

Kathy Boockvar, Secretary of the Commonwealth (“Secretary”), for Stay of

Discovery and Protective Order (“Application for Stay”), it is HEREBY ORDERED that the Secretary’s Application for Stay is GRANTED.

IT IS FURTHER ORDERED that all discovery in this action is STAYED until the later of 1) the Court’s ruling on the Secretary’s Preliminary Objections, or 2) the date the Commonwealth lifts current COVID-19 restrictions and reopens the Department of State’s offices to all personnel. The Secretary need not respond to any discovery requests until thirty (30) days following the lifting of the stay.

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J.

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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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

No. 674 MD 2019

**APPLICATION OF RESPONDENT, KATHY BOOCKVAR,  
SECRETARY OF THE COMMONWEALTH, FOR STAY OF DISCOVERY  
AND PROTECTIVE ORDER WHILE THE COVID-19 EMERGENCY  
PERSISTS AND PRELIMINARY OBJECTIONS ARE PENDING**

## **INTRODUCTION**

1. As Respondent, Secretary of the Commonwealth Kathy Boockvar (“Respondent” or “Secretary”), files this Application, organizations across the Commonwealth of Pennsylvania and across the country are battling an unprecedented public health emergency. The Pennsylvania Department of State is no exception.

2. The challenges facing the Department’s elections personnel have never been greater. Personnel are working around the clock to help Pennsylvania’s counties ensure that the 2020 elections run smoothly and fairly in the face of a rescheduled primary, safety concerns about in-person voting, an expected surge in absentee and mail-in voting, and an Election Code that has just undergone its second major overhaul in less than six months.

3. At the same time, Department personnel must contend with severe logistical challenges. All but a few employees are working from home, without access to physical files and with limited ability to search electronic files.

4. Thus far, the Department’s elections personnel have risen to the challenge. However, like many other workers trying to carry out critical functions in the midst of the COVID-19 pandemic, they are stretched to the limit.

5. This case is not on a fast track. Petitioners withdrew their Application for a Preliminary Injunction just before a scheduled hearing, and have not asked

the Court to expedite the proceedings. Preliminary Objections, which may well eliminate most or all of Petitioners' claims, are pending.

6. Nonetheless, Petitioners insist on moving ahead with discovery. On March 24, 2020, Petitioners served broad – in many instances, vastly overbroad – discovery requests. Responding to these requests will take up a significant amount of time for the Department's leaders, in-house counsel, information technology personnel, and other staff members.

7. Accordingly, pursuant to Rules 106 and 123 of the Pennsylvania Rules of Appellate Procedure and Rule 4012 of the Pennsylvania Rules of Civil Procedure, Respondent respectfully requests that this Court stay all discovery in this action pending the later of 1) the Court's ruling on Respondent's Preliminary Objections, or 2) the reopening of the Department's offices to all personnel. Respondent further requests that the Court enter a protective order providing that the Secretary need not respond to any discovery requests until thirty (30) days following the lifting of the stay.

### **FACTUAL BACKGROUND**

#### **I. Petitioners Have Not Treated This Case as an Urgent Matter**

8. Petitioners' action stems from the Secretary's certification of a voting system, the Election Systems & Software EVS 6021, on November 30, 2018. Petitioners claim that the ExpressVote XL, one of the voting machines included in

the EVS 6021 system, violates Pennsylvania's election laws and Constitution in various ways.

9. At the time the Secretary certified the EVS 6021, Petitioners knew, or should have known, about all of the features of the ExpressVote XL that they complain about today. *See* Respondent's Brief in Opposition to Petitioners' Application for Special Relief in the Form of a Preliminary Injunction, Jan. 22, 2020, at 11-15.

10. Nonetheless, Petitioners waited for more than a year, until December 12, 2019, to file their action.

11. Petitioners filed an Application for a Preliminary Injunction nearly a month later, on January 10, 2020. This Court promptly scheduled a hearing, but Petitioners withdrew their Application on January 24, one business day before the hearing.

12. In their Petition to Withdraw the Application, Petitioners stated that they intended to seek an expedited schedule in this case. They have, however, taken no steps to do so.

## **II. It Is Likely That Respondent's Preliminary Objections Will Result in the Dismissal of All or Some of Petitioners' Claims**

13. Petitioners filed an Amended Petition for Review on February 4, 2020.

14. On March 5, 2020, Respondent filed Preliminary Objections to the Amended Petition, which are attached as Exhibit A.

15. On March 17, Petitioners filed a response in opposition to the Preliminary Objections, along with a brief (“Pet. Resp.”).

16. Respondent’s brief is due by April 30, with Petitioners’ response due thirty days later. *See* Order dated March 26, 2020.

17. Respondent’s Preliminary Objections and Petitioners’ Response demonstrate the fundamental flaws in Petitioners’ claims. It appears likely that all, or a significant part, of the Amended Petition will be dismissed when the Court rules on the Preliminary Objections.

18. The first of Respondent’s five Preliminary Objections is that the Court should dismiss Petitioners’ statutory claims because Petitioners have not alleged facts sufficient to show that the Secretary exceeded her broad discretion over the certification of voting systems. Exhibit A ¶¶ 16-24.

19. In this Preliminary Objection, Respondent pointed out that Petitioners’ allegations fell far short of the standards the Pennsylvania Supreme Court set forth in *Banfield v. Cortes*, 110 A.3d 155, 174 (Pa. 2015). Indeed, even if Petitioners could substantiate their allegations of theoretical, speculative flaws in the ExpressVote XL, under *Banfield*, such flaws would not be sufficient to

override the Secretary's discretion to certify the machine. Exhibit A ¶¶ 3-5, 19-23.

20. Likely recognizing that *Banfield* dooms their claims, in their Response, Petitioners ask this Court to simply ignore the opinion. They argue that the Supreme Court's holdings on what a petitioner must *prove* to override the Secretary's decision to certify a voting machine are not relevant to what that petitioner must *plead*. See Pet. Resp. at 9 (arguing that legal standard set forth in *Banfield* is "not the legal standard at the pleading stage"); see *id.* at 9-11.

21. Petitioners are wrong; they cannot avoid binding precedent at any stage of this litigation, including the pleading stage.

Normally ... the essential elements of a claim remain constant through the life of a lawsuit. What a plaintiff must do to satisfy those elements may increase as a case progresses from complaint to trial, but the legal elements themselves do not change. So, to determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end.

*Comcast Corp. v. National Ass'n of African American-Owned Media*, \_\_ S.Ct. \_\_, 2020 WL 1325816, \*3 (March 23, 2020). Because Pennsylvania is a fact-pleading state, Petitioners must "plead all the facts that [they] must prove in order to achieve recovery on the alleged cause of action." *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 868 A.2d 624, 635 (Pa. Commw. Ct. 2005).



22. If the Court grants the first Preliminary Objection, Counts I through V of the Amended Petition will fall.

23. Respondent's second Preliminary Objection asserts that the Court should dismiss Count VI of the Amended Petition because Petitioners have failed to address the standards set forth in *Banfield* in order to allege an abuse of power sufficient to state a claim under the Pennsylvania Constitution. Exhibit A ¶¶ 25-30.

24. Petitioners' Response to the second Preliminary Objection, once again, disregards *Banfield*. See Pet. Resp. at 12-15.

25. Respondent's third Preliminary Objection is that Petitioners lack standing to bring claims alleging violation of the Election Code. Exhibit A ¶¶ 31-43.

26. Fourth, Respondent objects on the basis that the Court lacks jurisdiction because Petitioners have failed to join necessary parties, the counties that have purchased the ExpressVote XL for their elections. *Id.* ¶¶ 44-46.

27. Finally, Respondent objects that the Petition is time-barred under the six-month statute of limitations for mandamus actions brought against a governmental officer, which is set forth in 42 Pa. Cons. Stat. § 5522(b)(1). Exhibit A ¶¶ 47-52.

28. As Respondent will show in her brief, Petitioners' arguments on each of these Preliminary Objections are meritless.

29. Moreover, the Pennsylvania legislature's recent amendment of the Election Code moots one count of the Amended Petition.

