STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of:

COMMON CAUSE NEW YORK, THE BLACK INSTITUTE, SUSAN LERNER, KATHERINE MARSH WOLFRAM, MARTA GOMEZ, SUE ELLEN DODELL and JULIE GOLDENBERG,

Petitioners,

DECISION AND ORDER
Index No.: 911452-23

-against-

PETER S. KOSINSKI, as Co-Chair and Commissioner of the New York State Board of Elections, DOUGLAS A. KELLNER, as Co-Chair and Commissioner of the New York State Board of Elections, ANDREW J. SPANO, as Commissioner of the New York State Board of Elections, ANTHONY J. CASALE, as Commissioner of the New York State Board of Elections, and the NEW YORK STATE BOARD OF ELECTIONS,

Respondents,

-and-

ELECTION SYSTEMS & SOFTWARE, LLP,

Intervenor-Respondent.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES: PHILLIPS NIZER, LLP
Attorneys for Petitioners
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O'CONNOR, J.:

Background

On November 28, 2023, Common Cause New York ("Common Cause"), The Black Institute, Susan Lerner, Katherine Marsh Wolfram, Marta Gomez, Sue Ellen Dodell, and Julie Goldberg (collectively "petitioners") commenced this CPLR Article 78 proceeding for a writ of mandamus to compel respondent New York State Board of Elections ("NYSBOE") to rescind its approval for the use of the "ExpressVote XL" machine in New York State. The ExpressVote XL is manufactured by Election Systems and Software, LLC ("ES&S"). Petitioner brought this proceeding against NYSBOE, as well as NYSBOE Commissioners Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, and Anthony J. Casale ("respondents"). By Order to Show Cause, dated December 29, 2023, ES&S made an application to intervene as a respondent in this matter and file a response to the petition. By Decision, Order, and Judgment, dated March 15, 2024, the Court (O'Connor, J.) granted ES&S's application to intervene in this matter and file opposition to the petition.

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On February 2, 2024, respondents filed a motion to dismiss the petition pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction based on a lack of standing, and pursuant to CPLR 3211(a)(7) for failure to state a claim. In the alternative, respondents request leave pursuant to CPLR 7804(f) to serve an answer within thirty days of service of notice of entry of the Order deciding the motion. Petitioners oppose the motion.

Discussion

I. Standing

Respondents initially argue that petitioners lack standing to challenge the certification of the ExpressVote XL machine by NYSBOE. Election Law § 7-201 requires NYSBOE to determine whether a voting machine complies with the requirements of Election Law § 7-202 and can be safely and properly used by voters and local boards of election. Pursuant to Election Law §§ 3-100 (4) and 7-201(1), approval of a voting machine must be made by affirmative vote of at least three of the four Commissioners. Among other requirements, for "[a] voter machine or system to be approved" by NYSBOE, the machine or system "shall . . . provide the voter an opportunity to privately and independently verify votes selected and the ability to privately and independently change such votes or correct any error before the ballot is cast and counted" (Election Law § 7-202[1][e]).

"Standing is a threshold determination and a litigant must establish standing in order to seek judicial review, with the burden of establishing standing being on the party seeking review" (*Matter of Gronbach v. New York State Educ. Dept.*, 221 A.D.3d 1385, 1387 [3d Dep't 2023] [internal quotation marks and citations omitted]; *see Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v. City of Schenectady*, 178 A.D.3d 1329, 1331 [3d Dep't 2019]). To establish standing, "petitioners must show that they have suffered an injury in fact, distinct from that of the general public" (*Matter of Transactive Corp. v. New York State Dept. of Social Servs.*, 92 N.Y.2d 579, 587 [1998]), and "that the injury is within the zone of interests protected by the statute at issue" (*Matter of Brennan Ctr. for Justice at NYU School of Law v. New York State Bd. of Elections*, 159 A.D.3d 1301, 1304 [3d Dep't 2018]). "The injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and

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has suffered a cognizable harm . . . that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention" (*Matter of Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50 [2019] [internal quotation marks and citations omitted]). Although there is no "requirement that the harm necessary to confer standing be actual and in the present rather than potential and in the future" (*Police Benevolent Assn. of N.Y. State Troopers, Inc. v. Division of N.Y. State Police*, 29 A.D.3d 68, 70 [3d Dep't 2006]), alleged harm will be considered speculative when "it is predicated upon a series of [future] events that may not come to pass" (*Schulz v. Cuomo*, 133 A.D.3d 945, 947 [3d Dep't 2015]; *see Matter of Brennan Ctr. for Justice at NYU School of Law v. New York State Bd. of Elections*, 159 A.D.3d at 1301).

