

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of:

COMMON CAUSE NEW YORK, SUSAN
LERNER, KATHERINE MARSH WOLFRAM,
MARTA GOMEZ, SUE ELLEN DODELL and
JULIE GOLDBERG,

Petitioners,

-against-

DECISION AND
ORDER/JUDGMENT
Index No.: 911452-23

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, and 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
(Michael S. Fischman, Esq. of Counsel)
485 Lexington Avenue
New York, New York 10017

HON. LETITIA JAMES
Attorney General for the
State of New York
Attorneys for Respondents
(Lauren R. Eversley, Esq., Assistant
Attorney General of Counsel)
The Capitol
Albany, New York 12224

GREENBERG TRAURIG, LLP
Attorneys for Intervenor-Respondent
Election Systems & Software, LLC
(Robert M. Harding, Cynthia E. Neidl,
& Joshua L. Oppenheimer, Esqs. of Counsel)
54 State Street, 6th Floor
Albany, New York 12207

O'CONNOR, J.:

Background

On November 28, 2023, Common Cause New York, The Black Institute, Susan Lerner, Katherine Marsh Wolfram, Marta Gomez, Sue Ellen Dodell, and Julie Goldberg (collectively “petitioners”) commenced this CPLR Article 78 proceeding against respondents the New York State Board of Elections (hereinafter “NYSBOE) and NYSBOE Commissioners Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano, and Anthony J. Casale (collectively “respondents”), for a writ of mandamus to compel NYSBOE to rescind its certification and approval for use of the ExpressVote System (hereinafter “EVS”) 6.3.0.1 in New York State. The EVS 6.3.0.1, created by Election Systems and Software, LLC (hereinafter “ES&S”) utilizes the ExpressVote XL 4.2.1.1 ballot marking device (hereinafter “ExpressVote XL”). Petitioners argue that the ExpressVote XL

fails to meet the requirements set forth in Election Law §§ 7-200, 7-201, and 7-202(1)(e) and the federal Help America Vote Act of 2002 (hereinafter “HAVA”) (52 USCA § 21081).

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. On March 15, 2024, by Decision and Order/Judgment, the Court (O’Connor, J.) granted ES&S’s application to intervene in this matter and file opposition to the Petition. A Verified Answer was filed by ES&S on April 15, 2024. 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. By Decision and Order, dated April 18, 2024, the Court (O’Connor, J.) granted respondents’ motion to dismiss the Petition for lack of standing. Petitioners appealed this determination.

By Memorandum and Order, dated August 14, 2025, the State of New York Supreme Court, Appellate Division Third Department reversed this Court’s dismissal of the Petition, finding that petitioners had standing to challenge respondents’ approval of the ExpressVote XL.¹ The Third Department declined NYSEOE’s alternative request for affirmance on the ground that petitioners inappropriately sought relief for mandamus to compel, holding that although petitioners sought relief under CPLR 7803(1), the Petition could “be readily construed as one for mandamus to review, which asks ‘whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion ’ ” (*Common Cause New York v. Kosinski*, 241 A.D.3d 1036, 1042 [3d Dep’t 2025], quoting CPLR 7803[3]).

¹ The portion of the Court’s determination which found that The Black Institute lacked standing was not challenged on appeal. The Third Department held that any argument with respect to this determination was abandoned. Therefore, the Court finds that The Black Institute is no longer a petitioner in this proceeding.

Upon remittal, respondents filed a Verified Answer and petitioners replied in further support of the relief requested.²

Discussion

I. Contentions & Support

The ExpressVote XL was developed by ES&S Voting System Corporation for certification and use in New York State elections. The ExpressVote XL is an electronic ballot marking device which allows voters to select their opinions on a touchscreen which displays the candidates to choose from. Once the selections are made by the voter, the ExpressVote XL prints a paper ballot summary card which contains a barcode alongside a written description of the voter's selections. If the voter examines the summary card and wants to change their vote, the voter can end the voting session and start the voting process over again. Once the voter verifies their vote on the summary card, the barcode, which contains a summary of the voter's selections, is then scanned into the machine to submit and record the voter's selections. Petitioners argue that because the information contained within the barcode is not available to the voter, and the barcode information is what is being scanned into the system, the written summary card of the voter's selection does not provide an adequate verification process for the voter prior to the voter's ballot submission, as is required by Election Law § 7-202(1)(e).

