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 PRE-TRIAL MEMORANDUM OF LAW

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Plaintiff Brooklyn Branch of the NAACP ("Brooklyn NAACP" or "Plaintiff"), by and through its undersigned counsel, submits this Pre-Trial Memorandum of Law in support of its Proposed Findings of Fact and Conclusions of Law in the above-captioned case.

PRELIMINARY STATEMENT

The questions remaining for trial in this matter are narrow, and most of the relevant facts are undisputed. The Court has already set forth the legal framework for this case in its Opinion and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, ECF No. 50 (the "MTD Op."). In that Opinion, the Court concluded that the facts alleged in the Amended Complaint, taken as true, establish that (1) Plaintiff has standing to pursue this action; (2) "line warming," as Plaintiff intends to conduct it, is "expressive conduct" subject to First Amendment protection; (3) Section 17-140 of the New York Election Law (the "Line Warming Ban") is a content-based restriction on speech and thus subject to strict scrutiny; (4) the Ban is not sufficiently narrowly tailored to survive even intermediate scrutiny, let alone strict scrutiny; (5) for the same reasons, the Ban is facially overbroad; and (6) the terms "in connection with or in respect of any election" and "provision" are potentially vague in the absence of any limiting construction or clarifying legislative history. Brooklyn NAACP is prepared to prove the allegations of the Amended Complaint at trial. And the application of the Court's sound legal conclusions to these proven facts requires judgment in favor of Plaintiff.

The relevant facts, with citations to supporting evidence, are set forth in detail in Plaintiff's Proposed Findings of Fact and Conclusions of Law. Plaintiff presents this Memorandum of Law to provide further analysis of the issues left to be decided after trial.

ARGUMENT

I. Brooklyn NAACP has standing to challenge the Line Warming Ban.

Brooklyn NAACP has Article III standing to pursue its First Amendment claims. An organization such as Brooklyn NAACP "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, Brooklyn NAACP "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). 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) (cleaned up).[1]

Defendants have argued that any injury to Plaintiff or its members is speculative. Not so. "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

[1] As the Court has observed, in addition to asserting its own rights, an organization such as Brooklyn NAACP ordinarily "may bring suit on behalf of its members so long as it can show that a particular member would otherwise have standing to sue in his or her own right. MTD Op. 12 (citing *Faculty v. New York Univ.*, 11 F.4th 68, 75 (2d Cir. 2021)). Although the Second Circuit has held that "an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983," *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011), it has also explained that an organization may sue to "vindicate its own rights" by "establish[ing] that it (through its agents) suffered a concrete injury." *N.Y. C.L. Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 295 (2d Cir. 2012). The Second Circuit's limitation on associational standing in Section 1983 actions may no longer be good law in light of more recent Supreme Court case law recognizing associational standing in 1983 cases. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2158 (2023). But the Court need not reach that question because Brooklyn NAACP has standing to assert its own rights without the need to assert the rights of its members.

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) (alteration in original) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). As the Court previously recognized, the Amended Complaint "pleads with specificity that it and its members intend to engage in conduct proscribed by the Line Warming Ban. And although it is not certain that Plaintiff or its members will be prosecuted for violating the Line Warming Ban, Plaintiff has established a credible threat of such enforcement." MTD Op. 19-20. The evidence bears out those allegations.

a) Brooklyn NAACP and its members have established a concrete intent to engage in conduct prohibited by the Line Warming Ban.

Brooklyn NAACP and its members have a concrete, specific intent to engage in a particular proscribed activity—the distribution of food and water—at a particular place and time—at polling places in New York during voting hours for subsequent general, special, and primary elections. Brooklyn NAACP's President testifies that the organization plans to "provide sundries such as bottled water, granola bars, donuts, potato chips, or pizza to voters" waiting in line to vote. (Decl. of L. Joy Williams ¶ 32 ("Williams Decl.")). The Chair of Brooklyn NAACP's Civic Engagement Committee provides further detail: Brooklyn NAACP plans to focus its efforts on polling locations that have suffered from long lines in previous election cycles. (Bakiriddin Decl. ¶ 22). Brooklyn NAACP would "send volunteers to those locations armed with water bottles, granola bars, literature, and signage similar to" what it has provided at other voter-facing events. (*Id.*). No party disputes that this activity would violate the Line Warming Ban.

