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 SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE IMPROPER EXPERT TESTMONY AND CERTAIN OF DEFENDANTS' PROPOSED EXHIBITS

Plaintiff submits this memorandum in support of its motion *in limine* to preclude State Board Defendants from offering improper expert testimony from Thomas Connolly, Deputy Executive Director of the New York State Board of Elections, and proposed exhibits that constitute hearsay.

I. The Court should exclude improper expert testimony from Thomas Connolly, Deputy Executive Director of the New York State Board of Elections.

State Board Defendants indicate that they seek to call Thomas Connolly, Deputy Executive Director of the New York State Board of Elections, as a witness to "testify about the historical background and legislative history of N.Y. Election Law § 17-140 ('Section 17-140'), the State interests furthered by Section 17-140, the State Board's interpretation of Section 17-140, Enforcement of Section 17-140, complaints regarding voting lines, accommodations provided for elderly and disabled voters, and previous conduct in violation of Section 17-140." ECF No. 80 at 11. However, because Mr. Connolly has not been disclosed as an expert witness, he is not qualified

to offer testimony about "the historical background and legislative history of N.Y. Election Law § 17-140." For the reasons below, this Court should exclude testimony of Mr. Connolly that is based on specialized knowledge and is thus inadmissible under Rules 701 and 702.

A. Legal Standard

Where a witness is not testifying as an expert, that witness's opinion testimony must be "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. A witness may testify as an expert only if, among other requirements, the witness "is qualified as an expert by knowledge, skill, experience, training, or education"; the witness's "testimony is the product of reliable principles and methods"; and "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

Subsection (c) was added to Rule 701 in 2000 "to eliminate the risk" that Rule 702's reliability requirements "will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent the witness is providing testimony based on scientific, technical, or other specialized knowledge[.]" Fed. R. Evid. 701, Advisory Committee Note. "By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 . . . by simply calling an expert witness in the guise of a layperson." *Id.*

B. State Board Defendants have not disclosed any expert witnesses.

Federal Rule of Civil Procedure 26 requires each party to disclose the identity of any witnesses who will present expert testimony. Fed. R. Civ. P. 26(a)(2)(A). This disclosure must be

accompanied by a written report, or, in certain circumstances, "a summary of the facts and opinions to which the witness is expected to testify." *Id.* 26(a)(2)(B), (C). Where a party fails to provide information or identify an expert witness, "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial[.]" Fed. R. Civ. P. 37(c)(1); *see also* Fed. R. Civ. P. 26(a)(2)(B) (permitting parties to designate their own employee as an expert witness). Here, Defendants have failed to provide any expert disclosures or written reports, and are thus precluded from providing expert testimony at trial.

C. State Board Defendants seek to introduce expert testimony through a lay witness.

State Board Defendants' disclosure indicates they intend for Mr. Connolly to provide testimony that relies on specialized knowledge and that he is not qualified to give. Courts typically rely on experts to provide historical testimony. *See, e.g.*, *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 523, 542 (E.D.N.Y. 2012) (explaining that expert historian's "background and professional experience qualify as 'specialized knowledge' gained through 'experience, training, or education'"); *Walden v. City of Chicago*, 755 F. Supp. 2d 942, 950 (N.D. Ill. 2010) ("As a researcher and doctoral candidate in history, Lipari has the background to find, evaluate, and synthesize historical documents pertinent to the issue of Chicago Police Department policies and practices in 1952."); *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 593 F. Supp. 2d 549, 555 (S.D.N.Y. 2008), *on reconsideration in part* (June 26, 2008) ("Attorneys, historians, and musicians fall into [the] category" of "technical but nonscientific experts whose credentials normally include substantial formal instruction in the techniques of a discipline" (quoting Edward J. Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 Cardozo L. Rev. 2271, 2278–79

(1994))). Defendants may not funnel in expert testimony regarding "the historical background and legislative history of N.Y. Election Law § 17-140" through a lay witness like Mr. Connolly.

Even if State Board Defendants had disclosed Mr. Connolly as an expert pursuant to Rule 26, Mr. Connolly is not qualified to opine on the historical background of a statute. Mr. Connolly has no background or training in historical analysis of legislative enactments, New York history, history of voting laws, or history generally. *See* (Connolly Tr. at 23:18–28:12). Instead, he completed his undergraduate and graduate studies in the field of psychology, and his professional background is in corporate communications, information systems, graphic design and multimedia, and election administration. (*Id.*)

Any testimony offered by State Board Defendants purporting to explain "the historical background and legislative history of N.Y. Election Law § 17-140" should be excluded as inappropriate opinion testimony in violation of Federal Rules of Evidence 701 and 702.

