

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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Docket No. 372 CD 2024

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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 Communi,  
Respondents.

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On Appeal from Final Determination of Office of General Counsel Hearing  
Officer Steven R. Kovatis in the Department of State Bureau of Commissions,  
Elections and Legislation Title III of HAVA Complaint entered on February 20,  
2024, Case No. 2023-002

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**Petitioners' Principal Brief**

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Dated: August 26, 2024

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## I. Statement of Jurisdiction

Petitioners filed a complaint alleging violations of Title III of the Help America Vote Act, 42 USC § 15301 et seq, (HAVA), with the Pennsylvania Department of State on November 22, 2023. R.1a-14a. The Petitioners' Complaint included a verified Statement of Complaint Form under the Pennsylvania Election Code, 25 P.S. § 1206.2, which provides the Commonwealth's state-based administrative complaint procedure for alleged violations of the Help America Vote Act, 52 U.S.C. § 20901 et seq., (HAVA), as required by 52 U.S.C § 21112.

An informal administrative hearing was held before for the Office of General Counsel (OGC) Hearing Officer Deputy General Counsel, Stephen R. Kovatis on February 6, 2024. *E.g., Appendix A* at 2. The OGC issued a final agency determination in accordance with 25 P.S. § 3046.2 in Docket No. 2023-002, February 20, 2024. *Appendix A* at 16. The jurisdiction of this Commonwealth Court arises under 42 Pa.Cons.Stat. § 3046.2(f), because the final determination finding no HAVA violation was “an agency determination subject to the Commonwealth Court’s appellate review pursuant to 42 Pa.C.s. § 763.” Petitioners timely filed their appeal March 21, 2024, which was at the 30 days allowed by Pa.R.A.P. 1512 and 1513.

## II. Order or Determination in Question

OGC Hearing Officer, Deputy General Counsel Stephen R. Kovatis entered the Order and Determination in question on February 20, 2024. The Order and Determination in question are attached in full hereto as *Appendix A*, as required by Pa. R.A.P. 2115. *Appendix A*, Order at 2 stated:

AND NOW, having considered the arguments and evidence advanced in the written submissions of the parties and at the hearing in this matter, it is ORDERED and DECREED as follows:

1. Respondent Election Systems & Software is DISMISSED for lack of jurisdiction against this private party in a Title III HAVA complaint.
2. The Complainants have failed to establish that the Department and/or Northampton County has or is violating HAVA. This matter is therefore DISMISSED.
3. The request of Northampton County to dismiss the Northampton County Election Commission Board, Lamont McClure, and Christopher Commini from this action is DENIED AS MOOT.
4. This shall constitute a final agency determination of this matter in accordance with 25 P.S. § 3046.2(c)(5).

DATED: February 20, 2024

SUBMITTED BY:

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Stephen R. Kovatis  
Deputy General Counsel

### III. Scope of Review and Standard of Review.

This is an appeal of an agency decision of the Office of General Counsel (OGC), and generally, review of agency decisions is to determine whether a constitutional violation or agency procedure violation has occurred, and whether the necessary factual findings are supported by substantial evidence. *Shrom v. Pennsylvania Underground Storage Tank Indemnification Bd.*, 292 A.3d 894, 907 (Pa. 2023) (citing *Dep't of Labor & Indus. v. Workers' Comp. Appeal Bd. (Crawford & Co.)*, 611 Pa. 10, 23 A.3d 511, 514 (2011)). However, this appeal raises the issue of interpreting federal statute HAVA. Accordingly, this Court's review regarding statutory interpretation is *de novo* review with a plenary scope:

Insofar as the issues raised herein implicate questions of law—particularly by requiring us to engage in statutory interpretation—our standard of review is *de novo* and our scope of review is plenary. *Sch. Dist. of Phila. v. Workers' Comp. Appeal Bd. (Hilton)*, 632 Pa. 10, 117 A.3d 232, 241 (2015) (explaining that issues raised on appeal involved statutory construction “and thereby constitute[d] questions of law over which our standard of review is *de novo* and our scope of review is plenary”).

*Shrom*, 292 A.3d at 907.

For determining whether there is substantial evidence to support the OGC's factual findings, “[s]ubstantial evidence’ means ‘such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.’ ” *Id.* (citing *Kerr v. Pa. State Bd. of Dentistry*, 599 Pa. 107, 960 A.2d 427, 436 (2008) (quoting *Sell v. Workers' Comp. Appeal Bd. (LNP Eng'g)*, 565 Pa. 114, 771 A.2d 1246, 1250 (2001))).



#### **IV. Questions Involved.**

(1) Whether the OGC erred in its interpretation of the federal statutory Help America Vote Act (HAVA) in 52 U.S.C. § 21081(a)(2) requirement that a voting system “shall produce a permanent paper record with a manual audit capacity for such system” requires a human-readable paper record.

**Suggested Answer: Yes.**

(2) Whether the OGC erred in its interpretation and application of HAVA in 52 U.S.C. § 21081(a)(2), which requires voting machine systems to have manual audit capacity, is violated when voting system machines are selected and used though they are demonstrably and designedly capable of producing a mismatch between the human-readable manual paper record and the machine-only-decipherable genuine vote selections.

**Suggested Answer: Yes.**

(3) Whether the OGC erred in determining the Northampton County’s use of a voting machine system that has produced a paper record mismatch between the human-readable paper record and electronic vote selection will be a HAVA-violation if, and or, when used in a federal election.

**Suggested Answer: Yes.**

## **V..Statement of the Case**

### **A. Procedural History**

PA Fair Elections, Heather Honey, and Stacey Redfield (collectively, “PA Fair Elections” or “Petitioners”) filed a Statement of Complaint form under the Pennsylvania Election Code 25 P.S. § 1206.2 on November 22, 2023. R.1a-14a.

Heather Honey is a member and representative of PA Fair Elections, which is an association of Pennsylvania individuals, and Ms. Honey was allowed to represent PA Fair Elections in order to present facts known to the organization. *Appendix A*, Final Determination at 3 ¶ 2, & n.2; R.202a, 207a. The complaint statute (25 P.S. § 1206.2) provides the Commonwealth’s state-based administrative complaint procedure for alleged violations of the Help America Vote Act, 52 U.S.C. § 20901 et seq., (HAVA), as required by 52 U.S.C § 21112. HAVA complaints may be filed by “any person who believes that there is a violation... including a violation which has occurred, is occurring, or is about to occur.” 52 U.S.C § 21112(a)(2)(B).

PA Fair Election’s complaint alleged violations of Title III of the Help America Vote Act of 2002 (“HAVA”), specifically regarding the requirement that voting systems have certain manual audit capacities, as codified at 52 U.S.C. § 2101(a)(2). R.4a, 6a ¶ 12. Respondents were the Department of State and Secretary of State Al Schmidt (collectively, the “DoS”), Northampton County, Northampton County Election Commission Board, Northampton County Executive Lamont McClure, and Registrar Christopher Commini (collectively, “Northampton County”), and Election

Systems & Software (ES&S). R.4a. The complaint was forwarded to the Office of General Counsel (OGC) for adjudication by Hearing Officer Deputy General Counsel Stephen R. Kovatis. Certified Record 11-0 at 71 (OGC Kovatis Appointment Letter).

Respondents DoS and Northampton County filed written responses on December 12 & 15, respectively. R.15a-22a; R.23a-28a. ES&S was not served with the complaint, did not respond, and was later dismissed. *Appendix A*, Order at 2 ¶ 1; *see* R.199a-219a (Hearing Transcript Discussion of ES&S). An informal hearing on this matter was held online on February 6, 2024. *Appendix A* Order at 1. The OGC allowed post-hearing briefing, which all parties submitted on February 9, 2024. *See* R.392a (Complainant's Post-Hearing Brief), R.397a (Northampton's Post-Hearing Memorandum), and R.399a (DoS Post-Hearing Submission).

The OGC determined no violation of Title III of HAVA and dismissed the Complaint on February 20, 2024. *Appendix A*, Order at 2. Petitioners timely filed their appeal March 21, 2024, which was at the 30 days allowed by Pa.R.A.P. 1512 and 1513.

