HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
Christina C. Matthias (I.D. No. 326864)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200
(215) 568-0300 (facsimile)

TUCKER LAW GROUP

Joe H. Tucker (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NATIONAL ELECTIONS DEFENSE COALITION, *et al.*,	:	CIVIL ACTION
Petitioners,	:	No. 674 MD 2019
v.	:	
KATHY BOOCKVAR, in her official capacity as Secretary of the Commonwealth,	:	
Respondent.	:	

BRIEF IN SUPPORT OF RESPONDENT'S APPLICATION TO STAY PRELIMINARY INJUNCTION PROCEEDINGS PENDING RESOLUTION OF PRELIMINARY OBJECTIONS AND PARALLEL FEDERAL COURT MOTION

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Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth ("Respondent" or "Secretary"), submits this Brief in support of her Application to Stay Preliminary Injunction Proceedings Pending Resolution of Preliminary Objections and Parallel Federal Court Motion.

I. INTRODUCTION

Two pending proceedings could drastically alter the scope of Petitioners' Application for a Preliminary Injunction (the "Application"). First, in a Motion pending in the U.S. District Court for the Eastern District of Pennsylvania, a different group of plaintiffs seeks the same relief that Petitioners seek here – decertification of the ExpressVote XL voting machine – and assert many of the same grounds that Petitioners assert here. The District Court has scheduled an evidentiary hearing for January 21, 2020, and is likely to issue a ruling shortly thereafter. Second, on January 15, 2020, Respondent timely filed her Preliminary Objections, which are attached as Exhibit A. These Preliminary Objections show that Petitioners have not stated a claim that Respondent's certification of the ExpressVote XL violated Pennsylvania's statutes or Constitution (indeed, Petitioners do not even acknowledge the governing Pennsylvania case law on this subject); that Petitioners have not alleged that any of them has any disability, and therefore lack standing to bring a claim on behalf of disabled voters; and that Petitioners have not alleged the individual harm necessary to pursue their other claims.[1] The outcome of the federal court proceedings, and this Court's ruling on the Preliminary Objections, are likely to eliminate claims and issues, and could even moot the Application entirely. Accordingly, Respondent asks that the Court postpone her deadline to respond to the Application (currently January 22, the day

[1] In the Preliminary Objections, Respondent also contends that the Court lacks jurisdiction because Petitioners have failed to join indispensable parties. On January 15, this Court raised the issue *sua sponte*, and scheduled oral argument for January 23.

after the federal court hearing) and the preliminary injunction hearing (currently scheduled for January 28) until these other proceedings are resolved.

The Court can reasonably grant this brief stay. As explained below, it is far too late to replace the ExpressVote XL in time for the November 2020 election. Moreover, Petitioners' own leisurely approach to this proceeding shows that even to Petitioners, time is not of the essence. Petitioners knew, or should have known, every material fact underlying the Petition more than a year before they filed it. Even after they filed the Petition on December 12, 2019, Petitioners declined to move forward, serving Respondent by mail and then waiting nearly a month to take further action. They finally filed their Application at the close of business on Friday, January 10. Given Petitioner's relaxed approach, there is no reason to rush to a hearing on claims that will likely not survive.

The stakes are extraordinarily high in this litigation. If this Court were to grant the relief Petitioners seek, the resulting upheaval would threaten at least three counties' ability to hold orderly primary or general elections in 2020. Respondent respectfully submits that it is in the best interests of the parties, the Court, and, most importantly, the voting public, for the Court to postpone the preliminary injunction response and hearing for a short time. Once the Preliminary Objections and the federal court action have been resolved, this Court can streamline the Application and move forward with whatever claims remain.

II. STATEMENT OF FACTS

A. In Five Days, a Federal Court Hearing Will Take Place That Could Moot or Sharply Limit the Issues Raised In Petitioners' Application

On November 26, 2019, several voters, along with former Presidential candidate Jill Stein,[2] filed a Motion to Enforce Settlement in the matter of *Stein v. Boockvar*, No. 2:16-cv-06287, which is pending before Judge Paul Diamond of the Eastern District of Pennsylvania. *See* Motion to Enforce, attached (without exhibits) as Exhibit B. This Motion seeks essentially the same relief as that sought in the Application: decertification of the ExpressVote XL. It relies on the same key allegations that this case does. *Compare, e.g.*, Motion to Enforce at 6-8 with Application ¶ 4, Br. in Support of Application at 4, 7-8, 14, 26-27 (argument that because the ExpressVote XL's paper records have barcodes, they do not reflect voter intent); Motion to Enforce at 11-13 with Application ¶ 5, Br. in Support of Application at 22-28 (allegation of "insecure paper path"); Motion to Enforce at 8 with Application ¶ 8, Br. in Support of Application at 2-3, 11, 19-20 (alleged difficulty in verifying paper record).

Respondent responded to Plaintiffs' Motion on December 12, 2019. *See* Response, attached (without exhibits) as Ex. C. On December 20, 2019, Judge Diamond scheduled an evidentiary hearing for January 21, 2020. *See* Order, attached as Ex. D. Based on prior proceedings in the *Stein* case, Respondent believes it is very likely that Judge Diamond will rule

[2] Respondent does not know the extent of the relationship between Petitioners and the *Stein* Plaintiffs. However, the two sets of parties are coordinating their efforts, at least to some extent: Kevin Skoglund, Senior Technical Advisor to Plaintiff National Elections Defense Coalition ("NEDC"), and individual Petitioner Rich Garella have each filed declarations in support of the *Stein* Motion. The *Stein* Plaintiffs' expert, Dr. Alex Halderman, is on the Board of Advisors of NEDC.

shortly after the hearing.[3] The outcome of the *Stein* matter could moot or limit the evidence in any preliminary injunction proceeding in this case.

B. Respondent Has Filed Preliminary Objections That Call Into Question the Court's Authority to Hear Petitioners' Application

Respondent timely filed[4] Preliminary Objections, a copy of which is attached as Exhibit A. As the Preliminary Objections show, the Petition has flaws that are fatal to some or all of Petitioners' claims. For example:

- Petitioners do not adequately state a claim that Respondent exceeded her broad discretion when she certified the ExpressVote XL. Indeed, Petitioners do not even cite the Pennsylvania Supreme Court's recent, binding precedent on the standard for addressing challenges to the Secretary of the Commonwealth's discretion to certify voting machines. *See Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015).

- Petitioners lack standing to assert claims that the ExpressVote XL is inaccessible to voters with disabilities, because none of them alleges that they have a disability.

- Petitioners position themselves as disinterested enforcers of the Election Code and Pennsylvania Constitution; they do not allege the personal harm necessary to confer standing or to state a claim under the Pennsylvania Constitution.

- Petitioners have failed to name Pennsylvania counties that use the ExpressVote XL as respondents, even though their Petition bears directly on the counties' rights. Indeed, in their Application, Petitioners ask the Court to grant relief that only these counties can provide.

The Court has *sua sponte* scheduled oral argument on the indispensable parties issue, which is jurisdictional, for January 23, 2020. Under the current schedule, Respondent must respond to the Application on January 22, a day after the federal court hearing and a day before the Court considers whether it has jurisdiction at all.

[3] For example, in *Stein*, Judge Diamond held a preliminary injunction hearing on December 9, 2016 and issued an opinion and order on December 12, 2016.
[4] Respondent received service of the Petition by mail on December 16, 2019.

C. Despite Their Longstanding Knowledge of the ExpressVote XL and Its Relevant Features, Petitioners Delayed Filing Their Petition and Application Until It Was Too Late to Replace the ExpressVote XL in Time for the 2020 Elections

1. Petitioners Filed Their Application Long After They Learned About the Relevant Features of the ExpressVote XL

The ExpressVote XL is a component of several suites of voting technology manufactured by Election Systems & Software ("ES&S"), including the EVS 6000 system and the EVS 6021 system. Since mid-2018, it has been public knowledge that the Commonwealth of Pennsylvania was considering certifying the EVS 6000 and, later, the EVS 6021 systems. The features of the systems in general, and of the ExpressVote XL in particular, were also publicly known.

Petitioners NEDC and Citizens for Better Elections ("CBE") (together, the "Organization Petitioners"), as organizations that ostensibly focus on voting security, should thus have had detailed knowledge about the ExpressVote XL more than a year before they filed their Petition. Moreover, there is ample evidence that the Organization Petitioners' principals and associates in fact knew the features of the ExpressVote XL that they now claim entitle them to injunctive relief. To give just a few examples: In April 2018, Kevin Skoglund, Senior Technical Advisor to the NEDC, posted on Twitter about Pennsylvania's consideration of the ExpressVote system. *See* https://twitter.com/kskoglund/status/987480631058759682. Andrew Appel, Petitioners' expert, authored blog posts about the ExpressVote XL's allegedly flawed printer head design in October 2018. *See* https://freedom-to-tinker.com/2018/10/16/design-flaw-in-dominion-imagecast-evolution-voting-machine/. The certification document that is the sole basis of Petitioners' claim that the ExpressVote XL is not accessible to voters with disabilities was published in November 2018, thirteen months before Petitioners commenced this action. Petition ¶¶ 176-90 & Ex. C.

Petitioners petitioned for reexamination of the ExpressVote XL in July 2019, more than seven months after Respondent certified it. *See* Ex. A to Petition. After Respondent denied the petition on September 3, 2019, Petitioners waited another three months before filing this action on December 12, 2019. Petitioners served the Petition by mail and did not seek expedited relief. They finally filed the instant Application on January 10.[5]

2. At This Point, It Is Impossible to Decertify the ExpressVote XL Without Disrupting the 2020 Elections and Threatening to Disenfranchise More Than One Million Pennsylvania Voters

As Declarations filed in the *Stein* action demonstrate, immediate decertification of the ExpressVote XL would throw several counties' 2020 election processes into turmoil, placing an enormous burden on county officials and threatening voters' ability to cast their ballots. Replacement of voting machines is no simple matter, especially in a county as large as Philadelphia; it involves time-consuming and intricate policy decisions, complex logistics, and thousands of hours of training and testing. *See* Declaration of Kathy Boockvar dated December 12, 2019, attached (without exhibits) as Ex. E, ¶¶ 75-84; Declaration of Joseph Lynch dated December 11, 2019, attached (without exhibits) as Ex. F; Declaration of Monique Nesmith-Joyner dated December 12, 2019, attached as Ex. G; Declaration of Bethany Salzarulo dated December 11, 2019, attached as Ex. H. The 2020 Presidential election is less than ten months away; there is no practical way to replace the ExpressVote XL in that time without risking Election Day chaos.

[5] Petitioners will likely argue that they filed suit when they did because of events during the November 2019 election. However, there is no connection between the alleged issues with the ExpressVote XL's performance in Northampton County and the flaws that Petitioners allege entitle them to relief. Even if there were, it would not explain why Petitioners let another two months pass between the election and Petitioners' Application.

III. ARGUMENT

When, as here, preliminary objections have been filed raising issues of jurisdiction, the Court must address them before granting injunctive relief. *See City of Philadelphia v. Commonwealth of Pennsylvania*, 922 A.2d 1, 9-10 (Pa. Commw. Ct. 2003) (because preliminary objections included failure to join indispensable parties, and thus raised issues of jurisdiction, "we must make a threshold determination of probable jurisdiction, otherwise the preliminary injunction should be denied"). Accordingly, the Court must resolve at least one of Respondent's Preliminary Objections before it takes further action.

Moreover, the outcome of Respondent's other Preliminary Objections and of the federal court proceedings are likely to eliminate some or all of Petitioners' claims. If the Court proceeds with the preliminary injunction proceedings now, it could find itself hearing evidence on complex, consequential, and high profile issues that it has no power to resolve. As well as being a burden on the Court, the parties, and third parties such as the counties, an unnecessary hearing could contribute to the voter confusion that Petitioners claim to seek to avoid.

Accordingly, interests of efficiency and fairness weigh in favor of a short stay of the Preliminary Injunction proceedings. There is no countervailing interest in moving the proceedings forward at this point. As shown above, any practical deadline for decertifying the ExpressVote XL in time for the 2020 elections has long since passed, and Petitioners' litigation conduct demonstrates that even they are not treating this matter as urgent.

IV. CONCLUSION

For the reasons stated above, Respondents respectfully ask the Court to stay the current deadline for a response to Petitioners' Application and postpone the Preliminary Injunction hearing until decisions have issued in the federal court matter and on the Preliminary Objections.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: January 16, 2020

By: */s/ Michele D. Hangley*

Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
Christina C. Matthias (I.D. No. 326864)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200
(215) 568-0300 (facsimile)

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Joe H. Tucker (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non–confidential information and documents.

Dated: January 16, 2020

/s/ Michele D. Hangley
Michele D. Hangley

EXHIBIT A

Received 1/15/2020 10:13:09 AM Commonwealth Court of Pennsylvania

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674 MD 2019

NOTICE TO PLEAD

Petitioners:
You are hereby notified to file a written response to the enclosed Preliminary Objections within twenty (20) days from service hereof, or a judgment may be entered against you.

/s/ Michele D. Hangley
Michele D. Hangley
Attorney for Respondent

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
Christina C. Matthias (I.D. No. 326864)
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Dimitrios Mavroudis (I.D. No. 93773)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NATIONAL ELECTIONS DEFENSE COALITION, *et al.*, Petitioners, v. KATHY BOOCKVAR, in her official capacity as Secretary of the Commonwealth, Respondent.	:	CIVIL ACTION No. 674 MD 2019

RESPONDENT'S PRELIMINARY OBJECTIONS

Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth ("Respondent" or "Secretary"), pursuant to Pennsylvania Rules of Appellate Procedure 1516 and

1517 and Pennsylvania Rule of Civil Procedure 1028, hereby presents Preliminary Objections to the Petition for Review Addressed to the Court's Original Jurisdiction of Petitioners, National Elections Defense Coalition and Citizens for Better Elections (together, the "Organization Petitioners") and Rich Garella, Rachel A. Murphy, Caroline Leopold, Stephen Strahs, Kathleen Blanford, Sharon Strauss, Anne C. Hanna, Raphael Y. Rubin, Robert F. Werner, Sandra O'Brien-Werner, Thomas P. Bruno, Jr., Roger Dreisbach-Williams, and Jeff R. Faubert (together, the "Individual Petitioners"). In support thereof, Respondent avers as follows:

I. INTRODUCTION

1. As Pennsylvania's chief election officer, Respondent leads the Department of State's efforts to protect the integrity and security of the electoral process. She coordinates these efforts with many other stakeholders, including federal regulators, public interest groups, voting technology experts, and the election directors and personnel of the Commonwealth's 67 counties, to ensure that Pennsylvania's elections are free, fair, secure, and accessible to all eligible voters.

2. One of Respondent's duties is to assess, test, and give guidance on voting technology. The legislature has delegated to Respondent the duty of determining which voting systems may be certified for use in the Commonwealth. In order to make these determinations, Respondent must navigate the complex requirements of two election statutes: the Pennsylvania Election Code, 25 P.S. § 2600 *et seq.* (the "Election Code"), and the federal Help America Vote Act, 42 U.S.C. § 15301 *et seq.* ("HAVA"), as well as other state and federal statutes and policies. Respondent must determine whether particular election technologies meet acceptable standards of voting security, confidentiality, accessibility, efficiency, and other criteria.

3. Petitioners ask this Court to insert itself into this process by ordering Respondent to reverse her decision to certify a device called the ExpressVote XL. Petitioners contend that

Respondent should not have certified the ExpressVote XL because, they claim, its security protections are not strong enough, it is not sufficiently accessible to voters with disabilities, it lacks adequate privacy protections, and it does not align with certain technical requirements of the Pennsylvania Election Code. Petitioners argue that the Court should favor their conjecture about the ExpressVote XL, and their interpretation of the relevant statutes, over the Secretary's careful assessment of the system.

4. The Petition is remarkable in what it does not contain. Petitioners do not allege that Respondent's decision to certify the ExpressVote XL was fraudulent, in bad faith, an abuse of discretion, or arbitrary. And they do not present facts that would support those allegations. They simply tell the Court that they disagree with Respondent's conclusions. But Respondent, not Petitioners, is charged with the responsibility to make certification decisions, and Respondent has broad discretion with respect to those decisions. In the absence of fraud, bad faith, abuse of discretion, or arbitrary conduct, this Court has no authority to substitute its judgment for Respondent's. Because Petitioners have not alleged anything beyond a reasonable exercise of Respondent's discretion, the Court should dismiss their claims.

5. Moreover, Petitioners lack standing to bring their claims. They do not, and cannot, allege that the ExpressVote XL's purported technical noncompliance with the Election Code has any direct impact on them. They also do not allege that the Individual Petitioners or any of the Organization Petitioners' members has a disability, which leaves them without standing to assert claims on behalf of voters with disabilities.

6. Finally, Petitioners have failed to join several necessary parties, the Counties that have actually purchased and implemented the ExpressVote XL.

7. Accordingly, this Court should dismiss each of Petitioners' claims.

II. PRELIMINARY OBJECTIONS

A. First Preliminary Objection: Counts I-VI Should Be Dismissed for Legal Insufficiency/Failure to State a Claim for Which Relief May Be Granted Because Petitioners Have Failed to Allege That Respondent's Certification of the ExpressVote XL Was Fraudulent, in Bad Faith, an Abuse of Discretion, or Clearly Arbitrary (Pa. R. C. P. 1028(a)(4))

8. Respondent incorporates by reference the preceding paragraphs of these Preliminary Objections.

9. The Secretary of the Commonwealth has the affirmative duty under the laws of the Commonwealth "[t]o examine and reexamine voting machines, and to approve or disapprove them for use" in the Commonwealth. 25 P.S. § 2621(b). The Secretary's determinations about which voting machines to approve and which voting machines to disapprove must be made "in accordance with the provisions of [the Election Code]," and "the requirements of section 301 of the Help America Vote Act of 2002 [*see* 52 U.S.C.A. § 21081]." *Id.* In order to merit approval for use in the Commonwealth, an electronic voting system and its components must satisfy seventeen specific requirements. *See* 25 P.S. § 3031.7 (listing requirements relating to, *inter alia*, ballot components, privacy, security, quality, and accuracy). HAVA adds more than a dozen additional requirements. 52 U.S.C.A. § 21081(a). Thus, in order to fulfill her duty with regard to evaluating voting machines, Respondent must engage in highly complex analysis of constantly developing technology and carefully account for the many specifications imposed by the Election Code and HAVA.

10. In light of the intricate nature of Respondent's evaluations of proposed voting machines, the difficulty of making such multi-faceted and nuanced determinations, and Respondent's expertise, Respondent is afforded broad discretion to make the "necessarily…subjective determination[s]" as to whether a particular voting system conforms to various Election Code requirements. *Banfield v. Cortes*, 110 A.3d 155, 174 (2015).

Respondent's "administrative discretion in overseeing the implementation of the Election Code," including making such determinations, "is entitled to great deference." *Id.* at 175. Because "the statutory scheme [that Respondent administers] is complex," this Court "must be even more cautious in substituting its discretion" for Respondent's expertise. *Laundry Owners Mut. Liab. Ins. Ass'n v. Bureau of Workers' Comp.*, 853 A.2d 1130, 1136 (Pa. Commw. Ct. 2004).

11. Given Respondent's broad discretion in the field of certification of voting systems, an allegation that her conclusions were incorrect is not sufficient to state a claim. In order to successfully challenge Respondent's certification of the ExpressVote XL, Petitioners must allege facts showing that Respondent's certification was "fraudulent, in bad faith, an abuse of discretion or clearly arbitrary." *Id.*

12. Petitioners have not alleged that Respondent's certification of the ExpressVote XL was fraudulent, in bad faith, an abuse of discretion or clearly arbitrary, and have not alleged facts that would support such a conclusion.

13. Petitioners therefore have failed to state a claim for which relief may be granted.

WHEREFORE, Respondent respectfully requests that this Court sustain her preliminary objection for failure to state a claim and enter an order dismissing Counts I-VI of the Petition as to all Petitioners.

B. Second Preliminary Objection: Petitioners Do Not Have Standing With Respect to the Violation of the Election Code Alleged in Count V Because Petitioners Have Failed to Allege a Substantial Interest in Ensuring the Accessibility of the ExpressVote XL for Individuals With Disabilities (Pa. R. C. P. 1028(a)(5))

14. Respondent incorporates by reference the preceding paragraphs of these Preliminary Objections.

15. To establish standing to seek relief from this Court, a party must demonstrate that it is "aggrieved," that is, that it has "a substantial, direct, and immediate interest in the matter." *Markham v. Wolf*, 136 A.3d 134, 140 (2016) (internal citations and quotations omitted).

16. In order to establish that a party's interest is "substantial," it must demonstrate "some discernible effect on some interest other than the abstract interest all citizens have in the outcome of the proceedings." *Spahn v. Zoning Bd. of Adjustment*, 977 A.2d 1132, 1151 (internal citation omitted). Generally speaking, being a qualified elector is an insufficient basis to establish standing to pursue claims directed at obtaining compliance with the Election Code. *In re General Election 2014*, 111 A.3d 785 (Pa. Commw. Ct. 2015); *Kauffman v. Osser*, 271 A.2d 236 (1970).

17. Organizations/associations cannot establish standing based solely on allegations that their "mission or purpose is implicated" by a matter; rather, they are held to the same "aggrieved" party requirements of demonstrating a substantial, direct, and immediate interest in the dispute in order to establish standing. *Spahn*, 977 A.2d at 1152. An association may have standing on behalf of its members, "even in the absence of injury to itself," if "the association [ ] allege[s] that at least one of its members is suffering immediate or threatened injury as a result of the challenged action." *North-Central Pennsylvania Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550, 554 (Pa. Cmwlth. Ct. 2003). *See also, Pennsylvania Gamefowl Breeders Ass'n v. Com.*, 533 A.2d 838, 840 (Pa. Commw. Ct. 1987) ("[An] association must allege that its members, or at least one of its members, are suffering immediate or threatened injury as a result of the contested action" in order to establish standing in the absence of a direct injury to the association.)

