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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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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  
Commini,

Respondents.

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Case No. \_\_\_\_\_

**PETITION FOR REVIEW OF  
FINAL AGENCY  
DETERMINATION:  
*Help America Vote Act (HAVA)*  
*Administrative Complaint, Docket No.*  
*2023-002***

**I. PETITION FOR REVIEW OF FINAL AGENCY DETERMINATION**

*INTRODUCTION*

1. Petitioners PA Fair Elections, Heather Honey, and Stacey Redfield, through counsel, hereby file this petition for review of the February 20, 2024 Final Determination and Order issued by Hearing Officer, Deputy General Counsel Stephen R. Kovatis, in the Help America Vote Act (HAVA) Administrative Complaint, Docket No. 2023-002.

2. Petitioners filed a Complaint under Title III of the Help America Vote Act with the Commonwealth Department of State Bureau of Elections on November 22, 2023 against Northampton County and the Department of State, alleging a HAVA violation of 52 U.S.C. § 21081(a)(2).

3. The portion of HAVA codified at 52 U.S.C. § 21081(a)(2) 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.

4. The term “manual” is not defined in HAVA, thus the term is defined by its common use.

5. 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.”

6. Regardless which definition of “manual” controls, electronic machines are excluded from fitting under the definition of “manual.”

7. 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.

8. The crux of Petitioners’ Complaint of November 22, 2023, Docket No. 2023-002 (hereinafter “Complaint”) 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 manual audit capacity.

9. That the voting system fails to meet manual audit capacity requirement was exposed in the November 7, 2023 municipal elections in Northampton County when the human-readable portion of the paper record of many votes did not match with the “actual” vote purportedly stored in a barcode printed on the same paper record.

10. Barcodes are not readable with human eyes or countable by human hands.

11. In the November 7, 2023 elections, which were not federal elections, the paper record of some ballots were false.

12. During the November 7th, 2023, Municipal Election, when voters made a selection in the Superior Court Retention Question, the printed paper record produced did not accurately reflect the voter’s choices. If a voter selected “no” for retention of Panella on the screen and “yes” for retention of Stabile, the printed card produced a “yes” for Panella and a “no” for Stabile.

13. During the November 7th, 2023, Municipal Election, when voters printed their paper record, they discovered that the selections for Judicial Retention had been flipped. The order of the candidates printed on the paper record were reversed. Despite the HAVA requirement that the system produce an auditable official record used “for any recount conducted with respect to any election in which the system is used.” The ES&S system produced a record that was different than what was displayed on the screen and the selections were reversed for the retention questions.

14. The November 7, 2023 municipal elections exposed that the paper record produced by the voting system used in Northampton County is not reliable for a manual audit.

15. HAVA administrative complaints contemplate violations of HAVA that have occurred, are occurring, or will occur.

16. Use of the same voting system used in Northampton County in a federal election would be a HAVA violation because the permanent paper record is not reliable for a manual audit.

17. HAVA violations will occur if the same voting system incapable of a manual audit is used.

18. An informal hearing on this matter was held online on February 6, 2024.

19. Deputy General Counsel Stephen R. Kovatis found no HAVA violations in the matter of the Petitioners' complaint as stated in the Help America Vote Act Administrative Complaint, Docket No. 2023-02 Final Determination and Order.

20. A copy of the Final Determination and Order issued by Hearing Officer, Deputy General Counsel Stephen R. Kovatis, in the Help America Vote Act Administrative Complaint, Docket No. 2023-002 is attached to this Petition for Review as Exhibit A.

21. Petitioners will request a certified transcript with the official exhibits and briefing below be sent to this Honorable Court.

22. Petitioners appeal for review of the administrative agency decision to this Honorable Court with this Petition for Review.

## **II. STATEMENT OF JURISDICTION**

23. On February 20, 2024, the Department of State issued a final agency determination in accordance with 25 Ps Stat. § 3046.2 in Docket No. 2023-002, PA Fair

Elections and Stacey Redfield v. Pennsylvania Department of State. A copy of that Final Determination and Order is attached as Exhibit A.