Moreover, Brooklyn NAACP's planned line warming is consistent with its long history of voter outreach and engagement that often involves food sharing. Brooklyn NAACP has provided food at voter registration drives, trainings, and voter education events. (*E.g.* Ex. P-1 (Branch holiday party); Ex. P-3 ("Celebration Picnic"); Ex. P-7 at NAACP000083–84 (membership

meeting); Ex. P-6 at NAACP000213 ("Civic Engagement Session"); Ex. P-21 (Ballots & BBQ); Williams Decl. ¶ 6; Bakiriddin Decl. ¶ 6). As the Court has observed, these facts are "a far cry from allegations of speculative injuries that courts have found insufficient to support standing." MTD Op. 15–16 (first citing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); then citing *Faculty*, 11 F.4th 68). "Plaintiff—an organization with a vested interest in voting rights and a history of engaging in get-out-the-vote efforts—would run afoul of the Line Warming Ban simply by executing on its credibly stated plans." *Id.* at 16.

b) Brooklyn NAACP and its members face a credible threat of prosecution that chills their First Amendment rights.

Plaintiff has further established "a credible threat that [it] will be prosecuted for its line warming activities." *Id.* (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Because the Line Warming Ban undisputedly forbids Brooklyn NAACP's intended conduct, and Defendants have not disavowed any intent to enforce it, Plaintiff has satisfied this requirement.

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*, 442 U.S. at 298 (cleaned up). 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). But the Second Circuit has cautioned that these statements should not be "overread to require a rigorous inquiry into the chances that a given plaintiff will be prosecuted" and that

"Article III is satisfied by much less." *Antonyuk v. Chiumento*, 89 F.4th 271, 333 (2d Cir. 2023). Indeed, "the Supreme Court [has] found pre-enforcement standing without much evidence suggesting that a prosecution was either imminent or particularly likely." *Id.* (citing *Babbitt*, 442 U.S. at 302). *Babbitt*'s "credible threat of prosecution" requirement is thus "quite forgiving" and "sets up only a 'low threshold' for a plaintiff to surmount." *Id.* at 334 (quoting *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013)).

Plaintiff need not prove that it or its members have been specifically threatened with prosecution under the Ban, or even a history of past enforcement of the Ban. "[W]here a statute specifically proscribes conduct, the law of standing does not place the burden on the plaintiff to show an intent by the government to enforce the law against it." *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 138 (2d Cir. 2023) (quoting *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 71 (2d Cir. 2019)), *cert denied* No. 23-74, 2023 WL 8531888 (U.S. Dec. 11, 2023) (mem.). "While evidence that a plaintiff faced either previous enforcement actions or a stated threat of future prosecution is, of course, relevant to assessing the credibility of an enforcement threat, none of these cases suggest that such evidence is *necessary* to make out an injury in fact." *Antonyuk*, 89 F.4th at 334 (quoting *Vitagliano*, 71 F.4th at 139) (cleaned up).

Indeed, "an intent by the government to enforce the law" is "*presumed* . . . in the absence of a disavowal by the government." *Id.* (cleaned up) (emphasis added). It is thus *Defendants'* burden to overcome the presumption that the Ban will be enforced. For example, in *Brown v. Buhman*, the Tenth Circuit held that the plaintiffs' challenge to Utah's anti-bigamy statute became moot in part because the defendant, the County Attorney for Utah County, "declared under penalty of perjury that the [plaintiffs] will not be prosecuted unless they engage in criminal conduct beyond that proscribed by the Statute." 822 F.3d 1151, 1170 (10th Cir. 2016). The Utah Attorney General

similarly declared, under penalty of perjury, that his office had a "policy not to prosecute polygamists under Utah's criminal bigamy statute for just the sake of their practicing polygamy." *Id.* at 1157 (cleaned up).[2]

No evidence of such an official policy has been presented here. Quite the opposite. The evidence shows that the State Board of Elections has specifically charged county boards of elections—including the New York City Board of Elections—with monitoring and enforcing violations of the Line Warming Ban. The State Board's "Guide to Operating a County Board of Elections" charges County Boards with using their "[e]nforcement powers" to "prevent violations of the election process." (Ex. P-27 at NYSBOE 00121, 224). The Guide further specifies that "violation of the elective franchise may include," among other things, "Furnishing money or entertainment to induce attendance at the polls." (*Id.* at NYSBOE 00225). The State Board's Rule 30(b)(6) designee testified that this refers to Section 17-140, which is titled "Furnishing money or entertainment to induce attendance at the polls." (Connolly Tr. 139:2–140:5); N.Y. Elec. Law § 17-140.