18. None of the Individual Petitioners pleads any facts that, if true, would demonstrate a "substantial interest" in ensuring the accessibility of the ExpressVote XL for

individuals with disabilities. Specifically, none of the Individual Petitioners alleges that she has a disability at all, much less a relevant disability that could possibly implicate the accessibility of the ExpressVote XL. Thus, none of the Individual Petitioners has alleged a "substantial" interest in challenging the alleged inaccessibility of the ExpressVote XL, that is, none has alleged an interest that exceeds the abstract interest all citizens have in ensuring that all qualified electors, including those with disabilities, have access to voting technology.

19. Likewise, neither of the Organization Petitioners pleads any facts that, if true, would demonstrate a "substantial interest" in ensuring the accessibility of the ExpressVote XL for individuals with disabilities. Specifically, neither of the Organization Petitioners alleges a discernable effect it has experienced or will experience as a result of the alleged inaccessibility of the ExpressVote XL, nor has either alleged that it has one or more members with a disability, relevant or otherwise.

20. Thus, none of the Petitioners has established in the Petition that they are "aggrieved" by the complained of matter in Count V, and therefore none of the Petitioners have established standing to pursue this claim.

WHEREFORE, Respondent respectfully requests that this Court sustain her preliminary objection for lack of standing and enter an order dismissing Count V of the Petition as to all Petitioners.

C. Third Preliminary Objection: Petitioners Do Not Have Standing With Respect to the Violations of the Election Code Alleged in Counts I-IV and VI Because They Have Not Alleged Substantial, Direct, and Immediate Harm (Pa. R. C. P. 1028(a)(5))

21. Respondent incorporates by reference the preceding paragraphs of these Preliminary Objections.

22. As discussed above, to establish standing a party must demonstrate that it is "aggrieved," that is, that it has "a substantial, direct, and immediate interest in the matter." *Markham*, 136 A.3d at 140 (internal citations and quotations omitted).

23. Electors cannot establish standing to pursue claims directed at obtaining compliance with the Election Code solely on the basis that they are qualified electors who intend to vote in upcoming elections. *In re General Election 2014*, 111 A.3d 785 (Pa. Commw. Ct. 2015); *Kauffman v. Osser*, 271 A.2d 236 (1970). "[M]erely alleging the common interest of all qualified electors that the provisions of the Election Code be followed" accompanied by "unsupported allegation[s]" that some claimed deviation from the mandates of the Election Code have or will affect the outcome of an election is an insufficient basis on which to establish "the requisite 'substantial, direct, and immediate' interest." *In re General Election 2014*, 111 A.3d at 793.

24. The Organization Petitioners claim that their interest in this action is to "guarantee[] everyone the right to vote and have their vote counted in a transparent and trustworthy electoral system" (National Election Defense Coalition) and "to ensure accurate, verifiable, and secure elections" (Citizens for Better Elections). Pet. ¶¶ 13-14. Neither of the Organization Plaintiffs claim to have members who have been, or expect to be, individually damaged by the ExpressVote XL.

25. The Individual Petitioners claim to reside and vote in jurisdictions that use the ExpressVote XL. None of them claims to have experienced any difficulties with the ExpressVote XL in the past. Pet. ¶¶ 6-30.

26. In support of Counts I-III of their Petition, Petitioners allege that the ExpressVote XL violates the Election Code because it does not have acceptable security protections or sufficient guarantees of accuracy. Pet. ¶¶ 79-130, 247-52.

27. In support of Count IV, Petitioners allege that the ExpressVote XL has design flaws that make it possible for voters' privacy to be invaded. Pet. ¶¶ 131-75, 253-55.

28. In support of Count VI, Petitioners allege that the ExpressVote XL does not comply with certain technical requirements for ballot design (paper color, binding, and format). Pet. ¶¶ 191-221, 258-62.

29. Petitioners do not allege any interest that is "peculiar to them," as necessary to establish standing to challenge the Election Code. *Kauffman*, 271 A.2d at 240. Rather, they base these claims on allegations that tend to establish an "interest common to that of all other qualified electors," that is, that Respondent comply with the Election Code in certifying voting machines. *Id.* These allegations fail to make out a "substantial, direct, and immediate interest."

WHEREFORE, Respondent respectfully requests that this Court sustain her preliminary objection for lack of standing and enter an order dismissing Counts I-VI of the Petition as to all Petitioners.

D. Fourth Preliminary Objection: Count VII Should Be Dismissed for Legal Insufficiency/Failure to State a Claim for Which Relief May Be Granted Under Article I, Sections 5 and 26 of the Pennsylvania Constitution Because Petitioners Have Not Alleged a Plain, Palpable and Clear Abuse of Power That Actually Infringes on the Exercise of Their Voting Rights (Pa. R. C. P. 1028(a)(4))

30. Respondent incorporates by reference the preceding paragraphs of these Preliminary Objections.

31. In order to state a claim that action by the Commonwealth should be invalidated under Article I, Section 26 of the Pennsylvania Constitution – which guarantees that "the

Commonwealth…shall [not] deny to any person the enjoyment of any civil right" – and Article I, Section 5 of the Pennsylvania Constitution – which guarantees that "Elections shall be free and equal…" – petitioner must allege that the action constitutes a "plain, palpable and clear abuse of the power which actually infringes on the rights of the electors." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766 n.33, 808-09 (2018) (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (1869)).

32. "Although…the right to vote is fundamental and pervasive of other basic civil and political rights, the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner." *Banfield v. Cortes*, 110 A.3d 155, 176-77 (2015) (quotation and citations omitted) (rejecting Article I, Sections 5 and 26 challenges to the Secretary of the Commonwealth's certification of certain electronic voting machines in the absence of evidence that the certification decision was unreasonable or discriminatory).

33. As the Pennsylvania Supreme Court has explained, the Legislature delegated the "discretionary decision[s]" required in interpreting and applying the Election Code to the Secretary, "Pennsylvania's chief election official," and courts ordinarily should defer to such decisions made by the executive in carrying out a statute it is tasked with enforcing. *Banfield*, 110 A.3d at 261.

34. Petitioners have failed to allege facts that, if true, would establish that Respondent's decision to certify the ExpressVote XL constituted a "plain, palpable and clear abuse of power which actually infringes on the rights of electors." Much to the contrary, Petitioners' allegations are consistent with the reasonable exercise of Respondent's discretion to implement the Election Code.

WHEREFORE, Respondent respectfully requests that this Court sustain her preliminary objection for failure to state a claim and enter an order dismissing Count VII of the Petition as to all Petitioners.

E. Fifth Preliminary Objection: Counts I-VII Should Be Dismissed for Nonjoinder of A Necessary Party Because Petitioners Seek Redress from Certain Pennsylvania Counties and Those Counties Are Therefore Indispensable to the Resolution of This Action (Pa. R. C. P. 1028(a)(5))

35. Respondent incorporates by reference the preceding paragraphs of these Preliminary Objections.

36. A party is indispensable to an action "when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *City of Philadelphia v. Com.*, 838 A.2d 566, 581 (2003). The "basic inquiry" involved in determining whether a party is a necessary party is "whether justice can be done in the absence of him or her." *HYK Const. Co., Inc. v. Smithfield Tp.*, 8 A.3d 1009, 1015 (Pa. Commw. Ct. 2010) (internal quotation and citation omitted). In making this inquiry courts consider whether an absent party has a right or interest related to the claim, what the nature of that right or interest is, whether it is essential to the merits of the issue, and "[whether] justice [can] be afforded without violating the due process rights of absent parties[.]" *Id.* (quoting *City of Philadelphia*, 838 A.2d at 581 n.11).

37. Here, three Pennsylvania counties are unquestionably essential to this action. Philadelphia County, Northampton County, and Cumberland County have "spent millions of dollars buying [ExpressVote XL voting machines]," Pet. ¶ 3, and they all "intend to use the ExpressVote XL as the primary voting machine for all elections in 2020." Pet. ¶ 78. These three counties clearly have significant rights and interests that directly bear on and are essential to the merits of Petitioners' claim seeking de-certification of the ExpressVote XL, which if granted

would leave these counties scrambling at the last minute to replace their voting machines in a very short amount of time. Justice most certainly cannot be afforded in this case without violating the due process rights of Philadelphia, Northampton, and Cumberland Counties, unless these parties are joined in the action.

38. Even more importantly, Petitioners revealed in their recently filed Application for Special Relief in the Form of a Preliminary Injunction under Pa. R.A.P. 1532 that they are seeking relief from Philadelphia, Northampton, and Cumberland Counties in this case. Petitioners request an order from the Court enjoining the Commonwealth, in part, "from using the ExpressVote XL in any election," and requiring the Commonwealth "to implement replacement systems…" App. For Special Relief at 1. The Commonwealth has no ability to determine which of the voting systems it certifies will be used during elections. The counties do. This request is necessarily directed to the counties that have purchased ExpressVote XL voting machines and intend to use them in the upcoming elections. Petitioners seek redress from Philadelphia, Northampton, and Cumberland Counties, and they are necessary parties to this case. *Compare Banfield v. Cortes*, 922 A.2d 36, 43-44 (Pa. Commw. Ct. 2007) (overruling preliminary objection asserting failure to join necessary parties, in part, because petitioners did not seek redress from those parties).

WHEREFORE, Respondent respectfully requests that this Court sustain her preliminary objection for failure to join a necessary party and enter an order dismissing Counts I-VII of the Petition as to all Petitioners.

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Dated: January 15, 2020

By: /s/ Michele D. Hangley

Michele D. Hangley (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
Christina C. Matthias (I.D. No. 326864)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200
(215) 568-0300 (facsimile)

TUCKER LAW GROUP
Joe H. Tucker (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non–confidential information and documents.

Dated: January 15, 2020

/s/ Michele D. Hangley
Michele D. Hangley

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN, RANDALL REITZ, ROBIN HOWE, SHANNON KNIGHT, and EMILY COOK,

Plaintiffs,

-against-

KATHY BOOCKVAR, in her official capacity as Acting Secretary of the Commonwealth; and JONATHAN MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation,

Defendants.

No. 16-CV-6287 (PD)

MOTION TO ENFORCE THE SETTLEMENT AGREEMENT

Plaintiffs Jill Stein, Randall Reitz, Robin Howe, Shannon Knight, and Emily Cook hereby move the Court, pursuant to Paragraph 13 of the Parties' Settlement Agreement (Dkt. #108-1) and Paragraph 3 of the Court's Order of dismissal (Dkt. #110), upon the annexed memorandum of law, Declaration of Ilann M. Maazel with all exhibits thereto, Declaration of J. Alex Halderman, and Declaration of Rich Garella, for an order (1) finding Defendants in breach of the Settlement Agreement; (2) enjoining Defendants to specifically perform their obligations under the Settlement Agreement by immediately rescinding the certification of the Election Systems & Software ExpressVote XL voting system (the "ExpressVote XL") for use in the Commonwealth of Pennsylvania; and (3) enjoining Defendants from re-certifying the ExpressVote XL for use in the Commonwealth of Pennsylvania at any time until after the expiration date of the Settlement Agreement.

Dated: November 26, 2019

EMERY CELLI BRINCKERHOFF & ABADY LLP

/s/
Ilann M. Maazel, Esq.*
Douglas E. Lieb, Esq.*
600 Fifth Avenue, 10th Floor
New York, NY 10020
Phone: 212-763-5000
Fax: 212-763-5001
Email: imaazel@ecbalaw.com

* *Admitted pro hac vice*

MONTGOMERY McCRACKEN WALKER & RHOADS LLP

John G. Papianou, Esq.
Brett Waldron, Esq.
1735 Market Street
Philadelphia, PA 19103
Phone: 215-772-7389

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN, RANDALL REITZ, ROBIN HOWE, SHANNON KNIGHT, and EMILY COOK,

Plaintiffs,

-against-

KATHY BOOCKVAR, in her official capacity as Acting Secretary of the Commonwealth; and JONATHAN MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation,

Defendants.

No. 16-CV-6287 (PD)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO ENFORCE THE SETTLEMENT AGREEMENT

Emery Celli Brinckerhoff & Abady LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 763-5000

Montgomery McCracken Walker & Rhoads LLP
1735 Market Street
Philadelphia, PA 19103
(215) 772-1500

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PRELIMINARY STATEMENT

In this case, Plaintiffs—a 2016 presidential candidate and four Pennsylvania voters—challenged the Commonwealth of Pennsylvania's election system as a whole. Plaintiffs alleged that the Commonwealth disenfranchised voters by forcing them to use outdated machines that failed to work reliably, then erecting insurmountable barriers to having those votes counted under the byzantine provisions of the Election Code. After the Court denied Defendants' motion to dismiss in substantial part, the parties entered into a settlement agreement painstakingly negotiated with the involvement of Magistrate Judge Rice (the "Agreement," Maazel Decl. Ex. A). This Court has jurisdiction to enforce the terms of the Agreement. Agreement ¶ 13. The Agreement is designed, among other things, to achieve one clear goal: "every Pennsylvania voter in 2020 uses a voter-verifiable paper ballot." Agreement ¶ 3.

To that end, the Agreement limits Defendants' ability to certify voting systems in Pennsylvania. Defendants may only certify a voting system if: (a) "[t]he ballot on which each vote is recorded is paper," *i.e.*, the system must use "paper ballot[s]," *id.* ¶¶ 2(a), 3; (b) the system "produce[s] a voter-verifiable record of each vote," *id.* ¶ 2(b); and (c) the system is "capable of supporting a robust pre-certification auditing process" to verify the accuracy and integrity of election results before the results are certified, *id.* ¶ 2(c). The Agreement further requires the Secretary to "direct each county in Pennsylvania to implement these voting systems by the 2020 primaries." *Id.* ¶ 3. Taken together, these provisions ensure that all Pennsylvania counties transition to voter-verifiable, auditable paper-ballot systems by 2020.

Plaintiffs acknowledge Defendants' efforts to implement the Agreement and move toward the goal of voter-verifiable, auditable, paper-ballot voting in Pennsylvania by 2020. Progress has been made. Regrettably, however, Defendants have certified a voting system, the Election Systems & Software ExpressVote XL, that violates the Agreement's three clear

requirements. Defendants improperly certified the ExpressVote XL twice in the past year despite the availability of many other systems that comply with the Agreement and are consistent with best practices. This is significant. Absent relief, 17 percent of Pennsylvania voters will use this defective, non-compliant system, including the voters of Philadelphia County.

First, the ExpressVote XL counts votes by counting bar codes printed by a machine on paper. It does not count handwritten marks made by voters themselves on paper, or marks made by ballot-marking devices (BMDs) on paper that are visually comprehensible to voters. Because the ExpressVote XL counts bar codes, not comprehensible markings, it does not produce a "voter-verifiable record of each vote." The "vote" is the bar code. No voter can verify a bar code.

Second, the ExpressVote XL does not use a "paper ballot." And, because it makes reliable recording of the voter's choice on paper entirely dependent upon software, it does not function like a true paper ballot system in important ways. These shortcomings frustrate the parties' intent in requiring paper ballots.

Third, because its paper records may not accurately reflect voters' intent, the ExpressVote XL is not capable of supporting robust pre-certification auditing of election results.

The Court should therefore find Defendants in breach of the Agreement, order Defendants to immediately rescind the certification of the ExpressVote XL, and enjoin Defendants from again certifying the ExpressVote XL for the duration of the Agreement.

PROCEDURAL BACKGROUND

On November 30, 2018, Defendants initially certified the ExpressVote XL as safe for use by voters in Pennsylvania elections and compliant with the requirements of the Election Code under 25 P.S. § 3031.5(b). Maazel Decl. Ex. B at 2. On July 17, 2019, Pennsylvania voters petitioned for a reexamination of the system under 25 P.S. § 3031.5(a). *Id.* app. A. The

reexamination required Defendants to again decide whether the ExpressVote XL would be certified for use in the Commonwealth.[1]

Aware that the request for a reexamination was pending, on July 29, 2019, Plaintiffs notified Defendants under Paragraph 14 of the Agreement that the ExpressVote XL did not comply with the Agreement. Maazel Decl. Ex. C.

On September 3, 2019, Defendants announced the results of the reexamination and again certified the ExpressVote XL for use in the Commonwealth. Maazel Decl. Ex. B at 2. On September 12, 2019, Defendants responded to Plaintiffs under Paragraph 15 of the Agreement and explained the basis of their belief that the ExpressVote XL is compliant. Maazel Decl. Ex. D. Plaintiffs sent a further notice of noncompliance on October 1, 2019, Maazel Decl. Ex. E, to which Defendants again responded on October 29, 2019, Maazel Decl. Ex. F.

On Election Day, November 5, Northampton County conducted its first election using ExpressVote XL machines that it purchased in March. Voters reported widespread "irregularities" with the machine. As a result of this election disaster, the county abandoned ExpressVote XL machines to count the votes. *See* Maazel Decl. Exs. G, H. Instead, the county borrowed scanners from neighboring counties to count the votes. *See* Maazel Decl. Ex. I.

On November 6, 2019, the parties conferred by telephone, and were unable to resolve their differences. During that meet-and-confer, Plaintiffs informed Defendants that they would likely seek relief from the Court. On November 10, 2019, having learned about the problems in Northampton, Plaintiffs inquired one last time whether the State would modify its position. The State refused. *See* Maazel Decl. Ex. J. This motion follows.

[1] Counties are responsible for purchasing voting equipment. Counties therefore ultimately decide for themselves whether to use the ExpressVote XL or some other certified voting system.

LEGAL STANDARD

This Court has jurisdiction to enforce the Agreement because the Agreement so provides, Agreement ¶ 13, and the Court retained such jurisdiction in its order dismissing the case, Dkt. #110. *See Kokkonen v. Guardian Life Ins. Co of Am.*, 511 U.S. 375, 381 (1994). Pennsylvania law governs the interpretation of the Agreement. Agreement ¶ 23. Settlement agreements are contracts, and under Pennsylvania law, their enforcement is "governed by principles of contract law." *DeHainaut v. Cal. Univ. of Pa.*, 490 F. App'x 420, 422 (3d Cir. 2012) (quoting *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999)).

"The primary goal of contract interpretation is to determine the intent of the parties." *Wells Fargo Bank. N.A. v. Chun Chin Yang*, 317 F. Supp. 3d 879, 886 (E.D. Pa. 2018). "[I]t is 'firmly settled' under Pennsylvania law that 'the intent of the parties to a written contract is contained in the writing itself.'" *Id.* (quoting *Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc.*, 247 F.3d 79, 92 (3d Cir. 2001)).

Given the non-monetary nature of Defendants' obligations under the Agreement, the appropriate remedy for any breach is specific performance. *See, e.g., Cal. Sun Tanning USA, Inc. v. Electric Beach, Inc.*, 369 F. App'x 340, 348 (3d Cir. 2010).

ARGUMENT

I. ON THE EXPRESSVOTE XL, THE "VOTE" IS THE BAR CODE

In the mode certified for use in Pennsylvania, the ExpressVote XL works as follows:

1. A card is inserted into the machine to tell the machine which elections the voter can vote in.
2. The machine displays those elections and the candidates running in them on a touchscreen.

3. The voter makes her choice of candidate(s) in those races on the touchscreen, then presses "print."

4. The machine prints the voter's choices on a piece of paper.

5. The piece of paper includes (a) a series of bar codes that are supposed to reflect the voter's choices and (b) a written record of the voter's choices.

6. The machine scans the *bar code* on the piece of paper.

7. The voter can, with some difficulty, review the physical piece of paper through glass.

8. If the voter approves what she sees, she presses a button to cast her vote.

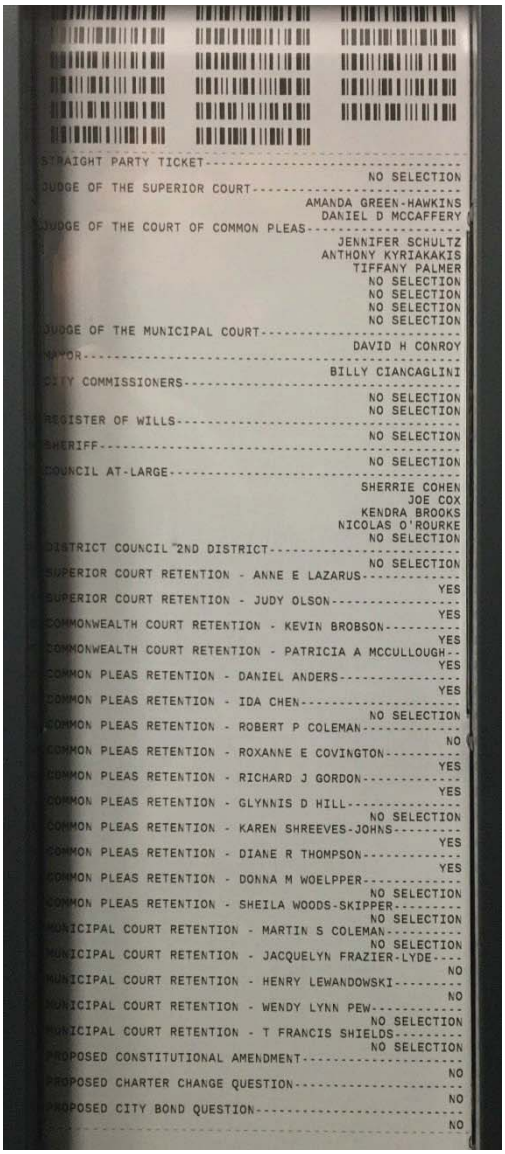
9. The vote recorded from the bar code is saved and tabulated.

10. The piece of paper goes back into the machine and is deposited and stored.

See Maazel Decl. Ex. B at 6.[2]

Thus, while the voter makes his or her choices on a touchscreen, the system actually counts the piece of paper. That piece of paper looks like this:

[2] A video showing how this process appears from the voter's perspective is available here: https://youtu.be/UjWQnngHRgE.



This system has three fundamental problems. Each violates the Agreement.

First, it does not provide the required "voter-verifiable record of each vote." Agreement ¶ 2(b). The scanner reads the bar code, not the words, to tabulate the results. Declaration of J. Alex Halderman dated Nov. 21, 2019 ("Halderman Decl.") ¶ 8. Unless the voter can somehow decipher a bar code, she cannot know whether the writing on the paper matches the vote that the machine will tabulate. The voter can only verify the *words*. She cannot verify the *vote*. She has to take it on faith that the words match the vote—the bar code.

