

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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COMMON CAUSE NEW YORK, THE BLACK
INSTITUTE, SUSAN LERNER, KATHERINE MARSH
WOLFRAM, MARTA GOMEZ, SUE ELLEN DODELL,
and JULIE GOLDBERG, Index No.

VERIFIED PETITION

Petitioners,
-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, and
ANTHONY J. CASALE, as Commissioner
of the New York State Board of Elections, and the
NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

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Petitioner’s Common Cause New York, Susan Lerner, Katherine Marsh Wolfram, Marta
Gomez, Sue Ellen Dodell, and Julie Goldberg (together, “Petitioners”), by and through their
counsel, Phillips Nizer LLP, for their Verified Petition for an Order and Judgment Pursuant to
Article 78 of the New York Civil Practice Law and Rules against Respondents New York State
Board Of Elections, as well as Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano and
Anthony J. Casale, in their official capacities, allege as follows:

PARTIES

1. Petitioners bring this petition for a writ of mandamus to compel Respondent New
York State Board Of Elections (“NYSBOE”), to comply with Article 7 of the Election Law, and
specifically N.Y. Elec. Law §§ 7-200, 7-201 and 7-202, which set forth specific minimum
requirements for voting machines, and specifically with respect to NYSBOE’s improper approval

of the “ExpressVote XL” voting machine, which fails to comply with such laws. By approving the ExpressVote XL, Respondent NYSBOE has failed to comply with its statutory duties.

2. Defiance of the foregoing laws by NYSBOE cannot be countenanced. Because Respondents’ legal obligations in connection with the types of voting machines are clear, as is their failure to comply with those obligations when approving the voting machine called “ExpressVote XL,” Petitioners therefore urge this Court to order the Respondent NYSBOE to immediately rescind its approval of that machine for use in New York State.

3. Petitioner Common Cause New York is the New York chapter of Common Cause, a national nonpartisan advocacy organization with more than 1 million members nationwide. It has more than 62,000 members across the state of New York fighting for a more just democracy and better elections. Common Cause New York is a leader in the movement for election administration reform, campaign finance reform and upholding ethics laws to impact systems that undermine people’s faith in democracy. Common Cause New York is dedicated to ensuring that every aspect of our elections and representative self-government is fair, open, accessible and set up so that New Yorkers 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. Common Cause New York thus has a 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.

4. Petitioner The Black Institute is a not-for profit corporation recognized by the Internal Revenue Service as a charitable and educational tax-exempt entity, which exists for the purpose of exposing and addressing racially discriminatory actions by, among other entities, the City and State of New York, and seeking remedies for that discrimination. The President of the Black Institute is Bertha Lewis, and its offices are located at 470 Vanderbilt Avenue, 9th Floor, Brooklyn, New York 11238

5. Susan Lerner is an individual registered to vote in Kings County, New York, in addition to being the Executive Director of 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.

6. Petitioner Katherine March Wolfram is an individual resident of Schenectady County where she has been registered to vote since 2004. She regularly votes and has an interest in ensuring that her vote is accurately cast and counted.

7. Petitioner Marta Gomez is an individual resident of Albany County, where she has been registered to vote since 1993. She regularly votes and has an interest in ensuring that her vote is accurately cast and counted.

8. Petitioner Julie Goldberg is an individual resident of Rockland County, where she has been registered to vote since 2002. She regularly votes and has an interest in ensuring that her vote is accurately cast and counted.

9. Petitioner Sue Ellen Dodell is an individual resident of Bronx County, where she has been registered to vote since 1984. She regularly votes and has an interest in ensuring that her vote is accurately cast and counted.

10. Respondent NYSBOE is responsible under Article 7 of the Election Law to approve only those voting machines for use by voters in the State of New York that allow such voters to privately and independently verify and change their votes before they are cast, which the ExpressVote XL machine does not provide.

11. Respondents Peter S. Kosinski, Douglas A. Kellner, Andrew J. Spano and Anthony J. Casale are sued herein in their official capacities with the NYSBOE and referenced herein together as the “Commissioners.”

VENUE

12. Venue is proper in Albany County because Respondents “refused to perform the dut[ies] specifically enjoined upon [them] by law” there; because “material events... took place” in Albany County, as described in the paragraphs below; and because Respondents’ principal offices are located in Albany County. CPLR § 506(b); *see also id.* § 7804(b) (providing that a proceeding brought pursuant to Article 78 must be brought in the supreme court of the county specified in CPLR § 506(b)).

BACKGROUND

13. Petitioners bring this Article 78 proceeding to compel the Commissioners of the NYSBOE to rescind the resolution issued on August 2, 2023 (the “Resolution”), certifying and approving the ExpressVote XL voting machine, which is an ATM-style touchscreen system that wrongly and illegally does away with papers ballots, and relies instead on barcodes to count votes thereby making it impossible for voters to verify their votes. The ExpressVote XL is manufactured by Election Systems and Software, LLC.

PETITION FOR WRIT OF MANDAMUS AGAINST RESPONDENTS

Failure to Fulfill Statutory Duties Under N.Y. Elec. Law Article 7

14. Petitioners reallege and reincorporate by reference all prior paragraphs of this Verified Petition and the paragraphs in the count below as though fully set forth herein.

15. A writ of mandamus is available where a government “body or officer failed to perform a duty enjoined upon it by law.” CPLR § 7803(1). It has long been established that mandamus lies in an action to compel election commissioners to perform ministerial acts. *E.g., Matter of Mansfield v. Epstein*, 5 N.Y.2d 70, 73 (1958).

16. Pursuant to Election Law §7-200(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 ... and thereupon such voting machine or system may be used at any or all elections.”

17. Respondents have failed to perform a duty enjoined upon them by the Election Law.

18. The NYSBOE Resolution authorized the New York City Board of Elections and all of the county boards of election in New York State outside of New York City (collectively, “BOEs”) to purchase the ExpressVote XL.

19. Pursuant to Election Law §7-201(1), a voting machine or system can only be approved for use if, upon examination, it complies with under the conditions prescribed in the NYEL and the requirements of the federal Help America Vote Act (“HAVA”).

20. Under Election Law §7-202(1)(e) 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.”

21. Voters using ExpressVote XL are not able to verify their votes or correct them before their votes are cast and counted.

22. Voters use a touchscreen to mark their ballots on the ExpressVote XL, which then prints a summary card that shows the voter's selections and prints a barcode on a summary card.

23. The barcode on the summary card is then read by a scanner that casts the vote by decoding the information from the barcode, not the text that is printed on the summary card.

24. The ExpressVote XL counts the votes encoded in the barcode, not the voter's selections shown on the summary card.

25. As a voter cannot read a barcode, the voter's ballot is not verifiable; no voter can verify that the barcode accurately reflects the voter's selections shown on the summary card.

26. The consequences of the ExpressVote XL reliance on the barcode for counting votes go beyond the obvious non-compliance with to Election Law §7-201(1). Use of the barcode can (and predictably will) provide fodder for those who peddle in election voter-fraud fearmongering and conspiracy theories about "rigged elections" to reduce public confidence that votes are accurately cast and counted.

27. Reliance on the barcode can render human error difficult to detect. For example, 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 recorded on the bar code – the text on the summary card did not match the voter selection. Voters were told that there was a barcode-text mismatch and that the barcode accurately reflected their choices. While 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.

28. Voters cannot correct any error in the barcode -- which identifies the votes -- before such votes are cast and counted because voters cannot read a barcode and ExpressVote XL does not provide for a system that allows voters to do so. If the error in Northampton County had been a barcode error, it likely would not have been detected, as voters would have assumed that the barcode matched the text on summary card, and the ballots would have appeared correct to voters.

29. The NYSBOE Commissioners lacked authority to certify the ExpressVote XL because it does not give voters the opportunity to verify their ballot, or to correct any errors on it, before the ballot is cast and counted.

30. The Commissioners abused their discretion when they issued the Resolution certifying the ExpressVote XL because it does not conform to the requirements of the Election Law.

31. Petitioners respectfully request that this court to issue an order compelling respondents to rescind the Resolution insofar as it certified the ExpressVote XL pending the hearing and determination of this proceeding.

32. If Respondents do not rescind the relevant portions of the Resolution, BOEs will be free to purchase the ExpressVote XL, or contract to buy it, as the Resolution was erroneously approved by the NYSBOE in violation of the Election Law.

33. The BOEs, as well as the State and local governments that fund them with taxpayer money, would suffer monetary damages if they contracted to buy, or bought, the

ExpressVote XL, , but subsequently could not use it because the NYSBOE certificate was improper and violated the NYEL.

34. Respondents may not lawfully approve the ExpressVote XL as the voting machine does not comply with requirements set by the Election Law, and Respondents are duty-bound to follow such requirements as such duty is imposed upon them by the Election Law. Because their willful failure to comply with the law imperils the rights of voters in Albany County and across the State, this Court should issue a writ of mandamus to ensure that the Election Law is followed.

WHEREFORE, petitioners respectfully request the Court to:

Grant the petition and enter judgment in favor of petitioners ordering Respondents to vacate the resolution, dated August 2, 2023, insofar as it approved the Election Systems and Software ExpressVote XL voting machine 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; and

Grant such other and further relief as the Court deems just and proper.

Dated: November 28, 2023

~~PHILLIPS NIZER LLP~~

By: _____

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New York, New York 10017
(212) 977-9700
Attorneys for Petitioners

VERIFICATION

STATE OF NEW YORK)
 SS:
COUNTY OF NEW YORK)


I, Susan Lerner, am a petitioner in this proceeding and I reside at 80 Broad Street, Suite 2703, New York, NY 10004. I have read the foregoing petition subscribed by me and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.



Susan Lerner

STATE OF NEW YORK)
 SS:
COUNTY OF NEW YORK)

On the 28th day of November, 2023, before me personally came Susan Lerner to me known to be the person described in and who executed the foregoing instrument. Such person duly swore to such instrument before me and duly acknowledged that she executed the same.



Michael S. Fischman, Notary Public
My Commission Expires:

MICHAEL S. FISCHMAN
Notary Public, State of New York
No. 02FI6009383
Qualified in New York County
Commission Expires Sept. 28, 2026