Some courts have suggested that a fear of prosecution under a challenged statute might be less reasonable where the statute is "moribund or of purely historical curiosity." *Johnson v. District of Columbia*, 71 F. Supp. 3d 155, 159-160 (D.D.C. 2014). To make this showing, Defendants must "*convincingly* demonstrate that the statute is moribund." *N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 16 (1st Cir. 1996) (emphasis added). As the Court previously recognized, *Poe v. Ullman*, 367 U.S. 497 (1961)—to Plaintiff's knowledge the *only* Supreme Court decision applying this exception—itself "illustrates the danger of failing to entertain pre-enforcement

[2] The Tenth Circuit further held that any credible threat of prosecution was mooted because the plaintiffs had moved out of state. *Brown,* 822 F.3d at 1172.

challenges; the appellants in *Griswold v. Connecticut*, 381 U.S. 479 (1965), were prosecuted under the very law challenged in *Poe* just a few years after the Court found Poe's risk of prosecution incredible based on a lack of historical prosecutions." MTD Op. 19.

Not only have Defendants failed to "convincingly" demonstrate that the Ban is moribund, *N.H. Right to Life*, 99 F.3d at 16, they have affirmatively argued the opposite. Defendants have, throughout this litigation, maintained that the Line Warming Ban is necessary to further an important state interest because "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." State Bd. Defs' Mem. of Law in Support of Mot. to Dismiss Pls.' Am. Compl. ("Mot.") 21, ECF 41-1. For the Ban to render the state's election law regime "more effective" in avoiding "outside influence," it necessarily *must* have some deterrent or chilling effect. A truly moribund statute can neither chill nor deter. Defendants cannot have it both ways. *See Barilla v. City of Hous.*, 13 F.4th 427, 433 (5th Cir. 2021) (finding a substantial threat of enforcement where "the City did not disclaim its intent to enforce the [challenged ordinances] to the district court, in its appellate briefing, or during oral argument, and instead stressed the Ordinances' legitimacy and necessity").

Without any formal policy disavowing prosecution, the existence of the Line Warming Ban *itself* chills Brooklyn NAACP's exercise of its First Amendment rights, regardless of the Ban's history. "A plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; *the threat is latent in the existence of the statute*." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (emphasis added) (internal citations omitted). A criminal prohibition like the Line Warming Ban "may deter constitutionally protected expression because most people are frightened of violating criminal statutes especially when the gains are slight, as they would be for people seeking only to

make a political point . . . ." *Id.* The fact that others might have gotten away with violating the Line Warming Ban without suffering prosecution is small comfort to Brooklyn NAACP's all-volunteer leadership, who, quite reasonably, are unwilling to engage in undisputedly illegal conduct on that basis alone. (*See* Williams Decl. ¶ 15, Bakiriddin Decl. ¶ 21).

c) Plaintiff satisfies the remaining requirements of Article III standing.

Brooklyn NAACP also satisfies the remaining elements of standing—traceability and redressability. Traceability requires that the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (cleaned up). "To satisfy the redressability element of Article III standing, a plaintiff must show that it is likely, as opposed to merely speculative, that the alleged injury will be redressed by a favorable decision." *Soule v. Conn. Ass'n of Schs., Inc.*, 90 F.4th 34, 47 (2d Cir. 2023) (en banc) (quoting *Lujan*, 504 U.S. at 561) (internal alteration omitted). "A plaintiff makes this showing when the relief sought 'would serve to eliminate any effects of' the alleged legal violation that produced the injury in fact." *Id.* (internal alteration omitted) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105–06 (1998)). Article III therefore requires only that a judgment in favor of Brooklyn NAACP "'would at least partially redress' the alleged injury." *Id.* at 48 (quoting *Meese v. Keene*, 48 U.S. 465, 476 (1987)).

