UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

STATE BOARD OF ELECTIONS DEFENDANTS' PRE-TRIAL MEMORANDUM OF LAW

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Defendants Henry T. Berger, Peter S. Kosinski, Andrew Spano, Anthony T. Casale, Kristen Zebrowski Stavisky, and Raymond J. Riley III (the "State BOE Defendants"), as the current Commissioners and Executive Directors of the New York State Board of Elections (the "State Board"), respectfully submit this pre-trial memorandum of law.

PRELIMINARY STATEMENT

This case involves a First Amendment challenge to a state election law which, in one form or another, has been on the books since 1906 and which has never been enforced by any governmental entity in New York, including the State Board. That law—N.Y. Election Law § 17-140 ("Section 17-140")—prevents a person from providing "any meat, drink, tobacco, refreshment or provision" to another person, in connection with an election, during polling hours on days when voting is taking place. The State Legislature enacted this neutral provision to insulate voters from real or perceived interference, undue influence, and intimidation during the voting process.

In many ways, the challenge by Plaintiff, The Brooklyn Branch of the National Association for the Advancement of Colored People ("Plaintiff") is a lawsuit in search of a problem. Plaintiff has never had any concrete plan to provide food or drink to voters in voting lines and the statute has never been enforced, or threatened to be enforced, by any governmental actor in its nearly-120-year history. This is notable because, in recent years, groups have openly violated the statute's terms. For the following reasons that will be established at trial, Plaintiff will fail to prove its claims.

First, Plaintiff lacks standing, as it has not suffered an injury in fact, nor is its alleged injury traceable to conduct by the State BOE Defendants or redressable by a favorable judgment in this action. As noted, Plaintiff has made no concrete plans to engage in the conduct that is covered by Section 17-140 (the "Proposed Conduct"). Indeed, Plaintiff has not formally determined to engage in the Proposed Conduct, nor has it budgeted any funds to do so.

Plaintiff also has no credible fear of prosecution under Section 17-140. Not only is there no enforcement history for Section 17-140 whatsoever, Plaintiff itself has shown that it has no fear of repercussions under the statute, engaging in similar conduct—the provision of face shields, masks, and hand sanitizer during early voting in 2020—without apprehension or formal approval.

Plaintiff also cannot prove traceability or redressability since the State Board lacks authority to commence criminal prosecutions pursuant to Section 17-140 (or any other statute). Thus, any injury incurred by Plaintiff is not traceable to an action by the State Board, which has never enforced, or threatened to enforce, Section 17-140 in the statute's history. Similarly, a judgment against the State Board, given its lack of enforcement authority, would not redress the injuries alleged by Plaintiff.

Second, even if Plaintiff had standing, the Law does not restrict expressive conduct subject to the protections of the First Amendment. Plaintiff will be unable to establish at trial that the act of providing a slice of pizza or bottle of water to a voter communicates a particular message to a New York voter. Plaintiff cannot prove its claim through testimony of a voter from Georgia, who has no knowledge regarding Plaintiff or the context in which Plaintiff's Proposed Conduct would take place. Since the Law does not restrict conduct subject to the First Amendment, Plaintiff's claim should fail.

Third, even if the Law were deemed to restrict expressive conduct, it is still within constitutional bounds. Although the State BOE Defendants believe the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) should apply in this case, Section 17-140 survives even strict scrutiny. The State has a compelling interest in insulating voters from real or perceived interference, undue influence, and intimidation during the voting process. This interest is not adequately furthered by other provisions of N.Y. Election Law.

Fourth, Plaintiff will fail to prove its facial vagueness claim since the phrases "in connection with or in respect of any election" and "provision" are susceptible to reasonable constructions that do not cause constitutional concerns.

Finally, Plaintiff's overbreadth challenge will also fail because Section 17-140 "regulates a substantial spectrum of conduct that is as manifestly subject to state regulation." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). An alternative conclusion is only made possible if the State BOE Defendants' reasonable limiting interpretations of Section 17-140, and the canon of constitutional avoidance, are ignored.

STATEMENT OF FACTS

As their statement of facts, the State BOE Defendants incorporate by reference their Proposed Findings of Fact filed herewith.

ARGUMENT

I. PLAINTIFF WILL FAIL TO PROVE STANDING.

To satisfy standing requirements under Article III of the U.S. Constitution, 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 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) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). These requirements ensure federal courts adjudicate only actual "cases" and "controversies". *Lujan*, 504 U.S. at 576. "Where a standing issue has gone beyond the pleadings to summary judgment or trial, 'the plaintiff must do more than plead standing, he must prove it.'" *Tm Patents, L.P. v. IBM*, 121 F. Supp. 2d 349, 367 (S.D.N.Y. 2000) (quoting *Glover River Org. v. U.S. Dept. of Interior*, 675 F.2d 251, 254 n.3

(10th Cir. 1982)); *Lujan*, 504. U.S. at 561 ("Since they are not mere pleading requirements but rather an indispensable part of plaintiff's case, each element must be supported in the same way as any other matter on which plaintiff bears the burden of proof, i.e. with the same manner and degree of evidence required at the successive stages of the litigation.").