## **B. Factual History**

### **1. Acronym Reference Guide**

There are numerous acronyms used through the records of the OGC proceedings and in this brief. For ease of reference, PA Fair Elections supplies the following table with acronyms and definition:

<b>Acronym</b>	<b>Definition</b>
HAVA	Help America Vote Act, 52 U.S.C. § 20901 et seq.
OCG	Office of General Counsel
DoS	Department of State
DRE	Direct Recording Electronic (type of voting system)
ES&S	Election Systems & Software (Northampton County voting system vendor)
EVS	Electronic Voting System
EVXL	ExpressVote XL (the specific voting machines by ES&S used in Northampton County)
FEC	Federal Election Commission
VVPAT	Voter Verifiable Paper Audit Trail
VVSG	Voluntary Voting System Guidelines

### **2. The Help America Vote Act (HAVA) requires electronic voting systems to produce a paper record with manual audit capacity.**

Title III of HAVA, entitled “Uniform and Nondiscriminatory Election Technology and Administration Requirements,” addresses voting systems standards, including audit capacity, accessibility for individuals with disabilities, alternative language accessibility, error rates, and uniform definition of what constitutes a vote. 52 U.S.C. §§ 21081. The portion of HAVA codified at 52 U.S.C. § 21081(a)(2), which was the primary subject of PA Fair Elections’ complaint, is accurately quoted as follows:

**(2) Audit capacity**

**(A) In general**

The voting system shall produce a record with an audit capacity for such system.

**(B) Manual audit capacity**

(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.

(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.

(iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

*See also* R.4a (Complaint ¶4). The Secretary of the Commonwealth is the one who is responsible for examining and reexamining voting machines for use in Pennsylvania, and the Secretary “shall not approve any voting machine for any election, federal or state, in this Commonwealth that does not comply with the requirements of section 301 of the Help America Vote Act of 2002.” 25 P.S. § 2621.

**3. In 2023, Northampton County’s electronic voting system EVXL machines demonstrated that it did, and can produce a mismatch between electronically-stored votes and its paper record.**

The November 2023 Election in Northampton County was a municipal election. *Appendix A* Final Determination at 3, ¶ 5. Complainant (now Petitioner) Stacy Redfield testified at the February 6, 2024 hearing that the November 2023 election was her third election as an election judge and she was serving in Northampton County, precinct 148. R.221a (Direct Testimony of Stacy Redfield). Northampton County used the EVXL component of ES&S for its electronic voting system. R.8a ¶ 3 (Declaration of Registrar of Elections for Northampton County

Christopher Communi); R.231a (Direct Examination of Stacy Redfield). Ms. Redfield explained he EVXL allows voters to insert a ballot card and then select their preferred candidates through a touch screen interface. R.232.

During the hearing, Ms. Heather Honey, for PA Fair Elections played a video from the Northampton County Website that provides step by step instructions for how to vote on the EVXL. R.235a-40a.<sup>1</sup> The video and Ms. Redfield described after the touch screen step, voters hit a “print” button, which prints on their ballot voting card, which cannot be touched by the voter, but seen through a viewing window. R.238a-40a. Ms. Redfield testified that if a voter wanted to change their vote from what was on their ballot, they would have to void that ballot, which would eject it from the machine, the ballot would be spoiled, and that voter would have to start again with another ballot. R.240a. The OGC findings of fact described the process accurately as follows:

The EVS 6300 with the ExpressVote XL used in Northampton County works as follows:

- a. The voter inserts a blank paper card into a slot;
- b. The voter makes selections by touching a screen, where the selections turn to green;
- c. When the voter has made all desired selections, he or she touches “PRINT” on the screen, and the selections are printed onto the blank paper card and displayed behind a clear window;

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<sup>1</sup> The Northampton County website now links to the following video, which is substantially similar, if not identical to the one played during the February 6, 2024 hearing. See *Welcome to the Northampton County Elections Department*, <https://norcopa.gov/election-voting> (last visited Aug. 25, 2024) (linking to *XL voting video*, Northampton County, YouTube (Feb. 2, 2024) <https://www.youtube.com/watch?v=vYrxYXa-Bdc>)

- d. If the voter wishes to make changes, he or she hits “QUIT VOTING,” which will spoil the ballot and start the voting process over; and
- e. If the voter is satisfied with the selections, he or she hits “CAST” to submit both the electronic record and paper printed ballot.

*Appendix A*, Final Determination at 4, ¶ 8. During step c., when the blank paper card appears in the viewing window, there is a “high-capacity barcode” at the top of the card. *E.g.*, R.132a. As is within knowledge of the general public, and witness Clay Parikh testified, a barcode is not verifiable by the viewer because humans cannot understand the encoded information. R.310a, R.315a:24-25 (“a human being cannot read a barcode or a QR code.”)

At the hearing, Ms. Redfield explained the day of the November 2023 elections, the EVXL machines seemed to be running slowly from the start of the day, R.222a-23a, but more problematically that in a state judge’s race, “when you voted on the screen in real time, when the ballot came through in the viewing window, the votes were flipped. The names were flipped.” R.224a (H’rg Tr. 44:10-12). Ms. Redfield testified that there was no way to know whether the printed ballot cards accurately reflected voter intent. R.247a. The voters who viewed their ballot card through the window could see that the vote was not recorded correctly. The barcode, however, recorded a different candidate selection than what was displayed on the card. R.224a. The Northampton County voters had no way to know that the card was correct, but could only confirm that what was printed was incorrect. *Id.* Ms. Redfield

testified that some voters tried to vote the opposite of their intent so that it would read correctly on the paper card. R.225a.

According to a declaration of Northampton County Registrar of Elections, Christopher Communi, the mismatch issue was due to a programming error that resulted in “the paper record printed out by the ES&S ExpressVote XL ballot marking devices at the November 7, 2023 [elections] mislabeled the vote recorded by the voter on the screen of the ballot marking device.” R.74a at ¶ 8. However, Mr. Communi also wrote in his declaration that “[t]he vote of the voter recorded on the machine was properly recorded and counted despite the mislabeling of the voter’s selection.” R.74a at ¶ 9.

Petitioners presented evidence of Northampton County Election Day Press Conference that addressed the problems with the election that day. R.72 (link to YouTube recording of the press conference)<sup>2</sup>; R..362a-63a (H’rg Tr. of video recording). At the Election Day press conference, which was held while voting was ongoing, and the ballots were sealed in ballot boxes Linda Bennet, Vice President of vendor ES&S said that they were “sure and positive that voter selections are actually being captured” because the “voter selections are recorded on the machine.” R.363a. Ms. Bennet also said in the press conference: “It was human error, based on someone from our team that programmed the election.” *Id.* She went on to say, “Someone

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<sup>2</sup> <https://www.youtube.com/watch?v=H4zAV9Rpbs0&t=587s>



from our team inadvertently put the wrong name.” Bennet insisted that the votes would be counted as they were selected on the screen despite what the printed card showed. *Id.* When asked if the issue should have been detected during L&A (logic and accuracy) testing, Bennett said: “this was definitely missed in the QA process um and something that should have been caught...we assist Northampton County with that process.” *Id.* Bennet confirmed that the programming error should have been identified during L&A testing but the error “was not picked up” by ES&S or the county during testing. *Id.*

The EVXL, which is a hardware component “hybrid paper-based polling place device” of an ES&S electronic voting system, was most recently certified by the DoS Respondents in January, 2023. *Appendix A*, Final Determination at 3 ¶ 4; R.82a (Department of State Hearing Exhibit 1 – Report Concerning the Examination Results of Elections Systems and Software EVS 6300). According to the Northampton County website, the EVXL is still the voting machine for the upcoming November 5, 2024 federal elections. *Welcome to the Northampton County Elections Department*, <https://norcopa.gov/election-voting> (last visited Aug. 25, 2024).

During the February 6 hearing, neither Respondent DoS, nor Northampton County presented witnesses, though the DoS flagged the exhibit it attached to its pre-hearing submission, the Report Concerning the Examination Results of Elections Systems and Software EVS 6300. R.82a-180a. Counsel for Northampton County also moved into evidence its exhibits A, B, the Declaration of Christophor Communi,

R.73a-75a, and C, text messages that Petitioner Redfield testified were sent to election judges in Northampton County on the day of the Election. R.76a-81a. Counsel for the Department asserted the County had publicly stated it would do “more robust logic and accuracy testing” in the future. R.378a:4-6. However, when asked by the OGC, counsel for Northampton County stated there is not a formal remedial plan in place. R.384a-85a. The OGC confirmed that the pre-hearing memoranda from all three parties, the Complainants, and both County and State Respondents would be considered. R.388a.

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## VI. Summary of Argument.

The OGC committed errors of fact and misinterpreted the law such that it failed to find HAVA has, or will be violated by the continued use of the ExpressVote XL, which is demonstrably untrustworthy to satisfy HAVA's "manual audit" capacity requirement. 52 U.S.C. § 21081(a)(2). Using the same voting system that previously failed to produce a "permanent paper record with a manual audit capacity" in a municipal election may threaten future elections, including the federal election that is about to occur in November, 2024.

