SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioners,

Index No. 911452-23

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

PETER S. KOSINSIKI, 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.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

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Respondents, New York State Board of Elections ("the Board"), Peter S. Kosinski, as Co-Chair and Commissioner of the Board, Douglas A. Kellner[1], as Co-Chair and Commissioner of the Board, Andrew J. Spano[2], as Commissioner of the Board, and Anthony J. Casale, as Commissioner of the Board (collectively "Respondents"), respectfully submit this Memorandum of Law, together with the Affirmation of Lauren R. Eversley, dated February 1, 2024 ("Eversley Aff."), in support of Respondents' Motion to Dismiss the Petition, NYSCEF No. 1 ("Pet."), pursuant to CPLR 3211(a)(2) & (7).

PRELIMINARY STATEMENT

No voting system can be used in New York without first being certified by the Board. *See* N.Y. ELEC. LAW § 7-200(1). By resolution dated August 2, 2023 (Resolution 23-27), the Board approved the use of Election Systems and Software ("ES & S") ExpressVote XL voting machines ("ExpressVote XL system") Pet., ¶ 13. This resolution followed the statutorily-required certification of the ExpressVote XL system by the Board pursuant to Election Law section 7-202.

Petitioners allege that the Board's August 2, 2023 approval and certification violate sections 7-200, 7-201, and 7-202 of the New York Election Law, and seek mandamus relief pursuant to CPLR 7803(1). *See generally,* Pet.. Specifically, Petitioners allege that the ExpressVote XL system does not allow voters to verify or correct their votes prior to the votes being cast in violation of Election Law section 7-202. *See* Pet., ¶ 21.

The Petition should be dismissed. First, Petitioners lack standing to bring this challenge. Second, the Petition fails to state a claim because the approval and certification of the ExpressVote XL system is not a ministerial act subject to mandamus review.

[1] Douglas Kellner no longer holds the position of Commissioner.
[2] Andrew Spano no longer holds the position of Commissioner.

STATUTORY FRAMEWORK OF VOTING APPROVAL PROCESS

Pursuant to Election Law section 7-200(1), a board of elections "may adopt any kind of voting machine or system approved by the state board of elections . . . ." N.Y. ELEC. LAW § 7-200(1). Further, "[a]ny 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." *Id.*, § 7-201(1). "The state board of elections shall cause the machine or system to be examined and a report of the examination to be made and filed in the office of the state board." *Id.*, § 7-201(1). During the examination process, the board of elections must ensure that the voting system complies with the applicable provisions of state and federal law and regulations, including but not limited to, Election Law section 7-202 and 9 NYCRR § 6209 ("Voting System Standards"), as well as all applicable federal voting system standards. *See id.,* § 7-201(1).

> Such report shall state 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 the federal Help America Vote Act. If the report states that the machine or system can be so used, *and the board after its own examination so determines*, in accordance with subdivision four of section 3-100 of this chapter, 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.

Id., § 7-201(1) (emphasis added).

As relevant here, section 7-202(1)(e) requires that "[a] voting machine or system to be approved by the state board of elections 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." N.Y. ELEC. LAW § 7-202(1)(e).

ARGUMENT

POINT I

PETITIONERS LACK STANDING TO SEEK THE REQUESTED RELIEF

"[T]o establish standing to challenge governmental action, the party asserting standing must show first, an injury-in-fact **and**, second, that the injury falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision." *C.K. v. Tahoe*, 211 A.D. 3d 1, 9 (3d Dept 2022) (emphasis added). Here, Petitioners lack standing for multiple reasons. Petitioners are (1) a national nonpartisan advocacy organization; (2) a not-for-profit corporation; and (5) five registered voters from Kings County, Schenectady County, Albany County, Rockland County, and Bronx County. *See* Pet., ¶¶ 3-9. Notably absent from the underlying submission are affidavits or *any* information from these corporations or individuals indicating that they suffered *any* injury from the Board's adoption of Resolution 23-27 approving the ExpressVote XL. *See generally* Pet. Indeed, aside from conclusory statements that the individuals "regularly vote," it is unclear from the Petition whether any of the individual Petitioners used the ExpressVote XL system in the November 2023 election and were unable to confirm, verify or change their votes. *See* Pet., ¶¶ 3-9. Petitioners seemingly assert a generalized challenge to Respondents' administration of the relevant statute, stating, "I regularly vote and have an interest in ensuring my vote is accurately cast and counted" or "my organization has a strong interest in ensuring voting laws are implemented in a fair and impartial manner." *See id.* These general statements are "too speculative and conjectural to satisfy the injury-in-fact requirement." *Gym Door Repairs, Inc. v. New York City Dep't of Educ.*, 112 A.D. 3d 1198, 1199 (3d Dept. 2013).

Petitioners similarly fail to allege common-law taxpayer standing. The common-law taxpayer standard doctrine "exists as a remedy for taxpayers to challenge important governmental

actions, despite such parties being otherwise insufficiently interested for standing purposes, when the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action." *61 Crown St., LLC v. City of Kingston Common Council*, 221 A.D. 3d 1090, 1094 (3d Dept. 2023) (internal quotation marks and citation omitted). Here, Respondents are not insulated from judicial review as a voter who utilized the ExpressVote XL system and felt that their vote was not counted could certainly bring such an action. This, however, is not the case at hand. "[T]he mere fact that a party that could assert standing lacks any motivation to do so does not in turn convey standing to others who do not otherwise have a tangible interest in the government conduct at issue." *61 Crown St., LLC*, 221 A.D. 3d at 1094-95.

