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 RESPONSE TO STATE BOARD DEFENDANTS' 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 response to the Pre-Trial Memorandum of Law of the State Board of Elections Defendants (the "State Board"), in the above-captioned case.

ARGUMENT

The State Board's Pre-Trial Memorandum of Law relies on recycled and inconsistent arguments rather than engaging with the binding precedent and law of the case on which Plaintiff's claims are based. As Brooklyn NAACP's pre-trial submissions make clear, and as detailed below, the organization has established all three elements of Article III standing: injury-in-fact, traceability, and redressability. Furthermore, it is entitled to judgment on the merits because it has demonstrated that line warming is First Amendment-protected expressive conduct, and the State Board's proposed limiting construction cannot save the Ban from failing intermediate scrutiny or Brooklyn NAACP's overbreadth and vagueness challenges.

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

As set forth in its pre-trial submissions, Brooklyn NAACP has established standing for each of its claims.[1] Plaintiff's Proposed Findings of Fact and Conclusions of Law, ECF No. 86 ¶¶ 24–41 ("Plf. FOF/COL"); Plaintiff's Pre-Trial Memorandum of Law, ECF No. 89 at 2–8 ("Plf. Mem."). The State Board's arguments rely on mischaracterizations of the law and the evidence.

A. Brooklyn NAACP satisfies Article III's injury in fact requirement.

Brooklyn NAACP has demonstrated imminent injury in fact sufficient to confer standing. As the State Board acknowledges, to establish injury for a pre-enforcement challenge, a plaintiff

[1] Because, as set forth below, Brooklyn NAACP meets Article III's standing requirements for its First Amendment claim, it also has standing to pursue its separate overbreadth and vagueness claims. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (explaining that standing requirements in the overbreadth and vagueness contexts are relaxed); *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (collecting cases); *Farrell v. Burke*, 449 F.3d 470, 498 (2d Cir. 2006).

must have (1) concrete plans to engage in the proscribed conduct and (2) a credible fear of prosecution. *See* State Board Defendants' Pre-Trial Memorandum of Law, ECF No. 82 at 3–9 (emphasis added) ("State Bd. Mem."); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The evidence shows that Brooklyn NAACP has both.

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

Brooklyn NAACP has established its intention to engage in line warming with more than sufficient specificity. *See* Plf. FOF/COL ¶¶ 29–32. As early as 2012, Brooklyn NAACP recognized that there was a need within its community to support voters waiting in long lines to cast their ballots and began discussing ways to address that need. (Declaration of L. Joy Williams ¶¶ 12–14 ("Williams Decl.")). Brooklyn NAACP refrained from providing line assistance in the election years that followed, however, due to fear of the Ban's enforcement. (Williams Decl. ¶ 15); *see also Latino Officers Ass'n v. Safir*, 170 F.3d 167, 170 (2d Cir. 1999) (finding that evidence of declining to engage in expression because of the challenged prohibition was sufficient for standing). Nevertheless, Brooklyn NAACP's community has continued to experience long lines, and its Civic Engagement Committee has periodically revisited the topic of providing line support. (Williams Decl. ¶¶ 16–17; Declaration of Joan Alexander Bakiriddin ¶¶ 20, 22 ("Bakiriddin Decl.")).

Although Brooklyn NAACP has never conducted line warming of the sort it intends to engage in if it is successful in this lawsuit, its related activities demonstrate a readiness to do so. For example, Brooklyn NAACP often provides food and refreshments at its other get-out-the-vote events. (Williams Decl. ¶ 6; Bakiriddin Decl. ¶ 6). And in 2020, Brooklyn NAACP planned and organized an early vote rally at Barclay's Center, during which its volunteers and members walked the lines providing voters with personal protective equipment (PPE), including face masks, shields, and hand sanitizer. (Williams Decl. ¶¶ 19–30; Bakiriddin Decl. ¶¶ 14–19).

Now that the 2024 presidential election is fast approaching, Brooklyn NAACP is again discussing plans for how best to support voters waiting in line at the polls. (Williams Decl. ¶ 38; Bakiriddin Decl. ¶¶ 20–23). Were the Ban enjoined, Brooklyn NAACP's "members and volunteers would provide sundries such as bottled water, granola bars, donuts, potato chips, or pizza to voters already waiting in the long lines that continue to plague our surrounding communities." (Williams Decl. ¶ 32; Bakiriddin Decl. ¶¶ 20–22). Brooklyn NAACP stands ready and able to engage in such activity and has not only discussed what financial and volunteer resources it will need, but plans to use reports from recent election cycles to determine which communities are most likely to have the longest lines and thus where it should focus its efforts. (Bakiriddin Decl. ¶ 22).

Brooklyn NAACP's plans are thus readily distinguishable from the "'some day' intentions" that courts have rejected.[2] Brooklyn NAACP has long engaged in GOTV and food-sharing activities and actively considered and planned ways to support voters in line, including in preparation for the April 2024 primary. (Williams Decl. ¶ 38). Brooklyn NAACP's engagement around line warming is thus entirely distinct from the circumstances in *Carney v. Adams*, 592 U.S. 53 (2020), in which the plaintiff's own behavior leading up to the lawsuit's filing indicated little more than "a desire to vindicate his view of the law" rather than being "able and ready" to engage in the prohibited conduct "in the reasonably imminent future." *Id.* at 63–64. Even in *Carney*, though, the Court reiterated that a plaintiff need not support an intent with a "formal" plan where

