UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

John DeRosier,

Civ. Action No.: 5:18-cv-00919

Plaintiff,

-against-

Dustin M. Czarny, in his official capacity as
Commissioner of the
Onondaga County Board of Elections,

Michele L. Sardo, in her official capacity as
Commissioner of the
Onondaga County Board of Elections,

Peter S. Kosinski, in his official capacity as
Co-Chair of the New York State Board of Elections,

Douglas A. Kellner, in his official capacity as
Co-Chair of the New York State Board of Elections,

Andrew J. Spano, in his official capacity as
Commissioner of the New York State Board of Elections,

Gregory P. Peterson, in his official capacity as
Commissioner of the New York State Board of Elections,

Defendants.

NOTICE OF CROSS-MOTION

Nature of Action:	First Amendment (political speech).
Moving Party:	Plaintiff.
Directed To:	Defendants.

Date and Time:	January 17, 2019.
Place:	United States Courthouse, 445 Broadway, Albany, New York.
Supporting Papers:	Declaration of Jeremy A. Colby dated December 18, 2018; Memorandum of Law dated December 18, 2018, Declaration of John DeRosier dated December 17, 2018 and Statement of Facts dated December 18, 2018.
Answering Papers:	Are due in accordance with the scheduling order of this Court.
Relief Requested:	An Order (a) granting plaintiff's cross-motion for summary judgment, (b) denying defendants' motion to dismiss and (c) awarding plaintiff litigation expenses including attorney fees.
Oral Argument:	Not requested.

Dated: December 18, 2018

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UNITED STATES DISTRICT COURT
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Andrew J. Spano, in his official capacity as Commissioner of the New York State Board of Elections,

Gregory P. Peterson, in his official capacity as Commissioner of the New York State Board of Elections,

Defendants.

DECLARATION OF JEREMY A. COLBY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I, Jeremy A. Colby, make this Declaration under penalties of perjury pursuant to 28 U.S.C. § 1746:

1. I am a partner at Webster Szanyi, LLP, counsel for Plaintiff John DeRosier ("DeRosier"). As such, I am fully familiar with the pleadings and proceedings in this action.

2. I submit this Declaration in Support of the Plaintiff's motion for summary judgment pursuant to Rule 56, and in opposition to summary judgment motions filed by Defendants.

3. This action arises out of New York Election Law 8-104(1) ("the Statute"), which prohibits three acts: (1) electioneering; (2) political banners, buttons, posters or placards in the polling place (or 100 foot radial); and (3) alcohol consumption in the polling place.

4. Plaintiff challenges the Statute as it applies to "political" buttons, but also as it applies to apparel and the undefined misdemeanor of "electioneering." If he must amend his pleading to clarify this, then he requests leave to do so. The Complaint specifically mentioned buttons because that was the term expressly included in the Statute.

5. Plaintiff challenges the deficiencies in the Statute, namely its vague and overbroad prohibition of "political" buttons and purported prohibition of apparel, which the State contends is covered by the undefined crime of "electioneering." Despite its best efforts, the State tries to characterize the Statute as "just an electioneering" prohibition rather than a general apparel ban, even though the State contends that electioneering also prohibits certain types of "political" apparel, albeit political apparel

that is not defined by the Statute, but instead by the State's own *ipse dixit* – which in its litigation papers is limited to candidates, parties, or issues on the ballot.

6. This case does not challenge what kind of electioneering statute *could* be adopted by New York. This case challenges the electioneering statute that actually was adopted by New York, and whether it withstands constitutional scrutiny. New York argues that it may regulate ballot-specific "electioneering" or "political" buttons or apparel even though no such language is contained in the Statute.

7. This case is different from Mansky (because DeRosier challenges speech outside the polling place, but within the 100 foot radial), and different from Burson (because the statute at issue does not regulate "campaign materials" as the Tennessee statute did, but rather "political" buttons as did the Minnesota statute in Mansky).

The Term "Electioneering" Is Statutorily Undefined

8. As discussed in the memorandum of law opposing the State's motion, the term "electioneering" is statutorily undefined in the Election Law (or in any other statute that contains electioneering and communication device prohibitions such as the Education Law or Town Law).

9. The State instead cites a definition contained in a *Basic Poll Worker Manual*, apparently published in 2016 (i.e., years before Mansky) by the Board of Elections of the City of New York. In other words, a local board of elections that has nothing to do with this case, voting in Onondaga County, or otherwise responsible for interpreting the Election Law in Onondaga County. Dkt. 21-2. The fact that the State reaches so far

down in the barrel in a desperate attempt to somehow define "electioneering" confirms the standardless and infinitely malleable nature of the term adopted by the Legislature. Voters are provided no guidance whatsoever as the State seeks to enforce a restriction according to its arbitrary and un-fixed subjective belief.

10. And even if the New York City poll workers manual were somehow included somewhere in the universe of statutory construction (it is not), it nonetheless does not reference apparel other than buttons, and thus appears to permit apparel. Nor does it clearly support the State's "electoral choices" interpretation where it defines "electioneering" as "efforts to encourage voters to vote a certain way," which could have included a MAGA button in the 2018 mid-terms – which the State concedes is not covered by the Statute.

11. The State also points to an October 3, 2018 e-mail issued by the State Board of Elections personnel to local election boards, which defined "electioneering" without citation to any supporting authority. Dkt. No. 21-2.[1] The State seeks to hang its hat on the State's own *ipse dixit* definition of "electioneering" contained in an **e-mail** sent a month before the 2018 election. The State cannot possibly be suggesting with a straight-face that it has *carte blanche* to define statutorily undefined terms in an e-mail that was not even published at large. And even this definition is vague and seeks further wiggle-room where it qualifies the State's newly-minted interpretation of what the Statute bans as "**typically must contain** the name of a candidate, political party,

[1] Is this e-mail the official or formal position of the SBOE? Was it ever voted on by the Commissioners? This e-mail has no force of law.

independent body or direct reference to a ballot proposal on the ballot **which contextually seeks votes**." Dkt. No. 21-2 (emphasis added).

12. Even this definition is hopelessly vague, instead suggesting that the electoral choices listed (which purportedly defines "electioneering," not "political") is a starting point that "typically" must be included and which must be seeking votes when viewed "contextually." The State omitted "typically" from its block quote in its brief, an implicit admission that inclusion of the word undermines its argument. Dkt. No. 21-9 at 6; Dkt. No. 21-2 ¶ 20.

13. Even under this unpublished and extra-statutory definition, a voter who wears apparel (or a button) naming a candidate, but who does not "contextually seek votes" would be permitted to so vote – if their speech was not chilled by a hopelessly vague threat of criminal prosecution.

14. The SBOE's "guidance" was intended for poll workers, not voters. Dkt. No. 21-9, at 12; Dkt. No. 21-2 at 15 of 19.

15. The SBOE also proffered guidance documents, which are only intended to provide guidance to election inspectors.[2]

16. Accordingly, this Court should reject the State's unfounded characterization of the Statute as "prohibit[ing] speech related to political candidates and issues on the actual ballot," or that the Statute's proscription is "ballot-specific," Dkt. No. 21-9 at 9, because the Statute contains no such language.

[2] Defendants inexplicably cite and rely on a manual intended for election inspectors in New York City – which has nothing to do with this case or voters in this District.

17. The State also proffered an excerpt from a 2010 Poll Worker Training Program manual, which states: "***Voters*** may wear political attire when casting their vote." Dkt. No. 21-2 Ex. 2 (emphasis in the original). This direction is 180 degrees opposite from the SBOE's litigation posture. And further confirmation that the terms "political" and "electioneering" are hopelessly beyond salvation. The more that the SBOE and County BOE say about the subject of "what is prohibited" under the Statute, the more confusing the matter becomes. As in Mansky, if the top lawyers for the State and County and the respective Board of Elections staff cannot agree as to what the Statute allows/does not allow, what hope do voters have?

New York State Board Of Elections' Post-*Mansky* Guidance

18. Although the State refers to a purported "plain language construction" (Dkt. No. 21-1 at 11), the obvious reply is "the plain language of what?" The State's "plain language" argument is based on the purported guidance (i.e., an e-mail that set forth an electoral choices limitation to be enforced after Mansky based on the State's *ipse dixit* and devoid of any supporting authority). After block-quoting the Statute, the State quickly moves on to discuss legislative history and purported guidance from the State Board of Elections as the basis for the electoral choices interpretation that it now proffers to this Court.

19. The State refers to "official guidance" from the State Board of Elections. Dkt. No. 21-9 at 11. But this "official guidance" is simply an e-mail from SBOE staff-members, it is not even a formal opinion of the SBOE. Dkt. No. 21-2, Ex. 1.

20. The guidance by the State Board (i.e., Connolly Decl, Exs. 2-3) was directed to poll workers, not voters. And Exhibit 3 was issued by the New York City Board of Elections, which is irrelevant.

21. The County received the SBOE Guidance and then issued its own policy letter/guidance to election inspectors seeking to define the scope of post-Mansky enforcement of the Statute, i.e., what is not permitted. But as discussed in the memorandum of law opposing the County's motion, this County BOE policy is even worse than the Statute, or the SBOE Guidance. The County's policy introduces terms like "political apparel" and "political messaging" – and does not address the concepts of political parties, independent bodies, or ballot issue that were contained in the SBOE Guidance. The County's policy is not a mirror image of the SBOE Guidance, despite what the County argues to the contrary.

22. In a nutshell, the Statute is hopelessly vague, and it is made worse still by the SBOE Guidance and County policy – which all come together to create absolute confusion as to what can and cannot be worn or done by voters at the polls.

New York State Board Of Elections' Purported Legislative History

23. The State proffers materials that purport to be legislative history for the Statute. Although some of the materials constitute legislative history, other materials are simply law review articles discussing the legislative history.

24. In any event, these materials proffered by the State discuss the evils at which the Australian secret ballot reforms were aimed – corruption and intimidation. These

materials, however, do not address button or apparel bans, instead referring to the vague and infinitely malleable term "electioneering," which may have (probably did) mean something different to the Legislature in 1890 (at a time when women were not yet permitted to vote) than it does to the State today. Nothing in the materials suggests that the Legislature was seeking to address buttons, apparel, or voter expression at all. The Statute was designed at curbing external influence of voters by partisans, vote-buyers, party bosses, and employers.

25. There is no suggestion anywhere that passive expression is remotely threatening to the "secrecy and purity of suffrage" in New York.

26. In any event, legislative history and other extra-statutory aides are inapplicable (and should not be considered) because the Statute is not ambiguous (i.e., several possible, reasonable meanings), it is vague (no clear lines at all).

County BOE's Extra-statutory Submissions

27. In addition to the SBOE Guidance addressed above, the County also proffered certain other items. The Affidavit of Attorney Yaus provides copies of what purport to be legislative history for certain election laws. As noted above, these materials are irrelevant and do not reference passive communication devices in any event.

28. Exhibit 2 of the Yaus Affidavit is a document excerpt that was provided to Plaintiff's Counsel in advance of the election, at which time we were advised by the County that Mr. DeRosier could wear Trump buttons or apparel when voting. Since

discovery has not been commenced, Plaintiff is unable to verify that the document is what it purports to be, an excerpt of guidance from the SBOE to county boards of election.

29. The County also proffers what purports to be its training manual for election inspectors, which is addressed in the accompanying memorandum of law.

30. Exhibit 4 of the Yaus Affidavit is a copy of an informal communication from the New York State Attorney General in 1933, which expressly states "This is not, however, an opinion of the Attorney General, but is written rather for your information in response to your request in the hope that it may be of service to you." But even if considered, the "guidance" in this document is that the Attorney General in 1933 did "not believe that it would be advisable for any watcher or other person to display campaign buttons for the purpose of electioneering within the polling place." This document does not address the area outside the polling place. And the qualification "for the purpose of electioneering," renders it useless for line-drawing purposes in light of the vague and undefined nature of "electioneering." Once again, we are left to scratch our head and wonder what is permitted speech.

31. This document, even if considered, is inconsistent with the present SBOE Guidance/position. For example, a "Trump 2020 button" or any "Trump" button would appear to be a "campaign button." These buttons are not "advisable" according to this document, but are permitted under the SBOE's interpretation of the Statute.

Conclusions

32. The only conclusion this Court can reach with any certainty in this case is that the Statute, standing alone or in conjunction with extra-statutory materials and "guidance," fails to clearly draw the line between permitted "political" buttons (and apparel) and unpermitted "political" buttons (and apparel). As in Mansky, each policy, guidance, or other extra-statutory item creates haphazard definitions and an indefinite scope of enforcement with respect to the Statute.

