League of Women Voters of N.Y. State v New York State Bd. of Elections
2019 NY Slip Op 32919(U)
September 30, 2019
Supreme Court, New York County
Docket Number: 160342/2018
Judge: Julio Rodriguez, III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JULIO RODRIGUEZ, III** **PART** **IAS MOTION 62EFM**

Justice

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LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, NICHOLAS DINNERSTEIN

Plaintiff,

- v -

NEW YORK STATE BOARD OF ELECTIONS, BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 160342/2018

MOTION DATE 05/09/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISSAL.

This action for declaratory and injunctive relief challenges the constitutionality of portions of Election Law §§ 5-210, 5-211, and 5-212 (collectively, "the Cutoff Law")[1]. Specifically, plaintiffs League of Women Voters of New York State ("the League") and Nicholas Dinnerstein ("Dinnerstein") claim that these provisions, which establish a 25-day voter registration cutoff for most people but provide a 10-day cutoff in two circumstances, violate the New York State Constitution's ("Constitution") guarantee that "no person shall be disenfranchised except by due process of law" (NYSCEF Doc. No. 1, Complaint ¶ 1 [citing NY Const art I, § 1]) as well as the equal protection guarantee. Plaintiffs also allege that the Cutoff Law violates article II, section 1 of the Constitution, which entitles citizens who are 18 years old and have resided in New York for at least 30 days preceding the election to vote "at every election" (citing NY Const art II, § 1). Plaintiffs' summons and complaint argues that the Cutoff Law, which was added to the Election Law decades ago, is arbitrary (NYSCEF Doc. No. 1 ¶¶ 6). They contend that, although the 25-day cutoff was appropriate when it was enacted because of the method used to process the registration forms, technological advances since the laws' enactments enable rapid processing of the registration applications and render the retention of the cutoff date unnecessary—and, moreover, disenfranchises tens of thousands of otherwise eligible voters. Plaintiffs point to the 10-day cutoff provided for newly returned veterans and newly naturalized citizens, alleging that it is irrational not to make this the cutoff date for all New Yorkers.

Plaintiffs filed the summons and complaint on November 6, 2018. Plaintiff the League, which came into existence after women gained the right to vote in 1919, is nonpartisan and not-

[1] Defendant calls this "the Registration Deadline". The court uses the wording in the complaint, but this does not reflect its views of the merits of either party's position.

for-profit. The New York chapter is affiliated with the League of Women Voters of the United States. Part of its mission is "to increase voter registration and turnout" (*id.* ¶ 9). Plaintiff Dinnerstein lives in Brooklyn, New York, and was unable to vote in November 2018 because he did not register before the cutoff date. The complaint includes reports by two Election Law experts, Professors Barry C. Burden of the University of Wisconsin-Madison (Burden) and Alex Street at Carroll College in Helena, Montana (Street). The reports support plaintiffs' contention that, at a minimum, tens of thousands of voters have been disenfranchised by this law over the years.

In response, defendant New York State Board of Elections ("State Board") brought a pre-answer motion to dismiss on January 28, 2019.[2] Plaintiffs filed their opposition papers on February 27, 2019, and defendant replied on March 13, 2019. The court held oral argument on May 9, 2019. Now, after careful consideration of the matter, the court denies the motion.

Dinnerstein Timetable

The complaint asserts that Dinnerstein, a New York City native, moved back to New York from California in early 2018. In November 2018, he was qualified to vote in New York, as he is over 18, he is a citizen of this country, he had resided in the State for over 30 days, and he fulfilled all other applicable criteria. According to the complaint, he missed the deadline for voter registration because he was unaware of the Cutoff Law. As a result, he could not vote in the midterm elections.

Pleadings and Claims

Plaintiffs assert three causes of action. The first cause of action rests on the Constitution's protection against disenfranchisement. In particular, the complaint asserts that the Cutoff Law "directly and severely burdens the fundamental right to vote" and that it is "arbitrary and unnecessary" in that "less burdensome measures" can protect any government interests (*id.* ¶¶ 69-70). The second cause of action asserts the same violation but focuses on the injuries to Dinnerstein and the League. The third cause of action alleges that the Cutoff Law violates the Constitution's guarantee of equal protection because some eligible voters are subject to this restriction while others "are permitted to register up to ten days before a general election" (*id.* ¶ 83). Here, too, the complaint calls the law arbitrary and asserts that less restrictive measures could effectuate the Cutoff Law's purpose. Plaintiffs note that article II, section 6 of the Constitution, which makes registration permanent if the voter remains qualified, does not contain a time restriction for registration, and they assert that same-day registration is therefore permissible.