[2] The best authority the State Board can muster for its contrary position is an improper citation to an unpublished summary order from the Second Circuit, *Am. Charities for Reasonable Fundraising Regul., Inc. v. Shiffrin*, No. 99-7506, 2000 WL 232656, at *2 (2d Cir. 2000) (unpublished). Second Circuit Local Rule 32.1.1(b)(2) prohibits citation of summary orders issued prior to January 1, 2007. *See also Cain v. Esthetique*, 182 F. Supp. 3d 54, 71 n.15 (S.D.N.Y. 2016) (explaining that citations to summary orders issued before January 1, 2007 "must be disregarded"). Nonetheless, the instant case is readily distinguishable from *American Charities*, where the plaintiff had no history of similar conduct and had taken no steps to even operate in the state where it allegedly intended to engage in the proscribed conduct.

doing so would be a "futile gesture." *Id.* at 66. Defendants' complaint that Brooklyn NAACP has not produced formal written plans or budgets is therefore beside the point.[3]

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

Brooklyn NAACP has also established a credible threat of prosecution. The State Board has steadfastly refused to disavow enforcing the Ban in the future, which itself is evidence that a credible threat exists. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014) (listing absence of disavowal by government as further support of credible threat). In fact, the State Board contends that the Ban "is *necessary*, in the broader context of the N.Y. Election Law, to fully insulate voters from real or perceived influence and interference." State Bd. Mem. at 17 (emphasis added). The State Board's contradictory description of the Ban as "moribund" *in the same filing*, is in direct tension with its argument that the Ban is *necessary* to achieve the state's compelling interests. *Compare id.* at 9 (arguing the threat of enforcement is "merely 'chimerical'"), *with id.* at 17 (explaining the Ban's necessity). Whichever description the State Board actually believes, it comes nowhere close to a disavowal. And Brooklyn NAACP cannot be required to expose itself to criminal liability to test the likelihood that this criminal statute will be enforced. *See N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996).

Each of the cases cited by the State Board on this point is readily distinguishable. In *Susan B. Anthony List v. Driehaus*, the plaintiff faced the threat of enforcement under a sweeping statute that criminalized its speech. 573 U.S. at 152–53. The Court looked to enforcement history as the most obvious evidence that the threat of enforcement was substantial, but never deemed it essential

[3] The State Board also cites *National Organization for Marriage v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013), a case that evaluates not standing, but constitutional ripeness. In any event, the court there determined that the plaintiff's complaint presented a live case or controversy because, like here, the challenged prohibition reasonably chilled the plaintiff's expressive conduct. *Id.*

as the State Board implies. *Id.* at 164–67. So, too, in *Steffel v. Thompson*, where the Court deemed warnings from officers and personal knowledge of an arrest under the challenged provisions sufficient—but not necessary—to show a credible threat. 415 U.S. 452, 456–460 (1974).

Kearns v. Cuomo, 981 F.3d 200 (2d Cir. 2020), is particularly inapposite. *Kearns* was not a First Amendment case. Instead, Kearns, a state official, claimed that he risked prosecution under the Immigration and Nationality Act ("INA") if he implemented an allegedly preempted state statute—New York's "Green Light Law." *Id.* at 207. The Second Circuit disagreed because that interpretation of the INA was "directly at odds with" a separate federal statute that "expressly permits" the Green Light Law. *Id.* at 208. The court relied on "the case law construing [the INA]" as well as legislative history to conclude that the INA would not apply to Kearns. *Id.* at 208–10. Kearns's proposed interpretation of the INA was further undermined by the fact that he "d[id] not identify a single instance . . . where a county clerk was prosecuted" for similar conduct. *Id.* at 210.

Similarly, the plaintiff in *Johnson v. District of Columbia* relied on an objectively unreasonable interpretation of the challenged provision to argue that he faced a threat of prosecution. 71 F. Supp. 3d 155, 158, 161 (D.D.C. 2014). Johnson ultimately failed to prove standing because the defendant explicitly rejected Johnson's interpretation and, moreover, explicitly disavowed "any intention to prosecute" Johnson for his intended speech. *Id.* at 161–62.

Here, unlike in *Kearns* and *Johnson*, there is no dispute that the Line Warming Ban expressly proscribes the Brooklyn NAACP's planned conduct, and no defendant has explicitly disavowed any intention of further prosecution.

The *only* case the State Board has cited that applies the "moribund" statute exception in the way the State Board attempts to do here is *Poe v. Ullman*, 367 U.S. 497 (1961). But, as the Court has already noted, *Poe* "illustrates the danger of failing to entertain pre-enforcement

challenges." Decision and Order, ECF No. 50 at 19 ("MTD Op."). Indeed, just a few years later, "the appellants in *Griswold v. Connecticut*, 381 U.S. 479 (1965), were prosecuted" under the very same law challenged in *Poe*. *Id.* And here, unlike in *Poe*, there is no history of "ubiquitous, open" violation of the challenged statute. 367 U.S. at 502.

The State Board's contention that "there is a significant history of open and notorious conduct that would constitute a technical violation of the statute" lacks support. The State Board identifies only *two* examples of such conduct. First, the State Board argues that "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." State Bd. Mem. at 8. But the legislative history *also* reflects that prohibiting that practice was "not the intent of the legislation as originally proposed." (Ex. D-13 at 11). This practice also differed markedly from Brooklyn NAACP's proposed conduct: It was "the practice in most upstate towns and cities that candy, lollipops and similar snacks are available at the polls for anyone who wishes them. . . . The normal practice is that there are boxes of these items and no one gives them to any individual, but they are taken by the people who appear at the polling place or their children." (*Id.* at 12). That is a far cry from distributing food and drink to voters waiting in line to vote outside the polling place. And, since 1992, the provision of such items inside the polling place has been expressly *permitted* by the Ban. Act of May 19, 1906, ch. 503, 1906 N.Y. Laws 1390.

