

Westmoreland County Board of Commissioners, Westmoreland County Board of Elections (collectively, Board of Elections) and Pedro A. Cortes, the Secretary of the Commonwealth (Secretary) have violated the Pennsylvania Constitution and the Pennsylvania Election Code² by agreeing to purchase electronic voting machines without putting the issue to a vote before the Electors of Westmoreland County.

I.

In their three-count complaint, the Electors allege that on December 29, 2005, the Board of Elections voted, in contravention of the Pennsylvania Constitution and Election Code, to purchase approximately 750 touch-screen iVotronic voting machines (voting system) from Election Systems and Software, Inc. by authorizing and directing the entrance into a contract with that company.³ Their specific arguments can be summarized as follows:

- Count I. The decision to procure the electronic voting system was in violation of Article VII, Section 6 of the Pennsylvania Constitution, which provides that the use of voting machines at all elections is to be at the

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District which includes parts of Westmoreland County. Sallie W. Bradley is a School Director in the Penn-Trafford School District. (Action for declaratory judgment and complaint in equity at paragraph 4.)

² Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2600-3591.

³ The parties have stipulated that the Board of Elections has not yet acted to execute a contract, lease or other agreement to procure the electronic voting system. (*See* stipulations at paragraph 9.)

option of the electors of the county, and regardless of that Constitutional provision the Board of Elections has entered into a contract for the purchase of the voting system.

- Count II. The failure to put the issue to vote is in violation of Article I, Section 5 of the Pennsylvania Constitution which provides that "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
- Count III. The Election Board has violated Sections 1102-A, 1103-A and 1104-A of the Pennsylvania Election Code⁴ which provide that it is the electors who decide by voting as to whether electronic voting systems will be used in an election.

The Electors request this Court to declare that the Board of Elections was required to put the issue of purchasing a voting system to the Electors and it did not, and declare that the Election Board's action to enter into a contract with Election Systems and Software, Inc. for the purchase of the voting system is in violation of the Pennsylvania Constitution and Pennsylvania Election Code. They also request that we issue preliminary and permanent injunctive relief enjoining the Board of Elections from implementing the contract to purchase the voting system without first putting it to a vote.⁵

⁴ 25 P.S. §§3031.2.-3031.4.

⁵ "In order to prevail on a petition for a permanent injunction, the party seeking the injunction must establish that the (1) right to relief is clear, (2) that there is an urgent necessity to avoid an injury which cannot be compensated for by damages, and (3) the greater injury will result from refusing rather than granting the relief requested." *Singleton v. Lavan*, 834 A.2d 672, 674 (Pa. Cmwlth. 2003). "[U]nlike a claim for a preliminary injunction, the party need not establish either irreparable harm or immediate relief and a court 'may issue a final injunction if **(Footnote continued on next page...)**

In response, the Board of Elections and the Secretary have each filed an answer and new matter denying that the Board of Elections must seek and receive the approval of the Electors of Westmoreland County prior to using any electronic voting system at the polling places within Westmoreland County. Under new matter, the Board of Elections and the Secretary identically allege that because the use of lever voting machines in elections for federal offices is prohibited by the Help America Vote Act of 2002 (HAVA),⁶ and the current voting machines in Westmoreland County are lever voting machines and do not meet the requirements of HAVA, it is required to procure a new electronic voting system that complies with those requirements. It further alleges that any provisions of the Pennsylvania Constitution and the Pennsylvania Election Code must give way to the mandatory requirements of HAVA because the voting system will be needed for the General Primary that will take place on May 16, 2006.⁷ From a practical standpoint, the Board of Elections argues that it is senseless to require this issue to go to a vote by

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such relief is necessary to prevent a legal wrong for which there is no adequate redress at law."
Id.

⁶ 42 U.S.C. §§15301-15545.

⁷ The parties have stipulated that because electors of the Commonwealth will be voting at the May 16, 2006 General Primary election for a member of the United States Congress, the election is an election for federal office under HAVA and other federal laws regulating elections. On that same date, the electors of the Commonwealth will also be casting votes for their respective party's nominees for the offices of United States Senator, Governor, Lieutenant Governor, and a member or members of the Pennsylvania General Assembly. (*See* stipulations at paragraphs 6-7.)

the Electors because the election would require an electronic voting system for the federal offices and a separate lever voting machine for state offices.

