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,	:	
- against -	:	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, 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 OPPOSITION TO

RESPONDENTS' MOTION TO DISMISS

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Petitioners, by and through undersigned counsel, in this Article 78 proceeding submit this memorandum of law in opposition to the motion of Respondents, New York State Board of Elections ("the Board"), Peter S. Kosinski, as Co-Chair and Commissioner of the Board, Douglas A. Kellner, as Co-Chair and Commissioner of the Board, Andrew J. Spano, as Commissioner of the Board, and Anthony J. Casale, as Commissioner of the Board (collectively referred to as "Respondents") to dismiss the Petition (NYSCEF No. 1) pursuant to CPLR §§ 3211(a)(2) and (7).

PRELIMINARY STATEMENT

This Article 78 proceeding seeks an order compelling Respondent New York State Board of Elections ("NYSBOE") to vacate a resolution certifying the ExpressVote XL voting system, manufactured by Election Systems and Software, LLC ("ES&S"), for use in New York State because the NYSBOE was without authority or discretion under the New York's Election Law to issue such certification. The Petition asserts that the ExpressVote XL system fails to satisfy New York Election Law §7-202(1)(e), which requires that "a voting machine or system to be approved by the State Board of elections shall... provide the voter and 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."

While Respondents mention that the NYSBOE members evaluated the ExpressVote XL system, they do not explain how, or even if they came to a conclusion that it satisfied the clear text of Election Law §7-202(1)(e) – as alleged in the Petition, the use of an encoded barcode to record a voter's choice runs afoul with this important Election Law requirement. Tellingly, Respondents' do not point to any document or analysis to justify their actions.[1] While

[1] In a separate motion in this case by ES&S to intervene, a Proposed Verified Answer from the manufacturer admits that a voter's selection that is "cast and counted" is recorded only in the barcode, which cannot be read by a

Respondents may have "engaged 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" they say nothing about satisfying the compulsory requirement of Election Law § 7-202(1)(e). Instead of addressing the statute and perhaps thereby mooting this action entirely by their explanation, Respondents seek to avoid the matter entirely. Respondent seeks to have this action dismissed on the basis that either the Petitioners alleged lack of standing to bring their challenge, or that the Petitioners itself fails to state a claim because they claim that the NYSBOE's approval of the ExpressVote XL system is not a "ministerial act" subject to mandamus review. Without this action, municipalities in New York State can begin to purchase the ExpressVote XL system (it is believed that none have yet been purchased), notwithstanding that it violates a clear provision of the Election Law that Respondents had no authority to ignore in their approval of it.

The motion to dismiss is without merit and should, therefore, be denied. The fact that the ExpressVote XL system is not yet in use does not render petitioners without a way to challenge the NYSBOE's decision to allegedly ignore the requirements of Election Law § 7-202(1)(e). Petitioners have standing and the Petition states a valid, justiciable claim that should be decided before taxpayer funds are used to purchase the ExpressVote XL system.

ARGUMENT

In determining a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the court's role is deciding "whether the pleading states a cause of action, and if from its four corners

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voter. (Proposed Verified Answer, NYSCEF No. 12, ¶¶23-24.) Essentially, the manufacturer argues that the use of a barcode to record a voter's ballot should render Election Law §7-202(1)(e) moot because it is assumed that local data entry personnel will ensure that information associated with the barcode is properly entered and the barcode information, therefore, will match the written data on the summary card. Of course, no voter can confirm this when looking at the summary card. Respondents have not made any similar argument, which, on its face, appears to confirm that the ExpressVote XL system does not comply with New York Election Law.

factual allegations are discerned which taken together manifest any cause of action cognizable at law." *African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 A.D. 3d 204, 211 (1st Dep't 2013); *Siegmund Strauss, Inc. v East 149th Realty Corp*., 104 A.D.3d 401 (1st Dep't 2013). On a motion to dismiss made pursuant to CPLR 3211, the court must "accept the facts [as] alleged in the [complaint] as true and accord [plaintiffs] . . . 'the benefit of every possible favorable inference [and] determine only whether the facts as alleged fit [into] any cognizable legal theory' " *Siegmund Strauss, Inc*., 104 A.D. 3d at 403; *Nonnon v City of New York*, 9 N.Y.3d 825 (2007). The same is true for that part of the motion addressed to CPLR § 3211(a)(2), which authorizes the Court to dismiss a cause of action where "the court has not jurisdiction of the subject matter of the cause of action." CPLR § 3211(a)(2).