Second, the State Board identifies two organizations, Pizza to the Polls and Chefs to the Polls, that it alleges were engaged in similar conduct during the 2020 election cycle. State Bd. Mem. at 8. For starters, this contention relies entirely upon inadmissible hearsay. The State Board's witness, Mr. Connolly, testifies that the State Board is "aware" of these groups. (Declaration of Thomas Connolly ¶ 56 ("Connolly Decl.")). There is no indication that Mr. Connolly has himself

witnessed or has personal knowledge of any of the alleged activity beyond what he has seen in news reports. (*Id.* ¶¶ 56-57 (referencing news videos and articles)); Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). And the videos and news reports upon which Mr. Connolly relies are themselves inadmissible hearsay, as explained in Plaintiff's motion *in limine*. ECF No. 88 at 5-6.[4] Moreover, there is no indication of *when* the State Board became "aware" of these groups' activity, whether at the time it occurred or years after the fact in preparation for this litigation. In any event, the handful of discrete examples from 2020 offered by the State Board do not suffice to demonstrate a "significant history of open and notorious conduct." *Cf. Poe* 367 U.S. at 502 (describing a history of "ubiquitous, open" violation of the challenged statute).

The State Board's argument that Brooklyn NAACP's "professed fear of prosecution is undercut by its performance of conduct similar to the Proposed Conduct without apprehension" is puzzling. State Bd. Mem. at 8. According to the State Board, the hand sanitizer and face masks distributed by Brooklyn NAACP at the Barclays Center in 2020 are "not covered by Section 17-140." *Id.* The fact that Brooklyn NAACP faced no consequences for this action therefore says little about its likelihood of prosecution for engaging in conduct that is *undisputedly* at the core of the Ban's proscription. Further, the evidence shows that Brooklyn NAACP *was* in fact apprehensive about the threat of prosecution. (Williams Decl. ¶ 22; Bakiriddin Decl. ¶ 15; Williams Tr. at 68:14–19). That is because, as Plaintiff has explained, the Ban is vague as to what items do and do not fall within its ambit. *See infra* III.B. Under the "emergency" circumstances of the COVID-19 pandemic, that uncertainty was overcome by Brooklyn NAACP's desire to support voters and keep

[4] Upon closer scrutiny, the State Board's video exhibits appear to show individuals distributing food items *near* the polls, but not directly to voters waiting in line. *See* (Ex. D-16; Ex. D-17). According to the State Board's limiting construction, that activity would not violate the Ban.

them safe. (Williams Tr. at 71:12-19). That says nothing about Brooklyn NAACP's fear of prosecution for distributing *undisputedly* prohibited items, such as food, in a post-pandemic world. Indeed, for at least eight years prior to 2020, Brooklyn NAACP refrained from distributing food or drink at the polls for fear of prosecution. (Williams Decl. ¶¶ 14–15).

B. Brooklyn NAACP satisfies Article III's traceability requirement.

Brooklyn NAACP also satisfies Article III's traceability requirement. The Second Circuit has "been clear that the causal-connection element of Article III standing, which is the requirement that the plaintiff's injury be 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, does not create an onerous standard." *Ateres Bais Yaakov Acad. of Rockland v. Town of Clarkstown*, 88 F.4th 344, 352–53 (2d Cir. 2023). For example, "[a] defendant's conduct that injures a plaintiff but does so only indirectly, after intervening conduct by another person, may suffice for Article III standing." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 55–56 (2d Cir. 2016). Likewise, a plaintiff can show traceability where the injury suffered is "produced by [the] determinative or coercive effect" of the defendant's conduct "upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997); *see also id.* at 168-69 (admonishing that courts should not "equate[] injury 'fairly traceable' to the defendant with [an] injury as to which the defendant's actions are the very last step in the chain of causation"). Finally, as made clear in two cases upon which the State Board relies, in a pre-enforcement challenge, a plaintiff need only show that the named defendant *has* some enforcement authority—not that the defendant has *used* that authority. *Compare* State Bd. Mem. at 9 (arguing that Plaintiff's injury is not traceable because the State Board has never enforced the Ban), *with Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1201 (11th Cir. 2021) ("[W]here, as here, a plaintiff has sued to enjoin a government official from

enforcing a law, he must show, at the very least, that the official has the authority to enforce the particular provision that he has challenged[.]"), and *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957–58 (8th Cir. 2015) (same).

Brooklyn NAACP easily meets that standard here, where New York law charges both the State Board and the City Board with preventing and investigating violations of the Line Warming Ban. *See* Plf. FOF/COL ¶¶ 39–40. The State Board itself explains that its chief enforcement counsel has authority "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," and that the State Board's commissioners then conduct a vote on whether there is "reasonable cause to believe that a violation warranting criminal prosecution has taken place." State Bd. Mem. at 9–10 (citing N.Y. Elec. Law § 3-104) (cleaned up). If the commissioners vote that there is such cause, then 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." *Id.* at 10 (citing N.Y. Elec. Law § 3-104(5)(b)) (cleaned up). That the State Board lacks the ultimate authority to prosecute is beside the point where it has statutory authority to investigate and refer violations for prosecution.