Second, it does not use a paper ballot and, because of its problematic design, thwarts the parties' intent in requiring paper ballots. Paper ballots are safer and more reliable for several reasons. Among the most important is that paper ballots minimize the role of error- and attack-prone software in mediating between the voter's expression of her choice and the tabulation of the vote. The ExpressVote XL largely neutralizes these advantages by scanning the ballot before the voter sees it and depending upon software to avoid tampering with the printed ballot.

Third, because one cannot be sure that the paper reflects voter intent, the ExpressVote XL cannot support robust pre-certification auditing of the election results.

II. THE EXPRESSVOTE XL DOES NOT "PRODUCE A VOTER-VERIFIABLE RECORD OF EACH VOTE"

The Agreement permits Defendants to certify a voting system only if it "produce[s] a voter-verifiable record of each vote." Agreement ¶ 2(b). The ExpressVote XL does not do so.

With ordinary paper ballots read by optical scanners, the "vote" is the voter's own marking on a piece of paper. On the ExpressVote XL, however, the "vote" is the bar code. *See* Maazel Decl. Ex. B at 6; Halderman Decl. ¶ 8. The voter can verify the text. The voter cannot verify the bar code. But it is the bar code, not the text, that counts as the vote. It is perfectly possible for a malfunctioned, hacked, or compromised machine to print one thing in the text and another in the bar code. *See* Halderman Decl. ¶ 9. For precisely these reasons, the State of Colorado in September 2019 decided to forbid the use of QR codes on ballots and to require that all ballots be tabulated using "human-verifiable information."[3] Maazel Decl. Ex. K. As Colorado found, "[a]lthough voters can see their vote choices, they cannot verify that the QR

[3] QR codes are functionally identical to bar codes but present information that can be scanned by a machine horizontally and vertically, rather than just in one direction.

code is correct. These ballots are tabulated by machines that decode the votes contained in the QR code. QR codes . . . are potentially subject to manipulation." *Id.*

That the ExpressVote XL requires voters to review the printed paper through glass further exacerbates these problems. While most BMDs release a piece of paper later scanned through an optical scanner, the ExpressVote XL only shows the piece of paper to the voter through a display window. In an informal survey of 150 Philadelphia voters who used the ExpressVote XL on November 5, 2019, about half expressed difficulty reading the paper through the glass window. Many commented that the print was "small" or "tiny" and that the lighting in the voting booth cast "shadows" on the display. *See* Declaration of Rich Garella dated November 25, 2019.

From the perspective of the voter, it is as if the ExpressVote XL printed out every voter's vote in Greek and scanned and tabulated the Greek version, while also printing what it claimed to be an English translation in semi-legible form. The voter's vote is recorded in a foreign alphabet she does not understand (unless she happens to read Greek). She has no way of knowing whether the translation accurately reflects the inscrutable original that the machine actually counts as her vote. She therefore cannot verify whether the machine has accurately translated her intention to the printed page. All she can do is hope the translation is accurate.

The parties' Agreement requires more. The Agreement forbids certification of any voting system unless it provides a "voter-verifiable record of each *vote*." Agreement ¶ 2(b) (emphasis added). The ExpressVote XL does not provide such a record.

III. THE EXPRESSVOTE XL DOES NOT USE PAPER BALLOTS AND FRUSTRATES THE PARTIES' INTENT IN REQUIRING PAPER BALLOTS

The Agreement also permits Defendants to certify a voting system only if "the ballot on which each vote is recorded is paper." *Id.* ¶ 2(a). The requirement furthers the parties'

objective that "every Pennsylvania voter in 2020 uses a voter-verifiable paper ballot." *Id.* ¶ 3. The ExpressVote XL uses paper, but it does not use paper ballots. It violates the parties' Agreement for this separate reason as well.

A. Not Every Piece of Paper Is a Paper Ballot

"Paper ballot" is a defined term in the Pennsylvania Election Code. It means a "printed paper ballot which *conforms in layout and format to the voting device in use*." 25 P.S. § 3031.1 (emphasis added). A paper ballot stands in contrast to a "ballot card," which refers to "a card which is compatible with automatic tabulating equipment and on which votes may be registered." *Id.* These definitions draw a clear distinction. A ballot card is any old piece of paper on which votes can be recorded in a manner susceptible to automated counting. But a paper ballot must to do more than simply be countable by a machine. It must "conform[] in layout and format" to the equipment the voter is actually using to indicate his choice among candidates. *Id.* In other words, it needs to look like a ballot. It needs to have choices on it. The National Institute of Standards and Technology, a federal agency that performs election security research, similarly defines a "paper ballot" as "[a] piece of paper, or multiple sheets of paper, *on which all contest options of a given ballot style are printed*." Maazel Decl. Ex. L (emphasis added). A paper ballot stands in contrast to a "voter-verified paper audit trail," which is simply "[a] paper document that the voter can review before officially casting their ballot." *Id.*

These definitions are consistent with the ordinary meaning of "ballot" and "paper ballot" in the election context. When one speaks of a "ballot" being presented to voters, one refers to the array of candidates among whom voters are given the option to choose. That is why candidates talk about being "on the ballot," for example. The Election Day "ballot," in the everyday meaning of that term, is not any scrap of paper on which the voter writes down his choice. It is the menu of options from which the voter chooses.

The piece of paper used by the ExpressVote XL is not a "paper ballot" under either the Election Code definition or the ordinary meaning of the term. It does not list all the candidates in all the races. It does not conform visually to the options presented to the voter on the ExpressVote XL touchscreen. The piece of paper used by the ExpressVote XL is therefore not a ballot. In the language of the Election Code, it is, if anything, a "ballot card." *Id.* § 3031.1. In ordinary language, it is probably best described as a receipt. Revealingly, even Defendants do not call it a paper ballot. They call it a "vote summary record" instead. Maazel Aff. Ex. B at 6.

This is not a problem endemic to all election systems that use a ballot-marking device to mark paper ballots. For example, the ClearBallot ClearAccess BMD, which is certified for use in Pennsylvania, prints an actual marked paper ballot after the voter uses the machine to make her choice. *See* Maazel Decl. Ex. M at 20-21. In certifying the ClearAccess for use in Pennsylvania in March 2019, Defendants described the piece of paper generated by that BMD as a "paper ballot," not a "vote summary record." *Id.* at 6. It is entirely possible for an electronic ballot-marking device to use a "paper ballot," within the meaning of that term under the Election Code and in plain English. The ExpressVote XL simply does not do so.

B. Design Flaws in the ExpressVote XL Frustrate the Purpose of Using Paper Ballots

Whether the ExpressVote XL uses a "paper ballot" is not just a matter of semantics. Regardless of what the piece of paper is called, the ExpressVote XL impermissibly frustrates the parties' purpose in requiring paper ballots in the Agreement because it does not function as a true paper ballot system in certain important ways.

Paper ballots enhance transparency and reliability by not using error- and attack-prone software to translate the voter's expression of his intention into an official record. With a paper ballot, the voter creates the official record of his vote with his own hand. The official

record of his vote—his ballot—is readily understandable to him, and he can tell if he has made a mistake. Unless he mismarks the page and does not realize it, the official record of his vote will reflect his choice. *See* Halderman Decl. ¶ 3.

The paper used by the ExpressVote XL does not serve these purposes. Beyond the fact that the bar code is incomprehensible to voters, the ExpressVote XL has two conspicuous design flaws that could cause the official paper record not to reflect the voter's choice if the software is malfunctioning or compromised.

First, when the paper is fed back into the machine after the voter has had the chance to look at it, the paper passes *back* through the printer that printed it. The software that runs the machine is *supposed* to make the printhead lift up so that the paper can pass back into the collection bin without making physical contact with the printhead. *See* Maazel Decl. Ex. J. But if the software is malfunctioning or hacked, the printhead could make physical contact with the paper *after* the voter has reviewed it and make new marks on the paper without the voter's knowledge. *See* Halderman Decl. ¶ 6.[4]

Second, the ExpressVote XL scans the bar code on the paper *before* the voter reviews the paper, not after. *See* Maazel Decl. Ex. B at 6. In most paper ballot systems, the voter marks his vote, has the chance to review it, and then scans it into a machine for tabulation. The ExpressVote XL works differently. The machine scans the vote; then the voter has the chance to review it; then the machine tabulates the already-scanned result if the voter does not

[4] In recertifying the machine, Defendants brushed aside this design flaw. They claimed that the voter would *hear* the printhead reprinting their ballot in the event of such a malfunction because the printer is noisy. *See* Maazel Aff. Ex. B at 7. This excuse is wrong for three reasons. First, an untrained voter would have no reason to find such noises suspicious. Second, the voter would have no reason to be listening to the machine at the relevant point in time, since he would have already hit the button to cast his vote and might be gathering his things or walking away. Third, even if the voter paid attention, heard the noises, and found them suspicious, no remedy exists that he can seek from a poll worker.

reject what he sees. That sequence of events is unusual for a paper ballot system and is more analogous to a direct-recording electronic voting machine that prints out a receipt after the fact. It makes the voter entirely reliant upon software not to cast his scanned ballot if he spots an error. Every vote—whether correct or erroneous—gets scanned into the ExpressVote XL. All that stops the erroneous ones from being cast and tabulated is software. *See* Halderman Decl. ¶¶ 5, 7.

Not only does the ExpressVote XL fail to use "paper ballots" under the relevant definitions of that term, but it also fails to *function* like a paper ballot system in important ways. It therefore violates the Agreement, which unambiguously requires paper ballots. *See* Agreement ¶¶ 2(a), 3.

IV. THE EXPRESSVOTE XL DOES NOT SUPPORT ROBUST PRE-CERTIFICATION AUDITING OF ELECTION RESULTS

Because its paper records do not necessarily reflect voters' actual votes, the ExpressVote XL is not "capable of supporting a robust pre-certification auditing process." Agreement ¶ 2(c).

Different methods of pre-certification auditing exist, but they share a basic premise: checking a sample of actual ballots to "correct any computer-based error or fraud." Halderman Decl. ¶ 10. In a voting system that uses paper ballots with an optical scanner, the audit hand-counts a sample of paper ballots to make sure they are consistent with the machine-counted result to a sufficient degree of confidence. This procedure confirms—before the results are certified—that the result tabulated by the scanner matches voters' choices. It increases public confidence in the result and makes costly recounts unnecessary.

The ExpressVote XL cannot support the same kind of effective auditing. As explained above, a successful hack could cause the ExpressVote XL to produce paper records

that deviate from voters' intended votes—whether by remarking ballots or by casting rejected votes. Halderman Decl. ¶¶ 7-8. If such an attack occurred, the paper records would match the machine count, but neither would match voters' actual choices. *See id.* ¶ 10. Counting paper records in the audit would therefore accomplish nothing—or worse, it would actually "confirm" the wrong result.

The Agreement requires that voting systems certified for use in Pennsylvania support robust pre-certification auditing. The design of the ExpressVote XL makes it impossible to do so. It therefore does not comply with the Agreement.

CONCLUSION

The Court should enter an order finding that the ExpressVote XL does not comply with the Agreement, directing Defendants to immediately decertify the ExpressVote XL, and enjoining Defendants from recertifying it for the duration of the Agreement.

Dated: November 26, 2019

EMERY CELLI BRINCKERHOFF & ABADY LLP

/s/
Ilann M. Maazel, Esq.*
Douglas E. Lieb, Esq.*
600 Fifth Avenue, 10th Floor
New York, NY 10020
Phone: 212-763-5000
Fax: 212-763-5001
Email: imaazel@ecbalaw.com

* *Admitted pro hac vice*

MONTGOMERY McCRACKEN WALKER & RHOADS LLP

John G. Papianou, Esq.
Brett Waldron, Esq.
1735 Market Street
Philadelphia, PA 19103
Phone: 215-772-7389

Attorneys for Plaintiffs

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN, et al., Plaintiffs, v. KATHY BOOCKVAR, in her official capacity as Secretary of the Commonwealth, and JONATHAN MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections and Legislation, Defendants.	CIVIL ACTION No. 16-cv-6287(PD)

DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION TO ENFORCE THE SETTLEMENT AGREEMENT

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I. INTRODUCTION

A little more than a year ago, with great fanfare, Plaintiffs achieved one of their stated goals in this litigation. Throughout the lawsuit, Plaintiffs had asserted that Pennsylvania counties should not use direct-recording electronic voting systems ("DREs") in elections. Plaintiffs contended that DREs are vulnerable to hacking because they do not produce a contemporaneous paper record that a voter can review before casting a vote. Accordingly, Plaintiffs argued, DREs provided no assurance to voters that their votes had been recorded correctly and did not allow for meaningful audits and recounts.

The Pennsylvania Supreme Court has held that use of DREs complies with the Pennsylvania Election Code. *See Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015). And in 2016, this Court rejected Plaintiffs' motion for preliminary injunctive relief, finding that Plaintiffs had shown "little more than a theoretical possibility" of hacking. (ECF 55, at 29.) Nonetheless, Defendants, the Pennsylvania Secretary of State and the Department of State's Deputy Secretary for Elections and Commissions (formerly the Commissioner of the Bureau of Commissions, Elections and Legislation), agreed that DREs should be phased out and replaced with voting systems that provided a voter-verifiable, auditable paper record. Defendants and the Pennsylvania Department of State ("DOS") set this process in motion in early 2018, announcing that all new voting systems procured in the Commonwealth would have voter-verifiable paper records. On November 28, 2018, Plaintiffs and Defendants entered into a Settlement Agreement that reflected, *inter alia*, their shared goal of replacing DREs with voting systems with auditable paper records. The Settlement Agreement provided that DOS would not certify any new voting system for use in the Commonwealth unless it provided a paper "voter-verifiable record of each vote."

At the time, Plaintiffs treated the settlement as a triumph, announcing a "[h]uge victory for election integrity!" (Wiygul Decl., Ex. 1.) Now, however, they appear to have second thoughts. As the settlement talks progressed, DOS had been in the process of certifying a voting system that included the Election Systems & Software ("ES&S") ExpressVote XL (the "ExpressVote XL"); Plaintiffs knew this. DOS certified the system on November 30, 2018, just two days after the execution of the Settlement Agreement, and Plaintiffs made no complaint that this certification violated their newly inked agreement. It was not until many months had passed that Plaintiffs first contended that the Settlement Agreement prohibited certification of this equipment; they filed their Motion to Enforce the Settlement Agreement (the "Motion") nearly a year after the certification.

The Court should deny the Motion. The Settlement Agreement's terms are unambiguous, and the ExpressVote XL complies with them. Plaintiffs ask the Court to ignore some of the Agreement's plain terms, apply implausible definitions to others, and factor in random criticisms of the ExpressVote XL that have no possible connection to the Settlement Agreement. Even if the Settlement Agreement's material terms were ambiguous, parol evidence compellingly shows that both Plaintiffs and Defendants believed that the ExpressVote XL complied with those terms. As the parties were negotiating the Settlement Agreement, Defendants gave Plaintiffs a list of the voting systems Defendants were preparing to certify; significantly, this list included the ExpressVote system. Plaintiffs, through their lead counsel and their expert, J. Alex Halderman, explained that they did not object to certification of the system as long as DOS imposed certain conditions, which DOS imposed.

Therefore, Plaintiffs cannot show that Defendants have breached the Settlement Agreement. Moreover, the Court should deny their Motion for other reasons. First, Plaintiffs

could have made every argument in their Motion on November 30, 2018, the day that DOS certified the ExpressVote XL. Instead, they inexplicably sat on their hands while counties across the Commonwealth invested enormous amounts of time and money in evaluating, purchasing, and introducing their voters to the ExpressVote XL. Two counties, Philadelphia and Northampton, have already used the system in elections. It is too late for the counties that have purchased the ExpressVote XL to adopt new systems in time for the 2020 elections, and decertification of the system at this late point will cause upheaval that could threaten those elections. In its 2016 holding that the doctrine of laches barred Plaintiffs' claim for injunctive relief, the Court noted that Plaintiffs' "unexplained, highly prejudicial delay" in bringing their claims had caused an unnecessary "judicial fire drill." (ECF 55, at 1, 20.) Once again, for no apparent reason, Plaintiffs have delayed seeking relief until the point where relief would inflict devastating harm on the public. Once again, the Court should find that the doctrine of laches bars Plaintiffs' requested relief.

Second, Plaintiffs' requested relief is barred by the doctrine of unclean hands. Third, principles of federalism weigh against granting the requested injunction. Finally, Plaintiffs cannot make out the factors necessary to grant a mandatory permanent injunction; indeed, they do not even discuss these factors in their Motion. Given the harm that decertification of the ExpressVote XL would inflict upon the Commonwealth and its citizens, the balance of hardships weighs heavily against Plaintiffs and an injunction would disserve the public interest.

II. BACKGROUND

A. Plaintiffs Pursue This Litigation, Seeking to Replace Pennsylvania's Direct-Recording Electronic Machines With Systems that Provide Voter-Verifiable Paper Records

1. Plaintiffs Seek a Preliminary Injunction, Complaining About DREs' Lack of a "Paper Trail"

Unsuccessful Green Party Presidential Candidate Jill Stein and Randall Reitz, a Montgomery County voter, filed this lawsuit on December 5, 2016, nearly a month after the November 8, 2016 Presidential Election. Although much of Plaintiffs' Complaint focused on potential recounts or contests of Pennsylvania's election results, Plaintiffs also criticized Pennsylvania's voting machines – in particular, the "six DRE machine models" that then-Secretary of State Pedro Cortés had certified. (ECF 55, at 9; *see also* Compl. ¶ 14 (ECF 1) ("The State of Pennsylvania relies primarily on direct electronic recording ('DRE') machines to record the vote.")).[1] The first paragraph of Plaintiffs' Complaint asserted the gist of their grievance: "There is no paper trail." (Compl. ¶ 1; *see also id.* ¶ 15 ("DRE machines in Pennsylvania do not leave a paper trail accessible to voters or to anyone else. Voters touch boxes on a screen, get no paper confirmation of their vote, and hope their votes were counted accurately."); *id.* ¶ 21 ("[F]or counties that use DRE machines, there is no paper ballot. It is impossible for voters to verify even a single DRE vote on a piece of paper.").) Plaintiffs asked this Court "to declare several

[1] In *Banfield v. Aichele*, 51 A.3d 300, 302 (Pa. Commw. Ct. 2012), *aff'd sub nom. Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015), the Commonwealth Court described DREs as follows: "DREs do not use a document/paper ballot in the vote process. Rather, DREs display ballots electronically on an interface screen and allow a voter to make choices with a push button, dial or touch screen and then cast his or her vote." 51 A.3d at 302. Significantly, although the DREs were "capable of printing the vote data at the close of the election," they did "not produce a contemporaneous paper record of an individual's vote." 110 A.3d at 159. Instead, the DREs "recorded each vote as digital markings in various forms of internal memory." 51 A.3d at 302. "[E]lectronic vote data [could then] be removed from the DRE on external memory devices, such as flash drives and memory cards, and connected to a different electronic system to tally the votes." 110 A.3d at 160.

sections of the Pennsylvania Election Code unconstitutional, and to issue a preliminary injunction ordering Defendants to 'institute an immediate recount of paper ballots,'" and a "'thorough, forensic examination of a reasonable sample of DRE voting systems,'" with respect to the results of the 2016 Presidential Election. (ECF 55, at 7-8; *see* Compl. at 18-19.)

On December 12, 2016, this Court denied Plaintiffs' preliminary injunction motion on multiple independent grounds. First, the Court found that Plaintiffs lacked standing. (ECF 55, at 13-14.) Second, it held that the doctrine of laches provided grounds to deny the relief Plaintiffs sought. Plaintiffs had "inexcusably waited well past the eleventh hour to seek [injunctive relief]." (*Id.* at 21.) As the Court observed, the voting machines at issue had been in use for years before the 2016 Presidential Election, and Plaintiffs' expert, Dr. Halderman, "knew before the 2016 election all the information on which he based his opinion respecting the DRE machines' purported vulnerabilities." (*Id.* at 20.) Plaintiffs' delay in seeking relief had caused "a 'judicial fire drill'" that was "unnecessary and unfair to all concerned." (*Id.*)

Third, the Court held, Plaintiffs were unlikely to prevail on the merits of their claims (*id.* at 22-24) and had failed to show irreparable harm. Despite their allegations, "Plaintiffs had presented no credible evidence … that any … tampering [with Pennsylvania vote totals] occurred or could occur." (*Id.* at 25.) Even if it credited all of Plaintiffs' experts' opinions, the Court noted, "they [would] make out little more than the theoretical possibility a voting machine somewhere in the Commonwealth might be susceptible to tampering." (*Id.* at 29.) "Plaintiffs have raised only spectral fears that machines were hacked or votes miscounted …. [S]uspicion of a 'hacked' Pennsylvania election borders on the irrational." (*Id.* at 30, 31.)

For these and other reasons, the Court denied Plaintiffs' motion for preliminary injunctive relief. (*Id.* at 31.)

2. In Their Amended Complaint, Plaintiffs Continue to Criticize "DRE Machines With No Paper Trail"

Plaintiffs filed an Amended Complaint (ECF 71) on February 24, 2017, which joined "four Montgomery County voters" as additional plaintiffs (ECF 98, at 7 (citing Am. Compl. ¶¶ 11-15)). Like the original Complaint, the Amended Complaint alleged that the vast majority of Pennsylvania voters "vote on DRE machines with no paper trail," which "give voters no way to ensure that their intended choices were accurately recorded by the machine, and no way for election officials to verify those choices in the case of a recount." (Am. Compl. ¶¶ 24-25.) Plaintiffs still did not allege "that any DRE machine … in Pennsylvania was actually hacked." (ECF 98, at 6.) But they averred that the fact that votes were recorded solely in digital, electronic form, with no paper record, made paperless DREs uniquely vulnerable to malicious attack. (Am. Compl. ¶¶ 26-29.) According to Plaintiffs, "*paper* ballots are the best and most secure technology available for casting votes" because "[p]aper cannot be hacked." (*Id.* ¶ 31 (emphasis in original).) "[T]he next best option," Plaintiffs opined, are "DREs with voter-verifiable paper audit trails ('VVPAT')," which "allow[] the voter to review a printed record of the vote he has just cast on a computer." (*Id.* ¶ 32.)