30. On March 27, 2020, Governor Wolf signed into law amendments to the Election Code. Among other things, these amendments moot Count V of the Amended Petition, "Unlawful Ballot Format," by eliminating or amending the language in the Election Code that Petitioners rely upon. *Compare* Amended Petition ¶ 287 (alleging violation of Code Section 1109-A's requirement that certain ballots "be printed on card or paper stock of the color of the party of the voter ....") *with* S.B. 422, Printer's No. 1608, at 7-8 (replacing language); Amended Petition ¶ 288 (alleging violation of Code Section 1004's requirement that certain ballots be "bound together in books of fifty") *with* S.B. 422 at 6 (deleting language); Amended Petition ¶ 289 (alleging violation of Code Section 1112-A's requirement that voter vote by "making a cross (x) or check (/) mark") *with* S.B. 422 at 8-9 (adding that voter may otherwise indicate a selection).<sup>1</sup>

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<sup>1</sup> Petitioners also allege that the ExpressVote XL violates a provision in 25 P.S. § 3031.9(a)(2) that a ballot page "shall list ... the names of ... political parties with designating arrows ..." Amended Pet. § 290. This language was removed in a prior amendment to the Election Code.

### **III. The Effect of the COVID-19 Emergency on the Department's Operations**

31. The Commonwealth, like the rest of the world, is in the midst of an unprecedented public health emergency. As of the day this Application is filed, the Pennsylvania Department of Health has reported 7,016 confirmed COVID-19 cases and 90 deaths. These numbers are increasing rapidly.

32. The Governor has issued a series of emergency orders closing schools and non-life sustaining businesses and ordering many Pennsylvania residents to “stay at home.” For most Pennsylvanians, day-to-day life has changed in ways they could not have imagined a few weeks ago.

33. The Pennsylvania Supreme Court has declared a statewide judicial emergency and has suspended “all time calculations for purposes of time computation relevant to court cases or other judicial business, as well as time deadlines.” *See* Orders dated March 16 and 18 and April 1, 2020. On March 16 and 18, this Court issued Orders continuing hearings and extending filing deadlines.

34. In the midst of this crisis, the Department of State, like other government entities that provide essential services, must continue to function.

35. Even before the COVID-19 crisis, the 2020 elections presented significant challenges to the Department's elections personnel. The Legislature recently enacted an overhaul of Pennsylvania's Election Code that makes

significant changes to registration and voting processes; all of Pennsylvania's counties are using new voting technology; and, because 2020 is a Presidential election year, the Department expects a surge in registration and turnout. *See* Declaration of Respondent Kathy Boockvar, attached as Exhibit B, ¶¶ 8-10.

36. The COVID-19 crisis has multiplied these challenges. Across the Commonwealth, elections directors are trying to determine how to relocate polling places, recruit and train pollworkers, protect voters and volunteers, and manage an influx of mail-in voting applications. All sixty-seven counties are calling on the Department for support, information, and legal and practical guidance. Boockvar Decl. ¶ 9.

37. The legislature's postponement of the primary election from April 28 to June 2 provides some relief, but the Department is still working at breakneck speed to help counties interpret the new legislation and find ways to administer a safe and fair election. Boockvar Decl. ¶ 10.

38. The COVID-19 pandemic has also strained another critical function of the Department: overseeing professional licensing boards and commissions. Every day, evening, and weekend, Department personnel have been assessing and issuing critical regulatory modifications needed to reduce administrative burdens for medical and other professionals, in order to enable these professionals to

provide comprehensive patient care and extend support to the Commonwealth's vulnerable healthcare systems. Boockvar Decl. ¶¶ 11-12.

39. The Department's legal and other staff has worked nonstop to expand health care provider licensing, extend license renewal deadlines, waive fees, and provide guidelines to critical professions. Due to the immeasurable and potentially devastating healthcare needs, regulatory changes that would ordinarily take a year or more to implement have been put in place in days. Boockvar Decl. ¶ 13.

40. The Department's senior in-house counsel, technical support personnel, and leadership – the same people who would be tasked with assisting outside counsel with discovery responses – are indispensable to the Department's efforts to carry the Commonwealth through this crisis. Boockvar Decl. ¶¶ 20-22.

41. On top of all of this, the Department, like most other workplaces, cannot function normally. Offices are closed to all but a few employees. Personnel are working from home. This situation puts an enormous burden on the Department's information technology personnel and on its computer system. Searches of electronic files are difficult to carry out. Boockvar Decl. ¶ 16.

42. It is not possible for Department staff to access physical files or gain on-site access to electronic files without putting their health, and the health of their families, at risk. Boockvar Decl. ¶ 22.

#### **IV. Petitioners' Discovery**

43. On March 12, 2020, Petitioners' counsel asked Respondent's counsel whether Respondent would accept e-mail service of discovery. Respondent's counsel agreed, but asked whether Petitioners would agree to stay discovery while Preliminary Objections were pending. *See Exhibit C.*

44. Within the next few days, the COVID-19 emergency overtook the Commonwealth.

45. Nonetheless, on March 17, Petitioners' counsel responded that they would only "hold off serving discovery until 3/23" and, for "discovery that would require problematic interpersonal interaction," would "be available to discuss any appropriate accommodation on a case-by-case basis." *Id.*

46. Respondents' counsel again requested a stay to accommodate the burdens that the COVID-19 crisis was placing on the Department. She offered, however, to look into whether there was any discovery that counsel could provide without taking Department personnel away from their regular duties, and asked to discuss this issue with Petitioners' counsel. *Id.*

47. Petitioners' counsel did not respond to Respondent's counsel's offer to discuss limited discovery.

48. Instead, Petitioners' counsel served fifty Requests for Admissions, attached as Exhibit D, twenty-three Requests for Production, attached as Exhibit

E, and seventeen Interrogatories, attached as Exhibit F. He stated in his cover email that “Petitioners do not think a blanket stay of discovery is warranted at this time.” *See* March 24, 2020 email, attached as Exhibit G.

49. Petitioners’ discovery requests are extensive and overly broad. For example, Petitioners seek the ExpressVote XL’s source code, indicating that they intend to go far beyond the theoretical issues they identify in their Amended Petition and will try to ferret out other supposed flaws with the device. *See* Ex. E ¶¶ 2, 12. They ask for reams of communications generated a year or more after the action they purport to challenge, the certification of the XL. *See* Ex. E ¶¶ 15-22; Ex. F ¶¶ 15-16. Petitioners also seek information regarding individual counties’ use of the ExpressVote XL – information that is largely not within the Department’s control and is not relevant to the Secretary’s certification of the device. *See* Ex. D ¶¶ 1-4, 37-39; Ex. E ¶¶ 8, 20; Ex. F ¶¶ 13-15;

50. To the extent Petitioners seek relevant information about the certification of the ExpressVote XL and Respondent’s defenses, this information is already largely available to them on the websites of the Department, the federal government, and the XL’s manufacturer<sup>2</sup>, as well as in the documents the

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<sup>2</sup> *See* <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Pages/Voting-Systems.aspx> (Department web page with links to voting system certification documentation); <https://www.eac.gov/voting-equipment/certified-voting-systems> (federal Election Assistance Commission web page with links to voting system certification documentation); <https://www.essvote.com/> (website of ExpressVote XL’s manufacturer).

Department filed in its lengthy opposition to Petitioners' Application for a Preliminary Injunction.

51. In the best of times, Petitioners' discovery requests would be unduly burdensome. Under current circumstances, they could cripple vital Department functions. Neither the Department's computer system nor its IT personnel can support extensive document searches, and the Department's legal personnel and senior officials cannot take time away from mission critical activities to assist with discovery.

### **ARGUMENT**

52. Under Rule 4012 of the Pennsylvania Rules of Civil Procedure, upon a showing of "good cause," this Court may "make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense ...." *See also* Pa. R.A.P. 106 (applicability of Rules of Civil Procedure in original jurisdiction actions).

53. "Every court has the inherent power to schedule disposition of the cases on its docket to advance a fair and efficient adjudication. Incidental to this power is the power to stay proceedings, including discovery." *Luckett v. Blaine*, 850 A.2d 811, 819 (Pa. Commw. Ct. 2004).

54. A grant of the stay that Respondent requests is necessary to protect the interests of the Department, the Court, and the public interest.



55. First, the Court's disposition of the Preliminary Objections may well eliminate, or at the very least sharply limit, any need for discovery. Respondent should not be required to undertake a search for documents and information when the Court's jurisdiction is in question and there is a strong likelihood that the case may not go forward, at least in its current form. *See Lockett*, 850 A.2d at 819 (“[T]he interests of justice were served by permitting [governmental defendants] the opportunity to show that the claims raised in the Complaint failed to state a cause of action before burdening them with discovery demands.”).

56. Second, given the breadth of Petitioners' proposed discovery, motion practice over its scope is likely. If the Preliminary Objections are eventually granted in whole or in part, this motion practice would be an unnecessary use of the Court's resources.

