SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 22-01133

PRESENT: SMITH, J.P., CURRAN, BANNISTER, OGDEN, AND NOWAK, JJ.

IN THE MATTER OF GEORGE BORRELLO, NEW YORK STATE SENATOR, CHRIS TAGUE, NEW YORK STATE ASSEMBLYMAN, MICHAEL LAWLER, NEW YORK STATE ASSEMBLYMAN, AND UNITING NYS, LLC, PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KATHLEEN C. HOCHUL, NEW YORK STATE GOVERNOR, MARY T. BASSETT, NEW YORK STATE COMMISSIONER OF HEALTH, NEW YORK STATE DEPARTMENT OF HEALTH AND PUBLIC HEALTH AND HEALTH PLANNING COUNCIL, RESPONDENTS-DEFENDANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

COX LAWYERS, PLLC, BRONXVILLE (ROBERTA A. FLOWER COX OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

GREGORY DOLIN, WASHINGTON, DC, FOR NEW CIVIL LIBERTIES ALLIANCE, AMICUS CURIAE.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered July 11, 2022, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment adjudged 10 NYCRR 2.13 null, void, and unenforceable and permanently enjoined respondents from enforcing and from readopting that regulation.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the third amended petition-complaint is dismissed.

Memorandum: At the outset of the COVID-19 pandemic, the Governor of the State of New York declared a state disaster emergency and authorized the Commissioner of respondent-defendant New York State Department of Health (DOH) to promulgate emergency regulations and amend the State Sanitary Code (*see* Executive Order [A. Cuomo] No. 202 [9 NYCRR 8.202]). DOH responded by promulgating and then regularly readopting a series of emergency regulations, including 10 NYCRR 2.13, which replaced preexisting related regulations and set forth isolation and quarantine procedures aimed at controlling the spread of highly contagious communicable diseases. DOH eventually expressed its intent

to adopt 10 NYCRR 2.13 permanently.

Petitioners-plaintiffs (petitioners), consisting of three members of the New York State Legislature (legislator petitioners) and an advocacy organization (organization petitioner), commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, among other things, a declaration that respondents-defendants (respondents) promulgated the subject regulation in violation of the State Constitution and the separation of powers doctrine and that the regulation is invalid, as well as an injunction preventing respondents from implementing or enforcing the regulation. Supreme Court, without addressing whether petitioners had standing despite respondents having raised that threshold issue in their answer and opposition papers, determined that respondents violated the separation of powers doctrine in promulgating the regulation by exceeding the scope of their delegated powers and encroaching upon the legislative domain of policymaking. The court therefore adjudged 10 NYCRR 2.13 null, void, and unenforceable and permanently enjoined respondents from enforcing and from readopting that regulation. Respondents appeal, and we now reverse the judgment and dismiss the third amended petition-complaint on the ground that petitioners lack standing.

"Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). "Standing is a threshold determination, resting in part on policy considerations, 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.*). "Under the common law, there is little doubt that a 'court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected' " (*id.* at 772, quoting *Schieffelin v Komfort*, 212 NY 520, 530 [1914]; *see Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 [2019]). "Related to this principle is 'a general prohibition on one litigant raising the legal rights of another' " (*Daniels*, 33 NY3d at 50, quoting *Society of Plastics Indus.*, 77 NY2d at 773). Thus, if the issue of standing is raised, "[a] petitioner challenging government agency action pursuant to an article 78 petition has the burden of demonstrating an injury in fact and that the alleged injury falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted" (*Matter of Stevens v New York State Div. of Criminal Justice Servs.*, — NY3d —, —, 2023 NY Slip Op 05351, *3 [2023] [internal quotation marks omitted]; *see Daniels*, 33 NY3d at 50; *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). "The injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered a cognizable harm . . . that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention" (*Daniels*, 33 NY3d at 50 [internal quotation marks omitted]; *see Stevens*, — NY3d at —, 2023 NY Slip Op 05351, *3; *New York State Assn. of Nurse Anesthetists*, 2 NY3d at 214; *Society of*

Plastics Indus., 77 NY2d at 772).

Addressing first respondents' contention that the legislator petitioners lack standing, we note that "[c]ases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power" (*Silver v Pataki*, 96 NY2d 532, 539 [2001], *rearg denied* 96 NY2d 938 [2001]). "Only circumstances presented by the latter two categories confer legislator standing" (*id.*). Thus, "in limited circumstances, legislators do have . . . standing to sue when conduct unlawfully interferes with or usurps their duties as legislators" (*id.* at 542). Nonetheless, to confer legislator standing, the alleged action must have caused "a direct and personal injury [that] is . . . within a legislator's zone of interest and . . . represents a concrete and particularized harm" (*id.* at 540 [internal quotation marks omitted]; *see Matter of Townsend v Spitzer*, 69 AD3d 1026, 1027 [3d Dept 2010], *lv denied* 15 NY3d 702 [2010]; *Matter of Montano v County Legislature of County of Suffolk*, 70 AD3d 203, 216 [2d Dept 2009]; *see generally Raines v Byrd*, 521 US 811, 818-830 [1997]). When there is no vote nullification and a legislator otherwise "suffer[s] no direct, personal injury beyond an abstract institutional harm," the legislator lacks standing (*Silver*, 96 NY2d at 540; *see Montano*, 70 AD3d at 215-216; *Urban Justice Ctr. v Pataki*, 38 AD3d 20, 25-26 [1st Dept 2006], *appeal dismissed & lv denied* 8 NY3d 958 [2007]; *see generally Raines*, 521 US at 821, 826, 829).

