

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

John DeRosier,

Civ. Action No.:

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.

COMPLAINT

1. This Complaint facially challenges in part N.Y. Elec. Law §§ 8-104(1) and 17-130(4), (23)¹ to the extent that the statutes prohibit voters from wearing “political buttons” and defining such expressive activity as the misdemeanor of “electioneering”, as an unconstitutional abridgement of Plaintiff’s First Amendment rights to free speech and freedom of association.
2. Under N.Y. Elec. Law § 8-104(1), persons are prohibited from, *inter alia*, wearing political buttons or bringing political placards into the polling place or within 100 feet of the entrance to the polling place. Under N.Y. Elec. Law § 17-130(4), (23), it is a misdemeanor to wear political buttons or to bring a political placard into a polling place
3. These statutes are facially unconstitutional inasmuch as they violate the First Amendment.
4. This Complaint also seeks a declaratory judgment that N.Y. Elec. Law §§ 8-104(1) and 17-130(4), (23), as applied to political buttons or placards, violate the First Amendment. This Complaint also seeks a permanent injunction prohibiting the New York State Board of Elections, the Commissioners of the Onondaga County Board of Elections, and all Defendants’ agents and successors, from enforcing N.Y. Elec. Law §§ 8-104(1) and 17-130(4). Equitable relief is necessary because there is no adequate remedy at law.
5. Preliminary injunctive relief is also necessary because the upcoming election will occur on November 6, 2018 and Plaintiff will be prohibited from exercising his First

¹ NY Election Law § 17-130(23) is only challenged to the extent that it contains the language classifying as a misdemeanor all previously stated proscriptions, including the electioneering set forth in § 17-130(4).

Amendment rights to wear “political buttons.” Plaintiff desires to wear political buttons expressing support for his favored candidates and/or conservative causes.

6. The United States Supreme Court recently struck down a similar ban enacted by the State of Minnesota in *Minnesota Voters’ Alliance v. Mansky*, 138 S. Ct. 1876, decided on June 15, 2018.
7. Therefore, due to the impending election related deadlines, a preliminary injunction is necessary to avoid violating Plaintiff’s First Amendment rights in the upcoming election on November 6, 2018.

JURISDICTION AND VENUE

8. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff challenges New York law as violating Plaintiff’s rights guaranteed under the First Amendment to the U.S. Constitution.
9. Federal question jurisdiction is also appropriate because this action is brought pursuant to 42 U.S.C. § 1983 as Defendants have violated Plaintiff’s constitutional rights under the color of state law. 28 U.S.C. § 1343 (2012); *see also id.* § 1331.
10. Venue is proper in this Court because all defendants reside in the State of New York and all defendants reside in and have their offices within this District. Additionally, some defendants have their offices or reside within this Division. 28 U.S.C. § 1391(b)(1).
11. Additionally, a substantial part of the events that give rise to Plaintiff’s claims also occurred within this District and within this Division. *See id.* § 1391(b)(2).

PLAINTIFF

12. Plaintiff John DeRosier resides at 204 Weathervane Way, Syracuse, NY 13209. His residence is within Onondaga County.
13. Mr. DeRosier is a registered New York voter and he intends to vote in the upcoming general election. He also intends to wear political buttons that are proscribed by N.Y. Elec. Law §§ 8-104(1) and 17-130(4), including but not limited to political buttons expressing support for his favored candidates and/or conservative causes.
14. Plaintiff also intends to carry political placards into the polling place, for personal reference with respect to his favored candidates, to aid in casting a ballot.
15. Plaintiff, however, is prohibited from exercising his rights guaranteed under the First Amendment to the U.S. Constitution to wear “political buttons” and carry “political placards” at the risk of committing a misdemeanor under N.Y. Elec. Law §§ 8-104(1) and 17-130(4), (23).
16. Upon information and belief, election inspectors at various polling places have directed voters to remove political clothing or to “turn it inside out” before voting. Although political apparel is not expressly addressed by New York’s statutes, local election inspectors have apparently “interpreted” or been advised incorrectly that New York law prohibits the wearing of “political” apparel in the polling place when voting. This informal policy or *de facto* policy as a result of the failure by the State and County Boards of Election to properly educate election inspectors and the people who train election inspectors also violates the First Amendment.

