

NOTICE TO PLEAD

Petitioners: You are hereby notified to file a written response to the enclosed Preliminary Objections within thirty (30) days from service hereof, or a judgment may be entered against you.

/s/ Michele D. Hangley

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NATIONAL ELECTION DEFENSE
COALITION, et al.,

Petitioners,

v.

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

Respondent.

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: CIVIL ACTION

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: No. 674 MD 2019
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**RESPONDENT’S PRELIMINARY OBJECTIONS TO
PETITIONERS’ AMENDED PETITION FOR REVIEW**

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 Amended 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. The Secretary of the Commonwealth is tasked with the important duty of leading the Department of State’s work to protect the integrity and security of the electoral process in Pennsylvania. In this role she coordinates with a wide range of stakeholders, including government officials from the local to the federal level, the public, public interest groups, and election technology experts, to ensure that Pennsylvania’s elections are free, fair, secure, and accessible to all eligible voters.

2. One of the Secretary’s duties is to evaluate voting technology and certify voting systems for use in Pennsylvania. 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. The Pennsylvania Supreme Court has made clear that voting systems are not “held to an impossible standard of invulnerability.” *Banfield v. Cortes*, 110 A.3d 155, 174 (2015). “[T]he mere possibility of error” presented by a particular voting system does not bar its certification given the reality that “electoral fraud can never be completely eliminated, no matter which type of ballot is used.” *Id.* Against this background, the Secretary is charged with weighing the relative benefits and risks of each system in order to determine which are appropriate for certification in Pennsylvania under the applicable standards.

4. Due to the extreme complexity involved in determining which voting systems are appropriate for certification, the Secretary is afforded great discretion in carrying out this duty. Courts generally defer to the Secretary’s decision to certify a voting machine absent proof that it was arbitrary, fraudulent, in bad faith, an abuse of her discretion, or an abuse of power.

5. Plaintiffs ask this Court to take the extraordinary step of intervening to reverse the Secretary's decision to certify a voting system called the ExpressVote XL. Petitioners allege that certain of the device's security measures could in theory be overcome; that operation of the device allows, in theory, for privacy intrusions; and that the device does not comply with certain ballot format requirements of the Pennsylvania Election Code. Petitioners do not explain, however, how these technical and theoretical issues mean that the Secretary's decision to certify the ExpressVote XL was arbitrary, in bad faith, an abuse of her discretion, or an abuse of power. These missing allegations are fatal to their claims.

6. Respondent, not Petitioners, is charged with the responsibility of making certification decisions, and Respondent has broad discretion with respect to those decisions. In the absence of fraud, bad faith, abuse of discretion, arbitrary conduct, or an abuse of power, this Court has no authority to substitute its judgment for Respondent's. Petitioners' disagreement with the Secretary about what the specific requirements for voting system certification under the Election Code and the Pennsylvania Constitution demand does not rise to that standard.

7. Moreover, Petitioners do not, and cannot, allege that the ExpressVote XL's purported technical noncompliance with the Election Code has any direct impact on them. In order to establish standing, Petitioners must allege some

particularized injury that is unique to them. The Amended Petition merely asserts a generalized complaint that certification of the ExpressVote XL is inconsistent with the Election Code and the Pennsylvania Constitution, not a particularized injury. As such, the Amended Petition fails to establish that Petitioners are aggrieved by the complained-of conduct, and thus Petitioners have failed to establish standing to pursue their claims.

8. Petitioners have also failed to join several indispensable parties – the three counties that have actually purchased and implemented the ExpressVote XL, and would therefore be severely injured if the relief sought by Petitioners is granted. The presence of all indispensable parties is a jurisdictional requirement.

9. Finally, Petitioners' claims are time-barred under the applicable statute of limitations, which provides that an action brought against a governmental officer for anything done in the execution of her office must be brought within six months. As Petitioners waited over a year to file this action, Petitioners are too late.

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

II. PROCEDURAL HISTORY

11. Petitioners filed their original Petition on December 12, 2019.

12. Respondent filed Preliminary Objections on January 15, 2020. In that filing, Respondent asserted the same objections that she asserts here, including that Petitioners had failed to join indispensable parties.¹

13. In the meantime, Petitioners filed an Application for Special Relief in the Form of a Preliminary Injunction, and this Court scheduled a hearing for January 28, 2020. On January 23, this Court held argument on whether the counties that had purchased the ExpressVote XL were indispensable to the resolution of the Application. On January 24, this Court ruled that it could “proceed preliminarily for purposes of the Application without the ... counties being joined as indispensable parties. This Order is entered without prejudice to Respondent’s Preliminary Objection raising the issue of whether the ... counties are indispensable parties to the litigation.”

