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Counsel for Respondent

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COUNTY OF FULTON, et al.,

Petitioners,

v.

SECRETARY OF THE COMMONWEALTH,

Respondent.

No. 277 MD 2021

NOTICE OF APPEAL

Notice is hereby given that Respondent, the Acting Secretary of the Commonwealth of Pennsylvania, appeals to the Supreme Court of Pennsylvania from the Order entered in this case on January 14, 2022, which denies Respondent's Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur on December 22, 2021, and dismisses Respondent's Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding. This Order, which is attached as Exhibit A, has been entered on the docket as evidenced by the copy of the docket entry attached as Exhibit B. There is no verbatim record of the proceedings relating to Respondent's Emergency Applications or Petitioners' responses thereto. A Jurisdictional Statement is being filed and served concurrently with this Notice of Appeal.

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: January 14, 2022

By: /s/ Robert A. Wiygul
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Counsel for Respondents

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: January 14, 2022

/s/ Robert A. Wiygul
Robert A. Wiygul

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board	:	
of Elections, Stuart L. Ulsh, in his	:	
official capacity as County	:	
Commissioner of Fulton County and	:	
in his capacity as a resident, taxpayer	:	
and elector in Fulton County, and Randy	:	
H. Bunch, in his official capacity as	:	
County Commissioner of Fulton County	:	
and in his capacity as a resident,	:	
taxpayer and elector of Fulton County,	:	
Petitioners	:	
v.	:	No. 277 M.D. 2021
	:	
Secretary of the Commonwealth,	:	
Respondent	:	

MEMORANDUM AND ORDER

Before the Court is Respondent Secretary of the Commonwealth's (Secretary) December 17, 2021, Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur on December 22, 2021 (Application to Preserve Evidence), seeking relief in the nature of a preservation order against the potential spoliation of evidence in this original jurisdiction matter. Also before the Court is the Secretary's January 13, 2022, Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding (Application to Enjoin Inspection). For the following reasons, the Court denies the Application to Preserve Evidence and dismisses the Application to Enjoin Inspection as improvidently filed.

This matter arises from Petitioners' 4-count Amended Petition for Review, challenging the Secretary's decertification of the Democracy Suite 5.5A voting system (System) the County of Fulton (County) leases from Dominion Voting

Systems, Inc. (Dominion) for use in elections in the County. After the Secretary initially certified the System in 2019, the County leased two such machines from Dominion and used them in the 2020 General Election. Thereafter, the County contracted with Wake Technology Services Inc. to inspect the System in conjunction with the County's investigation of the processes used in the election. Thereafter, on July 8, 2021, the Secretary issued Directive 1 of 2021, which prohibits county boards of elections from allowing third-party examination of state-certified voting systems, and provides for decertification of any system so examined. On July 20, 2021, the Secretary issued a letter to the County decertifying the System under Section 1105-A of the Pennsylvania Election Code¹ for the stated reason that the County had allowed a third-party examination. Petitioners filed an original jurisdiction Amended Petition for Review seeking declaratory and injunctive relief to reverse the decertification.

When the Secretary learned that Petitioners planned to allow another third party, Envoy Sage, LLC (Envoy Sage), to inspect the System on December 22, 2021, she filed an emergency application to prohibit spoliation of evidence that would allegedly occur during the inspection. The Secretary asserted that the County might use the work of Envoy Sage in the County's action to set aside the decertification.

After a status conference on December 21, 2021, this Court entered an order to reflect the agreement of the parties to negotiate protocols for the inspection and to postpone the inspection to January 10, 2022. The Court subsequently issued orders further postponing the inspection to January 14, 2022, to accommodate further negotiation and the attendance of the Secretary's technical expert at the

¹ Act of June 3, 1937, P.L. 1333, *as amended*, added by the Act of July 11, 1980, P.L. 600, 25 P.S. §3031.5.

inspection. On January 13, 2022, the parties filed a Joint Status Report advising that they remain, after weeks of negotiation, unable to agree on mutually acceptable protocols. At the same time, the Secretary filed the Application to Enjoin Inspection, asking the Court to postpone the inspection yet again in light of the parties' failure to agree.

The Application to Preserve Evidence is premised on the alleged risk of spoliation of evidence, which is “the non-preservation or significant alteration of evidence for pending or future litigation.” *Pyeritz v. Commonwealth*, 32 A.3d 687, 692 (Pa. 2011). A party that engages in spoliation faces numerous sanctions at the court’s discretion, ranging from an inference that the evidence would have been adverse to the spoliator, to prohibiting other evidence offered by the spoliator, to striking portions of pleadings or complete dismissal. *See Schroeder v. Department of Transportation*, 710 A.2d 23, 27 (Pa. 1998); *King v. Pittsburgh Water & Sewer Authority*, 139 A.3d 336, 346 (Pa. Cmwlth. 2016). These sanctions are applied in proportion to the severity of the spoliation, and Pennsylvania courts have refined a standard that applies particularly to spoliation of electronically stored evidence. *See PTSI, Inc. v. Haley*, 71 A.3d 304, 316 (Pa. Super. 2013) (citing Pa.R.Civ.P. 4009.1 and explanatory comment to the 2012 amendment thereto, discussing proportionality standard for electronic spoliation).

In addition to these well-developed sanctions that militate against spoliation, courts occasionally issue preservation orders during discovery. *See, e.g., King*, 139 A.3d at 340 (“In its most obvious form, spoliation occurs in the context of pending litigation when a party breaches a court’s preservation of evidence order.”); *PTSI*, 71 A.3d at 318 (discussing compliance with trial court’s preservation order). Our Supreme Court has cited favorably to the balancing test set forth in

Capricorn Power Company, Inc. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 433-34 (W.D. Pa. 2004), for purposes of determining whether a party is entitled to such an order. *See Pyeritz*, 32 A.3d at 694. *Capricorn Power* directs a court to balance the following three factors:

- (1) the level of concern the court has for the continuing existence and maintenance of the integrity of *the evidence in question* in the absence of an order directing preservation of the evidence;
- (2) any irreparable harm likely to result to the party seeking the preservation of *evidence* absent an order directing preservation; and
- (3) the capability of an individual, entity, or party to maintain the *evidence* sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

Capricorn Power, 220 F.R.D. at 433-34 (emphasis added).