DEFENDANTS

17. Peter S. Kosinski is the Co-Chair of the New York State Board of Elections (“SBOE”). Mr. Kosinski is sued in his official capacity.
18. Douglas A. Kellner is the Co-Chair of the New York State Board of Elections. Mr. Kellner is sued in his official capacity.
19. Andrew J. Spano is a Commissioner on the New York State Board of Elections. Mr. Spano is sued in his official capacity.
20. Gregory P. Peterson is a Commissioner on the New York State Board of Elections. Mr. Peterson is sued in his official capacity.
21. The members of the New York State Board of Elections are sued in their official capacity because they have general authority to issue instructions and promulgate rules and regulations relating to the election process. The State Board of Elections also provides oversight of the county boards of elections and has the power to order changes in procedures to make those procedures consistent with New York election code. See N.Y. Elec. Law §§ 3-102, 15-108, § 6-204.
22. Upon information and belief, the New York State Board of Elections has not issued any advisory opinion and/or formal opinion concerning the challenged statutes. Nor has the Board addressed the *Minnesota Voters’ Alliance* decision.
23. Dustin M. Czarny is a Commissioner on the Onondaga County Board of Elections. Mr. Czarny is sued in his official capacity.
24. Michele L. Sardo is a Commissioner on the Onondaga County Board of Elections. Ms. Sardo is sued in her official capacity.
25. The Commissioners of the Onondaga County Board of Elections are sued because

by statute, the County Board has the authority to control polling places within the county, which includes the authority and discretion to determine what is a “political” button or placard. The County Board appoints election inspectors to manage and administer polling places.

26. Under N.Y. Elec. Law § 3-402(1), “Election inspectors, in performing their duties, shall act as a board and a majority vote thereof shall be required to decide all questions. . . the inspectors present shall have and may exercise any power or perform any duty conferred or imposed upon a board of inspectors, provided that they are not all members of the same political party.”

27. Under N.Y. Elec. Law § 3-402(3), “The board of inspectors, and each member thereof, shall preserve good order within and around the polling place or place of registration, and shall keep access thereto unobstructed. The board of inspectors, or any member thereof, by order in writing may direct the arrest of any person who refuses to obey the lawful commands of the inspectors or who is guilty of disorderly conduct disturbing their proceedings or violating or attempting to violate any of the provisions of this chapter. Any peace officer, acting pursuant to his special duties, or police officer shall, when requested by the board or a member thereof, execute such order forthwith.”

28. Accordingly, election inspectors are tasked with the responsibility of determining what constitutes a “political” button or placard, a hopelessly ambiguous undertaking that lacks any guidance and which will necessarily result in myriad subjective interpretations of what it means to be “political.” Presumably, “political” would mean candidates for office or political parties (which is nonetheless an

unconstitutional abridgment of the First Amendment). But what about “MAGA” buttons? Or “Don’t tread on me”? “SCOPE”? “NRA”? “Black lives Matter”? “Feel the Bern”? Or any of a number of other expressive activity that one election inspector could deem political, and another would not.² The scope of a voter’s First Amendment rights will be determined on a case by case basis, and will potentially differ from county to county, from polling place to polling place, and even from inspector to inspector within a single polling place. The SBOE has not issued any guidance. Nor has the Onondaga Board of Election as far as Plaintiff has been able to ascertain.

THE FIRST AMENDMENT

29. The First Amendment declares in no uncertain terms that “Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

30. The First Amendment is “[p]remised on mistrust of governmental power” and is at “its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Citizens United v. FEC*, 558 U.S. 310, 339-40 (2010).

31. Speech concerning salient political issues is constitutionally enshrined because it is “the type of speech [that is] indispensable to decision making in a democracy[.]” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978).

² See, e.g., James J. Woodruff, 65 Mercer L. Rev. 331, *Freedom of Speech & Election Day at the Polls: Though Doth Protest Too Much* (2014).

32. A person's ability to exercise their rights guaranteed under the First Amendment is "undeniably enhanced by group association." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). Both the First and the Fourteenth Amendments, therefore, guarantee the "freedom to associate with others for the common advancement of political beliefs and ideas..." *Kusper v. Pontikes*, 414 U.S. 51 at 56 (1973); see also *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) ("[T]he right of individuals to associate for the advancement of political beliefs . . . rank[s] among our most precious freedoms.").
33. The First Amendment—through the Fourteenth Amendment—applies to state government action. *Lerman v. Bd. of Elections*, 232 F.3d 135, 145 (2d Cir. 2000).
34. This Complaint challenges the New York statutes that are unconstitutional under the U.S. Supreme Court's analysis in *Minnesota Voters' Alliance*, namely N.Y. Elec. Law §§ 8-104(1) and 17-130(4). These statutes prohibit voters from wearing political buttons or bringing political placards into a polling place.
35. *Minnesota Voters' Alliance* held that a Minnesota statute prohibiting "political" apparel inside the polling place was unconstitutional in violation of the First Amendment. Likewise, the statutes challenged here provide scant guidance as to what constitutes proscribed "political" speech within the polling place. Moreover, although *Minnesota Voters' Alliance* did not address the space outside of the polling place, government restrictions outside the polling place occur in public fora and must satisfy strict scrutiny review.

