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O'BRIEN-WERNER, THOMAS P.
BRUNO, JR., ROGER DREISBACH-
WILLIAMS, and JEFF R. FAUBERT,

Petitioners,

v.

KATHY BOOCKVAR, SECRETARY OF
THE COMMONWEALTH,

Respondent.

COMMONWEALTH COURT OF
PENNSYLVANIA

ORIGINAL JURISDICTION

Docket No.: 674 MD 2019

**PETITIONERS' BRIEF IN
OPPOSITION TO
RESPONDENT'S APPLICATION
TO STAY PRELIMINARY
OBJECTION PROCEEDINGS**

Respondent’s Application to Stay Preliminary Injunction Proceedings Pending Resolution of Preliminary Objections and Parallel Federal Court Motion (“Motion to Stay”), filed January 16, 2020, inaccurately represents Petitioners’ Petition for Review, filed December 12, 2019, and Application for Special Relief in the Form of a Preliminary Injunction (“MPI”), filed January 10, 2020. Because the Motion to Stay is predicated on arguments entirely inconsistent with Respondent’s own statements in the parallel federal court proceeding, and goes to the merits of the preliminary injunctive relief sought rather than whether consideration of that application should be stayed, the Court should deny the Motion to Stay and proceed with the hearing on Petitioners’ MPI currently scheduled for January 28, 2020.

I. This Action Can Coexist with the *Stein* Proceeding in the Eastern District of Pennsylvania

Petitioners have never obscured the fact that there is a pending Motion to Enforce Settlement Agreement in *Stein v. Boockvar*, E.D. Pa. Civ. No. 2:16-cv-6287. (*See, e.g.*, Petition for Review at ¶ 70 & n.5; Brief in Support of MPI at 3.) To be sure, the Motion to Enforce seeks *some* of the same relief that Petitioners seek in this action: decertification of the ExpressVote XL voting machine. But the relief sought is not coextensive: the Motion to Enforce seeks a declaration that the ExpressVote XL “does not comply with the Settlement Agreement” in the *Stein* case and that the Defendants in that case are in breach of the Settlement

Agreement. (E.D. Pa. Civ. No. 2:16-cv-6287, docket entry no. 112-4, Proposed Order.) Petitioners here are not affiliated with the *Stein* plaintiffs, and have no standing to enforce the settlement agreement that was entered into in 2018 and is now the subject of the Motion to Enforce.

Respondent's Motion to Stay omits the critical fact that the Respondent argued in its opposition to the Motion to Enforce *that the federal district court should abstain* from intervening in the state election process. (See dkt. entry no. 123 at 37-38, attached as Exhibit C to Respondent's Motion to Stay.) According to Respondent, the entry of an injunction by the federal court ordering the Secretary to decertify the ExpressVote XL "would constitute improper and damaging federal court interference in the state elections process that would violate principles of federalism." (*Id.* at 37.) Respondent cannot have it both ways, representing to this Court that the *Stein* Court is likely to enter judgment that could moot Petitioners' claims here, while representing to the *Stein* Court that it is improper for that Court to interfere with state election matters at all.

Three hours after Respondent filed the Motion to Stay, Respondent filed a "Notice of Procedural Development Regarding Respondent's Application to Stay Preliminary Injunction Proceedings Pending Resolution of Preliminary Objections and Parallel Federal Court Motion." That Notice states that on January 16, 2020, Judge Diamond stated during a teleconference with the *Stein* parties that he was

postponing the hearing from January 21, 2020 to February 18, 2020. This development means that rather than a stay of as little as a week or two, the stay sought would be over a month at minimum. For the reasons set forth below and in Petitioners' MPI (including the fact that the ExpressVote XL system is undergoing recertification this month, *see* Brief in Support of MPI at 17-18), the harm to Petitioners is too immediate and too substantial to entertain such a delay.

II. Petitioners Did Not Delay, and Any Alleged Delay Goes to the Merits of the MPI, Not Whether it Should Be Stayed

The Motion to Stay argues not only that there is no way that the ExpressVote XL could be replaced in time for either the primary or general election in 2020 (*see* Respondent's Brief in Support of Stay at 2 (“[I]t is far too late to replace the ExpressVote XL in time for the November 2020 election”), but also that the court should delay consideration of the merits of Petitioner's MPI indefinitely. Clearly, all parties would benefit from swift resolution of the question of whether the certification of the ExpressVote XL voting machine impermissibly burdens Petitioners' rights as Pennsylvania voters to free and equal elections as guaranteed by the Pennsylvania Constitution and Pennsylvania Election Code.