24. This Court has jurisdiction under 42 Pa.C.S. § 3046.2(f), which subjects an agency determination to appellate review in this Commonwealth Court, pursuant to 42 Pa.C.S. § 763.

25. Pursuant to Pa.R.A.P. 1512, this petition for review is timely and in accord with Pa.R.A.P. 1513.

### **III. PARTIES**

26. Petitioners (complainant-appellants) PA Fair Elections, by and through their bona fide officer Heather Honey, and Stacey Redfield, seek review of the aforementioned final agency determination.

27. Northampton County, Northampton County Election Commission Board, Northampton County Executive Lamont McClure, and Northampton County Registrar Christopher Commini are responsible for selecting, acquiring, testing and administering the voting systems for use in Northampton County.

28. Respondents Pennsylvania Department of State and Secretary of the Commonwealth Al Schmidt are responsible for certifying compliant voting systems for use in the Commonwealth.

29. All respondents are responsible for allowing voting systems in Northampton County that do not have a manual audit capacity in violation of HAVA.

### **IV. GOVERNMENT UNIT WHO MADE THE FINAL DETERMINATION**

30. Stephen R. Kovatis, Deputy General Counsel, Governor's Office of General Counsel made the final agency determination sought to be reviewed. Exhibit A.

## **V. DETERMINATION SOUGHT TO BE REVIEWED**

31. The February 20, 2024 Final Determination and Order issued by Hearing Officer, Deputy General Counsel Stephen R. Kovatis, in the Help America Vote Act Administrative Complaint, Docket No. 2023-002 is the determination sought to be reviewed and is attached to this Petition as Exhibit A.

32. In Exhibit A at 18 (Order at 2) the determination sought to be reviewed ordered and decreed that:

- a. Respondent Election Systems & Software is DISMISSED for lack of jurisdiction against this private party in a Title III HAVA complaint.
- b. The Complainants have failed to establish that the Department and/or Northampton County has or is violating HAVA. This matter is therefore DISMISSED.
- c. The request of Northampton County to dismiss the Northampton County Election Commission Board, Lamont McClure, and Christopher Communi from this action is DENIED

33. Without conceding that a private party could *never* be the subject of a Title III HAVA complaint, Petitioners acknowledge that previously-named respondent private company Election Systems & Software was likely properly dismissed under the circumstances of their Complaint and subsequent administrative proceedings.

34. Petitioners agree that Northampton County Election Commission Board, Lamont McClure, and Christopher Communi should not be dismissed.

35. Petitioners object to, and seek review specifically of item “b,” (Exhibit A at 18 ¶ 2, Order at 2 ¶ 2) which stated that Complainants failed to establish a HAVA violation and therefore dismissed the matter.

## **VI. GENERAL STATEMENT OF OBJECTIONS**

36. Petitioners object to several of the findings of fact and conclusions of law in the Final Determination and Order issued by Hearing Officer, Deputy General Counsel Stephen R. Kovatis, in the Help America Vote Act Administrative Complaint, Docket No. 2023-002, including, but not limited to those contained in the following paragraphs.

37. Petitioners object to the Hearing Officer's conclusion of section B ¶ 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)." Exhibit A Final Determination at 7.

38. Petitioners object to the Hearing Officer's conclusion of 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.

39. Petitioners object to the Hearing Officer's conclusion of 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)." Id.

40. Petitioners maintain their contention 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 is not a HAVA-compliant voting system.

41. 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.

42. Unlike what the Hearing Officer characterized as a “copy” of the vote (Exhibit 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.

43. There is a genuine controversy for this Court to review as to whether a voting system that relies on a machine-only readable barcode printed on paper with words that may not match the human-readable words on that paper, is a HAVA-compliant voting system.

44. Petitioners further object to some of the findings of fact, which fall short of being supported by substantial evidence, including, but not limited to the specific examples in the following paragraphs.

45. Petitioners object to the finding: “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.” Exhibit A at 15.

46. HAVA establishes minimum requirements that voting systems “shall comply” with standards established by the Federal Election Commission (FEC).

47. 52 U.S.C. § 21081(a)(5) states “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.”

