actively engaged in consumer publicity campaigns in the past"); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014) (plaintiff intended to continue making substantially similar statements to those made in the past); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (Steffel was handing out handbills protesting the Vietnam War, but then left before police arrested other demonstrators).

Second, Plaintiff has not alleged a credible fear of prosecution of the organization itself. It is well-established that a fear of prosecution that is "imaginary or speculative" is insufficient to confer standing. *Steffel*, 415 U.S. at 459 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). A

plaintiff must allege facts—such as prior prosecutions of similar organizations—to demonstrate that the alleged fear of prosecution is not overly speculative. *Susan B. Anthony List*, 573 U.S. at 159 (in *Steffel*, the plaintiff's "companion's prosecution showed that his 'concern with arrest' was not 'chimerical.'"); *see also Kearns v. Cuomo*, 981 F.3d 200, 210 (2d Cir. 2020) (no standing to challenge 1986 federal law where plaintiff could not identify a single instance of similar enforcement); *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (physician lacked standing to challenge anti-contraception statute where the law had "gone uniformly and without exception unenforced"). To the contrary, Plaintiff admits that in 2020 other "local organizations . . . successfully supported voters waiting in long lines by providing free food and drinks" without being arrested or prosecuted. Pl's Opp. at 11. Unlike challenges to recently-enacted laws where such evidence is given "little weight," *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2020), the absence of any enforcement of a law that has been on the books for decades is often determinative as to whether a plaintiff's alleged fear of prosecution, although theoretically possible, is insufficiently probable to confer standing, *see, e.g.*, *Poe*, 367 U.S. at 508.



Here, Plaintiff does not dispute that the Law has never been enforced. Instead of reckoning with this fact, Plaintiff attempts to shift the burden to Defendants to "disavow" future enforcement of the Law. Although the government's disavowal of any intention to enforce a provision can demonstrate without question that no credible fear of prosecution exists, the converse is not necessarily true. Where a law is not enforced for a significant period, the inference that the government will enforce it weakens the point where it cannot support a credible fear of prosecution. *See, e.g.*, *Poe*, 367 U.S. at 508 (over 90 years without enforcement); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (distinguishing the law at issue in *Poe*, with the "recent and not moribund" statute at issue in *Doe*). Moreover, the government is not obligated to disavow where,

as here, it "has not previously threatened or charged [the plaintiff] under the relevant statutes." *Frey v. Bruen*, 2022 U.S. Dist. LEXIS 31053, at *14 (S.D.N.Y. Feb. 22, 2022) (citations omitted).

Plaintiff's fear of prosecution against the organization itself is even weaker than any purported fear of prosecution of Plaintiff's members. To attempt to show that such potential prosecution is not completely imaginary, Plaintiff tortures the text of the Law and suggests that it might be prosecuted for aiding and abetting its members. *See* Pl's Mem at 12. Unsurprisingly, Plaintiff does not cite a single decision for this proposition, nor does it identify any similar law in any jurisdiction with a history of enforcement against non-profit organizations as opposed to their members.[2] The risk of prosecution is illusory.



## II. N.Y. ELECTION LAW § 17-140 RESTRICTS CONDUCT, NOT SPEECH.

It is irrelevant that Plaintiff subjectively intends to communicate by providing food and drinks to waiting voters—the key question is whether Plaintiff's proposed actions "would reasonably be understood by the viewer to be communicative." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1742 (2018). They would not. As the cases cited by Defendants show, the act of assisting another person in exercising their own constitution rights—by providing sustenance or distributing/collecting ballots—is not understood to convey any

[2] Furthermore, Plaintiff's statement that the decision cited from *ACLU of Ill. v. Alvarez*, 2010 U.S. Dist. LEXIS 115354, at *6 (N.D. Ill. Oct. 28, 2010) was overruled is not accurate. In that case, initially, the ACLU had attempted to establish associational standing based upon the fear of prosecution of the organization itself. The district court rejected the notion that this alleged fear, where there was no history of prosecution of organizations, could establish standing. Further, the district court noted, although an "organization may aver standing of its members and act in a representative capacity," the ACLU had failed to identify at "least one member of the ACLU who would suffer harm." *Id.* at *8 (citing *Summers*, 555 U.S. at 498 and *Lujan*, 504 U.S. at 563). On this basis, the defendants moved to dismiss, which the district court granted. Subsequently, the ACLU moved to alter the judgment and for leave to file an amended complaint, which identified individual members, including adding two such members as plaintiffs in order to establish standing. Although the district court ruled that amendment would be futile on the basis that the "right to record" was not constitutionally protected, the Seventh Circuit disagreed and ruled that the as-amended complaint established standing. *ACLU v. Alvarez*, 679 F.3d 583, 591-94 (7th Cir. 2012). The principle remains that an organization cannot establish organizational standing without identifying specific members who would suffer a concrete injury unless all members would suffer injury as a result of engaging in the challenged activity (which is not even alleged here). *See Summers*, 555 U.S. at 498; *Lujan*, 504 U.S. at 563.

