

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 372 CD 2024

**PA FAIR ELECTIONS, HEATHER HONEY and STACEY REDFIELD,
Petitioners**

v.

**PENNSYLVANIA DEPARTMENT OF STATE and SECRETARY OF THE
COMMONWEALTH AL SCHMIDT; NORTHAMPTON COUNTY,
NORTHAMPTON COUNTY ELECTION COMMISSION BOARD,
NORTHAMPTON COUNTY EXECUTIVE LAMONT MCCLURE, and
NORTHAMPTON COUNTY REGISTRAR CHRISTOPHER COMMINI,
Respondents**

**BRIEF FOR RESPONDENTS PENNSYLVANIA DEPARTMENT OF
STATE AND SECRETARY OF THE COMMONWEALTH AL SCHMIDT**

Appeal from the Final Determination of the Office of General Counsel dated
February 20, 2024, No. 2023-002

Kathleen A. Mullen (ID No. 84604)
Ian B. Everhart (ID No. 318947)
Pennsylvania Department of State
Office of Chief Counsel
306 North Office Building
Harrisburg, PA 17120
(717) 783-0736

*On behalf of Respondents Pennsylvania
Department of State and Secretary of the
Commonwealth*

Date Filed: September 25, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

COUNTER-STATEMENT OF JURISDICTION 3

COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW 4

COUNTER-STATEMENT OF QUESTIONS INVOLVED 5

COUNTER-STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 13

ARGUMENT 15

I. Petitioners Put Forth No Evidence that the XL Fails to Comply with HAVA.
..... 15

 A. Federal Requirements for Electronic Voting Systems. 15

 B. The Secretary’s Authority with respect to Voting Systems. 16

 C. The XL is certified by the EAC and the Secretary and fully comports
 with HAVA requirements..... 18

 D. Logic and Accuracy Testing..... 20

 E. Petitioners Put Forth No Evidence of a HAVA violation. 21

II. A HAVA Title III Complaint Is Not a Proper Vehicle to Challenge the
Certification of a Voting System. 27

III. The Office of General Counsel’s Final Determination Properly Applies the
Law and Should Be Affirmed..... 30

CONCLUSION 34

CERTIFICATION 35

TABLE OF AUTHORITIES

Cases

<i>Am. Civil Rights Union v. Phila. City Comm'rs</i> , 872 F.3d 175 (3d Cir. 2017)	7
<i>Balshy v. Pa. State Police</i> , 988 A.2d 813 (Pa. Commw. Ct. 2010)	4
<i>Banfield v. Cortés</i> , 110 A.3d 155 (Pa. 2015).....	14, 29
<i>In re Hickson</i> , 821 A.2d 1238 (Pa. 2003).....	6
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	7
<i>Stein v. Boockvar</i> , No. 16-6287, 2020 WL 2063470 (E.D. Pa. Apr. 29, 2020)	passim
<i>Stein v. Cortés</i> , 223 F. Supp. 3d 423 (E.D. Pa. 2016).....	7
<i>Van Osdol v. Dep't of Transp.</i> , 909 A.2d 428 (Pa. Commw. Ct. 2006)	4

Statutes

2 U.S.C. § 732

25 P.S. § 2621 16, 17, 28

25 P.S. § 262729

25 P.S. § 264228

25 P.S. § 275132

25 P.S. § 3031.5 16, 17, 28, 29

25 P.S. § 3046.2 3, 6, 9, 28

25 P.S. § 3101.513

42 Pa. Cons. Stat. § 7044

42 Pa. Cons. Stat. § 7633

52 U.S.C. § 20921 13, 16

52 U.S.C. § 20971 13, 16

52 U.S.C. § 2098115

52 U.S.C. § 21081 passim

52 U.S.C. § 210836

52 U.S.C. § 2110116

52 U.S.C. § 2110215

52 U.S.C. § 211026

52 U.S.C. § 211126

52 U.S.C. Ch. 2096

Rules

Fed. R. Civ. P. 25(d)8
Pa. R.A.P. 15513
Pa. R.A.P. 213535
Pa. R.A.P. 7023

Constitutional Provisions

Pa. Const. art. V, § 1532

RETRIEVEDFROMDEMOCRACYDOCKET.COM

INTRODUCTION

All electronic voting systems used in the Commonwealth of Pennsylvania must be certified by the U.S. Election Assistance Commission (“EAC”) and approved for use by the Secretary of the Commonwealth (“Secretary”). The standards utilized by the EAC and the Secretary more than meet the statutory requirements for voting systems set by Section 301 of the Help America Vote Act (“HAVA”). The system at issue here, Election Systems and Software’s (“ES&S”) ExpressVote XL (“XL”), as designed and used by Northampton County in the 2023 Municipal Election, undoubtedly met all of these requirements. Unfortunately, the voting system vendor, who was hired by the county to program ballots for the election, made a labelling error, which resulted in ballot cards printed with the titles of two judicial retention races inverted. While this error caused some confusion, the voting system worked as designed and accurately recorded all votes according to the voters’ intent. All parties agree that better logic and accuracy testing performed prior to the election would have identified the error and prevented this incident. While regrettable, this human error does not indicate any flaw in the voting system at issue.

Notwithstanding, Petitioners have used the improper vehicle of a Title III HAVA administrative complaint in an apparent effort to have the XL decertified and force Northampton County to stop using the voting system it deemed appropriate for

its citizens. Petitioners—unsurprisingly—cite no authority for the proposition that the Title III administrative complaint process can be used to commandeer a county’s choice in voting systems and to make an end run around the Secretary’s authority, as laid out in the Election Code with respect to approval of electronic voting systems in the Commonwealth. Petitioners fail to present any evidence of any Title III violation. The Office of General Counsel’s denial of this complaint is fully consistent with the law. As such, it should be affirmed.

