CV-23-755

IN THE ARKANSAS SUPREME COURT

ARKANSAS VOTER INTEGRITY INITIATIVE, INC., and CONRAD REYNOLDS*	APPELLANTS
vs.	
JOHN THURSTON, in his official capacity as SECRETARY OF STATE, the STATE BOARD OF ELECTION COMMISSIONERS, and ELECTION SYSTEMS AND SOFTWARE, LLC	APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, FOURTH DIVISION

THE HON. TIMOTHY FOX, CIRCUIT JUDGE

BRIEF OF THE APPELLANTS

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*Donnie Scroggins abandons any further relief and is not a party to the appeal.

LLF NO.: 03374

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JURISDICTIONAL STATEMENT

1. This case presents a pre-election challenge to an election procedure and contains a claim of an illegal exaction. Jurisdiction is proper in the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R. 1-2(a)(4).

2. The circuit court entered a final order on September 22, 2023. (RP 849).

3. On September 29, 2023, the appellants filed a timely post-trial motion for a new trial based on the circuit court's denial of the appellants' right to a jury trial. (RP 853).

4. On October 16, 2023, the appellants appealed the final order. (RP 855).

5. On October 30, 2023, the motion for a new trial was deemed denied. Ark. R. Civ. P. 59(b).

6. On October 31, 2023, the appellants amended their notice of appeal to include the denial of the motion for a new trial. (RP 857).

7. I express a belief based on a reasoned and studied professional judgment that this appeal raises several questions of legal significance for jurisdictional purposes.

A. Ark. Sup. Ct. R. 1-2(a)(4). This is a case involving an election and the interpretation of election laws. It is an appeal to the supreme court by law.

Additional issues that are important for jurisdictional purposes are:

B. Ark. Sup. Ct. R. 1-2(b)(4). This appeal involves issues of substantial public interest.

C. Ark. Sup. Ct. R. 1-2(b)(5). This appeal raises significant issues needing clarification or development of the law as it is an issue of first impression.

By: /S/ CLINTON W. LANCASTER
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STATEMENT OF THE CASE AND THE FACTS

In Arkansas, all elections are conducted using Election Systems and Software, LLC (ESS) voting machines, which are nothing more than computers configured to perform voting-related tasks. (RP 28). The voting process has a definitive structure. (RP 27–30). After confirming the voter is qualified to vote, the poll worker gives the voter a ballot summary card that is blank except for one small bar code at the top of the paper (this is not the barcodes that are at issue in this case). (RP 44) (RT 103). The voter then approaches a ballot marking device (BMD), the ESS ExpressVote. (RP 44). (RT 146). The voter inserts the ballot summary card into the computer processor of the ExpressVote. (RP 44). Using the barcode on the top of the ballot summary card to determine the correct style and races based on the voter's address, the ExpressVote

computer generates races and issues on its touchscreen monitor. (RP 44). (RT 147).

Next, the voter selects his or her ballot choices. (RP 44). Once the choices are selected, finalized, and confirmed by the voter on the BMD's touchscreen monitor, the ExpressVote prints the voter's selections onto the ballot summary card. (RP 44) (RT 150). Notably, the computer-generated screen on the ExpressVote and the printed document do not even remotely resemble each other. (RP 44) (RT 150). There are two sections on the printed ballot summary card. (RP 45) (RT 103).

In the top section, there are a series of several barcodes representing, allegedly, the voter's ballot selections. (RP 45) (RT 103). Below the barcodes are the voter's ballot selections in the English language. (RP 45) (RT 103). The voter takes the ballot summary card containing the vote encoded barcodes and the English selections and inserts it into an ESS DS200 tabulator. (RP 45). Though there are two languages on the ballot, barcode and English, the DS200 reads only the barcodes to tabulate the voter's selections and adds the votes to that machine's tally stored on the tabulator's memory drive. (RP 45) (RP 849).

The appellants' issue with this voting scheme pertains to the barcodes containing the votes. (RP 25–40). On May 4, 2023, the appellants filed an amended complaint seeking a declaratory judgment that a voter cannot verify her vote selections on the ballot in a private and independent manner before casting the ballot as required by Arkansas law because the voter cannot determine or verify if the barcodes containing the votes accurately represent the English selections. (RP 25–40). Since the voter cannot read the barcodes to verify their accuracy, the machines do not comply with Arkansas law and the Help America Vote Act (HAVA). (RP 25–40). As to the illegal exaction, tax dollars could only be spent on compliant machines and those spent on these machines constituted an improper use of tax dollars. (RP 25–40).

The case was removed by the state defendants to federal court. (RP 137). The federal district court wasted little time before remanding the case back to the state circuit court. (RP 151). Back in circuit court, the case was expedited. (RT 30). At the expedited hearing on the motion for a temporary injunction, things became rather surreal very quickly. (RT 76–100) (RP 849). The appellants called their first witness, Mr. Daniel

Schultz, who was the Director of the State Board of Election Commissioners (SBEC). (RT 43). During the State's cross-examination of Mr. Schultz, before ESS could cross examine the witness or the appellants could re-direct his testimony, the circuit court ruled on the merits and called it a "final order." (RT 92).