The Secretary, as the party seeking the preservation order, bears the burden under this test. She has failed, however, to demonstrate a critical element of each of the three factors—that the data or state of the System subject to inspection constitutes *evidence* in this matter worthy of protection. The spoliation doctrine protects evidence, not information in general. The Secretary has not persuaded the Court that she, or Petitioners for that matter, will use any data obtained from the System as evidence in this proceeding.

Petitioners, who initiated this case and will therefore establish the evidentiary scope of this litigation, have expressly disclaimed such a use, stating that they “are not conducting an inspection of the voting machines. Petitioners are complying with a request from Senator Cris Dush, Chairman of the Intergovernmental Operations Committee of the Pennsylvania Senate [IOC]. The

IOC's expert, Envoy Sage, is conducting the inspection on behalf of the Committee” (Joint Status Report, Appx. 1, at 3 (pagination supplied).) The inspection, and the data it may generate or alter, are not evidence in this matter, which concerns the principally legal issue of the Secretary's decertification authority under the Election Code. Thus, the *Capricorn Power* test is so strained here as to be virtually inapplicable, as all three of its factors contemplate evidence as the thing which is to be protected. If only information, not evidence, is at risk, there can be no level of concern for the integrity of evidence, no irreparable harm from destruction of evidence, and no capability to preserve evidence. Even if the inspection does affect evidence later used in this case, sanctions discourage spoliation.

Moreover, there is no underlying pleading to support a preliminary injunction request. The Application to Preserve Evidence is a discovery motion sounding in the spoliation-preservation framework discussed above, which carries its own legal standard distinct from that of injunctive relief. *See Treppel v. Biovail Corp.*, 233 F.R.D. 363, 370 (S.D.N.Y. 2006) (noting that “[i]nstead of importing the standards for injunctive relief, some courts have instituted a balancing test for determining whether to issue a preservation order,” and citing *Capricorn Power*). Given our analysis under that balancing test, the Court will not generally enjoin the inspection, much less enter what would essentially be an *ex parte* injunction purporting to bind Envoy Sage, among others. Because the Secretary has failed to carry her burden to show that the inspection or its effects are evidence deserving a preservation order, the Court hereby enters the following Order:

ORDER

NOW, January 14, 2022, Respondent's Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur on December 22, 2021, is **DENIED**.

Further, Respondent's Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding is **DISMISSED** as improvidently filed.



MARY HANNAH LEAVITT, President Judge Emerita

EXHIBIT B

Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 277 MD 2021**Page 1 of 14****January 14, 2022****CAPTION**

County of Fulton, Fulton County Board
of Elections, Stuart L. Ulsh, in his
official capacity as County
Commissioner of Fulton County and
in his capacity as a resident, taxpayer
and elector in Fulton County, and Randy
H. Bunch, in his official capacity as
County Commissioner of Fulton County
and in his capacity as a resident,
taxpayer and elector of Fulton County,
Petitioners

v.

Secretary of the Commonwealth,
Respondent

CASE INFORMATION

Initiating Document: Petition for Review

Case Status: Active

Case Processing Status: December 20, 2021 Awaiting Consideration

Journal Number:

Case Category: Miscellaneous Case Type(s): Equity

CONSOLIDATED CASES**RELATED CASES****COUNSEL INFORMATION****Petitioner Ulsh, Stuart L.**

Pro Se: No

IFP Status:

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Law Firm: Dillon McCandless King Coulter & Graham LLP
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Attorney: Breth, Thomas E.
Law Firm: Dillon McCandless King Coulter & Graham, LLP
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Phone No: (724) 283-2200 Fax No:

Miscellaneous Docket Sheet**Docket Number: 277 MD 2021****Page 2 of 14****January 14, 2022****COUNSEL INFORMATION****Petitioner** Ulsh, Stuart L.

Pro Se: No

IFP Status:

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 Law Firm: Florio Perrucci Steinhardt Cappelli Tipton & Taylor, LLC
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Attorney: Stein, James M.
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Attorney: Shuber, Jordan Peter
 Law Firm: Dillon, McCandless, King, Coulter & Graham, L.L.P.
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Petitioner Fulton County Board of Elections

Pro Se: No

IFP Status:

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Attorney: Breth, Thomas E.
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Attorney: Stein, James M.
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Miscellaneous Docket Sheet**Docket Number: 277 MD 2021****Page 3 of 14****January 14, 2022****COUNSEL INFORMATION****Petitioner County of Fulton**

Pro Se: No

IFP Status:

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Miscellaneous Docket Sheet

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COUNSEL INFORMATION

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Pro Se: No

IFP Status:

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Attorney: Steinhardt, Douglas Joseph
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Miscellaneous Docket Sheet

Docket Number: 277 MD 2021

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Pro Se:	No	
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Law Firm:	Hangley, Aronchick, Segal, Pudlin & Schiller	
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Attorney:	Moniak, Stephen	
Law Firm:	Pennsylvania Office of Attorney General, 16th Floor , Strawberry Square, Harrisburg, PA	
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Attorney:	Hill, John Brent	
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Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 277 MD 2021

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January 14, 2022

**COUNSEL INFORMATION**

Respondent Secretary of the Commonwealth
Pro Se: No
IFP Status:
Attorney: Kagedan, Eitan Gavriel
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FEE INFORMATION

Fee Dt	Fee Name	Fee Amt	Receipt Dt	Receipt No	Receipt Amt
08/18/2021	Miscellaneous Docket Filing Fee	70.25	08/18/2021	2021-CMW-H-001463	70.25
01/06/2022	Copy Work (Per Page)	133.50	01/06/2022	2022-CMW-H-000031	133.50

AGENCY/TRIAL COURT INFORMATION

Order Appealed From: Notice of Appeal Filed:
Order Type:
Documents Received: August 18, 2021

Court Below:
County: **Division:**
Judge: **OTN:**
Docket Number: **Judicial District:**