33. This Court should declare Election Law 8-104(1) unconstitutionally vague (and thus void), grant Plaintiff's motion for summary judgment, deny Defendants' motions for summary judgment, for vagueness, and any other and further relief the Court deems just.

Dated: December 18, 2018

s/ Jeremy A. Colby
Jeremy A. Colby

UNITED STATES DISTRICT COURT
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Douglas A. Kellner, in his official capacity as Co-Chair of the New York State Board of Elections,

Andrew J. Spano, in his official capacity as Commissioner of the New York State Board of Elections,

Gregory P. Peterson, in his official capacity as Commissioner of the New York State Board of Elections,

Defendants.

DECLARATION OF JOHN DEROSIER IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

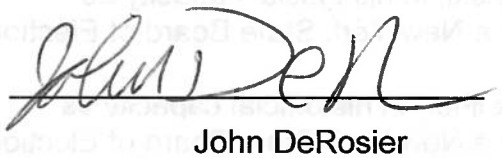
I, John DeRosier, make this Declaration under penalties of perjury pursuant to 28 U.S.C. § 1746:

1. I am the Plaintiff in the above-referenced matter and submit this Declaration in support of my Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56.

2. I intend to and would wear certain buttons and apparel while voting but for the improper chilling of my speech and First Amendment rights by the vague statute (Election Law sec. 8-104(1)), which purports to ban "political" buttons and establishes the misdemeanor of "electioneering," an undefined and unknown range of acts and speech that causes him to refrain from any speech while voting for fear of prosecution.

3. But for my belief that it would subject me to possible criminal prosecution, I would have worn buttons and apparel for Donald Trump and/or other candidates when voting in 2016.

Dated: December 17, 2018



John DeRosier

UNITED STATES DISTRICT COURT
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Defendants.

PLAINTIFF'S STATEMENT OF FACTS
ON MOTION FOR SUMMARY JUGMENT

Pursuant to Local Rule 7.1(a)(3), Plaintiff John DeRosier submits the following Statement of Material Facts in support of his motion and in opposition to Defendants' motions for summary judgment.

Preliminary Statement

1. DeRosier moves for summary judgment declaring Election Law § 8-104(1) to be unconstitutionally vague and in violation of the First Amendment, and thus declared null and void, and to have the Statute-related enforcement policies of the New York State Board of Elections ("SBOE") and the Onondaga County Board of Elections ("County BOE") likewise declared unconstitutional in violation of the First Amendment.

2. The SBOE has moved for summary judgment (Dkt. No. 21), and has submitted a Local Rule 7.1(a)(3) Statement (Dk. No. 21-1), which will be addressed herein.

3. The County BOE has moved for summary judgment (Dkt. No. 19), and has submitted a Local Rule 7.1(a)(3) Statement (Dk. No. 19-10), which will be addressed herein.

Material Facts Supporting Plaintiff's Motion for Summary Judgment

4. Plaintiff intends to, and would wear certain buttons and apparel while voting but for the improper chilling of his speech and First Amendment rights by the vague Statute, which purports to ban "political" buttons and establishes the misdemeanor of "electioneering," an undefined and unknown range of acts and speech that causes him to refrain from any speech while voting for fear of prosecution. DeRosier Decl. ¶ 1.

5. Plaintiff is entitled to summary judgment based on the plain text of the Statute and case law as set forth in the accompanying legal memoranda.

Response to SBOE's Statement of Facts

6. Paragraphs 1-4, 6 are admitted.

7. Paragraphs 5, 7 are items for which Plaintiff lacks knowledge or information sufficient to form a belief as to the truth or falsity of the alleged fact(s), and is therefore denied. Inasmuch as discovery has not yet commenced, and Mr. Thomas E. Connolly has not yet been deposed, the Plaintiff is not yet in a position to provide evidence in response to this assertion. That said, however, discovery is not needed because, based on the materials submitted by Defendants, Plaintiff is entitled to summary judgment declaring the Statute and the Defendants' respective enforcement policies unconstitutional. Alternatively, if Plaintiff's motion is not granted, he requests relief under Rule 56(d) to commence discovery in order to depose Mr. Connolly and to explore, *inter alia*, the SBOE's "motivation" in adopting its post-Mansky enforcement policy for the Statute.

8. Plaintiff objects to the SBOE's premature submission of witness declarations (Dkt. No. 21-2) and other purported evidentiary materials before discovery has commenced.

9. Attached as Ex. 1 to the Connolly Declaration is the SBOE Guidance, an e-mail dated June 20, 2018 from the SBOE Co-Executive Directors to various individuals. The SBOE Guidance is addressed in Plaintiff's summary judgment papers.

10. Attached as Ex. 2 to the Connolly Declaration is a purported excerpt from a Poll Worker Training Program manual ostensibly dated 2010 (years before Mansky). This manual states: "***Voters*** may wear political attire when casting their vote." Dkt. No. 21-2 Ex. 2 (emphasis in the original).

11. Attached as Ex. 3 to the Connolly Declaration is a purported excerpt from a Basic Poll Worker Manual ostensibly dated 2016 and published by the City of New York Board of Elections (the relevance of which is lost on Plaintiff).

12. Attached as Ex. 4 to the Connolly Declaration is the SBOE Guidance, an e-mail dated October 3, 2018 from the SBOE Co-Executive Directors to various individuals. Attorney Dague also submitted a Declaration attaching purported legislative history materials and two academic journal articles, all of which are germane to the Australian ballot reforms in New York, i.e., the secret ballot (not bans of political buttons or apparel).

13. The SBOE makes reference to its internal e-mails and guidance materials (collectively "SBOE Guidance"). No discovery has been conducted, and Plaintiff is unable to do anything other than deny or assume *arguendo* that the SBOE Guidance is what the SBOE claims it to be. As noted above, to the extent that Plaintiff's motion is denied, he seeks leave to conduct discovery and for other relief appropriate under Rule 56(d).

14. To the extent that the SBOE characterizes the contents of the SBOE Guidance materials, Plaintiff notes that they speak for themselves and reserves the right to make all challenges to these materials after having been given an opportunity to conduct discovery. Assuming *arguendo* that they are what they purport to be, the SBOE Guidance materials are constitutionally deficient for the reasons set forth in Plaintiff's memoranda of law. The purported SBOE Guidance is extra-statutory in nature. Since the SBOE does not claim that the Statute is ambiguous (which would render some interpretive aides

permissible), consideration of extra-statutory materials is improper, especially on a pre-discovery motion. Accordingly, no response is required to the allegations set forth in Paragraphs 9-11, 16-17 of the SBOE's Statement of Facts.

15. The SBOE improperly seeks to rely on certain extra-statutory materials in support of its pre-discovery motion for summary judgment. No discovery has been conducted, and Plaintiff lacks information or knowledge sufficient to substantively respond to these hearsay materials. As noted above, to the extent that Plaintiff's motion is denied, he seeks leave to conduct discovery and for other relief appropriate under Rule 56(d). Accordingly, no response is required to the allegations set forth in Paragraphs 12-15 of the SBOE's Statement of Facts.

Response to County BOE's Statement of Facts

16. Paragraphs 1-2, and 7 are admitted.

17. Paragraphs 3-6 are items for which Plaintiff lacks knowledge or information sufficient to form a belief as to the truth or falsity of the alleged fact(s), and is therefore denied. Inasmuch as discovery has not yet commenced, and no party has been deposed, the Plaintiff is not yet in a position to provide evidence in response to this assertion. Discovery is not needed because, based on the materials submitted by Defendants, Plaintiff is entitled to summary judgment declaring the Statute and the Defendants' respective enforcement policies unconstitutional. Alternatively, if Plaintiff's motion is not granted, he requests relief under Rule 56(d) to commence discovery in order to depose BOE officials and to explore, *inter alia*, the SBOE's Guidance communications

with the County BOE, as well as the County's post-Mansky enforcement policy for the Statute.

18. The Joint Affidavit of Commissioners Czarny and Sardo (Dkt. No. 19-2) should be disregarded. Inasmuch as discovery has not yet commenced, and the County Commissioners have not yet been deposed; Plaintiff is not yet in a position to provide evidence in response to this Joint Affidavit. That said, however, discovery is not needed because, based on the materials submitted by Defendants, Plaintiff is entitled to summary judgment declaring the Statute and the Defendants' respective enforcement policies unconstitutional. Alternatively, if Plaintiff's motion is not granted, he requests relief under Rule 56(d) to commence discovery in order to depose the County Commissioners and to explore, *inter alia*, the County BOE's post-Mansky enforcement policy for the Statute.

Dated: December 18, 2018

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Attorneys for Plaintiff
John DeRosier

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cc: **Onondaga County Attorney**
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Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO COUNTY OF ONONDAGA'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF AUTHORITIES

Cases

Statutes

Preliminary Statement

Plaintiff John DeRosier ("DeRosier") files this Memorandum of Law in opposition to the County of Onondaga's motion for summary judgment. DeRosier filed suit against the four Commissioners of the New York State Board of Elections ("State" or "SBOE") and the two Commissioners of the Onondaga County Board of Elections ("County"). DeRosier challenges Elec. Law § 8-104(1) (the "Statute"), as enforced through Election Law and § 17-130(4), (23), because the Statute prohibits voters from wearing "political" buttons. It also prohibits other passive expression (i.e. apparel) via the undefined crime of "electioneering." Both aspects of the Statute are unconstitutionally vague under the U.S. Supreme Court's decision in Minnesota Voters' Alliance v. Mansky, 138 S. Ct. 1876 (2018). Mansky held that Minnesota's "unmoored use of the term 'political' in the Minnesota law, combined with haphazard interpretations" of that term rendered the state's political apparel ban unconstitutional under a reasonableness standard.

Likewise, New York's standard less prohibitions against "political" buttons and "electioneering" renders the Statute unconstitutionally vague and overbroad under Mansky. Although New York may proscribe certain forms of speech in the polling place and 100 feet outside the polling place, it must draw a clear line in doing so.

This Court should reject the County's argument that it was "simply following orders" from the SBOE in enforcing the Statute. The County argues that it did not adopt a policy, but it submitted a copy of the policy that it in fact adopted and issued to election inspectors. The County's policy materially deviated from the SBOE's Guidance, and is actually vaguer and more constitutionally deficient. The County is subject to injunctive relief prohibiting it from enforcing its unconstitutional policy.

Statement of Facts

The facts are set forth in DeRosier's Response To Statement of Facts with respect to the State and County's Facts Statements, and Plaintiff's Declaration.

Argument

POINT I

Summary Judgment is Premature

Defendants' motions for summary judgment are premature and should be treated as a motion to dismiss for failure to state a claim. As Judge D'Agostino has noted, the "Second Circuit has clarified that summary judgment should only be granted if '*after discovery*, the non-moving party has failed to make a sufficient showing on an essential element of its case . . ."[1] And for that reason, summary judgment may only be granted in the "rarest of cases" against a "party who has not been afforded the opportunity to conduct discovery."[2] In Kenefic v. Oswego County, Judge Suddaby cited cases where courts treated a premature summary judgment motion as a motion to dismiss.[3]

Summary judgment or a Rule 12(c) motion might be proper if Defendants' analysis were restricted to the text of the challenged statutes or materials of which this Court could take judicial notice. But that is not the case. Defendants rely on witness affidavits, internal e-mails and publications, as well as legislative history and law review articles discussing the historical context of New York's adoption of secret ballots. Since discovery has not yet commenced, the evidentiary materials are patently improper. And

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[1] Mitsubishi Elec. Cor. v. Westcode, Inc., 2016 WL 3855180, at *11 (N.D.N.Y. 2016) (quoting Miller v. Wolpoff & Abramson, LLP, 321 F3d 292, 303-04 (2d Cir. 2000)).
[2] Id.

since the State Defendants deny statutory ambiguity (Dkt. No. 21-9 at 13),[4] the legislative history (and historical context of) secret balloting -- which is not challenged -- is irrelevant.

The County Defendants also proffer other extra-statutory materials that are prematurely considered before Plaintiff has had an opportunity to engage in discovery. That said, however, the County proffered the "guidance" it received from the SBOE and a County policy/guidance issued to poll workers. These extra-statutory materials are not properly considered before discovery because they are not the subject of judicial notice. But even if considered, these materials fail to carry the day for the same reasons set forth in Plaintiff's Memorandum opposing the State's motion. Namely, the "SBOE Guidance" is an *ipse dixit* e-mail that cites no authority supporting the SBOE's interpretation of "electioneering" other than an internal poll worker manual published by the New York City Board of Elections.

