

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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THE BOARD OF ELECTIONS IN THE CITY OF NEW : Index No. 70001/19
YORK, : :
: :
Plaintiff, : :
: :
-against- : :
: :
BITTA MOSTOFI, as Commissioner of : :
the New York City Mayor's Office of Immigrant Affairs, : :
AYIRINI FONSECA-SABUNE, as Chief Democracy : :
Officer of the City of New York, and : :
JAMES O'NEILL, as Commissioner of : :
the New York City Police Department, : :
: :
Defendants. : :
-----X

CITY OF NEW YORK'S MEMORANDUM OF LAW IN OPPOSITION

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Dated: New York, New York
February 25, 2019

PRELIMINARY STATEMENT

The Board of Elections in the City of New York (“Board”) seeks a preliminary injunction to enjoin the City of New York (“City”) from assisting voters with language barriers exercise their constitutional rights at the ballot box on February 26, 2019. There is no legal or factual basis for the relief that the Board seeks and, accordingly, it should be denied.

Since 2017, the City of New York has successfully operated a pilot program known as the Poll Site Project on a strictly non-partisan basis to expand the availability of interpretation services to limited-English-proficient (“LEP”) voters in New York City. During the February 26, 2019 Special Election, the Poll Site Project will offer interpretation services in Russian at 40 poll sites (reaching 46,670 LEP eligible voters), Haitian Creole at 5 poll sites (reaching 5,538 LEP eligible voters), Yiddish at 2 poll sites (reaching 3,752 LEP eligible voters), and Polish at 1 poll site (reaching 887 LEP eligible voters). For the first time, the Project’s interpreters will be stationed within poll site buildings to better serve LEP voters.

The Poll Site Project’s plan to place interpreters within the poll site buildings for the Special Election fully complies with the Election Law and all applicable State and federal laws, closely resembles interpretation initiatives offered by the Board itself, and is consistent with the City’s compelling interest in removing barriers that may prevent its citizens from exercising their constitutional right to vote. In order to enjoin the City from implementing its plan, the Board must demonstrate that its claims are likely to succeed on the merits. Because the Board’s arguments are bereft of any legal support and are based on pure speculation, it cannot meet the required legal threshold. The Project’s operations at the Special Election could be unlawful only if they i) constitute electioneering or threatened electioneering; or ii) obstruct the voting process; or iii) interfere with the orderly conduct of the election; or iv) otherwise violate State or federal law. The evidence presented here establishes that the Project will do none of

these things, and accordingly, the Board’s application is unlikely to succeed on the merits and should be denied.

Even if the Board were to prevail on the merits, it cannot show irreparable harm, and hence the Board’s application for a preliminary injunction must fail.

FACTS

The facts in support of denying the order the Board seeks are detailed in the Affidavits of Ayirini Fonseca-Sabune, Chief Democracy Officer for DemocracyNYC in the Office of the Mayor of the City of New York, and the documents annexed thereto (“Fonseca-Sabune Aff.”); Sonia Lin, Deputy Commissioner and General Counsel of the Mayor’s Office of Immigrant Affairs (“MOIA”) and the documents annexed thereto (“Lin Aff.”); Samuel Solomon, Director of Policy and Legislative Affairs of MOIA (“Solomon Aff.”) and the Affirmation of Doris F. Bernhardt (“Bernhardt Affirm.”).

ARGUMENT

I. THE PROJECT IS A LAWFUL INITIATIVE DESIGNED TO ASSIST VOTERS WITH LANGUAGE BARRIERS IN EXERCISING THEIR VOTING RIGHTS

The Project is consistent with the law and promotes the City’s compelling interest in improving access to the ballot box. No provision of New York Election Law—or any other law—bars the City from providing interpreters inside polling place buildings for voters with language challenges who wish to utilize them. To the contrary, the Election Law expressly contemplates that voters requiring assistance, whether due to disability or difficulty reading or writing English, may seek assistance from “a person of the voter’s choice.” N.Y. CLS Elec. Law § 8-306(3). A person assisting a voter may “enter the voting machine or booth with [the voter], help him in the preparation of his ballot and, if necessary, in the return of the voted ballot to the

inspectors for deposit in the ballot box.” *Id.* § 8-306(3). The Project’s operations for this Special Election are designed to fit seamlessly into this framework, by allowing Russian, Haitian Creole, Yiddish and Polish speakers who need assistance in orally translating voting instructions, the ballot, or in communicating with poll workers to obtain the very type of assistance already provided for by the Election Law.