In making his final order, the court found that the ballot is the printed ballot summary card, the ballot is cast when it is inserted into the tabulator, and the tabulator is reading the barcodes and not the printed English selections. (RP 850–51) (RT 76–100). The court further found that the voter cannot read the barcoded vote selections and has no ability to verify that the barcodes on the printed ballot are accurate before casting the ballot into the DS200 tabulator. (RP 850) (RT 76–100). However, the circuit court found that the confirmation on the BMD touchscreen computer monitor is verification of the votes on the ballot in compliance with Arkansas law even though the ballot does not yet exist when the voter makes that verification. (RT 92). This was the circuit court's "final order" at the hearing for an interlocutory and temporary injunction. (RP 850) (RT 76–100).

When the appellants pointed out that they had not completed their case and had additional evidence, the circuit judge said their additional evidence was of no moment and that the "threshold issue" he had decided was dispositive of the case. (RT 76–100). Being concerned that the circuit court was biased because it had made its decision before hearing all the evidence, the appellants moved the circuit judge to recuse. (RP 850–51). (RT 82, 86, 88, 93). After literally laughing out loud in the faces of the appellants, the circuit judge denied the motion. (RP 850–51) (RT 93).

The appellants timely appealed the final order. (RP 855). The appellants also sought a new trial by filing a post-trial motion. (RP 853). The basis of the motion for a new trial was that the appellants had pled for a jury trial but did not get one. (RP 853). That motion was deemed denied and timely appealed. (RP 850–51). This court granted expedited consideration, and for which the appellants express their deepest gratitude.

ARGUMENT

This is a convoluted appeal and that is disappointing because it did not have to be such. The heart of the case is very simple when considered

with the very specific, legal definition of the word "verify," the clear and unambiguous language of Ark. Code Ann. § 7-5-504(6)(7), and the voting equipment and process in Arkansas. The logic and reasoning in this case does not require elaborate mental gymnastics.

A. A voter must be able to verify, in a private and independent manner, his selected votes on the ballot before the ballot is cast and to change or correct any errors before casting the ballot. Ark. Code Ann. § 7-5-504(6)(7) (2023);

B. Arkansas's voting machines must comply with HAVA, which requires that a voter be able to verify, in a private and independent manner, his selected votes on the ballot before the ballot is cast and counted and to change or correct any errors before casting the ballot. *Id. See also* 52 U.S.C. § 21081(a)(1)(A)(i)(ii);

C. Voting machines approved by the SBEC and selected by the Secretary of State must comply with subpoints A and B, *supra*. Ark. Code Ann. §§ 7-5-503–04 (2021); and

D. Money from tax dollars can only be used for machines that comply with subpoints A and B, *supra*. *Id.* at §§ 7-5-301(j), 7-7-201, 7-5-104, and 19-5-1247.

Turning to the facts of this case, the following is clear:

1. After the voter has used the ExpressVote, it prints a ballot summary card with both barcodes and vote selections printed in English. (RT 103, 151–152);

2. The voter's computer marked and generated ballot summary cards are placed into the DS200 tabulator to be counted. (RT 43);

3. The DS200 reads only the barcodes to tabulate votes and not the voter's selections printed in English. (RP 850–51);

4. The voter cannot read the barcodes to determine if the ExpressVote accurately marked and generated the voter's selected candidates and issues. (RP 850–51); and

5. The voter cannot read the bar codes to determine if he needs to correct his ballot selections. (RP 850–51).

Because the ExpressVote prints votes as barcodes, a voter cannot read the barcodes, and the DS200 tabulates based only on the bar codes, the machines fail to comply with the statutory premises set out in subpoints A, B, C, and D, *supra*. To this end, tax dollars are misapplied to nonconforming machines and the continued use of voting machines, as well as the continued use of tax dollars funding these voting machines, are *ultra vires* and beyond the authority of the Secretary because it is not authorized by statute.

To reach this conclusion there are a few, very important facts that had to be resolved. The circuit court resolved these disputed questions of fact *sua sponte* before the first witness had finished testifying in a hearing on whether to grant a temporary restraining order pending a final hearing, before the introduction of evidence about the need for an injunction was complete, and prior to the case about the injunction being

submitted to the trial judge for a decision. (RT 76–100). Not only did the circuit court resolve these facts prematurely, getting most of them incorrect, but on a permanent and final basis, usurping the appellants' constitutional right to a jury trial while kicking them out of court and inviting them to appeal.[1] (RP 850–51) (RT 76–100).

The circuit court's ruling is replete with flawed conclusions. The court concluded that a voter verifies his ballot selections on the BMD touch screen even though the BMD touch screen is not the ballot. (RT 76–100). Instead, concludes the circuit court, the ballot is the paper printed by the BMD. (RP 850–51) (RT 76–100). This means that a voter verifies his vote selections on the ballot before the ballot exists, which is impossible because one cannot verify that the contents of a document are accurate when that document does not exist (an argument made to the circuit court (RT 92)). Additionally, the court made findings to support its factual conclusions that are *non-sequitur*. For example, the circuit court found that there was no evidence that the barcodes printed by the

[1]It is disappointing to be guaranteed a day in court only for that day to come and be given what appeared to be a preselected outcome. This court has had its own struggles with this circuit judge. *See Robinson Nursing & Rehabilitation Center, LLC v. Phillips*, 2023 Ark. 173. The bar struggles as well. In this case, the appellants are left with lingering, unresolved, and somewhat bitter thoughts about why the trial judge took his approach.