In further response to the request for injunctive relief, the Board of Elections and the Secretary argue that the Board of Elections and the Commonwealth will suffer greater harm than the Electors because the Commonwealth has already received federal funding in the amount of \$976,819.32 to purchase the voting system,⁸ and to repay the federal government the funds already received would cause greater harm than the Electors claim they would experience if the complaint and petition for injunctive relief was not granted. *See* Section 102(d) of HAVA, 42 U.S.C. §15302(d)(1) (requiring repayment to the United States Election Assistance Commission an amount equal to the non-compliant precinct percentage of the amount of funds provided to the state). The Board of Elections and the Secretary further argue that granting the requested relief would have ramifications across the Commonwealth and adversely affect the public interest because 23 other counties in the Commonwealth use lever voting systems which must also be replaced in time for the May 16, 2006 General Primary election in order to meet the requirements of HAVA.⁹

⁸ The parties have stipulated that the Commonwealth applied for and received approximately \$23 million from the United States General Services Administration (GSA) for the purpose of replacing the lever voting machines and punch card systems with an electronic voting system as required under HAVA. (*See* stipulations at paragraph 16.)

⁹ Boehm stated at the trial before this Court that two counties, Mercer and Philadelphia, have already purchased the electronic voting system. (*See* February 7, 2006 Trial Transcript at 15.) He did not indicate whether the issue of procuring the voting system was put to a vote before the electors of those counties.

A trial was held on February 7, 2006, at which time both sides presented their respective positions. Only the Board of Elections presented witnesses. William Boehm (Boehm), the Director of the Office of Policy in the Department of State, testified first that what was being proposed by the Electors – essentially two different voting systems, one for federal elections and one for state elections – would be extremely costly and impractical. He stated that it would require two different types of ballots that would have to be simultaneously used and displayed; twice as many polling workers to be trained to operate two different devices; two sets of voting data to be tabulated and certified; and each voter would have to vote twice on two different devices. He further testified that the Department of State never considered using two different voting systems because it would cause voter confusion. He explained that there would be voter confusion under two possible scenarios: the first, where federal elections for federal and state offices were held in even years and municipal elections for state or local offices were held in odd years; or the second, where electors had to vote for both federal and state officials at the same election. (*See* February 7, 2006 Trial Transcript at 25-28.) The confusion would be caused by requiring the voters to learn two different voting systems for the different elections.

Also testifying was Mark Wolosik (Wolosik), the Allegheny County Elections Division Manager, who explained in great detail how the lever voting machines worked, why they did not comply with HAVA, and how they could break down compared to the voting system proposed by the Board of Elections. He concurred with Boehm's testimony that using a two-system voting process would be extremely difficult on an election board, both financially and physically.

Wolosik focused on the fact that voters would be confused with two different voting systems as well as the costs of storing the machinery for two voting systems and on training personnel to handle the elections. He was also of the opinion that a paper ballot voting system would be just as difficult to handle due to the volume of paper ballots. In his estimation, the Allegheny County Board of Elections would have to print approximately one million ballots. Paula Pedicone (Pedicone), Director of Elections for Westmoreland County, testified regarding the Board of Elections' procurement of bids and the timeline involved in attempting to come into compliance with HAVA. She concurred with the testimony of Wolosik regarding the difficulties that the Board of Elections would encounter utilizing a two election system voting scheme.

Counsel for both sides closed by explaining their respective clients' positions as follows: the Electors contend that the Pennsylvania Constitution and the Election Code require the decision to procure a new voting system to be put on a referendum, and that HAVA does not preempt the Pennsylvania Constitution and/or the Election Code because there is no conflict between them and, therefore, no impediment to utilizing one voting system for HAVA and a separate voting system for state and local elections.¹⁰ The Board of Elections and the Secretary contend that the Commonwealth utilizes a unitary voting system which requires one voting system. Because HAVA requires the replacement of the lever voting machines, they argue that HAVA preempts the Pennsylvania Constitution and

¹⁰ The Electors agreed at trial that the current method of voting using a lever system in Westmoreland County did not comply with HAVA. (*See* February 7, 2006 Trial Transcript at 110.)

Election Code because they are an obstacle to complying with HAVA and meeting that goal.

II.

A.

