UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the accompanying memorandum of law, and all prior pleadings and proceedings had herein, Defendants Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, Todd D. Valentine, Robert A. Brehm, and Anthony J. Casale (the "State Board of Elections Defendants") will move this Court, before the Honorable Katherine Polk Failla, at the United States Courthouse, 500 Pearl Street, New York, New York, at a date and time to be determined by the Court, for an order pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure dismissing Plaintiff's Amended Complaint, with prejudice and granting such other and further relief as the Court deems to be just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to the scheduling order issued by the Court on March 31, 2022, Plaintiff's responsive papers must be filed and served by May 24, 2022, and reply papers must be filed and served by June 7, 2022.

Dated: April 26, 2022

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TO: All counsel of record (by ECF)

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

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

PRELIMINARY STATEMENT

This case involves a First Amendment challenge to a state election law which, in one form or another, has been on the books since 1906. That law—N.Y. Election Law § 17-140 (the "Law")—prevents a person from providing "any meat, drink, tobacco, refreshment or provision" to another person, in connection with an election, during polling hours on days when voting is taking place. The State Legislature enacted this neutral provision to protect waiting voters from unwanted interference, harassment, intimidation, undue influence, and vote buying during the voting process. Such conduct directed toward voters was commonplace before this and other election reforms were implemented by the State.

Plaintiff, The Brooklyn Branch of the National Association for the Advancement of Colored People ("Plaintiff"), despite having never before engaged in conduct proscribed by the Law, claims that the Law violates its right of free expression under the First Amendment. The Complaint should be dismissed for five independent reasons.

First, Plaintiff lacks standing. Plaintiff contends that it has standing because the potential for prosecution of the organization—not its members—under the Law has dissuaded it from offering food or drink to voters waiting in line at a polling place to vote. However, Plaintiff merely alleges that it "plans"—which were described as "hopes" in Plaintiff's initial Complaint (ECF No. 1)—to engage in this conduct—it does not allege to have ever before done so during the 100 years Plaintiff has been in existence. Moreover, despite this statute's long history as part of the State's election laws, Plaintiff has failed to allege that the Law has ever been enforced, much less against an

organization for conduct of the nature Plaintiff proposes. Against this backdrop, Plaintiff's vague and speculative allegations are insufficient to establish standing. If Plaintiff's allegations were sufficient, any person who claimed to want to provide food or drink to voters would have standing. Such limitless standing exceeds the bounds of what is permissible under Article III.

Second, even if Plaintiff had standing, the Law does not restrict expressive conduct subject to the protections of the First Amendment. The First Amendment is not implicated unless a law restricts conduct that was "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1742 (2018). Here, the Law's content-neutral provisions merely restrict a person from providing food, drink, and other provisions to voters in connection with an election. Despite Plaintiff's attempts to transform the proposed conduct into an act of expression, providing a slice of pizza or bottle of a water to a voter is not communicative, nor would it reasonably be interpreted by the voter as communicating a particularized message. As Plaintiff admits in the Amended Complaint, this conduct would be aimed to satisfy the needs of waiting voters so they will not leave the queue on their own to obtain food or drink. Since the Law does not restrict conduct subject to the First Amendment, Plaintiff's Amended Complaint should be dismissed.

Third, even if the Law were deemed to restrict expressive conduct, it is still within constitutional bounds. The Law satisfies the four-part test established in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), which applies where "speech" and "nonspeech" elements are combined in the same course of conduct. For the same reasons the Supreme Court upheld Tennessee's prohibition on the solicitation of votes and the display or distribution of campaign materials within 100 feet of a polling place, the Law would survive even the application of strict scrutiny since it furthers the State's compelling interest in maintaining the integrity of elections

and protecting the right of individuals to vote freely. *See Burson v. Freeman*, 504 U.S. 191 (1992).

Fourth, Plaintiff's facial vagueness challenge also fails because the claimed ambiguities in the statute, feigned as they are, are not even alleged to have chilled a substantial amount of expressive conduct, which is required to mount a facial vagueness challenge. The hypothetical scenarios posed by Plaintiff are either easily answered or involve implausible scenarios that could not support striking down the Law. Plaintiff's as-applied challenge also fails since there is no dispute that the conduct Plaintiff allegedly seeks to perform is clearly prohibited by the Law.

Fifth, Plaintiff's overbreadth claim is also subject to dismissal. The Law in question inarguably "regulates a substantial spectrum of conduct that is as manifestly subject to state regulation." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

SUMMARY OF ALLEGATIONS/STATEMENT OF FACTS

A. Historical background and the statute at issue.

In *Burson v. Freeman*, 504 U.S. 191 (1992), in connection with its assessment of Tennessee's prohibition on the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance of a polling place, the Court set forth a thorough description of the history that necessitated such provisions.