BMD were inaccurate. (RP 850–51) (RT 76–100). Accuracy of the barcodes is a separate issue than the one raised by the appellants, who raised that the voter cannot verify the votes on his ballot.

There are factual questions that exist. What is the ballot? Is the ballot the BMD screen that one touches to make vote selections? Perhaps the BMD is not the ballot and, as the circuit court found, the ballot is the document printed by the BMD that is inserted into the tabulator—which is consistent with the clear definition in Ark. Code Ann. § 7-1-101(20) that the BMD is a marking device and not a ballot. If this is the case, then the voter is not verifying his ballot on the BMD touchscreen because, by definition, it is not the ballot and the ballot does not exist until it is printed. Instead, the voter is only verifying what he wants the BMD to print and not verifying what the BMD has printed. The appellants did not have the opportunity to have these questions factually resolved on their merits by a jury after presenting all their evidence because the circuit judge cut off the intake of evidence before the first witness was done testifying and entered a final order.

More factual questions abound. A ballot is an instrument, such as a paper or ball, used for casting a vote or the system of choosing officers

or voting on a motion by recording individual votes, especially in secret, by physical means such as marking slips of paper or electronically, and tallying the results when all votes have been cast. BALLOT, Black's Law Dictionary (11th ed. 2019). If the piece of paper printed by the BMD is the ballot, which part of the paper is the ballot? Is it the English selections? Is it the barcodes? Is it both?

Since the tabulator is reading the barcodes, it seems that the barcodes are the ballots as they contain the votes read by the tabulator. It also seems that the rest of the printed information on the ballot is not the ballot but information about the ballot, such as what ballot style you should vote and English selections which may or may not accurately reflect the unintelligible and foreign barcodes containing the vote selections. These are also questions of fact that the appellants were entitled to present to a jury and provide evidence supporting these facts. However, that did not happen, and the resolution remains undeveloped.

This appeal presents collateral issues in addition to the merits of the circuit court's ruling. There is something very wrong about deciding the merits of an action before the first witness finishes testifying and all the evidence is submitted. There is something wrong about doing that in

a hearing on a temporary restraining order. There is something so wrong about violating the right to a jury trial that it is offensive to basic conceptions of freedom and the American justice system. While these provide palpable bases for reversal, the most important issue to the appellants is the merits of the circuit court's rulings and it is addressed first.

I. THE CIRCUIT COURT ERRED IN DETERMINING THAT THE VOTING MACHINES, AS THEY ARE CURRENTLY CONFIGURED, COMPLIED WITH ARK CODE ANN. § 7-5-504(6)(7).

This point requires the court to conduct an interpretation of Ark. Code Ann. § 7-5-504(6)(7) and apply it to the facts to resolve what the circuit court called a "threshold question." (RT 58). Issues of statutory interpretations are reviewed *de novo*, as it is this court's responsibility to determine what a statute means. *A-1 Recovery Towing & Recovery, Inc. v. Walther*, 2023 Ark. 34, 2, 660 S.W.3d 797, 799 (2023) (citing *Rent-A-Ctr. E., Inc. v. Walther*, 2021 Ark. 10, at 5, 615 S.W.3d 701, 703). Additionally, a circuit court's conclusion on a question of law is given no deference on appeal. *Gray v. Webb on Behalf of Republican Party of Ark.*, 2020 Ark. 385, 3, 611 S.W.3d 466, 468 (2020) (citing

Helena-West Helena Sch. Dist. v. Fluker, 371 Ark. 574, 577, 268 S.W.3d 879, 882 (2007)).

The statute at issue states that:

No make of voting machine shall be approved for use unless it is so constructed that:

> (6) It shall permit the voter to verify in a private and independent manner the votes selected by the voter on the ballot before the ballot is cast;
>
> (7) It shall provide the voter with the opportunity in a private and independent manner to change the ballot or correct any error before the ballot is cast;

Ark. Code Ann. § 7-5-504(6)(7). The circuit court's position was that the voter can verify the votes on the BMD's touchscreen before the ballot is printed and this suffices for the statutory requirement—even though it expressly found that the ballot was the printed ballot summary card and the statute requires verification of the votes on the ballot. (RP 850–51) (RT 92). However, some statutory construction is necessary to understand the flaw in that analysis. In performing a statutory interpretation, the appellants implore the court to consider the significance of the word "verify" and the phrase "on the ballot" in the above statute.

This court adheres to the basic rule of statutory construction, which is to give effect to the intent of the legislature. *Echols v. State*, 2010 Ark. 417, 6–7, 373 S.W.3d 892, 897–98 (2010). A statute is construed just as it reads, giving the words their ordinary and usually accepted meaning in common language, and if the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation. *Id.* Additionally, in construing any statute, it is placed beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. *State v. Torres*, 2021 Ark. 22, 4, 617 S.W.3d 232, 235 (2021) (citing *Singleton v. State*, 2009 Ark. 594, 357 S.W.3d 891; *Bush v. State*, 338 Ark. 772, 2 S.W.3d 761 (1999)). This is because statutes relating to the same subject are said to be *in pari materia* and should be read in a harmonious manner, if possible. *Hackie v. Bryant*, 2022 Ark. 212, 6, 654 S.W.3d 814, 818–19 (2022) (citing *Ark. Soil & Water Conservation Comm'n v. City of Bentonville*, 351 Ark. 289, 300, 92 S.W.3d 47, 54 (2002).