While there are Pennsylvania cases that superficially appear to impact this appeal, the issues are distinct from other times the courts examined electronic voting machine systems, for example in, *Banfield v. Cortes*, 110 A.3d 155, the Pennsylvania Supreme Court analyzed state election code requirements for machines, which differ from HAVA. Then, in a federal court denial of a settlement-enforcement motion request to decertify the EVXL machines in *Stein v. Boockvar*, No. CV 16-6287, 2020 WL 2063470, at \*9 (E.D. Pa. Apr. 29, 2020), the Eastern District of Pennsylvania opined that it was mere speculation that the EVXL might print a mismatch between voter selections and the paper record. As the 2023 Northampton County elections proved,

## VII. Argument.

Petitioners' Complaint, R.1a-R.14a, alleged the voting system used in Northampton County, though it was selected for use by officials in that county, and allowed for use by state election officials, fails to meet the requirements of HAVA in 52 U.S.C. § 21081(a)(2) because it does not produce a permanent paper record with a reliable manual audit capacity.

The OGC failed to apply the law to the facts, as supported by the evidence brought by Complainants (now Petitioners) PA Fair Elections and Stacey Redfield. HAVA administrative complaints contemplate violations of HAVA that have occurred, are occurring, or will occur. 52 U.S.C. § 21112(a)(2)(B). The November 7, 2023 municipal elections exposed that the paper record produced by the EVXL component of the voting system used in Northampton County is not reliable for a manual audit because the machine is designed to be capable of mismatching the text-readable paper record from the actual vote selection. The ES&S EVXL component has demonstrated it is susceptible to programming errors that make a manual paper audit impossible. Further, while there are some previous Pennsylvania cases that superficially appear similar, this appeal presents issues distinct from previous times the Commonwealth's Courts analyzed electronic voting machine systems, for example, *Banfield v. Cortes*, 110 A.3d 155; *Stein v. Boockvar*, No. CV 16-6287, 2020 WL 2063470, at \*9 (E.D. Pa. Apr. 29, 2020).

**A. The OGC made crucial errors in the findings of fact that were not supported by the substantial evidence produced.**

Several of the OGC's factual findings fall short of support by the substantial evidence the OGC had before it. As a preliminary matter, the OGC continuously referenced the EVS 6300 (also known as the EVS 6.3.0.0) throughout its Final Determination, as when it reached its conclusions: "Logic and accuracy testing, while important, is not a requirement in Title III of HAVA. Nothing in the statutory text creates a federal requirement that would be enforceable in this forum. Thus, Complainants' claims alleging inadequate logic and accuracy testing of the EVS 6300 are dismissed." *Appendix A* at 15. However, the Complainants' pre-hearing memorandum brought to the attention of the OGC that HAVA establishes minimum requirements that voting systems "shall comply" with standards established by the Federal Election Commission (FEC). R.29. This is a requirement of HAVA in, which states in relevant part:

The error rate of the voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which are in effect on October 29, 2002.

52 U.S.C. § 21081(a)(5). In turn, the Federal Election Commission Voting System Standards<sup>3</sup> set requirements for hardware and performance, including "accuracy

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<sup>3</sup> Voting System Standards, FEC (Dec. 13, 2001), <https://www.fec.gov/resources/updates/agendas/2001/mtgdoc01-62/v1/v1s3.pdf>

requirements, where requirements are specified for distinct processing functions of paper-based and DRE systems.” Voting System Standards, FEC, 3.1.a. (Dec. 13, 2001), <https://www.fec.gov/resources/updates/agendas/2001/mtgdoc01-62/v1/v1s3.pdf>. The FEC Standards in Section 3.2.1 continue explain that there must n only be met by testing every ballot position, including write-ins for every contest, over votes, undervotes and other error conditions, all permutations for each contest on the ballot:

Voting system accuracy addresses the accuracy of data for each of the individual ballot positions that could be selected by a voter, including the positions that are not selected. For a voting system, accuracy is defined as the ability of the system to capture, record, store, consolidate and report the specific selections and absence of selections, made by the voter for each ballot position without error. Required accuracy is defined in terms of an error rate that for testing purposes represents the maximum number of errors allowed while processing a specified volume of data. This rate is set at a sufficiently stringent level such that the likelihood of voting system errors affecting the outcome of an election is exceptionally remote even in the closest of elections.

*Id.* See also R.44a. While the FEC standards required by HAVA in 52 U.S.C. § 21081(a)(5) do not say the words “logic and accuracy testing” in that order, the standards do implicate that testing. Therefore, it is not accurate, as the OGC did, to say that L&A testing is not a HAVA requirement. Complainants’ concerns about L&A testing should not have been so easily dismissed.

In another example, the OGC cited Respondents’ briefing and again, the EVS 6.3.0.0: “In the 2023 Election, Northampton County used the ExpressVote XL, a

“hybrid paper-based polling place device” manufactured by ES&S. The ExpressVote XL is a hardware component of the EVS 6.3.0.0 electronic voting system (the “EVS 6300”). Dep’t Resp. to Compl. at 1; Dep’t Ex. 1 at 2.” *Appendix A* at 3 (citing documents available at R.17a and R.83a, respectively). The, EVS 6.3.0.0 was used for the first time in the Primary elections in Spring 2024, even though that was the most recently certified system in 2023, yet the OGC decision and order repeatedly made the error of discussing the EVS 6.3.0.0 as if it was the system used in Northampton County on November 7, 2023. Regardless, Petitioner’s claim that the EVXL falls short of HAVA compliance pertains equally to both the older EVS 6021, as well as the EVS 6300 EVXL systems.

Further Complainant’s Post-Hearing Memorandum highlighted the evidence presented that the system used in Northampton County did not have the voter-verified paper audit trail (VVPAT) included in the system’s functionality declaration. R.393a (discussing Complainant’s Exhibit 3 at page 63, available at Certified Record 11-1 at 29).

Petitioners continue to contend that the OGC’s finding that “Here, the Certification Report identifies potential issues with the exclusive use of the EVS 6300 for blind voters, but there is insufficient evidence that any such problem actually manifested. The EVS 6300, for example, has the ability to produce an “audio ballot” for the visually impaired” is not supported by the evidence. *Appendix A* at 15–16. Even the DOS Respondent’s exhibit with the most recent Certification Report

discusses issues with the XL for low vision test participants. *E.g.*, R.163a, 168a; *see also* R.368a (testimony of Heather Honey on behalf of PA Fair Elections, discussing certification problems from the ES&S 6.0.2.1, which are similar to those in the newer certification).

The OGC mischaracterized Petitioner's complaint when it stated "Further, Complainants' interpretation of HAVA would mean that no voting system could satisfy HAVA if it electronically maintained and counted votes." *Appendix A*, Final Determination at 11. However, the Complainant-Petitioners' interpretation of HAVA is not and has not been, nor have they argued that "no voting system could satisfy HAVA if it is electronically maintained and counts votes." For example, the record below reflects that Petitioners specifically noted that other voting system components also vended by ES&S, such as the optical scanners in the EVS 6300 Electionware suite, including the machines used for central count in Northampton, would meet the minimal HAVA requirements because a voter verifiable paper ballot, suitable for recounts and manual audits is generated during the first step in the voting process. *See* R.32a (Complainants' Pre-Hearing Brief: "The certified precinct level (election day voting) components of the EVS 6021 suite are: the DS 200 — Precinct Scanner, the ExpressVote Ballot Marking Device, and the ExpressVote XL All-In-One"); R.396a (Complainants' Post-Hearing Brief).

Similarly, the OGC misconstrued Petitioner's complaint related to DRE voting systems when it said: "Because HAVA expressly allows DRE voting systems, and



because DRE voting systems by definition store and count votes electronically and produce printed copies of those votes for auditing and verification purposes, it is impossible to read HAVA as prohibiting a voting system which stores and tabulates votes electronically. Which is to say, HAVA does not bar the use of the EVS 6300.” *Appendix A* at 12. Instead, the Petitioners position is and has been that HAVA does not prohibit the use of DREs (Direct Recording Electronic), but rather that HAVA does require the DREs meet the minimum HAVA requirements if used in a federal election, which does mean producing a paper record with a reliable manual audit capacity. *E.g.*, R.395a.

On the practical level, Petitioners presented witness testimony that there was no way to know whether the printed ballot cards accurately reflected voter intent. R.247a. The voters who viewed their ballot card through the window could see that the vote was not recorded correctly. The barcode, however, recorded a different candidate selection than what was displayed on the card. The Northampton County voters had no way to know that the card was correct, but could only confirm that what was printed was incorrect. Stacey Redfield at least had the impression that some voters tried to vote the opposite of their intent so that it would read correctly on the paper card. R.225a. This system flaw would allow the printed text to show the voters choice but the machine would count the barcode. There would be no way for the voter to verify the record because the voter cannot read or decipher the barcode.