As explained in Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶¶ 39-40, New York law charges both the State Board and the City Board with preventing and investigating violations of the Line Warming Ban. That is sufficient to satisfy both traceability and redressability. The declaratory and injunctive relief that Brooklyn NAACP seeks against Defendants would, at the very least, "partially redress" the Ban's chilling effect on Brooklyn NAACP's First Amendment rights. *Meese*, 481 U.S. at 476. Article III requires nothing more.

II. The Line Warming Ban violates the First Amendment.

At this stage of the litigation, Brooklyn NAACP's First Amendment claims hinge entirely on whether its planned line warming activity is expressive conduct protected by the First Amendment. The Court has already held as a matter of law that, once it is established that Plaintiff's conduct implicates the First Amendment, (1) strict scrutiny, not intermediate scrutiny applies, MTD Op. 33, and (2) the Line Warming Ban cannot survive either level of scrutiny, *id.* at 38-39 & n.14.

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

Brooklyn NAACP's planned line warming is expressive conduct protected by the First Amendment. "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) (cleaned up); *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).

As the Court has explained, "the expressive nature of conduct is a factual question evaluated on a case-by-case basis." MTD Op. 31. The Court has further held that, "[a]ccepting the facts as presented in the Amended Complaint . . . Plaintiff has alleged both its intent to convey a particularized message and a great likelihood that viewers will understand that message." *Id.* at 27. The evidence proves the allegations of the Amended Complaint and, accordingly, that line warming is expressive conduct. Two federal district courts, faced with similar factual records, have

reached that conclusion. *In re Ga. Senate Bill 202*, No. 1:21-CV-01229-JPB, 2023 WL 5334617, at *7–8 (N.D. Ga. Aug. 18, 2023) ("*S.B. 202 II*"); *In re Georgia Senate Bill 202*, 622 F. Supp. 3d 1312, 1327–29 (N.D. Ga. 2022) ("*S.B. 202 I*"); *League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1129 (N.D. Fla. 2022) ("*LOWV*"), *reversed in part on other grounds sub nom. League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905 (11th Cir. 2023). There is "no reason to deviate from the conclusion of these well-reasoned and thorough opinions." MTD Op. 26.

That Brooklyn NAACP and its members intend to communicate a message through line warming is "readily apparent." (*Id.* at 27). Plaintiff has substantiated the allegations in the Amended Complaint with testimony from two Brooklyn NAACP members. Brooklyn NAACP's President testifies that, through line warming, she "seeks to convey a celebration of our democracy and of the dedicated voters who endure weather and long lines 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." (Williams Decl. ¶ 33). Joan Bakiriddin, Chair of Brooklyn NAACP's Civic Engagement Committee, echoes this sentiment, testifying that through line warming, Brooklyn NAACP would "remind [voters] that many people fought hard for their right to vote," and that "they should fight to exercise it even when it is hard or inconvenient." (Bakiriddin Decl. ¶ 23). Brooklyn NAACP "want[s] voters to know that they have support from Brooklyn NAACP volunteers" and "hope that message encourages voters to exercise" their right to vote. (*Id.*) As the Court has already concluded, this is "a sufficiently particularized message to warrant First Amendment protection." MTD Op. 27.

Brooklyn NAACP "has also shown a sufficient likelihood that its message will be understood by those viewing it." MTD Op. 28. The Court has suggested that Plaintiff may "prove

ultimately that viewers will understand its message" by "offering the testimony of individuals who have benefited from, and understood the meaning of, line warming in the past"—though this is not "the only way Plaintiff can substantiate it's claim" *Id.* at 28–29 & n.9. Plaintiff has offered the testimony of Kayla Hart, a voter who has received food and drink while waiting in line at the polls in Atlanta, Georgia. (Decl. of Kayla Hart, ¶ 10). Ms. Hart testifies that in the May 2018 primary election in Georgia, she stood in line for over three hours on a sweltering hot day. (*Id.* ¶¶ 6-8). She was grateful for the snacks, water, and chicken sandwiches being handed out to voters in line. (*Id.* ¶¶ 10-13). She "got the message that the volunteers cared about [her] right to vote, appreciated that [she] was using [her] voice, and wanted to make sure that [she] was able to cast [her] ballot." (*Id.* ¶ 13). Ms. Hart has "seen people leave long voting lines" in the past and "know[s] firsthand how important it is to ensure that people feel solidarity while waiting to vote, especially in communities of color that feel disenfranchised to begin with." (*Id.* ¶ 14). Ms. Hart's testimony is substantially similar to testimony relied upon by the court in *S.B. 202 II*, 2023 WL 5334617, at *8, and *S.B. 202 I*, 622 F. Supp. 3d at 1327-29, to establish that line warming is likely to be understood as expressive conduct.