There is of course nothing unusual in providing interpreters at poll sites. Under the federal Voting Rights Act, the Board itself provides, among other languages, Spanish, Chinese, and Korean interpreters, and translates voting materials into these languages, and more. 52 USCS § 1050; *see also* United States Census, “Section 203 of the Voting Rights Act, Covered Areas for Voting Rights Bilingual Election Materials,” <http://bit.ly/2j1dkYc> (last accessed Feb. 24, 2019). The Project simply seeks to extend those services to speakers of additional languages as part of the City’s commitment to improving access to voting for all eligible voters. *See* Fonseca-Sabune Aff. ¶ 2; Lin Aff. ¶¶ 4-6.¹

In doing so, the Project promotes the City’s “compelling interest” in securing the voting rights of its citizens. *Burson v. Freeman*, 504 U.S. 191, 199 (1992). Certainly, it is undisputed that the “right to vote freely for the candidate of one’s choice is of the essence of a democratic society,” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), and that there is no right more important. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”); *see also* Lin Aff. ¶ 4-5. There is no rational basis to enjoin the City from providing this service that both advances vital government interests and benefits voters in exercising their most cherished democratic rights.

¹ Indeed, many jurisdictions provide language assistance beyond what is required by the Voting Rights Act. *See, e.g.* Cal. Elec. Code § 12303; <https://bit.ly/2IzTDD2>.

II. THE BOARD HAS NOT AND CANNOT SATISFY THE STANDARD FOR A PRELIMINARY INJUNCTION

A preliminary injunction may only be issued when the movant demonstrates the likelihood of success on the merits and that the movant will suffer irreparable harm in the absence of the injunction. CPLR § 6301; *Handler v. 1050 Tenants Corp.*, 295 A.D.2d 238 (1st Dep’t 2002). Here, the Board has not and cannot demonstrate a likelihood of success on the merits or irreparable harm. Accordingly, the application for a preliminary injunction should be denied.

A. The Board Cannot Demonstrate Likelihood of Success on the Merits of Its Claim

The Board has not and cannot demonstrate a likelihood of success on the merits of its claim for an injunction. The Board argues that it has “exclusive power to conduct elections” in New York City and that, accordingly, it possesses the absolute authority to bar the Poll Site Project from stationing interpreters inside poll site buildings on February 26, 2019. Pl.’s Memo. of Law at 4-5. But, no agency of government, including the Board, may act “without sound basis in reason” and “without regard to the facts.” *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974). Indeed, courts have recognized that the government’s power to proscribe conduct within polling places is far from absolute, and may even be subject to strict scrutiny. *See Silberberg v. Board of Elections*, Index No. 16-CV-8336, 2017 U.S. Dist. LEXIS 162541 (S.D.N.Y. Sept. 28, 2017) (subjecting prohibition on taking photographs of marked ballots to strict scrutiny under the First Amendment).

Here, the Board has not and cannot identify any basis grounded in fact or law to enjoin the Project from stationing its interpreters within poll site buildings during the Special Election. The Project is entirely lawful and would neither constitute electioneering or threaten

electioneering, nor would it obstruct the voting process, nor interfere with the orderly conduct of the election. The Board has not demonstrated any legitimate basis for enjoining the City from making interpreters of Russian, Haitian Creole, Yiddish and Polish available at certain polling places and accordingly, the Board has not demonstrated a likelihood of success on the merits of its claim.

1. The Project’s Operations for the Special Election Will Not Constitute Electioneering

The Board asserts, without offering a scintilla of evidence, that the Poll Site Project should be enjoined from stationing interpreters within poll sites during the February 26, 2019 Special Election because this activity would constitute “electioneering” within one hundred feet of a poll site entrance. Election Law §§ 8-104(1), 5-204(9); Pl.’s Memo. of Law at 5-6. But, contrary to the Board’s conclusory assertion, the Project does not constitute electioneering, regardless of where its interpreters are located.