Conspicuously, the State Board relies entirely on out-of-circuit cases to suggest the opposite. But even those cases cannot help the State Board here. First, this is not a case like *Digital Recognition Network, Inc.*, 803 F.3d at 958, or *Okpalobi v. Foster*, 244 F.3d 405, 425–26 (5th Cir. 2001), in which the challenged laws provided for enforcement *only* through private civil actions and the named government defendants thus had no authority to enforce them. Nor is it like *Support Working Animals, Inc.*, 8 F.4th at 1204, or *Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1253–54 (11th Cir. 2020), both of which involved—at best—general supervisory powers, not

affirmative duties to ensure compliance with the law by the persons within their jurisdiction. And neither case involved a pre-enforcement First Amendment challenge, in which the Eleventh Circuit has explained that "we needn't know for certain how the rules will be applied to fairly conclude that they chill [plaintiff's] speech." *Harrell v. Fla. Bar*, 608 F.3d 1241, 1260 n.7 (11th Cir. 2010) (discussing traceability). Moreover, *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1119, 1122 (11th Cir. 2022), a pre-enforcement First Amendment challenge that was decided by the Eleventh Circuit *after* all of those opinions were issued, found no "real dispute" that plaintiffs' injuries were traceable to a defendant who implemented the challenged policy and exerted indirect pressure to comply, even if that defendant did not have any actual "power to punish."

C. Brooklyn NAACP satisfies Article III's redressability requirement.

Finally, Brooklyn NAACP easily satisfies Article III's redressability requirement. As an initial matter, "traceability and redressability—often travel together." *Support Working Animals*, 8 F.4th at 1201 (citing 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.5 (3d ed. 2021)). "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. 555, 561 (1992)) (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*, 481 U.S. 465, 476 (1987)).

The State Board's statutory authority and corresponding admissions make clear that, unlike

in the cases the State Board cites, Brooklyn NAACP is injured at least in part due to Defendants' powers to enforce the Ban. *Cf. Jacobson*, 974 F.3d at 1254 ("Because the Secretary will not cause any injury the voters and organizations might suffer, relief against her will not redress that injury—either 'directly or indirectly.'"); *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1299, 1302–04 (11th Cir. 2019) (holding that defendant had "no enforcement role whatsoever," that "the relief that plaintiffs request in this action wouldn't constrain" those with authority to remedy plaintiffs' concerns, and that there was "considerable uncertainty" about how those with such authority "would respond to plaintiffs' requested declaration . . . and injunction"). Namely, enjoining Defendants from enforcing the Ban would significantly alleviate the chill on Plaintiff's expression because Plaintiff would no longer be subject to Defendants using their investigative and referral powers to ensure compliance with the Ban. That is enough to satisfy Article III.

II. Brooklyn NAACP is entitled to judgment in its favor.

The State Board's arguments on the merits of Brooklyn NAACP's claims are unavailing. Brooklyn NAACP has established that its planned line warming activity is protected expressive conduct, which is the only open question that this Court must decide to resolve Plaintiff's First Amendment claim. The State Board attempts to evade the narrow tailoring requirement and the overbreadth and vagueness legal standards by insisting that the Ban does not mean what it says. But when the Ban is given its plain meaning, there remains little doubt that it violates Plaintiff's First and Fourteenth Amendment rights. And even if the Court were to adopt the State Board's atextual limiting construction, that would not be enough to save the Ban.

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

Brooklyn NAACP has demonstrated that line warming is First Amendment-protected activity. Notably, the only federal courts to have considered whether line warming is expressive conduct have concluded that it is. *See 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*"); *see also In re Ga. 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). This is because line warming is both "intended to be communicative" and "in context, would reasonably be understood by the viewer to be communicative." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 1584 U.S. 617, 657 (2018) (Thomas & Gorsuch, J.J., concurring in part). The State Board challenges only whether Brooklyn NAACP has established the second "objective 'comprehensibility of message'" portion of that test. State Bd. Mem. at 12. Its concerns lack merit.

First, the State Board makes much of the fact that Brooklyn NAACP relies, in part, on testimony from Ms. Kayla Hart, a voter who received line warming in Georgia—not New York. In doing so, the State Board again "overlook[s] a key factual difference between this case and the Florida and Georgia cases: line warming was lawful in Florida and Georgia prior to the enactment of the statutes challenged in *S.B. 202* and *LOWV*. New York, by contrast, has maintained some iteration of a line warming ban for more than a century." MTD Op. at 29. Given this factual difference, Ms. Hart has experienced line warming in a way that New York voters necessarily have not. And although Georgia is not New York, much of the "context" surrounding the line warming Ms. Hart received is identical to what Brooklyn NAACP anticipates. *Cf. Zalewska v. County of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003) (distinguishing only between disparate contexts like "the wearing of a black armband in protest during the Vietnam War, compared with other types of activity, like choosing what to wear in the ordinary course of employment"). For example, Ms. Hart was at an early voting location where the line was more than three hours long and the majority of the voters were Black, (Declaration of Kayla Hart ¶¶ 6–7, 12 ("Hart Decl.")), similar to the early

voting locations in New York where Brooklyn NAACP intends to offer line warming support, *see* (Williams Decl. ¶ 25; Bakiriddin Decl. ¶ 22). Furthermore, the volunteers offering food and water at Ms. Hart's voting location were members of the community, (Hart Decl. ¶ 12), just like Brooklyn NAACP's volunteers, *see* (Williams Decl. ¶¶ 5, 10; Bakiriddin Decl. ¶ 12). Ms. Hart's testimony—that she "got the message that the volunteers cared about [her] right to vote, appreciated that [she had] shown up to exercise that right, and wanted to make sure that [she] was able to cast [her] ballot," (Hart Decl. ¶ 13)—thus directly supports that voters receiving line warming from Brooklyn NAACP in the future will understand its message.

Brooklyn NAACP also provided testimony that confirms New York voters, too, understand the expressive nature of line warming. *Contra* State Bd. Mem. at 13 (suggesting Plaintiff will not provide such evidence). As Brooklyn NAACP detailed in its pre-trial submissions, voters responded to Plaintiff's distribution of PPE during its early vote rally in 2020 with gratitude and enthusiasm. *See* Plf. FOF/COL ¶ 58; *see also* (Williams Decl. ¶¶ 28–30; Bakiriddin Decl. ¶¶ 16–19). Ms. Joan Alexander Bakiriddin also testified that she herself experiences food sharing as a "sign of welcome." (Bakiriddin Decl. ¶ 10). 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.