A. Plaintiff cannot prove an injury in fact.

1. Plaintiff had no concrete plans to engage in the Proposed Conduct.

As the Court recognized in its Decision, Plaintiff's standing requires proof of concrete plans by Plaintiff to engage in the Proposed Conduct. *See* Decision, at 14-15 ("It is not enough for plaintiffs to plead a vague intention to expose themselves to harm at an indeterminate time") (citing *Lujan*, 504 U.S. at 564)); *Lujan*, 504 U.S. at 564 ("'[S]ome day' intentions — without any description of concrete plans, or indeed even any specification of *when* the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require.") (emphasis in original). Under this standard, courts regularly conclude that standing is lacking where a plaintiff has made no concrete plans to engage in the conduct that would expose the plaintiff to potential injury. *See, e.g.*, *Am. Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin*, 2000 U.S. App. LEXIS 3463, at *5 (2d Cir. Feb. 25, 2000) (charity lacked standing to challenge Connecticut law based upon the Court's factual finding that its "plans to engage in charitable solicitation in Connecticut are some-day intentions rather than concrete plans") (internal quotation marks omitted); *Kearns v. Cuomo*, 415 F. Supp. 3d 319, 329 (W.D.N.Y. 2019), *aff'd*, 981 F.3d 200 (2d Cir. 2020) (collecting cases for the "concrete plan" requirement).

Although the Court concluded at the pleading stage that Plaintiff had advanced plausible allegations of its intention to engage in the Proposed Conduct, discovery has revealed that those allegations had no evidentiary support. Indeed, Plaintiff confirmed at its deposition that it has

never before engaged in the Proposed Conduct. Williams Dep. at 53:15-19. Moreover, Plaintiff's allegation that it "has set aside resources" to fund the proposed conduct (Am. Compl. ¶ 32) has been proven false—as of the date of Plaintiff's deposition, Plaintiff had never budgeted any funds to engage in the Proposed Conduct, notwithstanding that an approved budget would be required to purchase food and beverages to provide to voters. *See id.* at 48:2-50:8, 50:18-52:7. Moreover, no discussion of Section 17-140 is reflected in any meeting minutes of Plaintiff's Executive Committee, *id.* at 76:8-11, and the Plaintiff never generated any specific plans to provide food and drink to waiting voters or created any written materials that would accompany those actions, *id.* at 90:4-14, 107:20-25.

Therefore, although Plaintiff's allegations of intended conduct might have been sufficient at the pleadings stage, they ultimately lack factual support, and are insufficient to demonstrate standing by a preponderance of the evidence. In other words, there is no evidence to support Plaintiff's allegation that the presence of Section 17-140 on the books is what "chilled" it from engaging in the Proposed Conduct. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013) (a "real and imminent fear" is required for standing in the pre-enforcement First Amendment context). "A plaintiff must proffer some objective evidence to substantiate his claim that the challenged [law] has deterred him from engaging in protected activity." *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 170 (2d Cir. 1999) (quoting *Bordell v. General Elec. Co.*, 922 F.2d 1057, 1060-61 (2d Cir. 1991)). Without such proof, it is equally plausible that the Plaintiff's alleged intentions were formulated and advanced for the sole purpose of challenging the constitutionality of the law. An adjudication of such a claim would constitute an impermissible advisory opinion. *See Carney v. Adams*, 141 S. Ct. 493, 501 (2020).

2. Plaintiff cannot prove a credible fear of prosecution.

"When 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,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298-99 (1979) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). Although "courts are generally willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund," *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016) (quotations omitted), this "conventional background expectation of enforcement may be overcome where the law is moribund or of purely historical curiosity," *Johnson v. District of Columbia*, 71 F. Supp. 3d 155, 159-60 (D.D.C. 2014) (quotations omitted, collecting cases). In other words, "the mere existence of a law prohibiting intended conduct does not automatically confer Article III standing," *Adam v. Barr*, 792 F. App'x 20, 22 (2d Cir. 2019), and a "credible threat of prosecution, however, cannot rest on fears that are imaginary or speculative," *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 384 (2d Cir. 2015).

Although the presumption that a government will enforce its own laws is sufficient to confer standing at the pleadings stage, that presumption is insufficient in this case considering the evidence that will be introduced at trial. The State Board is unaware of any instance where any person or entity was prosecuted for a violation of Section 17-140 or any of its predecessor statutes. Connolly Decl. ¶ 46. Furthermore, the State Board has never referred any matter to the attorney general or any district attorney for prosecution of any violation of Section 17-140. *Id.* ¶ 47. The same is true of the City Board. Ryan Decl. ¶ 12. Plaintiff is also unaware of a single enforcement action ever taken for a violation of Section 17-140. Williams Dep. at 54:25-55:20; 150:12-18.