To “Electioneer” is “to work for the success of a particular candidate, party, ticket, *etc.*, in an election”² or to engage in partisan conduct. *See generally Burson*, 504 U.S. at 193; *Cullen v. Fliegner*, 18 F.3d 96, 100 (2d Cir. 1994); *Silberberg*, 2017 U.S. Dist. LEXIS 162541 *7. The Project takes no position as to any party, candidate or ballot issue and is nonpartisan. Lin Aff. ¶¶ 9-12, 18-22. The extensive training provided to all Project staff, which is based on the Board’s training materials, repeatedly hammers home the obligation to refrain from political conversations of any kind. *Id.* ¶¶ 18-22. The Board has offered no evidence to remotely suggest that Project staff would ignore these explicit and repeated warnings. Indeed, the evidence of the last two election cycles—in which the Project received no complaints

² See Dictionary.com, <http://www.dictionary.com/browse/electioneering> (last accessed Feb. 24, 2019).

whatsoever concerning electioneering—shows that the Board’s purported concerns over electioneering are baseless. *Id.* ¶ 12. Furthermore, there is no reason to believe that electioneering is more likely simply because interpreters will be stationed within polling site buildings rather than outside as they were in prior elections—and the Board has offered none. Contrary to the Board’s implication, Pl.’s Memo. of Law at 6, the Project does not constitute electioneering nor threaten the integrity of the Special Election simply because it is offered by the City rather than the Board. The Project is non-political, non-partisan and takes no position as to any candidate or issue on the ballot and accordingly is not electioneering of any kind.³

In fact, and contrary to the Board’s assertion that the City is seeking to wrest control of the Special Election from the Board or is improperly seeking to become involved in the Special Election, Pl.’s Memo. of Law at 4 and 9, the activities of the Project are extremely limited and are based on the Board’s instructions and trainings to its own interpreters. Lin Aff. ¶ 10, 17. These activities include orally translating the Board’s written voting materials, including the complete ballot, Instructions to Voters posters, Sample Ballot posters, and instructions on how to mark a ballot and providing interpretation services inside the poll site so that voters can communicate with poll site workers. *See* Lin. Aff. ¶ 23, Ex. B, slide 31. These activities do not constitute electioneering whether they take place one hundred and one feet from the polling place or within the polling place building.

2. The Project’s Operations for the Special Election Will Not Obstruct Any Poll Sites

The Board asserts that the Project must be enjoined from stationing interpreters inside poll site buildings during the February 26, 2019 Special Election because this may

³ The Board asserts that the Project chose interpreter languages by “fiat.” Pl.’s Memo. of Law at 6. In fact, the Project uses an objective methodology that seeks to provide interpreter services to the New Yorkers who need it most. *See* Solomon Aff.

interfere with the Board's obligation to make poll sites accessible to voters with disabilities, as required by Section 4-104 of the Election Law, the federal Americans with Disabilities Act and the Help America Vote Act. Pl.'s Memo. of Law at 7. In fact, the Project has been scrupulously designed to serve voters without obstructing access to the polls for anyone, including voters with disabilities.

The City has carefully pre-planned the positioning of the Project staff at polling sites to avoid obstruction and to avoid impeding wheelchair accessibility. *Fonseca-Sabune Aff.* ¶ 19 In making arrangements with each poll site, the Project staff informed the site that the interpreter location must not interfere with the ingress or egress to the building or poll site room, and must not obstruct wheelchair accessibility or create any sort of obstacle to voters' use of the poll site. *Id.* The Project specifically asked Department of Education polling locations to confirm that placing the interpreters at the selected locations within the poll site building would not interfere with Americans with Disabilities Act accessibility or with entry or egress to the poll site room. *Id.* The City has provided the Board with information about where interpreters will be located in poll sites. *Id.* ¶ 22, Ex. D.