Noting that "[n]one of the DREs used by Pennsylvania has VVPAT," Plaintiffs contended that voters using Pennsylvania DREs thus had no way "to verify that their votes were accurately recorded." (*Id.*; *see also id.* ¶ 119.c ("In all of the DRE counties, there is a total lack of a voter-verifiable paper trial. Voters in these counties can do nothing on Election Day to verify that their votes were counted.").) Moreover, Plaintiffs complained, recounts and recanvasses of votes recorded by paperless DRE machines "reveal nothing" because "they [are] simply reviews of images retrieved from the same machines that [purportedly] might have been hacked." (ECF 98, at 7 (citing Am. Compl. ¶ 56).)

On September 27, 2018, the Court dismissed Plaintiffs' claims in part. The Court denied the motions to dismiss with respect to (as relevant here) Plaintiffs' claims that the use of "paperless DRE … machines," combined with the Commonwealth's recount procedures, unconstitutionally burdened Voter-Plaintiffs' right to vote by "subject[ing] [them] to an unconstitutional risk that [their] vote will not be counted." (*Id.* at 37.) The Court observed that "Plaintiffs do not, and could not, allege that any voting mechanism is error free." (*Id.* at 31.) Indeed, Plaintiffs conceded that "[t]he issue in this case is not whether the Commonwealth may properly choose between electronic and paper voting systems." (ECF 79, at 9.) Rather, Plaintiffs alleged that their rights were unconstitutionally burdened because they were forced to use "DRE machines [that] have no way to verify that the machine properly recorded [voters'] votes, and no way to determine whether the machine was compromised." (ECF 75-1, at 24; *see also id.* at 25 (contending that "there is no reason that Pennsylvania cannot follow the lead of its sister states and provide paper verification (preferably by paper ballot, or at least a paper trail of DRE machines), as 33 states do").

3. Plaintiffs Never Specified Any Particular Format for the Paper Records They Sought

Throughout the litigation, Plaintiffs, like the general public, used the terms "paper ballots" and "ballots" loosely. Although they sometimes seemed to give the term "paper ballot" a more precise, technical meaning (so as to refer to, for example, a "traditional" paper ballot containing the entire menu of all electoral choices), they often appeared to use it to mean simply any vote recorded contemporaneously on paper – in contrast to what they attacked in the lawsuit, namely, paperless DREs. *See, e.g.*:

- Plaintiffs' Complaint. (*E.g.*, Compl. ¶ 21 ("For counties that use DRE machines, there is no paper ballot. It is impossible for voters to verify even a single DRE vote on a piece of paper."); *id.* ¶ 64 ("In DRE counties, there is nothing to 'count.' There is no paper ballot.

> All a candidate or a voter can do to ensure the integrity of the vote is examine the DRE voting system.").

- Statements by Plaintiffs' counsel at the December 9, 2016 hearing on the motion for preliminary injunction. (*E.g.*, Wiygul Decl., Ex. 2, at 40:21-41:6 (asserting that "[b]ecause there are no paper ballots[,] there is no way to examine [DREs]" other than "through a forensic examination"; "that really is the way to make sure that your vote counted in a DRE district where there is no paper ballot"); *id.* at 113:12-18 (referring to "the reality of voters having no way to verify their own votes in these DRE machines … their complete and utter inability to have any method in Pennsylvania to make sure their votes counted when they can't verify it in any way themselves with a paper ballot").

Notably, the *Banfield* decision was similarly loose in its use of the term "paper ballot." Even though it sometimes cited the statutory definition in 25 Pa. Stat. § 3101.1 (which distinguished a "paper ballot" from a "ballot card" and "ballot label"), it elsewhere used "paper ballot" to mean simply what the petitioners wanted, *i.e.*, a paper record of a vote, in contrast to paperless DRE machines, which record votes electronically and do not permit contemporaneous voter-verification or auditing. *See, e.g.*, *Banfield*, 110 A.3d at 167 (describing petitioners' argument "that the Election Code requires an electronic voting system to produce a software-independent, voter-verified paper record at the time each vote is cast" as an argument that "the Election Code require[s] an electronic voting system to print a paper ballot for each individual to view"); *id.* at 168 (explaining that petitioners' suggestion that "counties should purchase optical scanners or DREs equipped with new VVPAT (Voter-Verified Paper Audit Trail) technology … does not affect our finding that the Legislature clearly authorized electronic voting systems that do not utilize paper ballots"); *id.* at 170 ("[petitioners'] argument that a statistical recount requires election officials to assess whether a DRE has correctly captured voter intent is another reformulation of their contention that DREs must produce voter-verified paper ballots"); *see also* *Banfield*, 51 A.3d at 302 ("DREs do not use a document/paper ballot in the vote process.").

B. The Parties Reach a Settlement That Advances Their Shared Desire for Auditable, Voter-Verifiable Paper Records

1. DOS's Longstanding Efforts to Phase Out DREs

Long before the settlement, the Department of State was moving toward its goal of phasing out DREs and adopting machines that would produce the sort of voter-verifiable, contemporaneous paper record Plaintiffs appeared to desire. (Boockvar Decl. ¶¶ 12-18.) At a Pennsylvania Senate Committee hearing on September 25, 2018, Deputy Secretary Jonathan Marks, then the Commissioner of DOS's Bureau of Commissions, Elections and Legislation, explained the reasons for the Department's initiative: "Professionals in national security, intelligence, computer science, elections, and more, have urged states to act as quickly as possible, to replace older voting machines with voting systems that produce a paper record that voters can verify, and which enable robust post-election audits." (Unger Decl., Ex. 3, at 1.) Commissioner Marks noted that the U.S. Homeland Security Secretary had "called on 'every state in the Union to ensure that by the 2020 election, they have election systems'" employing "'a physical paper trail and effective audits.'" (*Id.*) Furthermore, Commissioner Marks pointed out, earlier in September 2018, the National Academies of Sciences, Engineering, and Medicine had issued a leading and widely cited report, "Securing the Vote: Protecting American Democracy" (the "Securing the Vote Report" or "Report"). (*Id.* at 2.) "The report assesses current technology and standards for voting, and recommends steps that federal, state, and local governments, election administrators, and vendors of voting technology should take to improve the security of election infrastructure, including that all elections should be conducted with paper ballots by 2020, and states should mandate risk-limiting audits within a decade." (*Id.*)

Significantly, the Report provides a specific definition of "paper ballots":

> Because records of ballots may take many forms, it is important to clearly define what is meant by 'paper ballot.' For the purposes of this report, references

> to paper ballots refer to original records that are produced by hand or *a ballot-marking device*, which are human-readable in a manner that is easily accessible for inspection and review by the voter without any computer intermediary (i.e., voter-verifiable), countable by machine (such as a scanner) or by hand, and which may be recounted or audited by manual examination of the human-readable portion of the ballot.
>
> A paper ballot-based voting system makes the paper ballot the official "ballot of record" of the voter's expressed intentions. Other representations (e.g., an electronic representation produced by a scanner) are derivative and are not voter-verifiable. The human-readable portion of the cast paper ballot provides the basis for audits and recounts.

(Wiygul Decl., Ex. 3, at 42-43 (emphasis added).) As discussed below, this is precisely the meaning of "paper ballot" as it is used in the Settlement Agreement, and the ExpressVote XL machine at issue here satisfies every aspect of this definition.

Commissioner Marks testified that, to meet these new standards, the Department had, in February 2018, issued "a directive requiring that all new voting systems procured by Pennsylvania counties have a voter-verifiable paper record," with the goal of having Pennsylvania counties transition to using such systems during elections in "2019 or early 2020." (Unger Decl., Ex. 3, at 2.) Furthermore, "[n]ew voting equipment must not only include voter-verifiable paper records and achieve U.S. Election Assistance Commission (EAC) certification, but must also be assessed" under "new voting system security and accessibility standards" issued in Spring 2018. (*Id.* at 3; *see* Boockvar Decl. ¶¶ 43, 46.)

Commissioner Marks also advised the legislative committee that one such new voting system had "already completed state and federal certification." (*Id.* at 3.) Another one – which happened to be the ExpressVote system – was then "wrapping up its testing after addressing issues identified during Kansas's primary election in August; [the Department] expect[ed] this testing to be complete in September [2018] and the system to be ready for certification." (*Id.*)

2. During Settlement Discussions, Plaintiffs Tell Defendants That They "Do Not Disapprove" of the ExpressVote XL if Certain Conditions Are Met

Given that the Department had decided to adopt the very type of voting machines systems Plaintiffs professed to want, a settlement appeared within reach. On September 28, 2018, Defendants' counsel sent Plaintiffs' counsel an email "forwarding some documents that [Defendants are] hoping could favorably influence settlement discussions." (Unger Decl., Ex. **1.**) Included among these documents was Jonathan Marks' September 25, 2018 testimony before the Senate State Government Committee. (Unger Decl., Ex. 3.) Also attached was the "[m]ost recent Pennsylvania Voting System and E-Poll Book Status Report which includes the specific voting systems (with model numbers) that [the Department of State] expects will be presented for examination in Pennsylvania." (Unger Decl., Ex. 1; *see id.*, Ex. 2.) One of the systems listed was the ES&S EVS Model 6.0.2.1, which includes the exact ExpressVote XL machine challenged in Plaintiffs' Motion. (Unger Decl., Ex. 2; Boockvar Decl. ¶ 57; Baumert Decl. ¶ 15.) Consistent with then-Commissioner Marks' Senate Committee testimony, the document noted that Pennsylvania was currently testing "new release EVS 6021 with fixes to anomalies scheduling during the week of Sep[tember] 24, 2018." (Unger Decl., Ex. 2.)

On October 9, 2018, just two days before the parties' settlement conference before Magistrate Judge Rice, Plaintiffs' counsel responded with "some feedback" on the "list of models in the 'PA voting systems & electronic poll book report.'" (Unger Decl., Ex. 4.) Notably, in his email, Plaintiffs' counsel used the term "paper ballot" in a way consistent with the Securing the Vote Report: he contrasted "election systems … [that] don't use paper ballots" with "paperless DRE system[s]." (*Id.*) Even more significantly, the email forwarded an evaluation by Alex Halderman – who had provided expert testimony in support of Plaintiffs' unsuccessful preliminary injunction motion, and who submitted a declaration in support of

Plaintiffs' present Motion – of the machines listed in the report sent to Plaintiffs on September 28. Dr. Halderman stated: "I reviewed the voting systems that PA is considering, and I don't *disapprove* of any of them in their entirety." (Unger Decl., Ex. 4 (emphasis in original).) Dr. Halderman also used the term "paper ballot" consistently with the definition of the term in the Securing the Vote Report; he explained that "[a]ll of them [*i.e.*, the voting systems under consideration] (that use paper ballots) can be used with reasonable security if implemented with voter-verified paper ballots and robust manual audits." (*Id.*)

Dr. Halderman further stated that "there are features of each of these voting systems that can render them unsafe if activated." (Unger Decl., Ex. 4.) But he did not contend that these features should *disqualify* any of the systems from certification. To the contrary, he suggested that Defendants' counsel "urge PA *to certify them* [*i.e.*, the systems] with restrictions that prohibit these dangerous features." (*Id.* (emphasis added).) With specific respect to the "ExpressVote machines," Dr. Halderman agreed that they "can work as traditional ballot marking devices," but he warned that it was "also possible to configure them in ways that defeat the purpose of the paper trail." (*Id.*)

Dr. Halderman then listed the specific potential configurations that he found problematic. First, he noted that the machines could be "set up to print the ballot but not show it to the vote[r] at all (the machine just scans it internally and stores it in a ballot box). This means there's paper but it's not voter-verified, so it's of no use in an audit." (*Id.*) Second, the ExpressVote could be configured so that "it asks voters whether they want to verify their ballots *before* printing them, and only allows the voter to inspect the paper if they say yes." (*Id.* (emphasis in original).) "[T]his also defeats the value of an audit, since malware could be programmed to cheat only if the voter opts not to see the paper." (*Id.*) Accordingly, Dr. Halderman explained, "PA should

require the machines to be configured so that every voter has an opportunity to see their completed ballot *after* it's been printed." (*Id.* (emphasis in original).)

Dr. Halderman's guidance was, of course, consistent with the Secretary's February 2018 directive and Commissioner Marks's September 25 testimony, which called for all newly certified electronic voting machines to produce voter-verifiable paper records supporting robust audits. And, in fact, when the Department certified the ExpressVote XL on November 30, 2018, it adopted Dr. Halderman's guidance, requiring "[j]urisdictions implementing ExpressVote XL [to] ensure that the configuration allows voters to review their vote selections on the screen and on the printed ballot card before it is cast." (Boockvar Decl., Ex. 1, at 42.)

Dr. Halderman did not cite any other issues with the ExpressVote machines. (*See id.*) *He did not mention **any** of the issues Plaintiffs raise in their Motion*. In summary: In the settlement discussions, DOS informed Plaintiffs of the specific machines it was planning to certify, including the ExpressVote XL; Plaintiffs' expert reviewed those machines; Plaintiffs' expert agreed that the ExpressVote XL machine used "paper ballots"; and Plaintiffs' expert blessed the certification of the XL machine so long as it was required to be configured "so that every voter has an opportunity to [verify] their completed ballot *after* it's been printed." (Unger Decl., Ex. 4.) Thus, long before they signed the Settlement Agreement, Plaintiffs knew, or should have known, everything about the ExpressVote XL that they now claim is a violation of that agreement – that the vote was recorded on barcodes and voter-verifiable text records printed on paper; that the machine scans the barcode before presenting the ballot to the voter for verification; and that the verified ballot travels past the printhead on its way to the secure collection box. (Boockvar Decl. ¶ 59; Baumert Decl. ¶¶ 4, 39, 50-54.)

3. The Settlement Agreement

Two days after the October 9 email from Defendants' counsel, the parties participated in a settlement conference, in which they agreed to the criteria that would be set forth in Paragraphs 2 and 3 of the Settlement Agreement on which Plaintiffs have focused. (Boockvar Decl. ¶ 40.) At no point during the settlement conference did the Plaintiffs assert that only voting systems that use hand-marked paper ballots were acceptable, that ballot-marking devices ("BMDs") or systems using barcodes were not, or that Plaintiffs opposed the certification of any system that was then going through the certification process. (Boockvar Decl. ¶ 41.) The Agreement was ultimately signed on November 28, 2018. (*See* ECF 112-1, Ex. A.)

Paragraph 2 of the Agreement provides that "[t]he Secretary will only certify new voting systems for use in Pennsylvania if they meet [three] criteria." (*Id.* ¶ 2.) First, "[t]he ballot on which each vote is recorded [must be] paper." (*Id.* ¶ 2.a.) To this criterion is appended a footnote stating that "[a] VVPAT receipt generated by a DRE machine is not a paper ballot." (*Id.* at 2 n.3.) Second, "[t]hey [*i.e.*, the voting machines] [must] produce a voter-verifiable record of each vote." (*Id.* ¶ 2.b.) And, third, "they [must be] capable of supporting a robust pre-certification auditing process." (*Id.* ¶ 2.c.) Paragraph 3 of the Agreement then states that "[t]he Secretary will *continue* to direct each county in Pennsylvania to implement these voting systems by the 2020 primaries, so that every Pennsylvania voter in 2020 uses a voter-verifiable paper ballot." (*Id.* ¶ 3 (emphasis added).)

The Settlement Agreement also provides, among other things, that "[t]he Secretary will direct each county to audit all unofficial election results using robust pre-certification audit methods to be determined based on the recommendations of a Work Group established by the Secretary …." (*Id.* ¶ 5.) With respect to enforcement, the parties agreed that, "if Plaintiffs have a reasonable basis to believe that Defendants are in non-compliance with a material term of this

Agreement, Plaintiffs will notify the Defendants in writing of the specific compliance issue(s)." (*Id.* ¶ 14.) Defendants would then have 30 days to "provide a good-faith written response." (*Id.* ¶ 15.)

Plaintiff Stein announced the settlement as a "[h]uge victory for election integrity!" (Wiygul Decl., Ex. 1.) Devotees of hand-counted, hand-marked paper ballots immediately attacked the settlement on social media, arguing that the settlement would permit use of the ExpressVote XL and similar systems. (*See, e.g.*, Wiygul Decl., Ex. 4 (Twitter thread beginning with "I hate to be Debbie Downer, but this agreement allows PA to buy awful "universal use" touchscreen ballot markers and scanners, which generate the COMPUTER marked so-called 'paper ballots' w/barcodes that I've been warning about."). Had Plaintiffs believed at the time that the settlement did not permit the ExpressVote XL system, one might have expected them to say that in response to this criticism. They do not appear to have done so.

C. Two Days After the Settlement, the Acting Secretary Certifies the ExpressVote XL

On November 30, 2018, two days after the Settlement Agreement was signed, then-Acting Secretary Robert Torres certified the ES&S Model 6.0.2.1, the system that included the ExpressVote XL machine. (Boockvar Decl. ¶ 60; Baumert Decl. ¶¶ 15, 19.) As the Acting Secretary's certification report stated, "ExpressVote XL create[s] *a paper ballot* based on a voter's selections, which is tabulated when the voter affirms that he/she is ready to cast a vote." (Boockvar Decl., Ex. 1, at 24 (emphasis added).) The certification report included a number of conditions. One of these was that counties using the ExpressVote XL machine must conduct a "statistical recount of a random sample of ballots after each election." (*Id.* at 38.) "This audit must be conducted *via a manual count of the voter marked paper ballots exclusively.*" (*Id.* (emphasis added).) Notably, in the audit, it is the text of the paper ballots that is reviewed.

(Boockvar Decl. ¶¶ 34-36.) In the event of any conflict between the text and the electronically recorded vote totals, or between the textual record of the vote and the barcode record, the voter-verified textual record on the paper ballots will control. (Boockvar Decl. ¶¶ 35-36.) Another condition was that requested by Dr. Halderman: that the system be configured to ensure that a voter cannot opt out of seeing the paper record. (Boockvar Decl. ¶ 62, Ex. 1, at 42.)

The mechanics of voting on the XL machine are relatively simple. The voter makes her selection of candidate(s) on the touchscreen and then presses "print." (Boockvar Decl., Ex. 1, at 5; Baumert Decl. ¶ 4.) The machine then prints a paper record on which the voter's selections are recorded both as barcodes and as human-readable text. (Boockvar Decl., Ex. 1, at 5; Baumert Decl. ¶¶ 4, 39.) The barcodes are scanned by the machine, and the paper record is then displayed behind glass for the voter to review and verify. (Boockvar Decl. ¶ 62 & Ex. 1, at 42; Baumert Decl. ¶ 4.) At that point, the voter has the option of using the touchscreen to either "cast" or "spoil" her ballot. If she elects to cast her ballot, the scanned selections are tabulated by the machine electronically, and the paper record is deposited into a secure collection box attached to the voting system. (Boockvar Decl., Ex. 1, at 5; Baumert Decl. ¶ 4.)

D. During the Year That Plaintiffs Wait to File Their Motion, Counties Consider, Purchase, and Deploy the ExpressVote XL

If Plaintiffs had a valid claim that the Secretary's certification of the XL machine was a breach of the Settlement Agreement, they could have raised it on November 30, 2018. But almost a year passed before they filed their Motion. In the interim, several Pennsylvania counties – including Philadelphia, the largest county in the Commonwealth – considered the XL voting system and decided to purchase it. (Boockvar Decl. ¶¶ 75-77.) Philadelphia began the procurement process in February 2018. (Nesmith-Joyner Decl. ¶ 7; Boockvar Decl. ¶ 76.) After a lengthy and complex procurement process, involving at least eight City departments, it selected

the machines in February 2019. (Nesmith-Joyner Decl. ¶¶ 3-21; Lynch Decl. ¶ 7 & Ex. 1.) Additional processes were required to secure appropriate warehouse space for the new machines (Lynch Decl. ¶ 9) and put contractual arrangements in place for their deployment to polling places (Nesmith-Joyner Decl. ¶ 28). The machines – nearly 4,000 of them – were delivered over a four-month period beginning in April 2019. (Lynch Decl. ¶¶ 8, 10-11.) The intense process of training poll workers, educating voters, and rolling out the new voting systems lasted through October 2019, and Philadelphia deployed the machines for use in the November 5, 2019 election. (Lynch Decl. ¶¶ 7-22.) Cumberland County began its search for a new voting system in August 2018; its Board of Elections voted to select the ExpressVote XL in June 2019, and its Board of Commissioners approved the procurement in September 2019. (Salzarulo Decl. ¶¶ 3-8.)

On July 16, 2019, several voters petitioned for the Secretary to reexamine the XL system. The petitioners argued, as Plaintiffs do in their Motion, that the ExpressVote XL did not comply with the Settlement Agreement in this case because it does not include a "paper ballot" as defined in Pa. Stat. § 3031.1. (ECF 112-1, at page 43 of 188.) The petitioners did not otherwise argue that the XL system failed to comply with the Settlement Agreement. (*See id.* at pages 32-43 of 188.) The Secretary determined that this claim, along with most of the petitioners' other claims, was a legal argument that did not apply to the reexamination or certification process. (Boockvar Decl. ¶¶ 65-67.) To address the claims that related to the certification process, the Department engaged a consultant to conduct a focused reexamination of the ExpressVote XL. (Boockvar Decl. ¶ 68.)

On July 29, 2019 – eight months after the ExpressVote XL system was certified by the Secretary – Plaintiffs first notified Defendants that they believed the system did not comply with the Settlement Agreement. (ECF 112-1, Ex. C.) On September 3, 2019, the Department

released the Reexamination Report for the ExpressVote XL, which maintained its certification but imposed additional conditions for its use. (ECF 112-1, Ex. B.) On September 12, 2019, Defendants responded to Plaintiffs, explaining, in no uncertain terms, that the XL machine complied with the Settlement Agreement. (ECF 112-1, Ex. D.) Rather than returning to Court, Plaintiffs communicated with DOS several more times, letting an *additional* two-and-one-half months pass before filing their Motion. (Memorandum of Law in Support of Plaintiffs' Motion to Enforce the Settlement Agreement at 3 (ECF 112) ("Pls. Memo.").)