In that same vein, Petitioners Common Cause and the Black Institute fail to establish organizational standing. An organization can establish standing to sue in two ways. First, "an organization can "show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members." *Laws. for Child. v. New York State Off. of Child. & Fam. Servs.*, 218 A.D. 3d 913, 193 N.Y.S. 3d 378, 380-81 (3d Dept. 2023) (internal quotation marks and citation omitted). Second, "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." *Id.*, at 381. In that way, "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.*

Here, neither Common Cause nor the Black Institute can demonstrate that they suffered any injury in fact. The lone paragraph in the Petition that references Common Cause proffers

nothing more than a generalized statement concerning their "strong interest in ensuring that voting laws are implemented in a fair and impartial manner in accordance with New York State's Constitution and applicable state and federal law, and in a manner that promotes confidence in the electoral system and our democracy." Pet., ¶ 3. The Black Institute describes itself as a not-for-profit seeking to address and expose racially discriminatory actions and does not mention anything as to elections or voters. *Id.*, ¶ 4. These generalized statements are not enough to establish standing on behalf of the organizations. *See Gym Door Repairs, Inc.*, 112 A.D. 3d at 1199. Further, neither organization has alleged, through affidavit, in the Petition or otherwise, that at least one of its members were disenfranchised by utilizing the ExpressVote XL machine. *See* Pet., ¶¶ 3, 4.

Petitioners fail to establish that they have a clear legal right to the annulment of the Board's resolution. Accordingly, Petitioners lack standing to bring this action and the Petition should be dismissed pursuant to CPLR 3211(a)(2).

POINT II

PETITIONERS FAIL TO ESTABLISH THAT THEY ARE ENTITLED TO MANDAMUS RELIEF

"Mandamus to compel performance is an extraordinary remedy that is available only in limited circumstances." *Hene v. Egan*, 206 A.D. 3d 734, 735 (2d Dept 2022). "The remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion." *Brusco v. Braun*, 84 N.Y. 2d 674, 679 (1994). "The general principle [is] that mandamus will lie against an administrative officer only to compel him [or her] to perform a legal duty, and not to direct how he [or she] shall perform that duty." *Willows Condo. Ass'n v. Town of Greenburgh*, 153 A.D. 3d

535, 536 (2d Dept 2017). A petitioner seeking mandamus relief "must show a clear legal right to that relief.'" *Hene*, 206 A.D. 3d at 735.

Here, Petitioners fail to establish that they are entitled to mandamus relief. Petitioners are challenging *the way* that Respondents approved and certified the ExpressVote XL – i.e. allegedly approving a system that violates Election Law section 7-201, 7-202. They are not, properly, alleging that Respondents failed to act or acted without authority. Although paragraph 29 of the Petition uses the phrase "lacked authority", a reading of document as a whole indicates that Petitioners are challenging Respondents' decision, not whether they had the authority to make the decision. Mandamus to compel does not lie in such a situation. *United Methodist Retirement Community Dev. Corp. v. Axelrod*, 110 A.D. 2d 292, 294 (3d Dept 1985) (mandamus to compel did not lie when "[t[he critical issue here is whether DOH had the authority to revoke its prior conditional approval in these circumstances, not whether DOH should have revoked it."). Consideration of an application that needs to be evaluated—like the one submitted by ES&S here—requires exercise of discretion. Indeed, section 7-201(1) provides that a voting machine will be approved only after the Board conducts its own examination. *See* ELEC. LAW § 7-201(1). Such an act is not reviewable under 7803(1). *See* CPLR § 7803(1).

Petitioners' reliance on *Mansfield v. Epstein*, 5 N.Y. 2d 70 (1958) is entirely misplaced. Pet., ¶ 15. That case involved a failure by county commissioners of elections to print petitioners' names on a ballot when they had secured the requisite number of signatures on their nominating petitions. *Mansfield*, 5 N.Y. 2d at 72. The court held that counting the number of qualified voters' signatures was "purely ministerial," and therefore the failure to include the petitioners on the ballot upon reaching the required count was reviewable under § 7803(1). *Id*. The county commissioners of elections had no choice–a person with the correct number of signatures had to be placed on the

ballot. *Id.* Here, Respondents had to engage in various layers of evaluation pursuant to Election Law section 7-202 and 9 NYCRR § 6209 to determine if the ExpressVote XL could be approved under state law.

Since the Petition fails to state a claim under CPLR 7803(1), it should be dismissed pursuant to CPLR 3211(a)(7).

CONCLUSION

For the reasons discussed above, the Petition should be dismissed in its entirety with prejudice.

Dated: Albany, New York
February 2, 2024

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STATEMENT PURSUANT TO 22 NYCRR 202.8-b

I, Lauren R. Eversley, affirm under penalty of perjury pursuant to CPLR 2106 that the total number of words in the foregoing Memorandum of Law, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, and signature block, is **2352**. The foregoing Memorandum of Law complies with the word count limit of 10,000 words approved by the Court on August 20, 2021, which is in excess of the word count limit set forth in 22 NYCRR 202.8-b. In determining the number of words in the foregoing memorandum of law, I relied upon the word count of the word-processing system used to prepare the document.

Lauren R. Eversley

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