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*Counsel for Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth*

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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NATIONAL ELECTIONS DEFENSE  
COALITION, *et al.*,

Petitioners,

v.

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

Respondent.

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**RESPONDENT’S APPLICATION TO STAY PRELIMINARY INJUNCTION  
PROCEEDINGS PENDING RESOLUTION OF PRELIMINARY OBJECTIONS AND  
PARALLEL FEDERAL COURT MOTION**

Respondent, Kathy Boockvar, in her official capacity as Secretary of the Commonwealth (“Respondent” or “Secretary”), presents this Application to Stay Preliminary Injunction Proceedings Pending Resolution of Preliminary Objections and Parallel Federal Court Motion. In support of her Application, Respondent avers as follows:

1. Two pending proceedings could drastically alter the scope of Petitioners’ Application for a Preliminary Injunction (the “Application”).

2. First, in a Motion pending in the U.S. District Court for the Eastern District of Pennsylvania, a different group of plaintiffs seeks the same relief that Petitioners seek here – decertification of the ExpressVote XL voting machine – and assert many of the same grounds that Petitioners assert here. The District Court has scheduled an evidentiary hearing for January 21, 2020, and is likely to issue a ruling shortly thereafter. *Stein v. Boockvar*, No. 2:16-cv-06287, pending before U.S. District Court Judge Paul S. Diamond.

3. Second, on January 15, 2020, Respondent timely filed her Preliminary Objections, which are attached as Exhibit A. These Preliminary Objections show that Petitioners have not stated a claim that Respondent’s certification of the ExpressVote XL violated Pennsylvania’s statutes or Constitution (indeed, Petitioners do not even acknowledge the governing Pennsylvania case law on this subject); that Petitioners have not alleged that any of them has any disability, and therefore lack standing to bring a claim on behalf of disabled voters; and that Petitioners have not alleged the individual harm necessary to pursue their other claims.<sup>1</sup>

4. The outcome of the federal court proceedings, and this Court’s ruling on the Preliminary Objections, are likely to eliminate claims and issues, and could even moot the Application entirely.

5. The Court can reasonably grant a brief stay of these proceedings brief stay.

6. As explained below, it is far too late to replace the ExpressVote XL in time for the November 2020 election.

7. Moreover, Petitioners’ own leisurely approach to this proceeding shows that even to Petitioners, time is not of the essence. Petitioners knew, or should have known, every

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<sup>1</sup> In the Preliminary Objections, Respondent also contends that the Court lacks jurisdiction because Petitioners have failed to join indispensable parties. On January 15, this Court raised the issue *sua sponte*, and scheduled oral argument for January 23.

material fact underlying the Petition more than a year before they filed it. Even after they filed the Petition on December 12, 2019, Petitioners declined to move forward, serving Respondent by mail and then waiting nearly a month to take further action. They finally filed their Application at the close of business on Friday, January 10.

8. Given Petitioner's relaxed approach, there is no reason to rush to a hearing on claims that will likely not survive.

9. The stakes are extraordinarily high in this litigation.

10. If this Court were to grant the relief Petitioners seek, the resulting upheaval would threaten at least three counties' ability to hold orderly primary or general elections in 2020.

11. Respondent respectfully submits that it is in the best interests of the parties, the Court, and, most importantly, the voting public, for the Court to postpone the preliminary injunction response and hearing for a short time.

12. Once the Preliminary Objections and the federal court action have been resolved, this Court can streamline the Application and move forward with whatever claims remain.

**I. In Five Days, a Federal Court Hearing Will Take Place That Could Moot or Sharply Limit the Issues Raised In Petitioners' Application**

13. On November 26, 2019, several voters, along with former Presidential candidate Jill Stein, filed a Motion to Enforce Settlement in the matter of *Stein v. Boockvar*, No. 2:16-cv-06287, which is pending before Judge Paul Diamond of the Eastern District of Pennsylvania. *See* Motion to Enforce, attached (without exhibits) as Exhibit B.