Second, the State Board confusingly asserts both that Brooklyn NAACP improperly seeks to rely on written materials to establish the expressive nature of line warming and that those written materials are not specific enough. State Bd. Mem. at 13. But Brooklyn NAACP cites its intent to distribute literature as only one of several "surrounding circumstances" that may "lead the reasonable observer to view the conduct as conveying some sort of message." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1242 (11th Cir. 2018); *see id.*

(explaining that literature "distinguishes [plaintiff's] sharing of food with the public from relatives or friends simply eating together in the park"); *see also Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995) (holding that participation in a parade was expressive in part because group members "distributed a fact sheet describing the members' intentions" and held banners while they marched). And it does not matter whether the literature spells out the precise message Plaintiff intends to convey. *See Food Not Bombs*, 901 F.3d at 1244 ("Whether those banners said 'Food Not Bombs' or 'We Eat With the Homeless' adds nothing of legal significance to the First Amendment analysis."). The same "contextual clues" present in *Food Not Bombs* are present here, which the State Board does not dispute. Plf. FOF/COL ¶¶ 46–53.

The similarities between Brooklyn NAACP's line warming and the speech at issue in *Food Not Bombs* also underscore why the State Board's reliance on *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), is misplaced. *See Food Not Bombs*, 901 F.3d at 1244 (distinguishing *FAIR*). Unlike the law schools' conduct in *FAIR*, for which a reasonable observer would likely require "explanatory speech" to infer that the communication of any message, "the expressive component of [Plaintiff's] actions is [] created by the conduct itself." *FAIR*, 547 U.S. at 66. Sharing food and drink as a form of expression "dates back millennia," *Food Not Bombs*, 901 F.3d at 1243, and no "explanatory speech," *FAIR*, 547 U.S. at 66, is needed to infer that it conveys "some sort of message," *Food Not Bombs*, 901 F.3d at 1243, 1244. Brooklyn NAACP's message is intrinsic to its actions.

Lastly, this Court has already rejected the State Board's recycled argument that GOTV activities and voter assistance are generally not protected by the First Amendment. MTD Op. at 30–31. Although the State Board attempts to resurrect its position by citing a slate of previously uncited out-of-circuit cases, none of its cases move the needle on this Court's well-reasoned conclusion—there is "no [] bright line rule" that the First Amendment does not apply to "conduct

that supports voting." *Id.* The *LOWV* court, too, explained that ballot collection and similar means of facilitating voting are distinct from line warming activities. *See LOWV*, 595 F. Supp. 3d at 1128. Thus, opinions that have "nothing to do with 'line warming activities'" and focus instead on conduct that facilitates voting, like each of the cases the State Board cites, are inapposite to assessing the constitutional protections afforded to line warming activities. *Id.*; *see Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 392–93 (9th Cir. 2016) (ballot collection); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013) (voter registration drives); *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 773 (M.D. Tenn. 2020) (distributing absentee ballot applications); *Wise v. City of Portland*, 483 F. Supp. 3d 956, 966–67 (D. Or. 2020) (offering medical services).

Ultimately, the State Board provides no reason for this Court to deviate from its prior opinion or the *S.B. 202* and *LOWV* opinions, especially in light of Brooklyn NAACP's evidence supporting its expressive conduct through line warming.

B. The State Board's proposed limiting construction is not reasonable or readily apparent.

The State Board's narrow tailoring, overbreadth, and vagueness arguments all depend upon its proposed limiting construction of the phrase "in connection with or in respect of any election" to apply only to "voters actively engaged in the act of voting." State Bd. Mem. at 16. According to the State Board, "[t]his 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.* But "federal 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 (1988). The State Board's proposed construction lacks any support in the statute's text, structure, or history.

The State Board makes no attempt to justify its proposed narrowing construction by

reference to the statute's text. The text, which restricts conduct related to "any person" "in connection with or in respect of any election" contradicts their assertion that the Ban applies only to "voters" "actively engaged in the act of voting." State Bd. Mem. at 16; N.Y. Elec. Law § 17-140. And while the Ban provides some narrow exceptions for the provision of refreshments to election officials and administrators, it contains no limitations that support the State Board's assertion that the Ban exempts anyone who is not a "voter." Nor does the text of the statute provide any geographic limitation. N.Y. Elec. Law § 17-140. If the Legislature meant to restrict the application of the Ban to only "voters" and only while they were in line at a polling place, it could easily have done so. Instead, it made the Ban broadly applicable to "any person" "in connection with or in respect of any election," with only narrow, defined exceptions. Indeed, the State Board's proposed limiting construction contradicts the plain language of the statute. *Compare* Connolly Tr. 45:12-15 ("act of voting" begins when a voter joins a line before a poll opens) *with* N.Y. Elec. Law § 17-140 (the Ban applies only "during the hours of voting").