In order to address the Electors' concerns as well as those of the Board of Elections and the Secretary, it is necessary to first understand the purpose of HAVA and what it requires from the states. HAVA was enacted in 2002 in response to problems that arose from the last presidential election relative to both voting and counting the votes.¹¹ HAVA requires the states to install a voting system¹² to use in federal elections and provides as follows:

¹¹ Boehm testified at trial as follows:

"The Help America Vote Act was enacted as a reaction to the events that occurred in Florida during the 2000 election, specifically with regard to the voter confusion that took place. And it was, it was an effort to modify the federal election laws to ensure that there were standards with, you know in the various voting devices that are used in the states. And it actually represented a, an election reform movement, you know, after the Florida elections."

* * *

"As, as I think most of us remember, there were all sorts of problems in Florida relating to the use of punch cards in particular. It became obvious that in Florida, there were no standards, for example, as to what constituted a vote: Pregnant chads, dimpled chads, et cetera. As a reaction to that controversy, Congress considered legislation in which it attempted to resolve some of those issues, but it also incorporated into the Help America Vote Act a lot of other concerns, you know, such as voter identification, provisional balloting and things like that. So basically, the Help

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America Vote Act was an election reform package to address the issues that arose during the Florida debacle, if you want to call it that, and other issues that were on the, on the concerns of the individual Congressmen regarding election reform."

(February 7, 2006 Trial Transcript at 7, 46.) In response to the question whether the congressional reaction in the passage of HAVA was to improve public confidence in elections and their results, Boehm stated: "I believe that's what the meaning of the election reform is." (February 7, 2006 Trial Transcript at 47.)

¹² "Voting system" is defined under 42 U.S.C. §15481 as:

(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—

(A) to define ballots;

(B) to cast and count votes;

(C) to report or display election results;

(D) to maintain and produce any audit trail information;
and

(2) the practices and associated documentation used-

(A) to identify system components and versions of such components;

(B) to test the system during its development and maintenance;

(C) to maintain records of system errors and defects;

(D) to determine specific system changes to be made to a system after the initial qualification of the system; and

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(a) ESTABLISHMENT OF PROGRAM.-

(1) IN GENERAL.-Not later than 45 days after the date of the enactment of this Act, the Administrator¹³ shall establish a program under which the Administrator shall make a payment to each State eligible under subsection (b) in which a precinct within that State used a punch card voting system or a lever voting system to administer the regularly scheduled general election for Federal office held in November 2000 (in this section referred to as a "qualifying precinct").

(2) USE OF FUNDS.-A State shall use the funds provided under a payment under this section (either directly or as reimbursement, including as reimbursement for costs incurred on or after January 1, 2001, under multiyear contracts) to replace punch card voting systems or lever voting systems (as the case may be) in qualifying precincts within that State with a voting system (by purchase, lease, or such other arrangement as may be appropriate) that –

(A) does not use punch cards or levers;

(B) is not inconsistent with the requirements of the laws described in Section 906; and

(C) meets the requirements of section 301.

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(E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

¹³ "Administrator" refers to the Administrator of General Services. Section 101(a) of HAVA, 42 U.S.C. §15301(a).

Sections 102(a)(1) and (2), 42 U.S.C. §§15402(a)(1) and (2). HAVA sets forth the required voting system standards mandated by Congress as: (a) manual audit capacity – Section 301 of HAVA, 42 U.S.C. §15481(a)(2);¹⁴ (b) accessibility for individuals with disabilities – Section 301 of HAVA(a)(3), 42 U.S.C. §15483(a)(3); (c) alternative language accessibility – Section 301(a)(4), 42 U.S.C. §15481(a)(4); and (d) error rate – Section 301(a)(5) of HAVA, 42 U.S.C. §15481(a)(5). Section 301(a) of HAVA, 42 U.S.C. §15481(a), specifies that the individual states must meet certain requirements "in an election for Federal office" relative to voting systems, and it provides criteria as to how the states may meet the requirements regardless of whether the state "uses a paper ballot voting system, a punch card voting system, or a central count voting system." 42 U.S.C. §15481(a)(1)(B). It is undisputed that the current method of voting in Westmoreland County does not comply with HAVA. (*See* February 7, 2006 Trial Transcript at 110.)

Section 305 of HAVA, 42 U.S.C. §15485, leaves the specific choices on the methods of complying with HAVA to the discretion of each state; however, HAVA sets a deadline for the replacement of the lever and punch-card voting systems, which for Westmoreland County was the first election for federal office held after January 1, 2006 – in this case, the May 16, 2006 General Primary election.¹⁵ *See* Section 102(a)(3) of HAVA, 42 U.S.C. §15302(a)(3)(B).