When measured against the forgoing standard, Petitioners respectfully urge that Respondents motion be denied. The issue presented in this action, as detailed in the Petition, is a simple one: Does the ExpressVote XL system comply with Election Law § 7-202(1)(e)? If it does not, it stands that NYSBOE lacked authority to approve its use in New York State as that statute set forth mandatory features for a voting system that Respondents have no authority to disregard.

1. <u>The Petitioners Have Standing</u>

'No 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.'" *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (quoting *Wesberry v. Sanders*, 376 U.S. 1 (1964)); see also, *Ill. State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 179 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."). The Constitution of the State of New York confers upon "[e]very citizen" the right to vote in elections for public office, subject to qualifications based upon age and residence. NY Const., Art. II, § 1. Incredibly, Respondents

argue that Petitioners herein, composed of citizens (i.e. voters) and groups representing the interests of voters (see accompanying Affidavit of Susan Lerner, sworn to February 20, 2024), have no standing to make certain that voting systems used in New York State comply with the minimum requirements of New York law. The motion is, at best, flawed.

To establish standing to challenge governmental action, the party asserting standing must show "first, an injury-in-fact and, second, that the injury 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision' " *Matter of Gym Door Repairs, Inc. v. New York City Dept. of Educ*., 112 A.D.3d 1198, 1199 (2013), quoting, *New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004). See also, *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 772–773 (1991). As noted in *Laws. for Child. v. New York State Off. of Child. & Fam. Servs*., 218 A.D. 3d 913 (3d Dep't 2023), a case cited by Respondents, "[i]t is well recognized 'that standing rules should not be heavy-handed' and the courts 'have been reluctant to apply [standing] principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review'" *Id*. at 914, quoting, *Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6 (2014). It is enough that "a plaintiff merely fears the prospect of an adverse effect." *Lino v. City of New York*, 101 A.D.3d 552, 555 (1st Dep't 2012) (emphasis added). Petitioners readily meet this standard.

Here, Petitioners present a conceivable injury-in-fact. As active voters, together with nonpartisan, grassroots organizations focused on matters relating to, *inter alia*, voting rights of New Yorkers[2], they would be harmed by loss of the ability "to privately and independently

[2] "[A]n 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 44, 51 (2019). One of the petitioners is Susan Lerner, described in the Petition as "an individual registered to vote in Kings County, New York, in addition to being the Executive Director of

change [their] votes or correct any error before the ballot is cast and counted" that is required under Election Law § 7-202(1)(e), which they allege will occur from use of the ExpressVote XL system.

The Petition satisfies the standing requirements. With respect to Petitioner Common Cause New York, the Petition describes it as being:

> 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. The organization is one of the founders of the Let New York Vote statewide coalition, and has successfully advocated for election reform measures recently adopted in New York, such as early voting, automatic voter registration, same day voter registration, vote by mail and readability standards for ballot measures. (Petition, ¶ 3; see also, Lerner Affidavit, ¶¶, 2-3.)

Common Cause has been found to have associational standing to represent its members' interests in cases involving the right to vote in New York. *Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, fn. 1 (2d Cir. 2006); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 288 (S.D.N.Y. 2020). Other petitioners are individuals who "regularly vote[] and [have] an interest in ensuring that [his or her] vote is accurately cast and counted. According to Respondents, Petitioners must wait for the ExpressVote XL to be purchased and used in an election[3] before any suit can be filed so that a party can allege that use and an inability to privately and independently verify information on the ballot's bar code. (See Respondent's Memorandum at 4 – "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.") Such an argument is misplaced.

Common Cause New York. Lerner has voted in every election for which she is eligible since registering to vote upon moving back to New York in late 2007. Lerner has an interest in being sure that the vote that she casts is accurately cast and counted." (Petition, ¶ 5.)

[3] Respondents claim that the Petition is defective because "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." (Respondents' Memorandum at 5.)