In addition to the testimony of Ms. Hart, Plaintiff has presented testimony concerning the reaction of voters to Brooklyn NAACP's 2020 "early vote kickoff rally" at the Barclay's Center. (*See* Williams Decl. ¶¶ 19, 26–30; Bakiriddin Decl. ¶¶ 14, 16–19). Although Brooklyn NAACP did not distribute food at this event, it did distribute face masks and hand sanitizer. (Williams Decl. ¶¶ 21–23; Bakiriddin Decl. ¶ 14). Branch members recall that voters reacted with "welcoming smiles and expressions of gratitude." (Williams Decl. ¶ 28). Voters also demonstrated that they understood Brooklyn NAACP's intended message of solidarity and support with nonverbal gestures such as a thumbs up or a raised fist. (*Id.* ¶ 29). The Florida federal district court relied on

similar testimony from volunteers who have provided line warming in the past to conclude that voters understand line warming to be expressive conduct. *LOWV*, 595 F. Supp. 3d at 1129.

Finally, "context links Plaintiff's intended conduct (providing physical support to voters) to its intended message." MTD Op. 28. The Eleventh Circuit has developed a multi-factor test to determine whether conduct is likely to be perceived as expressing a message, in the specific context of food sharing. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018). "Although not binding on this Court, the Eleventh Circuit's multi-factor context test from *Food Not Bombs* . . . provides further support for the contention that voters will comprehend Plaintiff's intended message." MTD Op. 28 n.8. As described in detail in Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶¶ 46-53, the evidence shows that each of the *Food Not Bombs* factors is present here. These factors "apply to the present case in substantially the same way they applied to the line warming at issue in *LOWV* and *S.B. 202* [*I*]." MTD Op. 28 n.8.

b) Strict scrutiny applies.

"Having determined that Plaintiff's intended conduct implicates the First Amendment," the next consideration is "whether the Line Warming Ban is a justified restriction on that expression." *Id.* at 31. As the Court has already concluded, the Line Warming Ban is subject to strict scrutiny because it is a content-based restriction on First Amendment-protected activity. MTD Op. 33. The Ban "prohibits only a certain category of expression"—i.e., line warming. *Id.* "It does not prohibit all communication with prospective voters, but instead selectively carves out line warming." *Id.*

But the Ban is also subject to strict scrutiny for the independent reason that it burdens Brooklyn NAACP's "core political speech." Brooklyn NAACP's volunteer efforts at polling places, including providing food, water, and other assistance, as well as their conversations and

interactions with voters, 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, 421–22 (1988). Limitations on core political speech invariably trigger strict scrutiny. *See id.* 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).

Although "core political speech" cases often involve restrictions on advocacy for or against candidates or ballot issues, that is not always the case. In addition to "express advocacy" for or against a particular candidate or ballot measure, core political speech includes "issue advocacy," which in this context means "speech about public issues more generally." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456, 477-81 (2007). Courts have applied the "core political speech" label to, for example, advocacy for reform of immigration policies and practices, *Ragbir v. Homan*, 923 F.3d 53, 70 (2d Cir. 2019), *vacated on other grounds sub nom. Pham v. Ragbir*, 141 S. Ct. 227 (2020) (mem.), and sending pre-filled absentee ballot applications to voters, *VoteAmerica v. Raffensperger*, No. 1:21-CV-01390-JPB, 2023 WL 6296928, at *9 (N.D. Ga. Sept. 27, 2023); *VoteAmerica v. Schwab*, No. 21-2253-KHV, 2023 WL 3251009, at *13–14 (D. Kan. May 4, 2023). Brooklyn NAACP's message of support for voters and protest of long voting lines fits well within this category of expression. "Encouraging others to vote or engage in the political process is the essence of First Amendment expression. At a minimum, discussing the right to vote and urging participation in the political process is a matter of societal concern because voting brings about 'political and social changes desired by the people.'" *Raffensperger*, 2023 WL 6296928, at *9 (quoting *Meyer*, 486 U.S. at 421). Where such speech is involved, "the importance of First

Amendment protections is at its zenith," and the protection afforded by strict scrutiny applies. *Ragbir*, 923 F.3d at 70 (emphasis omitted) (quoting *Meyer*, 486 U.S. at 421–22).