particular message. *See Feldman v. Reagan*, 843 F.3d 366, 392 (9th Cir. 2016) (ballot collection not sufficiently communicative); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) ("smorgasbord of activities comprising voter registration drives" not communicative); *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 773 (M.D. Tenn. 2020) (distribution of absentee ballot applications not expressive conduct); *Wise v. City of Portland*, 483 F. Supp. 3d 956 (D. Or. 2020) (service as medics at protest not protected conduct). Plaintiff merely characterizes these cases as involving different activities than that which Plaintiff seeks to engage in. Although different in the precise details, ballot collection/distribution, voter registration, and so-called "line warming" are all reasonably understood as a "means of facilitating voting, not a means of communicating a message." *Feldman*, 843 F.3d at 393. "Even if ballot collectors [or "line warmers"] intend to communicate that voting is important, '[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea.'" *Id.* at 392 (quoting *United States v. O'Brien*, 391 U.S. 367 (1968)).



Faced with this precedent, Plaintiff argues that voters' knowledge of Plaintiff's organization, as well as the identification of volunteers as associated with the organization, transforms handing out free food into an expressive act. Pl's Opp. at 14-15. However, this argument is foreclosed by the principle that the need for additional speech to discern the intended message "is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).

The fact that the Law furthers the State's legitimate interests does not "confirm" that providing free food to voters is an expressive act. *See* Pl's Opp. at 17. The State continues to maintain an interest in preserving calm in the period before a voter casts his or her ballot and

preventing a return to the carnival-like atmosphere that once plagued New York's elections. It is not necessary to engage in expressive conduct to harass or intimidate—approaching voters waiting in line, regardless of the purpose, is, or could be perceived as, harassment.

As Plaintiff acknowledges, the 11th Circuit, in staying the district court's ruling in *League of Women Voters of Fla., Inc. v. Lee*, has cast substantial doubt on its validity. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 2022 U.S. App. LEXIS 12293, at *33 (11th Cir. May 6, 2022). The appellate panel explained that, with respect to the "solicitation provision," which is similar in some respects to the Law, "[t]he state has a substantial argument that the statute passes constitutional muster." *Id.* For many of the same reasons as advanced by Defendants here, it appears likely that the district court's ruling will be reversed by the 11th Circuit on appeal.

Plaintiff's argument that the Law prevents its "core political speech" (Pl's Opp. at 18) is inconsistent with its allegations that its "efforts are nonpartisan" and not aimed to entice or sway voters. Am. Compl. ¶¶ 31, 33. Unlike all of the cases Plaintiff cites for this proposition, Plaintiff disavows engaging in "issue advocacy" at all. In any event, where a Law does not restrict speech at all, it is undisputed that rational basis review applies. *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 322 (2d Cir. 2003). Plaintiff does not dispute that the Law survives rational basis review.



## III. THE STATE CAN REGULATE EXPRESSIVE CONDUCT AT POLLING PLACES DURING VOTING HOURS.

Even if the First Amendment were applicable, Plaintiff is wrong that the *O'Brien* test—applicable to neutral governmental regulations that are unrelated to the suppression of speech and only incidentally restrict First Amendment freedoms—is inapplicable to the Law. On its face, the Law only restricts conduct—the provision of food and drink to voters during voting hours on an election day—and does not make any distinction regarding the intention of the person seeking to provide those items or the message they subjectively intend to convey. *See* N.Y. Elec. Law § 17-

140. Through the Law, the State seeks to ensure that voters should be "as free from interference as possible" on an election day. *Burson v. Freeman*, 504 U.S. 191, 210 (1992).[3] Although the Law might incidentally restrict some conduct protected by the First Amendment, such as handing out food with political messaging, the thrust of the Law is not to restrain speech, but rather to insulate waiting voters from persons who, for whatever reason, might seek to give them food or drink.

For the reasons stated in the State BOE Defendants' opening brief, the Law easily satisfies the *O'Brien* test. Plaintiff argues that the Law is not narrowly tailored because it believes its own intended conduct should be allowed. *See* Pl's Opp. at 21. This, however, misconstrues the State's interests. Although Plaintiff's alleged motives are certainly nobler than others who might approach and engage with voters, the State seeks to prevent these interactions—which could be perceived as harassment—too. This choice—to shield voters from all unnecessary interactions when waiting to vote or casting their ballots, justified by the interests of protecting voters from interference, harassment and intimidation during the voting process—has been deemed sufficient to withstand even strict scrutiny. *Burson*, 504 U.S. at 206.