New York Law

36. New York law states that “[w]hile 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 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.” N.Y. Elec. Law § 8-104(1); see also N.Y. Elec. Law § 17-130(4), (23) (making electioneering a misdemeanor).
37. The challenged New York statutes must be struck down under *Minnesota Voters’ Alliance* because they are even more egregiously and ambiguously drafted than was the statute at issue in *Minnesota Voters’ Alliance*.
38. Moreover, the “one hundred foot radial” ban is unconstitutional because under strict scrutiny review because it bans “political” speech and association in a public forum without a compelling government interest, and by means that are not narrowly tailored. Passive expression does not give rise to the evils of active electioneering that the State seeks to restrict from the “one hundred foot radial.”

FACTS

39. Plaintiff is a registered voter who is an enrolled member of the Independence Party in New York who wants to wear political buttons in the polling place as he votes and to bring political placards for favored candidates into the polling place as he votes in the upcoming and future elections.
40. Plaintiff also wants to associate with like-minded voters.

41. Moreover, as set forth above with respect to “political” buttons, “political” placards are ambiguous and violate Plaintiff’s First Amendment rights. This proscription could be applied differently by different election inspectors.

42. The burdens on Plaintiff’s First Amendment speech rights are severe.

43. Plaintiff would have worn political buttons and or brought political placards into the polling place during past elections. In particular, Plaintiff would have worn a Trump, MAGA, and/or Trump/Pence button and other apparel while voting in the 2016 general election.

COUNT I

(Violation of First Amendment -- 42 U.S.C. § 1983 Claim – Passive “Political” Expression Within the Polling Place)

44. Plaintiff incorporates by reference all of the foregoing paragraphs as if fully stated herein.

45. Plaintiff wants to exercise his First Amendment rights to free speech and association by wearing “political” buttons and apparel as set forth above while voting at his polling place.

46. Plaintiff also wishes to bring placards for favored candidates, and possibly other placards that may be distributed outside the polling place, as he enters the polling place to vote in the 2018 primary and general elections. Simple possession of political placards allows Plaintiff and similarly situated voters to vote for and associate with persons of a favored political party or group without having to remember their names and offices being sought, which can be difficult when there

are numerous offices on the ballot. This statute favors well-known incumbents to the detriment of political newcomers.

47. Because N.Y. Elec. Law N.Y. Elec. Law §§ 8-104(1) and 17-130(4) directly limit core political speech, these statutes are subject to strict scrutiny. *Lerman*, 232 F.3d at 146 (“[R]estrictions on core political speech so plainly impose a ‘severe burden’ that application of strict scrutiny clearly will be necessary.”); see also *Am. Constitutional Law Found.*, 525 U.S. at 186. But even if the polling place is deemed a non-public forum, the statute must nonetheless be struck down because it restricts too broadly (i.e., the “one hundred foot radial” outside the polling place), and is unconstitutional as drafted under *Minnesota Voters’ Alliance*, *supra*. In other words, the challenged statutes must fail, regardless of which level of scrutiny is applied.

48. The U.S. Supreme Court has already ruled that a similar ban on “political” apparel was an unconstitutional violation of the First Amendment. *Minnesota Voters’ Alliance*, *supra*.

49. Similarly, the ban on “political” buttons and placards in N.Y. Elec. Law N.Y. Elec. Law §§ 8-104(1) and 17-130(4) lacks a compelling interest. Even if the State has an interest in preventing conduct that might intimidate or unduly influence the average or reasonable voter, to give voters an atmosphere conducive to reflection and voting, this goal is not satisfied by the passive display of a “political” button, or the possession (as opposed to distribution) of a “political” placard.

50. Likewise, even if New York has a compelling interest, N.Y. Elec. Law §§ N.Y. Elec. Law §§ 8-104(1) and 17-130(4) are not narrowly tailored. New York’s interest can

be preserved with a narrowly tailored statute that does not ban passive expressive activity.

51. Nor does New York even have a reasonable interest in banning passive expression within the polling place, which has no relationship to the evils sought to be prevented (and which have been eliminated in modern times), active electioneering. There is no rational basis to restrict passive displays by voters as they vote in the polling place.

52. 42 U.S.C. § 1983 permits plaintiff to sue state actors in law or in equity, when state actors, under the color of state law, violate plaintiff's constitutional rights. Here, pursuant to N.Y. Elec. Law §§ 8-104(1) and 17-130(4), Defendants have prevented Plaintiff from exercising their "core political speech" rights guaranteed under the First Amendment to the U.S. Constitution.