57. Finally, while the Department's work is always important, this work has never been more critical to the public's health and well-being than it is today. Lives and elections literally depend upon the Department's making careful decisions and implementing them swiftly and effectively. Now is not the time to divert critical human and technology resources to responding to a fishing expedition in civil litigation.

58. A stay of discovery will not cause any prejudice to Petitioners. As discussed above, Petitioners took their time to file this litigation and have

proceeded at a leisurely pace since then. Now that unprecedented events have overtaken the Department and the world, there is no reason Petitioners cannot wait a little longer to conduct their discovery.

### **CONCLUSION**

For the above stated reasons, the Secretary respectfully requests that the Court stay all discovery in this litigation until the later of 1) the Court's ruling on the Secretary's Preliminary Objections, or 2) the reopening of the Department's offices to all personnel, and further order that the Secretary need not respond to any discovery requests until thirty (30) days following the lifting of the stay.

Respectfully submitted,

**HANGLEY ARONCHICK SEGAL PUDLIN  
& SCHILLER**

Dated: April 2, 2020

By: /s/ Michele D. Hangley  
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*Counsel for Respondent, Kathy Boockvar, in her  
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# **EXHIBIT A**

**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

**Michele D. Hangley**  
**Attorney for Respondent**

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CIVIL ACTION

No. 674 MD 2019

**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.<sup>1</sup>

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.

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<sup>1</sup> 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

Michele D. Hangley (I.D. No. 82779)  
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**TUCKER LAW GROUP**

Joe H. Tucker (I.D. No. 56617)  
Dimitrios Mavroudis (I.D. No. 93773)  
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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: March 5, 2020

/s/ Michele D. Hangle  
Michele D. Hangle

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

National Election Defense Coalition,	:	674 MD 2019
Citizens For Better Elections,	:	
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,		
Petitioners		
v.		
Kathy Boockvar,		
Secretary of the Commonwealth,		
Respondent		

**PROOF OF SERVICE**

I hereby certify that this 5th day of March, 2020, I have served the attached document(s) to the persons on the date(s)  
and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**PROOF OF SERVICE**

*(Continued)*

**Service**

Served: Jeanne Michele Mariani  
Service Method: eService  
Email: jmariani@bakerlaw.com  
Service Date: 3/5/2020  
Address: 2929 Arch Street  
Cira Centre - 12th Floor  
Philadelphia, PA 19104  
Phone: 215--56-4-1509  
Representing: Petitioner Anne C. Hanna  
Petitioner Caroline Leopold  
Petitioner Citizens For Better Elections  
Petitioner Jeff R. Faubert  
Petitioner Kathleen Blanford  
Petitioner National Election Defense Coalition  
Petitioner Rachel A. Murphy  
Petitioner Raphael Y. Rubin  
Petitioner Rich Garella  
Petitioner Robert F. Werner  
Petitioner Roger Dreisbach-Williams  
Petitioner Sandra O'Brien-Werner  
Petitioner Sharon Strauss  
Petitioner Stephen Strahs  
Petitioner Thomas P. Bruno Jr.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**PROOF OF SERVICE**

*(Continued)*

Served: John Frank Murphy  
Service Method: eService  
Email: johnmurphy@bakerlaw.com  
Service Date: 3/5/2020  
Address: 1132 S Leopard Rd  
Berwyn, PA 19312  
Phone: 610-644-4014  
Representing: Petitioner Anne C. Hanna  
Petitioner Caroline Leopold  
Petitioner Citizens For Better Elections  
Petitioner Jeff R. Faubert  
Petitioner Kathleen Blanford  
Petitioner National Election Defense Coalition  
Petitioner Rachel A. Murphy  
Petitioner Raphael Y. Rubin  
Petitioner Rich Garella  
Petitioner Robert F. Werner  
Petitioner Roger Dreisbach-Williams  
Petitioner Sandra O'Brien-Werner  
Petitioner Sharon Strauss  
Petitioner Stephen Strahs  
Petitioner Thomas P. Bruno Jr.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**PROOF OF SERVICE**

*(Continued)*

Served: Lesley McCall Grossberg  
Service Method: eService  
Email: lgrossberg@bakerlaw.com  
Service Date: 3/5/2020  
Address: 2929 Arch St.  
Cira Centre - 12th Fl.  
Philadelphia, PA 19104  
Phone: 504--71-7-3189  
Representing: Petitioner Anne C. Hanna  
Petitioner Caroline Leopold  
Petitioner Citizens For Better Elections  
Petitioner Jeff R. Faubert  
Petitioner Kathleen Blanford  
Petitioner National Election Defense Coalition  
Petitioner Rachel A. Murphy  
Petitioner Raphael Y. Rubin  
Petitioner Rich Garella  
Petitioner Robert F. Werner  
Petitioner Roger Dreisbach-Williams  
Petitioner Sandra O'Brien-Werner  
Petitioner Sharon Strauss  
Petitioner Stephen Strahs  
Petitioner Thomas P. Bruno Jr.

**Courtesy Copy**

Served: Kathleen Marie Kotula  
Service Method: eService  
Email: kkotula@pa.gov  
Service Date: 3/5/2020  
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401 North Street  
Harrisburg, PA 17120-0500  
Phone: (71-7) -783-0736  
Representing: Other Kotula, Kathleen

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

/s/ Michele D. Hangle

*(Signature of Person Serving)*

Person Serving: Hangle, Michele D.  
Attorney Registration No: 082779  
Law Firm: Hangle, Aronchick, Segal, Pudlin & Schiller  
Address: Hangle Aronchick Et Al  
1 Logan Sq Fl 27  
Philadelphia, PA 191036995  
Representing: Respondent Boockvar, Kathy

# **EXHIBIT B**

**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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: CIVIL ACTION  
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: No. 674 MD 2019  
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**DECLARATION OF RESPONDENT KATHY BOOCKVAR IN SUPPORT OF  
APPLICATION FOR STAY OF DISCOVERY AND PROTECTIVE ORDER WHILE  
THE COVID-19 EMERGENCY PERSISTS AND PRELIMINARY OBJECTIONS ARE  
PENDING**

I, Kathy Boockvar, declare under the penalty of perjury pursuant to 18 Pa.C.S. § 4902  
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 Respondent's  
Application for Stay of Discovery and Protective Order While the COVID-19 Emergency  
Persists and Preliminary Objections Are Pending.

1. As the Court is well aware, the Commonwealth, and the rest of the world, are  
facing an unprecedented public health emergency.

2. Thousands of Pennsylvanians have confirmed COVID-19 infections, and  
hundreds have died. These numbers are expected to increase rapidly.

3. In an effort to slow the spread of the disease, Governor Thomas Wolf has issued a  
series of emergency orders closing schools and businesses and ordering the residents of all 67



Pennsylvania counties to “stay at home.”

4. The entire statewide “stay at home” order was issued on April 1, 2020, but many counties’ “stay at home” orders were issued in the days and weeks before April 1. These counties included Philadelphia (March 23), Northampton (March 25), and Cumberland (March 30) – the three counties that have procured the ExpressVote XL – as well as Dauphin County (March 30) (where the Department of State is located), and the surrounding counties where the overwhelming majority of its employees live. The statewide “stay at home” order has been extended at least until April 30, 2020.

5. Even before the “stay at home” orders, three weeks earlier, effective Monday, March 16, the Governor directed that the Capitol complex be closed, including the Department of State’s offices, directing Commonwealth employees who worked in Dauphin County and the Capitol Complex to cease reporting in person to the office, and instead, to telework if possible. The Capitol complex has remained closed since that time.

6. In the midst of this crisis, the Department of State must continue to carry out functions that are absolutely critical to the health of the Commonwealth’s residents and the smooth functioning of its elections.

7. The Department’s critical functions include promoting the integrity and security of the electoral process.

8. Even before the COVID-19 crisis, the 2020 elections presented significant challenges to our elections personnel. The Legislature recently enacted an overhaul of Pennsylvania’s Election Code that makes significant changes to the registration and voting processes; all of Pennsylvania’s counties are using new voting technology; and, because 2020 is a Presidential election year, the Department expects a surge in registration and turnout.

9. The COVID-19 crisis has multiplied these challenges. Across the Commonwealth, elections directors are trying to determine how to relocate polling places, recruit and train pollworkers, protect voters and volunteers, and manage an influx of mail-in voting applications. All sixty-seven counties are calling on the Department for support, information, and legal and practical guidance.

10. Last week, the Governor signed into law additional amendments to the Election Code that postpone the primary election from April 28 to June 2 and make other changes to the registration and election processes. The Department's elections personnel are working at breakneck speed to help counties interpret the new legislation and find ways to administer a safe and fair election.