Finally, as the Court has explained, the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), does not apply here. MTD Op. 34–35. *O'Brien*'s intermediate scrutiny 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). That is, it applies only to content-neutral regulations. *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 27 (2010). "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." *City of Erie*, 529 U.S. at 289.

c) The Line Warming Ban is not narrowly tailored.

The precise level of scrutiny is immaterial here, however, because the Line Warming Ban fails constitutional muster under either standard. MTD Op. 35–37. Intermediate scrutiny under *O'Brien* requires that the challenged restriction must be "narrowly tailored," meaning it is "no greater than essential" to achieving the state's substantial interest. *Young v. N.Y.C. Trans. Auth.*, 903 F.2d 146, 157 (2d Cir. 1990) (quoting O'Brien, 391 U.S. at 377). In other words, the regulation "need not be the least restrictive or least intrusive means" of achieving the state's goal, as strict scrutiny would require, but the state still must show that its interest "would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (internal quotation marks omitted). 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.

The only state interest that Defendants have cited in defense of the Ban is an interest in "insulat[ing] the voter from undue influence, intimidation, or interference in participating in the election process." (Connolly Tr. at 70:7-11). But the Ban criminalizes a vast amount of innocent conduct that does not implicate this interest. It has no apparent geographic limit, and it applies equally to non-partisan line warming efforts having nothing to do with its stated goals. That is not narrow tailoring. 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." *Ward*, 491 U.S. 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). Brooklyn NAACP's nonpartisan line warming is not an "appropriately targeted evil." *Id.*

Further, as explained in greater detail in Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶¶ 68-70, the Ban is both under- and over-inclusive. It criminalizes a vast amount of protected expression having nothing to do with the state's stated interests, while *permitting* other interactions that are far more closely related to those same interests. The First Amendment does not tolerate such imprecision. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 805 (2011) (Laws affecting First Amendment rights "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993))).

For the same reasons that the Ban is insufficiently tailored under *O'Brien*, it cannot satisfy the more demanding strict scrutiny test. A speech restriction survives strict scrutiny only if it is "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573

U.S. 464, 478 (2014). 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, voter intimidation, and vote buying. *See* N.Y. Elec. Law §§ 8-104(1), 17-130(10), 17-142, 17-212. Defendants have not explained 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. 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.

III. The Line Warming Ban is facially invalid because it 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. "[I]mprecise laws can be attacked on their face under two different doctrines." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). "First, the overbreadth doctrine permits the facial validation 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.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612–15 (1973)). "Second, even if an enactment does not reach a

substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.*

The Ban 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.

"For reasons that are by now familiar," the Line Warming Ban is facially overbroad. MTD Op. 49. The Ban's expansive breadth restricts an unacceptably large amount of constitutionally protected speech. *See United States v. Williams*, 553 U.S. 285, 292 (2008). "Overbreadth challenges are a form of First Amendment challenge and an exception to the general rule against third-party standing." *Farrell v. Burke*, 449 F.3d 470, 498 (2d Cir. 2006). 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 (1963)). 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 (quoting *Button*, 371 U.S. at 433). Even "[a] clear and precise enactment may nevertheless be

'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).

As explained above, the evidence shows that "the Line Warming Ban restricts the expressive act of offering food and water to voters in encouragement of their exercise of the franchise." MTD Op. 49. The Ban "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). It 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 intimidating voters or influencing voters to support particular candidates or issues (both otherwise illegal under New York law, *see* N.Y. Elec. Law §§ 8-104, 17-212, 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 v. Freeman*, 504 U.S. 191, 211 (1992). 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 Brooklyn NAACP, that has no discernable relation to its stated goals. *See* MTD Op. 48-50.

b) The Line Warming Ban is vague.