Positions of the Parties

As a threshold issue, defendant contends that plaintiffs lack standing to bring this lawsuit. Defendant contends that Dinnerstein does not have standing because his challenge to the deprivation of his right to vote in the November 2018 elections is moot. Defendant further states

[2] By stipulation dated February 11, 2019, defendant Board of Elections in the City of New York ("City Board") and plaintiffs agree that, insofar as plaintiffs' claims are equally directed at the two defendants, the disposition of this motion will identically affect plaintiffs' claims as against the two defendants, including defendant City Board. However, defendant State Board is the only moving defendant.

that, although there is an exception to the mootness doctrine for recurring issues that otherwise would evade judicial scrutiny, the exception is inapplicable here because Dinnerstein's injury will not recur. They note that a proposed amendment to the Constitution, which the legislature has approved, and on which New Yorkers may soon vote, will allow for same-day registration.

According to defendant, the League also lacks standing. Defendant rejects the League's argument that the cutoff infringes on its mission to protect voters against disenfranchisement. Defendant states that the League chooses to hold numerous voter registration events after the cutoff, but it can easily hold them earlier. Further, defendant states, the League has not shown that one or more of its members has standing, or that the injuries of its members are different from those incurred by the general public. Absent this showing, the League impermissibly raises the legal rights of others and asserts generalized grievances not appropriate for judicial resolution.

Defendant also urges that the League also does not show it is within the pertinent zone of interests because the right to vote set forth in the Constitution does not grant citizens an unrestricted right to vote in every election. Instead, it argues, it protects individuals against discrimination. There is no standing based on equal protection, defendant says, because it is speculative that claims will arise from future potential voters who might miss the deadline, and because these potential voters are not a protected class. Defendant also states that registration requirements are not *per se* unconstitutional and that the matter is nonjusticiable because it requires the court to second-guess the legislature.

Defendant further notes that article II, section 5 of the Constitution requires that eligible New York citizens complete their registrations by "at least ten days before each election." Therefore, it is impossible to allow election-day registration at this time, and plaintiffs' argument to the contrary lacks merit. Defendant states that plaintiffs are attempting to get this court to impinge upon the State Legislature's role, and they point out that in January 2019 both houses of the Legislature passed election reforms, including a measure to delete the mandatory ten-day cutoff in article II, section 5. Defendant states that, because the ten-day restriction is enshrined in the Constitution, the State cannot make this change unless it is approved by the voters. Therefore, it may be implemented if voters approve the measure in November 2020 at the earliest (*see* NY Const art XIX, § 1).

In opposition, plaintiffs argue that Dinnerstein has standing. They state defendant's mootness argument mischaracterizes the nature of Dinnerstein's request for relief. Dinnerstein does not seek the right to vote in future elections, plaintiffs explain. Instead, he seeks a declaration that the Cutoff Law violated his right to vote and an injunction preventing harm to voters in the future. Plaintiffs state that the exception to the mootness doctrine applies because the issue is likely to occur again, it generally will evade judicial review, and it raises substantial, novel legal questions. Plaintiffs also contend that the League has sustained an injury-in-fact because the Cutoff Law prevents it from registering voters at the events it holds the month before elections. Although the League can hold events before the cutoff date, the League schedules events at times when voter interest and engagement are at their peaks.

According to plaintiffs, defendant contorts the meaning of the Constitutional protection at issue when they suggest that its focus is solely on discrimination. Instead, plaintiffs argue,

improper legislative interference with the right to vote is also prohibited. Plaintiffs claim that the League has organizational standing in its own right partly because if it were barred from litigating "the practical effect would be to exempt from judicial review the [alleged][3] failure of the defendants...to comply with their [Constitutional] obligations" (*Grant v Cuomo*, 130 AD2d 154, 159 [1st Dept 1987], *affd* 73 NY2d 820 [1988]). Therefore, defendant is incorrect that the League must show associational standing and assert that one or more of its members has standing. Plaintiffs acknowledge that individuals such as Dinnerstein may litigate their own rights but contend that the rarity of such challenges makes *Grant* applicable. In particular, they point out that Dinnerstein only instituted this case as co-plaintiff with the League, with the substantial help of legal service groups which worked on his case pro bono. Most people, they state, would lack this support and lack the significant financial resources necessary to litigate.