Moreover, contrary to Plaintiff's allegation in the Amended Complaint, the existence of long voting lines was not a new phenomenon in New York in 2020. Indeed, Plaintiff admits that long voting lines existed in Brooklyn since 2012. Williams Dep. at 37:13-38:20. Furthermore, the trial evidence will show that complaints regarding long voting lines both in New York City and upstate were made during each presidential election cycle since 2012. Connolly Decl. ¶ 49.

Further, unlike in other cases where a credible threat of prosecution was found, here, neither the Defendants nor the law enforcement officials with authority to prosecute violations of Section 17-140 have threatened to enforce the law against Plaintiff or anyone else. Connolly Decl. ¶¶ 43, 46-47; *see, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014) (credible threat of prosecution found where, not only had the relevant commission not disavowed enforcement of the statute, but also had issued a letter threatening enforcement proceedings); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (credible threat of prosecution found where plaintiff "told by the police that if he again handbills at the shopping center and disobeys a warning to stop he will likely be prosecuted"); *see also Kearns v. Cuomo*, 981 F.3d 200, 210 (2d Cir. 2020) ("The government's unwillingness or inability to prosecute a single county clerk for not verifying an applicant's immigration status in the 34 years that § 1324 has prohibited harboring is a reason to conclude that no such intent [to prosecute] exists.") (quotation omitted). This absence of enforcement activity is particularly persuasive given that there is a significant history of open and notorious conduct that would constitute a technical violation of the statute. *Cf.*, *Poe v. Ullman*, 367 U.S. 497, 502, (1961) (citing the "ubiquitous, open, public sales" of contraceptives with no enforcement activity as evidence that the threat of prosecution was insufficient to confer standing); *see also Kearns v. Cuomo*, 981 F.3d 200, 210 (2d Cir. 2020) (no credible threat of prosecution where "[t]he anti-harboring provision of § 1324 has been on the books in its current form since 1986," but the

plaintiff could "not identify a single instance in the intervening period where a county clerk was prosecuted . . . "). For example, until the 1992 amendments, the legislative history reflects that it was a standard practice for the Democratic and Republican parties to collectively provide cigars and candy to voters in polling places in upstate counties. *See* Connolly Decl. ¶¶ 15, 22, 26, 55. Additionally, in recent elections, other organizations have formed whose whole mission is to provide food to voters at the polls, including Pizza to the Polls and Chefs to the Polls. Both Pizza to the Polls and Chefs to the Polls were active during the 2020 election cycle in New York City, including Brooklyn. *Id.* ¶ ¶ 56-57; Exs. D-16, D-17, D-18.

Further, Plaintiff's professed fear of prosecution is undercut by its performance of conduct similar to the Proposed Conduct without apprehension. During early voting in the 2020 general election, Plaintiff handed out hand sanitizer, face masks, and face shields to voters waiting in line to vote. Williams Dep. at 67:9-15. Although such items are not consumable items and are therefore not covered by Section 17-140 (*see infra*, at 21-23), Plaintiff has argued in this case that such items are covered by Section 17-140's prohibition (*See* Decision, at 46-47), and thought at the time that it was violating Section 17-140 with these handouts. Nevertheless, Plaintiff informally decided that it would be fine to engage in that conduct, reasoning that "if someone wants to say something about us giving a shield during COVID, let them say something." Williams Dep. at 68:7-19; *see also id.* at 71:16-23 ("[I]t was more about we were under an emergency declaration and that no one would really challenge us on this. And if they did, we would say, well, it's COVID. You know, people are concerned about this and we didn't think that it would be, that we would be prosecuted or admonished for giving out those items."). Plaintiff's only explanation as to why it did not also give out food is that "people were primarily concerned about COVID" and "there's an apprehension about giving out food . . . ." Williams Dep. at 70:20-25. This conduct by Plaintiff

is clear evidence that Plaintiff does not have any actual fear of prosecution under Section 17-140. Additionally, as Plaintiff predicted, there is no evidence that Plaintiff was in any way challenged regarding the items it handed out during the 2020 election. Plaintiff was not prosecuted, and there is no record that Plaintiff was threatened with prosecution or even instructed to cease its activities.

This case presents the quintessential example of a law where the threat of enforcement is merely "chimerical". *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). If this case does not qualify under the "moribund" law exception, *see Johnson*, 71 F. Supp. 3d 155, 159-60, it is unclear what statute would ever qualify.

B. Plaintiff cannot prove that any alleged injury is traceable to any action by the State BOE Defendants or would be redressed by a favorable decision.