Within the Petition, petitioners allege that on or about November 7, 2023, "an apparent data entry error caused the ExpressVote XL used in Northampton County, Pennsylvania, to print ballot summary cards with selections for judicial candidates that were inconsistent with the data

² Within their Answer and supporting documents, respondents made reference to several attachments which were not properly filed on NYSECEF. The Court directed respondents to file these attachments by January 13, 2026. Missing attachments were filed by respondents on January 13, 2026. Based upon this extension for filing of documents annexed to the Answer, the Court rejects respondents' contention that petitioners' reply papers were untimely filed on January 9, 2026. The parties continued to dispute the *in camera* nature of NYSBOE's filing of Attachment C to the SLI Report. Attachment C was submitted for *in camera* review unredacted, and filed on NYSCEF in redacted form on March 3, 2026.

recorded on the bar code - the text on the summary card did not match the voter selection” (NYSCEF Doc. No. 1). Petitioners argue that although this was “likely an accidental occurrence due to a data entry error, the mismatch between the bar codes and the human-readable text highlights the problem with ExpressVote XL, both logistically and with respect to compliance under Election Law §7-202” (NYSCEF Doc. No. 1). Petitioners emphasize that if the situation were reversed and the error in Northampton County had been a barcode error, “it likely would not have been detected” because the text would have matched the voter’s selection and the voter is unable to know what data is stored in the barcode (NYSCEF Doc. No. 1).

Within their Verified Answer, ES&S argues that “NYSBOE’s determination to certify and approve the ExpressVote XL voting system was consistent with New York Election Law[,]...was rationally based and is supported by substantial evidence” (NYSCEF Doc. No. 34). ES&S denies that the information on the barcode differs from the voter’s selections printed on the summary card.

Respondents filed their Answer on September 3, 2025. Respondents maintain that NYSBOE’s determination is supported by a rational basis and is not affected by error of law. Respondents explain that as part of NYSBOE’s approval process it contracts with SLI Compliance (hereinafter “SLI”), a federally certified testing laboratory, to test each proposed voting system. SLI’s testing is subject to review by the New York State Technology Enterprise (hereinafter “NYSTEC”), which is overseen by the NYSBOE’s Operations Unit. The record establishes that the EVS 6.3.0.1 was tested by SLI, whose testing was subsequently reviewed by NYSTEC. In support, respondents submitted the affidavit of Thomas Connolly, who has been the Deputy Executive Director of NYSBOE since March 2023, and served as NYSBOE’s Director of Election Operations from August 2017 until March 2023. Connolly stated that he was involved in the

certification process of the ExpressVote XL, and maintained that the ExpressVote XL meets all of the regulatory and statutory requirements set forth in Election Law § 7-202(1)(e).

Connolly argued that there is an important distinction between how a voting machine counts votes and how voters verify their voting selections. Connolly provided that when counting votes, the use of a barcode is similar to the use of “timing marks” in a hand-marked paper ballot. Connolly explained that in a hand-marked paper ballot, the scanner does not read the words on the ballot which correspond to the marks filled in the ballot sheet, but rather, interprets the “coordinates of the mark” on the ballot that are associated with the candidate at that coordinate position, much like the coordinates “used in the board game Battleship” (NYSCEF Doc. No. 67). Connolly argued that much like the hand-marked paper ballot which is deciphered by a scanner which reads coordinates on the ballot, the ExpressVote XL reads the barcode which contains the selections reflected on the summary card. Connolly stated that on a hand-marked paper ballot, the voter verifies their voting selection by examining the face of the ballot. Connolly explained that with the ExpressVote XL, the voter similarly verifies their voting selection by reviewing the summary card printed by the machine. During the verification stage of both systems, the voter can choose to cast the ballot with the selections listed, or make alterations to the selections made. Connolly argued that use of a barcode in lieu of a paper ballot scanner is a “distinction without a difference” (NYSCEF Doc. No. 67). Connolly noted that at NYSBOE’s meeting on January 28, 2021, NYSBOE Commissioner Douglas Kellner recognized general objections to the use of barcodes in the election process, and provided the following explanation:

I've spent a lot of time reviewing the literature with respect to the use of barcodes and its effect on election integrity, and it is my conclusion that those who are objecting to the use of barcodes are missing the point. We have a requirement that there be a voter verifiable paper audit trail, and it is true that a voter cannot verify the barcode, but that's not the point, because in the audit, the audit needs to review the voter's choice as marked on the ballot, and not the barcode, so that the barcode

itself is irrelevant in the audit process. And it is important also for people in the election integrity community to understand that even with a handmarked paper ballot, the actual process of counting the vote still happens inside the black box. No one can observe how the vote is actually counted on a hand-marked paper ballot because it is the computer programming that determines the interpretation of the mark and creating the cast-vote record that leads to the counting of the ballots. So a hand-marked paper ballot is still counted inside the black box that is not directly verifiable. Instead, whether it's a hand-marked-paper ballot or whether it is a machine-marked ballot with a barcode, there needs to be an audit that actually verifies that the ballot, that the cast-vote record for the ballot is in fact the same as how the ballot was marked that could be observed by the voter."

Connolly stated that ES&S previously applied for approval of the ExpressVote XL, yet it was disapproved on January 28, 2021, for the following reasons: (1) the ExpressVote XL was not able to print the record of the voter's vote in every language for the language chosen when making ballot selections; and (2) the "paper and electronic display of the voter's selection" were not presented "so as to allow the voter to easily read and compare the two" (NYSCEF Doc. No. 67). Connolly stated that the ExpressVote XL was modified in the years following NYSBOE's disapproval of the machine to address these issues. On July 12, 2022, after modifications were made, NYSBOE passed Resolution 22-11, authorizing testing for EVS 6.3.0.1. NYSBOE conducted a Public Demonstration for the EVS 6.3.0.1 on April 23, 2023. Connolly stated that on August 2, 2023, following SLI's certification testing and NYSTEC's independent review of the work conducted by SLI, NYSBOE certified the EVS 6.3.0.1 by a vote of 3 to 1, certifying the use of the ExpressVote XL.

Connolly stated that in reaching this conclusion, NYSBOE considered the Master Test Report v.3.0 from SLI Compliance (hereinafter "SLI Report").³ The federal 2005 Voluntary Voting Systems Guidelines Volumes 1 & 2 (hereinafter "VVSG") contains "[a] set of specifications and

³ This report is attached through a hyperlink in Connolly's amended affidavit (NYSCEF Doc. No. 67).

requirements against which voting systems can be tested to determine if the systems provide all of the basic functionality, accessibility and security capabilities required of these systems” (NYSCEF Doc. No. 67, SLI Report, Page 6). The Electronic Assistance Commission (hereinafter “EAC”) is defined within the SLI Report as “[a]n independent, bipartisan commission created by the Help America Vote Act (HAVA) of 2002 that operates the federal government's voting system certification program” (NYSCEF Doc. No. 67, SLI Report, Page 5). SLI “accepted and leveraged all prior verification testing completed by previous EAC certifications” (NYSCEF Doc. No. 67, Page 13). NYSTEC confirmed that the prior system, the EVS 6.3.0.0, was already EAC certified (*see* NYSCEF Doc. No. 67, NYSTEC Report, Page 1). Therefore, SLI tested the functionality, security, and documentation of all modifications included in the EVS 6.3.0.1 to ensure its compliance with 2005 VVSG and 2022 New York State voting laws and regulations.

The SLI Report defines “Election Management System” (hereinafter “EMS”), in part, as “a database management system...used to layout the ballots, download the election data to the voting devices, upload the results and produce the final results reports” (NYSCEF Doc. No. 67, SLI Report, Page 5). EMS functions include, among other things, “[c]onfiguring and programming the ExpressVote XL UVS devices[,]...configuring and programming the DS200 v1.2, DS200 v1.3, DS200 v1.3.13, DS300, DS450, DS850 and DS950 scanners for marked paper ballots[,]...[and]... [i]mport of the Cast Vote Records from DS200 v1.2, DS200 v1.3, DS200 v1.3.13, DS300, DS450, DS850 and DS950 scanners” (NYSCEF Doc. No. 67, SLI Report, Page 8). “DS200 v1.2, DS200 v1.3, DS200 v1.3.13, and DS300 are scan precinct ballot counters (tabulators) that are...designed to scan marked paper ballots or [ExpressVote] XL printed vote records, interpret and record voter marks on the marked paper ballot or record voter selections on

the printed vote records, and deposit the ballots into the secure ballot box” (NYSCEF Doc. No. 67, SLI Report, Page 9).