11. Another critical Department function is overseeing professional licensing boards and commissions.

12. Every day, evening, and weekend, Department personnel have been assessing and issuing critical regulatory modifications needed to reduce administrative burdens for medical and other professionals, in order to enable these professionals to provide comprehensive patient care and extend support to the Commonwealth's vulnerable healthcare systems.

13. The Department has worked to expand health care provider licensing, extend license renewal deadlines, waive fees, and provide guidelines to critical professions. Due to the immeasurable and potentially devastating healthcare needs, regulatory changes that would ordinarily take a year or more to implement have been put in place in days.

14. The Department's staff, legal team, and leadership have been extraordinarily dedicated. They have performed above and beyond expectations to meet the immensely challenging needs presenting themselves during this public health emergency.

15. At the same time that Department personnel are shouldering these enormous responsibilities, they are facing severe logistical challenges.

16. Pursuant to the Governor's emergency orders, the Department's offices are closed and all but a few employees are working remotely. This situation has put an enormous burden on the Department's information technology personnel and on its computer system. Physical files are inaccessible. Searches of electronic files are difficult to carry out.

17. Department staff have risen to the challenges and are performing admirably under difficult circumstances. However, they are stretched to the limit.

18. I am aware that the Plaintiffs in this litigation recently served discovery requests.

19. At the best of times, responding to these requests would be extremely burdensome.

20. Under the current circumstances, it is not possible to respond to the requests without diverting personnel and resources from mission critical tasks.

21. The Department's senior in-house counsel, technical support personnel, and leadership have been working day and night on emergency matters. Time that they spend assisting outside counsel with discovery responses will hamper the Department's efforts to carry the Commonwealth through this crisis.

22. Any document search would strain vital network capacity and would require the physical presence of Department personnel, putting the health of Department employees and their families at risk.

23. In order to protect the Department's resources, preserve the health of its personnel, and enable it to devote its full efforts to its critical functions during this global emergency, I respectfully request that the Court stay discovery and issue a Protective Order, as

requested in the Application.

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

Executed on April 2, 2020.



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# **EXHIBIT C**

**From:** [Hangley, Michele D.](#)  
**To:** [John Murphy](#)  
**Cc:** [Wiygul, Robert A.](#); [Matthias, Christina C.](#); [Grossberg, Lesley](#); [Mariani, Jeanne-Michele](#)  
**Subject:** RE: NEDC v. Boockvar - quick question [IWOV-HASP1.FID127992]  
**Date:** Wednesday, March 18, 2020 4:32:11 PM  
**Attachments:** [image001.jpg](#)  
[image002.jpg](#)  
[image003.jpg](#)

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Hi John,

Given the recent COVID-19 developments and the really extraordinary burdens on the Department right now, I don't see how the people there will be able to devote time to discovery in the near future. For that reason, I think it makes sense to put a pause on everything, at least until the court rules on the POs. That said, if you'll let me know what you're going to be seeking in discovery, I can see if there's anything that we can get to you without taking Department personnel away from their duties. Please let me know what you'll be seeking, or give me a call if that's easier.

If we can't agree on a pause, we plan to ask the Court to stay discovery. In the meantime, we will hold off on serving discovery ourselves.

Thanks. I'm working from home for now – you can reach me on my cell at 215-514-5730, or via email.

Michele

Michele D. Hangley  
Hangley Aronchick Segal Pudlin & Schiller  
One Logan Square, 27th Floor  
Philadelphia, PA 19103  
215-496-7061 (direct)  
215-568-0300 (fax)  
[mhangley@hangley.com](mailto:mhangley@hangley.com)  
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20 Brace Road, Suite 201  
Cherry Hill, NJ 08034  
856-616-2100 (main)  
856-616-2170 (fax)

---

**From:** Murphy, John

**Sent:** Tuesday, March 17, 2020 12:19 PM

**To:** Hangley, Michele D.

**Cc:** Wiygul, Robert A. ; Matthias, Christina C. ; Grossberg, Lesley ; Mariani, Jeanne-Michele

**Subject:** RE: NEDC v. Boockvar - quick question [IWOV-HASP1.FID127992]

Michele-

Apologies for the delay responding, and thank you for agreeing to e-mail service. Regarding discovery generally, because we do not know how long it will take the Court to rule on the objections, we cannot agree to an indefinite delay of discovery until after that ruling. That said, although we did not have in mind any departure from the default rules, we will hold off serving discovery until 3/23, assuming Respondent agrees to do the same. Further, given the statewide restrictions, for discovery that would require problematic interpersonal interaction, we will of course be available to discuss any appropriate accommodation on a case-by-case basis.

Best regards,

John

**John Murphy**  
Partner



Cira Centre  
2929 Arch Street | 12th Floor  
Philadelphia, PA 19104-2891  
T +1.215.564.1603

[johnmurphy@bakerlaw.com](mailto:johnmurphy@bakerlaw.com)  
[bakerlaw.com](http://bakerlaw.com)



---

**From:** Hangley, Michele D. <[mdh@hangley.com](mailto:mdh@hangley.com)>  
**Sent:** Thursday, March 12, 2020 4:37 PM  
**To:** Murphy, John <[JohnMurphy@bakerlaw.com](mailto:JohnMurphy@bakerlaw.com)>  
**Cc:** Wiygul, Robert A. <[raw@hangley.com](mailto:raw@hangley.com)>; Matthias, Christina C. <[ccm@hangley.com](mailto:ccm@hangley.com)>  
**Subject:** RE: NEDC v. Boockvar - quick question [IWOV-HASP1.FID127992]

[External Email: Use caution when clicking on links or opening attachments.]

John,  
Yes, we will agree to e-mail service of discovery papers.  
We believe, however, that discovery should not proceed until the Court has ruled on Defendant's Preliminary Objections. Because the Court may dismiss the case in whole or in part, moving forward with discovery at this point could involve unnecessary time and effort. Would Plaintiffs agree to hold off on discovery until the Court rules?

Thanks,

Michele

Michele D. Hangley  
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Cherry Hill, NJ 08034  
856-616-2100 (main)  
856-616-2170 (fax)

---

**From:** Murphy, John <[JohnMurphy@bakerlaw.com](mailto:JohnMurphy@bakerlaw.com)>  
**Sent:** Thursday, March 12, 2020 11:06 AM  
**To:** Hangley, Michele D. <[mdh@hangley.com](mailto:mdh@hangley.com)>  
**Subject:** NEDC v. Boockvar - quick question

Michele-

Could we agree that e-mail will suffice for service of any discovery papers in this case?

Regards,

John

**John Murphy**  
Partner



---

Cira Centre  
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Philadelphia, PA 19104-2891

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# **EXHIBIT D**

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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,

Petitioners,

v.

KATHY BOOCKVAR, SECRETARY OF  
THE COMMONWEALTH,

Respondent.

COMMONWEALTH  
COURT OF  
PENNSYLVANIA

ORIGINAL JURISDICTION

Docket No.: 674 MD 2019

**PETITIONERS' FIRST SET OF REQUESTS FOR ADMISSIONS TO  
RESPONDENT**

Pursuant to Rule 4014 of the Pennsylvania Rules of Civil Procedure, Petitioners request that Respondent, Secretary Boockvar, answer in writing the following Requests for Admissions, within thirty (30) days after service hereof.

**DEFINITIONS AND INSTRUCTIONS**

1. “Action” means the above-captioned matter, *National Election Defense Coalition, et al., v. Kathy Boockvar*, 674 MD 2019, filed in the Commonwealth Court of Pennsylvania.
2. “Petition” means Petitioners’ Amended Petition filed on February 4, 2020.
3. “You,” “Your,” “the Secretary,” and “Respondent” as used herein means the Respondent in the Action, identified as Secretary of the Commonwealth Kathy Boockvar in the amended version of the Petition.
4. “Department” means the Pennsylvania Department of State, including the Secretary.
5. “ES&S” means Election Systems & Software, LLC, the manufacturer of the ExpressVote XL electronic voting system.

6. “ExpressVote XL” means the ExpressVote XL electronic voting system manufactured by ES&S.

7. “Ballot card” means the piece of paper which is compatibly designed to be inserted into the ExpressVote XL for a voter to begin voting and shows the summary of the voter’s selections before being cast and deposited into the secure ballot card container.