**B. Voting machines in Pennsylvania that fail to meet the federal statutory HAVA manual audit requirement must not be used.**

Nearly two decades ago, when HAVA was relatively new, the Pennsylvania Supreme Court found that voting machines can indeed violate HAVA by failing to produce a manual audit record. In *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 588 Pa. 95 (Pa. 2006), the Court considered whether HAVA preempted continued use of lever voting machines, or whether the Commonwealth Court had properly enjoined replacing those lever voting machines with electronic voting machines (EVS) for local elections, thus allowing a dual system with different machines for federal and local elections. *Id.* at 102, 121. The Court ultimately decided that HAVA preempted a state referendum requirement for changing the local election voting system. *Id.* at 124. There was agreement that “the use of lever voting machines in elections for federal offices is prohibited by HAVA.” *Id.* at 124.

The *Kuznik* court took the position that Pennsylvania Election code is a unified system, such that the EVS used for federal elections and local elections must both be HAVA-compliant machines:

Based on our Election Code, which prescribes a unitary system of voting, and the federal mandate to replace lever voter machines with EVS units for federal elections, we uphold the decision of the Secretary that when the EVS is installed at the polling places in Pennsylvania, voters in elections for state and local office must use these HAVA-compliant machines.

*Id.* at 503. This was because they viewed HAVA’s goals to preempt Pennsylvania’s election law to extend where the Pennsylvania code conflicted, even though a

temporary dual-system may have allowed compliance with both laws. *Id.* Admittedly, the *Kuznik* court did not determine if every aspect of HAVA applies to state elections as well as federal elections, but the court expressed concern that there be a single system of voting machines. *Id.* at 508.

Because the *Kuznik* court did require electronic voting systems used in state and municipal elections to be HAVA-compliant due to preemption, there is a basis that the OGC erred when it found it did not have jurisdiction to consider whether a HAVA violation occurred in the November 2023 election in Northampton County. *Contra Appendix A*, Final Determination at 7 ¶ 8 (“[T]his forum may consider only whether the EVS 6300 as it will be used in federal elections complies with HAVA. The Hearing Officer no jurisdiction to consider particular issues or concerns relating to the 2023 Election, which was solely a state and municipal election.”) While the OGC may have erred in its interpretation of law by declining to take jurisdiction to consider a HAVA violation for a municipal election, HAVA administrative complaints contemplate violations of HAVA that have occurred, are occurring, or will occur. 52 U.S.C § 21112(a)(2)(B).

**1. Pennsylvania’s requirement for an EVS to be able to provide a permanent physical record is distinct from HAVA’s paper record with manual audit capacity mandate.**

In the 2015 case, *Banfield v. Cortes*, the Pennsylvania Supreme Court again considered an appeal regarding electronic voting systems, this one brought by twenty-four Pennsylvania voters challenging the Secretary of the Commonwealth’s decision

to certify certain direct-recording electronic voting systems (DREs). 110 A.3d 155, 159 (2015). The appellant-voters' concern was, superficially, similar to the present Petitioner's complaint as the *Banfield* challenge was to certain electronic voting DRE systems, which "d[id] not produce a contemporaneous paper record of an individual's vote, but store[ed] each vote on internal memory," but could later print on sheets of paper or on thermal (receipt-style) paper. *Id.* at 159. However, the specific issues in *Banfield* were based on Pennsylvania election code, including: "Does an [electronic voting system] 'provide for a permanent physical record of each vote cast' as required by Section 1101–A [25 P.S. § 3031.1] if it only stores electronic data as votes are cast and only prints that electronic data (if ever) after an election has ended?" *Id.* at 164 (listing the five issues presented in that appeal).

HAVA was briefly mentioned in the *Banfield* opinion, 110 A.3d at 160, 160 n.3, and at 174, but the Pennsylvania Supreme Court did not actually discuss HAVA's paper record requirement at that time. Instead, the Court examined whether the DRE machines at-issue satisfied the Pennsylvania election code definitional requirement: "that an electronic voting system 'shall provide for a permanent physical record of each vote cast.'" *Id.* at 167 (referencing 25 P.S. § 3031.1).<sup>4</sup> The Pennsylvania election

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<sup>4</sup> 25 P.S. § 3031.1 "Definitions", defines that "**'Electronic voting system'** means a system in which one or more voting devices are used to permit the registering or recording of votes and in which such votes are computed and tabulated by automatic tabulating equipment. The system shall provide for a permanent physical record of each vote cast." (emphasis in statute).

code definition text for an “electronic voting system” that requires a permanent physical record is not the same as HAVA’s requirement for a manual paper audit capacity that the “the voting system *shall* produce a permanent paper record with a manual audit capacity for such system.” 52 U.S.C. § 21081(a)(2)(B)(i) (emphasis added).

The *Banfield* voter-appellants argued at the Pennsylvania Supreme Court that the DREs at-issue did not “produce a contemporaneous paper record at the time a vote is cast,” but the Commonwealth Court had understood the state statutory definition to mean the DREs would need to be able to “generate such a record upon demand.” *Banfield*, 110 A.3d at 161. The *Banfield* appellants argued that “electronic data are not ‘physical records’.” *Id.* at 165. The court disagreed, and ultimately encouraged the appellants (who were concerned about fraud issues) to seek legislative solutions. *Id.* at 168. However, as the issue before the court in *Banfield* specifically concerned a state statutory requirement, and did not explicitly raise the HAVA issue, *Banfield* does not dispose of PA Fair Elections’ specific HAVA claim.

As noted, the text of the Pennsylvania election code definition statute in 25 P.S. § 3031.1 is not the same as HAVA 52 U.S.C. § 21081(a)(2)(B)(i). The Pennsylvania statute requires that an electronic voting system “shall provide for a permanent physical record of each vote cast,” whereas HAVA’s requirement is that “the voting system shall produce a permanent paper record with a manual audit capacity.” Both statutes have a mandatory “shall,” but the Pennsylvania definition requires something

less than HAVA, as Pennsylvania only mandates an EVS to “provide for” a physical record, which means, as the *Banfield* court determined, “the Legislature's selection of the phrase ‘provide for’ is...to have the ‘ability to generate or supply the required records on demand.’” *Banfield*, 110 A.3d at 167. In contrast, HAVA mandates not a mere ability to generate or supply a record, but that an EVS actually *produce* a permanent paper record capable of use in a manual audit. 52 U.S.C.

§ 21081(a)(2)(B)(i).

**2. Manual audits are performed with human hands and human eyes, thus, they cannot depend on a barcode.**

Further, HAVA’s requirement that an EVS shall produce a permanent paper record with a *manual* audit capacity indicates that record must be able to be done without reliance on the electronic system itself. *See* 52 U.S.C. § 21081(a)(2)(B)(i). The term “manual” is not defined in HAVA, thus the term is defined by its common use, which can be aided by examining dictionary definitions. *Ursinus College v. Prevailing Wage Appeals Board*, 310 A.3d 154, 171 (Pa. 2024) (citing *Commonwealth v. Gamby*, 283 A.3d 298, 307 (Pa. 2022) (explaining that, “[t]o discern the legislative meaning of words and phrases, our Court has on numerous occasions engaged in an examination of dictionary definitions”). Publically-available dictionary definitions of “manual” as an adjective define the word as “relating to or done with the hands”; “(of a machine

or device) worked by hand, not automatically or electronically”; “using or working with the hands”; or, “worked or done by hand and not by machine.”<sup>5</sup>

Regardless which definition of “manual” controls, reliance on electronic machines is excluded from fitting under the definition of “manual.” The printed paper record is what must be used in a manual audit. As the Honorable Ron O’Brien, Attorney General of Ohio summarized in response to an opinion request: “[T]o satisfy HAVA, a voting system must produce a permanent paper record with a manual audit capacity, and the paper record must be available as an official record for purposes of any recount.” 2005 Ohio Op. Att’y Gen. 2-53 (2005) (discussing 42 U.S.C.A. § 15481(a)(2), which was transferred to 52 U.S.C. § 21081(a)(2), the specific portion of HAVA at-issue in this appeal). If an electronic machine is required to read a paper record of a vote and that record is not readable by human eyes for counting with human hands, then that paper record is not a manually-auditable record.

### **3. The EVXL machines used in Northampton County are demonstrably unreliable for a manual paper audit.**

In the case of a manual audit, no human can read a barcode, but would have to count votes through printed text. As the 2023 municipal elections in Northampton County demonstrated, the ES&S EVXL machines are capable of being erroneously programed to print out a mismatch between the actual vote, purportedly stored in the

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<sup>5</sup> Manual, Google Oxford Languages Dictionary (last visited Aug. 25, 2024); *see also* Manual, Merriam-Webster <https://www.merriam-webster.com/dictionary/manual>. (last visited Aug. 25, 2024).

barcode, and the text a person could see with their eyes. Had there been a need to a manual audit of the November 2023 municipal election, the paper ballots would not have been reliable for that audit. In other words, there was no capacity for a manual audit.

