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Petitioners,

v.

KATHY BOOCKVAR, SECRETARY OF  
THE COMMONWEALTH,

Respondent.

COMMONWEALTH  
COURT OF  
PENNSYLVANIA

ORIGINAL JURISDICTION

Docket No.: 674 MD 2019

**PETITIONERS' RESPONSE AND AMENDED BRIEF IN OPPOSITION TO  
RESPONDENT'S PRELIMINARY OBJECTIONS**

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Petitioners, by and through their counsel, hereby file their Amended Brief in Response to Respondent's Preliminary Objections, as follows:

## I. INTRODUCTION

This is a voting rights challenge to an electronic voting machine that failed dramatically in its first use in Pennsylvania and which threatens to cast the integrity and outcome of the 2020 election into doubt.

In July 2019, Petitioners asked the Secretary of the Commonwealth to re-examine the ExpressVote XL voting machine, arguing, *inter alia*, that it was too unreliable for use in Pennsylvania elections, and would violate voters' constitutional right to absolute secrecy. The Secretary ignored most of Petitioners' arguments; rejected others; and for several, announced "additional conditions" of certification which, if followed by poll workers, would in her view ameliorate the system's acknowledged defects.

Two months later, the ExpressVote XL was used for the very first time in Pennsylvania elections, in two counties and experienced technical difficulties which went so far as to declare the wrong winner of at least one race, among other problems.

Rather than defend the ExpressVote XL on the merits, Respondent seeks to sweep these problems under the rug via preliminary objections. Most of her preliminary objections in this case were tried by her predecessor, and rejected by

this Court, in the controlling case of *Banfield v. Cortes*, 922 A.2d 36, 46-48 (Pa. Commw. 2007) (*en banc*). To the extent that the Secretary’s real argument is that *Banfield* was wrongly decided, her arguments can be preserved for appeal, but this Court should adhere to its precedent and reject these rehashed arguments. Her remaining arguments largely attempt to argue the merits of the case at the preliminary objection stage. They should be overruled in their entirety.

## II. PETITIONERS’ FACTUAL STATEMENT

Petitioners are voting rights organizations (the “Organizational Petitioners”) and individual electors who are residents of counties that have procured the ExpressVote XL voting machine for use in elections (the “Individual Petitioners” and collectively with the Organizational Petitioners, the “Petitioners”). The Petitioners, by their Amended Petition for Review, challenge the Secretary of the Commonwealth’s certification of the ExpressVote XL voting machine for use in Pennsylvania elections. The ExpressVote XL uses ballots that do not conform to the requirements of the Pennsylvania Election Code,<sup>1</sup> violates the right of voters to

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<sup>1</sup> Certain nonconformities of the ExpressVote XL with the Pennsylvania Election Code asserted by Petitioners appear to have been obviated by Act 12 of Mar. 27, 2020 (SB422). While Act 12 does not obviate *all* the ballot form issues that Petitioners have pleaded, the change in the law suggests that the Secretary’s recertification was conducted in bad faith with respect to these points. On notice since July 2019 that the ExpressVote XL does not and could not conform to the technical requirements of the Election Code, Respondent relied on a change in the law to make them prospectively compliant rather than decertifying them on the basis of the nonconformities when urged to do so. A legitimate and unbiased examination would have forced the machines’ decertification.



vote in free and equal elections in which votes are counted fairly and accurately, violates voters' constitutional right to vote in absolute secrecy, and poses real and immediate risks of undetectable hacking or tampering. By their Amended Petition for Review, Petitioners seek an order from this Court directing the Secretary to decertify the ExpressVote XL in order to protect Petitioners' individual voting rights, and the integrity of the electoral process.

Respondent argues that Petitioners have failed to allege facts that would support their claims, but the opposite is true: Petitioners have laid out the facts to support those claims in their Amended Petition for Review. Respondent tries to argue that there is no basis to claim that the ExpressVote XL is unreliable and that Petitioners' concerns with the machines are at odds with the rest of the Pennsylvania electorate's interest in overseeing a free and fair election; however, Respondent fails to explain how the use of the machine that is capable of being hacked, fails to protect a voter's privacy, and has malfunctioned in the only election which it has been used in Pennsylvania, is the best choice for the Pennsylvania electorate.

Respondent tries to bolster her claim in two ways. First, she argues that there is no direct evidence that would support that the ExpressVote XL has been hacked in the past. However, the ExpressVote XL has never been made available to Petitioners or any other group for inspection, nor was it inspected after it wrongly

tabulated outcomes in Northampton County in the November 2019 general election. Second, Respondent relies on a recent decision in the federal case, *Stein v. Boockvar*, where the Eastern District of Pennsylvania held that the ExpressVote XL did not violate a settlement agreement between the Secretary of the Commonwealth and Plaintiff in that case. However, none of the petitioners in this case were members of the federal suit and no one in this case is challenging the outcome of the federal suit; rather, the issues here are wholly separate from those in *Stein* and therefore are not governed by its ruling.

Based on the foregoing, Petitioners believe all of Respondent's Preliminary Objections are meritless.

### **III. JURISDICTION**

The Court has original jurisdiction over this action pursuant to 42 P.S. § 761(a).

### **IV. STATEMENT OF THE QUESTION INVOLVED**

**1. Where Petitioners allege facts that, if true, would establish that the Secretary's certification of the ExpressVote XL was an abuse of her discretion, fraudulent, in bad faith, or clearly arbitrary, should the Court dismiss claims that allege a violation of the Election Code for legal insufficiency?**

Suggested Answer: No.

**2. Where Petitioners allege facts that, if true, would establish that the Secretary's certification of the ExpressVote XL was unreasonable, discriminatory, and an abuse of her power that resulted in a severe**

**infringement on the right to vote, should the Court dismiss claims that allege a violation of the Pennsylvania Constitution for legal insufficiency?**

Suggested Answer: No.

**3. Where the Petitioners have alleged an interest in the claims that the Secretary's certification of the ExpressVote XL violates the Election Code should the Court dismiss these claims for lack of standing?**

Suggested Answer: No.

**4. Should the Court dismiss the Amended Petition for failure to join indispensable parties where Respondent has not shown that three Pennsylvania counties' are indispensable?**

Suggested Answer: No.

**5. Should the Court dismiss the Amended Petition as time-barred by the six-month statute of limitations for actions brought against a governmental officer for anything done in the execution of her office, which does not apply to the claims raised here?**

Suggested Answer: No.

## **V. STANDARD OF REVIEW**

In ruling on preliminary objections, all well-pleaded, material and relevant facts will be considered as true, together with such reasonable inferences as may be drawn from such facts. *Santiago v. Pennsylvania National Mutual Casualty Insurance Co.*, 613 A.2d 1235, 1238 (Pa. 1992). "The test on preliminary objections is whether it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief." *Bower v. Bower*, 611 A.2d 181 (Pa. 1992) (citing *Firing v. Kephart*, 359

A.2d 833, 835 (1976)). “Where a doubt exists as to whether a preliminary objection should be sustained, this doubt should be resolved in favor of overruling it.” *Powell v. Drumheller*, 539 Pa. 484, 653 A.2d 619, 621 (Pa. 1995) (internal citations omitted).

“Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings and no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer.” *Ward v. Moses Taylor Hosp.*, 2010 WL 4357308 (Pa. Com. Pl. Apr. 23, 2010). “All material facts set forth in the pleading and all inferences reasonably deducible therefrom, must be admitted as true.” *Id.* The impetus of the Court’s “inquiry is to determine the legal sufficiency of the complaint and to determine whether the pleading would permit recovery if ultimately proven.” *Id.* “Since sustaining a preliminary objection in the nature of a demurrer will result in a denial of a claim or a dismissal of a suit, a demurrer should only be granted where the case is clear and free from doubt.” *Id.* (internal citations omitted.)