In addition, plaintiffs argue that the claim is justiciable. This is because the complaint argues that the Cutoff Law violates the constitutionally guaranteed right to vote, and a challenge to a law's constitutionality is allowable. Plaintiffs state that where constitutionality is in dispute, courts must determine whether the challenged laws are necessary, not whether they are reasonable, and thus defendant's argument as to the reasonableness of the Cutoff Law is irrelevant. Moreover, plaintiffs state that defendant's reliance on cases relating to primary election cutoffs is misplaced. Plaintiffs also contend that their equal protection claim is viable under the standards applicable to laws which restrict the right to vote.

In addition to reiterating its original arguments, in reply defendant rejects plaintiffs' positions that the complaint raises a novel question and that the zone of interest extends to plaintiffs. According to defendant, the League's claim that it does not seek associational standing is belied by its arguments. Moreover, defendant states, plaintiffs improperly argue that the reasonableness standard is inapplicable. Defendant states that although some categories of individuals may be more affected than others by the challenged statutory provisions, this is not sufficient to render these laws unconstitutional. Moreover, the legislature hopes to alleviate the burdens on these individuals with the proposed constitutional amendment. Additionally, defendant rejects plaintiffs' position that a strict scrutiny analysis applies.

Applicable Law

The complaint expressly refers to the rights that the Constitution, article II, section 1 and article I, section 1 guarantee, and the limitations that Election Law §§ 5-210, 5-211, and 5-212 place on those rights. As is relevant here, the Constitution states that "[e]very citizen shall be entitled to vote at every election...provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city or village for thirty days next preceding an election" (NY Const art II, § 1). Article I provides that "[n]o member of this state shall be disfranchised...unless by the law of the land" (NY Const art I, § 1). The court notes that, as defendant points out, the Constitution further provides that all voter registration must "be completed at least ten days before each election" (NY Const art II, § 5).

[3] In *Grant*, the defendants conceded their failure.

The challenged statutes involve the State's regulations involving voter registration. Under Election Law § 5-210 (3), voter registration applications must be submitted in person to the Board of Elections at least 25 days prior to the election or mailed at least 25 days before the election. Election Law § 5-210 (4) relaxes this requirement for individuals who have been honorably discharged from the armed forces or become naturalized citizens "after the twenty-fifth day before a general election" and provides that these individuals have until 10 days before the election to register. Election Law § 5-211 (11) states that agencies which register voters must submit voter registration application forms to the proper board of elections at least 25 days before the election. Finally, Election Law § 5-212 (1) allows citizens to apply for registration simultaneously with their driver's license application, but Election Law § 5-212 (7) clarifies that the 25-day cutoff also applies to these applications.

As this is a pre-answer motion to dismiss for failure to state a cause of action (CPLR 3211 [a] [7]), the court affords the complaint a liberal construction, accepts the allegations in the complaint as true, and affords plaintiffs "the benefit of every possible favorable inference" (*D.K. Property, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 168 AD3d 505, 506 [1st Dept 2019] [*DK Property*]). The court "determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *see Wilson v Dantas*, 29 NY3d 1051, 1056-57 [2017] [quoting *Leon*]). Courts cannot determine factual matters when considering a CPLR 3211 motion (*see Loreley Financing [Jersey] No. 28, Ltd. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 AD3d 463, 467-468 [1st Dept 2014]) unless the defendant shows the allegations are "contradicted by documentary evidence" or "unsupportable in the face of undisputed facts" (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]).

Analysis

Defendant's arguments involve challenges to the justiciability of plaintiffs' case. As the First Department has stated:

> "Although the concept of justiciability has never been precisely defined, its principles are found in those cases holding that courts should not render advisory opinions, entertain disputes in which the litigants lack standing, decide lawsuits which have become moot, resolve 'political questions,' intrude into the internal affairs of a coordinate branch of government, or become embroiled in policy matters constitutionally delegated to, or more suited to resolution by, the Executive or the Legislature"

(*People v Ohrenstein*, 153 AD2d 342, 411 [1st Dept 1989], *affd* 77 NY2d 38 [1990]). The court considers defendant's justiciability challenges in turn.