14. This Motion seeks essentially the same relief as that sought in the Application: decertification of the ExpressVote XL. It relies on the same key allegations that this case does. *Compare, e.g.,* Motion to Enforce at 6-8 with Application ¶ 4, Br. in Support of Application at 4, 7-8, 14, 26-27 (argument that because the ExpressVote XL's paper records have barcodes,

they do not reflect voter intent); Motion to Enforce at 11-13 with Application ¶ 5, Br. in Support of Application at 22-28 (allegation of “insecure paper path”); Motion to Enforce at 8 with Application ¶ 8, Br. in Support of Application at 2-3, 11, 19-20 (alleged difficulty in verifying paper record).

15. Respondent does not know the extent of the relationship between Petitioners and the *Stein* Plaintiffs. However, the two sets of parties are coordinating their efforts, at least to some extent: Kevin Skoglund, Senior Technical Advisor to Plaintiff National Elections Defense Coalition (“NEDC”), and individual Petitioner Rich Garella have each filed declarations in support of the *Stein* Motion. The *Stein* Plaintiffs’ expert, Dr. Alex Halderman, is on the Board of Advisors of NEDC.

16. Respondent responded to Plaintiffs’ Motion on December 12, 2019. *See* Response, attached (without exhibits) as Ex. C.

17. On December 20, 2019, Judge Diamond scheduled an evidentiary hearing for January 21, 2020. *See* Order, attached as Ex. D. Based on prior proceedings in the *Stein* case, Respondent believes it is very likely that Judge Diamond will rule shortly after the hearing.

18. The outcome of the *Stein* matter could moot or limit the evidence in any preliminary injunction proceeding in this case.

## **II. Respondent Has Filed Preliminary Objections That Call Into Question the Court’s Authority to Hear Petitioners’ Application**

19. On January 15, 2020, Respondent timely filed Preliminary Objections, a copy of which is attached as Exhibit A.

20. As the Preliminary Objections show, the Petition has flaws that are fatal to some or all of Petitioners’ claims. For example:

- Petitioners do not adequately state a claim that Respondent exceeded her broad discretion when she certified the ExpressVote XL. Indeed, Petitioners do not even cite the Pennsylvania Supreme Court’s recent, binding precedent on the standard for addressing challenges to the Secretary of the Commonwealth’s discretion to certify voting machines. *See Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015).
- Petitioners lack standing to assert claims that the ExpressVote XL is inaccessible to voters with disabilities, because none of them alleges that they have a disability.
- Petitioners position themselves as disinterested enforcers of the Election Code and Pennsylvania Constitution; they do not allege the personal harm necessary to confer standing or to state a claim under the Pennsylvania Constitution.
- Petitioners have failed to name Pennsylvania counties that use the ExpressVote XL as respondents, even though their Petition bears directly on the counties’ rights. Indeed, in their Application, Petitioners ask the Court to grant relief that only these counties can provide.

21. The Court has *sua sponte* scheduled oral argument on the indispensable parties issue, which is jurisdictional, for January 23, 2020. Under the current schedule, Respondent must respond to the Application on January 22, a day after the federal court hearing and a day before the Court considers whether it has jurisdiction at all.

**III. Despite Their Longstanding Knowledge of the ExpressVote XL and Its Relevant Features, Petitioners Delayed Filing Their Petition and Application Until It Was Too Late to Replace the ExpressVote XL in Time for the 2020 Elections**

**A. Petitioners Filed Their Application Long After They Learned About the Relevant Features of the ExpressVote XL**

22. The ExpressVote XL is a component of several suites of voting technology manufactured by Election Systems & Software (“ES&S”), including the EVS 6000 system and the EVS 6021 system.

23. Since mid-2018, it has been public knowledge that the Commonwealth of Pennsylvania was considering certifying the EVS 6000 and, later, the EVS 6021 systems. The

features of the systems in general, and of the ExpressVote XL in particular, were also publicly known.