## **VI. SUMMARY OF ARGUMENT**

Respondent has alleged multiple objections to Petitioners’ claims, namely that they should fail for lack of legal sufficiency, that the Petitioners do not have standing to bring such claims, that the counties need to be joined in order for this

suit to go forward, and that the statute of limitations has run on the causes of action. None of these objections have merit. Petitioners are individual voters and organizations, with at least one member, who have been and will to continue to be affected by the use of ExpressVote XL in forthcoming elections. Petitioners have alleged direct violations of the Pennsylvania Election Code and Pennsylvania Constitution due to the use of the ExpressVote XL, which compromises the security and secrecy of elections in Pennsylvania. Petitioners are also asking for direct relief from the Secretary, that of decertification, a remedy which the counties *cannot* grant. Finally, the six-month statute of limitations that Respondent tries to argue applies here is germane to mandamus actions, which this Petition is decidedly not. At no point do Petitioners suggest that Respondent has sat on her hands and failed to take on an action which she is legally bound to do; instead, Petitioners argue that she has taken an action which is unlawful and therefore must be reversed.

## VII. ARGUMENT

### **A. Response to First Preliminary Objection: Counts I-V Should Be Not Dismissed for Legal Insufficiency/Failure to State a Claim for Which Relief May Be Granted Because Petitioners Have Alleged Facts in Support of 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))**

In her first Preliminary Objection, Respondent argues that Petitioners have alleged three flaws in the machine but have only targeted them with theoretical

flaws and without empirical evidence. (Resp. Brief 12-13.) Specifically,

Respondent writes

two of the three design features they focus on (the “administrator access panel,” Am. Pet. ¶¶ 128-137, and “‘Test Deck’ feature,” Am. Pet. ¶¶ 138-148) could be exploited or malfunction to cause votes to be recorded inaccurately. They claim that a third allegedly flawed design feature (“insecure paper path”) could result in the wrong votes being recorded...but base this assertion on theory, rather than any real-world occurrences or testing that would demonstrate that these alleged outcomes are actually possible.

(Resp Brief. 12-13.) However, Respondent omits that the ExpressVote XL has never been made public to Petitioners, or anyone one else in the technological field, for inspection. In fact, Respondent’s challenged re-examination of the ExpressVote XL was conducted (contrary to longstanding practice) in Colorado, as opposed to Pennsylvania, and was only open to Department of State personnel.

(Am. Pet. ¶ 70.) Respondent is in a poor position to claim that this security vulnerability is only based on “theory” rather than “testing” since (1) the ExpressVote XL’s very first use in Pennsylvania resulted in an undisputed fiasco (Am. Pet. ¶¶ 264-69) and (2) Respondent has blocked Petitioners’ request for access to an ExpressVote XL in discovery in this very case, by objecting on multiple grounds and then obtaining a stay of discovery. (*See* Resp. Objs. to Requests for Production ¶ 4, attached hereto as Ex. A). Respondent can hardly

object to Petitioners' lack of "testing" of the vulnerability when she herself is using every tool in her arsenal to block Petitioners from conducting that testing.

Respondent uses the same argument to object to Petitioners' concerns that the ExpressVote XL does not properly protect a voter's constitutional right to absolute secrecy, remarking that "Petitioners do not allege that the claimed flaws [the ExpressVote XL's chronological storage of ballots and spoliation procedures] have ever resulted in an invasion of any voter's privacy while voting, or the exposure of any elector's vote selection." (Resp. Brief at 14.) Again, this argument suffers from the same shortcoming as Respondent's answer to Petitioners' security concerns—the machine has never been open to inspection in either a testing environment or a live election and so it would be impossible to know whether the secrecy of a voter's ballot has been compromised. Moreover, Respondent with regard to both the security and secrecy concerns conveniently ignores the myriad of problems that occurred in Northampton County during the November 2019 general election, not the least of which was wrongly reported vote counts and winners, and all of which were covered in the Amended Petition. (Am. Pet. ¶¶ 264-269.) The Amended Complaint also specifically alleges that in the November 2019 general election, the ballot spoliation process in at least Philadelphia County violated voters' right to vote in secrecy. (Am. Pet. ¶¶ 175-202.)

Respondent disregards these facts, and instead relies on a recent decision in *Stein v. Boockvar*, a federal case in the United States District Court for the Eastern District of Pennsylvania that is unrelated to this case except insofar as they happen to involve the same machine. The *Stein* case turned on whether the Secretary's certification of the ExpressVote XL violated the particular language of a 2018 settlement agreement to which none of the Petitioners were a party. The *Stein* litigation specifically did *not* touch upon most of the issues alleged in the Petition, such as violation of the constitutional right to absolute secrecy, or the legal and factual relevance of the ExpressVote XL's dramatic failure in Northampton County during the November 2019 general election. (Conversely, this litigation does not address the contractual interpretation of verbiage in the settlement agreement at issue in *Stein*.)

Switching from the facts alleged to the legal standard applied, Respondent argues that in order to survive its objection, Petitioners must allege facts showing that Respondent's certification was "fraudulent, in bad faith, an abuse of discretion or clearly arbitrary" in order to challenge it successfully. (Resp. Prelim. Obj. ¶¶ 16-24). This objection should be overruled for two reasons: that is not the legal standard at the pleading stage, and in any event, Petitioners *did* plead it.

First, Respondent misinterprets the law on this point. In this Court's 2007 en banc opinion in *Banfield v. Cortes*, 922 A.2d 36, 46-68 (Pa. Commw. 2007), it



rejected a similar preliminary objection, where the Secretary of State tried to argue that it was insufficient for Petitioners simply to allege that the certification decision was not consistent with the Election Code. The Court disagreed, stating that “Electors’ well-pled allegations raise questions of fact as to whether it is possible to comply with section 1117–A of the Election Code absent a voter verified independent record.” *Id.* at 47. With that interpretation, no mention was made of any necessity to plead fraud, bad faith, abuse of discretion, or clear arbitrariness. Similarly, Petitioners in this case have raised well-pled allegations concerning the ExpressVote XL’s inability to conform to the Pennsylvania Election Code, which is enough to survive dismissal.

Respondent’s misplaced reliance on the phrase, “plead fraud, bad faith, abuse of discretion, or clear arbitrariness” comes from her incorrect interpretation of the Pennsylvania Supreme Court’s subsequent 2015 decision in *Banfield v. Cortes*, where the Supreme Court stated that

[W]hen the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation.... Thus, our courts will not disturb administrative discretion in interpreting legislation within an agency's own sphere of expertise absent fraud, bad faith, abuse of discretion or clearly arbitrary action.

*Banfield v. Cortes*, 110 A.3d 155, 174 (Pa. 2015) (internal citation omitted.) This is a common principle of administrative law, but was not at all meant to be used in

reference to the pleading stage of a case. In *Banfield*, the Court only noted the standard of deference *after* Petitioners had had the opportunity to take discovery and present evidence, and in the course of affirming the Commonwealth Court's holding that Petitioners had not actually proven their case. Moreover, the above quoted language in *Banfield* was also taken from another case in which the parties had finished discovery, had appealed a summary judgment decision to the Commonwealth Court, and then had finally appealed that to the Supreme Court. *See Winslow-Quattlebaum v. Maryland Ins. Group*, 752 A.2d 878 (Pa. 2000). Additionally, Respondent asserts this objection to Counts I-V, but Count IV includes a constitutional claim. (Amended Pet. at ¶¶ 9, 284.) Respondent asserts no authority for applying this standard to a constitutional claim.

Respondent tries to distinguish the causes of action in Petitioners' Amended Petition from those in *Banfield* because whereas the *Banfield* petitioners alleged a very narrow violation of the election code, "Petitioners here do not allege a violation of any narrow and specific Election Code requirement, and their assertion that the Secretary's certification of the ExpressVote XL deviated from these more subjective Election Code mandates requires a greater factual basis than they have provided." (Resp. Brief at 20.)

This argument is specious. Petitioners have specifically alleged particular Election Code violations. It is hard to fathom how an allegation such as the fact

that a voter's ballot has the potential to be hacked and manipulated by the software that runs the ExpressVote XL, thereby changing a voter's choice, is considered a "subjective" test under Section 1107-A of the Election Code, 25 P.S. § 3031.7(12), regarding vote tampering. Similarly, it is hard to imagine how the allegation that the method of storing ballots in chronological order, thereby running the risk of exposing a voter's identity and violating their constitutional right to absolute secrecy in voting, is somehow "too broad" and therefore entitled to so much interpretation by the Secretary that the case should be dismissed before discovery.