RETRIEVEDFROMDEMOCRACYDOCKET.COM

COUNTER-STATEMENT OF JURISDICTION

Judicial review of proceedings under 25 P.S. § 3046.2 are “agency determination[s] subject to appellate review pursuant to 42 Pa.C.S. § 763.” Accordingly, this Court has “exclusive jurisdiction” of this appeal. 42 Pa.C.S. § 763(a); *see also* Pa. R.A.P. 702(a) and 1551.

RETRIEVEDFROMDEMOCRACYDOCKET.COM

COUNTER-STATEMENT OF SCOPE AND STANDARD OF REVIEW

In the absence of “a specific scope of review from the General Assembly,” the Court applies “the standard one for an appeal from an administrative agency:” whether constitutional rights have been violated, whether an error of law has been committed, or whether findings of fact are supported by substantial evidence. *Van Osdol v. Dep’t of Transp.*, 909 A.2d 428, 430 n.3 (Pa. Commw. Ct. 2006) (citing 42 Pa.C.S. § 704).

The Court’s standard of review requires affirmation of the order under appeal, “unless it shall find the adjudication is in violation of the constitutional rights of the appellants, or is not in accordance with law, or the statutory provisions controlling practice and procedure of Commonwealth agencies have been violated in the proceedings before the agency, or any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence.” *Balshy v. Pa. State Police*, 988 A.2d 813, 825 (Pa. Commw. Ct. 2010) (citing 42 Pa.C.S. § 704).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. Whether the Office of General Counsel’s dismissal of Petitioners’ HAVA Complaint was correct as a matter of law and supported by substantial evidence, in that it found Complainants had failed to show the Department or Northampton County had violated Title III of HAVA?

Agency Answer: Not answered by OGC.

Suggested Answer: Yes.

- II. Whether there is any basis to decertify an electronic voting system in Pennsylvania through the HAVA complaint process set up by 25 P.S. § 3046.2?

Agency Answer: Not answered by OGC.

Suggested Answer: No.

RETRIEVEDFROMDEMOCRACYDOCKET.COM

COUNTER-STATEMENT OF THE CASE

This proceeding comes before the Court on the Petition for Review of the Final Determination (“F.D.”) of the Governor’s Office of General Counsel (“OGC”) concluding that neither the Pennsylvania Department of State (“Department”), nor the Secretary, nor Northampton County violated Title III of HAVA, 52 U.S.C. §§ 21081–21102.

HAVA requires states receiving certain federal grants to set up an administrative complaint procedure for those who believe they are aggrieved by a violation of Title III. 52 U.S.C. § 21112(a)(2)(B). On November 22, 2023, Petitioners PA Fair Elections and Stacey Redfield (“Petitioners”)¹ submitted a Complaint to the Department pursuant to Section 1206.2 of the Pennsylvania Election Code, 25 P.S. § 3046.2, which establishes Pennsylvania’s HAVA administrative complaint process.

PA Fair Elections describes itself as an unincorporated “association of people across” Pennsylvania. R.207a.² Petitioners’ Complaint alleged that the XL does not

¹ Heather Honey has never been an individual party to this case. She was not a party to the initial HAVA complaint submitted to the Department; rather, she was identified as the contact in whose care materials for PA Fair Elections ought to be sent. R.14a. She retained that status through the issuance of the Final Determination. *See, e.g.*, F.D. at 2 (identifying Honey as the representative of PA Fair Elections).

² Neither PA Fair Elections nor Redfield have made any allegations of injury that would support ordinary standing pursuant to Pennsylvania law or Article III standing under federal law. *See generally In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003) (“[I]t is not sufficient for the person

comply with HAVA’s mandate to “produce a voter verified auditable paper record that accurately reflects the selections of the voter.” R.4a ¶ 4 (citing 52 U.S.C. § 21081(a)(2)); R.13a–14a. Petitioners brought the complaint against the Department and Secretary, responsible for certifying all voting systems for use in the Commonwealth, as well as Northampton County, one of three counties in the Commonwealth which uses the XL.

The XL is a hybrid device consisting of a large touchscreen for marking one’s ballot, a printer which prints a ballot summary card, a viewing window which allows the voter to review his or her ballot summary card, and a ballot box where the ballot summary cards are deposited once verified by the voter as correct. R.69a–70a, 89a; *see also Stein v. Boockvar*, No. 16-6287, 2020 WL 2063470, at *13–16 (E.D. Pa. Apr. 29, 2020) (“*Stein*”).³ Prior to printing the ballot summary card, a summary of

claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575–76 (1992) (holding generalized grievance insufficient to establish standing). Nor is there any private right of action under HAVA. *Am. Civil Rights Union v. Phila. City Comm’rs*, 872 F.3d 175, 181 (3d Cir. 2017).

³ Three documents from the same case are cited herein; in the interest of clarity, they are set forth below:

- *Stein v. Cortés*, 223 F. Supp. 3d 423 (E.D. Pa. 2016) (reported opinion denying plaintiffs’ motion for a preliminary injunction),
- Settlement Agreement and Release, Ex. A to Notice of Settlement, *Stein v. Boockvar*, No. 16-6287 (E.D. Pa. filed Nov. 28, 2018) (Doc. 108) (the parties’ settlement agreement), and
- Mem. Op., *Stein v. Boockvar*, No. 16-6287, 2020 WL 2063470 (E.D. Pa. Apr. 29, 2020) (unreported opinion denying plaintiffs’ motion to enforce settlement agreement).

the voter's selections on the touchscreen is presented to the voter so that he or she may verify and change his or her selections. R.86a. The XL saves the votes from the touchscreen in its temporary memory, compares the voter's selections with the barcode information denoting the voter's selections and if the information is not consistent will eject the card and display an error on the screen. *Stein* at *7. For each ballot that is cast, the XL scans the barcodes and the vote is then recorded. R.342a, *see also Stein* at *7 (“For each ballot cast, the XL scans the barcodes, recording the votes in its permanent memory, and deposits the card into its ballot box.”).