## IV. PLAINTIFF'S VAGUENESS AND OVERBREADTH CHALLENGES SHOULD BE DISMISSED.

### A. Vagueness

In Plaintiff's Amended Complaint, it hypothesized examples to attempt to illustrate why, according to Plaintiff, the Law is unconstitutionally vague. The State BOE Defendants explained why each of the hypotheticals advanced by Plaintiff are invalid. Mem. at 21-23. Plaintiff's opposition largely ignores them, tacitly admitting that no real ambiguities exist.

[3] In fact, it was this carnival-like atmosphere that the Legislature sought to curtail with the first iterations of the Law. *Burson*, 504 U.S. 191 (quoting W. Ivins, The Electoral System of the State of New York, PROCEEDINGS OF THE 29TH ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION 316 (1906) (describing New York elections after the Law was enacted as "peaceful as our Sabbaths"); 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-bumbowhen-booze-bought-elections-102758236/.

With respect to the fact that the Law contains no geographical boundary, Plaintiff does not explain how "voters" can be identified other than by virtue of their presence at or near a polling place. There is no need for a geographical restriction because it is entirely implausible that any person will seek to engage with voters elsewhere. It is therefore of no moment that the Law does not expressly state that it is inapplicable at individual's homes, on the bus, or at the laundromat. *See Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute").

Similarly, "in connection with or in respect of an election," means exactly what it states—food or drink provided because of an election. Although Plaintiff complains that the phrase is undefined, it has not identified any conduct that might or might not be covered by this language. Moreover, Plaintiff's alleged confusion regarding whether the restriction applies before polls open and after polls close is resolved by the Law's plain text, which provides that it only applies "during the hours of voting". N.Y. Elec. Law § 17-140.

That the term "provision" is undefined is also insignificant. Relying on established canons of construction, the term "provision" in the Law logically refers to consumable items. Plaintiff takes issue with this explanation, but advances no argument or allegation that Plaintiff or anyone else is seeking to provide non-consumable items to voters. The Court need not rule out every possible hypothetical in ruling on a vagueness claim. *See Hill*, 530 U.S. at 733. The State BOE Defendants have addressed and refuted each hypothetical posed.[4]

Finally, Plaintiff fails to explain how, given that the Law "clearly prohibits food sharing at

[4] Plaintiff's alleged confusion as to "whether the [Law] applies to election officials" is also without moment. Plaintiff does not allege that any persons are seeking to provide free food to election officials or that election officials are seeking to provide food to voters. Nevertheless, the Law clearly carves out an exception allowing food or drink to be provided to "official representatives of the board of elections". N.Y. Elec. § 17-140. The Law does not contain a similar carve out, and thus prohibits, election officials from providing food or drink to voters. *See id.*

the polls" (Pl's Opp. at 25), it can pursue its as-applied vagueness challenge. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). There is no temporal ambiguity at all (the Law applies "during the hours of voting"), and Plaintiff does not desire to provide free food to voters other than those waiting at the polls. Plaintiff's as-applied challenge should be dismissed.

**B. Overbreadth**

Plaintiff ignores the principle that a law cannot be declared overbroad if it "regulates a substantial spectrum of conduct that is as manifestly subject to state regulation." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Here, the inquiry should begin and end by measuring the Law's "plainly legitimate sweep". *Id.* at 616. The Law, together with other provisions of the Election Law, insulate waiting voters from potential intimidation, harassment, and undue influence. In furtherance of these interests, the Supreme Court has repeatedly deemed even content-based restrictions constitutional. *See, e.g., Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (deeming the California and Texas laws prohibiting display of certain political apparel and campaign material constitutional); *Burson*, 504 U.S. at 210 (upholding Tennessee's 100-foot electioneering restriction).



Again, Plaintiff's criticism of the Law's sweep results from its misconstruing of the State's interests as not seeking to prevent the conduct that Plaintiff seeks to engage in. To be clear, the State maintains an interest in making sure that voters are not harassed, bothered, or influenced, and this is accomplished, among other ways, by preventing persons from giving voters things of value, regardless of their motivation. The State is entitled to shield voters from harassment or intimidation, real or perceived, in the moments before they cast their ballot. *See supra*, at 8.

## CONCLUSION

The State BOE Defendants respectfully request that the Court grant their motion to dismiss, dismiss Plaintiff's Amended Complaint with prejudice, and grant such other and further relief as

the Court deems just and proper.

Dated: June 7, 2022

Respectfully submitted,

**HARRIS BEACH PLLC**

*/s/ Elliot A. Hallak*

Thomas J. Garry
333 Earle Ovington Boulevard, Suite 901
Uniondale, New York 11553
T: 516.880.8484
F: 516.880.8483
tgarry@harrisbeach.com

Elliot A. Hallak
Daniel R. LeCours
677 Broadway, Suite 1101
Albany, New York 12207
T: 518.427.9700
F: 518.427.0235
ehallak@harrisbeach.com
dlecours@harrisbeach.com

*Attorneys for the State Board of Elections Defendants*