48. Petitioners object to the finding: “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.” Exhibit A at 15–16.

49. Petitioners object to the finding that: “Further, Complainants’ interpretation of HAVA would mean that no voting system could satisfy HAVA if it electronically maintained and counted votes.” Exhibit A at 11.

50. 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.”

51. For example, the record below reflects that Petitioners specifically noted that other voting systems, like 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.

52. Petitioners object to the finding: “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.” Exhibit A at 12.

53. 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.

54. Petitioners’ position both in their complaint, and as-of now, in other words is just because HAVA permits DREs doesn’t mean all DREs are HAVA-compliant.

55. Petitioners object to the finding: “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.” Exhibit A at 3.

56. The record reflects that to date, EVS 6.3.0.0 has not been used in any Pennsylvania elections, yet the agency 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.

57. Regardless, the lack of HAVA compliance pertains equally to both the EVS 6021 and EVS 6300 EVXL systems.

58. Petitioners object to the finding: “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.” Exhibit A at 13.

59. The record reflects the Petitioners stated two separate facts about EAC certification:

- a. The Election Assistance Commission (EAC) certification of a voting system does not imply the system is HAVA-compliant.
- b. The ES&S System was not tested to all of the VVSG (Voluntary Voting System Guidelines) standards, and specifically, ES&S indicated on their request for testing that they were not submitting their ability to produce a VVPAT (Voter Verifiable Paper Audit Trail), and the The EVXL could not meet the requirements of the VVSG for VVPAT.

60. Petitioners further object-in-part to the finding “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).” Exhibit A at 5.

61. Petitioners complaint includes and the record below reflects that the system design of the EVS 6300 EVXL, like the EVS 6021, with its layers of software used to interpret the voter’s intent at each stage in the process to cast their ballot, has proven its ability to **disenfranchise** voters in future elections just as it did in past elections:

- a. by keeping voters from choosing their preferred candidates (2023),
- b. by using barcodes to count the votes which cannot be verified by the voter before cast and counted (2019),
- c. by not producing a permanent paper record of human verified votes to be used as the official record for any recount or manual audit conducted with respect to any election in which the system is used.

- (This is the Complainants’ main reason for stating the EVXL is not HAVA compliant.),
- d. by not complying with the error rate of the EVXL in counting ballots. (The error rate is determined by considering only those errors which are attributable to the voting system and not attributable to an act of the voter.), and,
  - e. by allowing a multitude of accessible issues, uncovered during two different testing sessions of those with disabilities, to go unresolved, impacting their ability to vote independently and privately.

62. The EVXL was used as a non-HAVA compliant DRE in 2023 because the paper record was irrelevant, as the machine manufacturer admitted that the paper—including the barcode and the printed text—are not a necessary component of the voting system.

63. The paper record produced by the EVXL could not have been used for a manual audit because the issues that occurred in 2023 and may occur in 2024 are not simply “clerical errors” but are only possible due to critical design failures of the EVXL.

64. While the hearing of February 6, 2024 was an informal hearing, Petitioners further object to some portions of the process and procedure of that hearing, including but not limited to: the admittance of Respondents’ evidence without witnesses, and the allowance that Respondents were permitted to discuss evidence not in the record of the hearing in closing argument, again, without witnesses or opportunity for cross-examination.

## VII. STATEMENT OF RELIEF SOUGHT

65. Wherefore, Petitioners humbly request this court grant this petition for review, allow further briefing, and ultimately issue a finding, order, or determination that:

- a. HAVA's requirement for a manual auditable paper record requires an accurate human-readable physical paper record.
- b. The ESXL machines which comprise the voting system in Northampton County will be non-compliant with HAVA if used in a federal election because, when paper is used, it relies on a barcode which is capable of containing a vote that does not match a human-readable written paper record.
- c. Grants any injunctive, declaratory, or other relief as appropriate.

Dated: March 21, 2024

/s/ Karen DiSalvo

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## VIII. CERTIFICATE OF COMPLIANCE

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

Dated: March 21, 2024

/s/ Karen DiSalvo

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