24. Petitioners NEDC and Citizens for Better Elections (“CBE”) (together, the “Organization Petitioners”), as organizations that ostensibly focus on voting security, should thus have had detailed knowledge about the ExpressVote XL more than a year before they filed their Petition.

25. Moreover, there is ample evidence that the Organization Petitioners’ principals and associates in fact knew the features of the ExpressVote XL that they now claim entitle them to injunctive relief. To give just a few examples: In April 2018, Kevin Skoglund, Senior Technical Advisor to the NEDC, posted on Twitter about Pennsylvania’s consideration of the ExpressVote system. *See* <https://twitter.com/kskoglund/status/987480631058759682>. Andrew Appel, Petitioners’ expert, authored blog posts about the ExpressVote XL’s allegedly flawed printer head design in October 2018. *See* <https://freedom-to-tinker.com/2018/10/16/design-flaw-in-dominion-imagecast-evolution-voting-machine/>. The certification document that is the sole basis of Petitioners’ claim that the ExpressVote XL is not accessible to voters with disabilities was published in November 2018, thirteen months before Petitioners commenced this action. Petition ¶¶ 176-90 & Ex. C.

26. Petitioners petitioned for reexamination of the ExpressVote XL in July 2019, more than seven months after Respondent certified it. *See* Ex. A to Petition.

27. After Respondent denied the petition on September 3, 2019, Petitioners waited another three months before filing this action on December 12, 2019. Petitioners served the

Petition by mail and did not seek expedited relief. They finally filed the instant Application on January 10.<sup>2</sup>

28. Petitioners will likely argue that they filed suit when they did because of events during the November 2019 election. However, there is no connection between the alleged issues with the ExpressVote XL's performance in Northampton County and the flaws that Petitioners allege entitle them to relief. Even if there were, it would not explain why Petitioners let another two months pass between the election and Petitioners' Application.

**B. At This Point, It Is Impossible to Decertify the ExpressVote XL Without Disrupting the 2020 Elections and Threatening to Disenfranchise More Than One Million Pennsylvania Voters**

29. As Declarations filed in the *Stein* action demonstrate, immediate decertification of the ExpressVote XL would throw several counties' 2020 election processes into turmoil, placing an enormous burden on county officials and threatening voters' ability to cast their ballots.

30. Replacement of voting machines is no simple matter, especially in a county as large as Philadelphia; it involves time-consuming and intricate policy decisions, complex logistics, and thousands of hours of training and testing. *See* Declaration of Kathy Boockvar dated December 12, 2019, attached (without exhibits) as Ex. E, ¶¶ 75-84; Declaration of Joseph Lynch dated December 11, 2019, attached (without exhibits) as Ex. F; Declaration of Monique Nesmith-Joyner dated December 12, 2019, attached as Ex. G; Declaration of Bethany Salzarulo dated December 11, 2019, attached as Ex. H.

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<sup>2</sup> Petitioners will likely argue that they filed suit when they did because of events during the November 2019 election. However, there is no connection between the alleged issues with the ExpressVote XL's performance in Northampton County and the flaws that Petitioners allege entitle them to relief. Even if there were, it would not explain why Petitioners let another two months pass between the election and Petitioners' Application.

31. The 2020 Presidential election is less than ten months away; there is no practical way to replace the ExpressVote XL in that time without risking Election Day chaos.

**WHEREFORE**, for the reasons stated above, Respondents respectfully ask the Court to stay the current deadline for a response to Petitioners' Application and postpone the Preliminary Injunction hearing until decisions have issued in the federal court matter and on the Preliminary Objections.

Respectfully submitted,

**HANGLEY ARONCHICK SEGAL PUDLIN &  
SCHILLER**

Dated: January 16, 2020

By: /s/ Michele D. Hangley  
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**CERTIFICATION REGARDING PUBLIC ACCESS POLICY**

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: January 16, 2020

/s/ Michele D. Hangle  
Michele D. Hangle