A Requirements Matrix was created by SLI to trace the requirements which must be met for “various test cases, test steps, and test methods” (NYSCEF Doc. No. 67, SLI Report, Page 6). The functional testing performed by SLI included both functional test planning and security functional test planning. SLI’s functional system testing included “validation of the voting system in a true end-user environment, following all pre-election day, election day, and post-election day voting rules and processes” in order “to provide verification that a system can be used to perform its job following the exact set of processes and steps that would be used by the target customer or end-user” (NYSCEF Doc. No. 67, SLI Report, Page 14). This end-to-end testing utilized “General and Primary elections during the NYS EVS 6.3.0.1 examination, which encompassed system utilization from creating an election definition, preparing election media and artifacts, opening of polls, processing ballots, as well as the accumulation, adjudication, tallying and reporting of results” (NYSCEF Doc. No. 67, SLI Report, Page 15).

The ES&S EVS 6.3.0.1 NYS System Requirements Matrix with Test Cases annexed to the SLI Report documented the testing which was performed to ensure that the ES&S EVS 6.3.0.1 system functions complied with the 2005 VVSG and NYS 2022 Election Law requirements (NYSCEF Doc. No. 70, SLI Report, Attachment A). “System performance to pass/fail criteria was measured against expected results for each test case and related set of test procedures as defined by the Requirements Matrix” (NYSCEF Doc. No. 70, SLI Report, Page 12). Connolly annexed a copy of the SLI Functional Test Case C73999, which was performed by SLI “to verify that the voter has the ability to change or correct any error before their ballot is cast and counted” in accordance with Election Law 7-202 (NYSCEF Doc. No. 64). Within this testing design, “[i]f

the voter does not have the ability to change or correct any error on their ballot before casting it, this test case fails, otherwise it passes” (NYSCEF Doc. No. 64). The test involved the insertion of an undervoted ballot, an overvoted ballot, and a blank ballot. The testing confirmed that in all instances “[t]he ballot is returned to the voter and displays a message indicating that the ballot was either undervoted, overvoted, or blank” and directed the voter “to see a pollworker” (NYSCEF Doc. No. 64). Based upon these results, the testing provided that the requirements of Election Law 7-202(1)(e) are met because “[t]he voter can make desired changes before reinserting to cast their ballot” (NYSCEF Doc. No. 64).

SLI conducted functional testing, security functional testing, and a review of the Technical Data Package (hereinafter “TDP”) provided by ES&S of the system’s functional requirements, specifications, end-user documentation, procedures, system overview, configuration management plan, quality assurance program, and manuals for all hardware, software, firmware, and components of the voting system. SLI reviewed the EVS 6.3.0.1 system against the 2005 VVSG and 2022 New York State voting laws and regulations. Any discrepancies identified during this review were identified by SLI and marked as resolved.

Connolly attached a copy of a NYSTEC report entitled: Testing Oversight of ES&S Express Vote (EVS) 6.3.0.1 Public Report v1 (hereinafter “NYSTEC Report”).⁴ This report was created at the behest of NYSBOE who tasked NYSTEC “with reviewing all deliverables produced by SLI, including the functional test plans, source code test plans, and security test plans that SLI created” based on the 2005 VVSG and 2022 New York State voting laws and regulations (NYSCEF Doc. No. 67, NYSTEC Report, Page 1). NYSTEC reviewed SLI’s requirements matrix, review of prior work, TDP, master test plan, functional test plan, and security test plan. NYSTEC

⁴ This report is attached through a hyperlink in Connolly’s amended affidavit (NYSCEF Doc. No. 67).

also reviewed SLI's master test report, functional test report, and security functional test report. NYSTEC enlisted the services of Cyber Castellum, a security consulting firm, to review the system's source code and SLI's review of the system's code (NYSCEF Doc. No. 67, NYSTEC Report, Page 1).

NYSTEC stated that SLI found 34 testing discrepancies in its review of the EVS 6.3.0.1.⁵ NYSTEC explained that "[i]n a code review, a discrepancy occurs when the source code does not meet defined requirements or specifications, does not function as intended, or allows a security breach" whereas "[i]n all other testing, a discrepancy occurs when an element of the voting system does not meet defined functional or security requirements" (NYSCEF Doc. No. 67, NYSTEC Report, Page 7). NYSTEC provided that although several issues were found by SLI during their review of the EVS 6.3.0.1, any issues identified in SLI's discrepancy reports were received by NYSTEC who "then worked with the NYSBOE Operations Unit, SLI, and ES&S to resolve any discrepancies" (NYSCEF Doc. No. 67, NYSTEC Report, Page 8). NYSTEC confirmed that "[a]t the conclusion of this testing effort, there [were] no open functional discrepancies" (NYSCEF Doc. No. 67, NYSTEC Report, Page 8).