To establish standing, in addition to demonstrating an injury in fact, a plaintiff must also prove that: (1) the injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court"; and (2) it is "likely as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quotations omitted). Plaintiff cannot make either showing.

Regarding traceability, the Plaintiff can point to no action by the State BOE Defendants that caused it any injury whatsoever. Indeed, as discussed above, Plaintiff admits that there is no indication that Section 17-140 has ever been enforced in its 40-year history. Williams Dep. at 53:6-14. Furthermore, the State Board has never even referred a violation of Section 17-140 to a district attorney or the N.Y. Attorney General for prosecution. Connolly Decl. ¶ 47. Within the State Board, the chief enforcement counsel has "sole authority within the state board of elections to investigate on his or her own initiative or upon complaint alleged violations of" "article fourteen of [N.Y. Election Law] and other statutes governing campaigns, elections and related procedures." N.Y. Election Law § 3-104(b). All investigations conducted pursuant to N.Y. Election Law § 3-

107 are conducted under the ambit of the chief enforcement counsel and the division of election law enforcement. The State BOE Defendants have no jurisdiction to enforce or prosecute criminal law. Upon a vote by the State Board's commissioners that there is "reasonable cause to believe that a violation warranting criminal prosecution has taken place," the State Board's chief enforcement counsel must "refer such matter to the attorney general or district attorney with jurisdiction over such matter to commence a criminal action." N.Y. Election Law § 3-104(5)(b). This is the only avenue for enforcement of criminal law violations provided for in N.Y. Election Law. Thus, the State Board lacks jurisdiction to prosecute a violation of Section 17-140.

In other words, to the extent that Plaintiff has incurred an injury-in-fact, such injury is not traceable to any conduct by the State BOE Defendants, but rather to "'the independent action of . . . third part[ies] not before the court.'" *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1204 (11th Cir. 2021) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 42 (1976)). This is fatal to Plaintiff's standing. *See Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015) ("[T]he causation element of standing requires the named defendants to possess authority to enforce the complained-of provision."); *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (the traceability requirement is "entirely consistent with the long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute").

Regarding redressability, "it must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (quotations omitted). Plaintiff seeks (1) a declaration that Section 17-140 is unconstitutional and (2) enjoining Defendants from

"enforcing [Section 17-140]." *See* Am Compl., at p. 18. Plaintiff cannot prove that such relief will redress its alleged injury.

A judgment against the State BOE Defendants "would only bind them," and not any other non-party governmental officials or entities not before the Court. Courts have repeatedly held, however, that "[a]ny persuasive effect a judicial order might have upon the [other governmental actors], as absent nonparties who are not under the [Defendant's] control, cannot suffice to establish redressability." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1254 (11th Cir. 2020) (citing *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1305 (11th Cir. 2019)). "Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1305 (11th Cir. 2019) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in the judgment)).

Moreover, an injunction against the State BOE Defendants would not provide meaningful relief to Plaintiff because the State BOE Defendants do not prosecute violations of criminal law, including Section 17-140. Connolly Decl. ¶ 45.

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

"[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). "To determine whether conduct is sufficiently expressive, the Court asks whether it was 'intended to be communicative' and, 'in context, would reasonably be understood by the viewer to be communicative.'" *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1742 (2018) (quotations omitted). Although Defendants acknowledge that expressive conduct need not necessarily embody "a narrow, succinctly articulable message," *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, 1 (1995),

there must be, "at the very least, an intent to convey a particularized message along with a great likelihood that the message will be understood by those viewing it." *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) (quotations omitted). "It is possible to find some kernel of expression in almost every activity a person undertakes -- for example, walking down the street or meeting one's friends at a shopping mall -- but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

At trial, Plaintiff must prove the objective and subjective elements by a preponderance of the evidence to establish that the First Amendment applies to the Proposed Conduct. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations 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 also Rosenbloom v. Metromedia*, 403 U.S. 29, 50 (1971) ("[W]e ordinarily decide civil litigation by the preponderance of the evidence."). Plaintiff will fail to establish the objective "comprehensibility of message" portion of the test. There is no evidence that Plaintiff's message would be understood by New York voters, the intended recipient of the Proposed Conduct. *See Zalewska*, 316 F.3d at 319. Plaintiff intends to rely on testimony of a single voter from Georgia in support of the expressive nature of the conduct. However, that voter's proposed testimony regarding her experience in Georgia involved a different organization and a different historical context. But it is the context of Plaintiff's delivery of food and drink, as well as Plaintiff's reputation, that Plaintiff contends will allow voters to understand the message. Indeed, Plaintiff explained that its message would be comprehensible to New York voters because Plaintiff "is a trusted voice in the community," Williams Dep. at 119:4-10, but Plaintiff is not offering the testimony of any voter from Brooklyn who has interpreted Plaintiff's conduct in that manner. In other words, this testimony will not aid the Court in its "examination of the context in which the activity was

conducted." *Zalewska*, 316 F.3d at 320. Plaintiff's failure to introduce such evidence is more telling given that it previously provided face shields, masks, and hand sanitizer to voters waiting in line for early voting in Brooklyn in 2020. Williams Dep. at 67:9-15; 67:24-68:4. If there was a message that could be deciphered from that conduct, one would expect that Plaintiff would be able to identify at least a single voter who could testify as such.