The interpretation of Ark. Code Ann. § 7-5-504(6)(7) is unambiguous and straightforward. A voter must be able to **verify** his

selections ***on his ballot*** before it is cast and must be able to change or correct any error before it is cast. *Id.* The appellants place particular emphasis on the word "**verify**." Verify has a legal definition. It means to prove to be true; to confirm or establish the truth or truthfulness of; to authenticate or to confirm or substantiate by oath or affidavit; to swear to the truth of. VERIFY, Black's Law Dictionary (11th ed. 2019). Applying the definition of verify to the language of the statute, the statute now reads that a voter must be able to prove, confirm or establish the truth of, or to authenticate sufficient to an oath or affidavit, the votes selected by the voter ***on the ballot*** before the ballot is cast.

However, a voter is unable to verify his votes on the ballot before casting it into the tabulator because he is unable to determine if the barcodes accurately reflect his selected votes. While the voter may have confirmed his vote selections on the BMD, he is not verifying the votes on the ballot and only confirming what he wants the BMD to print. He is completely unable to verify that the BMD correctly printed his vote selections on his ballot. This is similar to the instances where we print a document from our computer only to find that the wrong document was printed, an error message printed, or some problem exists with the ink

cartridge which has skewed or disfigured the document or image. We can see those errors and know that the printer did not accurately print the document. We can **verify** that what was printed by our machine was not what we wanted it to print on the paper to the level of certainty sufficient to swear an oath as to the contents of the printed document.

This verification feature does not exist on an ExpressVote printed ballot. When the voter confirms the vote selections on the BMD, he is only confirming the task to be performed by the BMD and not verifying the ballot itself. Because the barcodes are a language which is unintelligible and foreign to the human eye, a voter has no way to know if the BMD accurately performed the task as instructed. This means that the voter cannot verify the work of the BMD, recognize an error, or correct an error. The appellants concede that there are English selections that can be read on the ballot summary card, but these are not the votes. The voter cannot verify that the part of the ballot containing the votes and which the tabulator is reading to count the votes corresponds to the English selections.

The barcoded votes selections are a fatal problem for the statutory requirements. Both the Director of Elections for the Secretary of State

and the Executive Director of the SBEC admitted that there is no way for the voter to know if the barcodes are accurate on the ballot when the ballot is cast. (RP 91–94). Instead, continued the Director, the voter will not know if the barcodes are accurate until a post-election audit is conducted. (RP 91–94). The statements of these two people who have significant authority over our elections are clear: the votes on the ballot cannot be verified by the voter on the ballot prior to casting the ballot. (RP 91–94). Instead, they are only capable of verification after the election. (RP 91–94).

However, even this is not an accurate statement by the Director. Because the ballots are secret, once they are placed into the tabulator the ballot falls into the ballot bin becoming indistinguishable from all the other ballots in the bin and untraceable to the voter who cast the ballot. While a post-election audit may verify the tabulator accurately read the barcodes, that is also not the issue raised by the appellants. The appellants raised the ability of the voter to **verify** his votes ***on the ballot*** before casting his ballot in compliance with our law. The post-election audit does nothing for compliance with Ark. Code Ann. § 7-5-504(6)(7) because it is a post-election verification of the election and not a

verification of the voter's selections on the ballot before casting it as required by the statute.

There is a difference between verification of votes on a ballot and reading vote selections on a ballot. This difference is elucidated by a Georgia case. In *VoterGA v. State*, a challenge was made to the configuration of the voting machines used by the State of Georgia. *See generally VoterGA v. State*, 368 Ga. App. 119, 120, 889 S.E.2d 322, 323 (2023). There are some stark similarities between Arkansas and Georgia pertaining to election equipment. *Id.*

Like Arkansas, Georgia has only authorized the use of one brand of voting machine—Dominion—and those machines are used in every county in Georgia. *Id.* Georgia uses a Dominion BMD that prints the voter's selections in English and quick-response (QR) codes. *Id.* Like Arkansas, the Georgia tabulator reads the QR codes to tabulate votes. Being very dissatisfied that they could not read QR code, VoterGA sought a declaratory judgment that the machines failed to comply with Georgia law. *Id.*

However, the similarities between Arkansas and Georgia end there as the Georgia statute at issue in *VoterGA* is very different than the

Arkansas statute at issue in the case at bar. *Compare* Ark. Code Ann. § 7-5-504(6)(7) *with* Ga. Code Ann. § 21-2-300(a)(2). All that the Georgia statute required was that the BMD mark a paper ballot at the direction of an elector and print a paper ballot with the elector's choices in a format "**readable"** by the elector. *VoterGA*, 368 Ga. App. at 123, 889 S.E.2d at 325 (citing Ga. Code Ann. § 21-2-300(a)(2)) ("the law simply requires that electronic ballot markers produce paper ballots that are marked with the elector's choices in a format that can be read by the elector, and the petitioners do not dispute that an elector can read their voting choices on the printed paper ballot") (emphasis added). This is a significant distinction from the Arkansas statute and the reason the appellants previously emphasized the word "**verify.**" Nowhere in the Georgia statute considered by the *VoterGA* court is verification on the ballot required. Instead, the Georgia standard is much lower—the ability to read your ballot selections on paper. The *VoterGA* court's interpretation of their statute is that a BMD cannot print a ballot which only contains QR codes.