The court first addresses the argument that Dinnerstein lacks standing. Because standing "is an aspect of justiciability", it "must be considered at the outset of any litigation. . ." (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). Standing rests partly on the consideration "that a person should be allowed access to the courts to adjudicate the merits of a

particular dispute that satisfies the other justiciability criteria" (*id.*) Even if the issue is of "vital public concern", courts do not consider the matter without establishing standing (*id.*).

To show standing, an individual must demonstrate that he or she sustained an "injury in fact"—that is, there must be a showing that the action in question harms or harmed the plaintiff (*New York State Assn of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). In addition, the alleged injury "must fall within the zone of interests or concerns sought to be promoted or protected by the statutory [or constitutional] provision" in question (*id.* [citations omitted]). The rules governing standing "should not be 'heavy-handed'" (*Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301, 311 [2015] quoting *Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6-7 [2014]). Courts are 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.*).

Dinnerstein satisfies this two-part test. First, he alleges that because of the deadline set forth in the challenged law, he was deprived of his right to vote in the midterm elections. Second, the constitutional and statutory provisions on which the complaint relies protect an individual's right to vote. Therefore, the alleged injury is within the zone of interest. Nevertheless, defendant argues that Dinnerstein lacks standing because his claim is moot. A court's jurisdiction is limited to live controversies (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810 [2003]). This excludes consideration of moot questions (*id.* at 810-811). Defendant is correct that, as Dinnerstein's particular injury already has occurred, the deprivation of his right to vote in 2018 is not a live controversy.[4]

In response, however, plaintiffs properly contend that an exception to the mootness doctrine applies here because the case "presents an issue that (1) is likely to recur, (2) will typically evade review and (3) is substantial and novel" (*Matter of Puerto v Doar*, 142 AD3d 34, 44 [1st Dept 2016] [*Puerto*] [internal quotation marks and citation omitted]; *see Matter of Emmanuel B.*, 175 AD3d 49, 53-54 [1st Dept 2019]). "Substantial and novel issues" are ones which raise "significant or important questions not previously passed on" (*New York State Office of Mental Health v Marco G.*, 167 AD3d 49, 55 [1st Dept 2018] [internal quotation marks and citation omitted]). Where the case is not deemed novel enough "to warrant invocation of the exception to the mootness doctrine", courts dismiss the case as moot even if the first two prongs of the test are satisfied (*Matter of Freedom R.* [*Jamila W.*], 142 AD3d 922 [1st Dept 2016]).

Courts reviewing other election-related controversies have applied the exception to the mootness doctrine, thus finding that all three elements of the test are satisfied (*e.g., Matter of Jacobs v Biamonte*, 38 AD3d 777, 778 [2d Dept 2007] [although special election was over, court reviewed proceeding to compel production of absentee ballots in advance of election]; *Matter of Avella v Batt*, 33 AD3d 77, 80-81 [3d Dept 2006] [applied where one party challenged determination barring its use of funds to support another party's candidate during primary election]; *but see Matter of Leemhuis v Scranton*, 158 AD2d 784 [3d Dept 1990] [where petitioner sought to have his party affiliation changed before primary, issue was deemed moot after primary

[4] Plaintiffs argue that the court also may grant a declaration as to the constitutionality of the Cutoff Law because the issue is a live controversy. The court disagrees but does not discuss the argument given its conclusion that an exception to the mootness doctrine applies.

took place]). First, election-related challenges are in fact capable of evading judicial review. In the context of the Cutoff Law, a live controversy exists for only 25 days—that is, the days between the registration cutoff and the related election. In the case at hand, plaintiffs filed and served their pleadings on defendants on November 8, 2018. Although counsel for the defendants filed their notices of appearance within a few days, they simultaneously stipulated with plaintiffs to extend their time to respond to the complaint, and they entered into a further stipulation on December 4, 2018. Defendant filed its motion to dismiss, with accompanying documents, on January 28, 2019. The motion was not fully submitted to the court until March 13, 2019, and the motion was not argued until May 9, 2019. Even at the first stage of this lawsuit, the parties were unable to submit their papers and present them to the court during the pertinent period. Second, although defendant raised the issue of a potential constitutional amendment, it is not certain that such amendment will pass. Even if it does, however, this problem is likely to recur in the interim. Although Dinnerstein has had ample time since the midterms to register in time for the upcoming election, individuals other than the plaintiff here may face this problem (*see Puerto*, 142 AD3d at 44).