Likewise, the lawful assistance of voters in need of language assistance will not interfere with the Board's obligation to make voting accessible for people with disabilities or any other voter. As discussed above at 3, under the Election Law, providing language assistance to voters with limited English proficiency is lawful and has been in place for years as a matter of course. The Polling Project's lawful activities will enhance voter access and will not interfere with the Board's duty to maintain access to any polling place for all New Yorkers.⁴

⁴ The Board argues that the Project may threaten its compliance an existing judicial order in *United Spinal Association et al. v. Board of Elections et al.*, 10 Civ. 5653 (DAB) (Oct. 18, 2012), Pl.'s Memo. of Law at 7, but there is no basis for this assertion. Most of the obligations in

For the same reasons, the Project will not prevent the Board from keeping access to polling places “unobstructed,” as required by Section 3-402 of the Election Law.

3. The Project’s Operations for the Special Election Will Not Cause Disorder

The Board argues that placing interpreters within poll sites during the Special Election will interfere with the Board’s ability to ensure that “good order” is preserved in and around the polling site, as required by Section 3-402 of the Election Law. Pl.’s Memo. of Law at 6-7. Again, the Board offers no evidence that would even suggest such a possibility.

The Project’s staff members have been trained on and are familiar with the voting process and they have been instructed to conduct themselves in a manner fully consistent with the seriousness of the voting process and their narrow role therein. Lin Aff. ¶¶ 15-24. Certainly, Project staff members are better equipped to assist voters than a family member, friend, or other member of the public who may lawfully do so under Section 8-306(3) of the Election Law. The Project’s footprint is insignificant because it employs at most two or three interpreters per site,

United Spinal Association require affirmative actions from the Board, on which the Project would have no impact. *See id.* (directing the Board to, *inter alia*, assign an On-Site Accessibility Coordinator to each polling site who is trained to receive complaints on the date of any election; employ monitors to visit each polling site twice on the date of any election to assess the accessibility of the poll site and produce their findings in a report). Moreover, as set forth above, to the extent *Spinal Association* requires compliance with anti-discrimination law, the City has taken steps to avoid interfering with the Board’s compliance.

working one-on-one with voters that request their help. Lin Aff.¶ 26. The small number of staff members, assisting voters one at a time, will not interfere with an “orderly” election. To the contrary, by their training, Project staff will in fact enhance orderly voting. Furthermore, the Project has not interfered with good order in the past and there is no reason to believe that moving interpreters inside poll sites would increase the likelihood of disorder.

In *Silberberg*, 2017 U.S. Dist. LEXIS 162541 at *58, the court held that the Board’s prohibition on photography in the polling place, including ballot selfies, fell within the Board’s authority to maintain “order” because the policy sought to prevent the disorder likely to result from the delays prompted by voters taking the time to photograph their ballots. The court also emphasized the threats to election integrity made possible by photography in polling places. *Id.* at 33-41.⁵ Here no such concerns exist. To the contrary, Russian, Haitian Creole, Polish and Yiddish interpreters in proximity to the polling rooms and machines may improve the efficiency of the voting process and shorten lines by helping voters with language barriers navigate their polling place more easily. And, as set forth above, the Project does not present a risk of electioneering or any other threats to election integrity.

The Board asserts that permitting the Project to station its interpreters inside the polling sites would create a precedent where the Board might be required to grant other entities access to polling sites. Pl.’s Memo. of Law at 7. This argument is unavailing because the Board always retains the authority to exclude persons and groups it legitimately determines would cause disorder or violate other Election Law provisions.

⁵ Specifically, the court recognized that ballot selfies could interfere with the integrity of an election because they could be used in vote-buying or voter intimidation schemes to verify that a person who sold or promised a vote followed through. *Id.* at *39.

In fact, the Board routinely permits outside people and groups into polling places, including advocacy organizations conducting exit polls⁶ and the news media.⁷ In addition, bake sales and other fundraising frequently takes place inside polling places, including in rooms and hallways adjacent to voting machines. Bernhardt Affirm. ¶ 3. There is no legitimate reason to prohibit Project interpreters from this same physical area when their job is to promote orderly voting.⁸

4. The Project's Operations for the Special Election Will Not Violate Any Other Laws

The Board also argues incorrectly that the Project should be enjoined because it may violate a grab-bag of State and federal laws, Pl.'s Memo. of Law at 8-10, but none of these contentions have merit.