8. “Document” is used in its broadest possible sense and shall mean, without limitation, any and all written, typewritten, printed, taped, photographic, graphic electronic or digital material of any kind (including the originals and non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise), including without limitation: (i) correspondence, memoranda, notes, diaries, receipts, returns, summaries, pamphlets, books, prospectuses, interoffice and intra office communications, offers, notations of any sort of any conversation, bulletins, modifications, changes and amendments of any of the foregoing; (ii) graphic or manual records or representations of any kinds including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, records, motion pictures; and (iii) electronic, mechanical or electric records or representations of any kinds including, without limitation, tapes, cassettes, discs, diskettes, e-mail exchanges, hard-drive, voice mail messages and recordings, whether or not previously transcribed, thumb-drives, offsite storage backups,

DropBox or cloud contents, or emails sent to, received from or maintained on services such as gmail.com, yahoo.com, hotmail.com, or the like.

9. “Including” shall be construed to mean without limitation, (i.e., including but not limited to).

10. “Information” means all Documents, data, metadata, facts, or circumstances of any nature relating to the given subject matter, including Documents.

11. “Person” means any natural person, contractor, corporation, partnership, proprietorship, association, venture, governmental or public entity, or any other form of organization or legal entity and its officers, directors, employees, consultants, representatives, and agents.

12. “Relating to,” “relate(s) to,” and “related to” means concerning, constituting, embodying, evidencing, comprising, reflecting, refuting, identifying, indicating, stating, referring to, alluding to, dealing with, commenting on, responding to, describing, discussing, showing, reflecting, analyzing or containing information concerning a given subject matter.

13. “Request,” and “Requests” mean and are limited to the numerical requests set forth in these Requests for Admissions.

14. To the extent not defined above, all terms in these Requests for Admissions shall be given their plain and ordinary meaning.

## **INSTRUCTIONS**

1. These Instructions shall be considered part of the following Admissions as if fully set forth in each Admission.

2. The words “and” or “or” shall be interpreted conjunctively or disjunctively as necessary to include any and all information otherwise within the scope of any Admission.

3. The terms “all” and “each” shall both be construed as all and each.

4. The use of the singular form of any word includes the plural and vice versa.

5. A party’s full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, affiliates, agents, attorneys, accountants, consultants, contractors, and other representatives.

6. In construing these Admissions: (i) masculine, feminine or neuter pronouns shall not exclude other genders; (ii) the present tense includes the past and future tenses; (iii) the term “including” shall not be construed to limit the scope of any of the Admissions; (iv) all Admissions should be interpreted in a manner that makes them inclusive rather than exclusive; and (v) to the extent multiple Admissions seek the same information, and some of those Admissions are made with a greater level of specificity than the others, the presence of the more specific

Admissions shall not serve as a basis for interpreting the more general Admissions narrowly.

7. Unless a Request specifically states otherwise, the geographic scope of the Requests is the Commonwealth of Pennsylvania.

8. If you claim that any Admission is objectionable for any other reason, in whole or in part, state the objection, explain its application to the particular Admission, and respond to any portion of the Admission to which your objection does not apply.

9. If you are unable to respond fully to any Admission, you must answer it to the extent you are able, explain in detail why it cannot be answered fully, and provide all Information or knowledge you have concerning the unanswered portion.

10. These Admissions shall be deemed continuing so as to require prompt supplemental or amended responses if you obtain or discover additional information between the time of your initial response and the final disposition of this action.

### **ADMISSIONS**

1. Admit that in the November 5, 2019 general election, at least one ExpressVote XL machine in Northampton County did not accurately tabulate votes.

2. Admit that inaccurate vote tabulation in Northampton County during the November 5, 2019 general election resulted in the need for election officials to recount all ballot cards using different scanning and tabulation devices.

3. Admit that in the November 5, 2019 general election in Northampton County, at least one of the total number of votes reported by an ExpressVote XL at the close of the polls was not the same as the total number of votes reported when the corresponding ballot cards were scanned and tabulated by one or more different devices.

4. Admit that in the November 5, 2019 general election in Northampton County, the same ballot definition file was used in the ExpressVote XL and in the separate different devices later used for scanning and tabulation.

5. Admit that the ExpressVote XL does not use ballot cards that are printed on card or paper stock that is colored to correspond to the voter's party affiliation or independent status.

6. Admit that the ExpressVote XL uses ballot cards made of white card or paper stock.

7. Admit that the Department has not seen, nor asked ES&S to produce, evidence that a colored ballot card is available for use with the ExpressVote XL.

8. Admit that ES&S has not demonstrated to the Department that a colored ballot card is compatible with the ExpressVote XL.



9. Admit that the Department has provided no directive nor guidance to counties using the ExpressVote XL regarding use of colored ballot cards.

10. Admit that ballot cards for the ExpressVote XL are not bound together in books of fifty, in such manner that each ballot may be detached and removed separately.

11. Admit that the Department has not seen, nor asked ES&S to produce, evidence that ballot cards for the ExpressVote XL can be bound in books of fifty.

12. Admit that ES&S has not demonstrated to the Department that a ballot card removed from a bound book of fifty is compatible with the ExpressVote XL.

13. Admit that the Department has provided no directive nor guidance to counties using the ExpressVote XL regarding the binding of ballot cards in books of fifty.

14. Admit that in the November 5, 2019 general election in Philadelphia and Northampton counties, ballot cards were not bound together in books of fifty.

15. Admit that in the November 5, 2019 general election in Philadelphia and Northampton counties, ballot cards were not bound together in books in such a manner that each ballot could be detached and removed separately.

16. Admit that the ExpressVote XL does not make a cross, a check mark, a punch, or a mark sense mark in the square opposite the name of the candidate or issue for which a voter is voting on the touchscreen.

17. Admit that the ExpressVote XL combines two voting functions in a single piece of hardware: marking a voter's choices on a piece of paper and tabulating those choices from the same paper.

Admit that the ExpressVote XL tabulates votes from the barcodes at the top of the ballot card, and not from the touchscreen or the text on the ballot card.

18. Admit that the ExpressVote XL does not tabulate vote counts by reading the text on the ballot cards.

19. Admit that the vote totals reported by an ExpressVote XL at the close of the polls are a total of the barcodes representing vote selections that it scanned.

20. Admit that the barcodes representing vote selections on a ballot card are the official votes in each contest.

21. Admit that a voter is unable to determine whether the data in the barcodes at the top of the printed ballot card corresponds to the text printed on the ballot card.

22. Admit that the ExpressVote XL does not print the text of a ballot question onto the ballot card.

23. Admit that the ExpressVote XL does not provide a ballot card on which there are designating arrows to indicate a voting square or position.

24. Admit that the ExpressVote XL's procedures for spoiling a ballot require a poll worker to enter the voting booth while the voter is in the booth.

25. Admit that the ExpressVote XL's procedures for spoiling a ballot require a poll worker to physically remove the spoiled ballot from the machine.

26. Admit that the ExpressVote XL has a single paper path by which the ballot card travels from a holding area, to the printer, to the scanner, to the metal display box, and then back past the scanner, past the printer, to the ballot cartridge.

27. Admit that after a voter chooses to cast their ballot, the ballot card travels under the print head again before being impounded in the ballot container.

28. Admit that the ExpressVote XL utilizes software to function.

29. Admit that, apart from hardware controlled by software, the ExpressVote XL does not possess hardware that would physically restrict the movement of the print head or otherwise prevent it from contacting the ballot card after the voter has approved the selections.

30. Admit that, inside the ExpressVote XL, the software that controls the hardware that marks the ballot card is connected to the software that controls the hardware that scans the ballot card.

31. Admit that the ExpressVote XL vote tabulation process is operated by software.

32. Admit that the ExpressVote XL's ballot selection and tabulator functions can communicate directly without printing a paper record.

33. Admit that the ExpressVote XL, in tabulating its votes, compares the information on the ballot card to the information stored in memory from the voter's choices on the touchscreen.

34. Admit that the ExpressVote XL tabulates information on the ballot card if it exactly matches the information stored in memory from the voter's choices on the touchscreen and then counts the stored information in memory as its official vote.

35. Admit that the ExpressVote XL stores cast ballot cards in chronological order.

36. Admit that the Department has no ability to enforce the "additional conditions of certification" listed in Section V of the Secretary's September 3, 2019 report concerning reexamination.

37. Admit that after the November 5, 2019 general election, Northampton County did not open collection bins in the presence of board of election members and commingle them before canvass and storage.

38. Admit that after the November 5, 2019 general election, Philadelphia County did not open collection bins in the presence of board of election members and commingle them before canvass and storage.

39. Admit that, between September 3, 2019 and November 5, 2019, the Department did not review the poll worker training instructions, poll worker materials, or on-screen instructions in Northampton or Philadelphia counties.