The State Board's proposed limiting construction is also directly contradicted by its own account of the Ban's history and purpose. By the State Board's reckoning, the Ban was originally adopted to "address the carnival-like atmosphere that had developed at or around the polls during an election." State Board Defendants' Proposed Findings of Fact and Conclusions of Law, ECF No. 81 ¶ 7; (Connolly Decl. ¶ 19). The State Board provides examples: In September 1860, the "Douglas Democrats" allegedly hosted a "Grand Political Carnival and Ox-roast." (Connolly Decl. ¶ 5). In October 1876, "there was a 'grand Republican barbecue'" held in Brooklyn. (*Id.* ¶ 6). Neither of these events were held in the vicinity of the polls—or indeed, even on election day. *Id.* Neither event, therefore, would be covered by the phrase "in connection with or in respect of any election," as the State Board interprets it. And yet, the State Board's deputy executive director,

Mr. Connolly, testifies that both events were held "*in connection with*" the 1860 and 1876 presidential elections. (*Id.* ¶¶ 5, 6 (emphasis added)).[5]

Finally, the State Board argues that the "canon of constitutional avoidance militates in favor" of accepting their arbitrary limitation. State Bd. Mem. at 16. But the State Board asks this Court to go far beyond the canon of constitutional avoidance—which requires "competing plausible interpretations," *Clark v. Martinez*, 543 U.S. 371, 381 (2005), not present here—and instead to rewrite the statue entirely. Federal courts "may not rewrite a state law to conform it to constitutional requirements." *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (cleaned up). The canon of constitutional avoidance must be applied particularly judiciously—if at all—where a federal court is interpreting a *state* statute. That is because "a federal court's application of the canon of constitutional avoidance to a state statute is especially likely to create [a] 'friction-generating error' between its interpretation and that of state courts." *Valls v. Allstate Ins. Co.*, 919 F.3d 739, 743 (2d Cir. 2019) (quoting *Tunick v. Safir*, 209 F.3d 67, 75–76 (2d Cir. 2000)). The cases cited by the State Board both required federal courts to interpret *federal* statutes. *See Clark v. Martinez*, 543 U.S. 371, 377 (2005) (8 U.S.C. § 1231(a)(6)); *Doyle v. U.S. Dep't of Homeland Sec.*, 959 F.3d 72, 77 (2d Cir. 2020) (Freedom of Information Act).

C. The Line Warming Ban cannot survive intermediate scrutiny, let alone strict scrutiny.

The State Board offers no reason to depart from the Court's sound conclusion that the Line Warming Ban is subject to strict scrutiny, MTD Op. at 33, beyond reiterating its disagreement,

[5] This evidence, as explained in Plaintiff's motion *in limine*, ECF No. 88, relies entirely upon hearsay and improper expert testimony about events of which the witness has no personal knowledge, and is therefore inadmissible. Nonetheless, the State Board's assertions about the purpose and history of the Ban—though unsubstantiated—demonstrate the inconsistency in their own interpretation of the Ban.

State Bd. Mem. at 14. But, as the Court has also concluded, the precise level of scrutiny is immaterial because the Ban fails either standard. MTD Op. at 35.

The State Board claims an interest in "insulating voters from real or perceived influence, undue influence, and intimidation during the voting process." State Bd. Mem. at 15 (quoting Connolly Decl. ¶ 27). While the Supreme Court has recognized that states have a compelling interest in "protecting voters from . . . undue influence" and intimidation, *Burson v. Freeman*, 504 U.S. 191, 199 (1992), it has not held that interest extends so far as protecting voters from "perceived" influence at the polls—whatever that means.[6] In any event, the State Board has not even attempted to explain "how offering a voter a bottle of water and a donut, with no mention of any candidate or issue on the ballot, could impair a citizen's ability to vote freely for candidates of their choice, or that such conduct would be taken as expressing a preference for any candidate, party, or issue," MTD Op. at 38, let alone offered any evidence to that effect. The State Board's purported interest in protecting voters from "perceived" influence therefore is not even implicated by the Brooklyn NAACP's planned activity.

Even under the State Board's limiting construction, the Line Warming Ban fails the narrow tailoring required by strict or intermediate scrutiny. Although the Supreme Court has not

[6] Some courts have suggested that states may have an interest in protecting against the *public* perception that *elected officials* have been unduly influenced or corrupted by *political contributions*. *Ognibene v. Parkes*, 671 F.3d 174, 183 (2d Cir. 2011). But that interest is not implicated here and, in any event, it requires a strong showing of a "palpable sense of corruption." *Homans v. City of Albuquerque*, 366 F.3d 900, 911 (10th Cir. 2004). To the extent the State Board is claiming a compelling interest in proscribing actions that voters, election officials, or police officers *may* subjectively *perceive* as attempted influence, the Supreme Court has explained that criminalizing such conduct without consideration for the subjective intent of the speaker raises constitutional vagueness concerns. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) ("Conduct that annoys some people does not annoy others."); *Counterman v. Colorado*, 600 U.S. 66, 73 (2023) (even objective "true threats" cannot be prosecuted in the absence of proof that "the defendant had some understanding of his statements' threatening character.").

established a geographic "litmus-paper test" to "separate valid from invalid restrictions," it has held that "at some measurable distance from the polls," government regulation of First-Amendment-protected conduct becomes an "impermissible burden." *Burson*, 504 U.S. at 210–211. Here, because the geographic zone in which the Line Warming Ban applies "is tied to the position of the voter in line and fluctuates based on the location of the voter, it has no fixed line of demarcation and no limit." *S.B. 202 I*, 622 F. Supp. 3d at 1338. Thus, in practice, the geographic limit "could easily extend thousands of feet away from the polling station . . . given the documented hours-long lines that voters at some polling locations have experienced." *Id.* at 1338–39. As the *S.B. 202* court found in addressing a similar ban, "it is improbable that a limitless [geographic scope] would be permissible." *Id.* at 1339; *see also Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004) (finding that a 500-foot buffer zone was unconstitutional where the state's evidence was "glaringly thin . . . as to why the legislature . . . ultimately arrived at a distance of 500 feet"); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1053 (6th Cir. 2015) (rejecting a 300-foot buffer zone because the state "did not present any evidence . . . justifying a no-speech zone nine times larger than the one previously authorized by the Supreme Court [in Burson] and offer[ed] no well-reasoned argument" for a restricted area of that size).