14. Also on January 24, one business day before the scheduled hearing on Petitioners’ Application for a Preliminary Injunction, Petitioners withdrew the Application.

15. Petitioners filed their Amended Petition on February 4, 2020.

¹ Respondent also objected to Count V of the original Petition, which alleged that the ExpressVote XL is not accessible to people with disabilities. Petitioners have omitted that claim from their Amended Petition.

III. PRELIMINARY OBJECTIONS

A. First Preliminary Objection: Counts I-V Should Be Dismissed for Legal Insufficiency/Failure to State a Claim for Which Relief May Be Granted Because Petitioners Have Failed to Allege Facts That, if True, Would Support Their Allegations 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))

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

17. 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).

18. Thus, in order to fulfill her duty with regard to evaluating voting machines, Respondent must engage in highly complex analysis of constantly developing technology that carefully accounts for the many specifications imposed by the Election Code and HAVA.

19. 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 in this area, Respondent is afforded broad discretion to make the "necessarily...subjective determination[s]" as to whether different voting systems conform to the Election Code requirements. *Banfield*, 110 A.3d at 174. 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).

20. Given Respondent's broad discretion over the certification of voting systems, an allegation that her determination with respect to a particular voting system was incorrect is insufficient to state a claim that certification of that system violated the Election Code. 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.*

21. The Amended Complaint alleges no such facts. Instead, it alleges certain theoretical, speculative flaws in the functionality and performance of the ExpressVote XL. These allegations, even if true, would show nothing more than a "mere possibility of error" that would not eliminate the Secretary's discretion to certify a voting system. *Banfield*, 110 A.3d at 174.

22. Although Petitioners baldly assert that the Secretary's decision to certify the ExpressVote XL was clearly arbitrary, in bad faith, and an abuse of her discretion, Am. Pet. ¶¶ 253-254, they allege no facts that would support these assertions.

23. At bottom, Petitioners allege nothing more than a series of disagreements with the Secretary's judgments under the Election Code, followed by inapplicable legal conclusions. Even if Petitioners' litany of complaints were proven to have merit, it would not establish that the Secretary's decision was arbitrary, in bad faith, or an abuse of her discretion. As the Pennsylvania Supreme Court has made clear, "all voting systems are imperfect and not immune from tampering, [and] the Election Code cannot be read to impose a requirement that cannot be achieved." *Banfield*, 110 A.3d at 174.

24. 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 legal insufficiency and enter an order dismissing Counts I-V of the Petition as to all Petitioners.

B. Second Preliminary Objection: Count VI 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))

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

26. 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)).

27. “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).

28. 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 defer to such decisions made by the executive in carrying out a statute it is tasked with enforcing. *Banfield*, 110 A.3d at 174.

29. Again, the Amended Petition simply details alleged imperfections in the security and functionality of the ExpressVote XL, before concluding that in certifying this voting system “the Secretary committed a plain, palpable, and clear abuse of power that infringes on the voting rights of the Individual Plaintiffs and of the Organizational Plaintiffs’ individual members.” Am. Pet. ¶¶ 255. But the Amended Petition utterly fails to detail the ways in which the Secretary purportedly abused her power in that process.

30. Petitioners allege nothing more than that they do not agree with the conclusions Respondent reached in the exercise of her discretion. This discretion, however, lies with Respondent and not with Petitioners.

WHEREFORE, Respondent respectfully requests that this Court sustain her preliminary objection for failure to state a claim and enter an order dismissing Count VI 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-V Because They Have Not Alleged Substantial, Direct, and Immediate Harm (Pa. R. C. P. 1028(a)(5))

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

32. 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).

33. 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).

34. Organizations/associations are held to the same “aggrieved” party requirements of demonstrating a substantial, direct, and immediate interest in the dispute in order to establish standing; allegations that their “mission or purpose is implicated” by a matter are insufficient. *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.)

35. 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.

36. The Organization Petitioners claim that they have standing by virtue of having members who are residents of Philadelphia and Northampton County who voted in the November 2019 election where the ExpressVote XL was used, and who plan to continue to vote in Pennsylvania elections where the ExpressVote XL will be used. Am. Pet. ¶¶ 15, 17. They further assert their missions are 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). Am. Pet. ¶¶ 14, 16.