Petitioners' complaint stemmed from the November 2023 Municipal Election, in which a clerical labelling error by the vendor used by Northampton County to program the ballot caused the titles for the contests for the two judicial retention races for judges of the Superior Court to be reversed. R.74a. Essentially, as a result of this human error with respect to the ballot contest labels for these two races only, if a voter selected “no” for the retention of one judge and “yes” for the other, the printed ballot summary card appeared to show the votes were reversed when in

They were all part of one suit which named two successive Secretaries of the Commonwealth, who were automatically substituted pursuant to Fed. R. Civ. P. 25(d). Citations to “*Stein*” without further elaboration are citations to the 2020 unreported opinion.

This extensive description of the operation of the XL in *Stein* was based on a full evidentiary hearing, held February 18–21, 2020, during which Judge Paul Diamond examined the actual machines used in the election.

actuality it was only the labels for the retention races that had been reversed.⁴ R.74a. Critically, the voting system did not reverse any votes and this labelling issue, attributable to human error, did not impact the voters' selections or the tabulated results for the two judicial races in question. R.6a ¶ 14, R.19a–20a. Further, the county appropriately petitioned the Northampton County Court of Common Pleas on the morning of the election in an effort to ameliorate any voter confusion as a result of this issue. *Petition for Relief in the General Election of 2023, In re General Election 2023*, No. C-48-CV-2023-9141 (Northampton Cnty. Pa. Ct. Com. Pl. filed Nov. 7, 2023).

Because the Complaint alleged a HAVA violation against both the Department and Northampton County, the Department forwarded it to OGC for adjudication pursuant to 25 P.S. § 3046.2(c)(2) on November 28, 2023. F.D. at 1.

The Department submitted a Response on December 12, 2023, which explained that human mistakes caused the error and that the voting systems at issue had performed correctly. R.15a–22a. Further, the Department explained that the XL's features were fully consistent with HAVA and properly certified by the EAC and the Secretary.

⁴ If a voter voted “yes” in both races, or “no” in both, this labelling error would not have been apparent. This issue is unique to retention races where the vote is not the name of a candidate.

Northampton County, the Northampton County Election Commission Board, Northampton County Executive Lamont McClure, and Registrar Christopher Commini (“Northampton”) also filed a Response on December 15, 2023. R.23a–27a. Northampton explained the error related to a human programming issue involving a contest title label and that the voter’s selection was properly recorded. R.24a–25a. Northampton pledged to implement changes to its pre-election testing protocol, known as logic and accuracy (“L&A”) testing, to ensure that such an error does not impact any future elections. R75a.

The parties submitted pre-hearing memoranda of law on February 2, 2024. R.29a–68a. At Petitioners’ request, OGC convened an informal hearing before Hearing Examiner Stephen R. Kovatis on February 6, 2024. That hearing lasted over five hours during which Petitioners were permitted to put on multiple witnesses and present several exhibits without limitation as would normally be recognized by the Pennsylvania Rules of Evidence. R.219a–220a, 246a, 298a. Petitioners’ witnesses included a purported expert witness⁵ who made a key admission that any tabulation error would have been impossible because the XL tabulates voters’ selections as summarized in the barcode. R.342a. This witness also made clear that he doesn’t trust any electronic voting system and believes all votes should be hand-

⁵ Mr. Parikh was provided wide latitude in his testimony despite Petitioners’ failure to qualify him as an expert witness pursuant to Pa.R.E. 702, and his lack of any direct knowledge about what occurred in Northampton County on Election Day in 2023. R.289a-292a.

counted. R.344a–345a.⁶ He further admitted that appropriate L&A testing would have identified the issue. R.341a.

During the hearing, Petitioners presented a video from an Election Day press conference where Linda Bennet, a representative of Northampton’s vendor ES&S stated that this incident “was human error” and that “[s]omeone from our team inadvertently put the wrong name” on the respective judicial retention contest labels. R.11a, 361a–363a. Ms. Bennet further admitted that this mistake was missed during L&A testing that takes place before each election and should have been caught. R.11a.

All parties were then presented with the opportunity to provide post-hearing briefing. On November 21, 2023, OGC issued its Final Determination and Order,

⁶ Petitioners’ witness Clay Parikh testified as follows:

[Q.] If it were up to you, no jurisdiction. If you were in charge, no jurisdiction would use electronic voting systems, isn’t that right?

A. Yes, ma’am. If I had my way, yes.

Q. And you believe all the votes should be - ?

A. That’s up to the individual states and counties, depending on how the state is structured.

Q. You believe it’s better for all paper ballots to be counted by hand?

A. Yes, ma’am. And if somebody who -.

Q. Just one other question. On November 7, 2023, you tweeted that Pennsylvania had to shut down voting systems, and you said, hashtag, no machines, hand count paper ballots. Is that accurate?

A. Yes, ma’am. Something to that effect.

R.344a–345a. Of course, failing to provide any means of voting accessible by disabled citizens would violate HAVA. *See* 52 U.S.C. § 21081(a)(3) (providing for the accessibility of voting systems).

finding that Petitioners failed to show that either the Department or Northampton committed any violation of HAVA and dismissing the Complaint. F.D. at 1–16. Specifically, OGC concluded that the XL met all standards mandated by HAVA. OGC further found that HAVA does not require L&A testing. Accordingly, OGC dismissed the Complaint in the Final Determination and Order issued February 20, 2024.

This appeal followed, based on the Petition for Review filed on March 21, 2024.