But even to the extent that the bad faith standard applies to this action, Petitioners' Amended Petition pleaded that "on information and belief, the Secretary's reexamination of the ExpressVote XL was conducted in bad faith." (Amended Pet. at ¶¶ 250-54). Petitioners are entitled to take discovery into the circumstances of Respondent's certification and reexamination actions—circumstances which are currently known only to Respondent, the Department of State, and its consultants. Given that the procedural posture of the 2015 *Banfield* decision was long past the discovery stage, it is obvious that the Supreme Court was not purporting to provide a heightened pleading standard that would necessitate detailed substantiation of bad faith at the complaint stage. Thus, the Supreme Court's 2015 *Banfield* opinion should not affect the outcome of the

preliminary objections in this case, as they are instead governed by this Court's 2007 *Banfield* opinion.

Respondent asserts that Petitioners are not entitled to discovery to conduct a fishing expedition in the hope of finding a basis for their claims. (Resp. Brief 21.) However, Respondent relies on a case that dealt with a request for *pre-complaint discovery* as a means to figure out whether there was enough information to bring a claim—a totally different scenario than what has been presented here. *See Lockett v. Blaine*, 850 A.2d 811, 818 (Pa. Commw. Ct. 2004). Petitioners have made a *prima facie* showing and are entitled to continue with this cause of action.

Because Respondent has not carried her burden on this objection, this Court should overrule the objection.

**B. Response to Second Preliminary Objection: Petitioners' Constitutional Claims Should Not Be Dismissed for Legal Insufficiency/Failure to State a Claim Because Petitioners Have 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))**

As with her first Preliminary Objection, Respondent misinterprets the law on this point. Election regulations that “severely restrict the right to vote,” *Banfield*, 110 A.3d at 177, or that constitute a “plain, palpable and clear abuse of [ ] power which actually infringes on the rights of the electors,” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766, 809 (Pa. 2018) (quoting *Patterson v. Barlow*,

60 Pa. 54, 75 (Pa. 1869)), violate the Pennsylvania Constitution’s guarantee to free and equal elections. (Resp. Brief 23; Resp. Prelim. Obj. ¶ 26.)

Petitioners alleged that “[b]y certifying the ExpressVote XL while being aware that the machine violated the Election Code in the many ways already detailed in the Petition, the Secretary committed a plain, palpable, and clear abuse of power that infringes on the voting rights of the Individual Petitioners and of the Organizational Petitioners’ individual members.” (Amended Pet. ¶ 255.) Thus, Petitioners have pled the standard asserted by Respondent.<sup>2</sup>

In *League of Women Voters*, Petitioners sued the state, arguing that the Pennsylvania Congressional Redistricting Act of 2011 was an unconstitutional partisan gerrymander which infringed upon their constitutional rights. *League of Women Voters*, 178 A.3d at 741. The Supreme Court of Pennsylvania stated: “Pennsylvania’s congressional districts are drawn by the state legislature as a regular statute, subject to veto by the Governor. While this process is dictated by

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<sup>2</sup> It is not even clear that Petitioners are required to plead and ultimately prove a “plain, palpable, and clear abuse of power” as set forth in *League of Women Voters*, which dealt with the question of when a court may invalidate a legislative enactment relating to elections – not a voting machine certification decision by the executive branch. Moreover, in that case, the Secretary of the Commonwealth filed an Answer and New Matter in response to the Petition for Review rather than preliminary objections, and this Court dismissed the other Respondents’ preliminary objections with the exception of a challenge to the standing of the organizational entity to assert a gerrymandering claim. No. 261 M.D. 2017, Order Filed Nov. 13, 2017. This Court overruled all remaining preliminary objections, “based on the presence of disputed issues of fact and the exigency of the matter.” *Id.* This, the standard was not applied at the preliminary objection stage.

federal law, it is delegated to the states.” *Id.* at 742-43. In order to ensure that elections across the state were equal, the legislature would be given deference as well as discretion to enact laws to this end; as a result of that deference, legislative action could only be reviewed in “a case of plain, palpable, and clear abuse of the power which actually infringes on the rights of the electors.” *Id.* at 793. When it came to the 2011 map, however, the Petitioners argued that the method by which the map had been drawn was done in such a way that it violated their constitutional rights and therefore the legislative action should be reviewed.

In the case at present, no legislative action is being reviewed. Instead, here Petitioners set forth a clear constitutional injury by the *executive* branch—that by certifying the ExpressVote XL the Secretary has violated their constitutional rights by failing to provide voters with voting machines that ensure that “their votes [are] honestly counted.” *Banfield*, 922 A.2d at 48. Similar to this Court’s 2007 *Banfield* decision, where the Respondent brought forth a similar objection that was overruled, this Court should overrule this argument since a constitutional injury has been pled.

Because Petitioners have pled an injury under Article I, Sections 5 and 26 of the Pennsylvania Constitution, this Court’s 2007 *Banfield* opinion controls, and Respondent’s second preliminary objection should be overruled.

**C. Response to Third Preliminary Objection: Petitioners Have Standing With Respect to the Violations of the Election Code Alleged in**

**Counts I-V and Have Alleged Substantial, Direct, and Immediate Harm (Pa. R. C. P. 1028(a)(5))**

Respondent objects that neither the Individual Petitioners nor the Organizational Petitioners have standing with respect to the violations of the Pennsylvania Election Code alleged in the Amended Petition for Review. This preliminary objection should be overruled with respect to both groups.

**1. The Individual Petitioners Have Standing.**

Regarding the Individual Petitioners, this Court's *en banc* opinion in *Banfield v. Cortes*, 922 A.2d 36 (Pa. Commw. 2007) definitively established that individual electors have standing to challenge the Secretary's actions with respect to the testing, examination, and certification of voting systems, by asserting that they are required to use voting machines that are not reliable or secure and that they have no way of knowing whether the machines will accurately recognize and tabulate their votes in the next election. 922 A.2d at 44. The *Banfield* court found that individual electors have a "substantial" interest in challenging the certification of voting machines "by asserting that, unlike all citizens, they are required to vote using [machines] that are not reliable or secure and that do not provide a means for vote verification or vote audit." *Id.* Similarly, here the Individual Petitioners have specifically alleged that each of them resides in a county that uses the ExpressVote XL voting machine (Am. Pet. at ¶¶ 3-4, 18-31), and that each of them cast a ballot

in the November 5, 2019 general election and wants to cast ballots in future elections (Am. Pet. at ¶ 35).

Respondent’s allegation that the Individual Petitioners failed to distinguish themselves from residents of other counties is both incorrect and inadequate to distinguish *Banfield*. Resp. Br. 28. First, there is no dispute that the voters in Philadelphia, Northampton, and Cumberland Counties are distinct because those counties (and no other counties) purchased the ExpressVote XL — that is why, according to Respondent, *those counties* (and not others) are indispensable parties. See Resp Br. 2, 4, 11, 12 n.3, 32, 32 n.9, & 48; see also Am. Pet. ¶¶ 3-4, 264. The Secretary seems to suggest that, in order to have standing to allege that *their own* voting rights are violated by *this* machine used in the counties where *they themselves* live, they must plead a comparative analysis of the voting methods used in Pennsylvania’s other 64 counties. See Resp. Br. at 28 (faulting Petitioners for not enumerating “allegations regarding what voting systems other jurisdictions in Pennsylvania use, whether those voting systems share the alleged imperfections and vulnerabilities of the ExpressVote XL, or whether these voting systems are more reliable”). Perhaps different Pennsylvania voters, living in other counties, will at some point challenge voting systems that are used where *they* live, but Respondent provides no authority indicating that the Court lacks jurisdiction over a



voting rights lawsuit based on voting methods used in three counties unless it addresses all the flaws of the voting methods used in the other 64.