Further, as explained in Brooklyn NAACP's pre-trial memorandum of law, ECF No. 89 at 14–16, and its Proposed Findings of Fact and Conclusions of Law, ECF No. 86 ¶¶ 68–70, the Ban is both over-inclusive and under-inclusive, and is far from the least restrictive means to achieve the state's asserted interests. As discussed above, the State Board asserts—but fails to explain why—the "[the Ban] is necessary, in the broader context of the N.Y. Election Law, to fully insulate voters from real or perceived influence and interference." State Bd. Mem. at 17. The State Board further argues that other provisions of the election law "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." *Id.* But the Line Warming Ban does not shield voters from "all unnecessary interactions." It shields them only from *line warming*. Voters waiting in line outside the 100-foot zone may, for instance, be approached by candidates or campaign workers distributing literature. (Connolly Tr. at 41:8–42:1). And, again, the State Board offers no reason—beyond its say-so—to believe that the Brooklyn NAACP's planned activity "may be interpreted by a particular voter as harassment and/or intimidation." State Bd. Mem. at 17. The State Board cannot overcome strict or intermediate scrutiny simply by speculating that somebody, somewhere, "may" interpret line warming as "harassment and/or intimidation." *Id.*; *cf. N.Y. C.L. Union v. N.Y.C. Transp. Auth.*, 675 F. Supp. 2d 411, 438 (S.D.N.Y. 2009) ("[T]he Court has little trouble holding that, as a matter of law, Defendant's speculation about the likelihood that a respondent will be chilled from attending his or her own TAB hearing fails to justify Defendant's blanket 'respondent controls' public access policy.").

The State Board relies heavily upon the Eleventh Circuit's decision in *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213 (11th Cir. 2009), but it, too, does not support the State's position. In *Browning*, the Eleventh Circuit considered a Florida statute that prohibited solicitation of voters "within 100 feet of the entrance to any polling place or early voting site." *Id.* at 1215. The plaintiffs challenged the statute to the extent that it prohibited them from soliciting signatures from voters leaving a polling place. *Id.* No party disputed that the state has a "compelling interest" in "(1) protecting voters from confusion and undue influence;" and "(2) preserving the integrity of the election process." *Id.* at 1219. The Eleventh Circuit held that the state's ban on "exit solicitation" was both necessary to further that compelling interest and narrowly tailored." *Id.* at 1219–22. Unlike Florida's exit solicitation ban (and unlike the challenged

statute in *Burson v. Freeman*), the Line Warming Ban extends well beyond a 100-foot zone outside the polling place, even under the State Board's limiting construction. (Connolly Tr. at 43:14–21). And unlike Florida's exit solicitation ban, the Line Warming Ban *does not apply* to voters who have "exited the polling place," under the State Board's interpretation. State Bd. Mem. at 16. It therefore is not narrowly tailored to protect the state interest asserted in *Citizens for Police Accountability*—"peace and order around its polling places"—because it is underinclusive. 572 F.3d at 1220; *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) ("Underinclusiveness can also reveal that a law does not actually advance a compelling interest.").

D. The Line Warming Ban is unconstitutionally overbroad.

Likewise, the Line Warming Ban is overbroad. A statute is facially overbroad if "the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick*, 413 U.S. at 612–15). This Court has explained that because the Ban "prohibits both partisan and nonpartisan line warming within potentially all of New York State . . . , it potentially consumes vast swaths of core First Amendment speech." MTD Op. at 50 (cleaned up).

The State Board attempts to escape the overbreadth doctrine by adopting an impossibly broad view of the Line Warming Ban's "plainly legitimate sweep." It explains that "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." State Bd. Mem. at 23 (emphasis added). Again, no court has endorsed such an unbounded view of the scope of permissible regulation at polling places. While "[s]ome limitations . . . may be constitutionally permissible, such as prohibiting partisan line warming within a narrow radius immediately adjacent to polling places," the ban is "not so circumscribed." MTD Op. at 49–50.

As explained above, the State Board's proposed geographic limitation—that the Ban extends only to the end of the voting line—is not a reasonable or readily apparent interpretation of the phrase "in connection with or in respect of any election." But even if the Court were to adopt that construction, it would not save the Ban from overbreadth for the same reasons that it cannot satisfy narrow tailoring—namely, because the Ban as interpreted by the State Board "has no fixed line of demarcation and no limit." *S.B. 202 I*, 622 F. Supp. 3d at 1338.

The State Board next contends that its interests "cannot be achieved by restricting only overtly partisan speech." State Bd. Mem. at 25. That is because (1) the Ban is necessary to address "subtle" or "perceived" forms of interference, influence, and intimidation, and (2) it is impossible to police the motivations of persons providing voters with food and drink. *Id.* But it makes little sense to prohibit "subtle" forms of influence where, as the State Board acknowledges, "overt" attempts to influence—such as electioneering outside the 100-foot zone—are permitted. *Id.* And the State cannot broadly prohibit otherwise protected speech simply because, in its view, some voters may possibly perceive it as influencing or intimidating, or because it is too hard to distinguish legitimately proscribed speech from protected speech. That is the textbook definition of an overbroad law. *Cf. Nitke v. Ashcroft*, 253 F. Supp. 2d 587, 600 (S.D.N.Y. 2003) (per curiam) (three-judge district court) ("[T]he method by which an obscenity statute distinguishes between obscenity and non-obscene speech can determine whether it is overbroad, or whether it is drawn with sufficient precision to withstand constitutional scrutiny."). Moreover, New York law *already* distinguishes between non-partisan and partisan actors. For example, Section 8-104 prohibits "overtly partisan speech" within the 100-foot zone, but not other forms of speech. *Id.*

E. The Line Warming Ban is unconstitutionally vague.

Finally, the Line Warming Ban is impermissibly vague. As described above, the State

Board's limiting construction of the phrase "in connection with or in respect of any election" is not reasonable or readily apparent and thus cannot save the statute from vagueness. *See Sorrell*, 221 F.3d at 386. The State Board's construction of the term "provision" is similarly unavailing.