III. ARGUMENT

A. Plaintiffs' Contractual Arguments Fail

Plaintiffs' Motion presents a straightforward issue of contractual interpretation. Notwithstanding Plaintiffs' attempt to twist and torture the language of the Settlement Agreement, and to divert the Court into scholastic hair-splitting regarding the metaphysics of a "vote," the unambiguous plain terms of the Settlement Agreement are all that is needed to resolve this dispute. ExpressVote XL machines comply with the Settlement Agreement because the ballot on which each vote is recorded is paper; they produce a voter-verifiable record of each vote; and they are capable of supporting a robust pre-certification auditing process. The hodgepodge of complaints Plaintiffs throw up – conjuring spectral theories that the machines could be hacked or malfunction in certain ways, and noting that another state opted for machines without QR codes (which, in any event, the XL does not use) – do not and cannot change that fundamental, dispositive fact.

Moreover, even if the material terms of the Agreement were somehow ambiguous, the result would be the same. If anything, the parol evidence of the parties' intentions only tilts the scales *more* heavily in favor of Defendants. As shown above, during the settlement negotiations, Defendants disclosed to Plaintiffs the specific voting systems they were then preparing to certify,

including the ExpressVote XL. Plaintiffs, through the very expert that has submitted a declaration in support of their current Motion, made clear that they did not object to certification of the XL machine so long as the Secretary prohibited certain configurations. The Secretary certified the machine – with the exact restrictions Plaintiffs requested.

Plaintiffs' current arguments, which they did not bring to this Court until a year after the Secretary's certification, are a disappointing, *post hoc* attempt to move the goalposts that the parties clearly agreed on. Plaintiffs' Motion should be denied.

1. The ExpressVote XL Plainly Complies With the Unambiguous Terms of the Settlement Agreement

"Settlement agreements are interpreted according to basic contract principles." *In re Diet Drug Prod. Liab. Litig.*, 525 F. App'x 140, 142 (3d Cir. 2013) (internal quotation marks omitted). The Settlement Agreement here is to be construed under Pennsylvania law. (ECF 112-1, Ex. A ¶ 23.) "In Pennsylvania, the fundamental rule of contract interpretation is to ascertain the intent of the contracting parties." *McDonough v. Toys R Us, Inc.*, 795 F. Supp. 2d 329, 333 (E.D. Pa. 2011) (internal quotation marks omitted). "In ascertaining contractual intent, the plain language of the agreement controls. Proper construction also requires consideration of 'the situation of the parties, the attendant circumstances and the ends they sought to achieve.'" *Constitution Bank v. Kalinowski*, 38 F. Supp. 2d 384, 385-86 (E.D. Pa. 1999) (quoting *Williams v. Metzler*, 132 F.3d 937, 947 (3d Cir. 1997)). "[W]hen a term in an agreement is clear and unambiguous, its meaning must be determined from the four corners of the contract" as a matter of law. *In re Diet Drugs Prods. Liab. Litig.*, 525 F. App'x 140, 142 (3d Cir. 2013). In turn, "[w]hen determining whether a contract is ambiguous, a court must view the contract as a whole and not in discrete units." *Halpin v. LaSalle Univ.*, 639 A.2d 37, 39 (Pa. Super. Ct. 1994). To conclude that the Secretary's certification of the ExpressVote XL did not comply with the

Settlement Agreement criteria, Plaintiffs are forced to adopt a tortured reading that cannot be reconciled with the Agreement's plain language.

(a) The ExpressVote XL "produce[s] a voter-verifiable record of each vote"

Plaintiffs' first argument addresses the second certification criterion in the Settlement Agreement, namely, that newly certified voting systems must "produce a voter-verifiable record of each vote." The ExpressVote XL plainly does exactly that. As described above, each of the voter's selections is recorded on paper in two different forms: machine-readable barcodes and human-readable text. (Baumert Decl. ¶ 39.) And – as Plaintiffs requested during the settlement negotiations – the Secretary has required that the machines be configured so that the voter is shown and may verify the text record of her votes before casting her ballot. (*See supra* Section II.C.) Accordingly, under any reasonable construction of Paragraph 2.b of the Settlement Agreement, the Secretary's certification of the ExpressVote XL is compliant.

Plaintiffs' contrary arguments miss the mark. Their chief complaint is that an ordinary voter can verify only the text record and not the barcode. According to Plaintiffs, "the 'vote' is the bar code," so the voter purportedly cannot verify her vote. (Pls. Memo. at 7.) Plaintiffs' assertion that "the 'vote' is the bar code" is based on the fact that the machine scans the barcodes to tabulate vote totals. But, as explained above, Pennsylvania requires manual, statistical recounts of the XL's paper records *using the text records*, to ensure the integrity of the vote count. (*See supra* Section II.C.) Furthermore, if there is any discrepancy between the text and the electronic vote count, or between the text and the barcodes, *the voter-verifiable text will*

control. (*See supra* Section II.C.)[2] Accordingly, in the final analysis, "the vote" is the voter-verifiable text.

But even if Plaintiffs were right that "the vote" is the barcode, it would not change the fact that the ExpressVote XL complies with Paragraph 2.b. That provision, by its plain terms, does not require that "the vote is voter-verifiable"; it requires only that the voting system "produce a voter-verifiable *record of* the vote." Plaintiffs' interpretation would render the words "record of" superfluous, in violation of basic Pennsylvania-law principles of contract interpretation. *See Benchmark Grp., Inc. v. Penn Tank Lines, Inc.*, 612 F. Supp. 2d 562, 579 (E.D. Pa. 2009) ("the court must … giv[e] effect to all of the contractual language if at all possible," and "[n]o provision … is to be treated as surplusage"); *see also Banfield*, 110 A.3d at 167 (rejecting petitioners' interpretation of "provide for" in 25 Pa. Stat. § 3031.1 because it "would render the word 'for' … mere surplusage").

Furthermore, Plaintiffs' argument, if accepted, would also disqualify systems employing hand-marked paper ballots read by an optical scanner, *i.e.*, the very systems Plaintiffs profess to prefer. (*See* Pls. Memo. at 2, 12.) When a voting machine scans a hand-marked ballot (for example, a filled-in oval or drawn line next to a candidate's name) the machine is not reading the text. It is reading the marks. (Baumert Decl. ¶¶ 41-43; Boockvar Decl. ¶ 28.) And the voter cannot verify how the marks are being read and registered by the machine. That depends on software – and voter-inscrutable coding marks, which are often printed on the margins of the ballots themselves – that tell the machine how to interpret a mark at a particular coordinate on

[2] As previously noted, these procedures fully accord with the Secure the Vote Report's recommendation that "[t]he human-readable portion of the cast paper ballot provide[] the basis for audits and recounts." (Wiygul Decl., Ex. 3, at 43.)

the page.[3] Functionally, this is no different than the barcodes printed on the ExpressVote XL ballot. (Baumert Decl. ¶¶ 41-45; Boockvar Decl. ¶ 20.) In sum, not only is Plaintiffs' proposed standard divorced from the plain language of the Settlement Agreement; it is so exacting that it would disqualify the alternative voting systems proposed by Plaintiffs (and virtually any voting system, other than humans manually counting every vote on every ballot in every election, which would be impracticable from a resources standpoint and susceptible to human error[4]). (Boockvar Decl. ¶ 29.)

(b) The "ballot on which each [ExpressVote XL] vote is recorded is paper"

The Secretary's certification of the ExpressVote XL also complies with Paragraph 2.a of the Settlement Agreement, which requires that "[t]he ballot on which each vote is recorded is paper." Plaintiffs do not (and cannot) dispute that the XL machine, like other BMDs, records each official vote on paper (whether "the vote" is best understood as the barcode or the text) – unlike paperless DREs, and also unlike DREs with a Voter Verifiable Paper Audit Trail (VVPAT), where the DRE's digital vote record is the official tabulation. As set forth in the Securing the Vote Report, this feature allows for manual audits of official, contemporaneously-generated paper voting records and protects against the risk that the machine's internal electronic tabulation somehow becomes corrupted. (Wiygul Decl., Ex. 3, at 42-43.) In denying the obvious proposition that the "ballot on which each [XL] vote is recorded is paper," Plaintiffs put

[3] And, of course, in theory, the software could malfunction/be hacked or the coding marks could be altered, so that the machine's tabulation of a given mark would differ from what the voter intended.

[4] "For a discussion of the inherent weaknesses in human vote counting, see Goggin, Stephen N., Micheal D. Byrne, and Juan E. Gilbert, 'Post-election Auditing: Effects of Procedure and Ballot Type on Manual Counting Accuracy, Efficiency, and Auditor Satisfaction and Confidence,' *Election Law Journal: Rules, Politics, and Policy*, 2012, Vol. 11, No. 1, pp. 36-51." (Wiygul Decl., Ex. 3 (Securing the Vote Report), at 44.)

themselves at odds with the unambiguous meaning of the Settlement Agreement (as well as the overwhelming extrinsic evidence of the parties' intent).

Plaintiffs' interpretation of Paragraph 2.a rests on two definitional assertions. First, Plaintiffs contend that the term "ballot" must be read narrowly to refer only to "the [entire] menu of options from which the voter chooses." (Pls. Memo. at 9.) Second, Plaintiffs argue that "[t]he ballot on which each vote is recorded is paper" should be given the same meaning as the defined term "paper ballot" in 25 Pa. Stat. § 3031.1, *i.e.*, a "paper printed ballot which conforms in layout and format to the voting device at issue." Neither assertion is tenable.

As an initial matter, Plaintiffs cite no authority for their surpassingly narrow definition of "ballot." (*See* Pls. Memo. at 9-10.) In fact, the term is defined far more broadly as "[a]n instrument, such as a paper or ball, used for casting a vote." *Ballot*, BLACK'S LAW DICTIONARY (11th ed. 2019); *accord, e.g.*, *Ballot*, DICTIONARY.COM, https://www.dictionary.com/browse/ballot ("a slip or sheet of paper, cardboard, or the like, on which a voter marks his or her vote"); *Ballot*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) ("A sheet of paper or card used to cast or register a vote, especially a secret one."). Indeed, the Election Code provision on which Plaintiffs rely for the definition of "paper ballot" directly contradicts Plaintiffs' assertion. It defines "ballot" broadly as "ballot cards or paper ballots upon which a voter registers or records his vote or the apparatus by which the voter registers his vote electronically and shall include *any ballot envelope, paper or other material* on which a vote is recorded for persons whose names do not appear on the ballet labels." 25 Pa. Stat. § 3031.1 (emphasis added).[5] Undeniably, the paper on which the XL

[5] Furthermore, Plaintiffs provide no reason why the Settlement Agreement would incorporate such a narrow definition of "ballot," which would mean the paper used to record votes in candidate- and contest-heavy jurisdictions like Philadelphia would have to be either

machine records each vote is a "ballot," and thus the "ballot on which each [XL] vote is recorded is paper." *See Carr v. Thomas*, 586 P.2d 622, 624 (Alaska 1978) (although petitioners assumed that a particular type of a ballot "is not a 'paper ballot,'" those ballots "are constructed of paper, so that literally they are 'paper ballots'").

Plaintiffs' second argument is slightly more elaborate but no less wrong. Plaintiffs point to Paragraph 3 of the Settlement Agreement, which provides that "[t]he Secretary will continue to direct each county in Pennsylvania to implement these voting systems by the 2020 primaries, so that every Pennsylvania voter in 2020 uses a voter-verifiable paper ballot," and make a two-step argument. First, they argue that the definition of the term "paper ballot" in Paragraph 3 controls the meaning of the term "ballot" in Paragraph 2; second, they argue that the definition of "paper ballot" in 25 Pa. Stat. § 3031.1 controls the meaning of that term in Paragraph 3.

This complicated reading gets things exactly backwards, making the tail wag the definitional dog. As is obvious from the structure of the Settlement Agreement, the term "voter-verifiable paper ballot" in Paragraph 3 is not importing a new concept into the Agreement; it is shorthand for a ballot that meets the three criteria enumerated in Paragraph 2. (ECF 112-1, Ex. A ¶¶ 2-3.) In other words, Paragraph 2 sets forth the criteria all new voting systems will have to satisfy to be certified, and Paragraph 3 commits the Commonwealth to a timeline for implementing these systems. As the plain language and structure make clear, Paragraph 3's "paper ballot" requirement is nothing other than a shorthand restatement of Paragraph 2.a's requirement that "[t]he ballot on which each vote is recorded [be] paper."

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enormous (the ExpressVote XL has a 32-inch screen) or broken into multiple pages. Either of these configurations would cause significant administrative problems, assuming they were feasible at all.

Moreover, interpreting the reference to "voter-verifiable paper ballot" in Paragraph 3 to incorporate the definition in 25 Pa. Stat. § 3031.1, rather than simply encapsulating the criteria set forth in Paragraph 2, would lead to absurd results. It would mean that the Secretary is allowed to certify machines that lack "paper ballots" within the meaning of § 3031.1, but that she has to direct the counties to implement only a much narrower subset of those machines by 2020. (*See* ECF 112-1, Ex. A ¶¶ 2-3.) That simply makes no sense.

There is yet another plain-language obstacle to Plaintiffs' attempt to engraft 25 Pa. Stat. § 3031.1's definition of "paper ballot" onto the Settlement Agreement. The Agreement expressly provides that "[a] VVPAT receipt generated by a DRE machine is not a paper ballot." (ECF 112-1, Ex. A, at 2 n.3.) If the parties intended the meaning of "paper ballot" to be limited to ballots displaying the entire menu of all candidates and choices, that provision would be completely superfluous – not to mention oddly, and misleadingly, under-inclusive. *See Benchmark*, 612 F. Supp. 2d at 579 (rejecting interpretation of one contractual provision that "would render [a] second clause wholly unnecessary and entirely meaningless"). On the other hand, if the parties intended "paper ballot" to refer merely to a contemporaneous paper record of the vote, the decision to specifically exclude VVPATs makes perfect sense.[6] For one thing, it makes clear that although Plaintiffs ranked VVPATs as "the next best option" in their Amended Complaint (ECF 71 ¶ 32), they were not agreeing to VVPATs for purposes of settlement. For another thing, courts and commentators have sometimes used the term "voter-verified paper

[6] Critics of VVPATs have alleged that their design creates privacy concerns. *See 21st Century Copyright Law in the Digitial Domain Symposium Transcript*, 13 Mich. Telecomm. Tech. L. Rev. 247, 285 (2006), available at http://www.mttlr.org/volthriteen/transcript.pdf ("Unfortunately, really bad engineering has been used to retrofit the DREs [with VVPATs]…. Because votes are stored consecutively on the continuous rolls, there are privacy concerns.").

ballot" to include VVPATs.[7] Accordingly, to avoid any ambiguity about the parties' intent, it was necessary expressly to carve out DREs with VVPATs from the definition of certifiable voting machines.

(c) The ExpressVote XL is "capable of supporting a robust pre-certification auditing process"

The ExpressVote XL also clearly satisfies the third criterion in Paragraph 2 of the Settlement Agreement: it is "capable of supporting a robust pre-certification auditing process." (ECF 112-1, Ex. A ¶ 2.c.) As previously explained, because the system records votes in voter-verifiable text on the paper ballot, a random, statistically appropriate sample of ballots can be hand-counted before the vote totals are certified, to ensure that the machine-counted result is accurate. (*See supra* Section II.C.) In fact, the certification of the ExpressVote XL's system requires such audits for counties using the system. (*See supra* Section II.C.)

Plaintiffs' argument that the XL is *not* capable of supporting robust pre-certification audits rests exclusively on their theoretical supposition that the machines could be "hacked" to (a) cast rejected votes, *i.e.*, electronically tabulate votes scanned from a certain ballot, even though the voter opted to spoil the paper ballot itself, or (b) somehow print additional or different selections on the ballot after the voter has already verified it. (Pls. Memo., at 12-13.) As discussed below, these arguments are not supported by any admissible evidence, and there is simply no realistic prospect that the scenarios envisioned by Plaintiffs could ever come to pass.

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[7] *See, e.g.*, *Gusciora v. Christie*, No. A-5608-10T3, 2013 WL 5015499, at *5 (N.J. Super. Ct. App. Div. Sept. 16, 2013) (observing that plaintiffs noted "they have always sought an order that 'the State … comply with … voter verified paper ballot laws' regardless of whether that occurred through retrofitting existing DREs [with a VVPAT] or using optical scan voting systems"); *21st Century Copyright Law in the Digitial Domain Symposium Transcript*, 13 Mich. Telecomm. Tech. L. Rev. 247, 285 (2006), available at http://www.mttlr.org/volthriteen/transcript.pdf ("Voting machine vendors have been retrofitting DREs with paper that is supposed to make a record of the voter's ballot that the voter can either accept or reject. This is called a Voter Verified Paper Ballot or Audit Trail (VVPAT). ").

In any event, the first theoretical vulnerability only *underscores* that the ExpressVote XL allows for robust audits. If the machine somehow tabulated electronic votes associated with paper ballots the voter had rejected, the machine count would differ from the votes tabulated from the pile of cast paper ballots. The audit process described above would expose this discrepancy, and an accurate vote count could be obtained by tabulating the paper ballots. (Baumert Decl. ¶ 25; Boockvar Decl. ¶¶ 35-36.)

With respect to the second theoretical "vulnerability," Plaintiffs rely entirely on Dr. Halderman's speculation that "malware" could "cause the printhead to add additional races or selections to the paper [ballot] after the voter has reviewed it." (ECF 112-2 ¶ 6.) Among other flaws, this conjecture ignores that the text on the paper ballot is intentionally printed to allow no blank spaces between the selections made by the voter. (*See, e.g.*, Pls. Memo. at 6.) Accordingly, any additional marks printed post-verification would be apparent from an inspection of the ballots. (Baumert Decl. ¶ 59.) In this way, too, the ExpressVote XL's voter-verifiable paper ballots support robust pre-certification audits.

2. The Indisputable Parol Evidence Also Dooms Plaintiffs' Contractual Arguments

Even if the Agreement's material terms *were* somehow ambiguous, Plaintiffs would fare no better. If, after applying principles of construction, a "written contract is ambiguous, a court may look to extrinsic evidence to resolve the ambiguity and determine the intent of the parties." *Diet Drugs*, 525 F. App'x at 142. Notably, "if the court finds that a contract is ambiguous *and* that extrinsic evidence is undisputed, then the interpretation of the contract remains a question of law." *In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 241 (3d Cir. 1995) (emphasis added). Here, the undisputed parol evidence shows that any ambiguous terms must be interpreted in favor of allowing the ExpressVote XL certification to stand.

For example, contrary to Plaintiffs' assertion (*see* Pls. Memo. at 10), Defendants *do* refer to the XL's paper vote record as a "paper ballot." Indeed, that description appears in the November 30, 2018 certification report. (Boockvar Decl., Ex. 1, at 24 ("ExpressVote XL create[s] a paper ballot based on a voter's selections").) In February 2019, when it selected the ExpressVote XL as its new voting system, Philadelphia likewise described the XL's paper records as "auditable voter-verifiable paper ballot[s]." (Wiygul Decl., Ex. 5, at 1.) Even more importantly, Defendants clearly communicated this understanding of "paper ballot" to Plaintiffs during the parties' settlement discussions, when, by way of example only, they sent Plaintiffs the September 25, 2018 Senate Committee testimony of Jonathan Marks, which cited the Secure the Vote Report. (*See* Unger Decl**.**, Ex. 1, 3.) And most importantly of all, *Plaintiffs themselves* made clear to Defendants that they shared this understanding of "paper ballot." (*See* **Unger Decl.**, Ex. 4.) Indeed, Plaintiffs *expressly stated they did not object to certification of the ExpressVote XL machine*. (*See id.* (emphasis added).) For Plaintiffs to argue, as they now do, that the parties intended to allow certification only of machines that record votes on paper records containing the entire menu of all electoral options, strains credulity.[8]

3. Plaintiffs' Miscellany of Other Criticisms Is Irrelevant to the Question of Whether the ExpressVote XL Complies With the Settlement Agreement

Throughout their Motion, Plaintiffs make various attempts to bootstrap their own opinions about the "best" type of voting machines into an argument about the requirements of the Settlement Agreement. These arguments are not on point. The Court's task is, again, a

[8] Additionally, Plaintiffs' failure to object that the Commonwealth's certification of the ExpressVote XL would violate the Settlement Agreement, either in the days leading up to certification or for many months afterwards, constitutes a waiver of that position that precludes Plaintiffs from asserting it now. *See Norfolk S. Ry. Co. v. G.W.S.I., Inc.*, No. 16-2094, 2018 WL 4466008, at *6 (E.D. Pa. Sept. 18, 2018).

narrow one: To determine whether the ExpressVote XL meets the criteria set forth in the Settlement Agreement. It is the Secretary and Pennsylvania counties – not Plaintiffs or this Court – who have the discretionary authority to weigh the trade-offs among the various voting systems that satisfy those criteria. Put differently, the Court's role here is solely to enforce the terms of the Settlement Agreement, not to intrude on the decision-making of administrative officials.

As noted, much of Plaintiffs' Motion rests on the asserted theoretical possibility that the machines could somehow be hacked, and that the barcodes printed on the paper ballots might therefore not match the voter-verifiable text; the machines might electronically tabulate votes from ballots rejected by voters; or the ballot might be further marked after voter verification. But Plaintiffs do no more than to assert these risks, in conclusory statements by Dr. Halderman, as bare theoretical possibilities. (*See* ECF 112-2 ¶¶ 6-8.) Plaintiffs provide absolutely no evidence that such scenarios have actually occurred or that there is any realistic prospect of their occurring despite the phalanx of security measures required by the Commonwealth. (*See* Boockvar Decl. ¶¶ 31-36, ¶¶ 61-64) *See Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1144 (3d Cir. 1990) (expert affidavit that was "'essentially conclusory' and lacking in specific facts" was "insufficient to create a genuine issue of material fact"); *Daddio v. A.I. DuPont Hosp. for Children of Nemours Found.*, 650 F. Supp. 2d 387, 403 ("opinion evidence that is 'connected to existing data only by the ipse dixit of the expert'" is properly excluded), *aff'd*, 399 F. App'x 711 (3d Cir. 2010). In fact, there is no such prospect, and even if there were, the design of the machines and the Commonwealth's pre-certified audits would ensure that any such problems were detected: the voter-verified text records would not match the internal electronic or scanned-bar code counts, and any additional marks on the densely packed textual portion of the ballot

would be apparent. (Baumert Decl. ¶¶ 24, 59; Boockvar Decl. ¶¶ 34-36.) As this Court previously held, "suspicion of a 'hacked' Pennsylvania election borders on the irrational" (ECF 55, at 29), and evidence supporting no "more than the theoretical possibility a voting machine … might be susceptible to tampering" is insufficient to obtain relief (*id.* at 31).

More broadly, as previously noted, the hand-marked ballots Plaintiffs portray as a panacea involve machines that scan the marks, and thus are also theoretically susceptible to hacking. (Baumert Decl. ¶¶ 41-49.) The ExpressVote XL addresses this issue in exactly the way contemplated by the Settlement Agreement: utilizing paper records with voter-verifiable text that supports robust pre-certification audits. Again, the question is not which voting machine design is the best. The question is simply whether the machines certified by the Secretary satisfy the criteria in the Settlement Agreement. The ExpressVote XL does.

Plaintiffs' "scattershot allegations" (ECF 55, at 7) also refer to a recent decision by Colorado not to use QR codes on ballots. (Pls. Memo. at 7.) But the discretionary policy judgments made by officials in Colorado simply have no bearing on whether the ExpressVote XL meets the requirements of the Settlement Agreement. Furthermore, the very article Plaintiffs attach to their Motion indicates that Colorado will simply scan "marked ovals on the ballot rather than information from a QR code." (ECF 112-1, Ex. K, at 2.) As noted above, because software and other human-inscrutable coding determine how the tabulating machine reads the marks (Baumert Decl. ¶¶ 41-43), Colorado voters cannot verify the electronic meaning of the mark any more than Pennsylvania voters can verify barcodes.

Plaintiffs also submit a declaration regarding anecdotal "difficulties" in reading the paper ballots in the XL machine. But this "evidence" is plainly inadmissible and fails to raise any issue for the Court. The declaration, made by a non-expert witness, purports to describe an "informal

survey" of 150 voters who used the ExpressVote XL on November 5, 2019. (Pls. Memo. at 8; *see* ECF 112-3.) The voters were ostensibly asked "whether they had *any difficulty*" viewing the printed voter summary card. (ECF 112-3 ¶ 6 (emphasis added).) "Approximately half" purportedly reported having some unspecified difficulty. All this is, of course, inadmissible hearsay. But even taken at face value, the declaration does not claim that a single voter was actually unable to verify her vote. (*See* ECF 112-3.) The purported fact that the lighting in some polling places could be improved may be useful feedback for Philadelphia election officials, but has nothing to do with whether the ExpressVote XL meets the criteria of the Settlement Agreement.

Finally, Plaintiffs try to make hay out of certain issues that reportedly occurred in the most recent Northampton County election. Tellingly, however, Plaintiffs' discussion is limited to the background section of their brief; they do not connect these issues to any of their legal arguments. In fact, there is no connection. The Northampton issues were a product of human error; they have nothing to do with any of the theoretical "vulnerabilities" described in Plaintiffs' brief. (Baumert Decl. ¶¶ 60-68.) Indeed, notwithstanding the issues with the electronic tabulation of the vote totals, Northampton officials were able to obtain an accurate count of the vote using the paper records produced by the machines. (Baumert Decl. ¶¶ 69-70.) In sum, the Northampton election showed that the ExpressVote XL provides exactly what the Settlement Agreement requires – a voter-verifiable, auditable paper record of each vote.

B. <u>The Doctrine of Laches Bars Any Grant of Equitable Relief</u>

Plaintiffs inexplicably waited a year to seek relief from this Court. Plaintiffs knew, during the settlement negotiations, that the Commonwealth intended to certify the ExpressVote XL, and they knew the ExpressVote XL's features. (Unger Decl., Exs. 1, 2, 4; *see also* Boockvar Decl. ¶¶ 54-60.) Once the Commonwealth certified the ExpressVote XL on

November 30, 2018 – just two days after the parties signed the Settlement Agreement – Plaintiffs could have pursued relief. But Plaintiffs waited approximately eight months, until July 29, 2019, to send written notice to the Commonwealth that, in Plaintiffs' view, the certification of the ExpressVote XL violated the terms of the Settlement Agreement. (*See* ECF 112-1, Ex. C.) Under the terms of the Settlement Agreement, sending that notice was the only prerequisite to Plaintiffs' seeking assistance from this Court. But Plaintiffs chose to wait another four months, sending follow-up letters and emails to DOS but not filing their Motion until the day before Thanksgiving.[9]

During the one-year gap between the ExpressVote XL's certification and Plaintiffs' Motion, several Pennsylvania counties moved forward with purchases of ExpressVote XL systems. (Boockvar Decl. ¶¶ 75-77,) Facing DOS's December 31, 2019 deadline for replacement of DREs, these counties expended significant funds and time on reviewing and procuring ExpressVote XL machines, and training personnel and educating voters in their use. (Lynch Decl. ¶¶ 7-22; Salzarulo Decl. ¶¶ 3-8, 10-12; Boockvar Decl. ¶¶ 15, 19, 73-74, 78-79, 81-82.) Under these circumstances, the doctrine of laches applies and precludes the relief Plaintiffs seek.

Laches is an equitable defense developed to "protect defendants against 'unreasonable, prejudicial delay in commencing suit.'" *In re Bressman*, 874 F.3d 142, 149 (3d Cir. 2017) (quoting *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 960 (2017)). The elements of the defense – (1) "inexcusable delay in instituting suit," and (2)

[9] The Commonwealth responded to Plaintiffs' initial letter on September 12, 2019, affirming that the ExpressVote XL complies with the Settlement Agreement. The Settlement Agreement does not require Plaintiffs to wait for the Commonwealth's response before presenting a claim of noncompliance to this Court. However, even assuming Plaintiffs did reasonably await a response from the Commonwealth, they had no justification for waiting an additional two and a half months to file their Motion.

"prejudice resulting to the respondent from such delay," *id.* (quoting *Kane v. Union of Soviet Socialist Republics*, 189 F.2d 303, 305 (3d Cir. 1951)) – are clearly present. First, Plaintiffs' one-year delay is inexcusable. Indeed, Plaintiffs do not even attempt to excuse it; they offer no explanation for their delay at all. Second, the prejudice to the Commonwealth, its citizens, and the counties who have purchased the ExpressVote XL is undeniable and substantial. A grant of the relief Plaintiffs request would mean that millions of tax dollars and months of effort by the Commonwealth and the counties had been spent fruitlessly (Nesmith-Joyner Decl. ¶¶ 6-21; Lynch Decl. ¶¶ 7-22; Salzarulo Decl. ¶¶ 3-8; Boockvar Decl. ¶¶ 15, 19, 73-74, 78-79, 81-82), and would require government officials to devote significant additional time and attention to replacing the ExpressVote XL machines (Nesmith-Joyner Decl. ¶¶ 22-30). Further, an injunction would prejudice the Commonwealth's and the counties' interest in carrying out orderly elections, force the counties to make intricate policy decisions in a short amount of time, and distract government officials from other important work on behalf of citizens. (Nesmith-Joyner Decl. ¶¶ 6-21; Lynch Decl. ¶¶ 7-22; 31-32; Salzarulo Decl. ¶¶ 15-17; Boockvar Decl. ¶¶ 76-84.)

The doctrine of laches is particularly applicable here because Plaintiffs' delay in seeking relief could disrupt an impending election. "The U.S. Supreme Court has long acknowledged that the timing in cases involving upcoming elections is a relevant consideration in determining the propriety of immediately effective relief." *United States v. City of Philadelphia*, No. 2:06-cv-4592, 2006 WL 3922115, at *2 (E.D. Pa. Nov. 7, 2006) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006), and *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)); *see also Crookston v. Johnson*, 841 F.3d 396, 397-98 (6th Cir. 2016) (entering a stay of a preliminary injunction against certain

Michigan election laws in light of plaintiff's delay in seeking relief, and emphasizing plaintiff's failure to offer any explanation for his "belated challenge.").

In *Republican Party v. Cortes*, 218 F. Supp. 3d 396 (E.D. Pa. 2016), Judge Pappert denied a request for a preliminary injunction of certain state election laws in part because, in filing their lawsuit eighteen days before the election, "Plaintiffs unreasonably delayed filing their Complaint and Motion, something which weighs decidedly against granting the extraordinary relief they [sought]." *Id.* at 404. Judge Pappert explained that "[t]he delay is particularly relevant where, as here, an election is looming." *Id.* Given the amount of time that it takes to purchase and launch a new voting system (Nesmith-Joyner Decl. ¶¶ 22-30; Lynch Decl. ¶¶ 7-22; 31-32; Salzarulo Decl. ¶¶ 3-12, 15-17; Boockvar Decl. ¶¶ 78-83), the primary election scheduled for April 28, 2020, and even the general election scheduled for November 3, 2020, are "looming." Accordingly, Plaintiffs' delay is particularly damaging.

The Sixth Circuit's decision in *Crookston v. Johnson* tells a similar story. Less than two months before an election, the plaintiff sought to enjoin certain state laws governing conduct in polling places. The district court entered a preliminary injunction, but the Sixth Circuit stayed it. The court explained that "[w]hen an election is 'imminent' and when there is 'inadequate time to resolve factual disputes' and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures." *Crookston v. Johnson*, 841 F.3d 396, 397-98 (6th Cir. 2016) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam) (internal citations omitted). Plaintiff's delay in seeking relief, the court concluded, prejudiced the state's interest in the orderly operation of elections as it threatened to upend well-laid election preparations, and put the state in the unfair position of having to make "nuanced policy decisions

that no one should be making at the eleventh hour—absent a good explanation for the delay." *Id.* at 399.

Two years ago in this case, this Court held that Plaintiffs' "unexplained, highly prejudicial delay in seeking a recount" of the 2016 election results was "fatal to their claims for immediate relief." (ECF 55, at 1.) Plaintiffs had long had all the information they needed to make their claims, this Court wrote, but instead waited, creating a "judicial fire drill" that was "unnecessary and unfair to all concerned." (*Id.* at 20.) Plaintiffs' counsel was "unable to offer a credible justification for this delay." (*Id.* at 21.) This Court concluded that "Plaintiffs are not entitled to the 'emergency' relief they seek because they have inexcusably waited well past the eleventh hour to seek it." (*Id.*) Unfortunately, once again, Plaintiffs have delayed seeking relief for so long that they are burdening the Court and threatening the rights of Pennsylvania voters. Once again, they have no explanation for their conduct. Therefore, this Court should once again deny them relief.

C. The Balance of Harms and the Public Interest Weigh Against Granting Plaintiffs an Injunction

"Injunctive relief is an 'extraordinary remedy which should be granted only in limited circumstances.'" *Snyder v. Millersville University*, 2008 WL 5093140, * (E.D. Pa. Dec. 3, 2008) (J. Diamond) (quoting *Am. Tel. and Tel. Co. v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427–28 (3d Cir. 1994)). Even more so, "[m]andatory injunctions, which require defendants to take some affirmative action," are not readily ordered; rather, they are "'looked upon disfavorably and are generally only granted in compelling circumstances.'" *Snyder v. Millersville University*, 2008 WL 5093140, * (E.D. Pa. Dec. 3, 2008) (J. Diamond) (quoting *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F.Supp. 159, 166 (D.N.J. 1988)).

Plaintiffs are not entitled to the relief they seek because they have failed to set forth allegations sufficient to meet these demanding standards.

In order to obtain a permanent injunction Plaintiffs must, as a threshold matter, prevail on the merits, *Ciba-Geigy Corp. v. Bolar Pharmaceutical Co., Inc.*, 747 F.2d 844, 850 (3d Cir. 1984), and additionally must demonstrate "(1) [they] will suffer irreparable injury, (2) no remedy available at law could adequately remedy that injury, (3) the balance of hardships tips in their favor, and (4) an injunction would not disserve the public interest." *TD Bank N.A. v. Hill*, 928 F.3d 259, 278 (3d Cir. 2019) (quoting *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). Even if this Court were to find that the certification of the ExpressVote XL violates the Settlement Agreement (as set forth in Sections III.A.1-3 above, it should not), a permanent injunction should not issue. The balance of harms weighs heavily against entry of a permanent injunction, and an injunction is not in the public interest.

Entry of the requested mandatory permanent injunction would impose severe harms on the Commonwealth, the counties, and the citizenry of Pennsylvania. First, entry of a mandatory permanent injunction would be harmful to the Commonwealth's counties and taxpayers, and would put the orderly administration of the 2020 elections at risk. (*See supra* Section III.B.) Second, an injunction that prevents the Commonwealth from effectuating one of its duly enacted laws would harm the Commonwealth. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1, 3 (2012). By limiting the Commonwealth's right to engage in the voting machine approval process according to the mandates of the relevant election code sections, 25 Pa. Stat. §§ 3006, 3007, 3031.5, and 3031.7, the requested permanent injunction

would prevent the Commonwealth from fully effectuating the election statutes enacted by Pennsylvania's elected representatives.

Conversely, the Plaintiffs would not suffer any harm as a result of this Court's denial of their request for a mandatory permanent injunction. As in the 2016 preliminary injunction proceedings, Plaintiffs "have raised only spectral fears" that the ExpressVote XL machines could be compromised, based on Dr. Halderman's speculation that the machines could in theory be vulnerable. (ECF 55, at 28, 30.) Moreover, even assuming *arguendo* that the ExpressVote XL machines are exposed to the kinds of risks the Settlement Agreement was designed to avoid, the Plaintiffs face no realistic prospect of being affected by the use of the machines. Plaintiff Jill Stein has not indicated an intent to run in the 2020 presidential election, and thus has no interest in Pennsylvania voting systems. The other individual Plaintiffs live in Montgomery County, Pennsylvania. Montgomery County has not purchased ExpressVote XL machines and has not indicated any intent to do so. (Boockvar Decl. ¶ 53.)

D. Principles of Federalism Counsel Against a Grant of an Injunction

A grant of the mandatory permanent injunction that Plaintiffs request would directly undermine the Commonwealth's and the counties' abilities to prepare for and carry out upcoming elections. As such, it would constitute improper and damaging federal court interference in the state elections process that would violate principles of federalism. *See Page v. Bartels*, 248 F.3d 175, 195-96 (3d Cir. 2001) ("Federal court intervention that would create [ ] a disruption in the state electoral process" in the form of a delay or suspension of state elections at a high cost to taxpayers, "is not to be taken lightly."); *see also Republican Party*, 218 F. Supp. 3d at 404-05 ("Comity between the state and federal governments also counsels against last-minute meddling. Federal intervention at this late hour risks 'a disruption in the state electoral process ….' 'This important equitable consideration goes to the heart of our notions of

federalism.'") (quoting *City of Philadelphia*, 2006 WL 3922115, at *2). Moreover, "there is good reason to avoid last-minute intervention in a state's election process. Any intervention at this point risks practical concerns including disruption, confusion or other unforeseen deleterious effects.'" *Republic Party*, 218 F. Supp. 3d at 404-05.

Federal courts' general disinclination against granting injunctive relief that would affect state elections is especially forceful where the party has delayed seeking relief. *See Crookston v. Johnson*, 841 F.3d 396, 397-98 (6th Cir. 2016) ("When an election is 'imminent' and when there is 'inadequate time to resolve factual disputes' and legal disputes, courts will generally decline to grant an injunction to alter a State's established election procedures. That is especially true when a plaintiff has unreasonably delayed bringing his claim… Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.") (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006) (per curiam) (internal modification omitted) (internal citations omitted); *see also*, *Pennsylvania Democratic Party v. Republican Party of Pennsylvania*, No. 16-5664, 2016 WL 6582659 (E.D. Pa. Nov. 7, 2016).

E. Plaintiffs Have Come to Court With Unclean Hands

Throughout this litigation, Plaintiffs have insisted that their only goal is to improve the election system and ensure that voters' voices are heard. Their actions with respect to the Settlement Agreement, however, could almost be designed to have the opposite effect. First, during the settlement negotiations, Plaintiffs and their experts had every opportunity to consider the voting systems that were in DOS's certification pipeline. (Unger Decl., Ex. 1, 2, 4; *see also* Boockvar Decl. ¶¶ 54-59.) If the ExpressVote XL's design were as flawed as Plaintiffs now claim, Plaintiffs could have, and should have, raised their concerns then. But they did not. Plaintiffs also could have spoken up two days after they signed the Settlement Agreement, when

DOS certified the ExpressVote XL. (Boockvar Decl. ¶ 60.) Again, they did not, then or in the months that followed. Instead, they waited for month after month, as counties around the state invested time and money in selecting and purchasing new voting systems. (Lynch Decl. ¶¶ 7-22; Salzarulo Decl. ¶¶ 3-8, 10-12; Boockvar Decl. ¶¶ 15, 19, 73-74, 78-79, 81-82.) If Plaintiffs truly believed that the ExpressVote XL were putting Pennsylvania's votes at risk, this delay would be inexplicable. As shown above and in the attached declarations, by the time Plaintiffs finally filed their Motion (accompanied by a press conference in front of the courthouse), it was much too late to decertify the ExpressVote XL without severely disrupting the 2020 elections and possibly disenfranchising Pennsylvania voters.

Thus, if Plaintiffs' goal was to replace the ExpressVote XL with other voting systems, their tactics have been remarkably ineffective and irresponsible. These tactics appear well designed, on the other hand, to disrupt preparations for the 2020 elections and sow doubts in the minds of voters. Either way – whether Plaintiffs filed their Motion in irresponsible pursuit of a legitimate goal, or in an attempt to use the Court to pursue an illegitimate one – they have come into court with unclean hands.

Unclean hands is "an equitable doctrine which applies 'when a party seeking relief has committed an unconscionable act immediately related to the equity the party seeks in respect to the litigation.'" *Romero v. Allstate Ins. Co.*, 158 F.Supp. 3d 369, 375 (E.D. Pa. 2016) (quoting *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 174 (3d Cir. 2001)). Whether Plaintiffs have acted recklessly or cynically, they should now be barred under principles of equity from obtaining the requested injunctive relief.

IV. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs' Motion.

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

By: */s/ Mark A. Aronchick*
Mark A. Aronchick
Robert A. Wiygul
Christina C. Matthias
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

TUCKER LAW GROUP
Joe H. Tucker
Dimitrios Mavroudis
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2019, I caused the foregoing Defendants' Response in Opposition to Plaintiffs' Motion to Enforce the Settlement Agreement to be filed with the United States District Court for the Eastern District of Pennsylvania via the Court's CM/ECF system, which will provide electronic notice to all counsel of record.

/s/ Mark Aronchick
Mark Aronchick

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN, et al., Plaintiffs, v. KATHY BOOCKVAR, in her official capacity as Secretary of the Commonwealth, and JONATHAN MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections and Legislation, Defendants.	CIVIL ACTION No. 16-cv-6287(PD)

DECLARATION OF KATHY BOOCKVAR IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO ENFORCE THE SETTLEMENT AGREEMENT

I, Kathy Boockvar, declare under the penalty of perjury pursuant to 28 U.S.C. § 1746 that:

I am the Secretary of State (commonly known as the Secretary of the Commonwealth) of the Commonwealth of Pennsylvania. I make this declaration in support of Defendants' Response in Opposition to Plaintiffs' Motion to Enforce the Settlement Agreement.

Background

1. I was appointed Acting Secretary of the Commonwealth on January 5, 2019 and confirmed by the Senate on November 19, 2019.

2. In this role, I lead the Pennsylvania Department of State's efforts to promote the integrity and security of the electoral process. I work with election directors and personnel in the Commonwealth's 67 counties, as well as other Secretaries of State across the country, to ensure that our elections are free, fair, secure, and accessible to all eligible voters.

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN, et al.,	:	
Plaintiffs,	:	
v.	:	**Civ. No. 16-6287**
	:	
KATHY BOOCKVAR,	:	
in her official capacity as Secretary of	:	
the Commonwealth of Pennsylvania,	:	
et al.,	:	
Defendants.	:	

O R D E R

AND NOW, this 20th day of December, 2019, it is hereby **ORDERED** as follows:

1. Election Systems & Software, LLC's unopposed Motion for Leave (Doc. No. 130) to file an *amicus* brief is **GRANTED**. The brief attached to ES&S's Motion (Doc. No. 130) shall be deemed filed as of December 20, 2019.

2. The Philadelphia Board of Elections and the City of Philadelphia's Motion to Intervene is (Doc. No. 131) **GRANTED**. See Fed. R. Civ. P. 24(a)(2). The City has shown that: (1) it has a strong "interest in the litigation," the outcome of which could affect the rights of over 1,000,000 registered Philadelphia voters and jeopardize its multi-million dollar investment in 3,750 voting machines; (2) "a threat that [these] interest[s] will be impaired or affected, as a practical matter, by the disposition of the action"; and (3) "its interest is not adequately represented by" the Commonwealth, which neither paid for the voting machines, nor is responsible for ensuring polling places are adequately equipped. Pennsylvania v. President of the United States of Am., 888 F.3d 52, 57 (3d Cir. 2018). The brief attached to their Motion (Ex. A to Doc. No. 131) shall be deemed filed as of December 20, 2019.

3. Plaintiffs and Defendants may submit responses to the briefs filed by Intervenors and *Amicus Curiae* **no later than 10:00 a.m. on Friday, December 28, 2019**.