For the party to have an "actual legal stake in the matter being adjudicated," the alleged injury cannot be "'tenuous,' 'ephemeral,' or 'conjectural,"' but rather must be "sufficiently concrete and particularized to warrant judicial intervention." *Matter of Mental Hygiene Legal Serv. v Daniels*, *supra* at 50 (citation omitted). See also, *Stevens v. New York State Division of Criminal Justice Services*, 2023 WL 6983470 at *4, 2023 N.Y. Slip Op. 05351 (Court of Appeals, October 24, 2023). At the same time, there is no "requirement that the harm necessary to confer standing be actual and in the present." *Police Benevolent Ass'n of N.Y. State Troopers, Inc. v. Div. of N.Y. State Police*, 29 A.D.3d 68, 70 (3d Dep't 2006). Rather, the harm can be "potential and in the future as long as it is reasonably certain that the harm will occur if the challenged action is permitted to continue." *Id*. With allegations in the Petition that individual petitioners have cast ballots in prior elections, it is reasonable to assume that they will vote in the future and, if the ExpressVote XL system is in place, the harm complained will occur when they go to cast their votes and, therefore, cannot be considered speculative. As alleged in the Petition, ¶ 21, "[v]oters using ExpressVote XL are not able to verify their votes or correct them before their votes are cast and counted." Respondents do not claim that this defect will be cured when the voting system is put to use in New York.

Further, it is obvious that the injury to voters, such as the Petitioners and those represented by the organizations at issue, falls squarely within the zone of interests sought to be protected by the Election Law. See e.g., *Laws. for Child. v. New York State Off. of Child. & Fam. Servs., supra* at 915-16.; *Matter of City of New York v. City Civ. Serv. Comm'n*, 60 N.Y.2d 436, 443 (1983) (to satisfy the second prong of the standing inquiry, Petitioners need only allege that the injuries they assert are within the zone of interest to be protected by the relevant statute or the zone of interest to be protected by the regulations at issue); *Via v. Franco*, 223 A.D.2d 479

(1st Dep't 1996) (concluding the petitioners had standing to pursue Article 78 proceeding where they were in the zone of interests "intended to be protected by the regulations" in dispute). This part of the standing test is not even addressed by Respondents' moving papers.

2. Petitioners Are Entitled to Mandamus Relief

According to Respondents' motion, "Petitioners fail to establish that they are entitled to mandamus relief [because they] are challenging *the way* that Respondents approved and certified the ExpressVote XL." Respondents' Memorandum at 6. Petitioners are not attacking or challenging any process. As alleged in the Petition, ¶ 29, Petitioners claim that Respondents are without authority. Election Law Section § 7-202 sets forth what a "voting machine or system … shall" have (emphasis supplied) "to be approved by the state board of elections."

Insofar as New York Election Law § 7-202(1)(e) mandates and requires that voting systems provide voters with "the ability to privately and independently change such votes or correct any error before the ballot is cast." The NYSBOE does not have the authority to waive that requirement. Either the reliance on barcode vote counting renders ExpressVote XL non-compliant with New York Election Law § 7-202(1), or it does not. If it violates that statute, as alleged in the Petition, there is no discretion – the voting system cannot be approved for use in New York State. The decision to be made under section § 7-202(1)(e) is therefore no more ministerial than counting signatures as in *Mansfield v Epstein*, 5 N.Y.2d 70 (1958). While consideration of an application for approval for a voting system may require some exercise of discretion (Respondents' Memorandum at 6), that does not mean that there are elements or steps in that process where the law permits none; Election Law § 702 describes some of those non-discretionary issues where review by mandamus is appropriate and necessary.

CONCLUSION

If Petitioner is successful, it will be because the barcode element of the ExpressVote XL system violates a provision of New York's Election Law. The voters of New York State, such as the individual Petitioners herein and those who are the focus of efforts by the organizations, would be directly injured by the use of a voting system that Respondents had no discretion to approve. As such, Petitioners respectfully urge that Respondents' motion to dismiss be denied. This case presents a simple issue of law, and Respondents must, at some point, explain how they conclude that the ExpressVote XL system complies with York Election Law § 7-202(1)(e). It is an inevitable disclosure that they cannot avoid by this motion.

Dated: February 20, 2024
New York, New York

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 202.8-b of New York's Uniform Rules for the Supreme Court and County Court, I hereby certify that the total word count for all printed text in this Memorandum of Law is 2,641 words, excluding parts identified as common requirements by Rule 202.8-b(b).

Date: February 20, 2024
New York, New York

s/Michael S. Fischman
Michael S. Fischman

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