ORIGINAL RECORD CONTENT

Original Record Item	Filed Date	Content Description
----------------------	------------	---------------------

Date of Remand of Record:**BRIEFING SCHEDULE**

Petitioner	Respondent
Bunch, Randy H. Brief	Secretary of the Commonwealth Brief
County of Fulton Brief	Due: December 20, 2021 Filed: December 20, 2021
Fulton County Board of Elections Brief	
Ulsh, Stuart L. Brief	

DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
August 18, 2021	Petition for Review Filed			
	County of Fulton		Petitioner	
	Fulton County Board of Elections		Petitioner	
	Ulsh, Stuart L.		Petitioner	
	Bunch, Randy H.		Petitioner	

Miscellaneous Docket Sheet

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January 14, 2022



DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
August 18, 2021	Notice Exited Commonwealth Court Filing Office			08/18/2021
August 20, 2021	Certificate of Service Filed King, Thomas W., III King, Thomas W., III King, Thomas W., III King, Thomas W., III Document Name: Affidavit of Service	County of Fulton Fulton County Board of Elections Ulsh, Stuart L. Bunch, Randy H.	Petitioner Petitioner Petitioner Petitioner	
September 9, 2021	Entry of Appearance Hangley, Michele D. Document Name: for Respondent.	Secretary of the Commonwealth	Respondent	
September 9, 2021	Entry of Appearance Wiygul, Robert Andrew Document Name: for Respondent.	Secretary of the Commonwealth	Respondent	
September 9, 2021	Entry of Appearance Hill, John Brent Document Name: for Respondent.	Secretary of the Commonwealth	Respondent	
September 14, 2021	Entry of Appearance Thomson, Aimee Diane Document Name: on behalf of Respondent, Secretary of the Commonwealth.	Secretary of the Commonwealth	Respondent	
September 17, 2021	Filed - Other King, Thomas W., III King, Thomas W., III King, Thomas W., III King, Thomas W., III Document Name: Respondent's Consent to File Amended PFR	County of Fulton Fulton County Board of Elections Ulsh, Stuart L. Bunch, Randy H.	Petitioner Petitioner Petitioner Petitioner	
September 17, 2021	Amended - Petition for Review King, Thomas W., III King, Thomas W., III King, Thomas W., III King, Thomas W., III	County of Fulton Fulton County Board of Elections Ulsh, Stuart L. Bunch, Randy H.	Petitioner Petitioner Petitioner Petitioner	
October 18, 2021	Preliminary Objections Hangley, Michele D. Document Name: Respondent's Preliminary Objections to Petitioner's Amended Petition for Review.	Secretary of the Commonwealth	Respondent	
October 21, 2021	Entry of Appearance Shuber, Jordan Peter Shuber, Jordan Peter Shuber, Jordan Peter Shuber, Jordan Peter	County of Fulton Fulton County Board of Elections Ulsh, Stuart L. Bunch, Randy H.	Petitioner Petitioner Petitioner Petitioner	
October 26, 2021	Entry of Appearance Mavroudis, Dimitrios	Secretary of the Commonwealth	Respondent	

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Commonwealth Court of Pennsylvania

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
October 26, 2021	Entry of Appearance Tucker, Joe H., Jr.	Secretary of the Commonwealth	Respondent	
October 26, 2021	Entry of Appearance Rickabaugh, Jessica Ann	Secretary of the Commonwealth	Respondent	
November 4, 2021	Entry of Appearance Moniak, Stephen	Secretary of the Commonwealth	Respondent	
November 16, 2021	Answer to Preliminary Objections King, Thomas W., III King, Thomas W., III King, Thomas W., III King, Thomas W., III	County of Fulton Fulton County Board of Elections Ulsh, Stuart L. Bunch, Randy H.	Petitioner Petitioner Petitioner Petitioner	
November 18, 2021	Order Filed Per Curiam Document Name: Respondent's brief in support of its Preliminary Objections are due by December 20, 2021 Comment: Respondent's brief in support of its Preliminary Objections (4 copies) shall be filed and served no later than December 20, 2021. Petitioners' brief in opposition to Respondent's Preliminary Objections (4 copies) shall be filed and served within 30 days after service of Respondent's brief. Any reply brief (4 copies) shall be filed and served in accordance with Pa.R.A.P. 2185. The Prothonotary shall list Respondent's Preliminary Objections to Petitioners' Petition for Review for oral argument on the next available argument list.			11/19/2021
December 17, 2021	Application for Emergency Relief Hangley, Michele D. Document Name: Respondent's Emergency App for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur Comment: December 22, 2021	Secretary of the Commonwealth	Respondent	
December 18, 2021	Order Filed Per Curiam Document Name: Order directing answer and scheduling argument on Application for Emergency Relief Comment: NOW, December 17, 2021, upon consideration of Respondent's Emergency Application for an Order Prohibiting Spoliation of Key Evidence (Application), Petitioners shall file and serve an Answer thereto no later than December 20, 2021 at 4:00 p.m. Argument on the Application is hereby scheduled for December 21, 2021 at 3:00 p.m. The argument shall be conducted by telephone conference call with counsel of record, and shall be heard by a designated judge of the Commonwealth Court sitting in Harrisburg. The Court will contact counsel of record to confirm the call and to provide the call-in information.			12/18/2021
December 20, 2021	Answer to Application for Emergency Relief King, Thomas W., III King, Thomas W., III King, Thomas W., III King, Thomas W., III Document Name: PACFILED - Pet.'s Answer to Resp.'s Emergency App. for Order Prohibiting Spoliation of Key Evidence	County of Fulton Ulsh, Stuart L. Bunch, Randy H. Fulton County Board of Elections	Petitioner Petitioner Petitioner Petitioner	