Reading your ballot selections is a very different kind of process and event than verifying them. Arkansas requires the ability of the voter to **verify**—to prove and confirm the truth of the selected votes ***on the ballot***

with such authentication that it can withstand the substantiation of an oath. *See* Ark. Code Ann. § 7-5-504(6)(7); VERIFY, Black's Law Dictionary (11th ed. 2019). Our law does not require the mere ability to read the voter's selections like the Georgia statute. Instead, it requires verification of the accuracy of the barcodes printed by the BMD on the ballot. Ark. Code Ann. § 7-5-504(6)(7). It is this distinction which makes the instant case very different from *VoterGA*.

In Arkansas, verification of the selected votes on the ballot is the standard which must be met. Ark. Code Ann. § 7-5-504(6)(7). It is not confirmation of choices on a touchscreen computer monitor. It is not confirmation of what the voter wants the computer component of the BMD to print. It is not confirmation of some other information on the ballot. Our law, and federal law, is very, very specific. Because a voter cannot verify the votes on the ballot, the voting machines, as they are currently configured, do not comply with Arkansas law or HAVA.

II. THE CIRCUIT COURT JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE MOTION TO RECUSE.

This court reviews a circuit judge's denial of a motion to recuse under an abuse of discretion standard. *Irvin v. State*, 345 Ark. 541, 49

S.W.3d 635 (2001). A clearly erroneous interpretation or application of a law or rule will constitute a manifest abuse of discretion. *Ferguson v. State*, 2016 Ark. 319, 6, 498 S.W.3d 733, 737 (2016) (citing *Little Rock Wastewater Util. v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 902 S.W.2d 760 (1995)). To decide whether there has been an abuse of discretion, this court reviews the record to see if prejudice or bias was exhibited. *Holder v. State*, 354 Ark. 364, 375–76, 124 S.W.3d 439, 447–48 (2003) (citing *Irvin v. State,* 345 Ark. 541, 49 S.W.3d 635 (2001)).

The party seeking recusal must demonstrate bias. *Id.* (citing *Searcy v. Davenport,* 352 Ark. 307, 100 S.W.3d 711 (2003); *Bradford v. State,* 328 Ark. 701, 947 S.W.2d 1 (1997)). Further, unless there is an objective showing of bias, there must be a communication of bias in order to require recusal for implied bias. *Id.* (citing *Searcy v. Davenport,* 352 Ark. 307, 100 S.W.3d 711 (2003); *City of Dover v. City of Russellville,* 346 Ark. 279, 57 S.W.3d 171 (2001)). When any one of three indicators are present—the communication of bias, objective indicators of bias, or if the trial judge's impartiality may be *reasonably* questioned—a judge must recuse. *Isom v. State*, 2018 Ark. 368, 19, 563 S.W.3d 533, 546 (2018);

Ferguson v. State, 2016 Ark. 319, 7, 498 S.W.3d 733, 737 (2016) (emphasis in original). All three are present in this case.

There is a communication and an objective demonstration of bias in this case which causes the trial judge's impartiality to be reasonably questioned. They are found in the circuit court's prejudgment of the issues, comments on expert testimony, the refusal to accept evidence, laughing at the motion to recuse, and denial of the right to a jury trial.[2] Our justice system is predicated on the long practice of fully hearing the parties, accepting properly offered evidence, and submitting the case to the bench or a jury for findings. The concept is that the factfinder does not make a decision until all relevant and admissible evidence about a case has been presented by the parties. A party has the ability and the right to argue that the evidence he or she presented should be applied to the law to reach a given conclusion. In fact, that is what this brief is doing at this very moment.

Prejudgment is a communication of bias because it expressly informs the parties and the public that the court has made a decision that

[2]Counsel for the appellants has no idea why the trial judge laughed out loud when the motion to recuse was made. However, the trial judge's finding of humor in the litigants' assertion that the judge is biased against them itself creates a perception of bias.

is not based on all the evidence (because the court has not heard all the evidence). It communicates that the trial judge has developed a decision or position based on something external than the evidence presented. It is an objective indicator that the finder of fact is not impartial and considering the evidence but that something else is at play in the courtroom. Additionally, the trial judge took the following actions which evince bias, prejudgment, and calls into question his impartiality:

A. Commented inappropriately on expert testimony that he refused to receive into the record. This indicated that the trial judge held a preconception of the evidence and when the evidence did not harmonize with his preconceptions, he excluded it. This evinces bias because it clearly shows that the trial judge had a position on the evidence before it had been extracted from the witness and offered into the record—before he even knew what the evidence was going to be. The excluded evidence would have also challenged or refuted the judge's own, prejudged position; (RT 77–78)

B. Refused to allow additional evidence into the record ("we don't need any further testimony and evidence"); (RT 78) and

C. Refused to allow to testify the expert witnesses (two Ph.Ds with specialties in election machines and computer software) who had flown to Little Rock to testify in-person from the University of California at Berkley and Iowa. The trial judge said "he [referring to Dr. Andrew Appel and Dr. Doug Jones] doesn't get to say it factually." The "it" were the facts from scholarly research and real-world examples of barcode failures in elections which indicated that the inability to verify the barcodes is an inability to verify the selected votes on the ballot. This action by the trial judge was an outright

> repression of factual and expert evidence that supported the appellants' case and which challenged the trial judge's biased, prejudged position. (RT 78, 86).

The perception of a judge's bias must be viewed from the litigant's perspective. *Ferguson v. State*, 2016 Ark. 319, 7–8, 498 S.W.3d 733, 737–38 (2016). A judge is prohibited from making any public or nonpublic statement that might reasonably be expected to impair the fairness of a matter pending or impending in any court or that might substantially interfere with a fair trial or hearing. Ark. Code Jud. Conduct R. 2.10(A). To that end, a judge is required to disqualify himself in any proceeding in which the judge's impartiality might *reasonably* be questioned. Ark. Code Jud. Conduct R. 2.11(A)(1) (emphasis added). *See Carmical v. McAfee*, 68 Ark. App. 313, 330, 7 S.W.3d 350, 361 (1999) (citing *Sturgis v. Skokos,* 335 Ark. 41, 977 S.W.2d 217 (1998)) (a judge is required to recuse from cases in which his impartiality might reasonably be questioned under the Arkansas Code of Judicial Conduct). *See also Ferguson*, 2016 Ark. at 7–8, 498 S.W.3d at 737–38 ("[o]bviously, if a judge's impartiality may "reasonably" be questioned, the mandatory portion of Rule 2.11(A) is invoked and the judge is required to disqualify);

Ark. Code Judicial Conduct. R. 1.2 (maintaining impartiality of the judiciary and avoiding the appearance of impropriety).

Both the United States Supreme Court and this court required recusal in this case. *See Williams v. Pennsylvania*, --- U.S. ---, 136 S.Ct. 1899, 1905, 195 L.Ed.2d 132 (2016); *In re Murchison*, 349 U.S. 133, 136, (1955); *Isom v. State*, 2018 Ark. 368, 19, 563 S.W.3d 533, 546 (2018) (emphasis added). While there is a presumption that judges are impartial, due process guarantees not only an "absence of actual bias" on the part of a judge, but prohibits even the appearance of impropriety. *Isom*, 2018 Ark. at 19, 563 S.W.3d at 546 (citing *Williams, supra*); *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996)). *See also Ark. Judicial Discipline & Disability Comm'n v. Proctor*, 2010 Ark. 38, 9, 360 S.W.3d 61, 72 (2010); *Ark. Judicial Discipline & Disability Comm'n v. Simes*, 2009 Ark. 543, 12, 354 S.W.3d 72, 79 (2009). Even absent "actual bias" and even if the judge would "do [his] very best to weigh the scales of justice equally," when there is an appearance of impropriety—including an appearance of bias—recusal is required to preserve the "appearance of justice." *Id.*, 563 S.W.3d at 546 (citing *Murchison*, 349 U.S. at 136).

This is not the first time a prejudgment has occurred in Arkansas and been the subject of appellate review. The trial judge's prejudgment in this case is analogous to the facts in *Riverside Marine Remanufacturers, Inc. v. Booth*. 93 Ark. App. 48, 52–53, 216 S.W.3d 611, 614–15 (2005). In *Riverside Marine*, the circuit court made a finding about the liability of a party before testimony was complete and the evidence submitted. The Arkansas Court of Appeals found that the prejudgment of the issue was a communication of bias that necessitated recusal. *Id.*, 216 S.W.3d at 614–15. These appellants are in the same boat as those in *Riverside Marine*—the circuit judge made a finding before the testimony was complete and the evidence submitted. It was a communication which evinces the heart and soul of bias.

The mere appearance of prejudgment necessitates recusal. *Id.*, 216 S.W.3d at 614–15. This is because when the trial judge sits as a finder of fact, as he did in the temporary injunction hearing which he converted to a final trial, the appearance of fairness in trial proceedings becomes even more important. *Id.* at 52, 216 S.W.3d at 614 (citations omitted). Court proceedings must not only be fair and impartial—they must appear to be fair and impartial. *Id.* at 52, 216 S.W.3d at 614 (citing *Farley v.*

Jester, 257 Ark. 686, 520 S.W.2d 200 (1975)); Comment, *Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455*, 71 Mich. L. Rev. 538 (1973)).

The contention that there is an appearance of impartiality is as important, if not more so, than actual impartiality. *Id.* at 52, 216 S.W.3d at 614. Judges should reasonably appear to be disinterested as well as be so in fact. *Id.* at 52, 216 S.W.3d at 614. Any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. *Id.* at 52, 216 S.W.3d at 614 (citing *Farley, supra*). This is because "justice must satisfy the appearance of justice." *Allen v. Rutledge*, 355 Ark. 392, 404, 139 S.W.3d 491, 498 (2003) (citing *Offutt v. United States,* 348 U.S. 11 (1954)). Unfortunately, the appearance of bias and impartiality is readily apparent in the circuit court's prejudgment and determination of case issues, suppression and comments on the evidence, the infringement of the appellant's right to a jury trial, and the circuit judge's laughing at the appellants when they moved for his recusal. It was an abuse of discretion to deny the motion.

III. THE CIRCUIT COURT'S DENIAL OF THE MOTION FOR A NEW TRIAL WAS A REVERSIBLE AND "SERIOUS ERROR."

Some preliminary information may facilitate a faster, easier understanding of this point on appeal.