Rather, this issue is controlled by *Banfield*. There, this Court rejected a nearly identical standing objection from a previous Secretary, based on allegations that were, if anything, Petitioners considerably *less* specific than those made here. *See Banfield*, 922 A.2d at 44.

Like the *Banfield* individual elector Petitioners, the Individual Petitioners here “have alleged a direct interest” in the certification of the ExpressVote XL by asserting that, because of the specific identified deficiencies of the ExpressVote XL, they are “uncertain whether the outcome of the election in their jurisdiction will be accurately tabulated and reported.” (Am. Pet. at ¶ 36.) *See Banfield*, 922 A.2d at 44 (“Electors alleged a direct interest by asserting that” because DREs are not reliable or secure, electors have “no way of knowing” whether the DREs will recognize their votes in an election.”). *Banfield* further held that once the substantial and direct interest prongs are met, the “immediate” prong for standing is met where electors allege that they “each want to cast a ballot” in future elections, and “each wants their future votes ... to be properly counted and weighted.” *Id.* The fact that the electors had “no way of knowing” whether the voting machine recognizes, records, and counts their own votes “gives Electors a direct and immediate interest in the outcome” of the challenge to the certification

of a voting machine. *Id.* at 44 n.7. The Individual Petitioners thus clearly have standing.

## **2. The Organizational Petitioners Have Standing.**

An organization or association may have standing to bring suit under two circumstances: first, where the organization has standing in its own right to seek judicial relief from injury to itself; and second, on behalf of its members, where the members themselves have standing to bring the claims. *See Pa. Prison Soc. v. Cortes*, 508 F.3d 156, 162-63 (3d Cir. 2007); *see also Americans for Fair Treatment, Inc. v. Phila. Fed. of Teachers*, 150 A.3d 528 (2016) (“An association has standing to bring an action on behalf of its members where at least one of its members is suffering an immediate or threatened injury as a result of the challenged action.”) To have standing on the latter basis, the plaintiff organization “must allege sufficient facts to show that at least one of its members has a substantial, direct and immediate interest.” *Americans for Fair Treatment*, 150 A.3d at 533.

The Organizational Petitioners have standing because they each have individual members who have standing to bring the claims asserted in the Amended Petition for the same reasons as the Individual Petitioners. As alleged in the Amended Petition, the National Election Defense Coalition has “at least one member who is a resident of Philadelphia County and has voted in the November

2019 election where the ExpressVote XL was first used and plans to continue to vote in Pennsylvania elections where the ExpressVote XL will be used.” (Am. Pet. at ¶ 15.) Similarly, Citizens for Better Elections has “at least one member in each of Philadelphia and Northampton Counties who are residents of such county, who voted in the November 2019 election where the ExpressVote XL was first used, and who plan to continue to vote in Pennsylvania elections where the ExpressVote XL will be used.” (Am. Pet. at ¶ 17.) Thus, the Organizational Petitioners have each alleged that they have members who have standing—specifically, electors in Philadelphia and Northampton Counties who have a direct, substantial, and immediate interest in challenging the certification of the ExpressVote XL.

Respondent’s preliminary objection based on standing should be overruled.

**D. Response to Fourth Preliminary Objection: This Court Does Not Lack Jurisdiction to Adjudicate the Petition Because the Counties Are Not Indispensable Parties to the Resolution of This Action (Pa. R. C. P. 1028(a)(1))**

Respondent argues that Petitioners failed to join three necessary parties — Philadelphia County, Northampton County, and Cumberland County (collectively, the “Counties”) — and, therefore, the Court lacks jurisdiction to adjudicate the dispute. Resp. Br. 31-34. But, as with the standing issue, Respondent cannot distinguish the Court’s binding, *en banc* decision in *Banfield v. Cortes*, 922 A.2d 36 (Pa. Commw. 2007). Not only does *Banfield* mandate overruling Respondent’s

objection, but the reasoning of the majority in *Banfield* also correctly distinguishes the authorities relied upon by Respondent.

In *Banfield*, the petitioners alleged multiple violations of the Pennsylvania Election Code and Pennsylvania Constitution with respect to certain Direct Recording Electronic voting systems (“DREs”). *Id.* at 41-42. The Banfield petitioners sought a “judgment declaring that the Secretary has violated the Election Code and the Pennsylvania Constitution” as well as an order directing the Secretary to decertify the DREs, establish testing criteria, and re-examine the DREs. *Id.* The Secretary objected, arguing that the petitioners had failed “to join indispensable parties, i.e., the fifty-six counties planning to use one or more of the challenged DREs” in the upcoming election. *Id.* at 43.

The Court overruled the Secretary’s preliminary objection in *Banfield*, concluding that the counties were not indispensable:

Here, Electors do not seek redress from the fifty-six counties, and, because the November 2006 election has passed, the fifty-six counties will not be prejudiced by a judgment in favor of Electors. Even absent a request, the Secretary could de-certify a DRE at any time based solely on the statutory requirements for certification, and counties using certified DREs must be prepared for that possibility.

922 A.2d at 44. *Banfield* is on all fours with this case.

As in *Banfield*, Petitioners here are alleging violation of the Pennsylvania Election Code and Pennsylvania Constitution with respect to a voting machine. As in *Banfield*, Petitioners seek an order from this Court directing the Secretary to

decertify that machine. And, as in *Banfield*, any non-party counties using that machine will bear the consequences of that decertification.

Respondent attempts to distinguish *Banfield* because by the time of the decision, the November 2006 election had passed (Resp. Br. 33-34). But while the *Banfield* court did mention that fact, the *dispositive* point was that the counties had no right to affect the Secretary's decision. *See Banfield*, 922 A.2d at 44. Indeed, Respondent cites no authority relating the timing of the relief sought to the indispensability of parties. Nor could the timing of any one election be dispositive to the jurisdictional question of joining necessary parties. After one election has passed, another is always upcoming—especially in a state like Pennsylvania that regularly holds odd-year elections. Under Respondent's theory, jurisdiction would come and go with the passage of time depending on the proximity of the next election and the severity of the effects felt by the counties. This absurd result is easily avoided by following the legal principles underlying *Banfield*, which focus on the rights at stake rather than the effects felt.

Respondent attempts to bypass *Banfield* by relying on pre-*Banfield* precedent arising on other factual or legal contexts, such as the Supreme Court's decision in *City of Philadelphia v. Com.*, 838 A.2d 556 (2003). But there is no need for the Court to turn back time and pretend that these legal questions had not yet been decided in this precise legal context. *Banfield* cited *City of Philadelphia*

decision and applied its principles correctly. The Court rejected the Secretary's objection and held that the absent counties were not indispensable. Many if not all cases involving decrees will affect third parties, sometimes profoundly, as Respondent alleges the Counties will be affected here. But indispensability depends on the rights at stake, because "the basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of him or her." *City of Philadelphia*, 838 A.2d at 581 (quoting *CRY, Inc. v. Mill Serv., Inc.*, 536 Pa. 462, 469, 640 A.2d 372, 375 (1994)). Thus, key questions include the existence and "nature" of the absent parties' rights, and whether those rights are "essential to the merits of the issue." *Id.* at 581-82 (quoting *Mechanicsburg Area Sch. Dist. v. Kline*, 494 Pa. 476, 481, 431 A.2d 953, 956 (1981)). The focus must be on the rights at stake, rather than the nature or magnitude of the relief sought, as a guard against the temptation to include any party who may be affected. *City of Philadelphia*, 838 A.2d at 582; *see generally Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379, 346 A.2d 788, 789 (1975) (defining an indispensable party as "one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights").