The Board asserts that the Poll Site Project is inconsistent with Section 8-306(3) of the Election Law because that Law precludes employers and their agents from helping employees vote and the Project, run by the City, does not exclude City workers. Pl.'s Memo. of Law at 10. But, contrary to the Board's assertion, the Project interpreters are neither the City nor agents of the City under the Election Law. Project interpreters are not City employees or agents; they are employed by a third party vendor who contracts with the City for the purpose of providing interpreter services at the polls. Lin Aff. ¶ 15. In any event, the Election Law does not bar people with the same employer from helping one another vote. Under Section 208 of the

⁶ See Bernhardt Affirm. Ex. 1.

⁷ See Basic Poll Worker Manual, 2018/2019 Certification Period at 13, available at <https://bit.ly/2Qd2j29> (last accessed on Feb. 21, 2019).

⁸ The Board's concern that the Project's interpreters would impermissibly enter the restricted area delineated by the "guard-rail" is without merit as an interpreter would only accompany a voter there as permitted by Section 8-306(3) of the Election Law.

Voting Rights Act, 52 USCS § 10508, which is identical in relevant part to Section 8-306(3), the “ban on assistance by an agent of the employer ... does not extend to assistance by a voter’s co-worker.” Voting Rights Act Amendments, Assistance to Voters, P.L. 97-205, H.R. 3112, 97th Cong., 1st Sess., at 64 (1982).

The Board also suggests that the Project might open up the Board and City to an Equal Protection or Voting Rights Act challenge. Pl.’s Memo. of Law at 8. But this speculative possibility is no basis for an injunction. Furthermore, the City’s methodology for selecting poll sites and languages as set forth in the Solomon Affidavit would be more than adequate to survive the rational basis scrutiny applicable to such a challenge. *See, e.g., FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307 (1993); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 486-89 (1955) (same); *Wash. v. Glucksberg*, 521 U.S. 702, 728 (1997). The Board further asserts that Project violates the Election Law because the City does not vet Project interpreters’ party affiliation. Pl.’s Memo. of Law at 8-9. But, while bipartisanship requirements apply to Board personnel who assist voters, *see id* at 9, this requirement does not apply when a voter seeks assistance from a person of their choice, such as a Poll Site Project interpreter. N.Y. CLS Elec. Law § 8-306(3).⁹

Beyond conclusory assertions, the Board has not identified any legitimate basis—and there is none—to enjoin the City from placing interpreters in poll site buildings to improve access to the ballot box for voters with language barriers.

⁹ The Board also takes issue with the fact that Board staff are subject to severe criminal liability under the Election Law for certain misconduct, such as revealing which candidate a voter selected, while Project interpreters would not be. Pl.’s Memo. of Law at 9-10. But, the Board concedes that it is not alleging Project interpreters would commit any such misconduct, *id.* at 10, and has proffered no probative evidence to suggest that this is a valid concern.

B. The Board Cannot Demonstrate Immediate and Irreparable Harm

The Board cannot demonstrate irreparable harm or injury here because all of the potential problems, difficulties and inconveniences that it has identified in connection with the Project can be addressed on a case-by-case basis. The Project will only be present at 48 polling places, a very small proportion of the polling places in the City as a whole. Given the small size of the Project, the Board and the City will be able to address any matters that arise without disruption to the election.

III. THE NYPD SHOULD BE DISMISSED FROM THIS PROCEEDING

4. The Board seeks a declaration that it has the legal authority to order the New York City Police Department (“NYPD”) to remove or arrest any Project interpreter who fails to follow a directive of the Board. Pl.’s Memo. of Law at 12. But there is no need whatsoever for such a declaration. The NYPD will comply with any final Court order. In the unlikely event the Board obtains an order in its favor regarding the interpreter program at issue here for the February 26, 2019 Special Election, the NYPD will comply with Board and poll site inspector instructions lawfully implementing the Court’s order. Bernhardt Affirm. ¶ 4. Accordingly, there is no basis to continue this proceeding against Commissioner James O’Neill, and the proceeding should be dismissed as to him. *Id.*

CONCLUSION

For the foregoing reasons, the Board's application for a preliminary injunction should be denied.

Dated: New York, New York
February 25, 2019

Respectfully submitted,

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