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
December 20, 2021	Respondent's Brief Filed Hangley, Michele D. Secretary of the Commonwealth	Secretary of the Commonwealth	Respondent Respondent	
	Document Name: In Support of POs			
December 21, 2021	Order Granting Application for Emergency Relief Leavitt, Mary Hannah			12/21/2021
	Document Name: Inspection of Voting Machines Postponed to Jan. 10, 2022			
	Comment: NOW, December 21, 2021, following oral argument on the Secretary of the Commonwealth's Emergency Application for an Order Prohibiting Spoliation of Key Evidence, and upon agreement of the parties, the inspection of Fulton County's voting machines by Envoy Sage, LLC, presently scheduled for December 22, 2021, shall be postponed to January 10, 2022, by which time the parties will have negotiated protocols for said inspection.			
December 30, 2021	Praecipe for Withdrawal of Appearance Hangley, Michele D.	Secretary of the Commonwealth	Respondent	
	Document Name: Attorney Hangley for Secretary of the Commonwealth			
January 3, 2022	Application for Intervention (Pa.R.A.P. 1531b) Gallagher, Shawn N. Fitzgerald, Robert J. Lucas, Brendan Patrick	Dominion Voting Systems, Inc. Dominion Voting Systems, Inc. Dominion Voting Systems, Inc.	Possible Intervenor Possible Intervenor Possible Intervenor	
	Document Name: Emergency App. of Dominion Voting Systems, Inc. for Leave to Intervene for the Limited Purpose of			
	Comment: Seeking a Protective Order.			

Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 277 MD 2021

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January 14, 2022



DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
January 4, 2022	Hearing Scheduled Per Curiam			01/04/2022
	Document Name: On App for Intervention Jan. 7, 2022 / Answer and All Other Filings Due Jan. 6, 2022 by 1:00 pm			
	Comment: NOW, January 4, 2022, upon consideration of the Emergency Application of Dominion Voting Systems, Inc. (Proposed Intervenor) for Leave to Intervene for the Limited Purpose of Seeking a Protective Order, Petitioners and Respondent shall file and serve an answer thereto no later than 1:00 p.m. on January 6, 2022.			
	The Court hereby further ORDERS as follows:			
	1. Hearing on the Emergency Application for Leave to Intervene is hereby SCHEDULED for Friday, January 7, 2022, at 10:00 a.m., by WebEx video conferencing. The Court will host this hearing via WebEx.			
	2. Counsel of record, Petitioners, Respondent and Proposed Intervenor shall participate in the hearing via WebEx. The parties and Proposed Intervenor shall provide the Court with their name, email address and telephone numbers within 24 hours of receiving this Order. The contact email address for the Court is: CommCourtRemote@pacourts.us. The Court will provide counsel with the information for connecting to the hearing. To facilitate participation in the hearing, various WebEx applications are available for download at pacourts.webex.com. Please see the Protocol for WebEx Video Hearings, attached to this order. The parties and all participants are directed to connect to the hearing 15 minutes before the starting time. In the event of technical difficulties, please contact the Court's IT staff at 717-255-1626. All other inquiries should be directed to the Prothonotary's Office.			
	3. Proposed Intervenor is directed to secure the services of a court stenographer for the WebEx Hearing. No later than 12:00 p.m., Thursday, January 6, 2022, Proposed Intervenor shall email the name, email address and mobile telephone number of the court stenographer to the Court at CommCourtRemote@pacourts.us.			
	4. Proposed Intervenor shall file a list of all witnesses to be called at the hearing with a short offer of proof for each witness, the curriculum vitae and expert report for any expert witness, and a list of exhibits.			
	5. Petitioners and Respondent shall file a list of all witnesses to be called at the hearing with a short offer of proof for each witness, the curriculum vitae and expert report for any expert witness, and a list of exhibits.			
	6. The parties and Proposed Intervenor shall also provide via email to the Court at CommCourtRemote@pacourts.us their list of witnesses, including the name, email address and mobile telephone number for each witness. All witnesses will testify via WebEx.			
	7. The Court shall provide counsel with a link to upload their respective pre-marked exhibits, if any. Said exhibits shall be electronically exchanged by the parties and Proposed Intervenor and shall be uploaded no later than 3:00 p.m. on January 6, 2022. The parties and Proposed Intervenor shall email the Court at CommCourtRemote@pacourts.us to confirm all exhibits have been uploaded. Failure to comply with this paragraph may result in the exclusion of an exhibit. In addition, the parties and Proposed Intervenor are directed to provide their witnesses with			
	copies of the exhibits in advance of the hearing to which the witnesses can refer during their testimony.			
	8. The parties and Proposed Intervenor are strongly encouraged to consult prior to the filing of their list of witnesses and exhibits and, if possible, enter into evidentiary and/or factual stipulations and/or agreed-upon protocols in order to streamline the proceedings. The parties and Proposed Intervenor may PAC-file any joint stipulations or protocols prior to the hearing.			
	9. Unless otherwise ordered, all filings required or permitted by paragraphs 4, 5 and 6 of this Order shall be filed no later than 1:00 p.m. on January 6, 2022.			

Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 277 MD 2021

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January 14, 2022



DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
January 5, 2022	Answer to Application for Intervention (Pa.R.A.P. 1531b)			
	King, Thomas W., III	County of Fulton	Petitioner	
	King, Thomas W., III	Fulton County Board of Elections	Petitioner	
	King, Thomas W., III	Ulsh, Stuart L.	Petitioner	
	King, Thomas W., III	Bunch, Randy H.	Petitioner	
Document Name: Petitioners' Answer in Opposition to the Emergency Application to Intervene of Dominion Voting Systems, Inc.				
January 6, 2022	Application to be Admitted Pro Hac Vice Filed			
	Wygul, Robert Andrew	Secretary of the Commonwealth	Respondent	
January 6, 2022	Filed - Other			
	King, Thomas W., III	County of Fulton	Petitioner	
	King, Thomas W., III	Fulton County Board of Elections	Petitioner	
	King, Thomas W., III	Ulsh, Stuart L.	Petitioner	
	King, Thomas W., III	Bunch, Randy H.	Petitioner	
Document Name: Petitioner's Witness List				
January 6, 2022	Filed - Other			
	Gallagher, Shawn N.	Dominion Voting Systems, Inc.	Possible Intervenor	
	Fitzgerald, Robert J.	Dominion Voting Systems, Inc.	Possible Intervenor	
	Lucas, Brendan Patrick	Dominion Voting Systems, Inc.	Possible Intervenor	
Document Name: Proposed Intervenor Dominion Voting Systems' Witness and Exhibit Lists				
January 6, 2022	Stipulation Filed			
	Gallagher, Shawn N.	Dominion Voting Systems, Inc.	Possible Intervenor	
	Breth, Thomas E.	County of Fulton	Petitioner	
	King, Thomas W., III	County of Fulton	Petitioner	
	Breth, Thomas E.	Ulsh, Stuart L.	Petitioner	
	Breth, Thomas E.	Bunch, Randy H.	Petitioner	
	Breth, Thomas E.	Fulton County Board of Elections	Petitioner	
	King, Thomas W., III	Ulsh, Stuart L.	Petitioner	
	King, Thomas W., III	Bunch, Randy H.	Petitioner	
	King, Thomas W., III	Fulton County Board of Elections	Petitioner	
	Lucas, Brendan Patrick	Dominion Voting Systems, Inc.	Possible Intervenor	
	Wygul, Robert Andrew	Secretary of the Commonwealth	Respondent	
Document Name: Joint Stipulations				
January 6, 2022	Filed - Other			
	King, Thomas W., III	County of Fulton	Petitioner	
	King, Thomas W., III	Fulton County Board of Elections	Petitioner	
	King, Thomas W., III	Ulsh, Stuart L.	Petitioner	
	King, Thomas W., III	Bunch, Randy H.	Petitioner	
Document Name: Petitioner's Exhibit List				

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January 14, 2022



DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
January 6, 2022	Answer Filed			
	Wiygul, Robert Andrew	Secretary of the Commonwealth	Respondent	
	Hill, John Brent	Secretary of the Commonwealth	Respondent	
	Moniak, Stephen	Secretary of the Commonwealth	Respondent	
Document Name: Respondent's Answer to Emergency App. for Leave to Intervene				
January 6, 2022	Letter			
	Wiygul, Robert Andrew	Secretary of the Commonwealth	Respondent	
Document Name: re: inspection protocols				
January 6, 2022	Letter			
	King, Thomas W., III	County of Fulton	Petitioner	
	King, Thomas W., III	Fulton County Board of Elections	Petitioner	
	King, Thomas W., III	Ulsh, Stuart L.	Petitioner	
	King, Thomas W., III	Bunch, Randy H.	Petitioner	
Document Name: Response to inspection Protocol Letter				
January 6, 2022	Order Granting Application to be Admitted Pro Hac Vice			01/07/2022
	Per Curiam			
Document Name: for Eitan Gavriel Kagedan, Esq.				
Comment: NOW, January 6, 2022, upon consideration of the motion of Robert Wiygul, Esq., for admission pro hac vice of Eitan Gavriel Kagedan, Esq., on behalf of Respondent, the Secretary of the Commonwealth, it is hereby ordered:				
(1) Eitan Gavriel Kagedan, Esq. is admitted pro hac vice to the bar of the Commonwealth of Pennsylvania under Pennsylvania Bar Admission Rule 301, as co-counsel on behalf of Respondent in this matter;				
(2) Eitan Gavriel Kagedan, Esq. shall abide by the rules of this Court including all disciplinary rules;				
(3) Eitan Gavriel Kagedan, Esq. shall immediately notify this Court of any matter affecting his standing at the bar of any other court where he may be admitted to practice; and				
(4) Robert Wiygul, Esq., the moving attorney herein, shall continue to be responsible as counsel of record for the conduct of this matter on behalf of Respondent				
January 7, 2022	Order Filed			01/07/2022
	Per Curiam			
Document Name: Order Postponing Inspection				
Comment: NOW, January 7, 2022, upon consideration of letters submitted by Respondent and Petitioners on January 6, 2022, and following a status conference, upon agreement of the parties, this Court's order of December 21, 2021 is hereby AMENDED to postpone the inspection of Fulton County's voting machines by Envoy Sage, LLC, to Wednesday, January 12, 2022.				
The parties are ORDERED to negotiate, in good faith, protocols that will apply to said inspection. Further, the parties shall file a joint status report advising of the status of their negotiations no later than 1:00 p.m. on Tuesday, January 11, 2022.				
January 7, 2022	Letter			
	Steinhardt, Douglas Joseph	Ulsh, Stuart L.	Petitioner	
	Steinhardt, Douglas Joseph	Bunch, Randy H.	Petitioner	
Document Name: Petitioners' Opposition to the application before the court.				
January 7, 2022	Entry of Appearance			
	Steinhardt, Douglas Joseph	Ulsh, Stuart L.	Petitioner	
	Steinhardt, Douglas Joseph	Bunch, Randy H.	Petitioner	

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Commonwealth Court of Pennsylvania