Here, the Counties are not necessary parties because their rights and interests are largely irrelevant to the merits of the case. The Counties do not certify or decertify voting machines — that is the Secretary's responsibility. The Counties

are not even parties to that process: they do not have a statutory right to participate or even observe the examination, and the Secretary is certainly not required to consult them during the examination process. Rather, the Counties select a machine from the menu of options approved by the Secretary, and must stand ready to react — as happens from time to time — when machines are removed from that menu for any reason. *See Banfield*, 922 A.2d at 44. Thus, although the Counties may be affected by the outcome of this case, they have no rights to be vindicated in the decertification process. This is not a land use case like *HYK Const. Co., Inc. v. Smithfield Tp.*, 8 A.3d 1009, 1015 (Pa. Commw. Ct. 2010) (cited by Respondent), where the absent party had the opportunity to be — and actually was — granted party status in the underlying process. *Id.* at 1013, 1016 (“[T]he neighbors, having been granted party status at the conditional use hearing, participated in the proceedings and have an interest in not having those proceedings declared void.”). Rather, this is an electronic voting machine case, like *Banfield*. The Counties have no right to participate in the Secretary’s process, and thus the interests of justice are not advanced by involving them now. Similarly, the Counties lack a right that could be prejudiced.

Respondent is well aware that counties are not party to, and have no voice in, voting machine certification or decertification. On February 18, 2020, she testified in the Eastern District Court of Pennsylvania that it would be unacceptable

for counties to object or request a delay if a system required immediate decertification. (*See Stein v. Cortes*, No. 16-CV-6287 (E.D. Pa. Feb. 18, 2020), evidentiary hearing transcript at 37-38, attached hereto as Ex. B.)<sup>3</sup>

One indicator that an absent party may have rights of sufficient connection to the dispute that justice requires the presence of the party is when that party may have interests divergent from the named party. *See Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495 (Pa. Commw. 2002) (observing “[w]hile the governmental entity awarding a bid may ordinarily be expected to wish to avoid having its contract upset, it is far from certain that in the crucible of litigation it will always zealously defend the interests of the prevailing bidder”). Respondent has given no indication that the Counties have any unique or divergent perspective on this dispute, and there is no apparent reason why they would. To the contrary, given that the Counties do not have unique rights here, their contributions to the merits issues can be expected to be duplicative and burdensome.<sup>4</sup>

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<sup>3</sup> As an example, in 2007, the WinVote voting system was suspended and then eventually decertified, and the three affected counties were required to adapt to the Secretary’s orders and obtain new equipment for holding an election on short notice. *See id.* at 38-39. Furthermore, all 67 counties recently upgraded their voting systems because the Respondent stated her intention to decertify the previous systems, over the strong objections of several counties. *See, e.g., Jonathan Lai, 2020 election votes are at stake as a Pennsylvania county plays a game of chicken with Gov. Tom Wolf*, Phila. Inquirer, Nov. 14, 2019, available at <http://bit.ly/39V205t>; Mark Scolforo, *Dauphin County caves, last county to buy new paper-trail voting machines*, Morning Call, Dec. 31, 2019, available at <http://bit.ly/2ISjWBG>.

<sup>4</sup> In fact, it appears that the Secretary does not anticipate any participation by Counties. *See Zack Hoopes, Cumberland County Introduces New Voting Machines to Public*, The Sentinel



Respondent provides no sound distinction from this Court’s *en banc* decision in *Banfield* because there is no distinction. *Banfield*’s holding, and underlying reasoning, show that the Counties are not necessary parties, and therefore, Respondent’s Fourth Preliminary Objection should be overruled.

**E. Response to Fifth Preliminary Objection: Petitioners’ Claims are Not Time-Barred by a Six-Month Statute of Limitations Because the Amended Petition for Review Does Not Assert a Claim for Mandamus and Petitioners’ Claims Accrued Upon the Secretary’s Issuance of the Reexamination Report on September 3, 2019**

Respondent asserts that Petitioners’ claims should be dismissed under the statute of limitations for mandamus actions against government officers, 42 P.S. § 5522(b)(1). This objection should be rejected.

First of all, Respondent fails to characterize this action for what it is—one for equitable relief. Petitioners did not plead a cause of action for mandamus nor does the Amended Petition sound in mandamus. Chief Justice Castille of the Supreme Court of Pennsylvania explained the limitations of 42 P.S. § 5522(b)(1) to such actions:

Mandamus is a fairly narrow writ which may issue to compel a governmental entity to perform a ministerial act or mandatory duty. *See Chanceford Aviation Properties, L.L.P. v. Chanceford Twp. Bd. of Supervisors*, 592 Pa. 100, 923 A.2d 1099, 1108 (2007). Notably, mandamus “may not be used to direct the exercise of judgment or

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(Mar. 3, 2020) (available at [https://cumberlink.com/news/local/cumberland-county-introduces-new-voting-machines-to-public/article\\_fea032d1-9212-5cd2-b0ba-90dfe967801d.html](https://cumberlink.com/news/local/cumberland-county-introduces-new-voting-machines-to-public/article_fea032d1-9212-5cd2-b0ba-90dfe967801d.html)) (“The Department of State has told the county that it doesn’t anticipate involving counties any further in the ongoing litigation, Eichelberger said, leaving the county in a wait-and-see mode.”).

discretion in a particular way, or to direct the retraction or reversal of an action already taken. Mandamus is a device that is available in our system to compel a tribunal or administrative agency to act when that tribunal or agency has been sitting on its hands...Appellant's amended Petition for Review did not assert that appellees 'ha[d] been sitting on their hands'; to the contrary, appellant specifically sought review of the affirmative 'government action' that had resulted in the deduction of funds from his inmate account. Nor did appellant request relief in the nature of mandamus. To the contrary, he sought a declaratory judgment ...and an injunction (enjoining any further deductions). The limited scope of a mandamus action does not encompass such requests for declaratory and injunctive relief.

*Curley v. Wetzel*, 82 A.3d 418, 419 (Pa. 2013) (Castille, J., concurring). This Court expounded upon this understanding of mandamus relief in *Taylor v. Pennsylvania State Police of Com.*, where it stated that "constitutional claims against a Commonwealth agency, sound in declaratory and injunctive relief [not mandamus] over which we have original jurisdiction pursuant to Section 761(a) of the Judicial Code." 132 A.3d 590, 599 (Pa. Commw. 2016). There the Court stated that the Petitioner was properly filing a petition for review, as Petitioners did here, and it would consider the legal sufficiency of the claims. *Id.*

Moreover, Respondent has once again taken contradictory positions. In Respondent's second preliminary objection, she argues that the decision as to whether to certify a voting machine and whether it meets current election law standards are within the discretion of the acting secretary. Yet, in the context of mandamus, Respondent tellingly omits this point, perhaps because of the Supreme Court's 2015 decision in *Banfield*. In *Banfield* the Court stated that "[t]he writ of

mandamus is an extraordinary remedy which exists to compel official performance of a ministerial act or a mandatory duty....Where the action sought to be compelled is discretionary, mandamus will not lie to control that discretionary act,...but courts will review the exercise of the actor's discretion where it is arbitrary or fraudulently exercised or is based upon a mistaken view of the law.” *Banfield v. Cortes*, 110 A.3d 155, 175 (Pa. 2015). If Respondent wants to argue that this is an act within her sole discretion and subject to the above standard, then she cannot also claim that this action sounds in mandamus. For all intents and purposes, this is *not* an action that sounds in mandamus.

Respondent's preliminary objection, if sustained, would create a dangerous and unintended rule that a voting machine's use in the Commonwealth could *never* be challenged by voters if the certification of that machine happened more than six months prior. Electors are injured every single time they are forced to vote using a machine that is insecure, inaccurate, and violates the Election Code's and Pennsylvania Constitution's requirements. Indeed, many of the injuries alleged by Petitioners – including but not limited to the ballot card's second exposure to the print head after the voter has approved the ballot, the ballot form violations, the violations of ballot secrecy, and the inaccuracy of the machines (*see generally* Am. Pet. at 93, 97-98, 197, 219-245, 264-269) – could not have been known to Petitioners at the time the ExpressVote XL was initially certified for use. *See Fine*

*v. Checcio*, 870 A.2d 850, 859 (Pa. 2005) (holding that the discovery rule tolls the statute of limitations where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises). It would be deeply inequitable to find Petitioners' claims time-barred under these circumstances.

Furthermore, assuming *arguendo* that Petitioners' claims accrued as of the date that Respondent took some action concerning certification of the ExpressVote XL (a point that Petitioners do not concede, for the reasons stated above), the relevant date would be September 3, 2019 – the date the Secretary issued the *Report Concerning the Reexamination Results of Election Systems and Software ExpressVote XL* (“Reexamination Report”). (Am. Pet. at ¶ 77.) The Reexamination Report contained several “additional conditions for certification” that jurisdictions using the machine “must” implement. (Am. Pet. at ¶ 83.) To the extent that any of Petitioners' claims can be considered to have accrued as the result of a certification determination by Respondent, the accrual date is September 3, 2019. Petitioners' Petition for Review, filed on December 19, 2019, is well within the six-month limitations period that Respondent seeks to impose. To hold Petitioners to the original certification date would disincentivize the exhaustion of administrative remedies and render superfluous the ongoing obligation of the Secretary of the Commonwealth to re-examine and approve electronic voting machines for use in

the Commonwealth as set forth in 25 P.S. § 3031.5, subsections (b) (“Upon receipt of a request for examination or reexamination of an electronic voting system ...the Secretary of the Commonwealth shall examine the electronic voting system and shall make and file in [her] office [her] report...stating, whether in [her] opinion, the system so examined can be safely used by voters at elections as provided in this act and meets all of the requirements hereinafter set forth...”) and subsection (c) (“[I]f, upon the reexamination of any such system previously approved, it shall appear that the system so reexamined can no longer be used safely by voters at elections as provided in this act or does not meet the requirements hereinafter set forth, the approval of that system shall forthwith be revoked by the Secretary of the Commonwealth, and the system shall not thereafter be used or purchased for use in this Commonwealth”).

Finally, there is no merit to Respondent’s position that, if this action is not in mandamus, it is therefore barred by the doctrine of sovereign immunity.<sup>5</sup> The Pennsylvania Supreme Court has made a clear distinction between suits against the

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<sup>5</sup> Respondent cites *Finn v. Rendell* to support the proposition that she is protected by sovereign immunity; however that case does not at all stand for that principle and instead notes “First, although sovereign immunity does not bar a declaratory judgment action or injunction seeking to prohibit state parties, i.e., state agencies or employees, from acting, sovereign immunity does apply to an action seeking to compel state parties to act or seeking to obtain money damages or recover property from the Commonwealth.” *Finn v. Rendell*, 990 A.2d 100, 105 (Pa. Cmmw. 2010). In this case, the instances where sovereign immunity would lie are not present.

Commonwealth (which are within the rule of its immunity) and suits to challenge affirmative unconstitutional actions by officers of the Commonwealth. “Suits which seek to compel affirmative action on the part of state officials or to obtain money damages or to recover property from the Commonwealth are within the rule of immunity; suits which simply seek to restrain state officials from performing affirmative acts are not within the rule of immunity.” *Fawber v. Cohen*, 532 A.2d 429, 429–34 (Pa. 1987) (holding that an action which seeks to restrain a government official and declare his regulations invalid does not enjoy sovereign immunity).

Simply put, Petitioners are alleging constitutional violations and violations of the Pennsylvania election code. They are not alleging that the Secretary has *failed* to act, but instead that her affirmative actions are unlawful and unconstitutional.

Respondent spends pages of her brief trying to convince this Court that a six-month statute of limitations, which would ordinarily be relevant in mandamus actions, applies here and then spills even more ink explaining why that limitations period has already run. In reality, none of that is relevant, and while Petitioners have entertained those arguments here, the truth is similar to the 2007 *Banfield* case—Petitioners have valid, meritorious claims and those claims should be evaluated by this Court and not disposed of by preliminary objection.

## **CONCLUSION**

For the foregoing reasons, the Court should overrule all of Respondent's preliminary objections.

Respectfully submitted,

### **BAKER & HOSTETLER LLP**

Dated: May 21, 2020

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**CERTIFICATION**

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.

Date: May 21, 2020

/s/ Lesley M. Grossberg  
Lesley M. Grossberg (Pa. 208608)



**CERTIFICATE OF COMPLIANCE WITH PA. R. APP. P. 2135**

I hereby certify that Petitioners' Response to Preliminary Objections complies with all requirements of Pennsylvania Rule of Appellate Procedure 2135(a)(1). Specifically, the undersigned certifies that Petitioner's Response exceeds 30 pages, but complies with Rule 2135(a)(1) because it contains 9,131 words, according to the word processing software used to prepare the brief, excluding those parts of the brief exempted by Rule 2135(b).

Date: May 21, 2020

/s/ Lesley M. Grossberg  
Lesley M. Grossberg

# **EXHIBIT A**



this action until the later of (1) the Court’s ruling on Respondent’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, such that Respondent need not respond to any discovery requests until thirty days following the lifting of the stay.

Respondent will provide substantive responses to Petitioners’ discovery requests, subject to Respondent’s objections, on a timetable that accords with the Court’s forthcoming ruling on the Application for Stay. In the meantime, Respondent hereby objects to Petitioners’ First Set of Requests for Production of Documents (the “Requests”) on the grounds set forth below. Respondent respectfully reserves the right to supplement and amend these objections in accordance with the Court’s forthcoming ruling on the Application for Stay.

### **GENERAL OBJECTIONS**

The following General Objections are incorporated by reference into Respondent’s response to each and every Request:

1. Respondent objects to the Requests to the extent that they seek (a) information or documents subject to the attorney-client privilege, the executive privilege, the deliberative process privilege, the work product doctrine, or any other applicable privilege or protection from disclosure, or (b) information or documents that constitute material prepared in anticipation of litigation or in

preparation for trial. Respondent does not intend to waive the attorney-client privilege or any other protection, and her responses to the Requests shall not be deemed to be any such waiver.

2. Respondent objects to the Requests to the extent they seek information or documents containing trade secrets, proprietary or otherwise confidential information, or information the disclosure of which would risk compromising the security of elections.

3. Respondent objects to the Requests to the extent they seek information or documents not within Respondent's custody or control.

4. Respondent objects to Petitioners' Definitions and Instructions to the extent they seek to impose obligations on Respondent beyond those required by the Pennsylvania Rules of Appellate Procedure, Pennsylvania Rules of Civil Procedure, and applicable orders of this Court.

5. Respondent reserves the right to supplement these responses, including without limitation the general objections contained herein, if and when appropriate.

6. Respondent objects to the Requests to the extent that compliance with them would impose upon Respondent undue burden, oppression and/or expense. As used herein, these terms include Requests: (1) that, so characterized, require a search for information or documents that are not relevant to this lawsuit or to the

particular matters at issue between Petitioners and Respondent; (2) that request information or documents whose value, if any, is far outweighed by the burden or cost of producing them; or (3) that request information or documents that are equally available to or are already in the possession of Petitioners.

7. Respondent objects to the Requests to the extent they are overbroad, vague and/or ambiguous. As used herein, the term “overbroad” includes Requests that, so characterized, seek, at least in part, documents and information irrelevant in scope, subject matter and/or time period to this lawsuit or to the particular matters at issue in this lawsuit.

8. Each of the foregoing General Objections is incorporated into each response below as though fully set forth therein.

### **SPECIFIC OBJECTIONS**

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

### **RESPONSE:**

Respondent objects to this Request as overbroad to the extent it seeks to inspect aspects or features of an ExpressVote XL voting machine other than the aspects or features at issue in this lawsuit. Respondent further objects to this Request to the extent the requested inspection would threaten to reveal trade secrets, proprietary or otherwise confidential information, or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. Respondent also objects to this Request on the grounds that a “fully functional ExpressVote XL voting machine” is not within her custody or control.

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.

**RESPONSE:**

Respondent objects that this Request is not relevant to the claims or defenses of any parties. Respondent further objects to this Request on the grounds that it seeks trade secrets, proprietary and confidential information, and documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. Respondent also objects to this Request on the grounds that the documents sought are not within her custody or control.

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.