4. An evidentiary hearing on Plaintiffs' Motion to Enforce the Settlement Agreement (Doc. No. 112) shall be held at **10:00 a.m. on Tuesday, January 21, 2020 in Courtroom 14A.** Legal argument will not be presented. Rather, the Parties should be prepared to call witnesses (and present evidence) who can address the following factual questions:

   a. What did the Parties to the November 28, 2018 Settlement Agreement mean when they employed the following terms in the Agreement: "paper ballot," "voter-verifiable record of each vote," and "capable of supporting a robust pre-certification auditing process";

   b. In the months leading up to the November 28, 2018 Settlement Agreement, what were the Parties' communications regarding the type of voting machine systems the Department of State was considering, and Plaintiffs' evaluation, comments, or criticisms of these systems;

   c. When did the Secretary first certify the ExpressVote XL system;

   d. When did Plaintiffs first object to the ExpressVote XL system;

   e. What did Plaintiffs know about the ExpressVote XL system when the Department of State apparently first considered it in September 2018;

   f. Does the challenged ExpressVote XL system's methods of collecting and tabulating votes comport with the Settlement Agreement;

   g. Why did Plaintiffs wait until November 26, 2019 to file their Motion to Enforce the Agreement; and

   h. What effect would granting Plaintiffs' Motion have on voting in the November 2020 Election.

5. Each Party shall submit, **no later than 12:00 p.m. on January 13, 2020**, a Pre-Hearing

Memorandum that should include a list of the witnesses the Party is likely to call at the January 21 hearing to address my questions. Each Party should indicate whether the Party deems any witness potentially adverse. Because Plaintiffs, as the moving Parties, will make their hearing presentation first, Defendants may seek to supplement their witness list after Plaintiffs have completed their hearing presentation;

6. If possible, the Parties should, in advance of the hearing, stipulate to the authenticity of documents that will be introduced at the hearing;

7. The Parties shall, **no later than 12:00 p.m. on January 15, 2020**, also address whether hearing testimony will be required from the lawyers who negotiated the Agreement and subsequently monitored and addressed compliance questions. The Parties should further address whether testifying would disqualify those lawyers and their firms from serving as counsel in these proceedings. See Pa. R.P.C. 3.7(a) ("A lawyer shall not[, absent certain exceptions,] act as advocate at a trial in which the lawyer is likely to be a necessary witness.").

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN, et al., Plaintiffs, v. KATHY BOOCKVAR, in her official capacity as Secretary of the Commonwealth, and JONATHAN MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections and Legislation, Defendants.	CIVIL ACTION No. 16-cv-6287(PD)

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I, Kathy Boockvar, declare under the penalty of perjury pursuant to 28 U.S.C. § 1746 that:

I am the Secretary of State (commonly known as the Secretary of the Commonwealth) of the Commonwealth of Pennsylvania. I make this declaration in support of Defendants' Response in Opposition to Plaintiffs' Motion to Enforce the Settlement Agreement.

Background

1. I was appointed Acting Secretary of the Commonwealth on January 5, 2019 and confirmed by the Senate on November 19, 2019.

2. In this role, I lead the Pennsylvania Department of State's efforts to promote the integrity and security of the electoral process. I work with election directors and personnel in the Commonwealth's 67 counties, as well as other Secretaries of State across the country, to ensure that our elections are free, fair, secure, and accessible to all eligible voters.

3. I am an attorney with an extensive background in election administration.

4. From March 5, 2018, until the date I was appointed as Secretary, I served as Senior Advisor to Pennsylvania Governor Tom Wolf on Election Modernization, leading and managing initiatives to improve security and technology in Pennsylvania's elections, in collaboration with federal, state, and county officials.

5. In August 2019, I was appointed to serve as the Elections Committee Co-Chair for the National Association of Secretaries of State ("NASS").

6. One of my responsibilities as Co-Chair is to serve as a NASS representative on the Election Infrastructure Subsector Government Coordinating Council ("EIS-GCC"). The EIS-GCC is a first-of-its-kind collaboration among federal, state, and local officials to secure elections, working to formalize and improve information-sharing and communication protocols to ensure that timely threat information, support, and resources reach all election officials so they can respond to threats as they emerge.

7. Between 2008 and 2010, I served as senior voting rights counsel for Advancement Project, a national nonprofit civil rights organization. In this position, I worked in collaboration with local, state, and national government officials, agencies, legislators, and nonprofit organizations, to ensure that election laws were administered fairly, effectively, and accurately.

8. I also served as a poll worker for a number of years in Bucks County.

9. Since 2018, I have gained significant experience with voting system technology, including attending some portion of most of the certification examinations in Pennsylvania, participating in multiple voting system demonstrations, reviewing certification reports,

consulting with experts, attending conferences, and reading documentation relating to these systems.

Pennsylvania's Transition to Voting Systems With Voter-Verifiable Paper Records

10. At the beginning of 2019, Pennsylvania was one of only 12 states still using Direct Recording Electronic ("DRE") voting machines. DREs do not generate a paper record that voters can review and verify before their vote is tabulated.

11. Voter-verifiable paper records enable accurate recounts and robust post-election audits, because they ensure that election officials have access to a physical record of each vote, confirmed by the voter who cast it.

12. For several years, DOS has been committed to phasing out DREs and replacing them with voting systems that provide voter-verifiable paper records, in order to ensure that there is a voter-verifiable paper record of every vote cast in Pennsylvania.

13. To advance this process, in December 2017, DOS held a voting systems vendor forum that was open to the public, county election officials, and other stakeholders, to begin exploring new voting machine options for Pennsylvania. ES&S participated in this forum.

14. In February 2018, the Department issued a directive requiring that all new voting systems procured by Pennsylvania counties have voter-verifiable paper records of votes cast.

15. On April 12, 2018, DOS directed Pennsylvania's counties to purchase voting systems with voter-verifiable paper records no later than December 31, 2019, and preferably have them in place by the November 2019 general election.

16. On April 26, 2018, DOS held a voting systems vendor demonstration, allowing the public, legislators, county officials, press, and all stakeholders to view and try the new voting

systems under consideration. Election Systems & Software ("ES&S") participated in this demonstration.

17. Five additional DOS-sponsored vendor demonstrations were held around the state between Fall 2018 and January 2019, all of which included ES&S.

18. Since January 1, 2018, DOS has certified seven systems that meet DOS's February 2018 directive and have undergone enhanced security testing, as explained below.

19. As of today, nearly 90% of the Counties have complied with the Secretary's April 2018 mandate, and the remaining 8 counties are expecting to select their new paper-record voting systems in the next few weeks.

20. At present, there are two broad categories of voting systems that can provide voter-verifiable paper records. The first, optical or digital scan paper ballot systems, requires voters to hand mark paper ballots, which are then scanned and tabulated by scanning devices. In order to tabulate the votes, the scanners sense the marks the voters have made, along with timing marks and/or other machine-generated markings on the paper ballots.

21. The second category of voting systems that can provide voter-verifiable paper records of the voter's selections are ballot marking devices ("BMDs"). These systems provide an interface to assist each voter in marking a paper document reflecting the voter's choices, which is then scanned into a tabulator or counted by hand.

22. Because voters with disabilities may be unable to hand mark paper ballots independently and privately, federal law requires every polling place that uses optical scan equipment to have at least one BMD for use by voters with disabilities.

23. All systems certified for use in Pennsylvania since January 1, 2018, produce paper records with human-readable text that voters can review before casting their ballots.

24. In the systems certified in Pennsylvania that use hand-marked paper ballots, those ballots contain not only human-readable text but also barcodes, QR codes, and/or other non-human-readable pattern codes.

25. Hand-marked paper ballots contain information in three formats: The candidates' names in human-readable text, the marks that the voter makes (usually filled-in ovals next to the candidates' names), and a barcode or other pattern code that contains instructions as to how the scanner should interpret the voter's marks.

26. The scanner uses barcode or other pattern codes to interpret the voter's marks. The pattern code tells the scanner what a mark in a certain location of the ballot means and how that mark should be tabulated.

27. In Paragraph 3 of his Declaration in support of Plaintiffs' Motion, J. Alex Halderman states that a voting system that uses hand marked paper ballots "does not place a hackable computer between the voter and the official record of her vote."

28. If Dr. Halderman is stating that optical scan voting systems do not use computers to interpret and record votes, he is incorrect. As described above, optical scan systems, like BMDs, use computers to interpret the paper record of the voter's vote and tabulate that vote. These computers use non-human-readable pattern codes to make that interpretation.

29. The only alternative to using computers to translate the voter's actions into tabulated votes is to hand count paper ballots – an expensive, time-consuming, and unreliable process.

30. As described above, the advantage of systems with voter-verifiable paper records is that they allow election officials to catch errors in the computerized processes and conduct accurate recounts of the vote.

Recounts and Audits

31. Pennsylvania has formed a statewide post-election audit working group, which includes election officials from six counties, as well as expert advisors on audits and elections. This working group is studying audit models such as risk-limiting audits and is developing best practice recommendations for post-election audits that will review the plain text on the paper records and the tabulated votes to confirm to a reasonable degree of statistical certainty the accuracy of the outcome of the election.

32. One of the members of the working group, Mark Lindeman, Senior Science and Technology Policy Office for Verified Voting, was designated by the Plaintiffs in this lawsuit.

33. Following the 2019 elections, Mercer County and Philadelphia County performed pilot risk-limiting audits. County election officials, Department of State staff, and elections experts from the U.S. Election Assistance Commission, the University of Michigan, the Brennan Center for Justice at NYU School of Law, the Democracy Fund, VotingWorks, and Verified Voting participated in developing and implementing the pilot audit process using the new paper-based voting systems.

34. Independent of the audit working group, and pursuant to existing statutory provisions, DOS has conditioned certification of certain voting systems, including the ExpressVote XL, on the use of post-election, manual audits of the paper records. *See infra* ¶ 61.

35. I will require that any audit procedure the Commonwealth adopts will require review of the plain text of the paper records.

36. In the event of any conflict between the plain text and the non-human-readable information on the paper record, the plain text will control.

"Paper Ballots"

37. In the discussion above, I have used the term "paper ballots" to refer to the ballots, showing all the choices available in an election, that voters hand mark for use in optical scanning voting systems, and the term "paper record" to refer to the record of votes that a BMD prints, and a voter may verify, before the votes are cast.

38. However, in the context of the transition from DRE voting systems to voting systems with paper records that can be verified by the voter and audited by election officials, observers often use the term "paper ballots" as a catchall term for the benefit that DREs do not provide – verifiable, auditable, contemporaneous paper records of votes. In public statements, many in the election security community – including myself and others in Governor Tom Wolf's administration – sometimes distinguish between "paper records" and "paper ballots," but sometimes describe all such paper records as "paper ballots."

39. For example, in testimony to the Pennsylvania State Senate Government Committee on March 26, 2019, I stated: "As you know, last April, the department directed counties to purchase new voting systems that meet current security and accessibility standards, including an auditable paper ballot that voters can review and verify before casting their ballot."[1] *See also, e.g.*, Commissioner Marks's statement to the Senate State Government Committee dated September 25, 2018,[2] at 2 (describing professionals' view that elections "should be conducted with paper ballots by 2020"); interview with Commissioner Marks held at voting equipment expo on November 29, 2018 ("all of this voting equipment has a voter verified paper

[1] *See* https://stategovernment.pasenategop.com/wp-content/uploads/sites/30/2019/03/boockvar.pdf.
[2] *See* https://stategovernment.pasenategop.com/wp-content/uploads/sites/30/2018/09/MarksTestimony925.pdf

ballot … that's the most important component that we're focusing on relative to security …")[3]; Statement of Governor Tom Wolf dated Feb. 21, 2019 (lauding voting officials' commitment to "ensuring that all voters will be voting on systems with voter-verifiable paper ballots and meeting the highest standards of security and accessibility by 2020").

40. I attended and participated in the settlement conference in this case before Magistrate Judge Rice on October 11, 2018, at which the parties agreed to the terms set forth in Paragraphs 2 and 3 of the November 28, 2018 Settlement Agreement, a copy of which is attached as Exhibit A to the Declaration of Ilann M. Maazel docketed at ECF 112-1.

41. At no point during the settlement conference did the Plaintiffs assert that only voting systems that used hand-marked paper ballots were acceptable, that BMDs or systems using barcodes were not, or that Plaintiffs opposed the certification of any system that was then going through the certification process.

Pennsylvania's Voting Machine Certification Process

42. In order to become available to Pennsylvania counties, every voting machine system must go through an exhaustive process.

43. First, pursuant to the Pennsylvania Election Code at 25 P.S. § 3031.5, the system must be evaluated by a federally approved voting system test laboratory and certified by the U.S. Election Assistance Commission ("EAC") for conformance with either the 2005 Voluntary Voting System Guidelines or the Voluntary Voting Systems Guidelines 1.1 published by the EAC, or any subsequent iteration of federal voting system standards.

[3] *See* video posted at https://www.centredaily.com/latest-news/article222397975.html.

44. Once a system completes EAC testing, the vendor submits an application to DOS that includes testing reports, a list of all components of the system that require examination, and complete documentation for the system, including manuals and other technical data.

45. DOS then conducts an examination and testing to determine whether the system conforms to state law and any Commonwealth regulations or standards regarding the following criteria: confidentiality, security, accuracy, safety, reliability, usability, accessibility, durability, resiliency, and auditability.

46. Under updated Commonwealth security standards adopted in 2018, the certification process includes additional security testing, such as:

- Penetration testing evaluates the security of the voting system by seeking out and trying to exploit potential vulnerabilities that an attacker could exploit;
- Access control testing to confirm that the voting system can detect and prevent unauthorized access to the system and election data;
- Evaluation of voting system audit logging capabilities to confirm that the system logs will allow auditing, as well as investigation of any apparent fraudulent or malicious activity; and
- Tests that ensure every physical access point is well secured and system software and firmware is protected from tampering.

47. In conformance with protocols for protecting critical infrastructure election security information, since 2018, security testing of all systems has been and continues to be conducted offsite in the system examiner's laboratory.

48. DOS's examiners, SLI Global Solutions ("SLI"), have extensive experience with preventing, identifying and mitigating vulnerabilities and security risks in both computer system hardware and software. SLI is qualified as an EAC accredited Voting System Test Lab, experienced with multiple voting system manufacturers, and they maintain certification from

professional organizations like the International Organization for Standardization ("ISO") and the Institute of Electrical and Electronics Engineers ("IEEE").

49. As part of its certification, DOS may impose limitations or conditions on use of a particular voting system.

50. DOS's role in this certification process is not to determine which voting system is the "best" overall, but to ensure that each system used in the Commonwealth meets the Commonwealth's stringent standards.

51. Each County faces different challenges in election administration, and a voting machine system that works well in one County may not meet another County's needs. Therefore, DOS attempts to ensure that a range of modern voting technologies is available to the Counties.

52. The fact that the Commonwealth's Counties do not all use the same system also provides a security benefit, because it limits the effect of any effort to compromise a particular system.

53. I understand that the Plaintiffs in this litigation, other than Jill Stein, are residents of Montgomery County. Montgomery County has not purchased the ExpressVote XL, and has not indicated any plans to do so. To my knowledge, Jill Stein has never lived in Pennsylvania and is not currently a candidate for any public office.

Certification and Reexamination of the ExpressVote XL

54. Upon the application of Elections Systems & Software ("ES&S"), DOS held a functional and accessibility examination of the system known as EVS 6000, which included the ExpressVote XL. The examination, which was open to the public, commenced on June 25,

2018, and lasted for approximately four days. DOS's examiners also carried out security testing of the EVS 6000.

55. During these examinations, DOS identified functional issues with the EVS 6000 software (it did not accommodate straight ticket voting or write-ins in accordance with the Pennsylvania Election Code), and the security testing identified an installation issue.

56. ES&S corrected these issues, along with another issue noted during a primary election in Kansas, and resubmitted a new release, EVS 6021. Only the system's software was updated; its hardware components remained the same as those shown in the public examination of June 2018.

57. On September 21, 2018, DOS released a "Pennsylvania Voting System & Electronic Poll Book Report." This report noted that testing of the EVS 6021 was scheduled during the week of September 24.

58. An examination of the EVS 6021 took place on September 25 through 28, 2018.

59. All of the features of the ExpressVote XL that Plaintiffs criticize in their Motion – bar codes, printer head location, and tabulation process – were public knowledge by at least June 2018. The fact that the Commonwealth of Pennsylvania had been asked to certify the system was also public knowledge.

60. DOS issued its report and certification of the EVS 6021 system on November 30, 2018. A true and correct copy of DOS's report is attached as Exhibit 1.

61. The certification included a number of conditions. First, it required that after each election, counties must conduct a "statistical recount of a random sample of ballots" with a "manual count of the voter marked paper ballots." *Id.* at 38.

62. A second condition of certification was that "[t]he system **must not** be configured to have the voter validate the selections on the screen and "Autocast" the ballot, thus causing a situation where the voter has not verified what was printed on the paper ballot." *Id.* at 42. In other words, in Pennsylvania, the certified use of this system **requires** that all voters must be permitted to verify the plain text on the paper record before casting their vote. The "autocast" option skipping this step is prohibited in Pennsylvania.

63. Third, the certification required that "[i]n the event of a recount, the voter verified paper ballots must be used for the count." *Id.* at 40.

64. A fourth condition involved the machines' communications with other systems: "No components of the EVS 6021 shall be connected to any modem or network interface, including the Internet, at any time, except when a standalone local area wired network 80-configuration in which all connected devices are certified voting system components. Transmission of unofficial results can be accomplished by writing results to media, and moving the media to a different computer that may be connected to a network. Any wireless access points in the district components of EVS 6021, including wireless LAN cards, network adapters, etc. must be uninstalled or disabled prior to delivery or upon delivery of the voting equipment to a county board of elections." *Id.* at 37-38.

65. On July 17, 2019, I received a Petition to Reexamine the ExpressVote XL.

66. The petitioners argued, as Plaintiffs do in their Motion, that the ExpressVote XL did not comply with the Settlement Agreement in this case because it does not include a "printed ballot" as defined in 25 P.S. § 3031.1. They did not make any other arguments that the ExpressVote XL did not comply with the Settlement Agreement.

67. I determined that this claim, along with most of the petitioners' other claims, was a legal argument that did not apply to the reexamination or certification process.

68. DOS engaged a consultant to conduct a focused reexamination of the ExpressVote XL to address the petitioners' claims that related to certification requirements under state law. DOS requested that the consultants use their best efforts to try to create the issues that the petitioners alleged were theoretically possible. The consultants were unable to do so.

69. On September 3, 2019, DOS released the Reexamination Report for the ExpressVote XL, which maintained its certification but imposed additional conditions for its use.

Issues With the ExpressVote XL in Northampton County Elections

70. There were widely reported problems with the operation of the ExpressVote XL system in Northampton County in the November 2019 election.

71. Northampton County officials and ES&S have confirmed that the election day issues with their voting systems were caused by 1) human error in programming the details of the election into the system, and 2) imprecise factory configuration of a limited number of machines. The first issue caused an error in the end-of-night tally report, but did not impact the paper records or voting system screens. The second issue caused some machines to have some buttons that were difficult to select.

72. The situation underscored the importance of having a paper record of each ballot cast, as the county was able to re-scan every paper record of votes cast. Because the Northampton County voting systems included voter-verifiable, auditable paper records of the votes, the County was able to successfully recount the votes and avoid the need for a new election.

The Consequences of Decertification of the ExpressVote XL

73. As discussed above, the Commonwealth imposed a December 31, 2019 deadline for the Counties' purchase of voting systems with voter verifiable paper records.

74. In order to meet that deadline, the Counties moved quickly to evaluate and purchase new systems and put them in place.

75. In the year since the Commonwealth certified the EVS 6021 system, a number of Counties have purchased and installed the ExpressVote XL machines.

76. For example, Philadelphia County issued a request for proposals in November 2018, with a submission deadline of December 28, 2018. In February 2019, Philadelphia's City Commissioners voted to purchase the ExpressVote XL system.

77. Northampton County selected the ExpressVote XL system on March 6, 2019; Cumberland County's Board of Elections voted to select the system on June 26, 2019.

78. Putting a new voting system in place takes a great deal of time. Counties must go through the procurement process, select a system, physically acquire the machines, make any changes to the voting infrastructure that the machines require, and hold training sessions for poll workers and the public, and much more.

79. This entire process typically takes many months, and often over a year.

80. It is already too late for Counties to replace ExpressVote XL machines in time for the 2020 primary, which will be held on April 28, 2020.

81. For example, Counties have usually taken about three to twelve months to review and compare voting system options, assess equipment and storage needs, explore funding, leasing, and financing options, and negotiate/procure contracts.

82. Counties have typically taken at least three to eight months to seek delivery of the new systems, conduct acceptance testing on the new systems, provide training of county election personnel and poll workers, finalize and print ballots, conduct voter education campaigns, program details of the elections into the equipment, and perform logic and accuracy testing.

83. Depending on the system selected, the county may also need to reevaluate polling locations to ensure that those locations can accommodate the system's hardware configuration, the system's physical footprint, or the system's unique power source needs. Because many polling locations are housed in schools, municipal buildings, and churches, they are scheduled months in advance of the day of the election.

84. Given the complexity of the system and the short timeline involved, changing voting systems in short time risks confusing voters and election personnel.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 2019.

Kathy Boockvar

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN, RANDALL REITZ, ROBIN HOWE, SHANNON KNIGHT, and EMILY COOK,	:	
Plaintiffs,	:	
against	:	No. 16-CV-6287 (PD)
KATHY BOOCKVAR, in her official capacity as Secretary of the Commonwealth; and JONATHAN MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation,	:	
Defendants.	:	

DECLARATION OF JOSEPH LYNCH

I, Joseph Lynch, make this declaration and aver as follows:

1. I have been employed by the Philadelphia County Board of Elections (the "Board") for the past 25 years, including the last 19 years as the Assistant Administrator of Election Activities.

2. As Assistant Administrator, I oversee the Board staff who carry out the day-to-day operations for election activities. These activities include ordering and distributing nomination petitions, polling place selection and preparation, poll book preparation and distribution, voting machine demonstrations, poll worker and interpreter training, ordering and printing of provisional ballots, and staffing for elections. I also oversee ballot collection for absentee, overseas, and military ballots, as well as the Board's warehouse staff that store, monitor security for, and distribute voting systems for elections.

3. Over the past year, subsequent to the completion of the procurement process, the Board of Elections worked to implement the Election Systems & Software (ES&S) ExpressVote XL electronic voting system (the "ExpressVote XL")for use as the voting system for

elections in Philadelphia. As part of my duties and responsibilities, I was engaged with all aspects of the Board's implementation of the ExpressVote XL.