In the colonial period, many elections were conducted by "the *viva voce* method or by the showing of hands." *Id.* at 200. The open nature of these systems were ripe for bribery and intimidation. *Id.* This led to the widespread use of the paper ballot, which was initially a vast improvement, but eventually opportunistic political parties developed strategies to take advantage of the process. *Id.* Parties "began to produce their own ballots," which "were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance." *Id.* This allowed "vote buyers" to "place a ballot in the hands of the bribed voter and watch until he placed it in the polling box." *Id.* At this time, the surroundings of a polling place

were akin to "an open auction place," with numerous persons competing for the attention of "uncommitted or wavering voter[s]." *Id.* at 202.

This caused states to begin to adopt the Australian system of voting, which utilized "an official ballot, encompassing all candidates of all parties on the same ticket" and "provided for the erection of polling booths," and excluded the "general public from the entire polling room." *Id.* In 1888, New York adopted this system, and added other restrictions, including the prohibition of "electioneering on election day within any polling-place, or within one hundred feet of any polling place." *Id.* at 204 (quotations omitted).

Relatedly, in 1890, as part of the Australian ballot movement, New York first enacted what is now codified as Election Law § 17-130, to prevent persons from showing their ballots after being prepared for voting so as to reveal the contents.[1]

> Regarding the New York law adopting these reforms, "[o]ne commenter remarked":
>
> > We have secured secrecy; and intimidation by employers, party bosses, police officers, saloonkeepers and others has come to an end.
> >
> > In earlier times our polling places were frequently, to quote the litany, "scenes of battle, murder, and sudden death." This also has come to an end, and until night-fall, when the jubilation begins, our election days are now as peaceful as our Sabbaths.
> >
> > The new legislation has also rendered impossible the old methods of frank, hardy, straightforward and shameless bribery of voters at the polls.

Id. (quoting W. Ivins, The Electoral System of the State of New York, PROCEEDINGS OF THE 29TH ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION 316 (1906)).

Around the same time, in 1892, the Legislature enacted a predecessor to the Law, which, *inter alia*, proscribed "furnish[ing] entertainment to electors" or "furnish[ing] money or other

[1] As applied to current times and technology, this law prevents, among other things, the act of taking a "ballot selfie" at a polling place and posting it to social media sites. This Court has recently upheld this statute as applied to "ballot selfies" based upon the State's compelling interest in preventing vote buying and voter coercion. *Silberberg v. Board of Elections of New York*, 272 F. Supp. 3d 454, 459 (S.D.N.Y. 2017).

property . . . [to] procure the attendance of voters at the polls."[2] In 1906, the Law was amended to prohibit a person from providing another "any meat, drink, tobacco, refreshment or provision. . . ."[3] In 1985, the Legislature clarified that the prohibition only applies during the hours of voting.[4] In 1992, the Legislature added an exception for items "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."[5] Election Law § 17-140 now 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.

B. Plaintiff's allegations.

Plaintiff is a non-partisan organization that was chartered in 1922.[6] Plaintiff's mission is allegedly to "remove all barriers of racial discrimination through democratic processes, educate voters on their constitutional rights, and take all lawful action to secure the exercise of those rights." Am. Compl. ¶ 13. As a result of allegedly "unprecedented" lines present during the 2020 general election, Plaintiff "plans to support voters by offering food, water, and other modest refreshments" to voters who are waiting in line to vote. *Id.* ¶¶ 13, 26, 32. Plaintiff also now claims

[2] L. 1892, ch. 693, § 41o.

[3] L. 1906, ch. 503, § 1.

[4] L. 1985, ch. 154, § 1.

[5] L. 1992, ch. 414, § 1.

[6] https://www.brooklynnaacp.org/about

that is has "set aside resources" related to these alleged plans. *Id.* ¶ 32. According to Plaintiff, this would "facilitate the voting process" for waiting voters and "simply offer comfort to help voters better endure long lines so that they may successfully cast their ballot." *Id.* ¶¶ 19, 21. Plaintiff does not allege to have ever before engaged in this practice. However, Plaintiff alleges that it has previously held "get out the vote" "rallies," and, in other instances, Plaintiff provided "food, refreshments, and entertainment to convey its message of support for voters". *Id.* ¶ 29.

In addition to providing support to voters, Plaintiff also claims that such conduct is also an act of expression, which includes "a celebration of our democracy and of the dedicated voters who endure weather and long waits 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," *id.* ¶ 22, as well as a communication "convey[ing] the importance of them staying in line, the importance of voting, and emphasizing that everyone's vote counts," *id.* ¶ 32. Plaintiff alleges that if the Law was not in effect, it "would provide sundries such as bottled water, donuts, potato chips, or pizza to voters already waiting in line." *Id.* ¶ 30. Plaintiff alleges, without any specification, that "[t]he threat of prosecution harms organizations like the [Plaintiff] by proscribing its First Amendment-protected expressive conduct and its right to participate in the electoral process." *Id.* ¶ 36. Plaintiff does not allege that the Law has ever been enforced against anyone, much less a similar-situated organization performing conduct similar to that allegedly intended.