More important, these materials further establish Plaintiff's case. As discussed in Point II below, the County's submissions demonstrate the County BOE's policy – which should be declared unconstitutional and summary judgment awarded to Mr. DeRosier. The County received the SBOE Guidance, considered it, then issued a policy that is even more constitutionally deficient than the Statute (or the SBOE Guidance). Despite statutory silence, the County's policy prohibits "political apparel" and "political messaging." The County's adopted/operational definition deviates from the State's purported ballot-specific electoral choices interpretation (i.e., does not include political

[3] 2010 WL 2977267, at *9 (N.D.N.Y. 2010) (citing cases).

parties, independent bodies, or ballot issues). The County also proffers its elections inspector course manual (Dkt. No. 19-5), which is largely irrelevant, with the exception of page 65 of 72, which defines "electioneering" as "Anything that promotes a candidate (Political buttons, T-Shirts, hats, Campaign Signs, etc.)."[5] It mirrors the County BOE's unconstitutional policy (Dkt. No. 19-4).

The County's "we just follow SBOE Guidance" argument is refuted by its own submissions. The County's policy also entitles Plaintiff to summary judgment for declaratory relief. And at worst, the County's submissions create an issue of fact that require denial of their motions. Submission of witness Affidavits before discovery has commenced and before Plaintiff has had an opportunity to depose these individuals is especially unfair.

POINT II

The County's "Conscious Choice" Argument

The County discusses the Second Circuit's decision in Vives v. City of New York and argues that Election Law § 8-104 is a "state law" adopted by the State and that it "merely carries out state anti-electioneering law without any meaningful or conscious choice."[6] The County argues that, under Vives, this Court must consider: (1) "whether the County 'had a meaningful choice as to whether it would enforce' state anti-

[4] The Complaint erroneously described the Statute as ambiguous instead of vague (which will be corrected in an amended pleading and which is not a factual pleading as opposed to a legal characterization in any event).
[5] The County points to electioneering references at pages 8, 24, 27-28, but not 65 – which is most germane to the issue of whether or not the County has adopted a policy of defining electioneering and attempting to draw a line with respect to political apparel.
[6] Dkt. No. 19-9 at 5-6 (discussing Vives, 524 F.3d 346 (2d Cir. 2008)).

electioneering laws; and (2) if so, whether the County 'adopted a discrete policy to enforce' such laws that 'represented a conscious choice by a municipal policymaker."[7] The County argues that it has "no choice" but to enforce the Statute, and that there is therefore no policy in place, a pre-requisite to Monell liability.

But the County's argument must be rejected because the County adopted a policy or custom concerning the Statute's enforcement in the wake of Mansky.[8] The Complaint should be liberally construed to allege that the County adopted a custom or policy of exercising discretion when enforcing the Statute (i.e., deciding which "political" buttons are permitted and which ones are not permitted) because of the Statute's vagueness (as discussed in the accompanying Memorandum of Law opposing the State's motion for summary judgment).

Moreover, the materials that Defendants submitted on this motion conclusively show that the County **in fact adopted a policy** concerning enforcement of the Statute. The State and County both point to "guidance" the SBOE provided to local boards of election.[9] The State's self-described "guidance," in the words of Vives, "merely authorizes" municipal action, it does not mandate it within the meaning of Vives, 524 F.3d at 351. The County, in turn, issued its own directive to election inspectors (albeit adopting *some* of the State's guidance), thereby adopting a policy or custom.[10] The County had alternatives. It could have adopted the SBOE's Guidance as its own policy. It could have disagreed with the SBOE's informal guidance and instead articulated an

[7] Dkt. No. 19-9 at 6 (quoting Vives, 524 F.3d at 350).
[8] Mr. DeRosier requests leave to amend to the extent that the Court finds his allegations concerning municipal policy to be deficient. Indeed, the Defendants' submissions have revealed internal documents that were not previously published.
[9] Dkt. Nos. 19-3 and 19-4, 21-2 ¶¶13-16, 20, and Exs. 1, 4.

entirely different enforcement policy. Instead, however, the County BOE reviewed the SBOE guidance, considered it, and then adopted a modified version of the SBOE Guidance as the County's policy of post-Mansky enforcement of the Statute.

The County's "we just did what SBOE told us to do" assertion is belied by the materials submitted on this motion.[11] The SBOE Guidance indicated that the ban of "electioneering banners, buttons, posters and placards **typically**[12] must contain the name of a candidate, political party, independent body[13] or direct reference to a ballot proposal on the ballot which contextually seeks votes."[14] The SBOE's use of "typically" renders the guidance no more precise than the Statute's use of "political," even if the guidance were considered.[15] Nonetheless, the County BOE received the SBOE Guidance, reviewed it, then issued its own written policy, albeit "derived" in part from the SBOE Guidance.

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[10] Dkt. Nos. 19-3 and 19-4.

[11] *Compare* Dkt. Nos. 19-3 and 19-4 *with* Dkt. No. 21-2 ¶¶13-16, 20, and Exs. 1, 4.

[12] The expansiveness introduced by "typically" is confirmed by the County's papers, which state that the SBOE Guidance "can include 'attire' and the 'wearing' of certain messages . . . " Dkt. No. 19-9 at 8. Saying that the Statute's proscriptions "include" attire and "political messages" does nothing to draw a line demarcating what is not included within the Statute's scope. The SBOE Guidance is really no better than the Statute from a vagueness perspective.

[13] It is unclear what "political" buttons referring to an "independent body" would be prohibited under the SBOE's interpretation of the Statute. What is an "independent body"? The Tea Party? Congress? State Assembly? This is just another example of the vague nature of the SBOE Guidance heaped on top of the vague Statute. The remedy is not more vague attempts to corral the Statute's use of "political" – while simultaneously and extra-statutorily seeking to apply "political" beyond communication devices to all apparel under the guise of interpreting "electioneering." The remedy is to strike down the Statute and to send the Legislature back to the drawing board.

[14] Dkt. No. 19-3 (emphasis added).

[15] The SBOE Guidance should not be considered because the Statute is vague, not ambiguous, and thus not subject to extra-statutory interpretive aides as set forth in the Memorandum of Law opposing the State's motion and which is incorporated by reference herein.

The County's policy was prefaced as follows: "In light of the recent Supreme Court ruling and guidance from the NYS Board of Elections, the Commissioners of the Onondaga County Board of Elections give the following clarification on what is acceptable attire in a polling place."[16] The County's policy is as follows:

> No voter shall be restricted from voting for their political attire. Any voter with such political messaging must be allowed to vote but must immediately be asked to remove themselves from the polling place upon casting said vote. Any voter wearing attire with a candidate's [sic] will be asked to cover up or remove that attired before being issued a ballot.[17]

The County BOE's policy deviated from the SBOE Guidance in several notable respects – which shows that the County BOE issued its own policy (i.e., a "conscious choice") after considering the SBOE Guidance. The County BOE policy refers to "political attire" and "political messaging" without definition or guidance, not even the electoral choices qualification that the SBOE now proffers as its interpretation of the Statute. The County BOE policy presumably intends to ban attire with a candidate's name, but the typo prevents the reader from knowing what candidate attire will be prohibited. Is it just a candidate name as the Defendants now argue in this Court? Is it a candidate's photograph or slogan, which appear to be permissible according to the State's current litigation posture. The County BOE policy also deviates from the SBOE Guidance in not providing examples of permitted "political viewpoint" messages, such as Second Amendment or Immigration Reform.[18] As a result, the County BOE's policy, if possible, appears to be worse than the SBOE's Guidance because it relies on vague

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[16] Dkt. No. 19-4 (emphasis added).
[17] Dkt. No. 19-4. The County's papers indicate that the only word omitted from the County BOE policy was "name" as opposed to photograph, slogan, or political affiliation. Dkt. No. 19-9 at 8-9.
[18] *Compare* Dkt. No. 19-3 *with* Dkt. No. 19-4.

phrases such as "political attire" and "political messaging" as being banned. Accordingly, the County policy appears to conflict or deviate from the SBOE Guidance (despite the characterization that the County adopts here). Moreover, the County BOE policy deviates from the SBOE's stated electoral consequences language by omitting political parties, independent bodies, or ballot proposals.

And even if the deviation is unintended or the result of poor draftsmanship, the problem remains that this is the policy that the County BOE provided to its election inspectors before sending them off to the polling places to enforce the Statute as best they could.[19] The County policy is as hopelessly vague as the statute and guidance in Mansky, which exacerbates the vagueness of the Statute (and the problems associated with the SBOE Guidance, even if considered). And if you accept the County's litigation position that it is simply carrying out SBOE policy or has its arms locked with the SBOE, the County's policy shows what a futile task it is to try to provide intelligible guidance as to where the line is between permitted speech and unpermitted speech (especially if one does not deviate from the statutory language). Defendants are seeking judicial approval to impose the SBOE's Guidance, which was not adopted by the Legislature, in a vain effort to salvage a hopelessly vague Statute that uses the undefined and unmoored terms of "political" and "electioneering."

[19] If election inspectors have few electioneering or "political messaging" problems at the polls, an issue to be explored in discovery, it is probably because the Statute and its criminal sanctions have chilled people far from the line of their First Amendment rights in an effort to elevate administrative efficiency and convenience over political speech. McCullen v. Coakley, 134 S. Ct. 2518, 2534–35 (2014) ("But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'").

The County denies a policy, instead claiming that it "simply carries out its state-mandated duty to enforce state anti-electioneering statutes in accordance with state law and state guidance. . . "[20] But there is no mandate as to how the Statute will be interpreted/enforced, and thus the County BOE adopted SBOE "guidance" in part as its own policy or custom.[21] Moreover, "guidance" is not mandatory.[22] As Judge Treece recognized in the context of ethical rules, "the disciplinary rules are only guidance and not mandatory."[23] Other courts have also recognized the non-mandatory nature of the term "guidance." In U.S. ex rel. Polansky v. Pfizer, Inc., the Second Circuit Court of Appeals recently noted: "As Judge Cogan explained, 'guidelines' usually provide advice and (unsurprisingly) guidance, 'not mandatory limitation.'"[24] As a result, the County's "we were mandated by the SBOE Guidance" argument should be rejected.

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[20] Dkt. No. 7 (emphasis added).

[21] Dkt. No. 7-8 (repeatedly referring to "SBOE Guidance" and that it summarized and "simplified" the guidance and that the County's letter was "derived" from the SBOE Guidance). As noted above, this characterization is inaccurate. But even if accurate, adopting the SBOE Guidance as its own is still the adoption of a County policy for Monell purposes.

[22] https://www.merriam-webster.com/dictionary/guide#h2 (defining "guide" or "guidance" as (1) "to act as a guide to : direct in a way or course"; (2a) "to direct, supervise, or influence usually to a particular end"; or (2b) "to superintend the training or instruction of"); https://dictionary.cambridge.org/us/dictionary/english/guidance (defining "guidance" as "help and advice about how to do something or about how to deal with problems connected with your work, education, or personal relationships").

[23] Nelson v. Ulster Cty., 2007 WL 2288053, at *5 (N.D.N.Y. 2007) (citing S&S Hotel, *infra*); S & S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp., 69 N.Y.2d 437, 440 (1987) (holding that the "Code of Professional Responsibility provide[s] guidance, not binding authority").

[24] 822 F.3d 613, 618 (2d Cir. 2016) (citation omitted); *cf*. United States v. Reed, 2012 WL 12883635, at *2 (N.D.N.Y. 2012) ("the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the sentencing guidelines are advisory, not mandatory"); Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904 (2018) ("Courts are not bound by the Guidelines, but even in an advisory capacity the Guidelines serve as "a meaningful benchmark" in the initial determination of a sentence").

The County attacks a straw-man in arguing that they have no choice but to enforce the electioneering Statute. The County's policy choice is not between "enforce or don't enforce," but rather the question is "how should we enforce, and as against what conduct?" The County ignores the undefined nature of "political" and "electioneering," instead pretending that it has a statutorily defined scope (it does not). The SBOE adopted its own an extra-statutory scope for "political" and "electioneering" after Mansky, and the County BOE simply adopted part of that policy as its own.