a. Individual Petitioners

Respondents assert that petitioners lack standing. With respect to Susan Lerner, Katherine Marsh Wolfram, Marta Gomez, Sue Ellen Dodell, and Julie Golberg ("individual petitioners"), respondents state that the individual petitioners fail to submit any affidavits or other information indicating that they suffered any injury from the Board's adoption of Resolution 23-27 approving the use of the ExpressVote XL in New York State. Respondents argue that while the individual petitioners state that they "regularly vote," it is unclear whether they used the ExpressVote XL system in the November 2023 election and were unable to confirm, verify, or change their votes. Respondents further argue that each individual petitioners' statement, "I regularly vote and have an interest in ensuring my vote is accurately cast and counted," is too speculative and conjectural to articulate an injury-in-fact.

Petitioners counter that the Constitution of the State of New York confers upon every citizen the right to vote in elections for public office. Petitioners argue that as active voters who "regularly vote," the individual petitioners would be harmed by the inability "to privately and

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independently change [their] votes or correct any error before the ballot is cast and counted," in violation of the requirements set forth in Election Law § 7-202(1)(e). Petitioners maintain that the alleged harm cannot be considered as speculative. Petitioners state that with individual petitioners' allegations that they have cast ballots in prior elections, it is reasonable to assume that they will vote in the future and that if the ExpressVote XL is in use, the harm alleged will occur when the individual petitioners cast their votes. In opposition, petitioners submitted the affidavit of Susan Lerner. Among other things, Lerner stated that numerous counties in New York State, including Schenectady, Erie, Rockland, and Albany Counties, as well as New York City, use equipment provided by ES&S, and thus, would be likely to purchase and use new equipment, including the ExpressVote XL, from ES&S. According to Lerner, ES&S confirmed that it is actively marketing the ExpressVote XL to counties throughout New York.

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The petition states that Susan Lerner has been registered to vote in Kings County, New York, since 2007 and has "voted in every election for which she is eligible" during that time. The petition states that the remaining individual petitioners "regularly vote[] and ha[ve] an interest in ensuring that [their] vote[s] [are] accurately cast and counted." The petition specifies that Katherine Marsh Wolfram is an individual resident of Schenectady County who has been a registered voter since 2004, Marta Gomez is an individual resident of Albany County who has been registered to vote since 1993, Julie Goldberg is an individual resident of Rockland County who has been registered to vote since 2002, and Susie Ellen Dodell is an individual resident of Bronx County who has been registered to vote since 1984.

The petition states that voters using the ExpressVote XL machine are not able to verify their votes or correct them before their votes are cast and counted. According to the petition, voters use a touchscreen to mark their ballot selections on the ExpressVote XL, which prints a summary

card listing the voter's selections, as well as a barcode. Petitioners claim that the votes are cast by scanning the barcode, which decodes the information from the barcode, not from the text printed on the summary card itself. The petition states that as a consequence, the voter's ballot is not verifiable, as they are not able to interpret what is reflected within the barcode. According to the petition, on or about November 7, 2023, a data entry error occurred in the ExpressVote XL machine used in Northampton County, Pennsylvania, at which time the text on the summary card did not match the voter's selection. The petition states that voters were informed that there was likely a barcode-text mismatch, and the barcode accurately reflected their choices.

Based on the foregoing, the Court finds that the individual petitioners lack standing to challenge the certification of the ExpressVote XL machine by NYSBOE. Petitioners' alleged harm is the loss of a voters' ability to privately and independently change their votes or correct any error before a ballot is cast and counted. The Court finds that the individual petitioners' purported harm is both conjectural and speculative at this stage, as "it is predicated upon a series of events that may not come to pass" (*Schulz v. Cuomo*, 133 A.D.3d at 947). The individual petitioners are all registered voters in New York State. The affidavit of Susan Lerner provides that various counties in New York, including Schenectady and Albany Counties, as well as New York City, use equipment provided by ES&S, and thus, would be likely to purchase and use new equipment, including the ExpressVote XL, from ES&S. The Court does not dispute that registered voters within New York State have a demonstrated interest in ensuring that their votes are accurately cast and counted. However, particularized interest, by itself, is insufficient to establish an injury-in-fact.

