

**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. Hangle

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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NATIONAL ELECTIONS DEFENSE  
COALITION, *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, in her official capacity  
as Secretary of the Commonwealth,

Respondent.

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**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

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*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. Hangle  
Michele D. Hangle