RETRIEVEDFROMDEMOCRACYDOCKET.COM

SUMMARY OF ARGUMENT

The only issue in this matter is whether a violation of HAVA occurred in Northampton County in the 2023 Municipal Election. The OGC Hearing Examiner found no evidence of such a violation. That decision is fully correct as a matter of law and supported by substantial evidence. It should be affirmed.

HAVA establishes certain requirements for electronic voting systems. Such systems must provide for “private and independent” verification of a voter’s selection, and an opportunity to change or correct any errors before casting, as well as a “permanent paper record” to be used in audits or recounts. 52 U.S.C. § 21081(a)(1)(A)(i), (ii), (2)(A), (B)(i), (ii). HAVA also established the EAC, which is charged with the function of accrediting testing laboratories to certify voting systems for use in Federal Elections. 52 U.S.C. §§ 20921, 20971. The Pennsylvania Election Code charges the Secretary of the Commonwealth with the duty to examine electronic voting systems’ compliance with federal and other standards. The XL has repeatedly been held to meet these standards by the EAC and been certified for use in Pennsylvania.

This extensive testing makes clear that the XL complies with HAVA requirements. The clerical labelling error that occurred in connection with two judicial retention races in Northampton County in the 2023 Municipal Election does nothing to undermine the certification of this voting system. To the extent a Title

III HAVA violation could ever arise from a municipal election, none did here. The error had nothing to do with the functioning of the voting system, which performed consistent with all federally mandated requirements. Petitioners provide no evidence that any votes were improperly recorded. More fulsome L&A testing, which will prevent any similar errors from occurring again, has already been directed by the Secretary and implemented by Northampton.

Petitioners have attempted to abuse the Title III complaint process by seeking to decertify an entire voting system. They cite no authority to do so and would have this Court ignore both the Election Code and the dictates of our Supreme Court, which has recognized the deference accorded to the Secretary with respect certification of electronic voting systems in *Banfield v. Cortés*, 110 A.3d 155 (Pa. 2015). Petitioners' baseless claims simply rehash criticisms of the XL which were thoroughly rejected by a Federal court in *Stein*.

The OGC Hearing Examiner issued a Final Determination dismissing Petitioners' claims. That decision was based upon substantial evidence. It is fully correct as a matter of law and should be affirmed.

ARGUMENT

I. Petitioners Put Forth No Evidence that the XL Fails to Comply with HAVA.

A. Federal Requirements for Electronic Voting Systems.

HAVA was enacted in the wake of the 2000 Presidential Election to ensure eligible voters would not be disenfranchised, and that voting and election administration systems “will be nondiscriminatory and afford each eligible and registered voter an equal opportunity to vote and have that vote counted.” 52 U.S.C. § 20981. Title III of HAVA, consisting of 52 U.S.C. §§ 21081–21102, created new mandatory minimum standards for states in several key areas of election administration, including as pertinent to the issues here, requirements for “voting system[s] used in an election for Federal office.” 52 U.S.C. § 21081(a).

HAVA requires that the voting system provide:

1. A private and independent verification of “the votes selected by the voter on the ballot before the ballot is cast and counted;”
2. A private and independent opportunity “to change the ballot or correct any error before the ballot is cast and counted;”
3. An audit capacity, including a “permanent paper record,” to be the official record for any recount.

52 U.S.C. § 21081(a)(1)(A)(i), (ii), (2)(A), (B)(i), (ii).

HAVA also established the EAC and tasked it with accrediting testing laboratories and certifying voting systems for use in Federal elections. 52 U.S.C. §§ 20921, 20971. Part of the EAC’s mandate includes adopting standards for the testing and certification of electronic voting systems (“EVS”). *See id.* § 21101. Accordingly, the EAC adopted Voluntary Voting System Guidelines (“VVSG”) version 1.0 (“VVSG 1.0”).⁷ *See* Election Assistance Comm’n, Voluntary Voting System Guidelines Version 1.0 (2005), vols. I and II, <https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines>. The VVSG 1.0 incorporates all the relevant voting system requirements referenced by Section 21081(a) of HAVA. VVSG 1.0, Vol. I §§ 2.1.5 (audit capacity), 3.1 (voter verifiability, change or correction of ballot), and 4.1.1 (error rates).

B. The Secretary’s Authority with respect to Voting Systems.

The Election Code charges the Secretary with the duty to examine and approve voting systems to be used in all elections that take place in Pennsylvania. 25 P.S. § 2621(b). All such voting systems must be certified by the EAC. 25 P.S. § 3031.5(a). It is up to the Secretary to examine voting systems and to determine whether the system “can be safely used by voters at elections as provided in this

⁷ VVSG version 1.0 has since been superseded by VVSG versions 1.1 and 2.0. However, the EAC determined that those later versions were not applicable to the system at issue here.

act and meets all of the requirements . . . set forth” in the Election Code. 25 P.S. §§ 2621(b), 3031.5(b)).

In accordance with his authority under the Election Code to examine voting systems, the Secretary issued a directive governing such examinations. The requirements of this directive more than meet HAVA’s minimum standards. Specifically, Section 4.2.8 of Attachment E of that directive clearly requires that the voting system under test must "provide[] a mechanism for the voter to validate the contents of the ballot before it is cast irrespective of the mechanism used for casting the vote,” and “[t]he system must support a voter verified paper ballot or voter verifiable paper record which can be used by election officials to verify the election results.” Sec’y of the Commonwealth, Directive Concerning the Conduct of Electronic Voting System Examinations attach. E, 2 (April 2, 2018), https://www.dos.pa.gov/VotingElections/Documents/Voting%20Systems/Directives/Directive%20to%20Vendors_2018_Apr%202%20Final.pdf. Together, these requirements go above and beyond those found in HAVA, which requires only that the EVS permit verification of the voter’s choices and that it produces, on demand, a permanent paper record with a manual audit capacity. *See* 52 U.S.C. § 21081.