Based upon these allegations, Plaintiff asserts three claims: (1) pursuant to the First and Fourteenth Amendments, seeking a declaration that the Law is facially unconstitutional; (2) pursuant to the First and Fourteenth Amendments, seeking a declaration that the Law is facially unconstitutionally overbroad; and (3) pursuant to the First and Fourteenth Amendments, seeking a declaration that the Law, both facially and as-applied, is unconstitutionally vague.

LEGAL STANDARD

A complaint must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the "court lacks the . . . constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The party seeking to invoke jurisdiction "has the burden of proving by a preponderance of the evidence that it exists." *Id.* While "the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff," *Sweet v. Sheahan*, 235 F.3d 80, 83 (2d Cir. 2000), "jurisdiction must be shown affirmatively," *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998), and may not be predicated solely on "conclusory or hearsay statements," *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004). To survive dismissal under Rule 12(b)(6), the pleading must contain sufficient factual allegations which state a facially plausible claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. PLAINTIFF FAILED TO ADEQUATELY PLEAD STANDING.

To establish standing under Article III of the U.S. Constitution, a plaintiff must show:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). These requirements ensure federal courts adjudicate only actual "cases" and "controversies". *Lujan*, 504 U.S. at 576.

An organization has two avenues by which it can establish standing—associational standing and organizational standing. To establish associational standing, an organization must demonstrate that "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim

asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343-45 (1977)).

Organizational standing is implicated when an organization seeks to assert a claim "'in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.'" *N.Y. Civil Liberties Union v. N.Y.C. Trans. Auth.*, 684 F.3d 286, 294 (2d Cir. 2012) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). The test for organizational standing, which is the same as for individuals, requires a showing of "an 'actual and imminent, not conjectural or hypothetical' threat of a 'concrete and particularized' injury in fact that is 'fairly traceable to the challenged action of the defendant' and that 'a favorable judicial decision will [likely] prevent or redress.'" *N.Y. Civil Liberties Union*, 684 F.3d at 294 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). Organizations often have difficulty demonstrating an actual, and not merely hypothetical, imminent injury. Although organizational standing can exist where a law "perceptibly impairs" services that an organization had already been providing, including by causing the organization to divert resources from other core activities, *see, e.g.*, *Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110-11 (2d Cir. 2017), allegations of future hypothetical injury based upon not-yet-undertaken activities are insufficient, *see Lujan*, 504 U.S. at 564 (1992); *Summers*, 555 U.S. at 496.

In the first amendment context, it has been long established that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). Although "it is not necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge [a] statute," *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) (cleaned up),

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

Here, Plaintiff's argument for standing fails for at least three separate reasons: (1) Plaintiff does not allege that it has ever before performed the food distribution activities in the past, but only that it "plans" to do so in the future, and therefore its alleged plans are speculative and hypothetical; (2) Plaintiff's conclusory allegation that it "set aside resources" is insufficient; and (3) Plaintiff's allegations regarding its fear of prosecution are insufficient given the Law's long history and absence of any allegations regarding actual enforcement efforts in more than a century, much less enforcement against organizations as opposed to individual members.

First, as to the speculative nature of Plaintiff's purported plans, Plaintiff alleges that it "plans to support voters by offering food, water, and other modest refreshments," which it asserts is the "type of civic engagement and assistance Plaintiff would provide but for the [Law]." Am. Compl. ¶ 13; *see also id.* ¶ 30 ("But for the [Law], [Plaintiff]'s members and volunteers—identified

as such—would provide sundries such as bottled water, donuts, potato chips, or pizza to voters already waiting in line."). The only present harm Plaintiff identifies is that it is "prevented from distributing food and water enduring long lines to vote," despite that Plaintiff does not allege that it has ever distributed food and water to voters waiting to vote in the past. *See id.* ¶ 36.

Plaintiff's alleged injury is purely hypothetical and does not establish standing. An iteration of the Law has been in effect since 1906. Yet, Plaintiff does not allege that it has ever conducted—or even attempted to conduct—the food-distribution activities that it now alleges are core to its mission. This type of vague allegation of future conduct has been regularly rejected as a basis for standing. *See Faculty Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ.*, 2021 U.S. App. LEXIS 25501, at *12 (2d Cir. Aug. 25, 2021) (plaintiff-organization failed to adequately allege organizational standing where the organizations unnamed members alleged that they "'intend to continue submitting their scholarship' and 'intend' to apply for jobs at the Law School, or remain candidates for recruitment to the faculty"); *Schwarz v. Town of Greenwich*, 562 F. Supp. 2d 242, 246 (D. Conn. 2008) (plaintiffs failed to establish standing because their allegations that they had not gone to the beach in-question since a policy was enacted and that they would visit more often if the policy was not in effect did not "demonstrate a sincere intention to visit the Greenwich beach parks to exercise rights under the First Amendment in the future") . To establish standing, a future injury must be "imminent," and future intentions must be exacting and definitive to meet this requirement. As the Supreme Court has explained:

> Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes -- that the injury is "certainly impending". It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury

would have occurred at all.

Lujan, 504 U.S. at 564 n.2. Here, Plaintiff has provided very little detail regarding its alleged intention to distribute food and water to voters waiting at the polls. Given the absence of any alleged prior attempts to provide food and water to voters in the 100 years of Plaintiff's existence, the Court should view skeptically any argument that Plaintiff's vague allegations of intent are anything other than an attempt to establish standing to challenge the Law.

Similar allegations of standing have been frequently rejected in the environmental law context. For example, in *Lujan*, a group of plaintiffs challenged a rule promulgated by the Secretary of the Interior interpreting §7 of the Endangered Species Act as applicable only to actions within the United States or on the high seas. *Lujan*, 504 U.S. at 558. The organization members on whom the plaintiffs relied to establish standing stated in affidavits that they had vague future intentions to travel abroad to attempt to observe endangered species. *Id.* at 563-64. The Supreme Court held that the "profession of an 'intent' to return to the places they had visited before -- where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species -- is simply not enough. Such 'some day' intentions -- without any description of concrete plans, or indeed even any specification of when the some day will be -- do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* at 564.

In *Summers*, plaintiffs challenged the decision of the United States Forest Service to exclude certain types of activities, including small salvage sales of timber, from its normal notice, comment, and appeal process. *Summers*, 555 U.S. at 491. In support of standing, the plaintiffs alleged that a member had "plans to visit several unnamed national forests in the future". *Id.* at 495. The Supreme Court held that the individuals' "vague desire to return [to the national forest in question] is insufficient to satisfy the requirement of imminent injury." *Id.* at 496.

The allegations of injury are even weaker than those advanced in *Lujan* and *Summers*. In those cases, the individuals at least had previously traveled to the subject locations, thus rendering the allegations regarding an intended return somewhat plausible. Plaintiff, on the other hand, has never provided—or attempted to provide—food and water to voters waiting in line to vote. Although in the Amended Complaint Plaintiff now points to "get out the vote" "rallies," and separate occasions where it alleges that it has previously distributed "food, refreshments, and entertainment to convey its message of support for voters" (Am. Compl. ¶ 29), that is irrelevant. This case is not about get out the vote efforts or whether Plaintiff has ever distributed food for any purpose (most organizations have)—rather, it is about whether the State can permissibly restrict persons or organizations from providing items of value to voters during voting hours on an election day in connection with the election. Because it could not truthfully do so, Plaintiff does not allege to have ever provided refreshments to voters waiting in line during voting hours on an election day. In fact, Plaintiff does not even allege providing food at the get out the vote rallies. *See* Am. Compl. ¶ 29. Therefore, Plaintiff's conclusory allegation that it now "plans"— in the initial Complaint, the verbiage used was "hopes"—to do so in the future is insufficient to confer Article III standing.[7]

Second, Plaintiff also does not—and cannot—allege that the Law caused it to divert resources in any manner because, during the entire period the Law has been in effect, Plaintiff has never provided—or attempted to provide—food and water to voters. Instead, hoping to benefit from case law that supports a finding of standing where an organization "suffers a concrete and demonstrable injury to [its] activities -- with the consequent drain on [its] resources," *Havens*

[7] The State BOE Defendants acknowledge that the district court in *League of Women Voters of Fla., Inc. v. Lee*, 2022 U.S. Dist. LEXIS 60368 (N.D. Fla. Mar. 31, 2022) that various plaintiffs had standing to challenge a Florida law which restricted, among other things, activity similar to that intended by Plaintiff here. However, with respect to standing, that ruling warrants the opposite conclusion here since the Court's decision hinged on those plaintiffs' long-history of engaging in "line warming" activities, which Plaintiff does not allege in this case. *See id.* at *66-*68. That case also involved a challenge to a newly-enacted law, not a 100-year-old law with no history of enforcement.

Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982), Plaintiff alleges in conclusory fashion that it "set aside resources" for the food distribution activities, Am. Compl. ¶ 32. This is insufficient to establish organization standing. Importantly, Plaintiff does not allege to have diverted resources from its core activities as a result of the Law, which is necessary to establish organizational standing. *See, e.g.*, *Lowell v. Lyft, Inc.*, 352 F. Supp. 3d 248, 259 (S.D.N.Y. 2018); *NRDC, Inc. v. Wheeler*, 367 F. Supp. 3d 219, 230 (S.D.N.Y. 2019) (standing could not be established absent some "indication of diversion from the NRDC's core activities"). In fact, although contrary to the past century's history when the subject restriction was in effect in some form, Plaintiff alleges that the proposed activity is central to its mission. Thus, "setting aside resources" to engage in this conduct cannot constitute a diversion from Plaintiff's core activities because, according to Plaintiff, it is one. Indeed, Plaintiff alleges that it would expend resources if the Law were not in effect, not that the Law caused it to expend or divert resources. Plaintiff cannot rely on this body of law to establish organizational standing.

Third, Plaintiff's alleged fear of prosecution is entirely speculative. This is not a case involving a pre-enforcement challenge to a recently enacted statute. *E.g.*, *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000). Here, an iteration of the law has been in effect since 1906. In these circumstances, Plaintiff faces a far greater burden in alleging "an actual and well-founded fear that the law will be enforced against it." *Id.*; *see also Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016) ("The identification of a credible threat sufficient to satisfy the imminence requirement of injury in fact necessarily depends on the particular circumstances at issue, and will not be found where plaintiffs do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible") (quotations omitted); *Johnson v. District of Columbia*, 71 F. Supp. 3d 155, 159-60

(D.D.C. 2014) (the "conventional background expectation of enforcement may be overcome where the law is moribund or of purely historical curiosity."); *Poe v. Ullman*, 367 U.S. 497, 508 (1961) ("Eighty years of Connecticut history demonstrate a similar, albeit tacit agreement. The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication.").

Plaintiff would be hard pressed to offer the necessary "objective evidence to substantiate his claim that the challenged conduct has deterred him from engaging in protected activity." *Bordell v. Gen. Elec. Co.*, 922 F.2d 1057, 1061 (2d Cir. 1991). Nevertheless, here, Plaintiff makes no allegation at all regarding any alleged fear of prosecution, nor could it credibly do so. Indeed, the State BOE Defendants are unaware of a single court decision involving a prosecution commenced for a violation of the Law, much less for providing "sundries such as bottled water, donuts, potato chips, or pizza to voters already waiting in line." Am. Compl. ¶ 30. Moreover, Plaintiff's alleged fear of prosecution does not concern its members, but the organization itself, since there are no allegations in the Amended Complaint concerning Plaintiff's individual members. Plaintiff offers no factual allegations in support of the proposition the organization itself would be criminally prosecuted if they were to provide inexpensive food and beverage items to voters. *See ACLU v. Alvarez*, 2010 U.S. Dist. LEXIS 115354, at *6 (N.D. Ill. Oct. 28, 2010) (ACLU failed to establish standing where "[t]he State's Attorney has not threatened the ACLU with prosecution if its program is implemented, and the ACLU has not cited any case where an organization has been prosecuted for violating the Act."). "[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Younger v. Harris*, 401 U.S. 37, 42 (1971).

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

"[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to

demonstrate that the First Amendment even applies." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). At the pleadings stage, "[t]he party asserting that its conduct is expressive bears the burden of demonstrating that the First Amendment applies, and that party must advance more than a mere 'plausible contention' that its conduct is expressive." *Jones v. Schneiderman*, 974 F. Supp. 2d 322, 333 (S.D.N.Y. 2013) (quotations omitted).

The Supreme Court has expressly rejected "the view that conduct can be labeled 'speech" whenever the person engaging in the conduct intends thereby to express an idea." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006). Conduct is only within the First Amendment's protection where it is sufficiently expressive. *Id.* "To determine whether conduct is sufficiently expressive, the Court asks whether it was "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1742 (2018) (quotations omitted). Although Defendants acknowledge that expressive conduct need not necessarily embody "a narrow, succinctly articulable message," *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, 1 (1995), there must be, "at the very least, an intent to convey a particularized message along with a great likelihood that the message will be understood by those viewing it." *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) (quotations omitted). "It is possible to find some kernel of expression in almost every activity a person undertakes -- for example, walking down the street or meeting one's friends at a shopping mall -- but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Where accompanying or explanatory speech is necessary to convey a message, that is considered "strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection." *Forum for Acad.*

& Institutional Rights, 547 U.S. at 66.

Here, the Law does not restrict speech, but rather prohibits the provision of "meat, drink, tobacco, refreshment or provision" "in connection with . . . an election," subject to stated exceptions. N.Y. Elec. Law § 17-140. Plaintiff's attempt to convert the act of providing food or beverages to a voter into an expressive act—which it refers to as an "expression of support" (Am. Compl. ¶ 24)—is unavailing. Plaintiff does not seek to engage in symbolic speech of the type deemed protected under the First Amendment, *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989), *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), nor does Plaintiff seek to communicate its opposition to any longstanding injustice by its conduct in a manner understandable to a viewer, *see, e.g.*, *Brown v. Louisiana*, 383 U.S. 131 (1966). Rather, Plaintiff seeks to provide food and drink to voters waiting in line at a polling place on Election Day to assist those persons in their participation in the franchise.[8]

In similar cases, courts have regularly held that conduct intended to assist another person's exercise of his or her right to vote is not expressive conduct. For example, in *Feldman v. Reagan*, 843 F.3d 366, 392 (9th Cir. 2016), the Court rejected a First Amendment challenge to an Arizona law which restricted the individuals who could collect early voting ballots from another person. The Court reasoned that "[u]nlike burning an American flag or wearing a military medal, ballot collection

[8] Plaintiff's initial Complaint (¶ 38) and response to the Defendants' pre-motion letters (ECF No. 30) relied on the 11th Circuit's decision in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018) for the proposition that food-sharing can be expressive conduct protected by the First Amendment, but that decision is distinguishable. In *Food Not Bombs*, the Court held that it was the "context" surrounding the food-distribution conduct that made it expressive. *Id.* at 1242-43. The organization set up tables and banners (including one with its logo), distributed literature, and was positioned in a public park nearby government buildings. *Id.* at 1242. Additionally, food sharing was the method by which the organization, and others, typically conveyed its message regarding the importance of addressing hunger among the homeless. *Id.* at 1243. Here, however, all of that context is absent from the Amended Complaint's description of Plaintiff's intended activity. Indeed, Plaintiff does not allege that it has ever before provided food to persons waiting in line as a method of conveying its message. Plaintiff does not allege any of the other surrounding circumstances that led the 11th Circuit to conclude, on the facts of that case, that the conduct was sufficiently expressive.

does not convey a message that would reasonably be understood by the viewer to be communicative, [but] [r]ather a viewer would reasonably understand ballot collection to be a means of facilitating voting, not a means of communicating a message." *Id.* at 392-93 (quotations omitted); *accord Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (plaintiff failed to establish that "collecting ballots would reasonably be understood by viewers as conveying any of these messages or conveying a symbolic message of any sort."); *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1300 (N.D. Ga. 2020) (same). In *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013), the Court was "unpersuaded that the smorgasbord of activities comprising voter registration drives involves expressive conduct or conduct so inextricably intertwined with speech as to require First Amendment scrutiny." In *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 773 (M.D. Tenn. 2020), the Court determined that distribution of absentee ballot applications was likewise not expressive conduct.

Wise v. City of Portland, 483 F. Supp. 3d 956 (D. Or. 2020), also involved similar First Amendment claims asserted by medics who were attending to members protesting police brutality. Similar to Plaintiff here, the medics argued that assisting the protesters by rendering medical aid to them was expressive conduct. *Id.* at 967. The Court rejected the medics' "novel" argument that their provision of medical assistance to protesters amounted to expressive conduct. *Id.* Providing medical care to a protester, like providing food, water, or other sundries to a voter waiting in line, is reasonably construed as a conduct aimed to provide aid to another, not to communicate a message to them or anyone else. Plaintiff alleges that its goal is to keep voters from leaving line if they are hungry or thirsty. *See* Am. Compl. ¶ 20 (alleging that the intended conduct would help voters "better endure the wait"). In this respect, Plaintiff is no different from the protest medics in *Wise* who attended to the medical needs of protesters.

The State BOE Defendants acknowledge that the Florida district court in *League of Women*

Voters of Fla. held that the "line warming activities" of the plaintiffs in that case were expressive activities protected by the First Amendment. 2022 U.S. Dist. LEXIS 60368, at *223. Obviously, that ruling is not binding on the Court, and was based upon factors articulated by the 11th Circuit in *Burns v. Town of Palm Beach*, 999 F.3d 1317 (11th Cir. 2021). Nevertheless, the same result does not follow here. There, the plaintiffs intended to use banners, literature, and signs to convey their message (*id.* at *218-*221), but the Plaintiff here only alleges that it would "would provide sundries such as bottled water, donuts, potato chips, or pizza to voters already waiting in line." Am. Compl. ¶ 30. There was also a long history of providing support to waiting voters that Plaintiff does not allege here, and the plaintiffs brought a pre-enforcement challenge so they could continue their longstanding practices. *See League of Women Voters of Fla.*, 2022 U.S. Dist. LEXIS 60368, at *218-*221. It was this "common thread," not present in this case, that led the district court to conclude that the activity intended in that case was sufficiently expressive. *Id.* at *221-*222.

Laws that restrict non-expressive conduct are analyzed under rational basis review, and must be upheld unless they are "so irrational that it may be branded arbitrary". *Zalewska*, 316 F.3d at 322. Under this test, the Law should be upheld, because it is clearly rationally related to the legitimate—in fact, compelling—state interest in "protecting voters from interference, harassment and intimidation during the voting process." *Burson v. Freeman*, 504 U.S. 191, 206 (1992); *see also Silberberg*, 272 F. Supp. 3d at 471 (upholding N.Y. Elec. Law § 17-130(10), based upon the state's compelling interests in preventing vote buying, voter intimidation, and election fraud). In fact, as explained in detail below, the State has wide latitude in regulating speech in or around a polling place on an election day.

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

Even assuming Plaintiff's proposed food-distribution were sufficiently expressive to

implicate the First Amendment, the State may still regulate that conduct. As the Supreme Court established in *United States v. O'Brien*:

> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest 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.

391 U.S. 367, 376-77 (1968).

In *O'Brien*, the plaintiff burned his Selective Service Certificate in violation of federal law on the steps of a courthouse "in demonstration against the [Vietnam] war and against the draft." *Id.* at 369, 376. On appeal of his criminal conviction, the plaintiff argued the federal law prohibiting the knowing destruction of the certificate violated his First Amendment rights. The Court rejected that argument in adopting the eponymous four-part *O'Brien* test: Legitimate governmental regulations that advance important interests are constitutional, if they are unrelated to the suppression of speech and only incidentally restrict First Amendment freedoms. *Id.* at 377; *see Forum for Acad. & Institutional Rights*, 547 U.S. at 65-66 (applying the *O'Brien* test).

Here, the Law satisfies each prong of the *O'Brien* test. First, the Law is well within the constitutional power of the State. Indeed, the United States Constitution grants the states "broad power" to regulate federal and state elections. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586 (2008).

Second, the State clearly has an important and substantial interest in protecting the integrity of elections by preventing voter intimidation, harassment, undue influence, and vote buying. In *Burson*, the Court analyzed Tennessee's 100-foot campaign-free zone around polling places. Tennessee advanced two interests protecting the right of its citizens to vote freely" and "protecting

the right to vote in an election conducted with integrity and reliability" in support of the law. 504 at 198-99. Upholding the law, the Court held that these interests "obviously are compelling ones". *Id.* at 199. State election laws are entitled to a strong presumption of constitutionality. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969); *Butts v. City of New York*, 779 F.2d 141, 147 (2d Cir. 1985). The State's interests in preventing individuals from providing food, drink, and other provisions to waiting voters are the same concerns that were at issue in *Burson*. *See also Silberberg*, 272 F. Supp. 3d at 471 (in upholding N.Y. Elec. Law § 17-130(10), concluding that "[t]here can be no doubt that the state's interest in preventing vote buying and voter intimidation through ensuring the secrecy of the ballot is a compelling one."). For the same reasons set forth in *Burson*, this Law would survive even the application of strict scrutiny.

Third, the Law is facially unrelated to the suppression of free expression. As explained above (*see* Section II, *supra*), the Law does not restrict speech or expressive conduct, but rather restricts individuals from providing food and drink to voters on an election day. This restriction is intended to prevent a return to the carnival-like atmosphere at the polls that was historically present outside the polls on an election day.[9]

Fourth, the Law is narrowly tailored to advance the State's interests. A time, place, and manner restriction, like this one, is not invalid simply because there is some imaginable alternative that might be less burdensome on speech, *United States v. Albertini*, 472 U.S. 675, 689 (1985), but rather should be upheld "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *Albertini*, 472 U.S. at 689). The Law prohibits persons

[9] *See, e.g.*, Bramen, Swilling the Planters With Bumbo: When Booze Bought Elections, SMITHSONIAN MAGAZINE (October 20, 2010), available at https://www.smithsonianmag.com/arts-culture/swilling-the-planters-with-bumbowhen-booze-bought-elections-102758236/

from potentially intimidating or harassing waiting voters in a manner not covered by other State laws, including the prohibition on electioneering within 100 feet of a polling place (Elec. Law § 8-104[1]), displaying a marked ballot (Elec. Law § 17-130[10]), or vote buying (Elec. Law § 17-142). As was its prerogative, the Legislature determined that the Law was necessary to prevent against election-day behavior that was once quite common in the State. However admirable Plaintiff's stated intentions may be, the Law is one of general application, and, 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.

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

A. Vagueness.

In the First Amendment context, "[f]acial vagueness challenges may go forward only if the challenged regulation 'reaches a substantial amount of constitutionally protected conduct.'" *Farrell v. Burke*, 449 F.3d 470, 496 (2d Cir. 2006) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983)). This means that the uncertainty regarding the scope of the Law must be plausibly alleged to inhibit or chill a substantial amount of constitutionally protected conduct. *See Genco Importing, Inc. v. City of N.Y.*, 552 F. Supp. 2d 371, 385 (S.D.N.Y. 2008).[10]

Here, Plaintiff's vagueness arguments are as follows: (1) whether the Law permits giving provisions valued at less than one dollar to voters waiting in line outside a polling place (Am. Compl. ¶ 58); (2) whether the Law permits election officials to provide provisions to voters

[10] The vagueness and overbreadth analysis in the Florida district court's ruling in League of Women Voters of Fla., Inc. is irrelevant since the statutory text at-issue in that case bears no similarity to the Law. Florida's law banned solicitation within 150 feet of polling places and drop boxes, and broadly defined "solicitation" as "seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; selling or attempting to sell any item; and engaging in any activity with the intent to influence or effect of influencing a voter." *League of Women Voters of Fla.*, 2022 U.S. Dist. LEXIS 60368, at *226-*227. The Law does not include any similar language, including the key language scrutinized by the district court: "engaging in any activity with the intent to influence or effect of influencing a voter".

waiting in line outside a polling place (*id.*); (3) whether the Law applies on early voting days (*id.* ¶ 59); (4) whether the Law only applies during polling hours (*id.*); (5) whether the Law applies outside the 100-foot-radius where electioneering is not permitted under New York law (*id.*); (6) whether "'provisions" includes face masks, hand sanitizer, rain ponchos, or the like" (*id.* ¶ 55); (7) whether the law applies to "voters on their way to the polls, or only voters standing in line" (*id.* ¶ 56); and (8) whether restaurants may offer "promotional discounts to patrons who show their 'I Voted' stickers" (*id.* ¶ 56).[11] Although the Law does not restrict expressive conduct at all (*see* Section II, *supra*), Plaintiff's pleading does not contain any allegations from which the necessary conclusion regarding confusion over the statute's reach may be drawn.

A person of ordinary intelligence would not misunderstand the first, second, and fifth categories. The Law restricts the provision of the listed items "in connection with or in respect of any election during the hours of voting, and has no territorial restriction other than the exception for items valued at less than one dollar, which can only be provided "in a polling place without any identification." Elec. Law § 17-140. Additionally, Plaintiff's fourth category is resolved by the Law's plain text, which provides that the restriction applies "during the hours of voting." *Id.*[12]

With respect to the third category, New York's Election Law and the regulations promulgated thereunder make clear that, except for the process of tabulating votes, the laws applicable on early voting days are the same as on an "election day". *See* Elec. Law § 8-102 ("Voting at each polling place for early voting shall be conducted in a manner consistent with the provisions of this article"); 9 N.Y.C.R.R. § 6211.6 ("the manner of voting on days of the early voting period shall be the same as the manner of voting on the day of election"). The Election

[11] Although Plaintiff alleges that the phrase "in connection with or in respect of any election" is vague, aside from the eight categories described, Plaintiff does not provide any examples of conduct whose coverage under the Law it questions based on this language.

[12] Indeed, the Law was amended in 1985 to cure this potential ambiguity. L. 1985, ch. 154, § 1.

Law further specifies the precise hours of voting, including on early voting days. *See* Elec. Law. §§ 8-100(2); 8-600(4). Put simply, Plaintiff cannot legitimately argue that there is any question whether the Law applies on early voting days. It clearly does.

Plaintiff's proposed interpretation of the term "provision" in the series "any meat, drink, tobacco, refreshment, or provision" would violate the canons of statutory interpretation of *noscitur a sociis* and *ejusdem generis*: "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001) (quotations omitted). Meat, drink, tobacco, and refreshment each refer to consumable items, and thus, under these venerable canons—as well as ordinary syntax—"provision" includes other unmentioned consumable items. This interpretation is reinforced by the use of the phrase "such provisions" to refer to the entire group of prohibited items in the second to last clause in the Law. There is no real ambiguity.

Plaintiff's seventh category does not relate to a plausible hypothetical scenario. "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703 (2000) (quotations omitted). There is no allegation that any person or organization, including Plaintiff, has ever given the prohibited items to "voters on their way to the polls," nor is there any way one could identify such a person. To the extent the Law chills persons from engaging in such conduct, that effect would be clearly insubstantial.

Plaintiff's eighth category describes obviously illegal conduct under not only § 17-140, but also other provisions of the Election Law, *e.g.*, Election Law § 17-142(1), as the hypothetical restaurant would be providing valuable consideration to induce persons to vote in an election.

Plaintiff's as-applied vagueness challenge presents an easier question. "A party asserting a prospective as-applied challenge must tailor the proof to the specific conduct that she would pursue but for fear of future enforcement." *Copeland v. Vance*, 893 F.3d 101, 112-13 (2d Cir. 2018). "Where an allegedly vague state law has not yet been construed by the state courts, a federal court must determine whether the law is reasonably susceptible of constructions that might undercut or modify [the] vagueness attack." *Expressions Hair Design v. Schneiderman*, 803 F.3d 94, 119 (2d Cir. 2015) (quotations omitted). Here, there is no question that the conduct Plaintiff "plans" to engage in—providing food or drink to voters waiting in line to vote at a polling place during voting hours—is prohibited by the Law. Plaintiff correctly reached this conclusion based upon its own reading of the statute. *See* Am. Compl. ¶¶ 5-7, 13, 35, 41. The categories identified by Plaintiff also do not implicate Plaintiff.

As the Supreme Court recently held in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), "[a] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim." *Id.* at 1151-52 (quotations omitted). Therefore, Plaintiff's as-applied vagueness claim should be dismissed.

B. Overbreadth

Plaintiff alleges that the Law is unconstitutionally overbroad because it fails to distinguish among the possible intentions of persons who might provide food or drink to voters on an election day. Essentially, Plaintiff is arguing that the State can restrict those who might interact with voters for political reasons, but cannot restrict those with non-partisan intentions. However, where a law "is not a censorial statute, directed at particular groups or viewpoints," but rather "seeks to regulate political activity in an even-handed and neutral manner," courts employ "less exacting" scrutiny. *Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973). Plaintiff would flip this principle on its head.

"Where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Where a law "regulates a substantial spectrum of conduct that is as manifestly subject to state regulation," *id.*, "it should not be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute," *id.* at 618. Here, the Law merely restricts persons from providing food, drink, and other things of value to a voter during polling hours to insulate waiting voters from potential intimidation, harassment, and undue influence. Elec. Law § 17-140. This is within the purview of permissible State election regulation. *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (deeming the California and Texas laws, which prohibit displays to voters of certain political apparel and campaign material, as within the bounds of what a State may proscribe); *Burson*, 504 U.S. at 210 ("Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice."). As explained above, the Law is narrowly tailored to further the State's important interests. *See supra*, at 20-21. As such, the Law is not unconstitutionally overbroad.

CONCLUSION

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

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Respectfully submitted,

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