**RESPONSE:**

Respondent objects that this Request is overbroad, vague, and ambiguous in seeking documents "otherwise related" to certain examinations. Respondent further objects that this Request is overbroad, vague, and ambiguous in its use of the phrase "the Department or its consultants," inasmuch as the Requests define that phrase to include "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." Respondent further objects that this Request is overbroad and unduly burdensome to the extent it seeks documents that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. Respondent also objects to this Request to the extent it seeks documents not within Respondent's custody or control. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential

information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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

**RESPONSE:**

Respondent objects that this Request is overbroad, vague, and ambiguous in seeking documents "otherwise related" to certain examinations. Respondent further objects that this Request is overbroad, vague, and ambiguous in its use of the phrase "the Department or its consultants," inasmuch as the Requests define that phrase to include "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." Respondent further objects that this Request is overbroad and unduly burdensome to the extent it seeks documents that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. Respondent also objects to this Request to the extent it seeks documents not within Respondent's custody or control. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.



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."

**RESPONSE:**

Respondent objects that this Request is overbroad, vague, and ambiguous in seeking documents "otherwise related" to certain examinations. Respondent further objects that this Request is overbroad, vague, and ambiguous in its use of the phrase "the Department or its consultants," inasmuch as the Requests define that phrase to include "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." Respondent further objects that this Request is overbroad and unduly burdensome to the extent it seeks documents that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. Respondent also objects to this Request to the extent it seeks documents not within Respondent's custody or control. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is overbroad, vague, and ambiguous in seeking documents "otherwise related" to certain examinations. Respondent further objects that this Request is overbroad, vague, and ambiguous in its use of the phrase "the Department or its consultants," inasmuch as the Requests define that phrase to include "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.” Respondent also objects that this Request is not relevant to the claims or defenses of any parties, which concern Petitioners’ challenge to the Secretary’s certification of the ExpressVote XL in November 2018 and decision to maintain that certification in September 2019. Respondent further objects that, even if this Request had some relevance, it would be overbroad and unduly burdensome to the extent it seeks documents that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit; that address versions of the ES&S EVS voting system other than 6.0.0.0 or 6.0.2.1; or that address versions of the ExpressVote XL other than the one certified for use in Pennsylvania in November 2018 (and whose certification was maintained by the Department in September 2019 in response to the reexamination petition). Respondent also objects to this Request to the extent it seeks documents not within Respondent’s custody or control. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondents objects that this Request is unintelligible and unanswerable in that it refers to “voting equipment examinations enumerated in Requests 2.a-d” despite the fact that Request 2 has no sub-parts. Respondent further objects that this Request is overbroad, vague, and ambiguous in seeking videos “otherwise related” to certain examinations. Respondent also objects to this Request to the extent it seeks videos not within Respondent’s custody or control. Respondent further objects that this Request is overbroad and unduly burdensome to the extent it seeks videos of examinations other than the examination and reexamination of the ExpressVote XL related to the November 2018 certification of the ExpressVote

XL and the September 2019 decision to maintain that certification, respectively, which are the actions challenged by Petitioners in their Amended Petition; videos of examinations or portions of examinations that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit; that address versions of the ES&S EVS voting system other than 6.0.0.0 or 6.0.2.1; or that address versions of the ExpressVote XL other than the one certified for use in Pennsylvania in November 2018 (and whose certification was maintained by the Department in September 2019 in response to the reexamination petition).

Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is overbroad, vague, and ambiguous in seeking "any written communications ... relating to ... activities ... undertaken ... in furtherance of" the reexamination at issue. Respondent further objects that this Request is overbroad and unduly burdensome to the extent it seeks communications that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is overbroad and unduly burdensome to the extent it seeks communications that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is overbroad, vague, and ambiguous in seeking all documents "relating" to the subject matter at issue. Respondent further objects that this Request is not relevant to the claims or defenses of any parties; Petitioners do not contend that it was unlawful to conduct the reexamination of the ExpressVote XL voting machine outside of Pennsylvania. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-

client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is not relevant to the claims or defenses of any parties, which concern Petitioners' challenge to the Secretary's certification of the ExpressVote XL in November 2018 and decision to maintain that certification in September 2019. Respondent further objects that, even if this Request had some relevance, it would be overbroad and unduly burdensome to the extent it seeks documents that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is overbroad and unduly burdensome to the extent it seeks documents that do not relate to Respondent's decisions to certify

the ExpressVote XL in November 2018 and to maintain that certification in September 2019, or that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is overbroad and unduly burdensome to the extent it seeks documents that do not relate to Respondent's decisions to certify the ExpressVote XL in November 2018 and to maintain that certification in September 2019, or that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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

**RESPONSE:**

Respondent objects that this Request is overbroad and unduly burdensome to the extent it seeks documents that do not relate to Respondent's decisions to certify the ExpressVote XL in November 2018 and to maintain that certification in September 2019, or that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. Respondent further objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is duplicative of Request No. 2 above. Respondent also incorporates by reference her objections to Request No. 2 above.

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.

**RESPONSE:**

Respondent objects that this Request is not relevant to the claims or defenses of any parties, which concern Petitioners' challenge to the Secretary's certification of the ExpressVote XL in November 2018 and decision to maintain that certification in September 2019 in response to the petition for reexamination. Respondent further objects that this Request, even if it had some relevance, would be overbroad and unduly burdensome to the extent it seeks documents that do not relate to conditions of certification of the ExpressVote XL at issue in this case. Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is overbroad, vague, and ambiguous in its use of the phrase "the Department or its consultants," inasmuch as the Requests define that phrase to include "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." Respondent also objects to this Request to the extent it seeks documents not within Respondent's custody or control. In addition, Respondent objects that this Request is not relevant to the claims or defenses of any parties. Respondent further objects that this Request, even if it had some relevance, would be overbroad and unduly burdensome to the extent it seeks documents that do not relate to conditions of certification of the ExpressVote XL at issue in this case.



Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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

**RESPONSE:**

Respondent objects that this Request is not relevant to the claims or defenses of any parties, which concern Petitioners' challenge to the Secretary's certification of the ExpressVote XL in November 2018 and decision to maintain that certification in September 2019 in response to the petition for reexamination. Respondent further objects that this Request, even if it had some relevance, would be overbroad and unduly burdensome to the extent it seeks documents that do not relate to the aspects or features of the ExpressVote XL that are at issue in this lawsuit. Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is not relevant to the claims or defenses of any parties, which concern Petitioners' challenge to the Secretary's certification of the ExpressVote XL in November 2018 and decision to maintain that certification in September 2019 in response to the petition for reexamination. Respondent further objects that this Request, even if it had some relevance, would be overbroad and unduly burdensome to the extent it seeks documents that do not relate to the aspects or features of the ExpressVote XL that are at issue in this lawsuit. Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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

**RESPONSE:**

Respondent objects that this Request is overbroad and unduly burdensome to the extent it seeks documents that do not relate to Respondent's decisions to certify the ExpressVote XL in November 2018 and to maintain that certification in September 2019, or that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for

disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is not relevant to the claims or defenses of any parties, which concern Petitioners' challenge to the Secretary's certification of the ExpressVote XL in November 2018 and decision to maintain that certification in September 2019 in response to the petition for reexamination.. Respondent further objects that this Request, even if it had some relevance, would be overbroad and unduly burdensome to the extent it seeks documents that do not relate to the aspects or features of the ExpressVote XL that are at issue in this lawsuit. In addition, Respondent objects to this Request to the extent it seeks documents not within Respondent's custody or control, documents that are publicly available, or documents in the custody or control of Petitioners. Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects to this Request as overbroad, vague, and ambiguous in that it seeks documents and communications “relating to the ExpressVote XL.” Respondent further objects that this Request is overbroad, vague, and ambiguous in its use of the phrase “the Department or its consultants,” inasmuch as the Requests define that phrase to include “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.” Respondent also objects to this Request to the extent it seeks documents not within Respondent’s custody or control. Respondent further objects that this Request is not relevant to the claims or defenses of any parties, which concern Petitioners’ challenge to the Secretary’s certification of the ExpressVote XL in November 2018 and decision to maintain that certification in September 2019 in response to the petition for reexamination. In addition, Respondent objects that this Request, even if it had some relevance, would be overbroad and unduly burdensome to the extent it seeks documents that do not relate to the aspects or features of the ExpressVote XL that are at issue in this lawsuit. Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request is not relevant to the claims or defenses of any parties, which concern Petitioners' challenge to the Secretary's certification of the ExpressVote XL in November 2018 and decision to maintain that certification in September 2019 in response to the petition for reexamination. Respondent further objects that this Request, even if it had some relevance, would be overbroad and unduly burdensome to the extent it seeks documents that do not relate to the aspects or features of the ExpressVote XL that are at issue in this lawsuit. In addition, Respondent objects to this Request to the extent it seeks documents not within Respondent's custody or control, documents that are publicly available, or documents in the custody or control of Petitioners. Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects that this Request seeks multiple categories of items, in violation of Pennsylvania Rule of Civil Procedure 4009.11(b). Respondent also