The State Board interprets the term "provision" in Section 17-140 to embrace only "consumable items." State Bd. Mem. at 21. That term—"consumable items"—is entirely of the State Board's own invention and appears nowhere in the statute, legislative history, or any dictionary definition of the word "provision." As Brooklyn NAACP explained in its pre-trial submissions, that proposed limitation is *itself* vague, and therefore does nothing to cure the Ban's constitutional infirmity. *See* Plf. Mem. at 21; Plf. FOF/COL ¶¶ 82–85. But it is also inconsistent with the plain meaning of the term "provision" as commonly understood. Dictionary definitions of the term "provision" may include "food," but also include other commodities, whether or not consumable—especially when used in the singular.[7]

The mere fact that the statute was amended in 1906 to replace a prohibition on furnishing "entertainment" or "money or other property" with the current language sheds no light on the meaning of the term "provision"—let alone demonstrates an "express[] limit[ation]" to "consumable items." State Bd. Mem. at 21. This Court concluded last year that it "cannot determine the significance of the nineteenth-century prohibition vis-à-vis the Line Warming Ban without more briefing on the Ban's legislative history." MTD Op. at 47. The State Board has offered no additional legislative history beyond the mere fact of the change in statutory language,

[7] *See* "Provision," *Oxford English Dictionary*, https://www.oed.com/dictionary/provision_n (last visited February 11, 2024) ("1.a. . . . the providing or supplying of a commodity (esp. food). . . . 6.a. A supply of necessities or materials; a stock or store of something. . . . 6.c. Usually in *plural*. A supply of food; food supplied or provided; victuals."); "Provision," *Merriam-Webster*, https://www.merriam-webster.com/dictionary/provision (last visited February 11, 2024) ("a stock of needed materials or supplies *especially*: a stock of food → usually used in plural").

which the Court has already noted. *Id.* Without any further elucidation of the reasons for that change, it is equally plausible that "the legislature intended the term 'provision' to be a broad catchall that incorporated the conduct prohibited by the prior iteration of the statute." *Id.*

The State Board is also wrong that Brooklyn NAACP's conduct supports their proposed limitation. Ms. Williams testified that "the question [was] raised" at a Brooklyn NAACP meeting in 2020 whether masks and hand sanitizer would be covered by the Ban. (Williams Tr. at 68:15; *see also* Williams Decl. ¶ 22; Bakiriddin Decl. ¶ 15). Notwithstanding uncertainty about whether "hand sanitizer had a value that was larger" than one dollar, (Williams Tr. at 71:14), Brooklyn NAACP determined to move forward with its plans because, in light of the ongoing COVID-19 state of emergency (which has since subsided), it anticipated that "no one would really challenge us on this"—not because of any certainty about whether the Ban applied. (Williams Tr. at 71:12–18).[8] The uncertainty the Brooklyn NAACP faced—and continues to face—concerning the application of the Ban to these items demonstrates how vague laws may chill protected First Amendment activity. Organizations like Brooklyn NAACP should not have to guess at the outer bounds of criminal statutes that implicate their First Amendment rights.

Inconsistent testimony given by the State Board's own witness further demonstrates the Ban's vagueness. For instance, according to Mr. Connolly, the Ban's enumerated list of individuals ("persons who are official representatives of the bord of elections or political parties and committees and persons who are engaged as watchers, party representatives or workers assisting the candidate") refers to persons *to* whom it is permissible to "provide" food or drink "regardless

[8] As explained above, the fact that Brooklyn NAACP went forward with its plans to distribute items on the vague periphery of the Ban—items which the State Board now argues do not fall within its ambit—in the context of a global pandemic does not diminish its fear of prosecution for distributing items that are plainly proscribed such as food and drink.

of time or place." (Connolly Decl. ¶ 24). He further testifies that the State Board interprets the phrase "except 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" to mean that "consumable items of nominal value (*i.e.*, less than one dollar) may be provided to a voter inside the polling place without violating the statute, so long as the individual or entity providing the item does not disclose his or her identity or affiliation." (Connolly Decl. ¶ 25); *see also* State Bd. Mem. at 22-23. That interpretation is inconsistent with Mr. Connolly's testimony at his deposition that individuals *other than* those enumerated in the statute *may not distribute* items valued under $1 *inside* the polling place, even *without* identification. (Connolly Tr. at 53:3-54:1). It is also inconsistent with his testimony indicating that the one-dollar exception also applies *outside* the polling place. *See* (Connolly Tr. at 58:19-59:11, 143:21-144:4).[9]

That the State Board of Elections' Deputy Executive Director is apparently unable to consistently identify conduct that is proscribed by the Ban, even under the State Board's interpretation, shows the Ban both "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" and "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The First and Fourteenth Amendments demand greater clarity.

CONCLUSION

This Court should declare Section 17-140 of the New York Election Law unconstitutional and enter a permanent injunction prohibiting its enforcement.

[9] Even within his deposition, Mr. Connolly testified inconsistently on this point. He elsewhere testified that the under $1 exception applies inside the polling place, but not outside the polling place. (Connolly Tr. at 55:21-56:9).

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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*