Vives is further distinguished by the fact that the County considered the specific Statute in question after receiving "guidance" from the State on this specific statute, and after considering that guidance, issued its own directive.[25] The fact of the matter is that the County adopted a policy (Dkt. No. 19-4, 19-5), which is unconstitutional and supports summary judgment for Plaintiff. Indeed, it is shocking that the County makes a Sgt. Schulz "I know nothing" argument denying the existence of a policy that it actually produced (as well as training materials for the policy). How can the County argue that it simply followed SBOE Guidance when it issued its own policy that materially deviated from the SBOE Guidance? This Court should grant summary judgment to Plaintiff declaring the County's electioneering policy to be unconstitutional.

[25] In Vives on the other hand, the city enforced the Penal Law generally, and there was a fact issue whether the city had considered enforcement of the specific statute at issue (Penal Law § 240.30(1) for aggravated harassment), and was therefore remanded to the District Court for further proceedings. 524 F.3d at 358. Fact issues existed whether the city had adopted a policy for enforcing Penal Law § 240.30(1). This provision of the Penal Law was later declared unconstitutional by the Court of Appeals in People v. Golb, which also noted that a decision in the Vives case had noted that "where speech is regulated or proscribed based on its content, the scope of the effected speech must be clearly defined." 23 N.Y.3d 455, 467 (2014) (citation omitted). Golb struck down Penal Law § 240.30(1) as unconstitutionally vague and overbroad and its analysis is equally applicable to the Statute's use of "political" and "electioneering."

At the very least, given the lack of any discovery, this Court should deny the County's motion for summary judgment. Even if this Court somehow finds that the County BOE's policy does not definitively establish itself as a "County policy" for purposes of Monell, the question of whether or not the County has adopted a *de facto* custom or policy is an issue of fact that cannot be resolved in the County's favor before Mr. DeRosier has been afforded an opportunity to conduct discovery.

Plaintiff has sufficiently alleged a custom or policy by the County concerning post-Mansky enforcement of the Statute despite the constitutional deficiencies revealed by Mansky. The Statute does not define "political" or "electioneering." Enforcement is in the eye of the beholder. The County cannot proffer a policy and training materials while denying that such a policy exists, claim to simply rely on SBOE Guidance despite adopting a policy that materially departed from the SBOE Guidance, attempt to deny Plaintiff any discovery on that topic, and then seek summary judgment on that issue.

The County has also submitted training materials, which distinguish this case from Vives, which remanded because it was unclear what training, if any, was provided, or whether the specific statute at issue was considered by the municipality. Here, on the other hand, the materials provided by the County demonstrate that the Statute – and SBOE Guidance addressing the Statute – were specifically considered by the County. And further still, the County BOE issued a policy (and related training materials) with respect to the Statute and post-Mansky enforcement policy.

1. **Additional Discussion of *Vives***

As discussed above, the County did adopt a policy, i.e., a proposed course of enforcement of the Statute "consciously chosen from among various alternatives."[26] In Vives, the court examined decisions from other circuits, concluding that "a distinction should be made between a state law mandating municipal action and one that merely authorizes it."[27] The court also examined a Sixth Circuit decision (Garner v. Memphis Police Dep't), where a "municipality promulgated a deadly force policy that differed from the policy authorized by state law albeit in ways that restricted the use of deadly force."[28] Likewise, here, the County adopted a modified version of the SBOE Guidance, and thereby adopted its own policy concerning post-Mansky enforcement.

Vives also examined an Eleventh Circuit decision (Cooper v. Dillon), where a "municipality enacted an ordinance reflecting its intent to enforce state criminal law and the officer who decided to enforce this ordinance against the plaintiff was a policymaker."[29] Likewise, here, the County BOE's policy announced its intent to enforce state election law and announced the scope of enforcement. The Statute does not mandate how the County will enforce the Statute, which requires a substantial degree of discretion in determining which conduct implicates the Statute (and which does not).

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[26] Vives, 524 F.3d at 350 (citation omitted).
[27] Id. at 351 (discussing cases).
[28] Id. (discussing 8 F.3d 358, 364 (6th Cir. 1993)).
[29] Id. (discussing 403 F.3d 1208, 1222-23 (11th Cir. 2005)); *see also* Martin v. Evans, 241 F. Supp 3d 276, 285 (D. Mass. 2017) (following Vives and holding that a complaint sufficiently alleged "a conscious decision by the [Boston Police Department] to enforce [a wiretapping statute that implicated First Amendment rights]" where it trained its officers in generic terms about the right to arrest a person who "secretly records oral communications").

And even if the County were able to, after discovery, demonstrate that it did not adopt a policy concerning post-Mansky enforcement of the Statute, then the County could still be liable under Monell if the County made "a conscious choice to enforce [the Statute] in an unconstitutional manner."[30] Accordingly, this is an alternate basis for Monell liability against the County. This "unconstitutional manner" inquiry can be resolved against the County at this stage, or, at the very least, would entitle Plaintiff to discovery.

2. **The Power To Instruct County BOE Personnel**

The County attempts to have the best of both worlds. On the one hand, it argues that the official capacity claims against the County BOE Commissioners is essentially a claim against the County.[31] On the other hand, the County argues that it does "not have the power to instruct CBOE personnel not to enforce" the Statute.[32] If the County does not control the County Commissioners and their personnel, then they are not properly treated as the "functional equivalent" of the County. In order to substitute the County as the "real party in interest" under Kentucky v. Graham, 473 U.S. 159, 166 (1985) instead of the County Commissioners, the County must show that it stands in the shoes of the Commissioners. Otherwise, they cannot be deemed "functionally equivalent."[33]

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[30] Vives, 524 F.3d at 356.
[31] Dkt. No. 19-9 at 4-5.
[32] Dkt. No. 19-9 at 6.
[33] Kaczmarek v. Conroy, 218 A.D.2d 97, 101 (3d Dep't 1995) (official capacity claims against officers or departments component parts of municipality are "the functional equivalent" of suit against the municipality and are thus generally dismissed "as redundant"); *cf.* Farrar v. Handel, 2009 WL 4041895, at *2 (N.D. Ga. 2009) ("whether Defendant Handel [Secretary of State] exercised sufficient control over the actions and policies of the Board such that she may be held vicariously liable for their actions").

The County Defendants have exclusive control of their personnel. In County of Chautauqua v. Chautauqua County Employees' Unit 6300, the Fourth Department held that Article II § 8 of the New York Constitution "vested boards of election with complete and exclusive control of their personnel and the performance of their duties in that highly sensitive governmental area."[34] Accordingly, if the County Commissioners are the "functional equivalent" of the County as argued by the County, then the County must be deemed to have exclusive control of BOE personnel. Otherwise, if the County is not ultimately liable, the Commissioners are, then there is no need to apply Monell's policy or custom requirement, which is simply a way of ensuring the municipal liability is not liable solely under *respondeat superior*.[35] For what it is worth, the Commissioners were recently named parties in a First Amendment case involving the application of "mandatory" state election law, a case that ended in Plaintiff's favor.[36]

And, as stated above, the issue is not "enforce or not enforce," the question is "how to enforce and as against whom and what range in an infinite scope of conduct?"

The County points to Election Law § 5-204(9) for the proposition that the election inspectors "*shall* preserve good order within and around the place of registration."[37] Although this statute prohibits electioneering at the polls, it is aimed at the election inspectors themselves, not voters like Mr. DeRosier. This statute is entitled, "Local registration; general provisions for the conduct of." The sections speaks in terms of

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[34] 181 A.D.2d 1052, 581 N.Y.S.2d 967 (1992)

[35] Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 691 (1978) ("a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory").

[36] Parrish v. Kosinski, 2018 WL 1475222, at *1 (N.D.N.Y. 2018), report and recommendation adopted, 2018 WL 1474366 (N.D.N.Y. Mar. 26, 2018).

what the election inspectors shall do (i.e., display the flag, cause the election district maps to be displayed conspicuously, "attach to their clothing the proper identification . . . issued by the board of elections" etc.). Although election inspectors are required to maintain good order in the polling place, that does not begin to tell them how to enforce the Statute (i.e., which "political" buttons are allowed and which are not, or what constitutes "electioneering"). That is where the County BOE's custom and policy comes into play.[38] Also worth noting is the fact that Election Law § 5-204(9) omits "button" from its list of political communication devices.

Plaintiff concedes that "shall" connotes mandation. But, the County's cite to footnote 6 of Vives is interesting because it compares Penal Law § 240.30 (defining the offense of aggravated harassment)[39] and Agricultural and Markets Law § 371 (directing officers to issue a ticket or make an arrest for people violating animal cruelty laws). Here, the Statute and Section 5-204(9) define two offenses (albeit vaguely) and mandate generic conduct by election inspectors (i.e. "preserve good order") without telling them what to do or whom to do it against. If an election inspector encounters "electioneering" or a "political" button, must they call the police? Take action themselves? Accordingly, the Statute is more like Penal Law 240.30 than it is Ag. &

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[37] Dkt. No. 19-9 at 6 (emphasis provided by the County).

[38] Again, the County seeks to paraphrase Hamlet by essentially telling this Court that they are faced with "to enforce or not to enforce, that is the question." But the real question is "how to enforce and as to what types of conduct and buttons." The County's analysis is focused on "electioneering" rather than "political buttons," presumably an implicit admission that the electioneering ban is arguably stronger than the "political" button ban – but not my much.

[39] "Section 240.30(1) itself does not constitute such a mandate because it simply defines an offense without directing municipal officials to take any steps to act when the statute is violated." Vives, 524 F.3d at 354.

Markets Law § 371. The Statute does not mandate how election inspectors are to enforce the electioneering and "political" button bans.

The County attempts to distinguish Vives by arguing that it was not the one who "put flesh on the bones" of the Statute. But, as discussed above, it was the County who put the flesh on the bones of its policy concerning post-Mansky enforcement of the Statute. Plaintiff discussed above how the County BOE's policy deviated from the SBOE Guidance, as well as the express language of the Statute. The County argues otherwise. This Court may rule against the County based on its own submission. At the very least, the County creates a fact issue that defeats its motion.

3. **Education Law § 2031-a**

The County inexplicably quotes Education Law 2031-a for the proposition that it prohibits "electioneering and any 'banner, poster or placard *on behalf of or in opposition to any candidate or issue to be voted upon*".[40] The existence of this statute and this electoral choices type language undermines the Defendants' argument that the Statute – which does **not** contain this language – somehow borrows this language for purposes of interpreting the Statute. To the contrary, the fact that the Legislature omitted this language from the Statute, when it clearly knew how to add such language when it wanted to do so, shows that the Legislature did not intend to adopt the interpretation now advanced by the SBOE. Notably, this statute also omits "button" from its list of political communication devices, again showing that the button restriction is not needed to protect election integrity.

[40] Dkt. No. 19-9 at 8 (emphasis added).

4. **Failure To Train Allegations**

Although Plaintiff reserves the right to amend his pleading to address a failure to train claim, in light of the training materials proffered by the County and the County's policy concerning post-Mansky enforcement of the Statute, the present pleading does not include a separate failure to train cause of action.

POINT III

New York's "Political" Button And Electioneering Bans Are Unconstitutionally Vague

The County adopts and incorporates by reference the State's arguments in support of its motion for summary judgment. DeRosier hereby incorporates by reference and adopts the arguments set forth in his Memorandum of Law opposing the State's motion for summary judgment.

In a nutshell, the Statute's prohibitions against the undefined and infinitely malleable crime of "electioneering" and the ban against "political" buttons (or certain listed communication devices, but not including apparel) are standard less and hopelessly vague and overbroad. The Statute impermissibly chills First Amendment speech particularly, passive political speech at the moment of voting, which is apex of exercising one's right of self-government.

The plain language of the Statute does not support the interpretation proffered by the State (and joined by the County): namely, that "electioneering" is limited to ballot-specific choices (i.e., candidates, parties, and ballot questions), and that "political" is an example of "electioneering" – despite the fact that the Legislature separated

"electioneering" and "political" communicative device restrictions by a conjunction "and" and a semicolon. The Statute establishes three prohibited acts: (1) "electioneering;"[41] (2) "political" banners, buttons, posters, or placards; (3) consumption of alcoholic beverages in a polling place.

DeRosier's interpretation tracks the statutory language and grammatical structure without adding language not present in the Statute. The conjunctive use of "and" separated by a semi-colon indicates that electioneering and the "political" button ban are two separate prohibitions.[42] If the Legislature had intended the interpretation proffered by Defendants, it would have presumably adopted "including, but not limited to" type language. This Court should "interpret the statute in a manner that is most consistent with the plain language of the statute."[43]

Defendants' ballot-specific electoral choices interpretation, on the other hand, requires the addition of language not contained in the Statute.[44] In Chem. Specialties Mfrs. Ass'n v. Jorling, the Court of Appeals warned that "new language cannot be

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[41] The electioneering proscription is also a misdemeanor (under N.Y. Elec. Law § 17-130(4), (23)). "Electioneering" is statutorily undefined. Election Law § 1-104. The term "political" is also undefined, even though the Legislature defined much simpler terms such as "political unit" and "village primary."