¹⁴ Section 301 of HAVA, 42 U.S.C. §15481(a)(2)(B)(i), requires that "the voting system shall produce a permanent paper record with a manual audit capacity for such system."

¹⁵ HAVA initially set the deadline for compliance as the "regularly scheduled general election for Federal office to be held in November 2004." Section 102(a)(3)(A) of HAVA, 42 U.S.C. §15302(a)(3)(A). However, a waiver may be given if the state certifies to the EAC not **(Footnote continued on next page...)**

To aid the states in achieving the installation of a voting system, HAVA requires that each state is to be provided with federal funding. Section 102(a)(1) of HAVA, 42 U.S.C. §15302(a)(1). However, if a state fails to meet the deadline for replacing the voting systems, the state is required to pay GSA "an amount equal to the noncompliance precinct percentage of the amount of the funds provided by the State under the program." Section 102(d) of HAVA, 42 U.S.C. §15302(d). In order to obtain such funds, each state must file with the United States Election Assistance Commission (EAC) a state plan developed in accordance with the requirements of HAVA. *See* Section 253(b) of HAVA, 42 U.S.C. §15403(b).¹⁶

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later than January 1, 2004, that it will not meet that deadline for good cause and includes in the certification the reasons for its failure to meet that deadline. If the waiver is given, then the voting system must be "replaced in time for the first election for Federal office held after January 1, 2006." Section 102(a)(3)(B) of HAVA, 42 U.S.C. §15302(a)(3)(B). Nothing in the record explains why a waiver was given to the Commonwealth.

¹⁶ In this case, the Commonwealth filed with the EAC a state plan developed in accordance with the procedural requirements of HAVA after first presenting a preliminary draft to the public for inspection and comment, issuing HAVA Bulletin #1 (June 18, 2003) regarding the replacement of the voting system, and after holding public hearings. A final state plan was prepared on August 13, 2003, and submitted to the Federal Election Commission. After receiving approval from the EAC, the Commonwealth applied for and received federal funding from the GSA in the amount of \$23 million to replace the punch-card voting systems or lever voting systems. Of that \$23 million, \$976,819.32 was designated for Westmoreland County to replace its voting machines. The Commonwealth filed an amended state plan on September 15, 2005, for the 2005-2006 federal fiscal year as required under Section 253(b)(1) of HAVA, 42 U.S.C. §15403(b)(1). The amended plan was also made available for public inspection and comment and a hearing was held regarding the proposed amendments to the state plan. (*See* stipulations at paragraphs 30-57.) Subsequently, on December 29, 2005, the Board of Elections passed Resolution #R-41-2005 expressing its intent to procure an electronic voting system for use in elections in Westmoreland County on and after May 16, 2006. (Secretary's pre-hearing memorandum of law at 4-5.)

In summary:

- HAVA only deals with updating the voting mechanisms used by the States in *federal elections*;
- HAVA does not direct States on the type of voting mechanisms to be used in State or local elections;
- What determines and controls the type of voting mechanism to be used in State and local elections in each individual State is the individual State's constitutions and laws on elections.

B.

In this Commonwealth, Article 7, Section 4 of the Pennsylvania Constitution provides:

All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.

Article VII, Section 6 of the Pennsylvania Constitution further provides:

The General Assembly shall, by general law, permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote, at all elections or primaries, in any county, city, borough, incorporated town or township of the Commonwealth, *at the option of the electors of such county, city, borough, incorporated town or township*, without being obliged to require the use of such voting machines or mechanical devices in any other county, city, borough, incorporated town or township, under such regulations with reference thereto as the General Assembly may from time to time prescribe. (Emphasis added.)

In 1937, the General Assembly authorized the installation of voting machines. Pursuant to Section 1102 of the Election Code, 25 P.S. §3002, "any county, city, borough or township may, by a majority vote of its qualified electors voting thereon cast at any general or municipal election, authorize and direct the use of voting machines for registering or recording and computing the vote at all elections held in such county, city, borough or township, or in any part thereof." This provision, echoing the Pennsylvania Constitution, requires that a vote of the Electors be held to use certain voting machines. Section 1104(a) of the Election Code, 25 P.S. §3004(a), requires that voting machines may only be purchased if a majority of the voters agree upon that course of action. Section 1107 of the Election Code, 25 P.S. §3007, provides the requirements of the voting machines which also includes requirements for voting by paper ballot. Specifically, subsection (g) requires a voting machine to "permit each voter to deposit, write in, or affix upon receptacles or devices provided for the purpose, ballots containing the names of persons for whom he desires to vote, whose names do not appear upon the machine." 25 P.S. §3007(g). A change from utilizing mechanical voting machines to paper ballots requires a vote by the voters. Section 1104 of the Election Code, 25 P.S. §3004(g). Regarding voting by paper ballots, *see also* Section 1333 of the Election Code, 25 P.S. §3016; Section 1110-A of the Election Code, 25 P.S. §3031.10 (supplies; preparation of the voting system and of polling places); Section 1112-A of the Election Code, 25 P.S. §3031.13 (election day procedures and the process of voting); and Section 1215 of the Election Code, 25 P.S. §3055 (method of marking ballots and depositing same in districts in which ballots are used).