NYSBOE's certification of the ExpressVote XL and ES&S's active marketing of the machine across New York raises the possibility that the ExpressVote XL may be purchased in

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New York for use in upcoming elections, and the further possibility that the ExpressVote XL machine may be purchased by a county in New York State where one of the individual petitioners reside. Petitioners' allegation that the ExpressVote XL machine will not permit voters to privately and independently change their votes or correct any error before a ballot is cast and counted remains a possibility if those machines were purchased for use in New York State. However, "a claimed injury may not depend upon speculation about what might occur in the future, but must consist of 'cognizable harm, meaning that [a petitioner] *has been or will be* injured'" (*Matter of Brennan Ctr. for Justice at NYU School of Law v. New York State Bd. of Elections*, 159 A.D.3d at 1301, quoting *New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 214 [2004] [internal quotation marks and further citations omitted]). While the Court recognizes that standing requirements "should not be applied in an overly restrictive manner" (*Matter of Borrello v. Hochul*, 221 A.D.3d 1484, 1488 [4th Dep't 2023]), the alleged harm proposed by the individual petitioners is predicated upon a series of future events which may never occur (*see Schulz v. Cuomo*, 133 A.D.3d at 948). The certification of the ExpressVote XL, by itself, does not indicate that the machine will be purchased in New York State, regardless of whether ES&S is actively marketing the product or has sold products in other counties in New York State. Therefore, the Court finds that individual petitioners fail to establish an injury-in-fact. Accordingly, the portion of respondents' motion to dismiss the petition against the individual petitioners for lack of standing is granted.

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b. Common Cause + The Black Institute

"[F]or an organization to have standing to bring a CPLR article 78 proceeding challenging administrative decision-making, it must show that one or more of its members would have standing to sue, that the interests it asserts are germane to its purposes so as to satisfy the court that it is an

appropriate representative of those interests and that neither the asserted claim nor the appropriate relief requires the participation of the individual members" (*Matter of Friends of the Shawangunks v. Town of Gardiner Planning Bd.*, 224 A.D.3d 961, 962 [3d Dep't 2024] [internal quotation marks, brackets, ellipses and citation omitted]; *see Matter of Mental Hygiene Legal Serv. v. Daniels,* 33 N.Y.3d at 50; *Civ. Serv. Employees Assn., Inc., Local 1000, AFSCME, AFL-CIO v. City of Schenectady*, 178 A.D.3d at 1331). In the alternative, "an organization can also demonstrate "standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy" (*Matter of Mental Hygiene Legal Serv. v. Daniels,* 33 N.Y.3d at 51 [internal quotation marks and citation omitted]). "Under this option, an organization—just like an individual—must show that it has suffered an 'injury in fact' and that its concerns fall within the 'zone of interests' sought to be protected by the statutory provision under which the government agency has acted" (*id.* at 51 [citations omitted]).

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Respondents argue that neither Common Cause nor The Black Institute can establish that they suffered an injury-in-fact. With respect to Common Cause, respondents argue that the single paragraph in the petition which expressed the organization's "strong interest in ensuring that voting laws are implemented in a fair and impartial manner" in accordance with state and federal law, in a manner which "promotes confidence in the electoral system and our democracy" is too generalized to establish an injury-in-fact. Respondents argue that The Black Institute is similarly overgeneralized in its description as a not-for-profit seeking to address racially discriminatory actions. Respondents point out that the Black Institute fails to articulate any interest specific to elections or voters. Respondents emphasize that neither organization alleged, through the petition, an affidavit, or otherwise, that at least one of its members were disenfranchised by utilizing the ExpressVote XL machine.

Petitioners argue that while the alleged injury must be sufficiently particularized and concrete as to warrant judicial intervention, there is not a requirement that the harm must be actual and in the present, as long as the harm is reasonably certain to occur if the challenged action is permitted to continue. The petition states that Common Cause New York is "a national nonpartisan advocacy organization" with over 62,000 members in New York. Within the petition, Common Cause is described as an organization that is "dedicated to ensuring that every aspect of our elections and representative self-government is fair, open, accessible and set up so that we all have faith in the integrity of election outcomes and the people we elect to serve the public." Petitioners state that Common Cause is thus, an organization focused on matters related to voting rights of New Yorkers, the rights of whom would be harmed by the loss of the ability to privately and independently change their votes or correct any error before a ballot is cast and counted. Petitioners state that while respondents fail to address the second prong of the standing inquiry, petitioners adequately alleged that the injury to the voters represented by Common Cause falls squarely within the zone of interest sought to be protected by Election Law.[1]

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In further opposition to the motion to dismiss, petitioners included the affidavit of Susan Lerner, as the Executive Director of Common Cause. Lerner stated that Common Cause has spent hundreds of hours over the last five years studying the ExpressVote XL, and emphasized that the proposed certification and use of the machine in New York has been the organization's main focus. Lerner stated that Common Cause consulted with experts in voting technology and researched the instances in Pennsylvania where the ExpressVote XL machine printed out ballots which did not match voters' intended votes. Lerner explained that as part of its mission, Common Cause devotes