Third, the issue is novel and substantial. Article II, section 1 of the Constitution safeguards the right of every citizen to vote at every election (*Matter of Panio v Sunderland*, 4 NY3d 123, 129 n3 [2005], *reargt denied*, 4 NY3d 794 [2005]). Article I, section 1 of the Constitution declares that no citizen shall be disenfranchised. Furthermore, although defendant is correct that "the right to vote in any manner...[is] not absolute", it is "'of the most fundamental significance under our constitutional structure'" (*Matter of Walsh v Katz*, 17 NY3d 336, 343 [2011] quoting *Illinois Bd. of Elections v Socialist Workers Party*, 440 US 173, 184 [1979]). Accordingly, regulations that affect enfranchisement are subject to this constitutional right, and courts construe the right "in the broadest spirit" so as to secure "to all citizens the right to freely...cast their ballots" (*Golden v Clark*, 76 NY2d 618, 640 [1990] [internal quotation marks and citations omitted]). Laws which "disfranchise constitutionally qualified electors" or "unnecessarily prevent[] the elector from voting...violate[] the Constitution" (*People ex rel. Hotchkiss v Smith*, 206 NY 231, 242 [1912]).

In the case at hand, a novel and substantial issue exists. The laws that plaintiffs challenge here potentially have a broad impact on the voting population. Along with the petition, the Burden and Street reports, on which plaintiffs rely in opposition to this motion (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]), satisfy the pleading requirement by asserting that thousands of individuals have been harmed by the cutoff and the issue is likely to recur.[5] Burden, for example, cites the Census Bureau's 2016 Current Population Study, which determined that 13.2% of the nonregistered voters polled in New York stated that they were not registered because they missed the registration deadline (*see* NYSCEF Doc. No. 2, *11 [Table 1]). Burden estimates that between 111,028 and 183,380 New York residents were deterred from voting by the Cutoff Law. Using two alternative methodologies, Street estimates that 93,649 or 43,000, respectively, were precluded from voting because of the Cutoff Law, and that "tens or even hundreds of thousands more people would be able to register and vote if New York adopted a later registration deadline . . ." (NYSCE Doc. No. 3, *9). Plaintiffs are correct that, at this point, they do not have

[5] The Court does not address defendant's argument that these reports should be stricken from the complaint. Defendant improperly raised this issue for the first time in its reply papers, and plaintiffs did not have the opportunity to respond to the issue in writing (*see EPF International Limited v Lacey Fashions Inc.*, 170 AD3d 575, 575 [1st Dept 2019]).

to establish their case (quoting *T.V. v New York State Dept. of Health*, 88 AD3d 290, 306 [2nd Dept 2011]).

Defendant's arguments to the contrary lack merit. Its position that because Dinnerstein can register before the next election, the problem will not recur is based on an overly restrictive interpretation of the phrase "likely to recur." In *Iafrate v Suffolk County Bd. of Elections* (42 NY2d 991, 992 [1977]), the Court of Appeals found that a proceeding to compel a county's board of elections to allow certain individuals to register to vote was not moot because "registration to vote is a continuing status" and the issue was likely to recur "notwithstanding any indications of changed circumstances" (*see also Matter of Carr v New York State Bd. of Elections*, 40 NY2d 556, 559 [1976]; *Matter of Jacobs v Biamonte*, 38 AD3d 777, 778 [2d Dept 2007]). In *Coleman v Daines* (19 NY3d 1087, 1090 [2012]), the Court of Appeals found that given the possibility that other Medicaid claimants were likely to have the same problem in the future, the exception applied even though the individual plaintiff had received the services she had requested initially (*see also City of New York v Maul*, 14 NY3d 499, 507 [2010]).

Defendant's reliance on *Matter of Davis v Board of Elections of the City of N.Y.* (5 NY2d 66, 69 [1958]) for the proposition that the current issue is not novel is misplaced. Although the Court of Appeals found that the plaintiffs in *Davis* had no claim based on disenfranchisement because they could have registered to vote, it did so in a distinguishable situation. The *Davis* plaintiffs challenged the determination that their signatures on a nominating petition were invalid because they were not registered voters. The case did not involve an alleged infringement on anyone's right to vote in an election (*see id.* at 69). Similarly, the cases which address the law which sets a cutoff date by which voters must name their party affiliation in order to vote in that party's primary are not relevant on this point. *Rosario v Rockefeller* upheld the thirty-day cutoff because the stated purpose was to prevent party raiding on the eve of an election (*see* 410 US 752, 761-762 [1973]). The First Department recently reiterated that this cutoff date "is rationally related to the legitimate state interest[]" in inhibiting party raiding (*Moody v New York State Bd. of Elections*, 165 AD3d 479, 480 [1st Dept 2018] [internal quotation marks and citations omitted]).[6]