C. The XL is certified by the EAC and the Secretary and fully comports with HAVA requirements.

The EAC first certified the XL as part of the ES&S 6021 voting system in September 2018. R.370a.⁸ The Secretary then approved the XL for use in the Commonwealth on November 30, 2018. After a request for reexamination made pursuant to the Pennsylvania Election Code, the XL was then recertified by the Secretary in September of 2019. The EVS6300, simply an upgraded version of the EVS Express Vote system containing the XL, was certified by the EAC on November 17, 2022. Election Assistance Comm'n, Certificate of Conformance (Nov. 17, 2022). The EAC certification attests that the system conforms with the VVSG 1.0. Because the VVSG 1.0 standards incorporate all of HAVA's statutory voting system requirements, the XL has already been deemed to be compliant with HAVA. *See also Stein* at *8 (recognizing the XL meets federal standards).

The Secretary subsequently approved the EVS6300 on January 13, 2023. R.82a–180a. The Secretary's certification report confirms that all of the voting system requirements contained in Section 21081(a) of HAVA are met. Specifically:

Private and independent verification of the ballot. “The ballot is printed, reviewed by the voter, tabulated (if the voter confirms her intention to cast that

⁸ The EAC certification was Northampton County's Exhibit A at the hearing, introduced into evidence at R.370a under the description “First Certification.” While this document was not included in the reproduced record, it is found in the certified record at Exhibit 15.c.i (found in Part 8 of the voluminous certified record).

ballot), and deposited into a removable, secure card container” R.86a, 106a–108a ¶ A, 110a ¶ O, 111a–112a ¶ S.

Opportunity to change before casting. “The tests demonstrated that the [XL] allowed changing the selections until the voter decides to print or cast the ballot. The voter can either decide to affirm their intent by casting the ballot, or they can spoil the ballot and fill out another ballot.” R.100a–101a, 110a ¶ O, 111a–112a ¶ S.

Permanent paper record: “The EVS 6300 is a paper-based system and paper ballots provide a permanent physical record of each vote cast The ExpressVote XL create[s] machine-marked paper ballots based on a voter’s selections” R.99a.

Error rates: “The system accuracy testing completed during EAC certification testing provided confirmation of system accuracy” R.97a.

Accessibility: The Secretary’s certification report reviews the accessibility testing protocols and incorporates accessibility reports from EVS 6100 and EVS 6021; accessibility testing addressed voters with different disabilities including visual limitations, as contemplated in HAVA. R.104a, 139a–174a.

The Secretary’s certification also included various conditions of use, including that jurisdictions implementing the XL carry out full L&A testing on all components used on election day. R.107a–108a.

D. Logic and Accuracy Testing.

As an additional safeguard to ensure that voting systems properly perform as intended, the Secretary requires every county to undertake L&A testing prior to each election. Significantly, HAVA does not require this testing. But through his authority under Section 1105-A(a) of the Election Code, 25 P.S. § 3031.5(a), the Secretary has issued various directives requiring county boards of elections to conduct testing of the system before every election. Pertinent to the 2023 Municipal Election at issue, the Secretary issued Directive 4 of 2023 entitled “Directive on Logic & Accuracy Testing” (the “L&A Directive”). Sec’y of the Commonwealth, Directive on Logic & Accuracy Testing (September 25, 2023), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2023-Directive-Logic-Accuracy-Testing.pdf>.

This directive requires that “all counties in Pennsylvania must conduct pre-election logic and accuracy testing (L&A testing) prior to every election (primary, general, special, or municipal) that is conducted in the jurisdiction.” The directive goes on to explain what L&A testing is. Essentially, “L&A testing is a series of pre-election steps intended to ensure that ballots, scanners, ballot marking devices, and all components of a county’s certified voting system are properly configured and in good working order prior to being used in an election. These steps must include every procedure that counties will use in the actual election.”

As stated, all voting systems used in Pennsylvania must be certified by the EAC and, by definition, are HAVA-compliant. L&A testing has been mandated by the Secretary to ensure that those already certified and HAVA-compliant voting systems work as intended on election day. An issue with respect to the improper label configuration of a race does not render a voting system non-compliant with HAVA.

E. Petitioners Put Forth No Evidence of a HAVA violation.

Petitioners have shown no evidence that any HAVA violation took place in Northampton County during the November 7, 2023, Municipal Election. First, Petitioners' claims are doomed by a clear jurisdictional hurdle. HAVA's requirements only apply to voting systems used in elections for Federal Office. *See* 52 U.S.C. § 21081(a). While it is true that Pennsylvania has unified voting such that EVS are used both for Federal and municipal elections, that does not mean that Title III jurisdiction can be created to adjudicate a complaint under HAVA for alleged violations pursuant to Section 21112(a). Given that the 2023 Municipal Election was not covered by Title III, the Hearing Examiner correctly found that he lacked jurisdiction over any issue with respect to that election.⁹ F.D. at 8–9.

⁹ Because Petitioners' true intent in bringing this action was really to seek to improperly decertify the XL, they made allegations that its continued use in future federal elections would be a HAVA violation. As a result, the Hearing Examiner did proceed to the merits. F.D. at 9.

In any event, even if the Court should overlook this clear jurisdictional bar, Petitioners provide no evidence that any HAVA violation occurred. While Petitioners make spurious claims of votes being “flipped,” what they really mean, as acknowledged by Ms. Redfield’s own testimony, was that the labels of the two retention races were inverted due to a human error. Pet’rs’ Br. at 10, R.257a. Petitioners provide no evidence of any tabulation errors attributable to the XL nor could they. The votes, the actual “yes” and “no”, were never impacted. R.182a, 183a. Indeed, Petitioners themselves acknowledge that a tabulation error would have been impossible given their witness Mr. Parikh’s own admission that the XL tabulates voters’ selections as summarized in the barcode. R.342a.