COUNT II

(Violation of First Amendment -- 42 U.S.C. § 1983 Claim – Passive "Political" Expression Outside the Polling Place)

53. Plaintiff incorporates by reference all of the foregoing paragraphs as if fully stated herein.

54. Plaintiff wants to exercise his First Amendment rights to free speech and association by wearing "political" buttons and apparel as set forth above within the "one hundred foot radial" outside the polling place.

55. Plaintiff also wishes to possess (and possibly view) placards for favored candidates, and possibly other placards that may be distributed outside the polling place, within the "one hundred foot radial" outside the polling place during the 2018

primary and general elections. Simple possession of political placards allows Plaintiff and similarly situated voters to vote for and associate with persons of a favored political party or group without having to remember their names and offices being sought, which can be difficult when there are numerous offices on the ballot.

This statute favors well-known incumbents to the detriment of political newcomers.

56. Plaintiff also wishes to associated with like-minded people within the “one hundred foot radial” outside the polling place during the primary and general elections.

57. Because N.Y. Elec. Law N.Y. Elec. Law §§ 8-104(1) and 17-130(4) directly limit core political speech, these statutes are subject to strict scrutiny. *Lerman*, 232 F.3d at 146 (“[R]estrictions on core political speech so plainly impose a ‘severe burden’ that application of strict scrutiny clearly will be necessary.”); see also *Am. Constitutional Law Found.*, 525 U.S. at 186.

58. Similarly, the ban on “political” buttons and placards in N.Y. Elec. Law N.Y. Elec. Law §§ 8-104(1) and 17-130(4) lacks a compelling interest. Even if the State has an interest in preventing conduct that might intimidate or unduly influence the average or reasonable voter, to give voters an atmosphere conducive to reflection and voting, this goal is not satisfied by the passive display of a “political” button, or the possession (as opposed to distribution) of a “political” placard.

59. Likewise, even if New York has a compelling interest, N.Y. Elec. Law §§ N.Y. Elec. Law §§ 8-104(1) and 17-130(4) are not narrowly tailored. New York’s interest can be preserved with a narrowly tailored statute that does not ban passive expressive activity.

60.42 U.S.C. § 1983 permits plaintiff to sue state actors in law or in equity, when state actors, under the color of state law, violate plaintiff's constitutional rights. Here, pursuant to N.Y. Elec. Law §§ 8-104(1) and 17-130(4), Defendants have prevented Plaintiff from exercising their "core political speech" rights guaranteed under the First Amendment to the U.S. Constitution.

COUNT III

(Declaratory Judgment)

61. Plaintiff incorporates by reference all of the foregoing paragraphs as if fully stated herein.

62. There is an actual, justiciable controversy between the parties.

63. Plaintiff seeks judgment pursuant to 28 U.S.C. § 2201(a) declaring the rights and other legal relations of the parties.

64. In particular, Plaintiff seeks judgment declaring that N.Y. Elec. Law §§ 8-104(1) and 17-130(4) be declared unconstitutional, null and void to the extent that they apply to "political buttons" or "political placards," and declaring these statutes unenforceable in advance of the 2018 primary and general elections.

65. Plaintiff seeks a declaration that he may lawfully and without fear of criminal prosecution wear "political" buttons and possess "political" placards when voting in their respective polling places. If the challenged statutes are not declared invalid and void, then Plaintiff requires a declaration that he may wear buttons, political apparel, and possess placards for the favored candidates within the polling place.

66. Plaintiff also seeks a declaration that he may lawfully and without fear of criminal prosecution wear “political” buttons and possess “political” placards within the “one hundred foot radial” outside the polling place during the primary and general elections. If the challenged statutes are not declared invalid and void, then Plaintiff requires a declaration that he may wear buttons, political apparel, and possess placards for the favored candidates within the “one hundred foot radial” outside the polling place during the primary and general elections.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment on all causes of action and that he be awarded relief to include:

- A. Pursuant to 28 U.S.C. §§ 2201(a), 2202, Plaintiff requests that this Court declare N.Y. Elec. Law §§ 8-104(1) and 17-130(4) unconstitutional to the extent that they apply to “political buttons” or “political placards,” because these statutes violate Plaintiff’s First Amendment free speech and free associational rights.
- B. Plaintiff requests that this Court enjoin both preliminarily and permanently Defendants and their agents and successors from enforcing N.Y. Elec. Law §§ 8-104(1) and 17-130(4).
- C. Plaintiff requests that this Court award Plaintiff’s attorneys their reasonable attorneys’ fees pursuant to 42 U.S.C. § 1988(b).
- D. Plaintiff requests that this Court award any other relief that this Court deems just, including costs.

DATED: August 3, 2018

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