As a Northampton County voter uses the EVXL machine, they insert a blank ballot card into the machine. Unless that voter cancels and spoils that ballot, inserting it into the machine is the last time they touch the paper ballot. Next, the voter makes their vote selections on the electronic touch screen. When they are satisfied with their electronic selection, they then “print” the ballot, which then instructs the machine to print on the ballot card both a barcode and text that is supposed to reflect their vote selections. The voter may then view their printed ballot through a viewing window, however, as Northampton County has stated, the actual, accurate “vote” is stored in the barcode, not the text. At the viewing window, the voter is supposed to be able to verify through the text that they did votes as-intended before the final submission. No human being can read a barcode through their naked eye, so the voter is entirely reliant on the printed text.

The OGC’s conclusions of law in section B of the Final Determination stray from the text of HAVA when discussing aspects of the EVXL design. For example, when in paragraph 10 the OGC stated that “the EVS 6300 as designed and approved complies with HAVA in that it permits the voter to privately and independently verify his or her vote via a printed, readable paper card before their vote is cast. 52 U.S.C. §



21081(a)(1)(A)(i).” is neither supported by the evidence presented during the hearing, nor the text of HAVA. *See Appendix A*, Final Determination at 7. The evidence brought by Petitioners does not support the OGC’s conclusion of law in section B ¶ 11: “The EVS 6300 as designed and approved complies with HAVA in that it permits the voter to change the ballot or correct any error before the ballot is cast and counted. 52 U.S.C. § 21081(a)(1)(A)(ii).” *Id.* The OGC’s conclusion of law on the critical issue in section B ¶ 12, in which he found “[t]he EVS 6300 as designed and approved complies with HAVA in that it produces a permanent paper record with a manual audit capacity. 52 U.S.C. § 21081(a)(2)” does not match the evidence of the events in Northampton County during the November 2023 elections. *Id.*

One problem with the OGC’s assertion that the EVXL as designed “complies with HAVA” is that the EVXL was working within the parameters of its programming and design during the November 2023 election because the EVXL system is programed to allow printing text that is different from the vote, purportedly stored in the barcode.

Instead, the evidence is that the voting system selected for, and approved for use for Election Day voting Northampton County, the ExpressVoteXL (EVXL), is capable of producing a paper record that is not reliable for a manual audit with human eyes and hands, and therefore is not a HAVA-compliant voting system. That the voting system used in Northampton County did in-fact produce an unreliable and impossible to use for a manual paper audit during the November 7, 2023 elections,

demonstrates that the voting system is not HAVA-compliant. The HAVA mandate that an electronic voting system produce a permanent paper record with a manual audit capacity is a “shall” requirement, not a “whenever there isn’t a programming error” requirement.

Unlike what the OGC characterized as a “copy” of the vote (*Appendix A* at 11), the Northampton County voting system uses a process that does not actually copy the vote, as was demonstrated on November 7, 2023, wherein voters were unable to verify their vote on the permanent paper record because the “vote” was not copied in human-readable words.

**C. Past worries about the EVXL deemed too speculative in past Commonwealth litigation came true when those machines printed mismatches in 2023.**

In 2016, Jill Stein, a presidential candidate sued then Secretary of the Commonwealth Cortes. Part of her challenge involved the ExpressVote XL (the same ES&S system component challenged by Complainant-Petitioners here). *See* R.37a–39a (Complainants’ Pre-Hearing Memorandum).<sup>6</sup> The events of the November 2023

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<sup>6</sup> Complainants’ Pre-Hearing Memorandum also identified as Complainants’ exhibits a number of court filings related to the history, discussion and arguments that led to *Stein v. Boockvar*, No. CV 16-6287, 2020 WL 2063470, at \*1 (E.D. Pa. Apr. 29, 2020). Some of these, cited in Complainants’ memorandum include:

- Exhibit 17, *Stein v. Boockvar*, No. 2:26-cv-06287, Memorandum & Order (E.D. Pa. April 29, 2020), Certified Record 11-4 at 211-238 & 11-5 at 1-14 (printed version of the Memorandum opinion at *Stein v. Boockvar*, No. CV 16-6287, 2020 WL 2063470, at \*1 (E.D. Pa. Apr. 29, 2020));

election in Northampton County demonstrate the very concerns Stein raised about the EVXL were real, because the machines were capable of, and did produce a mismatch between vote selections

In November 2019, Jill Stein again sought court intervention to enforce the settlement agreement that had concluded the earlier case. The United States District Court for the Eastern District of Pennsylvania addressed its decision to deny Stein's motion to enforce the settlement agreement in an unpublished memorandum. *Stein v. Boockvar*, No. CV 16-6287, 2020 WL 2063470, at \*1 (E.D. Pa. Apr. 29, 2020). Stein asked the district court to decertify the EVXL machines before the November 2020 general election. *Id.* at \*2. The Stein Settlement agreement had the following provisions that limited the Secretary in certifying voting machine systems, which Stein argued were violated by certifying the EVXL for use in Pennsylvania elections:

The Secretary will only certify new voting systems for use in Pennsylvania if they meet these criteria:

- a. The ballot on which each vote is recorded is paper;
- b. They produce a voter-verifiable record of each vote; and
- c. They are capable of supporting a robust precertification auditing process.

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- Petitioner's Exhibit 21, *Stein v. Cortes*, No. 2:16-cv-6287, Maazel Letter to the Court Re: Settlement Agreement (E.D. Pa. Nov. 28, 2018), Certified Record 11-7 at 152-163;
  - Petitioner's Exhibit 22, *Stein v. Boockvar*, No. 16-cv-6287, Motion to Enforce the Settlement Agreement (E.D. Pa. Nov. 26, 2019), Certified Record 11-7 at 165-183;
  - Petitioner's Exhibit 23 *Stein v. Cortez*, No. 2:16-cv-06287, Complaint for Declaratory and Injunctive Relief (E.D. Pa. Dec. 5, 2016), Certified Record 11-7 at 185-190 & 11-6 at 1-16.

The Secretary will continue to direct each county in Pennsylvania to implement these voting systems by the 2020 primaries, so that every Pennsylvania voter in 2020 uses a voter-verifiable paper ballot.

*Id.* at \*6.

The Court related testimony from witness J. Alex Halderman,) which the court discredited, while preferring other witnesses, including Boockvar, *id.*), that “the XL does not produce a voter-verifiable record of the vote because “nothing that the voter has ... seen and been able to interpret is ever being read by the machine.” *Id.* at \*11 (citing a 2/19/20 hearing transcript 26:9–15.) A point of emphasis regarding the EVXL was that:

[V]erifiability would be an issue only if there is a mismatch between the barcode and the text. (*Id.* 26:16–25.) Yet, Halderman did not dispute that the machine itself will not record a vote if there is a mismatch between the barcode and the text. This is also the very discrepancy that an audit will detect. (*Id.* 237:12–238:17 (describing multiple audit techniques for catching mismatches).) Moreover, **there is no evidence that the XL has ever produced such a mismatch.** (2/18/20 Tr. 157:6-10 (Boockvar) (no evidence of mismatch).

*Id.* (emphasis in original). In reaching the conclusion that the ExpressVote XL did not violate Stein’s settlement agreement, the court further stated: “the evidence confirms that such a mismatch has never occurred and cannot occur.” *Id.* at \*18. The federal court for the Eastern District of Pennsylvania dismissed Stein’s motion to enforce her settlement agreement in April 2020 in-part because the court did not believe a mismatch by the EVXL was possible. Now, however, after the Northampton County

elections in November 2023, there is evidence the XL produced a mismatch in an actual, live election. The human-legible paper record did not match the voter's selections on the screen. Not only has a mismatch now occurred, a mismatch could occur again, and in a Federal Election as soon as this coming November 2024.

### **CONCLUSION**

For the foregoing reasons, Petitioners request 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.

Date: August 26, 2024

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Brief submitted herein contains 7,533 words and complies with the type/volume limitations of the Pennsylvania Rules of Appellate Procedure 2135. This Brief was prepared using a proportionally spaced typeface of 14-point. The word count is stated in reliance on Microsoft Word 2016, the word processing system used to prepare this Brief.

Date: August 26, 2024

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## USE OF AI TECHNOLOGY CERTIFICATION

Counsel attests that appropriate steps to verify whether AI technology systems have been used in preparation of this submission and if so, appropriate steps were taken, to the best of counsel's ability, to verify the truthfulness and accuracy of facts and citations of that content before submission to this Court. This submission did rely upon the ordinary or customary research tools and other available research sources such as, but not limited to, Westlaw or Lexis.

Date: August 26, 2024

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## CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2024, I electronically filed the foregoing document with the Commonwealth Court of Pennsylvania by using the PACfile system. I certify that all participants in the case are registered PACfile users and that service will be accomplished by the PACfile system.

Date: August 26, 2024

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# Appendix A

**COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR’S OFFICE OF GENERAL COUNSEL**

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PA FAIR ELECTIONS AND  
STACEY REDFIELD,

Complainants,

v.

PENNSYLVANIA DEPARTMENT  
OF STATE, *et al.*

Respondents.

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Docket Number 2023-002

**FINAL DETERMINATION**

**I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY**

Complainants Pennsylvania Fair Elections and Stacey Redfield (collectively “Complainants”) commenced this action on November 22, 2023 by filing with the Commonwealth of Pennsylvania Department of State a verified Statement of Complaint Form (“Complaint” or “Compl’t.”) under Section 1206.2 of the Pennsylvania Election Code. The Complaint alleged violations of Title III of the Help America Vote Act of 2002 (“HAVA”), 52 U.S.C. § 21081 *et seq.*, against the Department of State and Secretary of State Al Schmidt (collectively the “Department” or “Dep’t”); against Northampton County, the Northampton County Election Commission Board, Northampton County Executive Lamont McClure, and Registrar Christopher Commini (collectively “Northampton County”); and against Election Systems & Software (“ES&S”). In accordance with the Election Code, 25 P.S. § 3046.2(c)(1), the Department forwarded the Complaint to the Governor’s Office of General Counsel on or about November 28, 2023. On December 12, 2023, the Department filed a written response in

accordance with 25 P.S. § 3046.2(c)(2). Northampton County filed its response on December 15, 2023.

On January 9, 2024, the Department sent a letter observing that (i) no notarized affidavit had been filed by a representative of Complainant PA Fair Elections, as required by 25 P.S. § 3046.2, and that (ii) no attorney had entered an appearance for PA Fair Elections. As to the latter point, the Department argued that an entity like PA Fair Elections is required by law to be represented by counsel. PA Fair Elections, through its representative Heather Honey, responded by letter on January 22, 2024.<sup>1</sup> On January 26, 2024, the undersigned issued a Pre-Hearing Order allowing Honey to act as a representative of PA Fair Elections, but limiting her role to providing factual information.

The Complaint requested an informal hearing, which a complainant is entitled to under 25 P.S. § 3046.2(c)(3). Following a prehearing scheduling order, the Department, Northampton County, and Complainants each respectively filed prehearing memoranda, along with a witness and exhibit list, on February 2, 2024. A hearing was conducted before the undersigned on February 6, 2024. The parties were also permitted to file post-hearing memoranda, which they did on February 9, 2024. Having considered the written submissions of the parties and the arguments and evidence advanced at the February 6 hearing, the undersigned Deputy General Counsel, Stephen R. Kovatis, Esq., submits this Final Determination and Order.

For the reasons set forth below, the Complainants have not established a violation of Title III of HAVA, and Complaint is therefore dismissed.

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<sup>1</sup> Honey provided the notarized affidavit required by the Election Code at this time, and the Department subsequently withdrew its objection on this particular basis.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Findings of Fact**

1. Redfield is a resident of Northampton County, a voter, and an appointed judge of elections for the November 2023 municipal election (the “2023 Election”). Transcript of February 6, 2024 Hearing (“H’rg Tr.”) at 40.

2. Heather Honey is member and authorized representative of PA Fair Elections, an association of individuals in Pennsylvania. H’rg Tr. at 22, 27.<sup>2</sup>

3. ES&S is a private company. It is a vendor of Northampton County, but itself is not a state or municipal election administrator. H’rg Tr. at 23-26.

4. In the 2023 Election, Northampton County used the ExpressVote XL, a “hybrid paper-based polling place device” manufactured by ES&S. The ExpressVote XL is a hardware component of the EVS 6.3.0.0 electronic voting system (the “EVS 6300”). Dep’t Resp. to Compl’t. at 1; Dep’t Ex. 1 at 2.

5. The 2023 Election was a municipal, and not federal, election.

6. On January 13, 2023, the Department tested and conditionally certified the EVS 6300 pursuant to Article XI-A of the Pennsylvania Election Code. Dep’t Ex. 1 (the “Certification Report”).

7. The conditions to which certification is subject are set forth in Section IV of the Certification Report. Dep’t Ex. 1 at 25-37.

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<sup>2</sup> In accordance with a pre-hearing Order of the undersigned Hearing Officer, Honey was permitted to appear as a non-attorney representative of PA Fair Elections for the purpose of presenting factual information in the knowledge of the organization.

8. The EVS 6300 with the ExpressVote XL used in Northampton County works as follows:
- a. The voter inserts a blank paper card into a slot;
  - b. The voter makes selections by touching a screen, where the selections turn to green;
  - c. When the voter has made all desired selections, he or she touches “PRINT” on the screen, and the selections are printed onto the blank paper card and displayed behind a clear window;
  - d. If the voter wishes to make changes, he or she hits “QUIT VOTING,” which will spoil the ballot and start the voting process over; and
  - e. If the voter is satisfied with the selections, he or she hits “CAST” to submit both the electronic record and paper printed ballot.

Complainants Ex. 4.

9. For the EVS 6300 voting machines used by Northampton County for the 2023 Election, there was an error “during the programming of the election by the voting system manufacturer.” Northampton Cty. Ex. B ¶ 7.

10. This error inverted the names of two Superior Court 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. Northampton Cty. Ex. B ¶¶ 8-9.

11. Prior to the 2023 Election, Northampton County conducted logic and accuracy testing of their voting machines, but the testing did not reveal the problem with the Superior Court retention races. Northampton Cty. Ex. B ¶ 6.

12. On the morning of the 2023 Election, this problem was brought to the attention of a Northampton County judge, who ordered voters to be instructed to use the EVS 6300 machines with the error, and that “the paper receipt will record their selection for retention to the Pennsylvania Superior Court one candidate to the other candidate.” Northampton Cty. Ex. C.

13. Throughout the day, other judges issues slightly different orders, including instructing voters to be told that they should “ask for help” if their paper printout did not match their intended vote. Northampton Cty. Ex. C.

14. The instructions in these orders were not always clear and consistent, which caused confusion for voters throughout the day. H’rg Tr. at 45-46.

15. Northampton County intends to change its logic and accuracy testing prior to the 2024 elections, Northampton Cty. Ex. B ¶ 14, but no party introduced any further evidence showing what changes would be made or how those changes would prevent the same programming error from happening again.

## **B. Conclusions of Law**

1. HAVA was enacted after the 2000 U.S. Presidential election, designed “to improve our country’s election system.” *See* H.R. REP. No. 107-329, at 31 (2001). HAVA was passed to ensure that eligible voters would not be disenfranchised and that voting and election administration systems will “be the most convenient, accessible, and easy to use for voters” and “will be nondiscriminatory and afford each registered and eligible voter an equal opportunity to vote and have that vote counted.” 52 U.S.C. § 20981(a).

2. HAVA requires states to establish an administrative complaint procedure to remedy any grievances for those who believe that a violation of any provision of Title III has

occurred, is occurring, or will occur. 52 U.S.C. § 21112(a). Pennsylvania has done so in its Election Code. 25 P.S. § 3046.2.

3. Title III of HAVA, entitled “Uniform and Nondiscriminatory Election Technology and Administration Requirements,” addresses voting systems standards; provisional voting and voting information requirements; and the creation of a computerized statewide voter registration list, including requirements for voters who register by mail. 52 U.S.C. §§ 21081-21102.

4. HAVA sets “minimum requirements” for election administration and it grants states discretion to set “election technology and administration requirements that are more strict” than those in HAVA. 52 U.S.C. § 21084.

5. Further, HAVA leaves “[t]he specific choices on the methods of complying with the requirements of this subchapter” to the discretion of each state. 52 U.S.C. § 21085.

6. In accordance with the procedure Pennsylvania has established, Complainants bring this claim under Title III of HAVA. Specifically, Complainants contend that the EVS 6300 does not meet HAVA’s minimum requirements for voting machines.

7. HAVA provides, in relevant part, that each voting system “used in an election for Federal office” must:

(i) 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 and counted;

(ii) 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 and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and

(iii) if the voter selects votes for more than one candidate for a single office—

(I) notify the voter that the voter has selected more than one candidate for a single office on the ballot;

(II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and

(III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.