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DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
January 10, 2022	Application for Relief Wygul, Robert Andrew	Secretary of the Commonwealth	Respondent	
	Document Name: Emergency Appl. of Resp. to Reschedule the 1-12-22 Inspection due to the Unavailability of Expert.			
January 10, 2022	Order Filed Per Curiam			01/10/2022
	Document Name: Petitioner's Are Directed to File an Answer to App for Emergency Relief by 8:00am Jan. 11, 2022			
	Comment: NOW, January 10, 2022, upon consideration of the Emergency Application of Respondent to Reschedule the January 12, 2022 Inspection due to the Unavailability of Respondent's Expert (Application), Petitioners shall file and serve an answer to the Application later than 8:00 a.m. on January 11, 2022.			
January 10, 2022	Memorandum Opinion Filed Leavitt, Mary Hannah			01/10/2022
	Document Name: Memorandum Opinion (7 pages)			
	Comment: NOW, January 10, 2022, upon consideration of the Emergency Application for Leave to Intervene for the Limited Purpose of Seeking a Protective Order (Application to Intervene) filed by Dominion Voting Systems, Inc., the Application to Intervene is DENIED.			
January 10, 2022	Answer to Application for Emergency Relief King, Thomas W., III	County of Fulton	Petitioner	
	King, Thomas W., III	Fulton County Board of Elections	Petitioner	
	King, Thomas W., III	Ulsh, Stuart L.	Petitioner	
	King, Thomas W., III	Bunch, Randy H.	Petitioner	
	Document Name: Petitioner's Answer to Emergency Application to Reschedule the January 12, 2022 Inspection			
January 11, 2022	Order Filed Per Curiam			01/11/2022
	Document Name: Petitioner's Letter Request to Deny Emergency App to Intervene is Dismissed as Moot			
	Comment: NOW, January 11, 2022, upon consideration of the letter filed by Petitioners Stuart L. Ulsh and Randy H. Bunch in their individual capacities (Individual Petitioners), wherein the Individual Petitioners request that this Court deny the Emergency Application of Dominion Voting Systems, Inc. for Leave to Intervene for the Limited Purpose of Seeking a Protective Order, and it appearing that this Court's January 10, 2022, opinion and order denied the application to intervene, Individual Petitioners' letter request is DISMISSED as moot.			
January 11, 2022	Order Granting Application for Relief Per Curiam			01/11/2022
	Document Name: Inspection of Voting Machines is Postponed to 1:00 pm Jan. 14, 2022			
	Comment: NOW, January 11, 2022, upon consideration of the Emergency Application of Respondent to Reschedule the January 12, 2022, Inspection due to the Unavailability of Respondent's Expert, and Petitioners' Answer thereto, this Court's order of January 7, 2022, is hereby AMENDED to postpone the inspection of Fulton County's voting machines by Envoy Sage, LLC, to no earlier than 1:00 p.m. on Friday, January 14, 2022. The parties shall continue negotiating protocols that will apply to said inspection. Further, the parties' joint status report, currently due on January 11, 2022, shall now be due no later than 4:00 p.m. on January 13, 2022.			
January 11, 2022	Letter Steinhardt, Douglas Joseph	Ulsh, Stuart L.	Petitioner	
	Steinhardt, Douglas Joseph	Bunch, Randy H.	Petitioner	
	Document Name: Petitioner's Opposition to the emergency application before the Court			

Miscellaneous Docket Sheet

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January 14, 2022



DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
January 11, 2022	Order Filed Per Curiam			01/11/2022
	Document Name: Individual Petitioners' Letter In Opposition to Emergency Application is Dismissed as Moot			
	Comment: NOW, January 11, 2022, upon consideration of the letter filed by Petitioners Stuart L. Ulish and Randy H. Bunch in their individual capacities (Individual Petitioners) in opposition to the Emergency Application of Respondent to Reschedule the January 12, 2022, Inspection due to the Unavailability of Respondent's Expert (Application), and it appearing that the Court disposed of the Application by order of January 11, 2022, Individual Petitioners' letter request is DISMISSED as moot.			
January 13, 2022	Joint Status Report			
	Wiygul, Robert Andrew	Secretary of the Commonwealth	Respondent	
	Breth, Thomas E.	County of Fulton	Petitioner	
	King, Thomas W., III	County of Fulton	Petitioner	
	Breth, Thomas E.	Ulish, Stuart L.	Petitioner	
	Breth, Thomas E.	Bunch, Randy H.	Petitioner	
	Breth, Thomas E.	Fulton County Board of Elections	Petitioner	
	King, Thomas W., III	Ulish, Stuart L.	Petitioner	
	King, Thomas W., III	Bunch, Randy H.	Petitioner	
	King, Thomas W., III	Fulton County Board of Elections	Petitioner	
	Moniak, Stephen	Secretary of the Commonwealth	Respondent	
	Document Name: Jt Report on Status of Negotiations			
January 13, 2022	Application for Emergency Relief			
	Wiygul, Robert Andrew	Secretary of the Commonwealth	Respondent	
	Hill, John Brent	Secretary of the Commonwealth	Respondent	
	Moniak, Stephen	Secretary of the Commonwealth	Respondent	
	Tucker, Joe H., Jr.	Secretary of the Commonwealth	Respondent	
	Document Name: Respondent's Renewed Emergency App. for an Order to Enjoin Third Party Insepection on 1/14/22			
January 13, 2022	Answer to Application for Emergency Relief			
	King, Thomas W., III	County of Fulton	Petitioner	
	King, Thomas W., III	Fulton County Board of Elections	Petitioner	
	King, Thomas W., III	Ulish, Stuart L.	Petitioner	
	King, Thomas W., III	Bunch, Randy H.	Petitioner	
	Document Name: Petitioner's Response to Rspndent's Renewed Emergency Application			
January 14, 2022	Memorandum and Order			01/14/2022
	Leavitt, Mary Hannah			
	Document Name: Respondent's Emergency Application and Renewed Emergency Application Are Denied and Dismissed			
	Comment: NOW, January 14, 2022, Respondent's Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur on December 22, 2021, is DENIED.			
	Further, Respondent's Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding is DISMISSED as improvidently filed.			

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Counsel for Respondent

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COUNTY OF FULTON, et al.,

Petitioners,

v.

SECRETARY OF THE COMMONWEALTH,

Respondent.

No. 277 MD 2021

JURISDICTIONAL STATEMENT

Respondent, the Acting Secretary of the Commonwealth of Pennsylvania, submits this Jurisdictional Statement in support of her Notice of Appeal filed concurrently herewith.

I. OPINION BELOW

The subject of Respondent's appeal is the January 14, 2022 Memorandum and Order of the Commonwealth Court of Pennsylvania ("Order"). A copy of the Memorandum and Order is attached as Exhibit A.

II. BASIS OF THE SUPREME COURT'S JURISDICTION

This case was originally commenced in the Commonwealth Court pursuant to 42 Pa.C.S. § 761(a)(1). The Supreme Court has jurisdiction over this appeal pursuant to 42 Pa.C.S. § 723(a). The Supreme Court also has jurisdiction over this appeal pursuant to Pa.R.A.P. 311(a)(4), *see J&S Development Corp. v. Montrose Global Assets, Inc.*, 279 Fed. Appx. 131 (3d Cir. 2008) (taking interlocutory appeal on order resolving application for preservation order), or, in the alternative, Pa.R.A.P. 313(b).