As the record reflects, Northampton did conduct L&A testing prior to the 2023 Municipal Election. As Northampton’s vendor admitted, the error should have been caught. This failure does not create a violation of HAVA. Nowhere does HAVA require election authorities to conduct L&A testing. Rather, as explained above, L&A testing is mandated by the Secretary through his authority under Pennsylvania law.

Petitioners’ attempts to resurrect failed arguments from previous litigation involving an attack of the XL are also unavailing. Pet’rs’ Br. at 23–32 (citing *Stein* at *1–18).

Petitioners make much of the arguments citing general criticisms of the XL that a federal district court has already soundly rejected. As background, in *Stein v. Cortés*, failed presidential candidate Jill Stein made baseless hacking allegations seeking to disenfranchise millions of voters in the 2016 presidential election. Her attempt to obtain injunctive relief was unsuccessful. *Stein v. Cortés*, 223 F. Supp. 3d 423, 442–43 (E.D. Pa. 2016). The Secretary ultimately settled that suit in 2018 as part of an independent decision the Department of State made to replace Pennsylvania’s direct recording electronic voting machines with more modern systems, like the XL, that include a paper record.

Nearly a year later, in November of 2019, Stein moved to enforce the settlement agreement in an attempt to bar the use of the XL. After a full evidentiary hearing, the Court conclusively rejected allegations, similar to the ones Petitioners make here, that the XL was unreliable as “baseless and irrational.” *Stein* at *1. One provision in the settlement in the *Stein* case involved a requirement that a voting system “produce a voter-verifiable record of each vote.” Settlement Agreement and Release ¶ 2(b), Ex. A to Notice of Settlement, *Stein v. Cortés*, No. 16-6287, (E.D. Pa. filed Nov. 28, 2018) (Doc. 108) (cited in Pet’rs’ Br. at 30). While the case centered on whether this private settlement agreement was violated, that Court rejected every one of the claims that Petitioners now make against the XL. *See id.* at *11–18 (rejecting claims, inter alia, that the XL was a DRE; that the XL does not

produce a voter-verifiable record; that a mismatch between the barcode and the text could ever result in a recorded vote; and that the XL cannot support a robust pre-certification audit).

Petitioners suggest that the errors in the 2023 Northampton County retention election are an example of the type of mismatch which Judge Diamond determined was impossible. Pet'rs' Br. at 31–32 (citing *Stein* at *11). They are simply wrong. The testimony before Judge Diamond in *Stein* concerned the potential for a hypothetical mismatch printed on the ballot card: “cleartext” printed to be read by a human, and the information embedded in the barcode, readable only by a computer. *Stein* at *11. Petitioners have put forth no evidence that the barcodes, which they admit is what is used to tabulate the votes, did not reflect Northampton County voters' intent. Further, the voters could easily see their intended selections on the XL screen. While the summary card did have the ballot labels of the retention contests reversed, this was attributable to the acknowledged ballot contest labelling error by the vendor that should have been identified in L&A testing.¹⁰ R.341a. As Petitioners further admit, the vote is recorded through the barcode. Pet'rs' Br. at 10, R.342a. The mismatches plaintiffs in *Stein* claimed could occur were those resulting from a speculative installation of “extremely sophisticated” malware by an unknown

¹⁰ Judge Diamond's opinion includes an image of a ballot summary card used by the XL. *Stein* at *8. The sample included for illustrative purposes there shows the way in which retention races are labeled. The vote is the “yes” or “no”, not the name of the race.

third party, which would intercept the data submitted by the voter to display the cleartext reflecting the voter's intent, but furtively print a barcode representing a different selection. *Stein* at *10–13. Petitioners provide absolutely no evidence that anything of the sort happened here and indeed there is none. And their assertion that the XL is “capable of being erroneously programed” to change a vote, *see* Pet'rs' Br. at 26, has no evidentiary basis and is just as speculative now as it was when Judge Diamond found that there was no evidence to support the “daft theor[y]” that the XL could ever be “hacked.” *Compare* Pet'rs' Br. at 26 *with* *Stein* at *10–13. Petitioners admit this was not an issue of illicit hacking, and cite only the explanations offered by Northampton and ES&S officials about the labelling error (rather than claiming interference from malign actors). Pet'rs' Br. at 11–12. The ballot labelling issue that occurred in Northampton has nothing to do with the integrity of the XL.

Instead, as all parties have acknowledged, R.13a ¶ 39, 75a ¶ 14, the issue would have been avoided by more robust L&A testing that would have identified the labelling error well in advance of Election Day. Northampton County specifically noted that better L&A testing would have identified the issue and committed to changes in the L&A processes to ensure that this error does not recur. R75a ¶ 14. Petitioners admit this and the very evidence Petitioners presented showed this. Pet'rs' Br. 11–12; R.11a, 341a, 362–363a.

In the wake of this incident, the Department issued a new directive on L&A testing which, among other things, includes a requirement to test ballot questions (including judicial retention votes) with multiple distinct outcomes (as opposed to the same result for all ballot questions). Directive on Logic & Accuracy Testing at 6, Pa. Dep't of State (Mar. 7, 2024), available at <https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2024-Directive-on-Logic-Accuracy-Testing-3.0.pdf> (“For example, where a ballot contains two ballot questions, each with ‘Yes’ and ‘No’ choices, the county should prepare the test deck such that one ballot question receives two ‘Yes’ votes and one ‘No’ vote, and the other ballot question receives one ‘Yes’ vote and two ‘No’ votes.”). Following implementation of this testing protocol, any similar future issue would quickly reveal itself during L&A testing.