40. Admit that the ExpressVote XL software included in EVS 6.0.0.0 did not comply with all of the requirements of the Pennsylvania Election Code and was one of the reasons EVS 6.0.0.0 was not certified.

41. Admit that the ExpressVote XL software was modified between the Department's examination of ES&S EVS 6.0.0.0 and the Department's examination of ES&S EVS 6.0.2.1.

42. Admit that the Department did not conduct a full examination of ES&S EVS 6.0.2.1.

43. Admit that the Department did not conduct a full examination of the ExpressVote XL with the software as included in EVS 6.0.2.1.

44. Admit that, in response to the Petition for Reexamination of the ExpressVote XL in July 2019, the Department did not conduct a full examination of the ExpressVote XL.

45. Admit that, at the time a Petition for Reexamination of the ExpressVote XL was received in July 2019, the Department had no back-up plan to utilize in the event the machine was decertified.

46. Admit that, after receiving a Petition for Reexamination of the ExpressVote XL in July 2019, the Department did not provide guidance to Philadelphia, Northampton, or Cumberland counties concerning contingency

planning for the November 5, 2019 general election in the event the machine was decertified.

47. Admit that the Department has no back-up plan for the upcoming April primary election in the event of a long-term power outage or any other event that could cause an ExpressVote XL in a precinct to cease functioning.

48. Admit that the Department has no back-up plan in place should the ExpressVote XL be decertified.

49. Admit that the Secretary intends to decertify all Direct Recording Electronic (DRE) voting machines because DRE machines lack a voter-verifiable and auditable paper ballot or paper record.

50. Admit that the Secretary has not yet decertified all DRE machines and they may still be used to conduct elections in Pennsylvania.

**BAKER & HOSTETLER LLP**

Dated: March 24, 2020

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**CERTIFICATE OF SERVICE**

I, John F. Murphy, hereby certify that on March 24, 2020, I caused a true and correct copy of the foregoing Request for Admissions to be served via email service upon the Respondent Kathy Boockvar via, her attorneys at:

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# **EXHIBIT E**

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WERNER, SANDRA 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' FIRST SET OF REQUESTS FOR PRODUCTION OF  
DOCUMENTS AND THINGS TO RESPONDENT**

Pursuant to Rule 4009 of the Pennsylvania Rules of Civil Procedure, Petitioners request that Respondent, Secretary Boockvar, answer in writing and produce responsive documents and things, in accordance with the definitions and instructions set forth below, within thirty (30) days after service hereof.

**DEFINITIONS AND INSTRUCTIONS**

1. “Action” means the above-captioned matter, *National Election Defense Coalition, et al., v. Kathy Boockvar*, 674 MD 2019, filed in the Commonwealth Court of Pennsylvania.

2. “Petition” means Petitioners’ Amended Petition filed on February 4, 2020.

3. “You,” “Your,” “the Secretary,” and “Respondent” as used herein means the Respondent in the Action, identified as Secretary of the Commonwealth Kathy Boockvar in the amended version of the Petition.

4. “Department” means the Pennsylvania Department of State, including the Secretary.

5. “The Department or its consultants” means, collectively, the Pennsylvania Department of State, and any consultants, contractors, or advisors outside the Department, whether or not part of any government agency, from which

the Department sought or received assistance in a particular matter, including but not limited to SLI.

6. “SLI” includes SLI Global Solutions LLC, SLI Compliance, SLI Government Solutions, and any other related company that has served as a consultant, contractor, or advisor to the Department with respect to examining the ExpressVote XL or a voting system that includes the ExpressVote XL.

7. “Conditions of Certification for the ExpressVote XL” means the conditions of certification listed in Section IV of the Secretary’s November 30, 2018 initial certification report for the ExpressVote XL and the additional conditions of certification listed in Section V of the Secretary’s September 3, 2019 report concerning reexamination.

8. “Document” is used in its broadest possible sense and shall mean, without limitation, any and all written, typewritten, printed, taped, photographic, graphic electronic or digital material of any kind (including the originals and non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise), including without limitation: (i) correspondence, memoranda, notes, diaries, receipts, returns, summaries, pamphlets, books, prospectuses, interoffice and intra office communications, offers, notations of any sort of any conversation, bulletins, modifications, changes and amendments of any of the foregoing; (ii) graphic or manual records or representations of any kinds

including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, records, motion pictures; and (iii) electronic, mechanical or electric records or representations of any kinds including, without limitation, tapes, cassettes, discs, diskettes, e-mail exchanges, hard-drive, voice mail messages and recordings, whether or not previously transcribed, thumb-drives, offsite storage backups, DropBox or cloud contents, or emails sent to, received from or maintained on services such as gmail.com, yahoo.com, hotmail.com, or the like.

9. “ES&S” means Election Systems & Software.

10. “Identify” means to state:

a. in the case of a person other than a natural person, its name, the address of its principal place of business (including ZIP code), its telephone number, and the name of its chief executive officer, as well as, if it has a person other than a natural person that ultimately controls it, that other person's name, the address of that person's principal place of business (including ZIP code), that other person's telephone number, and the name of that other person's chief executive officer;

b. in the case of a natural person, his or her name, business address and telephone number, employer, and title or position;

c. in the case of a communication, its date, type (e.g., telephone conversation or discussion), the place where it occurred, the identity of the

person who made the communication, the identity of the person who received the communication, the identity of each other person when it was made, and the subject matter discussed; and

d. in the case of a document, the title of the document, the author, the title or position of the author, the addressee, each recipient, the type of document, the subject matter, the date of preparation, and its number of pages.

11. “Including” shall be construed to mean without limitation, (i.e., including but not limited to).

12. “Information” means all Documents, data, metadata, facts, or circumstances of any nature relating to the given subject matter, including Documents.

13. “Person” means any natural person, contractor, corporation, partnership, proprietorship, association, venture, governmental or public entity, or any other form of organization or legal entity and its officers, directors, employees, consultants, representatives, and agents.

14. “Relating to,” “relate(s) to,” and “related to” means concerning, constituting, embodying, evidencing, comprising, reflecting, refuting, identifying, indicating, stating, referring to, alluding to, dealing with, commenting on, responding to, describing, discussing, showing, reflecting, analyzing or containing information concerning a given subject matter.

15. “Request,” and “Requests” mean and are limited to the numerical requests set forth in these requests for production of documents and things.

16. To the extent not defined above, all terms in these Requests shall be given their plain and ordinary meaning.

### **INSTRUCTIONS**

1. These Instructions shall be considered part of the following Requests as if they were fully set forth in each Request.

2. In responding to these Requests, you shall furnish all information available at the time of answering, including information in the possession of any and all representatives.

3. The words “and” or “or” shall be interpreted conjunctively or disjunctively as necessary to include any and all information otherwise within the scope of any Request.

4. The terms “all” and “each” shall both be construed as all and each.

5. Whenever necessary to bring within the scope of a Request all the information that might otherwise be construed to be outside its scope, the use of a verb in any tense shall be construed as the use of the verb in all other tenses.

6. The use of the singular form of any word includes the plural and vice versa.

7. A party’s full or abbreviated name or a pronoun referring to a party

mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, affiliates, agents, attorneys, accountants, consultants, contractors, and other representatives.

8. In construing these Requests: (i) masculine, feminine or neuter pronouns shall not exclude other genders; (ii) the present tense includes the past and future tenses; (iii) the term “including” shall not be construed to limit the scope of any of the Requests; (iv) all Requests should be interpreted in a manner that makes them inclusive rather than exclusive; and (v) to the extent multiple Requests seek the same information, and some of those Requests are made with a greater level of specificity than the others, the presence of the more specific Requests shall not serve as a basis for interpreting the more general Requests narrowly.

9. The Requests contained herein pertain to all information (unless privileged) currently in your possession, custody or control, and include information possessed by you, your agents, representatives, officers, employees, accountants and your attorneys.

10. If you claim that any Request is objectionable for any other reason, in whole or in part, state the objection, explain its application to the particular Request, and respond to any portion of the Request to which your objection does not apply.

11. If you are unable to respond fully to any Request, you must answer it



to the extent you are able, explain in detail why it cannot be answered fully, and provide all Information or knowledge you have concerning the unanswered portion.

12. All Documents identified and produced in response to these Requests shall be Bates numbered or given a unique production identifier for identification purposes and produced with a load file with OCR and paginated on a document level.

13. If there are no Documents responsive to a Request, please so state.

14. These Requests shall be deemed continuing so as to require prompt supplemental or amended responses if you obtain or discover additional information between the time of your initial response and the final disposition of this action.