37. The Individual Petitioners claim to reside and vote in jurisdictions that use the ExpressVote XL. Am. Pet. ¶¶ 18-33. They assert that they each have “concerns over the security and reliability of the ExpressVote XL,” that they each have “a substantial, direct, and immediate interest in the outcome of this litigation as each expects to vote on an insecure and unreliable voting machine in April and November 2020, and each is uncertain that his or her vote will be properly marked

and counted” and as to “whether the outcome of the election in their jurisdiction will be accurately tabulated and reported.” Am. Pet. ¶¶ 34-36. None of them claims to have experienced any difficulties with the ExpressVote XL in the past. Pet. ¶¶ 18-36.

38. 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. ¶¶ 93-148, 277-282.

39. 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. ¶¶ 157-202, 283-85.

40. In support of Count V, Petitioners allege that the ExpressVote XL does not comply with certain technical requirements for ballot design (paper color, binding, and format). Pet. ¶¶ 217-247, 286-290.

41. 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 their claims solely on allegations that the certification of the ExpressVote XL violated the Election Code. These allegations 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 do not make out a “substantial, direct, and immediate interest.”

42. The Individual Petitioners' unsupported claims that they are uncertain that votes will be accurately counted in the 2020 election cycle is no more effective at establishing that Petitioners have a particular interest, beyond that of all other electors, in ensuring that certification of the ExpressVote XL was consistent with the Election Code. These allegations are merely a restatement of Petitioners' assertions about why they believe the Secretary made the wrong judgment in deciding to certify the ExpressVote XL. They are similarly an appeal for enforcement of the Election Code, a pursuit which all electors share an equal interest in, and therefore fail to establish that Petitioners have standing to bring these claims.

43. The Organization Petitioners' allegations about their organizational missions likewise do not cure Petitioners' pleading defects with respect to standing. These allegations are plainly insufficient under the law to establish standing in the absence of allegations that the organizations or one of their members are aggrieved by the complained of conduct.

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

D. Fourth Preliminary Objection: Counts I-VI 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)(1))

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

45. 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). Where an indispensable party has not been joined, this Court lacks jurisdiction to adjudicate the dispute. *Id.* 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).

46. 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],” Am. Pet. ¶ 3, and they all “intend to use the ExpressVote XL as the primary voting machine for all elections in 2020,” Am. Pet. ¶ 92. 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 therefore 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.

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-VI of the Petition as to all Petitioners.

E. Fifth Preliminary Objection: Counts I-VI Should Be Dismissed as Time-Barred Under the Six-Month Statute of Limitations for Mandamus Actions Brought Against a Governmental Officer, Set Forth in 42 Pa. Cons. Stat. § 5522(b)(1)

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

48. Petitioners allege that the Secretary certified the ExpressVote XL on November 30, 2018. Am. Pet. ¶ 71.

49. A mandamus action brought “against any officer of any government unit for anything done in the execution of his office” must be commenced within six months, in the absence of any other applicable limitation period. 42 Pa. Cons. Stat. § 5522(b)(1). *See Schneller v. Prothonotary of Montgomery Cnty.*, No. 1316 C.D. 2016, 2017 WL 3995911, at *4 (Pa. Commw. Ct. Sept. 12, 2017) (“[T]his Court has held that mandamus actions are typically subject to the six-month time limitation set forth in section 5522(b)(1) of the Judicial Code” (citing *Twp. of Bensalem v. Moore*, 620 A.2d 76, 80 (Pa. Commw. Ct. 1993); *Fleming v. Rockwell*, 500 A.2d 517, 519 (Pa. Commw. Ct. 1985))).

50. Petitioners challenge the certification of the ExpressVote XL. Their claims thus accrued the moment the Secretary certified the ExpressVote XL on November 30, 2018. *See Schneller*, 2017 WL 3995911, at *6 (“A ‘cause of action accrues when the injured party is first able to litigate the claim,’ or, as our Supreme Court put it, ‘as soon as the right to institute and maintain a suit arises.’ (internal citations omitted)).

51. As no other limitation period applies to Petitioners’ claims, they were required to initiate this lawsuit within six months of accrual, that is, by May 30, 2019 at the latest. Petitioners initiated this action on December 12, 2019, more than six months too late.

52. Petitioners' claims are therefore time-barred and should not be permitted to proceed.

WHEREFORE, Respondent respectfully requests that this Court sustain her preliminary objection to this suit as time-barred under the applicable statute of limitations and enter an order dismissing Counts I-VI of the Petition as to all Petitioners.

**HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER**

Dated: March 5, 2020

By: /s/ Michele D. Hangley

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*Counsel for Respondent, Kathy Boockvar, in her
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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: March 5, 2020

/s/ Michele D. Hangley
Michele D. Hangley