The remainder of Petitioners’ picayune attacks at the Hearing Examiner’s findings have neither basis nor relevance. For instance, Petitioners incorrectly claim without any citation that the Hearing Examiner referenced the wrong version of the XL. Pet’rs’ Br. at 18. That is incorrect and unsupported. In any event, the 6021 and 6300 simply reflect software upgrades with no modification with respect to the working of the XL about which they complain. Petitioners admit this. *Id.* And critically, the EAC has certified both.

Petitioners also make a vague reference to HAVA error rate standards, Pet.'s Br. at 16, without having provided any evidence that the XL made any errors in tabulating ballots in Northampton. That is because there is none. Petitioners additionally claim that the XL does not provide a voter verified paper audit trail ("VVPAT"), showing their fundamental ignorance regarding the XL. Pet'rs' Br. at 18. VVPATs are relevant to direct recording electronic voting machines ("DREs"). The XL is not a DRE because it does not directly record a voter's selection into the EVS's memory from the voter's input on the screen. Rather, it tabulates votes by reading the bar code on the summary card. *See* R.99a; *Stein* at *11.

Unfortunately, no matter the amount of preparation by dedicated elections officials, errors sometimes happen. The labelling error that occurred in Northampton during the 2023 Municipal Election was not the result of any system flaw of the XL. Petitioners provide no evidence of any HAVA violation.

II. A HAVA Title III Complaint Is Not a Proper Vehicle to Challenge the Certification of a Voting System.

As stated above, Petitioners have failed to allege any violation of Title III of HAVA on the part of either the Secretary or Northampton County. Yet even if they had, the remedies they seek cannot be achieved through this proceeding. Tellingly, Petitioners have not made their remedies clear to this Court. *See* Pet'rs' Br. at 32 (seeking that "this Court reverse the decision and order of the OGC and issue a

finding, order, or determination with other relief as this Court finds appropriate.”). However, they previously requested that the Department be ordered to decertify the XL for future elections. R.13a–14a ¶¶ 40–42, 49a.

Petitioners likewise mount a frontal attack on the Secretary’s authority to certify EVS, and the county boards of elections’ powers to select and procure their choice of EVS from among the certified options. R.14a ¶ 43–45 (specifically requesting, *inter alia*, that Northampton County be ordered not to use the XL). Petitioners unsurprisingly cite no authority for either of these remedies and their failure to address them on appeal is a tacit acknowledgement of their impropriety.

Nowhere does the Election Code give the Office of General Counsel or this Court the ability to decertify a voting system pursuant to the Title III administrative complaint process contemplated by Section 1206.2.¹¹ 25 P.S. § 3046.2.

Rather, the Election Code charges the Secretary with the duty to “examine and reexamine voting machines, and to approve or disapprove them for use” in the Commonwealth. 25 P.S. § 2621(b); *see also* 25 P.S. § 3031.5(b). And, in turn, each county board of elections is entitled to select the type of system of its choice for use within its county. 25 P.S. § 2642(c). *See generally Banfield v. Cortés*, 110

¹¹ While the Title III complaint process outlined in the Election Code does contemplate that OGC may issue a “final determination and remedial plan” regarding an alleged violation of HAVA, the scope of the issues to be resolved through this process is set in the opening subsection, which limits them to “complaint regarding the administration of Title III of” HAVA. 25 P.S. § 3046.2(a), (c)(5). The language of this section nowhere suggests that the dispositions available to OGC might include decertification of an individual or class of electronic voting systems.

A.3d 155, 159 (Pa. 2015) (providing overview of framework of voting system certification under Election Code).

Decertification of voting systems is wholly within the Secretary's authority. The Election Code does contain a procedure under which any ten registered voters may request that the Department reexamine any previously-certified voting system. 25 P.S. § 3031.5(a). Yet even in such a proceeding, great deference is accorded to the Secretary to whom the Legislature has specifically delegated the question of whether an EVS has adequate security measures against tampering. *Banfield*, 110 A.3d at 174.¹²

As the Pennsylvania Supreme Court recognized in *Banfield* in rejecting an attempt to decertify all DREs “the mere possibility of error cannot bar the use of a voting system as ‘the unfortunate reality is that the possibility of electoral fraud can never be completely eliminated, no matter which type of ballot is used.’” *Banfield*, 110 A.3d at 174 (internal citations omitted). Even paper ballots can be susceptible to manipulation by bad actors. *See id.* (“As all voting systems are imperfect and not immune from tampering, the Election Code cannot be read to impose a requirement that cannot be achieved.”).

¹² Decertification en masse of several voting systems is specifically regulated via a specific statutory process involving notification by the Department to the General Assembly, with a mandated delay before any such disapproval could take effect. 25 P.S. § 2627.

Petitioners have provided no evidence of any such tampering. But even more, Petitioners have failed to avail themselves of the appropriate vehicle to challenge concerns with an electronic voting system. Their attempt to do an end-run around the Election Code's process with respect to EVS through a HAVA administrative complaint must be denied. Petitioners would have the Court believe that all of the detailed prescriptions for the Secretary's testing and approval of electronic voting systems, and the counties' powers to select and purchase them, are subject to collateral attack through the Title III complaint process. They offer absolutely no authority for such an astounding position. OGC's Final Determination properly recognized that requests such as Petitioners—for control over the certification and procurement of voting systems—fall well outside the proper scope of a Title III complaint. This Court should reject this grossly overbroad reading of the scope of the Title III complaint process laid out by the Election Code.

III. The Office of General Counsel's Final Determination Properly Applies the Law and Should Be Affirmed.

After a full hearing in which Petitioners were generously permitted to present all of the evidence they sought, the OGC hearing examiner dismissed the complaint, finding Petitioners failed to show the Department violated HAVA. This determination contains findings of fact ("F.F.") fully supported by the record and conclusions of law fully consistent with HAVA. F.D. at 1–16, F.F. 1–15. These

findings support the Final Determination’s conclusions that neither the Department nor Northampton County violated HAVA.