### **REQUESTS**

1. Permit inspection of a fully functional ExpressVote XL voting machine at a time and place to be mutually agreed upon by the parties.

2. Provide a copy, or permit inspection at a site mutually agreed upon by the parties, of the ES&S source code used in connection with the ExpressVote XL.

3. Identify and provide any reports, findings, written analyses, or other Documents produced by the Department or its consultants in preparation for, during, at the conclusion of, or otherwise related to the following voting equipment examinations:

a. The Department's 2018 examination of ES&S's EVS 6.0.0.0 Voting System.

b. The Department's 2018 examination and certification of ES&S's EVS 6.0.2.1 Voting System.

c. The Department's 2019 reexamination of the ExpressVote XL machine in response to the July 2019 petition for reexamination. This Request specifically includes the findings provided to the Department by Jesse Peterson and Mike Santos as described at the top of page 3 of the Secretary's September 3, 2019 "Report Concerning the Reexamination Results of Election Systems and Software ExpressVote XL."

d. Any examinations by the Department of additional EVS systems that include versions of the ExpressVote XL and which have commenced or concluded after the September 3, 2019 reexamination of the ExpressVote XL.

4. Identify and provide any videos recorded during, as part of, or otherwise related to any of the voting equipment examinations enumerated in Requests 2.a-d.

5. Identify and provide any written communications between the Department and SLI between July 16, 2019 and September 3, 2019 relating to SLI Compliance's activities undertaken as part of or in furtherance of the Department's reexamination of the ExpressVote XL voting machine.

6. Identify and provide any written communications between the Department and ES&S between July 16, 2019 and September 3, 2019 relating to the Department's reexamination of the ExpressVote XL voting machine.

7. Identify and provide any Documents in the Department's custody or control created between July 16, 2019 and September 3, 2019 relating to why the

Department conducted its reexamination of the ExpressVote XL voting machine outside of Pennsylvania.

8. Identify and provide any reports, analyses, or findings in the Department's custody or control, whether prepared by the Department or prepared by others and received by the Department, involving the use or performance of ExpressVote XL machines in the Northampton County election of November 2019.

9. Identify and provide any and all communications sent between the Department and ES&S discussing or relating to security concerns involving the ExpressVote XL.

10. Identify and provide any and all communications sent between the Department and election officials from any county in Pennsylvania discussing or relating to security concerns involving the ExpressVote XL.

11. Identify and provide any and all communications sent between the Department and SLI discussing or relating to security concerns involving the ExpressVote XL.

12. Provide a copy, or permit inspection at a site in Harrisburg or Philadelphia, Pennsylvania, agreed upon by the parties, of the ES&S source code used in connection with the ExpressVote XL.

13. Identify and provide any communications between the Department and local election officials in Northampton or Philadelphia Counties on or after

September 3, 2019, relating to the Conditions of Certification for the ExpressVote XL and/or the counties' compliance with those conditions.

14. Identify and provide any Documents created by the Department or its consultants on or after July 16, 2019, regarding the Department's oversight, review, or enforcement of local election officials' compliance with the Conditions of Certification for the ExpressVote XL and/or the counties' compliance with those conditions.

15. Identify and provide any Documents or communications on or after November 5, 2019, pertaining to voter complaints regarding the ExpressVote XL.

16. Identify and provide any Documents or communications on or after November 5, 2019 pertaining to poll worker complaints or communications regarding the ExpressVote XL.

17. "Identify and provide all correspondence received by the Department from poll workers or county boards of election expressing concerns about the ExpressVote XL.

18. Identify and provide any Documents or communications on or after November 5, 2019, pertaining to problems with the ExpressVote XL's functioning in an election.

19. Identify and provide any Documents or communications between the Department or its consultants and any local election commission, Board of Elections,

and/or County Commissioners, on or after November 5, 2019, relating to the ExpressVote XL.

20. Identify and provide any Documents or communications pertaining to the Northampton County Election Commission's vote of no confidence in the ExpressVote XL on December 19, 2019.

21. Identify and provide any Documents or communications referring to or discussing known or suspected security vulnerabilities of the ExpressVote XL. Identify and provide any Documents or communications relating to the ExpressVote XL between the Department or its consultants and the U.S. Election Assistance Commission, created, sent, or received on or after November 5, 2019.

22. Identify and provide any Documents or communications relating to the ExpressVote XL between the Department or its consultants and the office of the Secretary of State (or equivalent elections officials or boards) of any other state, created, sent, or received on or after November 5, 2019.

23. Identify any provide any Documents or communications that the Department has sent to counties since January 1, 2000 in which the the Department informed one or more counties of the Department's suspension or decertification of a particular voting system.

**BAKER & HOSTETLER LLP**

Dated: March 24, 2020

/s/John F. Murphy

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**CERTIFICATE OF SERVICE**

I, John F. Murphy, hereby certify that on March 24, 2020, I caused a true and correct copy of the foregoing Request for Production to be served via email service upon the Respondent Kathy Boockvar via, her attorneys at:

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# **EXHIBIT F**



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NATIONAL ELECTION DEFENSE  
COALITION, CITIZENS FOR BETTER  
ELECTIONS, 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,

Petitioners,

v.

KATHY BOOCKVAR, SECRETARY OF  
THE COMMONWEALTH,

Respondent.

COMMONWEALTH  
COURT OF  
PENNSYLVANIA

ORIGINAL JURISDICTION

Docket No.: 674 MD 2019

**PETITIONERS' FIRST SET**  
**OF INTERROGATORIES**  
**TO RESPONDENT**

Pursuant to Rules 4003.1 and 4005 of the Pennsylvania Rules of Civil Procedure, Petitioners request that Respondent, Secretary Boockvar, answer in writing and verify the following Interrogatories, in accordance with the definitions and instructions set forth below, within thirty (30) days after service hereof.

### **DEFINITIONS AND INSTRUCTIONS**

1. “Action” means the above-captioned matter, *National Election Defense Coalition, et al., v. Kathy Boockvar*, 674 MD 2019, filed in the Commonwealth Court of Pennsylvania.

2. “Petition” means Petitioners’ Amended Petition filed on February 4, 2020.

3. “You,” “Your,” “the Secretary,” and “Respondent” as used herein means the Respondent in the Action, identified as Secretary of the Commonwealth Kathy Boockvar in the amended version of the Petition.

4. “Department” means the Pennsylvania Department of State, including the Secretary.

5. “The Department or its consultants” means, collectively, the Pennsylvania Department of State and any consultants, contractors, or advisors outside the Department, whether or not part of any government agency, from which

the Department sought or received assistance in a particular matter, including but not limited to SLI.

6. “SLI” includes SLI Global Solutions LLC, SLI Compliance, SLI Government Solutions, and any other related company that has served as a consultant, contractor, or advisor to the Department with respect to examining the ExpressVote XL or a voting system that includes the ExpressVote XL.

7. “ES&S” means Election Systems & Software, LLC, the manufacturer of the ExpressVote XL electronic voting system.

8. “ExpressVote XL” means the ExpressVote XL electronic voting system manufactured by ES&S.

9. “Conditions of Certification for the ExpressVote XL” means the conditions of certification listed in Section IV of the Secretary’s November 30, 2018 initial certification report for the ExpressVote XL and the additional conditions of certification listed in Section V of the Secretary’s September 3, 2019 report concerning reexamination.

10. “Ballot card” means the piece of paper which is compatibly designed to be inserted into the ExpressVote XL for a voter to begin voting and shows the summary of the voter’s selections before being cast and deposited into the secure ballot card container.

11. “Document” is used in its broadest possible sense and shall mean, without limitation, any and all written, typewritten, printed, taped, photographic, graphic electronic or digital material of any kind (including the originals and non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise), including without limitation: (i) correspondence, memoranda, notes, diaries, receipts, returns, summaries, pamphlets, books, prospectuses, interoffice and intra office communications, offers, notations of any sort of any conversation, bulletins, modifications, changes and amendments of any of the foregoing; (ii) graphic or manual records or representations of any kinds including, without limitation, photographs, charts, graphs, microfiche, microfilm, video tapes, records, motion pictures; and (iii) electronic, mechanical or electric records or representations of any kinds including, without limitation, tapes, cassettes, discs, diskettes, e-mail exchanges, hard-drive, voice mail messages and recordings, whether or not previously transcribed, thumb-drives, offsite storage backups, DropBox or cloud contents, or emails sent to, received from or maintained on services such as gmail.com, yahoo.com, hotmail.com, or the like.