1. The appellants pled for a jury trial. (RP 38).

2. A jury trial is afforded in a declaratory judgment and illegal exaction case. Ark. Code Ann. § 16-111-109 (2023). *See also Foster v. Jefferson Cnty. Quorum Ct.*, 321 Ark. 105, 110, 901 S.W.2d 809, 812 (1995), *on reh'g* (July 17, 1995).

3. No contemporaneous objection must be made when the right to a jury trial is denied. *Calnan v. State*, 310 Ark. 744, 748, 841 S.W.2d 593, 596 (1992) (citing *Wicks v. State,* 270 Ark. 781, 606 S.W.2d 366 (1980)).

4. Its denial can even be raised for the first time on appeal. *Collins v. State*, 324 Ark. 322, 327, 920 S.W.2d 846, 849 (1996).

5. However, the denial of the right to a jury trial was brought to the circuit court's attention in a Rule 59 motion for a new trial. (RP 853).

6. A ruling on that motion was obtained when it was deemed denied by operation of law. Ark. R. Civ. P. 59(b). (RP 857).

When a motion for a new trial is denied the test on review is whether the verdict is supported by substantial evidence, giving the verdict the benefit of all reasonable inferences permissible under the

proof. *Bell v. Darwin*, 327 Ark. 298, 300, 937 S.W.2d 665, 666 (1997) (citing *Russell v. Colson,* 326 Ark. 112, 928 S.W.2d 794 (1996); *Gilbert v. Shine,* 314 Ark. 486, 863 S.W.2d 314 (1993); Ark. R. Civ. P. 59(a)). The party moving for a new trial must show that his rights have been materially affected by demonstrating that a reasonable possibility of prejudice resulted from the misconduct. *Suen v. Greene*, 329 Ark. 455, 459, 947 S.W.2d 791, 793 (1997) (citing *Diemer v. Dischler,* 313 Ark. 154, 852 S.W.2d 793 (1993)). Also, this court employs a *de novo* standard of review for claims relating to a right to a jury trial. *Bauer v. Beamon*, 2023 Ark. 194, 8, ---S.W.3d --- (citing *Bandy v. Vick*, 2020 Ark. 334, at 4, 608 S.W.3d 903, 905).

A new trial may be granted to any of the parties and for all or parts of the claims for any of the following grounds materially affecting the substantial rights of the aggrieved party:

> Any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial; or
>
> The verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law;

Ark. R. Civ. P. 59(a)(1)(6)(8). The appellants assign error in this point to the circuit judge's denial of the right to a jury trial because it was an

irregularity in the proceeding and an order of the court as well as an abuse of discretion which prevented the appellants from having a fair trial. Additionally, the circuit court's actions in rendering a final decision during a hearing on a motion for a preliminary injunction is a decision clearly contrary to the law. The circuit court's verdict was not supported by substantial evidence because the evidence was limited, incomplete, and the verdict rendered by the bench instead of a jury.

The injunction hearing was held on September 11, 2023. Prior to that, on August 7, 2023, the circuit judge held a hearing and stated that he was "moving this thing forward at the trial court level." (RT 30). To the appellants, this statement meant the circuit court was expediting the case hearings. And while the circuit judge stated that was his intention, he did not make clear he would not allow a jury trial until he made the order a final, appealable order at the September hearing. (RT 82). The appellants do not dispute that the trial court had the power to consolidate and advance the case as the relevant rule specifically permits such an action. Ark. R. Civ. P. 65(a)(2).

However, in doing so, "the court must preserve any party's right to a jury trial." *Id.* The rule makes clear that evidence received on the

motion for an injunction becomes part of the trial record and does not have to be repeated at the final hearing. *Id.* The provisions of this rule are very different from what the circuit court actually did. Instead of following the rule, the circuit court changed the rule such that the evidence taken at the hearing on the motion for injunction is the final trial on the merits. In doing so, the circuit court forfeited the appellants' rights to a jury trial in a bright line, if not flagrant, violation of Article 2, § 7 of the Arkansas Constitution and Rules 38, 39, and 65 of the Arkansas Rules of Civil Procedure.

The fundamental constitutional right to a jury trial cannot be lost by forfeiture. *Calnan*, 310 Ark at 748, 841 S.W.2d at 595. It can only be waived. *Id.* It is otherwise to remain "inviolate." *Id.* It is protected by the Constitution of Arkansas, and procedural rules cannot be applied to diminish the right to a jury trial. *Walker v. First Com. Bank, N.A.*, 317 Ark. 617, 622, 880 S.W.2d 316, 319 (1994) (citing *Bussey v. Bank of Malvern,* 270 Ark. 37, 603 S.W.2d 426 (Ark. App. 1980)). It is so fundamental a right that if it is denied, the result is a "serious error." *Calnan*, 310 Ark. at 748–49, 841 S.W.2d at 596 (citing *Bussey v. Bank of Malvern,* 270 Ark. 37, 603 S.W.2d 426 (Ark. App. 1980)).