Defendant also contends that the sole purpose of the cited constitutional provisions is simply to prevent racial or other discrimination, and therefore plaintiffs' arguments, which do not challenge the Cutoff Law based on discrimination, are irrelevant. This is incorrect. As the cases above show, the protection at hand is broader.

Next, the court turns to the issue of the League's standing. It is not clear that these challenges warrant analysis. In *Saratoga County Chamber of Commerce, Inc. v Pataki* (100 NY2d 801, 813 [2003]), the Court of Appeals found that because individual plaintiffs had standing to sue, it was unnecessary to address the question of whether the organization had standing. Several subsequent decisions in this State have adhered to this principle (*e.g., New York State United Teachers v State of New York*, 140 AD3d 90, 95 [3d Dept 2016]; *Matter of Menon v State Dept. of Health*, 140 AD3d 1428, 1430 n 2 [3d Dept 2016]; *Avery Parents' Assn, Ltd. v New York City Dept. of Educ.*, 27 Misc 3d 1220 [A], 2010 NY Slip Op 50820 [U], *2 n 3 [Sup Ct NY County 2010]). This approach seems fitting in the case at hand. The League's purpose—to protect voting

[6] As long as the League has standing, the exception to mootness similarly applies to the League.

rights—is at issue here, and the complaint raises the same claims as to both plaintiffs. Nevertheless, as the law is not entirely consistent on the issue of whether organizational standing need be reached, the court considers the question.

"An organization can establish standing in several ways" (*Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 51 [2019] [*Daniels*]). To show that it has standing on its own behalf, "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" (*Daniels*, 33 NY3d at 51 quoting *Society of Plastics*, 77 NY2d at 774-775 [internal citations and quotation marks omitted]). An organization cannot show an injury in fact through the allegation that some of its clients or members have sustained injury (*see Daniels*, 33 NY3d at 52-53). Instead, it "must demonstrate an injury in fact to itself" (*Athenaeum Blue & White [R.A.], Inc. v American Studies Assoc., Inc.*, 173 AD3d 953, 953 [2d Dept 2019] [citation omitted]). Even where "the factual demonstration by the organizational plaintiffs in support of their standing to seek judicial relief is unimpressive [as to injury in fact]" (*Grant*, 130 AD2d at 158-159), standing may exist if the practical effect of denying standing would be to exempt from judicial scrutiny the constitutionality of statutes (*see id.* at 159; *New York County Lawyers' Assn. v State of New York*, 294 AD2d 69, 76-77 [1st Dept 2002]).

The League has established standing sufficiently at this juncture. According to the affidavit of Laura L. Bierman, the executive director of the League, the group is "dedicated to promoting active and informed citizen participation in government, including through various initiatives focusing on voter registration" (NYSCEF Doc. No. 23 [Bierman Aff] ¶ 2). The complaint asserts that the Cutoff Law prevents the League from fully realizing its objective of registering voters. Furthermore, the League notes that it costs money to stage and promote its events and to prepare its literature. The League's asserted financial loss shows injury in fact (*Chevron Corp. v Donziger*, 833 F3d 74, 120 [2d Cir 2016] [*Chevron*], *cert denied*, 137 S Ct 2268 [2017]). Here, where the Cutoff Law allegedly causes an indirect injury to the League, standing exists (*see League of Women Voters of Mich. v Johnson*, US Dist Ct, ED Mich, 17-cv-14148, May 16, 2018, Clay, J., *18-20 [*Johnson*]; *Chevron*, 833 F3d at 121).

"There are many approaches by which the League might attempt to prove that the [challenged statute] impairs its mission" and the court must be flexible in its evaluation of injury (*Johnson*, *19-20). For this reason, several federal courts have found that the League of Women Voters in other States has standing where election laws are concerned (*e.g.*, *League of Women Voters of the United States v Newby*, 838 F3d 1, 9 [DC Cir 2016]; *Johnson*, *18-20; *League of Women Voters of Cal. v Kelly*, US Dist Ct, ND Cal, 17-cv-02665-LB, August 25, 2017, Beeler, J., *16-18). Although these cases are not controlling, the court adopts their reasoning here.

Defendant also cannot prevail on its position that the League has chosen to incur financial injuries by holding events after the cutoff date, and thus it has no standing. Defendant ignores the possibility that the League may hold events and incur costs before the cutoff date, but that the inability to hold productive events after the cutoff "diminishes the organizational efforts and goals of the League" (NYSCEF Doc. No. 23 ¶ 6). The League also notes that the certification of issues on the ballot generally occurs close enough to the election that the League cannot prepare, advertise, and schedule debates on new ballot measures prior to the cutoff date (*id.* ¶ 10).

Furthermore, based on the experts' detailed reports, the League's asserted injury is not "too speculative to constitute the type of an injury in fact necessary to confer standing" (*Urban Justice Ctr. v Pataki*, 38 AD3d 20, 24 [1st Dept 2006] [*Pataki*] [citation omitted]). This is sufficient for the purposes of a pre-answer motion.

Finally, defendant's arguments relating to representational and third-party standing are meritorious but irrelevant. Plaintiffs concede that the League does not have standing on these bases, and the court therefore need not consider defendant's arguments in these respects.

Furthermore, the court concludes that the causes of action herein, which allege violations of the right to vote, are justiciable. Initially, the court notes that "[i]n deciding a motion to dismiss for failure to state a cause of action, a court must liberally construe the allegations to determine if a bona fide justiciable controversy exists" (*Niagara Mohawk Power Corp. v State*, 300 AD2d 949, 952 [3d Dept 2002] [*Niagara Mohawk*]). Moreover, the court cannot consider defendant's factual arguments at this juncture (*see id.*).[7]

Any analysis of justiciability requires a balancing process. Although courts must "abstain from venturing into areas if it is ill-equipped to undertake the responsibility and other branches [of government] are far more suited to the task" (*Roberts v Health & Hops. Corp.*, 87 AD3d 311, 323 [1st Dept 2011] [internal quotation marks and citation omitted]), they retain the power to resolve disputes as to whether the other two branches of government have exceeded their constitutional powers (*see Davids v State of New York*, 159 AD3d 987, 991-992 [2d Dept 2018]).

Plaintiffs contend that the history of the Cutoff Law mandates a finding that the law is unconstitutional. The legislature amended the Cutoff Law in May 1991, and this amendment established the 25-day cutoff (*see* NYSCEF Doc. No. 1 [Complaint] ¶ 32). As the complaint acknowledges, the cutoff provided the necessary time for processing voter registration forms (*id.* ¶ 33). The complaint also cites the legislative sessions and contemporaneous comments by the governor and Board of Elections director suggesting that, although the cutoff date was necessary at that time, with advanced computerization less time would be necessary (*id.* ¶¶ 34-35). Now that there have been "dramatic advances in computerization and other technology", plaintiffs urge the court to hold that presently the cutoff "is arbitrary and set unnecessarily early" and thus in violation of the Constitution (*id.* ¶¶ 36-37). Indeed, defendant acknowledges that the Cutoff Law was established to provide those who implemented registration and voting the time necessary to process voters.

Plaintiffs frame this as a constitutional issue, and the court agrees. Here, as plaintiffs clarified at oral argument, plaintiffs do not ask this court to decide the appropriate cutoff date. Instead, they ask for a declaratory judgment order which determines whether the 25-day cutoff is constitutionally permissible (*see* Tr. of Oral Argument, p 24 lines 17-21 [May 9, 2019]). Plaintiffs argue that, to make this determination, the court must evaluate the law in light of the cited constitutional provisions and the changes in technology which arguably render the early cutoff date obsolete and determine whether "less burdensome measures" may achieve the legislative

[7] The exception to this is that courts can review factual submissions "with an eye toward remedying defects in the petition" (*Niagara Mohawk*, 300 AD2d at 952). Thus, as stated, it is permissible to review the expert reports for this limited purpose.

goals (NYSCEF Doc. No. 1 [Complaint] ¶ 70). The court need not "reorder fiscal priorities…or interject itself into the day-to-day administration" of the legislature to make such a determination (*see Board of Educ., Levittown Union Free School Dist. v Nyquist*, 83 AD2d 217, 234 [2d Dept 1981], *modified on other grounds*, 57 NY2d 27 [1982]), *appeal dismissed*, 459 US 1138 [1983]; *see King v Cuomo*, 81 NY2d 247, 251 [1993] ["courts do not trespass into the wholly internal affairs of the Legislature…when they review and enforce a clear and unambiguous constitutional regimen…"] [internal quotation marks and citation omitted]).