objects to this Request as overbroad, vague, and ambiguous in that it seeks documents and communications “relating to the ExpressVote XL.” Respondent further objects that this Request is overbroad, vague, and ambiguous in its use of the phrase “the Department or its consultants,” inasmuch as the Requests define that phrase to include “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.” Respondent also objects that this Request is overbroad and unduly burdensome to the extent it seeks documents that do not relate to Respondent’s decisions to certify the ExpressVote XL in November 2018 and to maintain that certification in September 2019, or that do not address the aspects or features of the ExpressVote XL voting machine that are at issue in this lawsuit. In addition, Respondent objects to this Request to the extent it seeks documents not within Respondent’s custody or control, documents that are publicly available, or documents in the custody or control of Petitioners. Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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.

**RESPONSE:**

Respondent objects to this Request as overbroad, vague, and ambiguous in that it seeks documents and communications “relating to the ExpressVote XL.” Respondent further objects that this Request is overbroad, vague, and ambiguous in its use of the phrase “the Department or its consultants,” inasmuch as the Requests define that phrase to include “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.” Respondent also objects that this Request is not relevant to the claims or defenses of any parties, which concern Petitioners’ challenge to the Secretary’s certification of the ExpressVote XL in November 2018 and decision to maintain that certification in September 2019 in response to the petition for reexamination. Respondent further objects that, even if this Request had some relevance, it would be overbroad and unduly burdensome to the extent it seeks documents that do not relate to the aspects or features of the ExpressVote XL that are at issue in this lawsuit. In addition, Respondent objects to this Request to the extent it seeks documents not in Respondent’s custody or control. Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections utilizing ExpressVote XL machines. In addition, Respondent objects to this Request to the extent it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

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

**RESPONSE:**

Respondent objects that this Request is not relevant to the claims or defenses of any parties. Respondent also objects to this Request to the extent it calls for disclosure of trade secrets, proprietary or otherwise confidential information, or documents or information the disclosure of which would risk compromising the security of elections. In addition, Respondent objects to this Request to the extent

it calls for disclosure of documents or information protected by the attorney-client privilege, executive privilege, deliberative process privilege, work product doctrine, or other applicable privilege or protection.

**HANGLEY ARONCHICK SEGAL PUDLIN  
& SCHILLER**

Dated: April 23, 2020

By: /s/ Michele D. Hangley  
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*Counsel for Respondent, Kathy Boockvar, in her  
official capacity as Secretary of the  
Commonwealth*



**CERTIFICATE OF SERVICE**

I, Michele D. Hangley, hereby certify that on April 23, 2020, I caused a true and correct copy of the foregoing Respondent's Objections to Petitioners' First Set of Requests for Production of Documents to be served upon the persons and in the manner indicated below:

Service by e-mail as follows:

John F. Murphy  
Lesley M. Grossberg  
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***Counsel for Petitioners***

/s/ Michele D. Hangley  
Michele D. Hangley

# **EXHIBIT B**

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

JILL STEIN, ET AL : CIVIL CASE NUMBER  
PLAINTIFFS :  
VERSUS : 16-6287  
PEDRO A. CORTES, ET AL, :  
DEFENDANTS :

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FEBRUARY 18, 2020  
COURTROOM 14A  
PHILADELPHIA, PA 19106

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BEFORE THE HONORABLE PAUL S. DIAMOND, J.

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EVIDENTIARY HEARING - DAY 1

APPEARANCES:

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PROCEEDINGS RECORDED BY STENOTYPE-COMPUTER,  
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 OR TIME MARK READERS OR SENSOR READERS.

2 Q. CAN A VOTER UNDERSTAND A BARCODE?

3 A. SIMILAR TO QR CODE OR TIMING MARKS OR SENSORS,  
4 NO.

5 Q. CAN THE VOTER VERIFY THAT THE BARCODE REFLECTS  
6 THAT VOTER'S VOTE?

7 A. WITHOUT A READER, NO.

8 Q. NOW, SOMETIMES YOUR DEPARTMENT HAS TO DECERTIFY  
9 A VOTING SYSTEM, YES?

10 A. YES.

11 Q. AND WHAT ARE THE VARIOUS REASONS THAT YOUR  
12 DEPARTMENT WOULD HAVE TO DECERTIFY A VOTING SYSTEM?

13 A. WELL, IF IT WAS DETERMINED, FOR EXAMPLE, IN  
14 ANOTHER STATE TO BE THAT IT'S NOT MEETING ONE OF -- SO  
15 IF IT'S NOT CAPABLE OF ACCURACY, IF IT'S DECERTIFIED BY  
16 THE FEDERAL EAC, I MEAN, IT COULD BE A HOST OF REASONS  
17 THAT IT NO LONGER CAN BE SAFELY USED BY THE VOTERS OF  
18 PENNSYLVANIA.

19 Q. SOMETIMES DECERTIFICATION MUST HAPPEN VERY  
20 QUICKLY, YES?

21 A. INFREQUENTLY, THANK GOODNESS, BUT YES.

22 Q. AND WOULD YOU AGREE THAT, IN THOSE SITUATIONS,  
23 THAT IT'S IMPORTANT FOR COUNTIES TO BE RESILIENT AND  
24 FLEXIBLE IN THEIR RESPONSE TO YOUR DECERTIFICATION  
25 ORDER?

1 A. IT'S ALWAYS IMPORTANT.

2 Q. WOULD IT BE ACCEPTABLE FOR A COUNTY TO SAY TO  
3 YOUR OFFICE, IF YOU DECERTIFY A SYSTEM, WE NEED 18 TO  
4 24 MONTHS TO GET A NEW SYSTEM IN PLACE? IS THAT  
5 ACCEPTABLE?

6 A. NOT IF IT WAS SOMETHING THAT REQUIRED IMMEDIATE  
7 DECERTIFICATION.

8 Q. IN FACT, THERE HAVE BEEN EXAMPLES IN  
9 PENNSYLVANIA WHERE YOUR DEPARTMENT DECERTIFIED SYSTEMS,  
10 YES?

11 A. CORRECT.

12 Q. FOR EXAMPLE, IN DECEMBER 2007, THERE WAS A  
13 SYSTEM THAT YOU DECERTIFIED THAT WAS USED IN  
14 NORTHAMPTON, LACKAWANNA AND WAYNE COUNTIES, YES?

15 A. YES. AND WE HAD HAD NOTICE BACK IN AUGUST, AND  
16 THE COUNTIES HAD NOTICE BACK IN AUGUST OF THAT YEAR THAT  
17 THIS WAS LIKELY COMING.

18 Q. THE DECISION TO DECERTIFY THAT SYSTEM OCCURRED  
19 IN DECEMBER 2007, YES?

20 A. IT DID, BUT I THINK IT WAS TEMPORARILY SUSPENDED  
21 EARLIER.

22 Q. AND THOSE THREE COUNTIES WERE ABLE, IN TIME FOR  
23 A PRESIDENTIAL PRIMARY IN APRIL OF 2008, TO ACQUIRE NEW  
24 EQUIPMENT AND TRAIN THEMSELVES AND THEIR POLL WORKERS IN  
25 TIME FOR A PRESIDENTIAL PRIMARY, CORRECT?