[42] McMillan v. Police Dogs, Inc., 52 A.D.2d 369, 370-371 (3d Dep't 1976) (holding that statutory groupings were "separated not only by a coordinating conjunction but also by a semi-colon. Thus, a separate grouping is clearly indicated); Vernon v. Vernon, 100 N.Y.2d 960, 971 (2003) ("The conjunctive 'and' at the end of subsection (c)(1), after the semicolon, does not serve to conflate the two separate subsections"); United States v. Smith, 17 F.2d 534, 535 (2d Cir. 1927) ("punctuation by a semicolon is indicative of a complete thought in one clause separate from the other clauses of the statute").

[43] People v. Hill, 82 A.D.3d 77, 79 (4th Dep't 2011) (citations omitted).

[44] Defendants deny that the Statute bans political apparel beyond that which "electioneers" -- a *de facto* apparel ban that is vague and standard less. If the Legislature had intended "electioneering" to ban apparel, then there would have been no need to specifically include "button" in the communication device clause. Inclusion of the narrower "button" indicates that no apparel ban was intended.

imported into a statute to give it a meaning not otherwise found therein."[45] Moreover, courts "cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact [and an] inference must be drawn that what is omitted or not included was intended to be omitted and excluded."[46] Accordingly, this Court must reject Defendants' interpretation because it violates well-established canons of construction as well as the plain language adopted by the Legislature.

This interpretation is also undermined by the language adopted by the Legislature in sister statutes, such as Town Law § 175(4) and Education Law § 2031-a(2). These sister statutes expressly limit similar communication device bans with an express electoral choices qualification.[47] For example, Town Law § 175(4), which governs elections for fire district officers, provides:

> While the polls are open **no person shall do any electioneering** within the polling place, or in any public street within the one hundred foot radial, or within such distance in any place in a public manner. **No electioneering** banner, **button**, poster or placard **on behalf of or in opposition to any candidate or issue to be voted upon** shall be allowed in or upon the polling place or within such one hundred feet therefrom during the election.

(emphasis added). In other words, the Legislature knew how to add such a limitation if it had wanted to do so, "and its failure to do so is presumed to be intentional."[48] If the Legislature had intended to limit political buttons to "electoral choices at issue in the

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[45] 85 N.Y.2d 382, 394 (1995) (citing McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 190).
[46] Id.
[47] Tall Trees Const. Corp. v. Zoning Bd. of Appeals of Town of Huntington, 97 N.Y.2d 86, 91 (2001) ("statutes relating to the same subject matter must be construed together unless a contrary legislative intent is expressed, and courts must harmonize the related provisions in a way that renders them compatible").

polling place," it could have easily done so – as it did in Education Law § 2031-a(2), which bans political banners etc. "on behalf of or in opposition to any candidate or issue to be voted upon."

In Mansky, the Supreme Court rejected a similar electoral choices argument where the statute prohibited "campaign materials" in a different (not challenged) provision of the statute, which meant that it had a meaning distinct from the term "political," which was contained in the challenged provision of the statute.[49] Likewise, the New York Legislature has adopted electoral choices type language when it intended to adopt a prohibition that was narrower than the broad proscription of "political" communication devices.

In light of the other statutory language options the Legislature could have adopted, as reflected in these sister statutes, the State cannot in good faith contend that the ban of "political" buttons is narrowly tailored, let alone necessary (or even germane) to address fraud and voter intimidation. These evils were addressed by a secret ballot, not by apparel bans. The purported legislative history proffered by the State shows no connection between apparel bans and voter intimidation. The legislative history cited by the County is irrelevant because it relates to the secret ballot (i.e., active solicitation and vote-buying), not passive communication by voters.

The terms adopted by the Legislature -- "political" and "electioneering" -- are vague, but not ambiguous. They are vague because they are imprecise and standard

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[48] People v. Tata, 196 A.D.2d 328, 332 (2d Dep't 1994).

[49] Mansky, 138 S.Ct. at 1883, 89. Minn. Stat. § 211B.11(1) prohibited any person to "display campaign material" and otherwise solicit votes. Id. at 1883. This provision was not challenged. The statute also prohibited people from distributing "political buttons."

less, applying to a potentially infinite range of activities. Ambiguous language, on the other hand, is subject to several possible meanings (i.e., the feather was light – color or weight). The undefined term "electioneering" is so vague as to deprive voters of fair notice of what speech is permitted versus what speech could result in criminal prosecution. Does electioneering include asking your spouse who to vote for? Her response? Saying out loud (to a spouse or no one in particular), I am voting for candidate X or I do not like candidate Y? Wearing apparel that supports a candidate? Apparel that supports a political party? What about apparel that is all red or all blue so as to suggest support of one of the major parties? What about a shirt that says "conservative"? Or "Conservative"? Does apparel that says "vote the bums out!" electioneer against incumbents? This chills First Amendment expression. The right to speak and associate at the polls with like-minded citizens is consistent with the obligation to participate in self-government.

The Statute is also unconstitutionally vague because its unmoored use of "political" is more like the statute struck down in Mansky (under a lenient standard) than it is to the "campaign materials" at issue in Burson (which survived strict scrutiny). Under Burson, the State has a compelling interest in election integrity. But the Statute is not narrowly tailored because "political" captures too much speech, extending to speech that does not undermine election integrity.

The County's interpretation of "political/electioneering" is not only extra-statutory in nature, but it is hopelessly vague and unable to be understood with any precision. According to the County's interpretation, as far as we understand it, DeRosier can wear

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Id. This provision was not challenged. The only provision challenged in Mansky

Trump apparel when voting in 2019, but not 2020. He can wear a "Tea Party" shirt, but not a "Republican" shirt. We surmise that he can wear a "conservative" shirt, but not a "Conservative" shirt. Who knows whether the State's interpretation extends to apparel that references political slogans such as "I'm with Her" or "Women support women" in an election featuring female candidates. Or a "Batman" button (referring to the Marvel superhero) in an election featuring a State Assembly candidate whose last name happens to be Batman. The Statute provides voters no guidance whatsoever, let alone drawing a "reasonable" line as to what voters can wear while voting at (and near) the polls to exercise their First Amendment rights while avoiding criminal prosecution.[50]

In Russell v. Lundergan, the Sixth Circuit struck down a 300-foot electioneering zone in Kentucky as not narrowly tailored, holding that the "right against voter intimidation is the right to cast a ballot free from threats or coercion; it is **not the right to cast a vote free from distraction or opposing voices**."[51] Likewise, the Statute – and the County's published policy concerning electioneering enforcement – seeks to prohibit passive speech such as buttons and apparel that do not protect against voter intimidation or any of the ills sought to be cured by the adoption of the secret ballot.

In Vermont Right to Life Comm., Inc. v. Sorrell, the Second Circuit held that "the due process clauses of the Fifth and Fourteenth Amendments forbid enforcement of a statute if 'the statute ... fails to provide a person of ordinary intelligence fair notice of

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prohibited voters from wearing "political" apparel. Id.

[50] *Cf.* Cullen v. Fliegner, 18 F.3d 96, 101 (2d Cir. 1994) (holding that disciplinary proceeding to enforce electioneering statute (Education Law § 2031-a) violated the First Amendment because the District's failure to erect a "100-foot marker" and its "method of enforcement provided no notice of either the parameters of the campaign free zone or the nature of the electioneering prohibition itself.") (emphasis added).

[51] 784 F.3d 1037, 1051 (6th Cir. 2015) (emphasis added).

what is prohibited, or is so standard less that it authorizes or encourages seriously discriminatory enforcement.'"[52] And "this standard is applied more stringently where the rights of free speech or free association are implicated."[53] That is the case here. The Statute's criminal proscription against electioneering is standard less and results in substantial discretion to be exercised by the **County's** election inspectors.

Conclusion

This Court should deny the County's motion for summary judgment, grant DeRosier's Motion for Summary Judgment, and award DeRosier any other relief this Court deems appropriate.

DATED: December 18, 2018

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[52] 758 F.3d 118, 128 (2d Cir. 2014) (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 18 (2010)).
[53] Id.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

John DeRosier,

Civ. Action No.: 5:18-cv-00919

Plaintiff,

-against-

Dustin M. Czarny, in his official capacity as Commissioner of the Onondaga County Board of Elections,

Michele L. Sardo, in her official capacity as Commissioner of the Onondaga County Board of Elections,

Peter S. Kosinski, in his official capacity as Co-Chair of the New York State Board of Elections,

Douglas A. Kellner, in his official capacity as Co-Chair of the New York State Board of Elections,

Andrew J. Spano, in his official capacity as Commissioner of the New York State Board of Elections,

Gregory P. Peterson, in his official capacity as Commissioner of the New York State Board of Elections,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO STATE OF NEW YORK'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Preliminary Statement

Plaintiff John DeRosier ("DeRosier") files this Memorandum of Law in opposition to the motion for summary judgment filed by the four Commissioners of the New York State Board of Elections (collectively "State" or "SBOE") and the two Commissioners of the Onondaga County Board of Elections ("County Defendants"). This memorandum is also submitted in support of DeRosier's motion for summary judgment declaring the Statute unconstitutionally vague.

DeRosier challenges N.Y. Elec. Law § 8-104(1) (the "Statute"), as enforced through Election Law and § 17-130(4), (23), because the Statute prohibits voters from wearing "political" buttons. It also prohibits other passive expression (i.e. apparel) via the undefined crime of "electioneering." Both aspects of the Statute are unconstitutionally vague under the U.S. Supreme Court's decision in Minnesota Voters' Alliance v. Mansky, 138 S. Ct. 1876 (2018). Mansky held that Minnesota's "unmoored use of the term 'political' in the Minnesota law, combined with haphazard interpretations" of that term rendered the state's political apparel ban unconstitutional.

Likewise, New York's standardless prohibitions against "political" buttons and "electioneering" renders the Statute unconstitutionally vague and overbroad under Mansky. Although New York may proscribe certain forms of speech in the polling place and 100 feet outside the polling place, it must draw a clear line in doing so and the Statute must be narrowly tailored (i.e., "campaign materials" but not "political" buttons). And the Statute's vagueness cannot be cured by the SBOE's after-the-fact informal "Guidance" as to what it now says the Legislature intended when adopting the Statute.

This Court should reject the State's statutory interpretation, which ignores the Statute's plain language and requires this Court to add language that the Legislature did not deem fit to include. The State's entire position rests on the unfounded premise that the Statute's button ban is limited to candidates, parties, or issues on the ballot – language found nowhere in the Statute.

Statement of Facts

The facts are set forth in DeRosier's Response To Statement of Facts with respect to the State and County's Facts Statements and the Declaration of John DeRosier.

Argument

POINT I

Summary Judgment is Premature

This motion for summary judgment is premature and should be treated as a motion to dismiss for failure to state a claim. As Judge D'Agostino has noted, the "Second Circuit has clarified that summary judgment should only be granted if '*after discovery*, the non-moving party has failed to make a sufficient showing on an essential element of its case . . ."[1] And for that reason, summary judgment may only be granted in the "rarest of cases" against a "party who has not been afforded the opportunity to

[1] Mitsubishi Elec. Cor. v. Westcode, Inc., 2016 WL 3855180, at *11 (NDNY 2016) (quoting Miller v. Wolpoff & Abramson, LLP, 321 F3d 292, 303-04 (2d Cir. 2000)).

conduct discovery."[2] In Kenefic v. Oswego County, Judge Suddaby cited cases where courts treated a premature summary judgment motion as a motion to dismiss.[3]

Summary judgment or a Rule 12(c) motion might be proper if Defendants' analysis were restricted to the text of the challenged statutes or materials of which this Court could take judicial notice. But that is not the case. Defendants rely on witness affidavits, internal e-mails and publications, as well as legislative history and law review articles discussing the historical context of New York's adoption of secret ballots. Since discovery has not yet commenced, the evidentiary materials are patently improper. And since Defendants do not point to any statutory ambiguity, the legislative history (and historical context of) secret balloting -- which is not challenged -- is irrelevant. Plaintiff, however, is entitled to summary declaratory judgment based solely on the Statute.