[1] Petitioners highlight that Common Cause has been found to have associational standing to represent its members' interests in cases involving the right to vote in New York (*see Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, n. 1 (2d Cir. 2006); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 288 (S.D.N.Y. 2020). However, those cases presented significantly different circumstances than exist in this case.

substantial time and resources to ensuring that voting equipment will be appropriately certified in order to facilitate accurate recording and counting of votes. Lerner recalled that following the misrecording of votes by the ExpressVote XL machine in Northampton, Pennsylvania, Common Cause fielded inquiries from voters in New York who expressed concern, and was able to reassure voters that ExpressVote XL machines were not in use in New York. Lerner stated that she believes numerous counties in New York State, including Schenectady, Erie, Rockland, and Albany Counties, as well as New York City, use equipment provided by ES&S, and thus, would be likely to purchase and use new equipment, including the ExpressVote XL, from ES&S. Lerner emphasized that Common Cause represents thousands of members and activists who live in those counties, the majority of which are high propensity voters. Lerner stated that ES&S has confirmed that it is actively marketing the ExpressVote XL to counties throughout New York, including Monroe County. According to Lerner, Common Cause NY has members and activists who reside in Monroe County.

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Based on the foregoing, the Court finds that Common Cause similarly lacks standing to challenge the certification of the ExpressVote XL machine by NYSBOE. In finding that Susan Lerner lacked standing as an individual petitioner, Common Cause cannot establish standing by alleging that Lerner, as member of Common Cause, had standing to sue. Moreover, Common Cause failed to establish that it had standing, as an organization, to challenge NYSBOE's certification of the ExpressVote XL. Common Cause represents that it is an advocacy group with over 62,000 members in New York, and has thousands of members and activists who live in the New York counties where ES&S may market the ExpressVote XL. Moreover, Common Cause states that it devoted resources to researching and investigating the ExpressVote XL, and expressed that as an organization, part of its mission is to ensure that voting equipment will be appropriately

certified to facilitate accurate recording and counting of votes. Although these representations support the contention that Common Cause, as an organization, has a particularized interest in this matter, the alleged harm is too speculative to establish an injury-in-fact. Common Cause does not allege that ES&S has contracted with any county in New York State for the purchase of the ExpressVote XL. While the affidavit of Susan Lerner states that ES&S is actively marketing in counties in New York, namely Monroe County, where Common Cause has active members, the alleged harm has not occurred, and may never occur if the ExpressVote XL is not purchased by a county where Common Cause's members reside (*see Matter of Brennan Ctr. for Justice at NYU School of Law v. New York State Bd. of Elections*, 159 A.D.3d at 1301; *Schulz v. Cuomo*, 133 A.D.3d at 948). Accordingly, the portion of respondent's motion which seeks dismissal against Common Cause for lack of standing is granted.

Turning to the remaining petitioner, The Black Institute, the Court finds that petitioners failed to establish the organization's standing in the instant proceeding. The petition states that The Black Institute is a not-for-profit organization "which exists for the purpose of exposing and addressing racially discriminatory acts by, among other entities, the City and State of New York, and seeking remedies for that discrimination." In support of dismissal, respondent points out that aside from this statement, there is no other mention of the Black Institute in the petition sufficient to establish an injury-in-fact. The Court agrees with respondent in this regard. The alleged harm set forth in the petition is the loss of a voters' ability to privately and independently change their votes or correct any error before a ballot is cast and counted. The Black Institute did not articulate any interest or alleged harm with respect to elections of voters of New York State. Consequently, the Court finds that petitioners failed to establish organizational standing for The Black Institute.

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Therefore, the portion of respondents' motion which seeks to dismiss against The Black Institute for lack of standing is granted.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit, or need not be reached in light of this determination.

Accordingly, it is hereby

ORDERED, that respondents' motion to dismiss the petition against petitioners for lack of standing is granted; and it is further

ORDERED, that the petition is dismissed.

This memorandum constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order/Judgment and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those rules with respect to service and notice of entry of the Decision and Order/Judgment.

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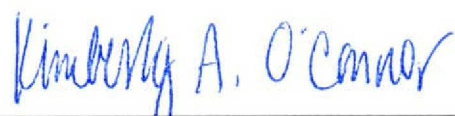
SO ORDERED.

ENTER.

Dated: April 18, 2024
Albany, New York



HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

04/18/2024

Papers Considered:

1. Notice of Petition, dated November 29, 2023; Petition, dated November 28, 2023;
2. Respondents' Notice of Motion, dated February 2, 2024; Memorandum in Support, dated February 2, 2024; Affirmation of Lauren Eversley, Esq., in Support of Motion, dated February 2, 2024; *and*

3. Petitioners' Memorandum in Opposition to Motion, dated February 20, 2024; Affidavit of Susan Lerner, sworn to February 20, 2024.

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