In 1980, the Election Code was amended to allow for electronic voting machines. The determinative factor under the Election Code is what defines an electronic voting machine. Section 1101-A of the Election Code, 25 P.S. §3031.1, defines "electronic voting system" as "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 case." As with the other voting machines which are mechanical systems, the purchase and use of an electronic voting system requires a vote of the electors. *See* Section 1102-A of the Election Code, 25 P.S. §3031.2. Only when a majority of the qualified registered electors voting on the question vote in favor of adopting an electronic voting system may the county board of elections of that county purchase, lease or otherwise procure an electronic voting system as approved by the Secretary of the Commonwealth. Section 1104-A of the Election Code, 25 P.S. §3031.4(a). A vote of the electors is also required to change from paper ballots or mechanical voting machines to electronic voting machines. Article VII, Section 6 of the Pennsylvania Constitution; 25 P.S. §3031.2.

To summarize, the provisions of the Pennsylvania Constitution provide that utilizing paper ballots that are counted manually is the default method of voting and computing votes. Article VII, Section 4 of the Pennsylvania Constitution provides that to change from a ballot to a mechanical system or from either to an electronic system or back to another system also requires a vote of the electors. *See also* 25 P.S. §3031.2 and 25 P.S. §3031.2. The Election Code specifically sets forth the requirements that the Board of Elections must follow

before changing the voting system, but the Election Code does not mandate a specific mechanism to be utilized in state and local elections.¹⁷ Moreover, the Election Code does not prefer one method of voting over another (i.e., the use of mechanical voting or voting by paper ballots), but it does mandate that it is up to the voters of the Commonwealth to decide if an electronic voting system will be utilized. With this understanding of HAVA and knowledge regarding the Commonwealth's election laws on electronic voting systems, we may now address each of the parties' concerns.

III.

The Board of Elections and the Secretary argue that laches should apply because it publicized its commitment to replace all of its lever voting machines as early as 2003, and the Electors waited until 2006 before filing their complaint. It contends that this delay in filing a complaint has caused it to be prejudiced because it could have submitted a referendum to the Electors with enough time to satisfy the provisions of the Election Code and still procure an electronic voting system in time for use by the May 16, 2006 General Primary election; however, now there is insufficient time to conduct a referendum and comply with HAVA.

¹⁷ Even if the electors do not vote in favor of adopting an electronic voting system, Section 1106-A of the Election Code, 25 P.S. §3031.6, provides that the county board of elections "may provide for experimental use at any primary or election in one or more election districts of said county, of an electronic voting system, and the use of such system shall be as valid for all purposes as if the electronic voting system had been adopted in accordance with the provisions of this act." Boehm testified that he believed the intent of HAVA was "to replace the lever machine. So I guess the question becomes whether an experimental use reflects an intent to replace." (February 7, 2006 Trial Transcript at 54.)

The doctrine of laches applies when a party establishes a delay arising from the other party's failure to exercise due diligence and prejudice resulting from the delay. *Reform Congregation Oheb Shalom v. Berks County Board of Assessment Appeals*, 839 A.2d 1217 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 578 Pa. 691, 849 A.2d 1206 (2004). We disagree that laches is applicable because despite the Electors being aware of HAVA in 2003, they had no reason to file a claim until they were aware that the Board of Elections was not going to allow them to vote to decide whether an electronic voting system would be used in the upcoming elections. Additionally, at the hearing on this matter, Boehm testified that the final state plan was only sent to the EAC on September 15, 2005 because:

The delayed organization of the U.S. Election Assistance Commission (EAC), and subsequent lack of Federal guidance severely impeded the Department's ability to make progress towards voting system replacements or upgrades. Specifically, **the Department has waited** for the EAC to define the terms "accessible" and "manual audit capacity" as used in HAVA **before the Department determines which systems should be considered for examination and certification in Pennsylvania. The EAC has not yet made those decisions.** (Emphasis added.)