POINT II

New York's "Political" Button Ban Is Unconstitutionally Vague

New York's ban against "political" buttons in the polling place and 100-foot radial, which is set forth in Election Law §§ 8-104(1), is unconstitutional. The State's undefined criminalization of "electioneering" is also unconstitutionally overbroad; it is impermissibly vague and chills First Amendment political speech. Accordingly, the Statute should be declared unconstitutional and struck down.

New York Election Law § 8-104(1) provides that,

> The American flag shall be kept displayed at each polling place throughout the election. Facsimile ballots, voter information posting and distance markers shall not be taken down, torn or defaced during the election. While the polls are open no person shall do any electioneering within the polling place, or in any public street, within a one hundred foot radial

[2] Id.
[3] 2010 WL 2977267, at *9 (N.D.N.Y. 2010) (citing cases).

> measured from the entrances designated by the inspectors of election to such polling place or within such distance in any place in a public manner**; and no political** banner, **button**, poster or placard shall be allowed in or upon the polling place or within such one hundred foot radial. While the polls are open, no person shall consume any alcoholic beverages within the polling place.

(emphasis added). Anyone who "electioneers" is guilty of a misdemeanor under N.Y. Elec. Law § 17-130(4), (23).

Under a plain-reading of the Statute, this Court should deny Defendants' motions for summary judgment and instead grant declaratory relief in favor of DeRosier. The plain text of § 8-104(1) prohibits three things: (1) "electioneering;"[4] (2) "political" banners, buttons, posters or placards; and (3) consumption of alcoholic beverages in a polling place. This interpretation tracks the statutory language and grammatical structure without adding language not present in the Statute. The conjunctive use of "and" separated by a semi-colon indicates that electioneering and the "political" button ban are two separate prohibitions.[5] The Legislature identified multiple acts. The State's analysis of authority outside this Circuit actually supports DeRosier's plain reading. If the Legislature had intended the interpretation now proffered, Dkt. No. 21-9 at 10, it would have presumably adopted "including, but not limited to" type language.

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[4] Electioneering is a misdemeanor under N.Y. Elec. Law § 17-130(4), (23). "Electioneering" is statutorily undefined. Election Law § 1-104; Point III below. The term "political" is also undefined, even though the Legislature defined much simpler terms such as "political unit" and "village primary." The SBOE cannot define "political" as electoral choices on the ballot where the Legislature did not define the term.

[5] McMillan v. Police Dogs, Inc., 52 A.D.2d 369, 370-371 (3d Dep't 1976) (holding that statutory groupings were "separated not only by a coordinating conjunction but also by a semi-colon. Thus, a separate grouping is clearly indicated"); Vernon v. Vernon, 100 N.Y.2d 960, 971 (2003) ("The conjunctive 'and' at the end of subsection (c)(1), after the semicolon, does not serve to conflate the two separate subsections"); United States v. Smith, 17 F.2d 534, 535 (2d Cir. 1927) ("punctuation by semicolon is indicative of a complete thought in one clause separate from the other clauses of the statute").

This Court should apply the Statute as drafted because "a court should interpret the statute in a manner that is most consistent with the plain language of the statute."[6] The State's interpretation, on the other hand -- that "electioneering" modifies "political" -- requires this Court to add language to the Statute and to ignore the conjunction and semicolon ("and;") that the Legislature used to separate electioneering and the ban of "political" communication devices. Even worse, the State's electoral choices interpretation – limiting the button ban to candidates, political parties, independent bodies, or issues on the ballot – adds language not contained in the Statute.[7] In other words, the State's interpretation both ignores language in the Statute and adds words to the Statute.

In Chem. Specialties Mfrs. Ass'n v. Jorling, the Court of Appeals warned that "new language cannot be imported into a statute to give it a meaning not otherwise found therein."[8] Moreover, courts "cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact [and an] inference must be drawn that what is omitted or not included was intended to be omitted and excluded."[9] Accordingly, this Court must reject the State's interpretation because it violates well-established canons of construction as well as the plain language adopted by the Legislature.

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[6] People v. Hill, 82 A.D.3d 77, 79 (4th Dep't 2011) (citations omitted).
[7] Dkt. No. 21-9 at 1, 10. The State's use of "electioneering" as a *de facto* apparel ban is likewise vague and standardless. If the Legislature had intended "electioneering" to ban apparel, then there would have been no need to specifically include "button" in the communication device clause. Inclusion of the narrower "button" indicates that no apparel ban was intended.
[8] 85 N.Y.2d 382, 394 (1995) (citing McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 190).
[9] Id.

The State's interpretation is also undermined by the language adopted by the Legislature in sister statutes, such as Town Law § 175(4) discussed below. These sister statutes expressly limit similar communication device bans with an express electoral choices qualification.[10] The Legislature knew how to add such a limitation if it had wanted to do so, "and its failure to do so is presumed to be intentional."[11]

The terms "political" and "electioneering" are vague, but not ambiguous.[12] They are vague because they are imprecise and standardless, applying to a potentially infinite range of activities, but they are not ambiguous because they do not have two possible meanings (i.e., the feather was light – color or weight).[13] The undefined term "electioneering" is so vague as to deprive voters of fair notice of what speech is permitted versus what speech could result in criminal prosecution.[14] This chills First

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[10] Tall Trees Const. Corp. v. Zoning Bd. of Appeals of Town of Huntington, 97 N.Y.2d 86, 91 (2001) ("statutes relating to the same subject matter must be construed together unless a contrary legislative intent is expressed, and courts must harmonize the related provisions in a way that renders them compatible").

[11] People v. Tata, 196 A.D.2d 328, 332 (2d Dep't 1994).

[12] And if the Statute were ambiguous, it would be construed against the State because it is a criminal statute. United States v. Valle, 807 F.3d 508, 523 (2d Cir. 2015) (describing "rule of lenity" and noting that "[w]hen interpreting a criminal statute, we do not play the part of a mindreader.").

[13] Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 Cardozo L. Rev. 1535, 1585 n.205 (2005) ("There is, of course, a difference between 'vagueness' and 'ambiguity,' in statutes; the former means the terms could describe an almost infinite range of activities (no clear lines at all), while the latter describes (typically a single term or phrase) that could have two meanings, and a court must decide which to use. The two are treated differently by the judiciary: vagueness can become a constitutional issue (depriving citizens of due process), which makes a statute void, while ambiguity is simply resolved with a tilt in favor of the [criminal] defendant (the 'rule of lenity').").

[14] Does electioneering include asking your spouse who to vote for? Her response? Saying out loud (to a spouse or no one in particular), I am voting for candidate X or I do not like candidate Y? Wearing apparel that supports a candidate? Apparel that supports a political party? What about apparel that is all red or all blue so as to suggest support of one of the major parties? What about a shirt that says "conservative"? Or "Conservative"? Apparel that says MAGA in 2019? MAGA in 2020? Does the meaning

Amendment expression. Indeed, the right to speak and associate at the polls with like-minded citizens is consistent with the obligation to participate in self-government.

And "political" is equally vague and amorphous. Is a button with Trump's face permissible in 2020? Are MAGA buttons always permitted because it is not a candidate's name? Is a button with Trump's name OK (Martin Van Buren's campaign slogan) in 2019, but not 2020? This unmoored use of "political" fails under Mansky.

The State ignores the plain language of the Statute, instead relying on legislative history and unpublished guidance. This Court should reject the State's misplaced reliance on extra-statutory arguments. First, the Statute is not ambiguous. As the Supreme Court has noted, "reliance on legislative history is unnecessary in light of the statute's unambiguous language."[15] Second, the legislative history cited is irrelevant; it relates to the secret ballot (i.e., active solicitation and vote-buying), not passive communication by voters. Third, the "guidance" – an e-mail -- is not even a formal opinion of the State Board of Elections. This "guidance" also suggests that the Statute is malleable according to the State's subjective belief of what the Statute should say – as opposed to an objective understanding of the Statute actually does say. Finally, the State's reliance on some (but not all) sister statutes is misplaced because, as discussed below, the language adopted by the Legislature in the sister statutes undermines the

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of "political" change from year to year? Does apparel that says "vote the bums out!" electioneer against incumbents?

[15] Mohamad v. Palestinian Auth., 566 U.S. 449, 458 (2012); *See also* Friends of Gateway v. Slater, 257 F.3d 74, 87 (2d Cir. 2001) ("Because the language of the statute is unambiguous, recourse to the legislative history is unnecessary."); Sega v. State, 60 N.Y.2d 183, 191 (1983) ("resort to extrinsic matter is inappropriate when the statutory language is unambiguous . . . . While legislative intent is the great and controlling principle, it should not be confused with legislative history, as the two are not coextensive") (citations omitted).

State's electoral choices interpretation. The State cannot cure the Statute's defects made apparent in the wake of Mansky unless it amends the Statute. The Statute is unconstitutionally vague and must be struck down.

The Statute's "political" button ban and electioneering prohibition must be viewed under two standards: (1) strict scrutiny for the public forum outside the polling place, and (2) reasonableness for the non-public forum inside the polling place. The Statute fails to satisfy either standard. And it is also unconstitutionally vague. An understanding of the Supreme Court's case law in this area is important.

A. **Minnesota Voters' Alliance v. Mansky**

In Mansky, the Supreme Court held that a Minnesota statute was unconstitutional because it failed to draw a reasonable line between what could and could not be worn while voting.[16] The statute had three provisions, only the third of which was challenged and addressed by the Supreme Court. The first provision prohibited "any person to 'display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter . . . to vote for or refrain from voting for a candidate or ballot question."[17] The second provision prohibits the distribution of a "political badge, political button, or other political insignia to be worn at the polling place."[18] The third provision, the "political apparel ban," provided that a "political badge, political button, or other

[16] Mansky, 138 S.Ct. at 1891-92.
[17] Mansky, 138 S.Ct. at 1883. New York seeks to characterize its Statute as falling within this part of the Minnesota statute. Unlike this part of the Minnesota statute, or the statute construed in Burson, however, the New York Statute bans "political" communications (buttons etc.), which is much broader than "campaign materials," the phrase contained in the Minnesota and Tennessee statutes construed in Mansky and Burson.
[18] Mansky, 138 S.Ct. at 1883.

political insignia may not be worn at or about the polling place."[19] This provision, which only applied "within" the polling place, was struck down despite having been on the books for over a century.[20] And it is this provision that most resembles New York's "political" button ban. DeRosier also challenges the ban outside of the polling place within the 100-foot radial, an issue not addressed by Mansky.

Mansky held that inside the polling place is a nonpublic forum subject to regulation that is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[21] The Court also noted that speech in a public forum, including streets and sidewalks, is subject to "reasonable time, place, and manner restrictions," but that "restrictions on content must satisfy strict scrutiny, and those based on viewpoint are prohibited."[22] Mansky applied the non-public forum standard because it only examined regulation inside the polling place.[23]

Mansky applied Burson v. Freeman, 504 U.S. 191 (1992), which upheld Tennessee's law imposing a 100-foot campaign free zone that prohibited vote

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[19] Id.
[20] Id.
[21] Id. at 1885 (citing Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46 (1983)).
[22] Id. at 1885 (citing Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009)). Indeed, seven of the justices (i.e., the plurality and the dissent) all applied a strict scrutiny standard when evaluating the regulation of speech outside the polling place. Burson, 504 U.S. 191, 198, 217; McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 n.10 (1995) (discussing Burson, and noting that "both the plurality and dissent applied strict scrutiny because the law was 'a facially content-based restriction on political speech in a public forum.'" *Id.,* at 198, 112 S.Ct. at 1851; see also *id.,* at 212–213, 112 S.Ct. at 1858 (KENNEDY, J., concurring); *id.,* at 217, 112 S.Ct. at 1861 (STEVENS, J., dissenting)).
[23] Id. at 1886 (citing Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46 (1983)). Here, on the other hand, DeRosier also challenges the Statute as it is applied outside the polling place, i.e., streets and sidewalks for many polling places (discussed further below).

solicitation, distribution, and the "display" of "campaign posters, signs or other campaign materials."[24] Although apparel was not addressed by either the Burson plurality or Justice Scalia, the statute, which prohibited the display of "campaign materials" was upheld.[25] Here, however, New York's Statute bans "political . . . buttons" – which is broader and vaguer than "campaign materials." Mansky recognized the mischief that accompanies attempts by election inspectors to distinguish between permitted and unpermitted "political" apparel.[26] Although a state may establish "an island of calm" for voters inside the polling place, that does not mean that any and all forms of expression may be banned -- and the "state must draw a reasonable line" in any event.[27] The statute in Mansky was unconstitutional because of its "unmoored use of the term 'political' . . . combined with haphazard interpretations the State has provided in official guidance and representations to this Court."[28]

Under Mansky, the New York Statute must be struck down to the extent that it prohibits "political" buttons, and to the extent that it applies outside the polling place. Like the Minnesota statute, New York's Statute "does not define the term 'political.'"[29] Mansky held that "the word ['political'] can be expansive. It can encompass anything 'of or relating to government, a government, or the conduct of governmental affairs, or anything "of, relating to, or dealing with the structure of affairs of government, politics, or the state."[30] In defending the statute, the State of Minnesota argued that "political"

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[24] Mansky, 138 S.Ct. at 1886 (citing 504 U.S. at 193-194, 211, 216).
[25] Id. at 1886-87.
[26] Id. at 1888-91.
[27] Id. at 1887-88.
[28] Id. at 1888.
[29] Id. at 1888.
[30] Id. at 1888 (quoting dictionaries).

should not be broadly construed to cover all political speech, but rather should have been interpreted "to proscribe 'only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in the polling place."[31] Minnesota's political apparel ban was not limited to campaign materials because the Statute expressly referenced both "campaign materials" and "political" apparel, indicating that "political" apparel was broader.[32] As a result, the state's attempt to limit the interpretation of "political" to "electoral choices" was rejected.