II. The Court should exclude State Board Defendants' Exhibits 1-4 and 16-18 as inadmissible hearsay.

State Board Defendants should not be permitted to offer news articles, video clips from news and social media, and excerpts from academic sources as evidence in this case, including through Mr. Connolly's testimony.

Plaintiffs object to the following exhibit designations from State Board Defendants:

Number	Description	Category
D-1	Excerpt from Robert J. Dinkin, Campaigning in America, A History of Election Practices, GREENWOOD PRESS (1989).	Excerpt of Academic Book
D-2	The Presidential Campaign.; The Douglas Barbecue, NEW YORK TIMES (September 13, 1860)	News Article
D-3	The Republican Barbecue, NEW YORK TIMES (October 20, 1876).	News Article
D-4	W. Ivins, The Electoral System of the State of New York, PROCEEDINGS OF THE 29TH ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION 65 (1906)	Academic Journal Article

D-16	Video titled "Pizza to the Polls Delivers Food to Voters Across U.S." posted by NowThisNews, November 1, 2020 (Youtube) (https://www.youtube.com/watch?v=XPmI72shCU0)	Video Clip from News Source
D-17	Video titled "Pizza to the Polls NYC," November 5, 2020, posted by Pizza to the Polls (Facebook) (https://www.facebook.com/pizzatothepolls/videos/pizza-to-the-polls-nyc/1002821390228458/).	Video Clip from Social Media Page
D-18	"#ChefsForThePolls Brings Food To Patient Voters Stuck For Hours Waiting On Long Lines," dated October 28, 2020, by CBS News, available at https://www.cbsnews.com/newyork/news/chefsforthepolls-brings-food-to-patient-voters-stuck-for-hours-waiting-on-long-lines/).	News Article

Such documents are paradigmatic examples of inadmissible hearsay not subject to any exception to the usual prohibition. *See* Fed. R. Evid. 802, 803, 804. "Newspaper articles offered for the truth of the matter asserted are inadmissible hearsay." *Century Pac., Inc. v. Hilton Hotels Corp.*, 528 F. Supp. 2d 206, 217 (S.D.N.Y. 2007), *aff'd*, 354 F. App'x 496 (2d Cir. 2009); *see also United States v. Difeaux*, 163 F.3d 725, 729 (2d Cir. 1998) (newspaper articles are inadmissible hearsay); *Nooner v. Norris*, 594 F.3d 592, 603 (8th Cir. 2010) ("Newspaper articles are 'rank hearsay.'"); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1381, 1384 (M.D. Ala. 2014) ("A newspaper report that an event occurred, if used to prove that the event actually occurred, is classic hearsay."). "News accounts, unsupported by corroborating evidence and offered to prove that certain statements were made, will usually lack the 'circumstantial guarantees of trustworthiness' that [the residual or catchall exception to the hearsay rule] requires." *In re Columbia Sec. Litig.*, 155 F.R.D. 466, 475 (S.D.N.Y. 1994) (quoting Fed. R. Evid. 803(24)); *see also id.* ("Unless their author is available for cross-examination, newspapers stories generally will present a blank face that gives little clue as to the reliability of the reporter's perception, memory, narration, or sincerity, and in addition fails to disclose how the article was changed in the editing process."); *Planned Parenthood Se.*, 33 F. Supp. 3d at 1384–85 ("There is no general hearsay

exception for newspaper articles."). The same is true for State Board Defendants' academic sources and video clips; like his newspaper articles, they are out-of-court statements used for the truth of the matter asserted. *See* Fed. R. Evid. 801(c).

State Board Defendants have indicated their intention to rely on these documents for the truth of the matter asserted therein by suggesting in the Joint Pretrial Order that Mr. Connolly will testify about "the historical background . . . of N.Y. Election Law § 17-140" and "previous conduct in violation of Section 17-140." ECF No. 80 at 11. But because Mr. Connolly has not been designated as an expert, he may not rely on hearsay as the basis for his testimony. *Cf.* Fed. R. Civ. 703 (providing "if *experts* in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted" (emphasis added)). And regardless, the hearsay evidence is not independently admissible, even if an expert could hypothetically rely on it in forming his expert opinion.

Accordingly, State Board Defendants should be prohibited from relying on Exhibits 1-4 and 16-18 at trial, pursuant to the prohibition on hearsay.[1]

III. Conclusion

For the foregoing reasons, the Court should preclude Mr. Connolly from offering improper expert testimony about the historical background and legislative history of the Line Warming Ban and exclude Exhibits 1-4 and 16-18 as inadmissible hearsay.

[1] State Board Defendants' articles are unlike the articles on which Plaintiff will rely, which are not being offered for the truth of the matter asserted therein but to establish that "[l]ocal and national news organizations reported extensively on the issue." *See* Proposed Findings of Fact and Conclusions of Law ¶ 8.

Dated: February 7, 2024

Respectfully submitted,

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