(February 7, 2006 Trial Transcript at 39, reciting from the September 15, 2005 Amended State Plan at 55.) Although Boehm testified that because the federal government did not provide direction to the Commonwealth on how to act and it had to go ahead and make its own interpretations of certain terms, it expressly states in its state plan that was presented to the public for comment that it had not yet made any decisions and was waiting for the EAC to provide further guidance.

Despite the fact that the Board of Elections ultimately went ahead with negotiations for the purchase of the electronic voting systems by obtaining bids from five different companies in September 2005, the public would have had no way to know that, given the information contained in the amended state plan upon which the Board of Elections expected the public to rely.¹⁸

Additionally, it was not until December 22, 2005, that the Board of Elections received notification from the Department of State that the vendor it had chosen had been certified.¹⁹ This statement in the amended state plan and the Board of Elections' actions lend further credence to the Electors failure to take any action because they did not know until December of 2005 that the Board of Elections would actually take any action without involving them. In contrast, however, the Board of Elections was aware of HAVA since its enactment in 2002, and it certainly had time to put the issue on a referendum for the Electors to decide well in advance of the three months that are now left before the May election. Consequently, the laches argument is without merit.

IV.

The Board of Elections and the Secretary's main argument is that the Commonwealth's voting system is a unitary system covering both the federal and

¹⁸ Although the Board of Elections contends that it provided information to the public in its 2003 preliminary draft of the state plan and in its 2004 state plan that the lever voting machines did not comply with HAVA, that information alone is insufficient to alert the public that a new voting system was going to be purchased without Electors first voting on the issue.

¹⁹ See February 7, 2006 Trial Transcript at 98.

state elections based on the language found in Article VII, Section 6 of the Pennsylvania Constitution which provides that the "General Assembly shall, by general law, permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote, **at all elections or primaries.**"²⁰

The Board of Elections and Secretary argue that because the Commonwealth utilizes a unitary system, when the federal government changes the law regarding elections by using that system, the General Assembly, in effect, agrees to acquiesce that such a change effects **all** elections, and anything that may be tangentially affected – including state and local elections – must comport with the change. Because voting on a compliant voting system as required by HAVA tangentially affects state elections because they sometimes occur at the same time as the federal elections, the Board of Elections and the Secretary argue that requiring a referendum to vote on whether the Electors want a change in the voting system would be unnecessary.

That argument ignores that it is the Pennsylvania Constitution that requires the referendum, not the General Assembly. Moreover, acquiescence or delegation can never be assumed, inferred or delegated. Because it involves the legislative power vested by the Pennsylvania Constitution in the General

²⁰ Article I, Section 4 of the United States Constitution provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of choosing Senators.

Assembly, acquiescence or delegation of power, even if permissible, must be expressly stated because the net effect would be either an administrative or judicial giving of powers to another entity which would violate the separation of powers and the principles of unlawful delegation. Even if they could be inferred, there is nothing in the Constitution or the Election Code that even suggests acquiescence or delegation to Congress of control over the manner or counting of state or local elections when Congress enacts a change to those methods for federal elections. To the contrary, the Election Code only portends to have control over state elections when defines "election" as "any general,²¹ municipal, special or primary election," none of which include a federal election. *See* Section 1 of the Election Code, 25 P.S. §2602; *see also* ftnt. 26.

The Board of Elections and the Secretary also argue that the provisions of the Pennsylvania Constitution dealing with elections and the Election Code requirements providing for a referendum are preempted by HAVA, a federal law. There are three ways in which federal law may preempt state law: "express preemption," "field preemption" and "conflict preemption." *Orson, Inc. v. Miramax Film Corporation*, 189 F.3d 377, 381 (3d. Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000). Express preemption occurs when there is explicit statutory language that state law will be displaced. *Id.* Under "field preemption," state law may be displaced "if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to

²¹ The Election Code defines a "general election" as "the election which the Constitution of this Commonwealth requires to be held in even-numbered years." 25 P.S. §2602.

supplement it." *Id.*, 189 F.3d at 381. Under "conflict preemption," which the Board of Elections contends applies in this case, state law may be displaced if it is physically impossible to comply with both the state and federal laws or the state law stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. *Id.*, 189 F.3d at 381-82.