Connolly stated that he and other members of the Operations Unit personally reviewed and used the ExpressVote XL prior to recommending approval by the Commissioners. Connolly confirmed that when he used the ExpressVote XL, it produced a "voter verifiable audit record" which allows a voter to verify their selections on the summary card, the screen, and by using the other accessibility features (i.e. having ballot selections read to the voter out loud) (NYSCEF Doc. No. 67). Connolly argued that the type of error that occurred in Pennsylvania in paragraphs 27 *et seq.* of the Petition are not possible in New York State because pursuant to 9 NYCRR 6210.8, a

⁵ SLI referred to each discrepancy during testing as a "JIRA."

“test desk” is required to be used “to verify that the voting system's election configuration and ballot configuration is correct and that the voting system will accurately cast and count votes within each individual ballot configuration” (9 NYCRR 6210.8).

In reply, petitioners argue that NYSBOE’s admission that the printed summary of the voter’s selections, and not the barcode, is used in the event of a recount to audit the voter selections only illustrates the inadequacy of the barcode as a form of voter verification. Petitioners clarify that they are not challenging the vote tabulation component which occurs inside the ExpressVote XL after a vote is cast, but rather, how the vote is memorialized outside the machine. Petitioners emphasize that because the barcode is the basis for recording and counting votes, and there is no way for the voter to decipher the information contained within the barcode, the voter has no means to privately and independently verify and/or correct their vote before the ballot is cast. Petitioners allege that NYSBOE’s finding that the use of a barcode complies with state and federal law is unreasonable, and thus, is not entitled to deference by this Court. Petitioners maintain that if a barcode is being used to record a vote, to comply with state and federal verification requirements the voter must have the opportunity to privately and independently verify the information contained within the barcode before his or her vote is cast.

Petitioners argue that while both a hand-marked ballot system and the ExpressVote XL can suffer system tabulation errors, at the voter verification stage, because both the machine and the human use the filled in oval or square as confirmation of the voter’s choice on a hand-marked paper ballot, the voter can read the text next to the mark they filled in to confirm that their intended vote is correctly recorded. In contrast, the barcode and the text on the summary card of the ExpressVote XL appear separately, so the voter is unable to verify that their voting selection

matches the data stored within the barcode, which the machine uses as confirmation of the voter's choice.

I. Standard of Review

When reviewing an administrative action, the issue before the Court is whether the action “was affected by an error of law, was arbitrary or capricious or lacked a rational basis” (*Matter of Biggs v. Eden Renewables LLC*, 188 A.D.3d 1544, 1548 [3d Dep’t 2020]; see *Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack Park Agency*, 34 N.Y.3d 184, 191 [2019]; CPLR § 7803[3]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Matter of Murphy v. New York State Div. of Hous. & Community Renewal*, 21 N.Y.3d 649, 652 [2013] [internal quotation marks and citation omitted]; see *Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 [1974]). A rational basis will be found where the action is supported “by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the action” (*Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d at 231 [internal quotation marks and citation omitted]). If the Court finds that the administrative action is supported by a rational basis, the action will be sustained (see *Matter of Peckham v. Colagero*, 12 N.Y.3d 424, 431 [2009]; *Matter of Spence v. New York State Dept. of Agric. & Mkts.*, 154 A.D.3d 1234, 1238 [3d Dep’t 2018], *aff’d* 32 N.Y.3d 991 [2018]).

II. Analysis

Congress enacted HAVA to “provide funds to States to replace punch card voting systems,...to otherwise provide assistance with the administration of certain Federal election laws and programs,...[and] to establish minimum election administration standards for States and units

of local government with responsibility for the administration of Federal elections” (HAVA, Pub. L. No. 107-252, 116 Stat. 1666). HAVA provides that all voting systems used in an election for Federal Office must “(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;” and “(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error)” (52 USCA § 21081[1][A][i]-[ii]). “[T]he Election Reform and Modernization Act of 2005 (L. 2005, ch. 181) [was] adopted in order to implement New York’s new regime of voting by the use of electronic scanning machines, mandated by the federal Help America Vote Act of 2002” (*Matter of Johnson v. Martins*, 15 N.Y.3d 584, 586 [2010]). In 2007, the Election Reform and Modernization Act was amended, mandating that all voting machines or systems in New York elections be compliant with Election Law 7-202 and HAVA (*see* Election Law § 7-201[1]).