Plaintiff also cannot rely on any written materials that it may distribute to voters in conjunction with the Proposed Conduct to establish its expressive nature. Not only did Plaintiff have no concrete plan to distribute any literature, *see* Williams Dep. at 116:6-10, where accompanying or explanatory speech is necessary to convey a message, that is considered "strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection." *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 66 (2006). Moreover, the literature Plaintiff has identified, which are materials Plaintiff has distributed during different get-out-the-vote activities, does not convey the same message that Plaintiff's purports to have intended to convey. Plaintiff's intended message is that "we value [voters'] voice in the electoral process and we're going to provide [voters] information and support" and to "demonstrate that we value their participation in the governance of their community and their city." Williams Dep. at 118:7-24. Instead of conveying that message, Plaintiff has speculated that the materials it would include might resemble materials it has distributed for other purposes. Williams Dep. at 116:11-117:4.

Furthermore, the State Defendants reiterate their position that the Proposed Conduct is equivalent to the type of get-out-the-vote activities that courts have consistently ruled are not expressive conduct. *See, e.g.*, *Feldman v. Reagan*, 843 F.3d 366, 392 (9th Cir. 2016), (ballot collection not sufficiently communicative); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) ("smorgasbord of activities comprising voter registration drives" not communicative);

Lichtenstein v. Hargett, 489 F. Supp. 3d 742, 773 (M.D. Tenn. 2020) (distribution of absentee ballot applications not expressive conduct); *Wise v. City of Portland*, 483 F. Supp. 3d 956 (D. Or. 2020) (service as medics at protest not protected conduct). Plaintiff admits that the conduct that has allegedly been chilled by Section 17-140 is "[p]roviding support to people who are in line to participate in voting." Williams Dep., at 87:15-16. The Proposed Conduct is functionally the same as delivering ballots to voters or delivering filled-out ballots to elections officials.

III. THE STATE'S INTERESTS IN PRESERVING A ZONE OF REPOSE AT A POLLING PLACE DURING AN ELECTION SATISFY EVEN STRICT SCRUTINY.

The State BOE Defendants reiterate their argument that the proper standard of review in this case is the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The State BOE Defendants disagree that Section 17-140 constitutes a content-based restriction on speech. Although Section 17-140 restricts the provision of certain consumable items to voters in a voting line or polling place (*see infra*, at 21-23), that law must viewed within the full framework of New York's election laws, wherein many other interactions with voters are also prohibited. *See, e.g.*, N.Y. Election Law §§ 8-104; 17-142(1); 17-212. Viewed through this broader lens, New York intends to create a "zone of repose" for voters who are in the process of engaging in the franchise of voting to avoid even perceived interference or influence. *See* Connolly Decl. ¶¶ 36-37. Thus, the content of the messages of those who would seek to interact with voters who are in the process of voting—if such message is comprehensible at all—is irrelevant and not targeted by Section 17-140 or the N.Y. Election Law more broadly. Therefore, the justification of Section 17-140 does not depend on "the content of the regulated speech," and there is no evidence it was "adopted . . . because of disagreement with the message the speech conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (alterations and quotations omitted).

However, even if the Court applies strict scrutiny, Section 17-140 survives. "To survive strict scrutiny, . . . a State must . . . demonstrate that its law is necessary to serve the asserted interest." *Burson v. Freeman*, 504 U.S. 191, 199 (1992). The State has a compelling interest of "insulating voters from real or perceived interference, undue influence, and intimidation during the voting process." Connolly Decl. ¶ 27; *see Burson*, 504 U.S. at 199 ("a State indisputably has a compelling interest in preserving the integrity of its election process.") (quotation omitted); *see also Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1220 (11th Cir. 2009) ("The State wants peace and order around its polling places, and we accord significant value to that desire for it preserves the integrity and dignity of the voting process and encourages people to come and to vote."). Further, the Supreme Court has recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 187 (1999) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

In *Citizens for Police Accountability Political Comm. v. Browning*, the Eleventh Circuit affirmed Florida's restriction on exit solicitation of voters. In upholding that law, the Court reasoned as follows:

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

Citizens for Police Accountability Political Comm., 572 F.3d at 1220 (citations omitted); *see also N.J. Press Ass'n v. Guadagno*, 2012 U.S. Dist. LEXIS 161941, at *18 (D.N.J. Nov. 13, 2012)

(concluding that plaintiffs were unlikely to succeed in their challenge of New Jersey's exit solicitation law).