III. TEXT OF THE ORDER IN QUESTION

The text of the Commonwealth Court Order in question is:

NOW, January 14, 2022, Respondent's Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur on December 22, 2021, is **DENIED**.

Further, Respondent's Renewed Emergency Application for an Order to

Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding is **DISMISSED** as improvidently filed.

IV. CONCISE STATEMENT OF THE PROCEDURAL HISTORY OF THE CASE

This case arose from Petitioners' surreptitious decision—made without any public notice or public deliberation, and without informing the Department of State—to permit Wake TSI, an unqualified and unvetted third party with no election administration role, to access and take images of key components of Fulton County's certified electronic voting equipment in December 2020. When Respondent learned of this unsanctioned breach of basic security protocols, she discharged her duty to protect the integrity of Pennsylvania's elections by prohibiting the future use of Fulton County's compromised electronic voting equipment. Petition for Review ("Pet.") Ex. H at 2.

Petitioners initiated this lawsuit to challenge Respondent's decision to prohibit the future use of Fulton County's compromised electronic voting equipment. Importantly for this appeal, Petitioners directly dispute Respondent's conclusion that Wake TSI's inspection breached the security of any of the County's equipment. According to Petitioners' allegations, an "[e]xamination" of those machines would show that, following Wake TSI's actions, the County's equipment "continued to meet the [security] requirements of the Election Code and that such ... machines could readily be used by Fulton County" in the future.

Amended Petition for Review ¶ 48.

Despite the consequences of Petitioners' earlier decision to allow third-party access to Fulton County's electronic voting equipment, and despite the fact that this equipment—in particular, its status and condition following Wake TSI's "examination"—is essential evidence in this case, Petitioners decided to allow yet another third party, Envoy Sage, LLC to access that equipment and manipulate its data.

On December 17, 2021, Respondent filed an Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur On December 22, 2021 (the "Emergency Application") in which Respondent argued that the Court should enjoin the planned inspection and require Petitioners to preserve voting equipment and data under the Court's inherent authority to supervise the discovery process and ensure fairness to litigants. Respondent argued that each of the three factors for the issuance of a preservation order enunciated in *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429 (W.D. Pa. 2004), as favorably cited by the Pennsylvania Supreme Court in *Pyeritz v. Commonwealth*, 32 A.3d 687, 694 (Pa. 2011), weighed strongly in favor of the entry of a preservation order in this case.

In their written opposition to the Application and at oral argument, Petitioners expressly framed the intended inspection as their own "discovery" of

electronically stored information,” “[u]nder the Pennsylvania Rules of Civil Procedure.” Petitioners’ Answer to the Emergency Application at 17 (filed Dec. 20, 2021). According to Petitioners, “[t]he electronically stored information at issue is the primary evidence in this case,” and “*Petitioners* [are entitled to] conduct[] *their own inspection* of the evidence.” *Id.* at 17 (emphasis added); *see also id.* (asserting that “Petitioners have the . . . right to copy and inspect the [electronically stored evidence]”).

Nonetheless, the Commonwealth Court denied Respondent’s Emergency Application (and dismissed Respondent’s subsequent Renewed Emergency Application, filed January 13, 2022), finding that Respondent “has failed . . . to demonstrate . . . that the data or state of the [voting] System subject to inspection constitutes *evidence* in this matter worthy of protection.” (Order at 4.) While it is true that, since taking their initial position, Petitioners have repudiated that *this inspection* is to go forth as a matter of party discovery,¹ there is no doubt that the electronic voting machines at issue are indeed evidence in this case, and that the spoliation of the same should be prevented pursuant to the *Capricorn* factors.

¹ Petitioners now tie the inspection to a “request” from Pennsylvania Senator Cris Dush.

V. QUESTIONS PRESENTED FOR REVIEW

1. Did the Commonwealth Court err in holding that the planned inspection does not implicate evidence in the case?
2. Did the Commonwealth Court err in holding that the *Capricorn* test is inapplicable to the dispute at issue?
3. Did the Commonwealth Court err in holding that the *Capricorn* test weighs against the issuance of a preservation order?

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: January 14, 2022

By: /s/ Robert A. Wiygul
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Counsel for Respondents

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: January 14, 2022

/s/ Robert A. Wiygul
Robert A. Wiygul

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this Jurisdictional Statement was prepared in word-processing program Microsoft Word 2016 (for Windows), and I further certify that, as counted by Microsoft Word 2016, this Jurisdictional Statement contains 887 words.

Dated: January 14, 2022

/s/ Robert A. Wiygul
Robert A. Wiygul

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board	:	
of Elections, Stuart L. Ulsh, in his	:	
official capacity as County	:	
Commissioner of Fulton County and	:	
in his capacity as a resident, taxpayer	:	
and elector in Fulton County, and Randy	:	
H. Bunch, in his official capacity as	:	
County Commissioner of Fulton County	:	
and in his capacity as a resident,	:	
taxpayer and elector of Fulton County,	:	
Petitioners	:	
v.	:	No. 277 M.D. 2021
	:	
Secretary of the Commonwealth,	:	
Respondent	:	

MEMORANDUM AND ORDER

Before the Court is Respondent Secretary of the Commonwealth's (Secretary) December 17, 2021, Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur on December 22, 2021 (Application to Preserve Evidence), seeking relief in the nature of a preservation order against the potential spoliation of evidence in this original jurisdiction matter. Also before the Court is the Secretary's January 13, 2022, Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding (Application to Enjoin Inspection). For the following reasons, the Court denies the Application to Preserve Evidence and dismisses the Application to Enjoin Inspection as improvidently filed.