In the case before us, "[n]o vote nullification [is] alleged" (*Silver*, 96 NY2d at 540) inasmuch as the legislator petitioners have expressly disclaimed any reliance on that category of legislator standing, and thus only the usurpation category is at issue. With respect to that category, we conclude that the legislator petitioners failed to fulfill the injury-in-fact requirement to establish standing inasmuch as we discern no allegation of "a direct and *personal* injury" that "represents a *concrete* and *particularized* harm" (*id.* [emphasis added and internal quotation marks omitted]; *see Urban Justice Ctr.*, 38 AD3d at 25; *see also Montano*, 70 AD3d at 215-216). The legislator petitioners, who sued in their official capacities, alleged in the operative pleading that respondents, in promulgating the challenged regulation, exceeded their executive powers, thereby usurping the power of the legislator petitioners "and all New York State legislators similarly situated" by prohibiting them from performing their duties to represent their constituents and to make laws on behalf of the people of New York. The legislator petitioners specifically alleged that respondents violated the separation of powers doctrine because the ability to make laws lies with the legislature and yet respondents had "exceeded the scope of their authority, . . . abused their regulat[ion-]making power, and . . . impermissibly crossed into the realm of law-making to the detriment of [the legislator petitioners] and all those legislators similarly situated." Indeed, regarding the purported usurpation of their power, the legislator petitioners alleged that they sustained the "same injury" as all other legislators. Inasmuch as the legislator petitioners merely asserted an alleged harm to the separation of

powers shared by the legislative branch as a whole, they failed to establish that they suffered a "direct, *personal* injury beyond an abstract institutional harm" (*Silver*, 96 NY2d at 540 [emphasis added]; *see Urban Justice Ctr.*, 38 AD3d at 25; *see also Montano*, 70 AD3d at 215-216; *see generally Raines*, 521 US at 821). Unlike circumstances in which a legislator demonstrates a concrete, personal injury arising from, for example, deprivation of a specific statutory right to participate in the legislative process as an individual member of a particular committee (*see Dodak v State Admin. Bd.*, 441 Mich 547, 559-561, 495 NW2d 539, 545-546 [1993]) or disproportionate allocation of funds to operate a legislative office (*see Urban Justice Ctr.*, 38 AD3d at 25), we conclude that the injury alleged by the legislator petitioners here "involve[s] only 'a type of institutional injury (the diminution of legislative power),' which does not provide standing" (*id.*). To the extent that the legislator petitioners assert that they have standing based on alleged harm to the participation of their constituents in the policymaking process, we reject that assertion because the legislator petitioners "may not raise legal grievances on behalf of others" (*id.* at 27; *see Society of Plastics Indus.*, 77 NY2d at 773).

Next, addressing respondents' contention that the organization petitioner lacks standing, we note that "[a]n organization can establish standing in several ways" (*Daniels*, 33 NY3d at 51). An organization "may demonstrate 'associational standing' by asserting a claim on behalf of its members, provided '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' " (*id.*, quoting *New York State Assn. of Nurse Anesthetists*, 2 NY3d at 211). "Alternatively, an organization can 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.*, quoting *Warth v Seldin*, 422 US 490, 511 [1975]; *see Society of Plastics Indus.*, 77 NY2d at 772-773). "Under this option, 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).

Here, we agree with respondents that the organization petitioner also lacks standing. First, the organization petitioner failed to demonstrate that " 'at least one of its members would have standing to sue' " (*id.*). The organization petitioner did not claim that any of its members had been personally subjected to isolation and quarantine under any regulation, and the affidavits of certain members of the organization petitioner setting forth potential impacts of an isolation and quarantine order on others fail to establish that any member "has suffered a cognizable harm . . . that is not tenuous, ephemeral, or conjectural but is [instead] sufficiently concrete and particularized to warrant judicial intervention" (*id.* at 50 [internal quotation marks omitted]; *see Rudder v Pataki*, 93 NY2d 273, 279 [1999]). Insofar as the organization petitioner alleged the generalized concern that promulgation of the regulation deprived its

members of a voice in the policymaking process, the organization petitioner failed to "articulate any direct injury to its [members], other than the injury every citizen allegedly suffers by reason of the challenged [action] of the . . . executive branch[ ]" (*Urban Justice Ctr.*, 38 AD3d at 24; *see Matter of Brennan Ctr. for Justice at NYU Sch. of Law v New York State Bd. of Elections*, 159 AD3d 1301, 1304-1305 [3d Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Schulz v Cuomo*, 133 AD3d 945, 947 [3d Dept 2015], *appeal dismissed* 26 NY3d 1139 [2016], *lv denied* 27 NY3d 907 [2016], *reconsideration denied* 27 NY3d 1047 [2016]; *see generally Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]). Second, we conclude for the same reason that the organization petitioner lacks standing to bring the challenge in its own name inasmuch as it "has failed to allege a personally concrete and demonstrable injury distinct from that suffered by the public at large" (*Urban Justice Ctr. v Silver*, 66 AD3d 567, 568 [1st Dept 2009]).

Finally, we are cognizant that "standing rules should not be applied in an overly restrictive manner where the result would be to completely shield a particular action from judicial review" (*Stevens*, — NY3d at —, 2023 NY Slip Op 05351, *3 [internal quotation marks omitted]). However, inasmuch as the legislature retains its power to address the regulation and there exists a large pool of potential challengers to the regulation who could assert a concrete and particularized harm, we conclude that "this is not a case where to deny standing to these [petitioners] would insulate government action from judicial scrutiny" (*Rudder*, 93 NY2d at 280; *see Society of Plastics Indus.*, 77 NY2d at 779).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court