In one of these findings, the hearing examiner specifically concluded the XL is certified subject to the conditions set forth in Section IV of the Department’s Certification Report. F.F. 7 (citing R.106a–118a). The hearing examiner found that the XL allows the voter to review his or her selections, and if desired, change them before final casting of the ballot. F.F. 8(d), (e).

The examiner further found that the error which gave rise to this proceeding was an “error ‘during the programming of the election by the voting system manufacturer.’ This error inverted the names of . . . judges up for retention on the printed paper record, but it did not affect the proper recording of the voter’s intended selection in the computer’s system.” F.F. 9, 10 (citing R.74a ¶¶ 7–9).

Similarly, the conclusions of law (“C.L.”) in the Final Determination fully outline HAVA and the requirements of Title III. F.D. at 5–8, C.L. 1–15. Significantly, the hearing examiner correctly recognized:

- That there was no jurisdiction to consider particular issues relating to the 2023 Municipal Election because Title III only governs voting systems used in Federal elections, C.L. 8;
- That HAVA set “minimum requirements” for election technology to be used by each state, but leaves the “specific choices” as to how to comply with these

requirements “to the discretion of each state,” C.L. 4, 5 (citing 52 U.S.C. § 21085);

- The Title III complaint process concerns only voting systems to be used in Federal elections, as opposed to elections for state office (such as the 2023 election for state and local office at issue herein),¹³ C.L. 8 (citing 52 U.S.C. § 21081(a));
- The XL satisfies HAVA requirements, including:
 - to afford the voter the ability “to privately and independently verify his or her vote via a printed, readable paper card before their vote is cast,” C.L. 10 (citing 52 U.S.C. § 21081(a)(1)(A)(i));
 - to “permit[] the voter to change the ballot or correct any error before the ballot is cast and counted,” C.L. 11 (citing 52 U.S.C. § 21081(a)(1)(A)(ii);
 - to “produce[] a permanent paper record with a manual audit capacity,” C.L. 12 (citing 52 U.S.C. § 21081(a)(2)); and
 - that the XL meets applicable standards for voters with visual disabilities, C.L. 14 (citing 52 U.S.C. 21081(a)(3)).

¹³ It bears noting that the particular error that occurred herein—mislabeling of the judicial retention election—would never happen in a federal election. Retention elections are peculiar to the state judiciary and not a feature of any federal office (or non-judicial state or local office). Pa. Const. art. V, § 15(b). Moreover, retention elections occur during municipal (odd-year) elections, *id.*, whereas federal offices are on the ballot at general (even-year) elections; except for a stray special election for Congress, no federal candidate would ever share the ballot with a retention election. 2 U.S.C. § 7, 25 P.S. § 2751; *contra* Pet’rs’ Br. at 32.

While the Final Determination rightly notes that the hearing examiner lacked jurisdiction to address the 2023 Municipal Election, in that it was a municipal election for state and local office, F.D. at 8–9, it also fully reviewed HAVA Title III standards for voting systems and found Petitioners’ claims meritless. While Petitioners recklessly allege that the programming error violates various provisions of HAVA, the hearing examiner’s careful and thorough examination correctly concludes the opposite. F.D. at 10–16.

The Office of General Counsel’s determination is consistent with the law, fully supported by substantial evidence, and should be affirmed in full.

* * * * *

The issue affecting two judicial retention races in the 2023 Municipal Election in Northampton County had its sole genesis in the erroneous labelling of the contest name for that race—not in the design, implementation, or certification of the XL. Indeed, as the Pennsylvania Supreme Court recognized in *Banfield*, no voting system could ever withstand scrutiny if the standard is to make it incapable of being susceptible to human error.

Both the Secretary and the County have employed changes to the L&A testing process so that this error never happens again. Errors on the part of Northampton County’s contractor are deeply regrettable, but do not give rise to a violation of HAVA, or form grounds to decertify the XL. A procedural mechanism to request

reexamination (and possible decertification) of an EVS exists in the Election Code, but that is not the procedure Petitioners have invoked herein. Petitioners offer no authority to support their audacious request that they can usurp the authority of the Secretary and the counties of the commonwealth to dictate the voting system a county can use. Their attempt should be rejected.

CONCLUSION

No violation of HAVA occurred. The Final Determination of the Office of General Counsel dismissing Petitioners' Complaint is correct and fully supported by substantial evidence. Accordingly, the Court should affirm the Final Determination of the Office of General Counsel.

Respectfully submitted,

/s/ Kathleen A. Mullen _____

Kathleen A. Mullen (ID No. 84604)

Ian B. Everhart (ID No. 318947)

Pennsylvania Department of State

Office of Chief Counsel

306 North Office Building

Harrisburg, PA 17120

(717) 783-0736

*On behalf of Respondents Pennsylvania
Department of State and Secretary of the
Commonwealth Al Schmidt*

Date: September 25, 2024

CERTIFICATION

This 25th day of September, 2024, I certify that:

Electronic version. The electronic version of this Brief that has been provided to the Court in .pdf format in an electronic medium today is an accurate and complete representation of the paper original of the document that is being filed by Respondent Pennsylvania Department of State and Secretary of the Commonwealth Al Schmidt.

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.

The undersigned verifies that the preceding Brief does not contain or reference exhibits filed in the trial court under seal. Therefore, the preceding Brief does not contain confidential information.

Word Count. I certify that this filing contains 8,122 words and, thus, complies with the word count limit imposed by Pa. R.A.P. 2135(a)(1). In making this certification, I have relied on the word count of the word processing system used to prepare this filing.

Service. I am this day serving this Brief to all counsel of record electronically via the PACFile system, and to any *pro se* participants via electronic mail, with a certificate of service to be generated thereby.

/s/Kathleen A. Mullen
Kathleen A. Mullen

RETRIEVEDFROMDEMOCRACYDOCKET.COM