Contrary to Plaintiff's proposed interpretation of Section 17-140 at the motion to dismiss stage, it does not "potentially reach[] the entirety of New York's geographic territory." Decision, at 37. The phrase "in connection with or in respect of any election" should be interpreted as only applying to voters actively engaged in the act of voting. Connolly Decl. ¶ 18. Therefore, Section 17-140 is inapplicable to any actions until a voter initiates their engagement in the act of voting. *Id.* This means that Section 17-140 applies only to the period from when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place. *Id.* At that point, the voter has completed the act of voting and, therefore, any provision of "meat, drink, tobacco, refreshment, or provision" would no longer be "in connection with or in respect of any election." *Id.* This interpretation accords with Section 17-140's text and history. The statute was initially drafted to address the carnival-like atmosphere that had developed at or around the polls during an election. *Id.* ¶ 19. Moreover, since Section 17-140 concerns the provision of food, drink, and other consumable items to voters—i.e., persons other than those engaged in the administration of the election—it is consistent with the statute's text and purpose to limit its application to the act of voting itself. *Id.* Before a voter has initiated their engagement in the act of voting, the underlying State interests—insulating voters from real or perceived intimidation, harassment, and interference—are not implicated. *Id.*

The canon of constitutional avoidance militates in favor of accepting the State BOE Defendants' interpretation of Section 17-140, particularly because there is no evidence that the legislature intended Section 17-140 to apply outside of the immediate vicinity of the polling place. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (the canon of constitutional avoidance "is a tool

for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"); *Doyle v. United States Dep't of Homeland Sec.*, 959 F.3d 72, 77 (2d Cir. 2020) ("We are bound to avoid deciding the constitutional question if the ambiguous statutory text to be interpreted . . . fairly admits of a less problematic construction.") (quotations omitted).

Regarding the tailoring of Section 17-140, a law is constitutional if it is "reasonable and does not *significantly impinge* on constitutionally protected rights." *Burson*, 504 U.S. at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)) (emphasis in original). Section 17-140 is necessary, in the broader context of the N.Y. Election Law, to fully insulate voters from real or perceived influence and interference. *See* Connolly Decl. ¶ 27. Although Plaintiff has argued that the State's interests are already furthered by other provisions, that argument is incorrect and misinterprets the State's interests. Indeed, the other restrictions set forth in N.Y. Election Law regarding interactions with voters, including Election Law §§ 8-104 (electioneering ban within 100-foot radius); 17-142(1) (ban on giving consideration for franchise); 17-212 (ban on certain acts of intimidation, deception, or obstruction) are insufficient to protect voters from all unnecessary interactions when waiting to vote or cast their ballots because any such encounters may be interpreted by a particular voter as harassment and/or intimidation.

Furthermore, as the Eleventh Circuit recognized:

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

Citizens for Police Accountability Political Comm., 572 F.3d at 1220-21. Therefore, the State need not "offer its own evidence demonstrating that the [restriction] is necessary to serve its compelling interests" *Id.*; *Munro*, 479 U.S. at 195, (1986) (the State is not subject "to the burden of

demonstrating empirically the objective effects on political stability that [are] produced" by the voting regulation in question); *see also Burson*, 504 U.S. at 200 (plurality) ("While we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places."). This "restricted zone around the voting compartments" is necessary to "serve the State['s] compelling interests in preventing voter intimidation and election fraud." *Burson*, 504 U.S. at 206 (plurality).

IV. PLAINTIFF'S VAGUENESS AND OVERBREADTH CHALLENGES FAIL.

A. Vagueness.

The vagueness doctrine ensures that statutes are drafted "with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them." *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007) (quotations omitted). The Supreme Court has not clearly defined how courts should evaluate vagueness challenges to criminal prohibitions that implicate the First Amendment, but has cautioned that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). After all, not every statute that implicates speech is unconstitutionally vague. *See Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 21 (2010) (rejecting a vagueness challenge to a criminal law that implicated First Amendment activities near schools).

In reviewing statutes for vagueness, courts employ a number of tools. Chief among these tools is the examination of the words of the statute itself. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). However, courts do not look at statutory language in isolation; rather, courts also "consider[] the language in context, with the benefit of the canons of statutory construction

and legislative history." *Commack Self-Serv. Kosher Meats v. Hooker*, 860 F.2d 194, 213 (2d Cir. 2012) (citing *United States v. Farhane*, 634 F.3d 127, 142 (2d Cir. 2011)). Additionally, courts consider "the interpretations the relevant courts have given to analogous statues," as well as "the interpretation of the statute given by those charged with enforcing it." *Id.* (quoting *Grayned*, 408 U.S. at 110).

Here, Plaintiff alleges that Section 17-140 is facially vague because it allegedly fails to provide persons of reasonable intelligence notice of what conduct it prohibits. *See* Pl. Opp. 23-25. Plaintiff specifically takes issue with only two specific phrases contained within Section 17-140: (1) "in connection with or in respect of any election," and (2) "provisions." *See* Decision, at 45. Each phrase is discussed in turn.

1. "In Connection With Or In Respect Of Any Election".

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

Territorially, as explained above, Plaintiff's alleged concern that Section 17-140 could reach the entirety of New York State's geographical territory ignores the established canon of constitutional avoidance and the common-sense interpretation advanced by the State Board. *See supra*, at 16. To recap, the State Board's interpretation of this phrase is that Section 17-140 applies only to the period from when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place. Connolly Decl.¶ 18. After all, any voter in line by the time of poll closing is entitled to cast a vote, and as such is engaged in the act of voting despite their physical presence outside of the polling place. *See* N.Y. Election Law § 8-104(5). As the state agency charged with administering elections under N.Y. Election Law, the State Board's interpretation is to be afforded deference "so long as the interpretation is neither irrational,

unreasonable nor inconsistent with the governing statute." *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 418-19 (1996) (quotations omitted).

Temporally, Section 17-140 expressly states that it applies "during the hours of voting," and is thus appropriately limited to apply only to the period of time from when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place. *See* N.Y. Election Law § 17-140. Undoubtedly, voters who cast their vote on early voting days are acting "in connection with or in respect of any election" to the same degree as voters who cast their vote on "election day," and as such as protected by the same election laws. *See* N.Y. Election Law § 8-102 ("Voting at each polling place for early voting shall be conducted in a manner consistent with the provisions of this article"); 9 N.Y.C.R.R. § 6211.6 ("the manner of voting on days of the early voting period shall be the same as the manner of voting on the day of election"). Before a voter has initiated their engagement of voting by joining the voting line, the underlying State interests of preventing voter intimidation, harassment, and interference are not implicated. Additionally, once a voter has cast his or her vote, he or she has completed the act of voting, such that any provision would no longer be "in connection with or in respect of any election."

Consequently, under this interpretation, Plaintiff would be permitted to offer snacks to voters before they enter the line to vote or after they exit the voting line, and would also be permitted to distribute snacks to New York voters on election day at its Brooklyn headquarters. However, from the time a voter steps in line to vote—regardless of whether the location of that line may fall outside the 100-foot radius surrounding a polling place—until the time the voter has cast his or her vote and exited the polling place, he or she is acting "in connection with or in respect of any election" under Section 17-140. Thus, properly interpreted, Section 17-140's reference to "in connection with or in respect of any election" is not vague, but rather is clearly defined both

territorially as the 100-foot radius around polling places and any voting line where voters have congregated to participate in the franchise (even if such lines extend past the 100-foot radius around polling places), and temporally to the period of time from when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place.

2. "Provision".

With respect to the word "provision" in the statutory phrase "meat, drink, tobacco, refreshment or provision," the meaning is readily apparent: "provision," as referred to in Section 17-140, refers only to consumable items. Connolly Decl. ¶¶ 19-20, 22-23. The foregoing interpretation is consistent with the interpretive canons of *ejusdem generis* and *noscitur a sociis*, which hold that, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001) (quotations omitted). Using this common interpretive tool, the term "provision" should be read as consistent with the other listed items of meat, drink, tobacco, and refreshment, each of which are consumable goods.

Further, this interpretation is consistent with Section 17-140's legislative history. A predecessor statute to Section 17-140, enacted in 1892, applied to non-consumable goods by prohibiting the furnishing of "entertainment to electors" and the provision of "money or other property" to induce individuals to vote. *See* L. 1892, ch. 693, § 41o; Connolly Decl. ¶¶ 7-8. In 1906, the statute was overhauled to instead prohibit a person from providing another "any meat, drink, tobacco, refreshment, or provision . . . . ," thereby expressly limiting the items covered by the statute to consumable items. L. 1985, ch. 154, § 1; Connolly Decl. ¶¶ 22-23. The New York Legislature's subsequent redrafting of the statute signals the Legislature's clear intention to remove

the statute's prior prohibition on non-consumable goods and, in its place, impose a restriction on the gifting of consumable goods. There is no record whatsoever of any concern by the Legislature, in connection with Section 17-140, regarding the provision of non-consumable items. The only subsequent legislative discussion concerning the items disallowed under the statute concerned consumable items. In 1992, the exception to Section 17-140 for such items "having a retail value of less than one dollar" was added to allow for the common practice in "most upstate communities" of "hav[ing] available for al[l] voters pieces of candy, cigars, coffee, soda and the like for voters." Connolly Decl., Ex. D-13.

There is also no support in Section 17-140's legislative history for Plaintiff's far-reaching interpretation of the word "provision" as covering all "needed materials or supplies," including but not limited to both consumable and non-consumable goods. *See* Decision, at 46-47. Indeed, Plaintiff's own conduct reveals its disagreement with this strained interpretation. As noted above, during early voting in the 2020 general election, Plaintiff handed out hand sanitizer, face masks, and face shields to voters waiting in line to vote, and had no fear that by so doing it would be at risk of prosecution under Section 17-140. *See* Williams Dep. at 67:9-15; 68:7-19; 71:16-23; *see also supra*, at 8, 13.

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

Finally, Section 17-140 expressly provides an exception for "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." N.Y. Election Law § 17-140. Allowing the provision of less valuable consumable items inside a polling place is consistent with the State's interest because small, less valuable consumable items are less likely to influence voters and more supervision by election officials is possible inside the polling place. Moreover, not allowing the person or group supplying such provisions to be identified makes it far less likely that voters will perceive such conduct as harassment, intimidation, or influence because the gift will not be colored by the voter's perception of the identifying person or entity.

For the reasons stated above, Section 17-140's reference to "provision" is not vague, but rather is clearly limited to consumable goods.

B. Overbreadth

The overbreadth doctrine applies where a statute punishes a substantial amount of protected speech, judged in relation to the statute's "plainly legitimate sweep". *See Virginia v. Hicks*, 539 U.S. 113, 122 (2003). However, a statute cannot be declared overbroad if it "regulates a substantial spectrum of conduct that is . . . manifestly subject to state regulation." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

The overbreadth inquiry begins and ends with measuring the statute's "plainly legitimate sweep." *Id.* at 616. Here, Section 17-140, together with other provisions of the statute, serves to insulate waiting voters from either actual or perceived intimidation, harassment, and undue influence. Connolly Decl. ¶¶ 27, 36. Undoubtably, this goal is within the purview of permissible State election regulation. *See Burson*, 504 U.S. at 199 ("a State indisputably has a compelling interest in preserving the integrity of its election process.") (quotation omitted); *see also Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1220 (11th Cir. 2009) ("The State wants peace and order around its polling places, and we accord significant value to that desire

for it preserves the integrity and dignity of the voting process and encourages people to come and to vote."); *see supra*, at 15-18. Section 17-140 accomplishes this purpose by, among other things, preventing the giving of food, drink, and other consumable goods of value to voters, regardless of the giver's motivations, from the time when a voter enters a line to vote at a polling place until after the voter has cast his or her vote and exited the polling place. In so doing, New York intends to create a "zone of repose" for voters who are in the process of engaging in the franchise of voting to avoid even perceived interference or influence. *See* Connolly Decl. ¶¶ 36-37.

Plaintiff argues that Section 17-140 is facially overbroad for two reasons. First, Plaintiff argues that Section 17-140 could potentially reach the entirety of New York State's geographical territory. As previously noted, such concerns are unfounded. Section 17-140 erects a zone of repose within the polling place itself, as well as in the area outside of the polling place, not only extending 100 feet from the door of a polling place, but until the end of any voting line where voters have congregated to participate in the franchise. Past this point, Section 17-140 does not apply. To conclude otherwise would be to ignore Section 17-140's text and the established doctrine of constitutional avoidance. *See supra*, at 16, 19-20; *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"); *Doyle v. United States Dep't of Homeland Sec.*, 959 F.3d 72, 77 (2d Cir. 2020) ("We are bound to avoid deciding the constitutional question if the ambiguous statutory text to be interpreted . . . fairly admits of a less problematic construction.") (quotations omitted).

Second, Plaintiff argues that Section 17-140 does not distinguish among the possible intentions of people who might provide food or drink to voters on an election day. *See* Decision,

at 38, 49-50. Essentially, Plaintiff has argued that the State can restrict those who might interact with voters for political reasons, but cannot restrict those with non-partisan intentions. Plaintiff's argument is based upon a misunderstanding of the State interest underlying Section 17-140.

The State's interest is to insulate voters from real or perceived interference, undue influence, and intimidation during the voting process. Connolly Decl. ¶¶ 27, 36. This interest cannot be achieved by restricting only overtly partisan speech. Indeed, within the 100-foot zone outside a polling place, such speech is already covered by the State's electioneering ban. *See* N.Y. Election Law § 8-104. Section 17-140 is necessary to address more subtle voter interference, undue influence, and intimidation, including perceived interference, undue influence, and intimidation, that results from encounters with voters in the critical moments before a ballot is cast. Connolly Decl. ¶ 36.

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

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

CONCLUSION

Upon consideration of the evidence introduced at trial in this action, the State BOE Defendants respectfully request that the Court enter judgment in Defendants' favor in all respects, and grant such other and further relief as the Court deems just and proper.

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Respectfully submitted,

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