Background on Voting Machines in Philadelphia

4. Prior to the November 2019 General Election, Philadelphia used Danaher direct-recording electronic (DRE) voting machines. Before that, Philadelphia used lever voting machines. Philadelphia transitioned to the Danaher DRE machines in 2002, a non-presidential election year. In the year leading up to the 2002 election, the Board conducted roughly 500 demonstrations in the community in order to familiarize voters with how to use the new machines. Educating voters on the use of voting systems through demonstrations and printed materials to ensure voters can to express their will at the polls is an important function of the Board.

5. In 2002, the Board also held well over 100 trainings, multiple times each week, for poll workers to teach them how to operate the new machines to ensure they could be successfully used on election day. Trainings were held at a different location in the City each week.

6. Transitioning to new voting systems during lower-expected-turnout elections allows the Board to devote additional staff to testing the new system, voter demonstrations, and poll worker trainings. It also minimizes the potential disruption to the election in the event of unforeseen issues that may occur during the first use of a new system by reducing the number of provisional ballots the Board must print, deliver, and count in those situations.

Board Implementation of a New Voting System in 2019

7. On February 20, 2019, the Board selected the ES&S ExpressVote XL to replace the Danaher DRE machines. A true and correct copy of the transcript from that meeting is attached hereto as **Exhibit 1**. The ExpressVote XL also complies with the Americans with Disabilities Act (ADA), both because it can be used by the visually impaired and also lowered for wheelchair users. Unlike optically scanned hand-marked ballots, the ExpressVote XL also prevents overvotes and avoids issues of determining voter intent.

8. Beginning in April 2019, the Board began to receive shipments of the ExpressVote XLs. A true and correct copy of schedule reflecting the shipments received is attached hereto as **Exhibit 2**. As this schedule reflects, the Board received nearly thirty shipments from ES&S over a four month period, with between 60 and 240 machines—sometimes requiring multiple trucks— delivered in each shipment.

9. In order to store the ExpressVote XLs and their paper ballots, the Board had to arrange for a new warehouse lease large enough to house the machines and provide a climate-controlled environment to preserve the condition of the ballots. The Board also had to retrofit the warehouse to provide additional power outlets for the machines, seal the floor to limit the amount of dust in the air, and redesign the interior of the warehouse to organize the machines. Each of these steps had to go through the City's procurement process.

10. As each shipment was received, the Board performed User-Acceptance Testing (UAT) on every ExpressVote XL received by the Board. Ultimately, the Board received and tested roughly 3,750 ExpressVote XLs.

11. UAT involves physically and functionally testing voting systems for physical defects as well as proper functionality. It generally takes slightly less than one hour to perform a UAT on each individual ExpressVote XL. Using roughly twenty staff members, the Board was able to complete the UAT process in August 2019. This represented roughly 3,750 hours of work across the approximately twenty individuals assigned to this project.

12. To implement and use the ExpressVote XLs, the Board also had to procure new secure computer systems. In addition, to transmit the data for the new system, the Board had to upgrade its network speed connections at its regional transmission centers. The Board also had to purchase new optical scanners to process absentee and provisional ballots.

13. While the UAT process was ongoing, in June, the Board also began conducting public demonstrations of the ExpressVote XL. These demonstrations are important and necessary to familiarize voters with the system prior to its use in an election.

14. Board staff held semi-weekly demonstrations at City Hall and the Municipal Services Building throughout the summer. Two staff members also conducted weekly demonstrations at a location in Reading Terminal Market. And the Board provided multiple staff and machines for demonstrations at special events at the National Constitution Center such as the Fourth of July, Constitution Day, and National Voter Registration Day.

15. The Board also held numerous demonstrations at City Council meetings, events held by city, state, and federal elected officials, ward and civic group meetings, public schools, block parties, senior fairs, libraries, senior centers, recreation centers, swimming pools, nursing homes, and retirement and assisted living facilities. The Board also took requests for demonstrations from members of the public.

16. In total, the Board performed 827 demonstrations over the five months from June through the end of October. A true and correct copy of the list of these demonstrations is attached hereto as **Exhibit 3**.

17. For demonstrations, the Board arranged for the machines to be populated with sample ballots so that voters could practice voting on the new systems. For each demonstration, the Board had to arrange transportation and staffing. Demonstrations involved between one and four machines, requiring at least three to four staff members. The Board had to procure custom vans and ramps to transport the ExpressVote XLs.

18. In addition to familiarizing the public with a voting system, the Board offers training to poll workers to ensure they are familiar with and able to properly operate voting systems on election day. Poll worker familiarity with a voting system is important to ensure that polls are orderly on election day.

19. During years in which there is no change to a voting system, the Board provides a single training for poll workers roughly two months before each election. However, because the ExpressVote XLs were new, the Board decided to hold additional trainings to familiarize poll workers with the new voting system.

20. During July and August, the Board, in conjunction with ES&S staff, held local trainings for the thousands of poll workers and interpreters in the City. The Board held between two and four training sessions each day, including on weekends, at a different location each week, with over 100 in total. As part of this process, the Board also relocated several training locations and polling places due to accessibility problems.

21. In late August, the Board used its entire staff of nearly 100 employees to conduct a pilot election to test the Board procedures with the new ExpressVote XLs. The Board conducted this pilot election using 80 ExpressVote XLs, and placed them at different polling places throughout the City to test not only the system but also the Board's delivery process and other operations that are necessary for the conduct of an election. Board staff then cast sample ballots on each machine, including both individual candidate selections, write-in votes, and straight ticket voting. Following the sample voting, the Board staff conducted certain procedures that occur once polls close on election day to test the Board's election database using the new computers, and the new chain-of-custody procedure to safeguard the paper ballots themselves.

22. Because the ExpressVote XLs were larger than the Danaher DRE machines and could not be carrier up or down stairs like the Danaher DRE machines, the Board had to individually reevaluate the over 800 polling locations in Philadelphia. The Board subsequently moved a number of polling places, including some moves with Court approval, in order to ensure the ExpressVote XLs could be rolled into the polling locations and had a sufficient power supply.

Preparation for and Conduct of the November 2019 Election

23. The ballot for an election is finalized roughly 50 days before the election. Once this occurs, the Board begins pretesting of the voting machines. In November 2019, for the ExpressVote XLs, this process included full functional testing for every machine used on Election Day in which staff voted on each machine five times according to a script so that each candidate received between one and five votes. Each machine's totals were then compared to the scripted total to ensure the tallies were accurate. Staff also ensured the screens were properly calibrated and conducted a visual inspection of each machine.

24. As part of the pretesting, the Board also performed additional testing on a subset of 70 randomly selected machines. For this additional testing, staff tested all buttons for functionality and tested numerous vote combinations to ensure that the machines were functioning properly.

25. Following pretesting, each machine was loaded with the ballots for its respective election division and given a numerical seal. The seals are tracked and recorded at each polling location.

26. For the November 2019 General Election, the Board had 831 polling locations for the 1,703 distinct election divisions, each of which have their own machines and, depending on the candidates in a given election cycle, their own ballot. There were 304,553 votes cast. Overall, this election went as smoothly, if not more smoothly, than previous elections. On Election Day, the Board received far fewer complaints about voting machines, and replaced fewer than half as many voting machines, than it had during the preceding Primary Election.

27. Following the elections, Board staff, along with experts from the Pennsylvania Department of State, the U.S. Election Assistance Commission, the University of Michigan, the Brennan Center for Justice at NYU School of Law, the Democracy Fund, VotingWorks, and Verified Voting, performed a pilot risk-limiting audit, a procedure that uses statistical methods to confirm whether reported election winners are correct and to detect possible interference. The Board also performed an audit as prescribed by statute by hand counting the names on all ballots from all voting machines from randomly selected election division. These tallies, from 2,200 ballots, were then compared with the tallies from the scanning of the bar codes on those ballots. Even this limited hand counting of the 2,200 ballots took the sixteen Board staff members roughly twelve hours.

Preparation for and Conduct of 2020 Election Cycle

28. By contrast, the Board expects roughly 700,000 and perhaps more votes to be cast for the 2020 General Election. Were this election to be conducted without a voting system available, and even with the entire Board staff working eight hour days, hand counting that many ballots would likely take over one hundred days.

29. To prepare for the 2020 election cycle, the Board is in the process of having the roughly twenty warehouse staff, who are responsible for storing and securing the ExpressVote XLs, go through the certification process so that they are qualified to maintain the machines.

30. The Board also expects an enormous influx of voter registration applications preceding the 2020 presidential election. For comparison, the Board received nearly 500,000 applications in 2016, more than double the number received in 2015. Of those, nearly 175,000 were paper applications physically filed with the Board following registration drives. While these applications are normally processed by the Board's data entry staff in the voter registration unit, due to this influx the Board expects to assign additional Board staff to assist with this undertaking. These additional staff would be unavailable to test new voting machines or train poll workers if the City were unable to use the ExpressVote XLs. Moreover, the Board used voter registration unit staff to help with the demonstrations and testing of the ExpressVote XLs during the 2019 election cycle.

31. If the Board switched to a different type of electronic voting system for a future election, the Board would need to reevaluate all 831 polling places to ensure there was space for the new machines. This would require physical inspection of many polling places. If the system included optically scanned ballots, the Board would likely need to find larger

polling places to provide privacy for voters filling out the ballots and space for ADA-compliant ballot-marking devices, in addition to the space for the scanners themselves.

32. Changing to a new election system would also require the Board staff to retrain the close to 8,000 poll workers and interpreters. The Board would have to create and print new election guides with instructions for poll workers to set up and use the machines. In addition, handouts from the vendor showing voters how to use the system would also need to be printed and translated into additional languages.

33. If the Board was forced to acquire new voting machines for the 2020 election cycle, the Board would need to determine if the current warehouse facilities could house the new machines, if the facilities needed to be reconfigured, or if the Board would need to lease need to lease new facilities.

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I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct, based upon my own knowledge and/or belief.

DATE: December 11, 2019

Joseph Lynch

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN, RANDALL REITZ, ROBIN HOWE, SHANNON KNIGHT, and EMILY COOK,	:	
Plaintiffs,	:	
against	:	No. 16-CV-6287 (PD)
KATHY BOOCKVAR, in her official capacity as Secretary of the Commonwealth; and JONATHAN MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation,	:	
Defendants.	:	

DECLARATION OF MONIQUE NESMITH-JOYNER

I, Monique Nesmith-Joyner, make this declaration and aver as follows:

1. I have been employed by the City of Philadelphia (the "City") for the past two years, including one year as the Procurement Commissioner. As Procurement Commissioner, I am responsible for directing the City's procurement efforts in key purchasing areas—services, supplies, equipment, construction, and concessions—and activities, including ensuring all Department activities conform to the letter and spirit of the laws and policies regarding integrity and ethical conduct, ensuring the procurement needs of City departments and agencies are met in a timely and cost-efficient manner through the establishment of City contracts, cooperative purchasing agreements, or other such contracting methodology as appropriate. I also am responsible for working with the City Solicitor to approve the procurement of goods and services and ensure sufficient bonds for the City.

2. During 2018 and 2019, the Procurement Department was involved in the City's and the Philadelphia County Board of Elections' (the "Board") effort to procure a new voting system for use in elections in Philadelphia. Through that process, the City and the Board selected, procured, and implemented Election Systems & Software's ("ES&S") ExpressVote XL voting system. I am familiar with the facts set forth herein regarding the

procurement of a new voting system for Philadelphia through my role as Procurement Commissioner.

Background to the Acquisition of a New Voting System

3. During 2018, Pennsylvania Governor Tom Wolf and the Department of State repeatedly urged counties to acquire new voting equipment that would provide a "paper record" of votes cast. *See, e.g.*, February 9, 2018 Statement, *available at* https://www.governor.pa.gov/newsroom/governor-wolf-statement-directive-new-voting-machines-paper-record/; April 2, 2018 Statement, *available at* https://www.media.pa.gov/Pages/State-Details.aspx?newsid=276.

4. Although the City and Board had been working towards acquiring a new voting system in or around 2022, by early 2018 it was clear that this timeline should be accelerated to acquire a system that could be used no later than the November 2019 General Election.

5. The City and Board moved forward as quickly as possible in order to comply with the gubernatorial mandate. The expedited process—which included obtaining authorization for the expenditure of approximately $30 million and the coordination of personnel from eight City departments—required 16 months to complete from the point when the Procurement Department became engaged in February of 2018 through the final execution and conformance of the contract with ES&S. This does not include the subsequent work to implement the new voting system, described in detail in the Declaration of Joseph Lynch, which is beyond the role of the Procurement Department and takes place afterwards.

The Procurement Process for the City's New Voting System

6. Voting systems concern the work of many City departments and require diverse expertise ranging from election-specific knowledge to technology to community engagement. As a result, the procurement of a new voting system for Philadelphia necessitated the involvement of at least eight City departments: the City Commissioners, the Procurement Department, the Office of Innovation and Technology ("OIT"), the Chief Administrative Office, the Office of the Director of Finance, City Council, the Law Department, and the Mayor's Office.

7. The formal procurement process began in February 2018.

8. The City developed an "aggressive" timeline for the procurement process that would allow a new voting system to be procured in time for use in the November 2019 General Election.

9. An early step in this process was the preparation of a Request for Information ("RFI"). An RFI is a publicly issued request that provides respondents to that request with the opportunity to submit information to the City that may be relevant to the preparation of a Request for Proposals ("RFP"), which is the process through which vendors bid for the opportunity to obtain the contract with the City.

10. The RFI was issued on June 4, 2018, with responses due no later than July 17, 2018.

11. Once the responses to the RFI were received, they were reviewed and an RFP was drafted. Because the contract was to be awarded on a "Best Value" basis, a justification form was also provided as part of that process.

12. Concurrent with the RFI and RFP drafting processes, the City Commissioners and OIT visited and observed primary elections in Monongalia, West Virginia and St. Louis, Missouri in May and August 2018, respectively.

13. Once the Board had developed a draft RFP, the RFP had to be reviewed by the Procurement Department to ensure the appropriate terms and conditions were included.

14. Once the draft RFP was approved by Procurement, it needed to be approved by the Local Contract Opportunity Review Committee (LCORC). Because LCORC only meets once per month, RFPs must be submitted for review by the first Monday of the month.

15. The City posted the RFP publicly on November 30, 2018, with proposals due on December 28, 2018.

16. Proposals are reviewed by a selection committee governed by Procurement Department regulations and guidelines for Best Value RFPs. The selection committee must have diverse membership with a diversity of experience, with members chosen by each of the involved departments and approved by the Procurement Commissioner.

17. Upon receiving the proposals to the RFP, the Committee began reviewing them. Because the Selection Committee includes individuals from departments other than Procurement, the Committee's first meeting generally consists of an overview of the review and scoring process as well as the confidentiality requirements. Committee members then individually review the proposals, and subsequent meetings are devoted to examining the contents of the proposals individually and considering the scores assigned by Committee members. Vendors whose proposals the Committee decides to move forward with are then invited to provide demonstrations to the Committee, after which Committee members can revise their scores. The Committee then meets again to further discuss the revised scores. At this point, the Committee may request best and final offers from the vendors, after which the Committee scores the proposals based on price. Finally, the Committee provides its joint scores and recommended proposal(s) to me.

18. Here, the Committee conferred multiple times a week to consider the responses, met at least 10 times, and, ultimately, on February 12, 2019, provided a recommendation to me that two of the proposals for voting machines were substantially similar.

19. At this point, I provided information to the Board of Elections so that the Board could determine which voting system and proposal should be selected for use in Philadelphia's elections.

20. In addition to the procurement process required for the acquisition of a new voting system, the City also had to conduct – and continues to conduct – procurement processes

for storage and transportation of the system. These include temporary and permanent warehouse spaces to house the new equipment and a logistics contract for the delivery, set-up, and removal of the ES&S voting machines at the polling locations. Although the City had vendors that previously provided some of these services, the contracts had to be modified because of, among other things, the different maneuverability of the machines, the different ways the machines nest (or stack), their inability to withstand inclement weather or be carried over steps at scores of polling locations, and the number of trucks and staff needed to deliver the machines in time for an election.

21. Procurement and the Board also set up a pilot contract with the logistics company to complete a smaller trial delivery run with the new machines before an actual election where votes needed to be counted. The add-on to the logistics contract for the pilot alone required an additional three weeks to complete.

Purchasing a New Voting System Requires a Lengthy Process

22. If the City's voting machines are decertified, the City may have to conduct all of the above procurement processes again. Because additional voting systems have been certified by the State since the Board's previous selection, and because of the comments the Board and City received during the process, the Board could not simply re-issue the same RFP. Instead, the RFP may need to be redrafted or even a revised RFI may need to be issued to seek additional information to craft such a revised RFP.

23. As with the prior procurement process, each of these procurement processes would need to comply with the processes mandated by the Philadelphia Home Rule Charter and Best Value Regulations, as well as other City processes such as LCORC.

24. In addition, additional appropriations from City Council might be required to procure a new voting system. That process would require: 1) a bill to be introduced by a member of Council; 2) scheduling of a public hearing before a committee of Council on the bill; 3) advertisement of the committee hearing for 5 days before the hearing; 4) holding of the public committee hearing, which may not be scheduled for weeks, and solicitation of public comment; 5) recommendation of the bill out of committee to Council; 6) printing of the bill as amended; 7) first reading of the bill in City Council; 8) second reading of the bill in City Council and final passage at least a week later; and 8) approval of the Mayor within two weeks, or disapproval within two weeks, returning of the disapproved bill to Council, and another vote where the bill passes with a 2/3 majority within another seven days. The process can be lengthened based on how long it takes to gain the support of Councilmembers.

25. Procurement estimates that approximately 5 to 7 additional weeks would be required to get a bill through City Council, plus up to 2 additional weeks for mayoral enactment. This time could be longer depending on the complexity of the ordinance and the level of political interest.

26. In addition, the Board of Elections would also have to approve the use of any new voting machines for elections in Philadelphia before a contract could be awarded and the final contract negotiation and conformance process could begin.

27. Furthermore, the logistics contract for the delivery, set-up, and removal of the new system could require a substantial amount of time, as the previous negotiations required an additional 8 weeks from the point that Procurement became engaged and required the involvement of the Law Department, Finance, Risk Management, among others, to complete.

28. Should another trial delivery run be required, that could add another three weeks to the process.

29. During 2019, the City employed as rigorous a process as possible under strict time constraints, which still took 16 months. However, that process still came under the scrutiny of the City Controller and the public for proceeding too quickly. Given this, the City would have to consider including time for additional public testing and commentary were it to have to conduct a new voting machine purchase process. As a result, I expect the entire procurement process for a new voting system would take 18 to 24 months at a minimum.

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I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct, based upon my own knowledge and/or belief.

DATE: December 12, 2019

Monique Nesmith-Joyner

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL STEIN, et al., Plaintiffs, v. KATHY BOOCKVAR, in her official capacity as Acting Secretary of the Commonwealth, and JONATHAN MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections and Legislation, Defendants.	CIVIL ACTION No. 16-cv-6287(PD)

DECLARATION OF BETHANY SALZARULO

I, Bethany Salzarulo, declare under the penalty of perjury pursuant to 28 U.S.C. § 1746 that:

I am the Director of Elections & Voter Registration for Cumberland County. I make this declaration in support of Defendants' Opposition to Plaintiffs' Motion to Enforce the Settlement Agreement.

1. I have been employed by Cumberland County (the "BoE") for the past 15 years.

2. As the Director of Elections & Voter Registration, I direct and manage the activities of the county registration office, manage the ballot preparation process, oversee and certify election results.

3. In August 2018, I was directed by the BoE to begin searching for certified voting system vendors in order to conduct vetting of various voting systems.

4. My staff viewed demonstrations and tested multiple voting systems on more than one occasion for each voting system.

5. The vetting process concluded 0n or around June 2019, which resulted in a recommendation to the BoE that the ExpressVote XL electronic voting system (the "ExpressVote XL") be selected for purchase by Cumberland County.

6. On or about June 26, 2019, the BoE voted to confirm the selection of the ExpressVote XL.

7. On or about September 23, 2019, the Cumberland County Board of Commissioners (the "BoC") voted to approve the procurement of the ExpressVote XL.

8. On November 14, 2019, Cumberland County purchased four hundred (400) ExpressVote XL systems through the Commonwealth of Pennsylvania's Cooperative Purchasing Program ("COSTARS") for the amount of $3,965,612.00.

9. Cumberland County anticipates the delivery of the ExpressVote XL to occur sometime between January 13, 2020 and January 17, 2020.

10. After the machines arrive, a week-long testing of the machines will occur prior to acceptance of the delivery.

11. Training for the ExpressVote XL is scheduled to begin the first week of February 2020. Cumberland County estimates that training for 1,200 poll workers will take approximately two (2) months. As a result, training is expected to be completed on or about April 1, 2020, just weeks before the April 28, 2020 Pennsylvania primary election.

12. In addition to training poll workers, Cumberland County will engage in voter outreach and advertising to educate voters regarding the use the ExpressVote XL system.

13. The ballot for an election is finalized roughly 50 days before the election. Once this occurs, the BoE begins pretesting of the voting machines.

14. Following pretesting, each machine is loaded with the ballots for its respective

election division and given a numerical seal.

15. If Cumberland County were required to switch to a different type of voting system, the BoE would have to begin reevaluating new voting systems in order to select and have a new system ready for the April 28, 2020 primary election. Based on Cumberland County's past experience, this process of evaluation, procurement, training, and rollout of the new machines could last for over a year and a half but would need to be expedited to comply with the state mandate. Even expediting this process would set back the County training and voter outreach which could have an impact on the Primary.

16. Switching to a voting system other than the ExpressVote XL would cause the public confusion, especially as the BoE advertised the use of the ExpressVote XL system for months.

17. Based on the requirements and timeline outlined above, there is substantial basis to doubt that Cumberland County could switch to a voting system other than ExpressVote XL in time for the April 28, 2020 primary election. At a minimum, switching to a voting system other than the ExpressVote XL would pose a grave danger compromising the integrity of the election by leaving insufficient time for system testing, poll-worker training, and voter education.

SIGNATURE CONTINUED TO NEXT PAGE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 11, 2019.

Bethany Salzarulo