In this case, there is no express preemption because nowhere does HAVA specifically state that it preempts state law. "Field preemption" also does not apply because while HAVA deals thoroughly with federal elections, it limits the rulemaking authority of the EAC to federal elections.²² Section 209 of HAVA, 42 U.S.C. §25329, provides:

The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-7(a)).

This language is indicative that there is "room for the states to supplement" HAVA.²³

²² The Commission serves as "a national clearing-house and resource for the compilation of information and review of procedures with respect to the administration of Federal elections." Section 202 of HAVA, 42 U.S.C. §15322.

²³ The effect of HAVA on state law is similar to the Voting Rights Act Amendments of 1970 that changed the voting age from 21 to 18 for federal elections in the respect that Congress could fix the age of voters in national elections but could not set the voting age in state and local elections. *See Oregon v. Mitchell*, 400 U.S. 112 (1970).

As to "conflict preemption," nothing in HAVA makes it physically impossible to comply with HAVA by requiring the displacement of mechanical voting machines that are legal under the Election Code.²⁴ In fact, HAVA supports the states performing what is required under individual state law. Section 102(B)(2) of HAVA, 42 U.S.C. §§15402(B)(2), addresses the compliance of states that require changes to state law and provides:

In the case of a State that requires State legislation to carry out an activity covered by any certification submitted under this subsection, the State shall be permitted to make the certification notwithstanding that the legislation has not been enacted at the time the

²⁴ During the trial, counsel for the Board of Elections cited *O'Brien v. Massachusetts Bay Transportation Authority*, 162 F.3d 40 (1st Cir. 1998), as persuasive that there is federal preemption in this area because the Court of Appeals held that "as long as a state receives federal funds for a particular purpose, its law, if contrary to conditions attached to the funds, must give way to federal law." *Id.* at 43. That case, however, discusses the issue of random drug and alcohol testing of transit police pursuant to a federal law – the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. §5331, and the conditional payment of federal funds based on that drug testing which was alleged to be in violation of an individual's state constitutional rights. In finding that there was preemption of state law because it conflicted with the right of the state to obtain federal funding to meet the requirements of the drug testing Act, the Court explained that what was at issue was the congressional exercise of spending power, and preemptive legislation enacted under the spending power presented the states with a choice: they could either accept federal funds and be subject to the requirements imposed by federal law or decline the funds and avoid the requirements. The present case is considerably different because the implementation of HAVA does not conflict with the requirements of the Pennsylvania Constitution and Election Code and, therefore, there is no conflict requiring preemption. Moreover, if there is a state constitutional provision that conflicts with the purpose of federal funding, then the state is foreclosed from taking those funds from the government. In effect, the citizens of the state have made the decision for the administrative officials and the General Assembly that those funds cannot be accepted, and the remedy should not be compliance with the federal requirement but to give the money back. For this reason, we do not find *O'Brien* applicable to this matter.

certification is submitted and such State shall submit an additional certification once such legislation is enacted.

Additionally, Section 209 of HAVA, 42 U.S.C. §15329, provides a limitation on the authority of the EAC to require the states to do anything related to state and local elections. From the language contained in these statutes, it is apparent that just because the federal government does something different from that of the states, it does not mean the states must acquiesce if the change is not in direct conflict to state law prohibiting its implementation.²⁵

All that HAVA does require is that a compliant voting system be used for federal elections. While it may present difficulties, nothing forecloses the Board of Elections from using paper ballots for two or three federal elections every two years or, if they desire, to purchase electronic voting machines in those years. In addition, the physical impossibility was created by not placing before the public a referendum as required by state law as to whether they wanted to change to an electronic voting system. HAVA has been in existence since 2002; Act 150 of 2002, which amended the Election Code regarding the issue of referendums, now allows an unlimited number of elections at which voters may vote and change the

²⁵ While the Board of Elections argues that the Pennsylvania Constitution and the Election Code must give way to the "mandatory requirements of HAVA," there are no mandatory requirements relative to state and local elections, only federal elections. If the issue before us was whether the Electors have a right under the Election Code to vote on whether they want the voting system for federal elections only, HAVA (federal law) would trump the Election Code and the Pennsylvania Constitution with regard to the usage of electronic voting systems in federal elections because the federal government's intent can be inferred through the numerous and comprehensive statutes on the subject which were enacted specifically related to HAVA.

voting system used.²⁶ Moreover, there was even time to take out these provisions in the Pennsylvania Constitution. Since the time HAVA was enacted up through the time of this trial, it has never been an impossibility to comply with HAVA and still follow state laws at the same time. What has made this case so difficult is that the Board of Elections waited so long before taking any action to comply with HAVA.