The court rejects defendant's arguments against justiciability. As defendant has pointed out and this court has noted, article II, section 5 of the Constitution requires that eligible New York citizens complete their registrations by "at least ten days before each election." Thus, plaintiffs incorrectly stated in the complaint that there is no constitutional impediment against election-day registration. However, this error does not render the causes of action herein nonjusticiable. The complaint's Prayer for Relief does not ask this court to mandate election-day registration or a 10-day cutoff. The complaint instead seeks a declaratory judgment that the Cutoff Law violates the right to vote and an injunction preventing enforcement of the pertinent Cutoff Law provisions. In addition, though defendant correctly points out that 33 States do not have same-day registration, and many States have cutoffs similar to or even earlier than the one in New York (citing, e.g., 51 MGL § 26 [20-day cutoff in Massachusetts]; 25 Pa CSA Elections § 1326 [b] [3], [b] [4] [30-day cutoff in Pennsylvania]), this goes to the merits of plaintiffs' case and are not relevant in this pre-answer motion to dismiss. Further, defendant's comment that the Legislature already has examined and approved changes to the Cutoff Law does not render the matter nonjusticiable. Otherwise, every statute would be insulated from review because of the legislative power to amend it. The timetable for passage of the constitutional amendment, moreover, guarantees that the amendment will not be implemented in time for the 2020 primaries or for the presidential election. Because of these issues, pre-answer dismissal of plaintiffs' first two causes of action is not appropriate.

Next, the court turns to the complaint's equal protection cause of action. The State's equal protection clause, which is modeled after the provision in the United States Constitution, "commands that persons similarly situated should be treated alike" (*Matter of Walton v New York State Dept. of Correctional Servs.*, 13 NY3d 475, 492 [2009] [internal quotation marks and citation omitted]). In their complaint, plaintiffs allege that the cutoff law "represents an unequal burden on the fundamental right to vote, as it imposes a 25-day registration cutoff that makes exercising the right to vote more difficult for some eligible voters, including the individual plaintiff in this case, while other classes of eligible voters are permitted to register up to ten days before a general election and still vote." Specifically, plaintiffs contend that individuals honorably discharged from the military and those who become naturalized citizens after the registration cutoff can register up to ten days before a general election and still vote; this opportunity is denied to other voters who are not exempted from the cutoff. Accepting the allegations in the complaint as true and affording plaintiff the benefit of every possible favorable inference, this Court determines that plaintiffs have sufficiently pled an equal protection claim.

Conclusion

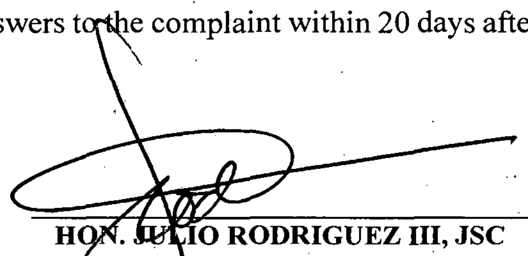
Defendant has raised several arguments relating to the reasonableness of the 25-day Cutoff Law. The court's current decision takes no position as to whether the Cutoff Law is rational. Considering the liberal rules for interpreting complaints in CPLR 3211 motions (*see D.K.*, 168 AD3d at 506), which also applies to pre-answer motions which seek to dismiss complaints on the ground of non-justiciability, the causes of action herein must stand at this juncture (*Niagara Mohawk*, 300 AD2d at 952). It is more appropriate to review these arguments once issue is joined and the parties have presented their cases. At that point, the "strong presumption of constitutionality" accorded to "legislative enactments" (*Amazon.com, LLC v New York State Dept. of Taxation & Fin.*, 81 AD3d 183, 194 [1st Dept 2010]) comes into play.

For all the reasons above, it is

ORDERED that defendant New York State Board of Election's motion to dismiss is denied in its entirety; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days; and it is further

ORDERED that defendants are to serve their answers to the complaint within 20 days after service of a copy of this order with notice of entry.



September 30, 2019

HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**