12. “Identify” means to state:

- a. in the case of a person other than a natural person, its name, the address of its principal place of business (including ZIP code), its telephone

number, and the name of its chief executive officer, as well as, if it has a person other than a natural person that ultimately controls it, that other person's name, the address of that person's principal place of business (including ZIP code), that other person's telephone number, and the name of that other person's chief executive officer;

- b. in the case of a natural person, his or her name, business address and telephone number, employer, and title or position;
- c. in the case of a communication, its date, type (e.g., telephone conversation or discussion), the place where it occurred, the identity of the person who made the communication, the identity of the person who received the communication, the identity of each other person when it was made, and the subject matter discussed; and
- d. in the case of a document, the title of the document, the author, the title or position of the author, the addressee, each recipient, the type of document, the subject matter, the date of preparation, and its number of pages.

13. “Including” shall be construed to mean without limitation, (i.e., including but not limited to).

14. “Information” means all Documents, data, metadata, facts, or circumstances of any nature relating to the given subject matter, including Documents.

15. “Person” means any natural person, contractor, corporation, partnership, proprietorship, association, venture, governmental or public entity, or any other form of organization or legal entity and its officers, directors, employees, consultants, representatives, and agents.

16. “Relating to,” “relate(s) to,” and “related to” means concerning, constituting, embodying, evidencing, comprising, reflecting, refuting, identifying, indicating, stating, referring to, alluding to, dealing with, commenting on, responding to, describing, discussing, showing, reflecting, analyzing or containing information concerning a given subject matter.

17. “Interrogatory,” and “Interrogatories,” mean and are limited to the numerical requests set forth in these Interrogatories.

18. To the extent not defined above, all terms in these Interrogatories shall be given their plain and ordinary meaning.

### **INSTRUCTIONS**

1. These Instructions shall be considered part of the following Interrogatories as if fully set forth in each Interrogatory.

2. In responding to these Interrogatories, you shall furnish all information available at the time of answering, including information in the possession of any and all representatives.

3. The words “and” or “or” shall be interpreted conjunctively or disjunctively as necessary to include any and all information otherwise within the scope of any Interrogatory.

4. The terms “all” and “each” shall both be construed as all and each.

5. Whenever necessary to bring within the scope of an Interrogatory all the information that might otherwise be construed to be outside its scope, the use of a verb in any tense shall be construed as the use of the verb in all other tenses.

6. The use of the singular form of any word includes the plural and vice versa.

7. A party’s full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, affiliates, agents, attorneys, accountants, consultants, contractors, and other representatives.

8. In construing these Interrogatories: (i) masculine, feminine or neuter pronouns shall not exclude other genders; (ii) the present tense includes the past and future tenses; (iii) the term “including” shall not be construed to limit the scope

of any of the Interrogatories; (iv) all Interrogatories should be interpreted in a manner that makes them inclusive rather than exclusive; and (v) to the extent multiple Interrogatories seek the same information, and some of those Interrogatories are made with a greater level of specificity than the others, the presence of the more specific Interrogatories shall not serve as a basis for interpreting the more general Interrogatories narrowly.

9. The Interrogatories contained herein pertain to all information (unless privileged) currently in your possession, custody or control, and include information possessed by you, your agents, representatives, officers, employees, accountants and your attorneys.

10. If you claim that any Interrogatory is objectionable for any other reason, in whole or in part, state the objection, explain its application to the particular Interrogatory, and respond to any portion of the Interrogatory to which your objection does not apply.

11. If you are unable to respond fully to any Interrogatory, you must answer it to the extent you are able, explain in detail why it cannot be answered fully, and provide all Information or knowledge you have concerning the unanswered portion.

12. These Interrogatories shall be deemed continuing so as to require



prompt supplemental or amended responses if you obtain or discover additional information between the time of your initial response and the final disposition of this action.

### **INTERROGATORIES**

1. Identify and state the relevant professional qualifications, education, and background of each person or persons participating in the following voting equipment examinations:

- a. The Department's 2018 examination of ES&S's EVS 6.0.0.0 Voting System.
- b. The Department's 2018 examination and certification of ES&S's EVS 6.0.2.1 Voting System.
- c. The Department's 2019 reexamination of the ExpressVote XL machine in response to the July 2019 petition for reexamination.
- d. Any examinations by the Department of additional ES&S voting machines or systems that include versions of the ExpressVote XL and which have commenced or concluded after the September 3, 2019 reexamination of the ExpressVote XL.

2. Identify all videos that were recorded during, or part of, or otherwise related to any of the voting equipment examinations enumerated in Requests 1.a-d.

3. Identify all persons, including but not limited to those employed or retained by ES&S, with whom the Department consulted or communicated relating to:

- a. The July 2019 petition for reexamination.
- b. The Department's 2019 reexamination of the ExpressVote XL machine in response to the petition for reexamination.

4. Identify all persons whom the Secretary expects to call as an expert witness at trial and state for each such person the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

5. State whether the Secretary is asserting a laches defense in this Action, and if so, the factual basis for asserting such defense as to each Petitioner against whom the Secretary asserts such defense.

6. Identify all examinations or reexaminations of voting machines or voting systems that the Department or its consultants have conducted since January 1, 2018 that were conducted—in whole or in part—outside of Pennsylvania.

7. Identify all examinations or reexaminations of voting machines or voting systems since January 1, 2018, conducted by the Department or its

consultants, and state whether members of the public were permitted to observe the examination or reexamination.

8. Identify the Secretary and/or the Department's back-up or contingency plan should the ExpressVote XL malfunction or experience power failures during any upcoming election.

9. Identify the Secretary and/or the Department's written guidance to counties for a county-level back-up or contingency plan should the ExpressVote XL malfunction or experience power failures during any upcoming election.

10. Identify any and all instances in which the Secretary or the Department has ever temporarily suspended a voting system's use in Pennsylvania elections, and for each such instance, state whether the system was eventually decertified.

11. State whether the ExpressVote XL compares the text on the ballot card indicating a voter's choices to the machine's stored memory of the voter's choices, and if so, identify and describe such comparison process.

12. Identify and describe whether and/or how the ExpressVote XL uses Optical Character Recognition Software to read the ballot card after the voter makes his choices and selects "cast ballot."

13. Describe any actions the Department took between September 3, 2019, and November 6, 2019, to ensure that Philadelphia and Northampton Counties complied with the Conditions of Certification for the ExpressVote XL.

14. Describe any actions the Department or its consultants took following the November 5, 2019 general election to investigate and determine the causes and/or scope of tabulation errors using the ExpressVote XL voting machines in Northampton County.

15. Describe any actions the Department or its consultants took following the November 5, 2019 general election to investigate and determine the causes and/or scope of malfunctioning touchscreens on the ExpressVote XL voting machines in Philadelphia and Northampton counties.

16. Describe any actions the Department or its consultants took following the November 5, 2019 election to address voter complaints or concerns regarding the ExpressVote XL voting machine.

17. Identify all correspondence received by the Department from legislators of the United States Congress or the Pennsylvania General Assembly, or county election officials, expressing concerns about the ExpressVote XL.

**BAKER & HOSTETLER LLP**

Dated: March 24, 2020

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*Counsel for Petitioners*

**CERTIFICATE OF SERVICE**

I, John F. Murphy, hereby certify that on March 24, 2020, I caused a true and correct copy of the foregoing Request for Interrogatories to be served via email service upon the Respondent Kathy Boockvar via, her attorneys at:

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*Pudlin & Schiller*

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# **EXHIBIT G**

**From:** [John Murphy](#)  
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**Cc:** [Mariani, Jeanne-Michele](#); [Grossberg, Lesley](#); [Ron Fein](#); [McKenna, Sinead](#); [Surratt, Chanell](#)  
**Subject:** NEDC v. Boockvar - Discovery  
**Date:** Tuesday, March 24, 2020 11:31:31 AM  
**Attachments:** [image001.jpg](#)  
[image003.jpg](#)  
[image005.jpg](#)  
[2020-03-24 - Petitioner's First Set of RFPs \(1-23\).pdf](#)  
[2020-03-24 - Petitioner's First Set of RFAs \(1-50\).pdf](#)  
[2020-03-24 - Petitioner's First Set of Interrogatories \(1-17\).pdf](#)

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Counsel:

Please find attached Petitioner's first sets of RFPs, RFAs, and Interrogatories. With reference to my correspondence with Michele, Petitioners do not think a blanket stay of discovery is warranted at this time. That said, we of course stand ready to meet and confer on any particular aspect of these discovery requests that you wish to discuss.

Best regards,

John

**John Murphy**

Partner



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