Because HAVA provides no information whatsoever relative to state and local elections, and the Election Code does not mandate that electronic voting systems be used for state and local elections because paper ballots may still be utilized,²⁷ it is not impossible to comply with both state and federal laws regarding the upcoming elections – it just requires that two different types of voting mechanisms or systems may be used; one for the state and local elections and another for the federal election.

²⁶ Act 150 of 2002 amended the Election Code regarding the issue of referendums. Previously, the Election Code only allowed a vote to be put to the electors once every 103 weeks. Act 150 amended that portion of the Election Code, effectively removing that requirement so that there is no set time for placing an issue on a ballot for the electors. This is a further indication that the issue of the electronic voting systems could have and should have been placed on the ballot for the Electors to decide upon because there were no time constraints involved. Additionally, in response to a question at the hearing from the Court as to why the 103 week provision was removed from the Election Code, counsel for the Commonwealth responded: "Just to—in case there were any obstacles in complying with HAVA, they wanted to make it clear, I think—I mean, there's no—you know, this is my view. They just wanted to make it clear in case there were any obstacles, this [issue at hand] wasn't going to be one...It was like a kind of a, we're, we're we want to make it easy to implement HAVA; if necessary, if necessary, if a referendum is, should be necessary, we want to make it easy." (February 7, 2006 Trial Transcript at 135.)

²⁷ Boehm conceded at the hearing before this Court that paper ballots were not preempted by HAVA and were in compliance with HAVA. (See February 7, 2006 Trial Transcript at 46.)

Consequently, because there is no specific language in HAVA preempting state law and HAVA is not at variance with the Pennsylvania Constitution and Election Code, HAVA does not preempt the Pennsylvania Constitution or the Election Code on this issue.

V.

Even if the Pennsylvania Constitution and the Election Code are not preempted and a vote of the Electors is required, the Board of Elections and the Secretary contend, nonetheless, that a permanent injunction should not be granted because more harm would come from granting the injunction than refusing it. The harm they allege is that they have already received federal funding for the purchase of the electronic voting system and they may lose that funding if they do not purchase electronic voting machines for use in the 2006 May primary. They also argue that if they cannot change Westmoreland County's voting machines, it would be burdensome on election officials, cause added expense and cause some confusion on the part of the voters, either to have paper ballots or separate elections machines for state elections, while having to maintain the current system. While there may be some confusion among voters and additional costs certainly will be imposed, what those arguments ignore is that the Pennsylvania Constitution and the Election Code require a referendum.

As to voter confusion, while some may occur, that confusion can largely be ameliorated by voting district election workers explaining the different voting systems. Regardless, even if there is some confusion caused by having to vote for two or three offices on a HAVA compliant voting system, which could be

a separate paper ballot, that still would not be a reason for failing to follow the mandates of the Pennsylvania Constitution. Moreover, expediency, efficiency or and an added administrative burden is not a recognizable type of harm that would justify denying a permanent injunction and not following the Pennsylvania Constitution or the election law. The citizens of the Commonwealth, when adopting Article VII, Section 6 of the Pennsylvania Constitution, thought that the manner and counting of voting was so important that it had to be adopted with the consent of the voters so that confidence in the outcome of state and local elections and in state and local democracies would be maintained.

Because nothing justifies non-compliance with the express mandates of the Pennsylvania Constitution, as implemented by the election laws of this Commonwealth, allowing the violation of the Pennsylvania Constitution and the Election Code would cause the Electors to be harmed by refusing them their fundamental right to vote on an issue designated to go to vote by the General Assembly.

VI.

Because the Electors will be harmed if the Board of Elections enters into a contract for the purchase of the voting system and there is no adequate remedy at law by which they can seek legal redress, the injunctive relief requested by the Electors to enjoin the Board of Elections from implementing the contract is granted, and the Board of Elections is prohibited from entering into a contract to purchase the voting system until such time that the question is posed to the

Electors and a majority of the Electors have voted for such purchase as required under the Pennsylvania Constitution and the Election Code.

DAN PELLEGRINI, JUDGE

Respondents will file exceptions within three days of the date of this order. If a hearing on the exceptions is not requested within that same time period, it is deemed waived.

DAN PELLEGRINI, JUDGE