The Line Warming Ban must also be struck down for the independent reason that it is unconstitutionally vague under the First and Fourteenth Amendment. *See Farrell*, 449 F.3d at 484–85. 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 Brooklyn NAACP'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) (cleaned up). With respect to facial vagueness challenges, the Supreme Court's cases "recognize a different approach where the statute at issue purports to regulate or proscribe rights of speech or press protected by the First Amendment. Although a statute may be neither vague, nor overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others." MTD Op. 45 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 619-20 (1971) (White, J. dissenting)); *see also United States v. Loy*, 237 F.3d 251, 259 (3d Cir. 2001) (Even a party "whose conduct is at the 'core' of the activities clearly covered by the statute's terms may . . . raise a vagueness defense if the statute is one that is likely to chill the exercise of constitutional protected conduct."); *Farrell*, 449 F.3d at 497 (same); *cf. Union Square Supply Inc. v. De Blasio*, 572 F. Supp. 3d 15, 21 (S.D.N.Y. 2021) ("When a statute *does not implicate First Amendment rights*, courts generally evaluate a vagueness challenge in light of the specific facts of the case at hand and not with regard to the facial validity of the statute or regulation at issue." (emphasis added) (cleaned up)).

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, 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). Indeed, the statute's structure is so confusing that even the State Board of Elections' Rule 30(b)(6) designee at times gave conflicting testimony about what is and is not allowed under the Ban. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶ 80.

Further, several undefined terms leave Brooklyn NAACP 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. N.Y. Elec. Law § 17-140. The Ban apparently contains *no territorial limitation* so long as the offering is made "in connection with or in respect of any election." *Id.* That phrase potentially encompasses all manner of food sharing at any distance from a polling place. As the Court has observed, it is not apparent "whether it would apply to an individual who offers snacks to voters in the polling place parking lot before they get in line to

vote, or whether it bars Plaintiff from distributing snacks to New York voters on election day at its Brooklyn headquarters." MTD Op. 46.

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."[3] But the Ban plainly is not limited to food. Defendants have relied 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.[4] *See* Proposed Findings of Fact and Conclusions of Law ¶¶ 82-85.[5]

These vague provisions are not "readily susceptible" to any narrowing construction that saves the Ban from vagueness. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000). "[F]ederal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Boos v. Barry*, 485 U.S. 312, 330

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

[4] *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).

[5] Legislative history offers no clarity on the Ban's scope. *See* MTD Op. 47. "The New York Court of Appeals commonly relies on submissions included in the Bill Jacket as a source of legislative history." *Ortiz v. CIOX Health LLC*, 386 F. Supp. 3d 308, 315 n.5 (S.D.N.Y. 2019) (citing *Kimmel v. State*, 29 N.Y.3d 386, 398-400 (2017)). The bill jacket consists of materials transmitted when the Legislature submits a bill to the Governor for approval. *Id.* at 315. There is no bill jacket available for L. 1906, ch. 503, which first enacted the relevant language. *See Bill, Veto and Recall Jackets*, N.Y. State Library (Oct. 6, 2022), https://www.nysl.nysed.gov/billjack.htm (explaining that bill jackets are available only for 1905 and 1921 to the present); *Legislative Bill and Veto Jackets, Series 12590*, New York State Archives (last accessed Feb. 4, 2024), https://www.archives.nysed.gov/research/featured-topic-bill-and-veto-jackets ("Pre-1920 records are closed to research because of extreme fragility.").

(1988). Because the Court "may not rewrite a state law to conform it to constitutional requirements," the Ban must be struck down. *Sorrell*, 221 F.3d at 386 (cleaned up).

CONCLUSION

This Court should declare the Line Warming Ban unconstitutional and enter a permanent injunction prohibiting Defendants from enforcing it.

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Respectfully submitted,

By: */s/ Lalitha D. Madduri*

Lalitha D. Madduri*
Jyoti Jasrasaria*
Richard A. Medina
Meaghan Elysia Mixon*
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Washington, DC 20001
Tel: 202.968.4490
Fax: 202.968.4498
LMadduri@elias.law
JJasrasaria@elias.law
RMedina@elias.law
MMixon@elias.law

Abha Khanna*
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
Tel: 206.656.0177
Fax: 202.968.4498
AKhanna@elias.law

Andrew G. Celli
EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP
600 Fifth Avenue, 10th Floor
New York, NY 10020
Tel: 212.763.5000
Fax: 212.763.5001
ACelli@ecbawm.com

* Admitted *pro hac vice*