Because a "serious error" results, no contemporaneous objection must be made when the right to a jury trial is denied. *Id.* at 748, 841 S.W.2d at 596 (citing *Wicks v. State,* 270 Ark. 781, 606 S.W.2d 366 (1980)). This exception to the contemporaneous objection rule is an established *Wicks* exception. *Id.* (the third exception applies in this case—there is no need for contemporaneous objection to raise an issue on appeal if an otherwise serious error will result). A jury trial is so sacrosanct a right, long engrained in our constitution and system of justice that its denial can even be raised for the first time on appeal. *Collins*, 324 Ark. at 327, 920 S.W.2d at 849. However, the appellants presented this serious error to the circuit court for an opportunity to correct the action in the motion for a new trial and the circuit court declined to act on it. (RP 853). Now, it falls on this court to correct the blatant infringement of the appellants' constitutional right to a trial by jury.

CONCLUSION

There are a significant number of facts that are either unresolved, resolved without sufficient evidence to support their resolution, or improperly resolved by the bench and not a jury. These facts include,

what is the ballot, what does the voter verify on the BMD touch screen, and when verification of the votes occurs. These facts were inaccurately resolved before all the evidence had been received. There have been erroneous conclusions of law about what is verified as the votes, whether verification is possible before a ballot exists, when verification of the votes is required, and whether verification has occurred before the ballot is cast.

If the ballot is the document printed by the BMD, and a voter must verify the votes on the ballot, then it is impossible to verify something that does not exist and verification of votes on the ballot cannot occur before the ballot is printed. The circuit court's finding that verification occurs on the BMD is clearly wrong. Instead, the voter confirms what he wants the BMD to print. The voter has no way to verify that the BMD printed the ballot accurately. The voter cannot verify the votes on his or her ballot to the strong, specific criteria defined by law and this means that the voting machines do not comply with Arkansas law.

There are other bases for reversal, and they are good ones. The circuit judge expressed a clear bias when he prejudged the issues in a hearing before the first witness had finished testifying. When concerns

about prejudgment were raised, and recusal sought, the circuit judge laughed in the faces of the appellants and expressed that they had a "disconnect" about what was happening in the courtroom. (RT 94). However, the motion was made, and it was denied. It is important to note that even if the circuit court had reached the right result, a right result reached through the foul, ugly, and blinding fog of bias is neither justice nor the appearance of justice. The bias alone necessitates reversal.

Additionally, and deeply concerning, is the circuit court's denial of the appellants' right to a jury trial. The appellants were entitled to a jury trial by law and never waived that right. So sacred is the right to a jury trial that an objection is not required to preserve the issue and it can even be raised for the first time on appeal. *See Carnan and Collins, supra*. Looking at the record, the circuit judge made statements that he would consolidate the issues pursuant to Rule 65. Naturally, the appellants would not expect that to mean that the judge would convert their jury trial demand to a bench trial. If the rule had been followed, evidence at the injunction hearing could be accepted at the final hearing.

The appellants had a right to present their case to a jury. Even if the circuit court had decided that there were questions of law that could

resolve the case, the proper vehicle for that resolution was summary judgment. If summary judgment was the resolution method, the appellants had the right to present their case in briefs. However, counsel for appellants calls this court's attention to the intake of evidence at the injunction hearing. The submission of evidence is improper in a summary judgment setting. *Stephens v. Petrino*, 350 Ark. 268, 274, 86 S.W.3d 836, 840 (2002). The intake of evidence indicates that there was a dispute of facts—facts resolved by the trial judge, and not a jury—before the first witness was finished on the stand.

The appellants did not want, and candidly do not know how, to prepare and litigate the circuit judge's unique method of resolving this case. It was not a jury trial. It was not summary judgment. It was not an injunction hearing. Instead, it was an event where the parties appeared and the trial judge announced the decision that he had already made before they arrived. Tellingly, the circuit court allowed all proffers to come in, and then invited the parties to appeal as if a *de novo* review on the record by this court would suffice in place of their right to a jury trial. While this court is learned and just its appellate review does not suffice for a jury trial, and this court should not allow it to suffice.

REQUESTED RELIEF

1. Reverse the circuit court's finding that the voter can verify her votes on the touchscreen monitor of the BMD before the ballot is printed.

2. Enjoin the use of the ESS ExpressVote ballot marking device as it is currently configured pending the result of a final trial.

3. Reverse the circuit court's denial of the motion to recuse. Additionally, to prevent any delays or impediments that may arise, use this court's superintending power under Amendment 80 to remove Judge Timothy Fox from this case and order the clerk of the circuit court to assign a new circuit court judge. *See Robinson Nursing, supra*.

4. Reverse the denial of the motion for a new trial.

5. Remand the case back to the circuit court with instructions to expedite traditional proceedings which occur in the normal course of litigation including, but not limited to: written discovery; depositions; motions in limine; and a trial by jury.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

By my signature above, I certify pursuant to Ark. R. Civ. P. 5(e) that a copy of the foregoing has been delivered by the below method to the following person or persons:

☐ First Class Mail ☐ Email ☒ AOC/ECF ☐ Hand Delivery

Jordan Broyles	Justin Brascher
Kevin Crass	Mary McCarroll
Chris Madison	Hon. Timothy Fox

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Ark. Sup. Ct. Admin. Order 19 in that there is no unredacted confidential information (no confidential information is contained in the brief), Admin Order No. 21 in that this brief contains no live hyperlinks (hyperlinks, if any, removed by Adobe Acrobat Pro Continuous Release Version 2023.006.20380), and conforms to Rule 4-2(d) because the jurisdictional statement, statement of the case, argument section, conclusion, and requested relief portions of this brief, including the footnotes, contains 8362 words.

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