Pursuant to Election Law § 200(1), “[t]he board of elections of the city of New York and other county boards of elections may adopt any kind of voting machine or system approved by the state board of elections.” “Any person or corporation owning or being interested in any voting machine or system may apply to have the state board of elections examine such machine or system” (Election Law § 7-201[1]). NYSBOE’s “examination shall include a determination as to whether the machine or system meets the requirements of [Election Law § 7-202] and a thorough review and testing of any electronic or computerized features of the machine or system” (Election Law § 7-201[1]). NYSBOE must produce a report that provides “an opinion as to whether the kind of machine or system so examined can safely and properly be used by voters and local boards of elections at elections, under the conditions prescribed in this article and the requirements of

[HAVA]" (Election Law § 7-201[1]). If the report approves the use of the machine or system, and the machine or system reviews an affirmative vote from three of NYSBOE's commissioners for approved use, "the machine or system shall be deemed approved, and machines or systems of its kind may be adopted for use at elections as herein provided" (Election Law § 7-201[1]; Election Law § 3-100[4]).

Election Law § 7-202 sets forth the requirements for a voting machine or system to be approved by NYSBOE. Pursuant to Election Law § 7-202(1)(e), the voting machine or system must "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." The voting machine or system must also "retain all paper ballots cast or produce and retain a voter verified permanent paper record which shall be presented to the voter from behind a window or other device before the ballot is cast, in a manner intended and designed to protect the privacy of the voter" (Election Law § 7-202[1][j]). "[S]uch ballots or record shall allow a manual audit and shall be preserved in accordance with the provisions of [Election Law §] 3-222[,] which govern the standards required for the preservation of ballots and records of voting machines (Election Law § 7-202[1][j]).

On February 27, 2026, the Court (O'Connor, J.) permitted respondents to file Attachment C to the SLI Report in redacted form under seal. On March 5, 2026, petitioners' counsel objected to the redacted nature of the document. After completing an *in camera* review of SLI Report, Attachment C, entitled "ES&S EVS 6.3.0.1 Master JIRAs," the Court declines to direct the submission of an unredacted version of the document, as respondents raised concerns regarding the proprietary nature of the source code identified in the testing performed, and Attachment C does not identify any discrepancies related to Election Law § 7-202(1)(e) or the subsections within

9 NYCRR 6209.2 which relate to voter verification. Regardless, any such deficiencies were marked as addressed prior to NYSBOE's review of the SLI Report, and were identified as resolved in the NYSTEC report prior to NYSBOE's final review and approval of the ExpressVote XL.

Considering the aforementioned requirements and the proof submitted by respondents, the Court finds that NYSBOE's approval of the EVS 6.3.0.1 and the ExpressVote XL was supported by a rational basis. When ES&S resubmitted their application to have NYSBOE examine the EVS 6.3.0.1, in compliance with the procedural requirements set forth in Election Law §§ 200 and 201, NYSBOE contracted with SLI to have the EVS 6.3.0.1 tested. The SLI Report confirmed that SLI tested the functional components of the ExpressVote XL in a true end-user environment, as well as the functional and security components of the system coding. None of the deficiencies identified by SLI in the document entitled ES&S EVS 6.3.0.1 Master JIRAS (SLI Report, Exhibit C) identified any issues with the processing of voter selections through barcode scanning, nor any issues with the verification process itself. Regardless, SLI confirmed that any deficiencies identified were marked as resolved prior to NYSBOE's review and approval of the EVS 6.3.0.1.

After this testing was completed, NYSBOE directed NYSTEC to review SLI's testing of the EVS 6.3.0.1. The NYSTEC Report confirmed that the 34 testing discrepancies identified by SLI in its review of the EVS 6.3.0.1 were received by NYSTEC, who worked with the NYSBOE Operations Unit, SLI, and ES&S to resolve all discrepancies (NYSCEF Doc. No. 67, NYSTEC Report, Page 8). Within NYSBOE Resolution 23-27 which certified the use of the ExpressVote XL, NYSBOE confirmed that "[a]ll identified issues, as discovered and reported during testing, have been resolved to the satisfaction of SLI, NYSTEC and the Election Operations staff through the provision of additional documentation, revisions to existing documentation and/or the

application of NYSBOE voting system procedures as compensating controls” (NYSCEF Doc. No. 65).