Likewise, New York's Statute contains the undefined and indeterminate ban of "political" buttons. Mansky recognized that such "an indeterminate prohibition carries with it 'the opportunity for abuse, especially where it has received a virtually open-ended interpretation.'"[33] What constitutes a permissible "political" button will differ from county to county, and from precinct to precinct.

Like Minnesota in Mansky, New York argues that the Statute's use of "political" should be interpreted as addressing campaign materials / electoral choices, i.e., "electioneering conduct and attire that is directly related to issues or candidates appearing on the actual ballot and do not prohibit unrelated political expression."[34] As in Mansky, however, this "electoral choices" interpretation must be rejected. This language is not found anywhere in the Statute, which completely undermines the State's argument that "the distinctions between the New York and Minnesota laws

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[31] Id. at 1888-89.
[32] Id. at 1883, 89. Minn. Stat. § 211B.11(1) prohibited any person to "display campaign material" and otherwise solicit votes. Id. at 1883. This provision was not challenged. The statute also prohibited people from distributing "political buttons." Id. This provision was not challenged. The only provision challenged in Mansky prohibited voters from wearing "political" apparel. Id.
[33] Id. at 1891.

actually renders [Mansky] favorable to New York." There is no distinction between the use of "political" to define certain apparel in the Minnesota and New York statutes. If the Legislature had intended to limit political buttons to "electoral choices at issue in the polling place," it could have easily done so – as it did in Education Law § 2031-a(2), which bans political banners etc. "on behalf of or in opposition to any candidate or issue to be voted upon." *See also* Town Law § 175(4).

In other words, the State seeks to defend the Statute's unmoored use of "political" (struck down in Mansky) by making an argument rejected in Mansky (i.e., that "political" should be construed as "electoral choice on the ballot") and by pointing to unpublished guidance that ignores the language used in the Statute – and language used in similar statutes, which collectively show that the Legislature did not intend to adopt the interpretation now proffered by the State.

B. **The Plain Reading of Election Law § 8-104(1)**

New York Election Law § 8-104(1) prohibits three distinct acts: (1) electioneering; (2) "no political banner, button, poster or placard shall be allowed in or upon the polling place or within such one hundred foot radial"; and (3) alcohol consumption within the polling place. Under this straightforward interpretation, this Court should deny Defendants' motions for summary judgment and instead grant declaratory relief in favor of DeRosier. This interpretation tracks the statutory language (and grammatical structure) without the need to add language to the Statute. Unlike the State's interpretation, which seeks to add language, DeRosier's plain-reading of the Statute confirms that it prohibits three distinct acts and that "electioneering" does not

[34] Dkt. No. 21-9 at 1.

qualify "political." Moreover, the language adopted by the Legislature in similar statutes confirms this plain-reading of the Statute.

1. **Other New York Statutes Confirm DeRosier's Plain Reading of Election Law § 8-104(1)**

DeRosier's interpretation is also supported by other New York statutes. For example, Education Law §§ 2031-a(2) and 2609-4-a(b) both establish separate prohibitions for electioneering and communication devices. The uniformity of the Legislature's statutory separation of (1) electioneering and (2) banning certain communication devices confirms that the Legislature intended separate restrictions. Similarly, Town Law § 175(4), which governs elections for fire district officers, provides:

> While the polls are open **no person shall do any electioneering** within the polling place, or in any public street within the one hundred foot radial, or within such distance in any place in a public manner. **No electioneering** banner, **button**, poster or placard **on behalf of or in opposition to any candidate or issue to be voted upon** shall be allowed in or upon the polling place or within such one hundred feet therefrom during the election.

(emphasis added). This statute also creates two separate acts: (1) electioneering and (2) banning communication devices to be used for the purpose of electioneering. This statute refers to "electioneering . . . button[s] . . . on behalf of or in opposition to any candidate or issue to be voted upon." In other words, when the Legislature wants to limit the reach of a button/communicative devices ban, it knows how to do so.

Town Law § 175(4) undermines the State's interpretation of the Statute.[35] Town Law § 175(4) shows that the Legislature knows how to expressly combine the concepts of electioneering and buttons when it wants to do so. The Legislature adopted the

[35] Although the State discussed sister statutes from the Education Law, it did not address Town Law §175(4). Dkt. No. 21-9 at 11 n.3.

narrower term "electioneering . . . button" rather than the broader "political . . . button," and it also included the "electoral choices" language that the State now seeks have judicially crafted into Election Law § 8-104. If the Legislature had intended the interpretation now proffered by the State, then it could have easily adopted language like that set forth in Town Law § 175(4). It is only now, after Mansky was decided, that the SBOE now claims that the Legislature intended the narrower meaning all along.

The Legislature also adopted similar "electoral choices" type language in Education Law § 2031-a(2), which governs school board elections, and which provides:

> no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner **and** no banner, poster or placard **on behalf of or in opposition to any candidate or issue to be voted upon** shall be allowed in or upon the polling place or within one hundred feet therefrom during the election.

(emphasis added). These same restrictions are also contained in Education Law § 2609-4-a(b), which governs elections in certain city school districts.

Unlike Election Law § 8-104(1), Education Law §§ 2031-a(2) and 2609-4-a(b) do not ban buttons, instead simply banning banners, posters, or placards.[36] As a result, these statutes apparently permit "political buttons," or buttons of any kind, including buttons supporting or opposing a candidate or issue on the ballot (in school elections).[37] This also shows that a ban against "buttons" of any kind is unnecessary to guard

[36] Election Law §5-204(9) also omits any button restriction from its list of banned communication devices.

[37] The State will presumably argue that such buttons are not permitted, and fall within the "electioneering" prohibition. This, however, begs the question why would the Legislature specifically include the "political" button ban in the Statute, but not Election Law § 5-204 or Education Law § 2031-a(2), both of which prohibit "electioneering" as well – unless "electioneering" does not encompass passive apparel, as opposed to active conduct such as soliciting, asking, or distributing literature?

against the evils the Legislature seeks to guard against in conducting elections.[38] The same concerns for orderly elections underlie school board elections governed by Education Law §§ 2031-a(2) and 2609-4-a(b) and fire district elections governed by Town Law § 175(4) as they do elections governed by Election Law § 8-104(1). If election statutes seek to eliminate the same threats to election integrity, then why ban buttons during some elections but not others?

In light of the other statutory language options the Legislature could have adopted, as reflected in these sister statutes, the State cannot in good faith contend that the ban of "political" buttons is narrowly tailored, let alone necessary (or even germane) to address fraud and voter intimidation. These evils were addressed by a secret ballot, not by apparel bans. The purported legislative history proffered by the State shows no connection between apparel bans and voter intimidation. Dkt. 21-3, Exs. 1-4.

Finally, unlike Election Law § 8-104(1), Education law §§ 2031-a(2) and 2609-4-a(b) do not use the amorphous term "political," instead banning certain communication devices "on behalf of or in opposition to any candidate or issue to be voted upon." And the narrower "electioneering . . . button" restriction in Town Law § 175(4) further demonstrates the overbreadth inherent in the Statute's ban of "political . . . button[s]." If the Legislature had intended to limit Election Law § 8-104(1) to "electoral options" or "candidates or issues on the ballot," then it knew how to do so, and has in fact done so in other statutes. Accordingly, this Court should reject the SBOE's "I wish this is what the Legislature had written" interpretation of the Statute.

[38] When adopting the Australian model in 1890, the New York Legislature was seeking to restore integrity to elections by avoiding fraud, vote-buying and intimidation of voters.

C. **Application of *Mansky*/*Burson* To Election Law § 8-104(1)**

Applying the rules set forth in Mansky and Burson here, the Statute's button ban is unconstitutional. This case differs from Mansky in a way that makes DeRosier's case stronger. Mansky only construed the inside of the polling place, which is a non-public forum under Burson. Here, on the other hand, DeRosier challenges the application of New York's Statute inside *and* outside the polling place.

Under Burson, the area outside the polling place is a public forum that is subject to strict scrutiny review because the Statute is content-based (i.e., political buttons as opposed to commercial or religious buttons).[39] New York's ban of "political" buttons outside the polling place is subject to strict scrutiny, a standard under which laws rarely survive.[40] Under Mansky/Burson, inside the polling place is a non-public forum subject to regulation under a reasonableness standard. Under either standard, however, the Statute is unconstitutionally vague and overbroad.

1. **The Button Ban Falls Under Mansky's Reasonableness Standard**

Inside the polling place is a non-public forum, and is subject to review under a reasonableness standard. Under this standard, New York must show that the button ban is "reasonable in light of the purpose served by the forum" voting."[41]

New York's political button ban fails this standard for the same reasons set forth in Mansky. Namely, the unmoored use of "political" cannot stand, despite the State's attempt to interpret it to mean "electoral choices." The undefined use of the same

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Silberberg v. Board of Elections, 272 F. Supp.3d 454, 459, 461-463 (S.D.N.Y. 2017) ("combating vote buying and voter intimidation"); Dkt. 21-3, Ex. 1 at 7-8.

[39] *See* McIntyre, 514 U.S. at 346 n.10 *supra*.

[40] Burson, 504 U.S. at 200 ("a law rarely survives such scrutiny").

[41] Mansky, 138 S.Ct. at 1886 (citation omitted).

amorphous term "political," without statutory (i.e., fixed) limits to constrain abuse renders the regulation an unreasonable line in the sand. If the Legislature had intended to limit the meaning of "political" to "electoral choices," then it would have adopted the language that it used in Town Law § 175(4) or Education Law § 2031-a(2). Since it did not do so, the State cannot now seek to have this court engraft that language onto the Statute under the guise of interpretation. Since the Statute is unambiguous (as opposed to vague), it is improper to rely on legislative history or regulatory guidance.[42]

Moreover, the State's unpublished guidance materials and purported legislative history shed no light on the meaning of the Statute. The evils confronted by the State in adopting the secret ballot – vote buying and intimidation -- are not confronted by a ban on passive communication devices. Although New York may create "an island of calm" within the polling place, in doing so, "the State must draw a reasonable line."[43] As in Minnesota, "the unmoored use of the term 'political'" fails this forgiving test. As in Mansky, New York's "'electoral choices' construction introduces confusing line-drawing problems."[44] Although New York seeks refuge in Mansky's analysis of the "electoral choices" standard (i.e., candidates, parties, and ballot questions), it ignores the fact that the prong of the Minnesota statute that used the term "campaign materials" was not

[42] And even if considered, the State's unpublished guidance provides no guidance whatsoever to the voting public, and does not properly define/confine "political" in any event. And this "guidance" is subject to change at the State's regulatory whim. Vermont Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 383 (2d Cir. 2000) ("there is nothing that prevents the State from changing its mind. It is not forever bound, by estoppel or otherwise, to the view of the law that it asserts in this litigation. . . . Kucharek v. Hanaway, 902 F.2d 513, 519 (7th Cir.1990) (interpretation of statute offered by Attorney General is not binding because he may "change his mind ... and he may be replaced in office")).

[43] Mansky, 138 S.Ct. at 1888.

[44] Mansky, 138 S.Ct. at 1889 (citation omitted).

challenged, and that "political" apparel must mean something different than "campaign materials."[45] Likewise, the Statute does not contain electoral choices-type language, and this Court should not add language. Accordingly, the Statute's communication device ban cannot be constitutionally applied inside the polling place.

2. **The Button Ban Falls Under Burson's Strict Scrutiny**

Outside the polling place is a public forum. As such, regulation must satisfy strict scrutiny review, and be viewpoint neutral.[46] The Statute is a content-based restriction because it singles out "political" speech.[47] As Judge Castel recently noted in Silberberg, "[s]uch restrictions 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"[48] And the "narrow tailoring requirement is met only where 'the challenged regulation is the least restrictive means among available, effective alternatives.'"[49] Political speech during a campaign, the essence of self-government, is the apex of First Amendment protection.[50]

The Statute's regulation of political buttons outside the polling place cannot survive strict scrutiny review. The Statute is not narrowly tailored to protect election integrity because banning apparel is not necessary to fight voter intimidation and election fraud. In Russell v. Lundergan, the Sixth Circuit struck down a 300-foot electioneering zone in Kentucky as not narrowly tailored, holding that the "right against voter intimidation is the right to cast a ballot free from threats or coercion; it is **not the**

[45] Mansky, 138 S.Ct. at 1889.
[46] Mansky, 138 S.Ct. at 1885 (citation omitted).
[47] Burson, 504 U.S. at 197; Reed v. Town of Gilbert, 135 S.Ct. 2218, 2227 (2015).
[48] Silberberg v. Bd. of Elections of New York, 272 F. Supp. 3d 454, 467 (SDNY 2017).
[49] Silberberg, 272 F. Supp. 3d at 467 (citation omitted).

right to cast a vote free from distraction or opposing voices."[51] Kentucky's 500-foot zone was previously struck down because it was too large, and "because absent a narrowing construction it prohibit[ed] more speech than is necessary to meet the State's protected interest."[52] The court held that the defined term of "electioneering" must be narrowed because it "may permissibly apply only to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure." Id.

Moreover, as noted above, the Statute's overbreadth is apparent when compared to the sister statutes that either do not ban buttons or limit the reach of the button ban while still safeguarding election integrity.

The Statute is also unconstitutionally vague because its unmoored use of "political" is more like the statute struck down in Mansky (under a lenient standard) than it is to the "campaign materials" at issue in Burson (which survived). Under Burson, the State has a compelling interest in election integrity. But the Statute is not narrowly tailored because "political" captures too much speech, extending to speech that does not undermine election integrity.[53]

The Statute does not define "political" or "electioneering." It thus leaves enforcement in the eye of the State. Defendants' interpretation requires this Court to add language that does not exist in the statute by adding the type of language used in

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[50] Silberberg, 272 F. Supp. 3d at 469 (citation omitted); Burson, 504 U.S. at 197.
[51] 784 F.3d 1037, 1051 (6th Cir. 2015) (emphasis added).
[52] 356 F.3d 651, 666 (6th Cir. 2004).
[53] McCullen v. Coakley, 134 S. Ct. 2518, 2534–35 (2014) ("But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'").

Town Law § 175(4).[54] The State's effort to use "electioneering" (itself vague) to qualify "political" simply exacerbates the Statute's vagueness. The Statute improperly chills First Amendment expression by establishing criminal liability for a standardless act that the government cannot define, but knows it when it sees it.

The Statute is unconstitutional: (1) to the extent it bans "political" buttons inside the polling place for the reasons set forth in Mansky and (2) to the extent it bans "political" buttons outside the polling place because the statutory language "political" is broader than the "campaign materials" ban upheld in Burson. And this broader ban is not narrowly tailored to address voter intimidation and fraud, which are not promoted by passive apparel use. The Statute's two principal terms are unconstitutionally vague. Accordingly, the Statute should be struck down, the Defendants' motions denied, and DeRosier's motion granted.

D. **New York's Interpretation of Election Law § 8-104 Must Be Rejected**

The State's "electoral choices" interpretation of the Statute should be rejected. First, the State ignores the Legislature's use of a semi-colon and the word "and". If the "political" button ban was intended as an example of what constituted "electioneering," then the Legislature would not have used a semicolon and could have used language indicating that "political" button was but an example of types of "electioneering." Second, the State's interpretation ignores the sister statutes' use of electoral choices type language that the State asks this Court to add to the Statute despite the Legislature's failure to do so. Third, the State relies on extra-statutory materials – which

[54] Matter of Richmond Constr., 61 N.Y.2d 1, 6 (1983) ("[Court of Appeals] will not add words to a statute which has a rational meaning as written . . . [and] every term of a statute should be given meaning").

are improper in any event because the Statute is not ambiguous, it is vague (i.e. covers infinite conduct without reference to any standards).

Nonetheless, even if "electioneering" were construed to include the "political" button ban, the Statute does not define "political," and would thus declare the wearing of any "political" button to be electioneering. And this violates Mansky. The ban of "political" buttons is not statutorily limited to candidates/parties/issues on the ballot as the State argues.[55] The "political" button ban – unmoored from anything defining "political" or "electioneering" – fails for the same reasons that the "political" apparel provision was struck down in Mansky.

The State's interpretation of "political/electioneering" is not only extra-statutory in nature, but it is hopelessly vague and cannot be understood with any precision. According to the State's interpretation, as far as we understand it, DeRosier can wear apparel that says "Trump" when voting in 2018 or 2019, but not 2020. He can wear a "Tea Party" shirt, but not a "Republican" shirt. We surmise that he can wear a "conservative" shirt, but not a "Conservative" shirt. Who knows whether the State's

[55] *Compare* Election Law 8-104(1) *with* Dkt. No. 21-9 at 1, 10. As discussed in Point II(B) above, Town Law § 175(4) shows that the Legislature could have easily adopted language effectuating the interpretation now advanced by the State. In fact, the Legislature adopted narrower restrictions in sister statutes governing electioneering and communication devices permitted near polling places in elections for school boards and fire district officers. In those contexts, the Legislature banned "electioneering . . . buttons" and/or communication devices "on behalf of or in opposition to any candidate or issue to be voted upon." And the fact that the State has enacted statutes containing the analog to Minnesota's "campaign materials" as well as the broader "political . . . buttons" shows that "political . . . button[s]" must have a meaning distinct from "electioneering . . . button[s]", which is fatal to the State's argument that "political . . . button[s]' really means buttons (or apparel, even though not specifically mentioned by the Statute) concerning a candidate, party, or issue on the ballot in a given election (i.e., the "electoral choices" interpretation rejected by the Supreme Court in Mansky because the statute identified both "campaign materials" and "political" apparel).

interpretation extends to apparel that references political slogans such as "I'm with Her" or "Women support women" in an election featuring female candidates. Or a "Batman" button (referring to the Marvel superhero) in an election featuring a State Assembly candidate whose last name happens to be Batman. Although "button" is the only apparel expressly included in the Statute, the State interprets the Statute to ban all apparel. The Statute's use of the broad and undefined terms "political" and "electioneering" – even if considered together as suggested by the State (despite the grammatical structure adopted by the Legislature in this and other statutes) – is confusing and standardless. The Statute provides voters no guidance whatsoever, let alone drawing a "reasonable" line as to what voters can wear at (and near) the polls to exercise their First Amendment rights while avoiding criminal prosecution.[56]

And nothing in the "legislative history" or "guidance" materials offered by the State cures the vagueness of "political" or "electioneering." Rather, the legislative history (and law review article) cited by the State addresses the need to adopt the secret ballot system of voting, which is not challenged here. The secret ballot is a laudable development in election integrity. But the "political" button ban is unrelated to the secret ballot. The "political" button ban is not necessary (or narrowly tailored) to promote election integrity. Passive expression like wearing a button or apparel does not upset the "island of calm" awaiting voters in a polling place. The evils the State sought

[56] *Cf.* Cullen v. Fliegner, 18 F.3d 96, 101 (2d Cir. 1994) (holding that disciplinary proceeding to enforce electioneering statute (Education Law § 2031-a) violated the First Amendment because the District's failure to erect a "100-foot marker" and its "method of enforcement provided no notice of either the parameters of the campaign free zone or the nature of the electioneering prohibition itself.") (emphasis added).

to eliminate, as outlined in the legislative history materials proffered by the State, were vote buying and voter intimidation.

If a voter wants to verbally announce to the world that they support/are voting for/did vote for candidate X, they appear to be permitted to do so under the Statute, subject perhaps to a claim by the State that such conduct amounts to the undefined crime of "electioneering." If a person can verbally announce their support, or who they voted for,[57] then it is even less intrusive for them to passively wear a button that contains the same message. Although party bosses of yesteryear watched voters to confirm they cast the "right" ballot, the secret ballot avoids this. A voter can wear a button for candidate X while voting for candidate Y. The evils identified by the State were and are addressed through the secret ballot, not the banning of communication devices. Nothing in the State's extra-statutory materials remotely suggests that banning passive communication devices is intended to guard against election abuses.

Although the State now contends that "political" button under the Statute excludes "political" buttons like MAGA or Trump (in certain years), that is not clear (or remotely hinted at) in the Statute (i.e., what voters have to rely on). Rather, the State's post-Mansky attempt to interpret the Statute consistent with Mansky is simply an attempt to cure a defective statute that should be struck down and revisited by the Legislature. More important, however, the ability of voters to wear political buttons (like MAGA) may send the same message as a button listing Candidate X (a Republican) or Candidate Y (a Democrat). This undermines the State's purported "need" to restrict the type of "political" buttons that they deem proscribed by the Statute as opposed to those

buttons that the State concedes are permitted.[58] The Statute's use of "political" is no less confusing than was the use of "political" in the statute struck down in Mansky.

POINT III

New York's "Electioneering" Misdemeanor Is Unconstitutionally Vague

New York Election Law § 17-130(4), (23)) makes "electioneering," which is not statutorily defined,[59] a misdemeanor. The term "electioneering" thus encompasses infinite acts. Voters have no idea what conduct may result in criminal prosecution. This vagueness chills speech because no reasonable voter will have any idea where the line is between permissible speech and impermissible speech. This vagueness forces voters to stand too far from the "line" of permissible speech.[60] And § 17-130 does not "buoy" the State's interpretation of "political" in the Statute; § 17-130 makes "electioneering" a misdemeanor, but it no more includes "political" buttons within the

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[57] Silberberg, 216 F. Supp. 3d 411, 420 (S.D.N.Y. 2016) ("Voters are free to express their pride in voting and even reveal who they voted for in any number of other ways.").

[58] It was not clear to Mr. DeRosier that he could wear MAGA apparel when voting this year until he filed suit and counsel was so advised. And this stated ability to wear certain "political" apparel is not published, is muddled by the undefined crime of "electioneering," and is subject to change at the State's whim.

[59] Although statutes may rely on dictionary definitions, even these definitions of "electioneering" do not extend to passive expressions such as apparel. Merriam-Webster defines "electioneer" as "to take an active part in an election; specifically: to work for the election of a candidate or party." https://www.merriam-webster.com/dictionary/electioneer; *see also American Heritage Dictionary* (3d ed. 1994) ("To work actively for a candidate or political party"). The definition has not changed substantially since the Statute was adopted or amended. *Webster's Seventh New Collegiate Dictionary* (1965) ("to take an active part in an election; to work for the election of a candidate or party") (emphasis added); Daniel Webster, *American Dictionary of the English Language* (1828) ("ELECTIONEE'RING, participle present tense: Using influence to procure the election of a person. ELECTIONEE'RING, noun: The arts or practices used for securing the choice of one to office."). These definitions are also vague, do they include passive communication/apparel by a voter?

[60] Cullen, 18 F.3d at 102.

meaning of "electioneering" than it does consumption of alcohol (which is also prohibited by the Statute).

In Vermont Right to Life Comm., Inc. v. Sorrell, the Second Circuit held that "the due process clauses of the Fifth and Fourteenth Amendments forbid enforcement of a statute if 'the statute ... fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'"[61] And "this standard is applied more stringently where the rights of free speech or free association are implicated."[62] That is the case here. The Statute's criminal proscription against electioneering is standardless and results in substantial discretion to be exercised by election inspectors.

Conclusion

This Court should deny the State's Motion for Summary Judgment, grant DeRosier's Motion for Summary Judgment, and award DeRosier any other relief this Court deems appropriate.

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[61] 758 F.3d 118, 128 (2d Cir. 2014) (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 18 (2010)).
[62] Id.