As acknowledged in the Petition for Relief, some of the Petitioners were indeed involved in the petition to the Secretary for reexamination of the ExpressVote XL and generally aware of the *potential or likely* problems posed by

the ExpressVote XL before the filing of the Petition for Review in this case.¹

However, had Petitioners filed their Petition for Review in the period between when the Secretary issued her Report on Reexamination of the ExpressVote XL on September 3, 2019, and the November 5, 2019 general election, Respondent doubtless would have objected to any such action as premature and the Petitioners as lacking any concrete or cognizable injury. The events of the November 5, 2019 general election gave context and specificity to the enormous shortcomings of the ExpressVote XL vis-à-vis the Pennsylvania Election Code, which are set forth in Petitioners' Petition for Review and MPI: the ExpressVote XL failed in its fundamental objectives of accurately capturing voter intent and accurate tabulation; the ExpressVote XL did not provide complete secrecy to voters; the ExpressVote XL was not secure; and the ExpressVote XL was not accessible to voters with disabilities.

Furthermore, Respondent's statement that "it is far too late to replace the ExpressVote XL in time for the November 2020 election" disregards the actual relief sought by Petitioners. The MPI seeks *immediate* decertification of the ExpressVote XL, which could affect at least: (1) the special election for

¹ Respondent emphasizes that Kevin Skoglund and Dr. Andrew Appel were on record as to their concerns about the ExpressVote XL as early as April 2018 and October 2018, respectively. (Mot. to Stay at ¶ 25.) Respondent makes no proffer, however, as to what she thinks Mr. Skoglund or Dr. Appel should have done with that information at that time (at which the ExpressVote XL had not yet been certified for use in Pennsylvania nor acquired by any county boards of election). Any purported delay by these individuals has no bearing on the named Petitioners in this case.

Pennsylvania House District 190 in West Philadelphia on February 25, 2020, which Petitioners explained can reasonably use paper ballots and a central scanner to tabulate same; (2) the primary election on April 28, 2020; and (3) the general election on November 3, 2020. (*See* Brief in Support of MPI at 44-51.)

Respondent's own testimony in March 2019 to the Pennsylvania State Senate on the importance of the Secretary of the Commonwealth's decertification power noted a precedent from 2008 in which a voting system utilized by several Pennsylvania counties was successfully replaced in advance of a primary election on a time frame of just a few months. (*Id.* at 44-45.) Respondent's attempt to distort and delay the relief sought by Petitioners compounds the immediate and irreparable harm posed to Petitioners by continued certification of the ExpressVote XL.

III. Respondent's Preliminary Objections Need Not Be Resolved in Order for the Court to Consider Petitioners' Application for Preliminary Injunctive Relief

The Motion to Stay summarizes several of Respondent's Preliminary Objections, which were filed on January 15, 2020, and suggests that the Preliminary Objections may moot some or all of the Petition for Review. Petitioners reserve their right to respond fully to the Preliminary Objections in a timely manner. However, Respondent's motion makes multiple incorrect

statements about the Petition for Review (Motion to Stay at ¶ 20; Brief in Support at 4), which need to be rectified:

- “Petitioners do not even cite...*Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015).”

This is false. The Petition for Review cites *Banfield* at ¶ 223, and the case is referenced at ¶ 64 as well. Clearly, Petitioners as well as the Court are all fully aware of *Banfield*.

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

While none of the individual Petitioners are specifically alleged to have a disability, the organizational Petitioners (National Election Defense Coalition and Citizens for Better Elections) represent the interests of all voters, including disabled voters, and have organizational and associational standing to assert claims concerning the fundamental right to vote. *See Bergdoll v. Kane*, 731 A.2d 1261, 1268 (Pa. 1999) (granting Pennsylvania Bar Association standing to challenge proposed constitutional amendment ballot question because the right to vote was at stake). Petitioners submitted the declaration of Tamira Morales, a voter with disabilities from Northampton County, in support of its MPI; this individual provided her declaration as to her difficulty using the ExpressVote XL through the organizational Petitioners. All of the named Petitioners have an interest in ensuring accessibility of voting machines since anyone could become disabled at any time.

- “Petitioners failed to name Pennsylvania counties that use the ExpressVote XL as respondents...”

As acknowledged by Respondent in its Motion and Brief, the Court has already ordered oral argument on this preliminary objection pertaining to nonjoinder of allegedly indispensable parties. Presumably, the parties will address the effect of the MPI on the joinder issue at the January 23, 2020 hearing. This issue presents no reason to stay a determination of the MPI.

The remaining points raised by Respondent in the Motion to Stay go to the merits of the MPI and should be addressed by the parties in a hearing before the Court on the date already scheduled.

IV. Conclusion

As shown by Respondent’s flurry of filings today, this matter, and the questions implicated by Petitioners’ Petition for Review and MPI, are likely to get more complex, rather than less, as time goes on. The Motion to Stay should be denied.

Respectfully submitted,

BAKER & HOSTETLER LLP

Dated: January 16, 2020

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CERTIFICATE OF COMPLIANCE

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.

Submitted by: Plaintiffs National Election Defense Coalition, et. al.

Signature: /s/ Lesley M. Grossberg

Name: Lesley Grossberg

Attorney No.: PA 208608

CERTIFICATE OF SERVICE

I, Lesley M. Grossberg, certify that on January 16, 2020, I caused a true and correct copy of the foregoing Brief in Opposition to Respondent’s Motion to Stay to be served upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R.A.P. 121:

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