To the extent that petitioners’ use the data entry inconsistency of the ExpressVote XL identified in Northampton County, Pennsylvania to challenge the use of a barcode in a voting machine, the Court finds that this incident occurred outside of the administrative record before this Court and merely speculates about a potential mismatch between the barcode and the text on the summary card when NYSBOE’s administrative review and subsequent regulatory processes to ensure accurate system functioning are unique to New York and differ from those used in other states (*see* Election Law § 201[1]; 9 NYCRR 6210.2 [requiring that all “voting equipment owned by a county board of election...be tested at least once every calendar year”]; 9 NYCRR 6210.8 [requiring that each county board “prepare a test deck to be used to verify that the voting system’s election configuration and ballot configuration is correct and that the voting system will accurately cast and count votes within each individual ballot configuration”]).

No discrepancies were identified during SLI’s functional testing of the EVS 6.3.0.1 to suggest that the written summary did not match the data stored within the corresponding barcode. The record confirms that as part of its testing, SLI tested the ExpressVote XL through SLI Functional Test Case C73999 “to verify that the voter has the ability to change or correct any error before their ballot is cast and counted” in accordance with Election Law 7-202 (NYSCEF Doc. No. 64). The testing confirmed that “[t]he voter can make desired changes before reinserting to cast their ballot” (NYSCEF Doc. No. 64). The Court agrees with respondents that there is a clear distinction between how a voting machine counts votes and how a voter verifies their voting selections. As Commissioner Kellner stated, “even with a handmarked paper ballot,” the voter cannot “observe how the vote is actually counted on a hand-marked paper ballot because it is the

computer programming that determines the interpretation of the mark and creating the cast-vote record that leads to the counting of the ballots” (NYSCEF Doc. No. 66). The actual counting process occurs “inside the black box” and is not directly verifiable (NYSCEF Doc. No. 66). With both a hand-marked paper ballot and the ExpressVote XL, there is a voter verifiable paper audit trail which confirms the voter’s choice as marked on the ballot. Therefore, in the absence of any identified discrepancies or objections to the functionality or accuracy of the ExpressVote XL scanners, the Court finds that NYSBOE rationally relied upon the thorough testing and review set forth in the SLI Report and NYSTEC Report, which provided that the EVS 6.3.0.1 met the voter verification requirements of Election Law § 7-202 and HAVA (*see* Election Law § 201[1]). Accordingly, the Court denies the relief requested by petitioners to vacate respondents’ resolution, dated August 2, 2023, which approved the ExpressVote XL for purchase by the New York City Board of Elections and the boards of election of the New York State counties outside of New York City. Therefore, the Petition is dismissed.

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 AND ADJUDGED, that the Petition is dismissed.

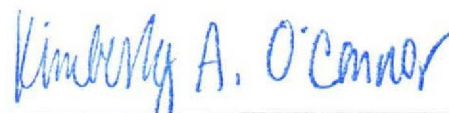
This memorandum constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order/Judgment and uploading to the NYSCEF system shall not constitute 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.

SO ORDERED.

ENTER.

Dated: May 11, 2026
Albany, New York



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



05/12/2026

Papers Considered:

1. Notice of Petition, dated November 29, 2023; Petition, dated November 28, 2023;
2. Decision and Order/Judgment (O'Connor, J.), dated March 15, 2024; Verified Answer of ES&S, dated April 15, 2024;
3. Decision and Order/Judgment (O'Connor, J.), dated April 18, 2024;
4. Memorandum and Order, dated August 14, 2025;
5. Respondents' Verified Answer, dated September 3, 2025; Affidavit of Thomas Connolly, dated September 3, 2025, with Exhibits A-F annexed;⁶ Memorandum of Law, dated September 3, 2025; SLI Report Attachment A & B, filed January 13, 2026; Order Granting Leave to File Document Under Seal (O'Connor, J.), dated February 27, 2026; SLI Report Attachment C, filed as redacted on March 3, 2026, and submitted unredacted for *in camera* review; NYSTEC Report Attachments A-J filed January 13, 2026; *and*
6. Petitioners' Memorandum in Reply, dated January 9, 2026.

⁶ Exhibit B was amended and refiled as NYSCEF Doc. No. 66.