52 U.S.C. § 21081(a)(1)(A).

8. As a threshold matter, because Title III governs voting systems used in federal elections, this forum may consider only whether the EVS 6300 as it will be used in federal elections complies with HAVA. The Hearing Officer has no jurisdiction to consider particular issues or concerns relating to the 2023 Election, which was solely a state and municipal election. 52 U.S.C. § 21081(a).

9. As an additional threshold matter, ES&S is not a proper respondent to a Title III action using the procedures established by the Pennsylvania Election Code. 25 P.S. § 3046.2.

10. On the merits, the EVS 6300 as designed and approved complies with HAVA in that it permits the voter to privately and independently verify his or her vote via a printed, readable paper card before their vote is cast. 52 U.S.C. § 21081(a)(1)(A)(i).

11. The EVS 6300 as designed and approved complies with HAVA in that it permits the voter to change the ballot or correct any error before the ballot is cast and counted. 52 U.S.C. § 21081(a)(1)(A)(ii).

12. The EVS 6300 as designed and approved complies with HAVA in that it produces a permanent paper record with a manual audit capacity. 52 U.S.C. § 21081(a)(2).

13. Title III of HAVA does not require logic and accuracy testing of voting systems or set any minimum standard or procedure for logic and accuracy testing.



14. The weight of evidence introduced in this proceeding does not support the conclusion that the EVS 6300 is not accessible for those with visual disabilities. 52 U.S.C. § 21081(a)(3).

15. Consequently, the Complaint is dismissed.

### III. ANALYSIS AND DISCUSSION

#### Preliminary Matters

##### *Jurisdiction*

The Hearing Examiner, *sua sponte*, raised the issue of whether Title III, which applies to “voting system used in an election for **Federal** office,” 52 U.S.C. § 21081(a) (emphasis added), can be the basis for claims related to the November 2023 **municipal** election, and thus whether this dispute can be heard in the context of a Title III proceeding. *See Blackwell v. Com., State Ethics Comm'n*, 523 Pa. 347, 358, 567 A.2d 630, 636 (1989) (“Since an issue of subject matter jurisdiction is not waivable, it may be raised at any stage of a proceeding by a party, or *sua sponte* by the court or agency.”).

The large majority of the Complaint focuses on specific concerns related to the performance of the EVS 6300 in the 2023 Election. *See* Compl. ¶¶ 14-39. All parties agreed that the 2023 Election was a municipal, and not federal, election. The Department and Northampton County, however, acknowledged that the EVS 6300 will be used in federal elections, and thus prospective questions as to whether future use of the machines complies with HAVA are properly before the Hearing Examiner. Complainants agreed with this position, clarifying that they are not seeking relief related to the 2023 Election. Honey confirmed that PA Fair Elections is seeking “action not regarding a past election, not regarding the municipal election,” but rather it wants “action for future elections, which happen to be a federal election.” H’rg Tr. at 38.

Further, Northampton County submitted un rebutted evidence that the issue in the 2023 Election was caused by a human programming error particular to that election, in which names for one judicial race were inverted on the printed paper ballot but not the recorded vote. Northampton Cty. Ex. B ¶¶ 7-9.

Title III proceedings regarding voting systems are limited to deciding whether the systems meet the minimum requirements set forth in 52 U.S.C. § 21081(a). And those requirements apply only to voting systems used in federal elections. Consequently, issues related to a municipal election, like the 2023 Election, fall outside the scope of this Title III action. This is especially true when, like here, the issues relate to a programming error that was specific to a particular race in that particular election. Whether or not the erroneously programmed machines used in the 2023 Election were HAVA-compliant as they performed on that day cannot be the question here. Those questions were handled by the Northampton County courts on the day of the election, as they should have been.

As acknowledged by Respondents, this alone does not require dismissal of this action in its entirety. It is appropriate in this forum to decide whether the EVS 6300, as it will be used during the 2024 federal elections and beyond, complies with HAVA. And evidence of the performance of the EVS 6300 in the 2023 Election can be relevant to the question, but only to the extent that it is indicative of continuing HAVA violations. The question is whether the system design falls short of HAVA's standards, not whether a prior error caused its performance to fall short of HAVA's standards in one election.

Complainants' claim is thus dismissed in part for lack of jurisdiction, but the remainder of their claim will be analyzed through this jurisdictional lens.

### ***Respondent ES&S***

The Complaint filed in this matter identifies ES&S as a respondent. Complt. at 1. At the hearing, Honey confirmed that it was PA Fair Elections' intent to name ES&S as a respondent, but that PA Fair Elections had not served ES&S, instead expecting the Department to effectuate service, which the Department did not do. *See* H'rg Tr. at 23-26. ES&S did not appear or otherwise engage in the administrative proceedings at all, and the parties agreed that ES&S had no notice of the Complaint.

The issue of notice aside, ES&S is not a proper party to this Title III proceeding. HAVA places obligations on state and municipal election administrators, not on private companies. *See generally* 52 U.S.C. § 21081 (setting requirements for states and jurisdictions effectuating elections). There is no provision of the Election Code or HAVA that gives a Hearing Officer jurisdiction over a private company. Also, because private parties are not subject to a Title III proceeding, there is nothing in the procedures in Section 3046.2 that provides a manner for serving private parties. *See* 25 P.S. § 3046.2 (outlining procedures for handling complaints against the Department and municipalities and their officers, not against private companies).

Because ES&S is not a proper party and there is no jurisdiction over it, it is dismissed as a respondent.

### **The EVS 6300 Complies with Title III of HAVA**

#### ***The EVS 6300 Allows Voters to Verify Their Votes Before Being Cast***

The gravamen of Complainants' claim is that the EVS 6300 does not comply with HAVA's "requirement that all voting systems produce a permanent paper record with a manual audit capability." Complt. ¶ 12. They argue that the EVS 6300 violates HAVA because it does not allow the voter to verify his or her actual vote which will be cast, because the voter actually verifies a printed paper version of the slate of votes. The voter's actual votes, which are used for

tabulation purposes, lives as an electronic record which is readable only to the computer. In other words, Complainants object to a process where what the voter reviews is a *copy* of the vote and not the actual vote itself. Complainants believe this violates HAVA.

Complainants' argument fails because HAVA does not prohibit voting machines from functioning this way. The text of HAVA itself requires only that the voter be permitted "to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted." 52 U.S.C. § 21081(a)(1)(A)(i). Nothing prescribes any particular method of verification. More to the point, nothing in HAVA says that, when a vote is recorded electronically, it is inadequate for the voter to review a printed copy of that electronic vote. Indeed, when a vote is recorded electronically, one of the most logical ways for the voter to verify that vote would be to review a legible printout of the votes about to be cast.

Further, Complainants' interpretation of HAVA would mean that no voting system could satisfy HAVA if it electronically maintained and counted votes. To be sure, this appears to be the position of PA Fair Elections. H'rg Tr. at 130, 135-36 (noting that voters cannot verify the "barcode" or "QR code" used to tabulate votes and therefore can never truly verify the accuracy of their vote). In fact, its witness testified during the hearing that he believes that the only truly secure method of voting is by paper ballot. H'rg Tr. at 165 ("Q: ... 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."). But this evidence shows only personal policy preferences. As a matter of law, HAVA does require the use of paper ballots or prohibit the use of electronic voting systems. In fact, HAVA explicitly notes that acceptable voting systems include a "direct recording electronic system." 52 U.S.C. § 21081(a)(1)(A). By definition, "[a] direct-recording electronic (DRE) voting system records votes by means of a ballot display provided with mechanical or electro-

optical components that can be activated by the voter; that processes data by means of a computer program; and that records voting data and ballot images in memory components.” Compl. Ex. 20 at 25. A DRE system “produces a tabulation of the voting data stored in a removable memory component and *as printed copy*.” *Id.* (emphasis added). Because HAVA expressly allows DRE voting systems, and because DRE voting systems by definition store and count votes electronically and produce printed copies of those votes for auditing and verification purposes, it is impossible to read HAVA as prohibiting a voting system which stores and tabulates votes electronically. Which is to say, HAVA does not bar the use of the EVS 6300.

Complainants’ reliance on the United States Election Assistance Commission’s (the “Commission’s”) Voluntary Voting System Guidelines (“VVSG”) is misplaced. Compl. Pre-H’rg Mem. at 3. As a threshold matter, it is far from clear that the VVSG can be used as a baseline for a Title III complaint. The authority and function of the Commission lies outside of Title III, and nothing in Title III provides that the Commission’s guidelines are enforceable in this forum. Additionally, it is not even clear that the Commission’s guidelines could be considered mandatory—HAVA states that testing and certification of voting machines by the Commission is “[a]t the option of a State.” 52 U.S.C. § 20971(a)(2); *accord Graeff v. Ashcroft*, No. 4:22-cv-971 RLW, 2023 WL 2424266, at \*2 n.1 (E.D. Mo. Mar. 9, 2023) (“Under HAVA, states may choose to participate in [the Commission’s] Testing and Certification Program.”). Thus, even if a complainant could show that the EVS 6300 did not meet the VVSG standards, that alone would not establish a violation of Title III.<sup>3</sup>

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<sup>3</sup> PA Fair Elections responds that “adhering to the VVSG is voluntary **except in select states where it is required by their own state law**.” Compl. Pre-H’rg Mem. at 3 (emphasis in original). But it does not provide a citation to Pennsylvania law mandating compliance with the VVSG or, more specifically, legal authority which removes discretion from the Secretary of

That said, the Department has submitted compelling evidence that the EVS 6300 meets the VVSG standards. To wit, on November 17, 2022, the Commission certified that the EVS 6300 “has been evaluated at an accredited voting system testing laboratory for conformance to the *Voluntary Voting System Guidelines Version 1.0*.” Dep’t Ex. 1 at 40. Complainants point to particular findings in the Scope of Certification that accompanies this certificate, arguing that they show that the EVS 6300 should not have been certified to meet the VVSG standards. *See* H’rg Tr. at 142-46. But, of course, this argument ignores that the Commission *did* certify these machines. Complainants attempt to downplay certification by arguing that Commission certification is not sufficient to comply with HAVA standards. Compl. Post-H’rg Mem. at 1 (pointing out that “[Commission] certification is **not** HAVA certification” (emphasis in original)). But by both relying on VVSG standards as the basis of their HAVA claim and then dismissing those standards as irrelevant to HAVA compliance, Complainants’ argument is circular and self-defeating. If the VVSG standards are incorporated into HAVA, then the EVS 6300 meets the minimum standards; if the VVSG standards are independent of HAVA, then the evidence related to compliance with those standards is irrelevant to a HAVA claim. At bottom, Complainants have failed to demonstrate how the EVS 6300 fails to meet HAVA’s minimum standard for a voter-verification requirement. *See* 52 U.S.C. §§ 21084-21085 (noting that HAVA sets minimum standards and leaves methods of compliance to the discretion of the states).

The EVS 6300 thus complies with HAVA’s requirement that each voter be permitted to verify his or her votes before they are cast.

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State to decide whether counties must comply with the VVSG. Thus, the question of VVSG compliance is for the Secretary of State, not a Title III Hearing Officer.

### ***The EVS 6300 Produces an Auditable Paper Trail***

Complainants alternatively argue that the EVS 6300 “does not produce a paper record that can be reliably used for a manual audit.” Compl. Pre-H’rg Mem. at 1. However, they have presented no evidence in support of this claim. There is clear evidence that the EVS 6300 produces a printed paper copy of each voter’s votes, and that each voter is given the opportunity to verify his or her votes on this paper. And as set forth in the Department’s approval of the EVS 6300, Northampton County is required by the Election Code to conduct an audit “exclusively via a manual count of the voter marked paper ballots.” Dep’t Ex. 1 at 26. Complainants have produced no credible evidence that Northampton County does not perform the required audit.

Complainants’ challenge to the EVS 6300’s audit capabilities appears directly related to the issues with the 2023 Election. They contend that the system “was not compliant with HAVA on November 7th, 2023” because the paper record with the inverted judicial candidates could not be used to audit those races. Compl. ¶ 15; Compl. Pre-H’rg Mem. at 13. But, as set forth above, whether the machine as erroneously programmed complied with HAVA during the municipal election is not at issue in this matter. Importantly, the record is clear that voters had access to the courts during that time, and orders issued by Northampton County judges on election day are not reviewable here. Instead, the question is whether the EVS 6300 as approved for use in future elections complies with HAVA’s auditability requirement. The evidence indicates that it does, and Complainants offer no persuasive evidence to the contrary.

Thus, Complainants’ claims alleging violations of HAVA’s audit capacity requirement are dismissed.

### ***Title III of HAVA Does Not Require Logic and Accuracy Testing***

Complainants argue that HAVA requires logic and accuracy testing of voting machines prior to each election, which means “testing every ballot position, including write-ins for every

contest, over votes, undervotes and other error conditions, all permutations for each contest on the ballot.” Compl. Pre-H’rg Mem. at 16. But Complainants do not cite any provision in Title III as the basis for their contention. The Department, on the other hand, argues that HAVA does not require logic and accuracy testing, and that this testing requirement originates from a directive of the Department. Dep’t Pre-H’rg Mem. at 6.

Logic and accuracy testing, while important, is not a requirement in Title III of HAVA. Nothing in the statutory text creates a federal requirement that would be enforceable in this forum. Thus, Complainants’ claims alleging inadequate logic and accuracy testing of the EVS 6300 are dismissed.<sup>4</sup>

***There Is Insufficient Evidence to Rebut Respondents’ Evidence That the EVS 6300 Complies with HAVA Requirements for Persons with Disabilities***

Finally, Complainants argue that the EVS 6300 does not meet HAVA’s standard of accessibility for voters with disabilities. *See* Compl. Pre-H’rg Mem. at 6 (citing 52 U.S.C. § 21081(a)(3)(A)). However, they presented no evidence from any person with a disability who had trouble using the EVS 6300. Instead, they relied on the section in the Certification Report which “identified three problems that could reduce the ability of people with disabilities to vote independently and privately.” Dep’t Ex. 1 at 67; *accord* H’rg Tr. at 142-44.

HAVA requires that a voting system “be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” 52 U.S.C. § 21081(a)(3)(A). To accomplish this, a county must provide at least one system at each precinct for those with disabilities. 52 U.S.C. § 21081(a)(3)(B). Here, the

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<sup>4</sup> This decision reaches no conclusion as to whether logic and accuracy testing by Northampton County prior to the 2023 Election was proper or adequate.



Certification Report identifies *potential* issues with the exclusive use of the EVS 6300 for blind voters, but there is insufficient evidence that any such problem actually manifested. The EVS 6300, for example, has the ability to produce an “audio ballot” for the visually impaired. *See* Dep’t Ex. 1 at 30. Thus, the Department and Northampton County have produced evidence that the EVS 6300 complies with HAVA for visually impaired voters, and Complainants have failed to produce sufficient persuasive, non-speculative evidence that a problem actually exists.

#### **IV. CONCLUSION AND DETERMINATION**

Wherefore, for the reasons stated above, Complainants have failed to show that the EVS 6300, as approved by the Department, violates Title III of HAVA. The Complaint is therefore DISMISSED. It is further determined that, because no violation of HAVA has been established, no remedial plan is necessary. This shall be considered a final determination of the Office of General Counsel under 25 P.S. § 3046.2(c).

DATED: February 20, 2024

SUBMITTED BY:



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Stephen R. Kovatis  
Deputy General Counsel

**COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR’S OFFICE OF GENERAL COUNSEL**

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PA FAIR ELECTIONS AND  
STACEY REDFIELD,

Complainants,

v.

PENNSYLVANIA DEPARTMENT  
OF STATE, *et al.*

Respondents.

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Docket Number 2023-002

**ORDER**

**WHEREAS**, Complainants Pennsylvania Fair Elections and Stacey Redfield (“Complainants”) commenced this action on November 22, 2023, by filing with the Commonwealth of Pennsylvania Department of State (“Department”) a verified Statement of Complaint Form (“Complaint”) under Section 1206.2 of the Pennsylvania Election Code;

**WHEREAS**, the Complaint alleged violations of Title III of the Help America Vote Act of 2002 (“HAVA”), 52 U.S.C. § 21081 *et seq.*, against the Department, against Northampton County, and others;

**WHEREAS**, the parties were each afforded the opportunity to submit both pre-hearing and post-hearing memoranda; and

**WHEREAS**, the Complaint requested an informal hearing, which took place on the record on February 6, 2024 and permitted all parties to present evidence and argument supporting their respective positions;

**AND NOW**, having considered the arguments and evidence advanced in the written submissions of the parties and at the hearing in this matter, it is **ORDERED** and **DECREED** as follows:

1. Respondent Election Systems & Software is **DISMISSED** for lack of jurisdiction against this private party in a Title III HAVA complaint.

2. The Complainants have failed to establish that the Department and/or Northampton County has or is violating HAVA. This matter is therefore **DISMISSED**.

3. The request of Northampton County to dismiss the Northampton County Election Commission Board, Lamont McClure, and Christopher Communi from this action is **DENIED AS MOOT**.

4. This shall constitute a final agency determination of this matter in accordance with 25 P.S. § 3046.2(c)(5).

DATED: February 20, 2024

SUBMITTED BY:



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Stephen R. Kovatis  
Deputy General Counsel