This matter arises from Petitioners' 4-count Amended Petition for Review, challenging the Secretary's decertification of the Democracy Suite 5.5A voting system (System) the County of Fulton (County) leases from Dominion Voting

Systems, Inc. (Dominion) for use in elections in the County. After the Secretary initially certified the System in 2019, the County leased two such machines from Dominion and used them in the 2020 General Election. Thereafter, the County contracted with Wake Technology Services Inc. to inspect the System in conjunction with the County's investigation of the processes used in the election. Thereafter, on July 8, 2021, the Secretary issued Directive 1 of 2021, which prohibits county boards of elections from allowing third-party examination of state-certified voting systems, and provides for decertification of any system so examined. On July 20, 2021, the Secretary issued a letter to the County decertifying the System under Section 1105-A of the Pennsylvania Election Code¹ for the stated reason that the County had allowed a third-party examination. Petitioners filed an original jurisdiction Amended Petition for Review seeking declaratory and injunctive relief to reverse the decertification.

When the Secretary learned that Petitioners planned to allow another third party, Envoy Sage, LLC (Envoy Sage), to inspect the System on December 22, 2021, she filed an emergency application to prohibit spoliation of evidence that would allegedly occur during the inspection. The Secretary asserted that the County might use the work of Envoy Sage in the County's action to set aside the decertification.

After a status conference on December 21, 2021, this Court entered an order to reflect the agreement of the parties to negotiate protocols for the inspection and to postpone the inspection to January 10, 2022. The Court subsequently issued orders further postponing the inspection to January 14, 2022, to accommodate further negotiation and the attendance of the Secretary's technical expert at the

¹ Act of June 3, 1937, P.L. 1333, *as amended*, added by the Act of July 11, 1980, P.L. 600, 25 P.S. §3031.5.

inspection. On January 13, 2022, the parties filed a Joint Status Report advising that they remain, after weeks of negotiation, unable to agree on mutually acceptable protocols. At the same time, the Secretary filed the Application to Enjoin Inspection, asking the Court to postpone the inspection yet again in light of the parties' failure to agree.

The Application to Preserve Evidence is premised on the alleged risk of spoliation of evidence, which is “the non-preservation or significant alteration of evidence for pending or future litigation.” *Pyeritz v. Commonwealth*, 32 A.3d 687, 692 (Pa. 2011). A party that engages in spoliation faces numerous sanctions at the court’s discretion, ranging from an inference that the evidence would have been adverse to the spoliator, to prohibiting other evidence offered by the spoliator, to striking portions of pleadings or complete dismissal. *See Schroeder v. Department of Transportation*, 710 A.2d 23, 27 (Pa. 1998); *King v. Pittsburgh Water & Sewer Authority*, 139 A.3d 336, 346 (Pa. Cmwlth. 2016). These sanctions are applied in proportion to the severity of the spoliation, and Pennsylvania courts have refined a standard that applies particularly to spoliation of electronically stored evidence. *See PTSI, Inc. v. Haley*, 71 A.3d 304, 316 (Pa. Super. 2013) (citing Pa.R.Civ.P. 4009.1 and explanatory comment to the 2012 amendment thereto, discussing proportionality standard for electronic spoliation).

In addition to these well-developed sanctions that militate against spoliation, courts occasionally issue preservation orders during discovery. *See, e.g., King*, 139 A.3d at 340 (“In its most obvious form, spoliation occurs in the context of pending litigation when a party breaches a court’s preservation of evidence order.”); *PTSI*, 71 A.3d at 318 (discussing compliance with trial court’s preservation order). Our Supreme Court has cited favorably to the balancing test set forth in

Capricorn Power Company, Inc. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 433-34 (W.D. Pa. 2004), for purposes of determining whether a party is entitled to such an order. See *Pyeritz*, 32 A.3d at 694. *Capricorn Power* directs a court to balance the following three factors:

- (1) the level of concern the court has for the continuing existence and maintenance of the integrity of *the evidence in question* in the absence of an order directing preservation of the evidence;
- (2) any irreparable harm likely to result to the party seeking the preservation of *evidence* absent an order directing preservation; and
- (3) the capability of an individual, entity, or party to maintain the *evidence* sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

Capricorn Power, 220 F.R.D. at 433-34 (emphasis added).

The Secretary, as the party seeking the preservation order, bears the burden under this test. She has failed, however, to demonstrate a critical element of each of the three factors—that the data or state of the System subject to inspection constitutes *evidence* in this matter worthy of protection. The spoliation doctrine protects evidence, not information in general. The Secretary has not persuaded the Court that she, or Petitioners for that matter, will use any data obtained from the System as evidence in this proceeding.

Petitioners, who initiated this case and will therefore establish the evidentiary scope of this litigation, have expressly disclaimed such a use, stating that they “are not conducting an inspection of the voting machines. Petitioners are complying with a request from Senator Cris Dush, Chairman of the Intergovernmental Operations Committee of the Pennsylvania Senate [IOC]. The

IOC's expert, Envoy Sage, is conducting the inspection on behalf of the Committee” (Joint Status Report, Appx. 1, at 3 (pagination supplied).) The inspection, and the data it may generate or alter, are not evidence in this matter, which concerns the principally legal issue of the Secretary's decertification authority under the Election Code. Thus, the *Capricorn Power* test is so strained here as to be virtually inapplicable, as all three of its factors contemplate evidence as the thing which is to be protected. If only information, not evidence, is at risk, there can be no level of concern for the integrity of evidence, no irreparable harm from destruction of evidence, and no capability to preserve evidence. Even if the inspection does affect evidence later used in this case, sanctions discourage spoliation.

Moreover, there is no underlying pleading to support a preliminary injunction request. The Application to Preserve Evidence is a discovery motion sounding in the spoliation-preservation framework discussed above, which carries its own legal standard distinct from that of injunctive relief. *See Treppel v. Biovail Corp.*, 233 F.R.D. 363, 370 (S.D.N.Y. 2006) (noting that “[i]nstead of importing the standards for injunctive relief, some courts have instituted a balancing test for determining whether to issue a preservation order,” and citing *Capricorn Power*). Given our analysis under that balancing test, the Court will not generally enjoin the inspection, much less enter what would essentially be an *ex parte* injunction purporting to bind Envoy Sage, among others. Because the Secretary has failed to carry her burden to show that the inspection or its effects are evidence deserving a preservation order, the Court hereby enters the following Order: