

IN THE SUPREME COURT OF PENNSYLVANIA

COUNTY OF FULTON, *et al.*,

Petitioners/Appellees,

v.

SECRETARY OF THE COMMONWEALTH,

Respondent/Appellant.

No.: 277 M.D. 2021

No.: 3 MAP 2022

**RESPONDENT APPELLEE FULTON COUNTY'S
EMERGENCY APPLICATION FOR A STAY UPON SPECIAL MASTER'S
DENIAL OF SAME**

TABLE OF CONTENTS

INTRODUCTION.....3

STATEMENT IN SUPPORT OF EMERGENCY STAY4

A. Introduction4

B. Background.....7

REASONS FOR GRANTING THE APPLICATION.....24

PRAYER FOR RELIEF.....26

INTRODUCTION

The following is an emergency application to STAY THE SPECIAL MASTER’S PROCEEDINGS pursuant to Rule 3315 (review of Special Master’s Order Denying Stay), currently being held, after the Special Master denied same. (**Attachment A**, Special Master’s Order Denying Stay, August 23, 2023). Petitioners filed this emergency application seeking an immediate ruling from the court.

On April 19, 2023, the this Court dismissed an appeal in the underlying case under Pennsylvania’s Election Code that had been brought by the Respondent Secretary of the Commonwealth and issued an order of contempt and other sanctions against Fulton County and its attorneys. Petitioners filed a petition for a writ of certiorari before the United States Supreme Court, No. 23-96.

Petitioners seek an Emergency Stay of the proceedings before the Special Master to prevent irreparable harm that will result from Fulton County tax funds being utilized to hold a hearing to place the election equipment (mothballed) and owned by Fulton County in the custody of a third party escrow agent where it will be “powered on” and data will be deleted. Order, attached as **Attachment B**.

Specifically, on August 23, 2023, this Court appointed the Special Master to conduct an evidentiary hearing on August 28, 2023 to appoint a third-party escrow agent to take custody of certain voting machines. The voting machines at issue will be switched on and necessary evidence of the asserted failures and other

problems with the machines stored in memory will be erased. See Supporting Affidavit of Benjamin R. Cotton, attached as **Attachment C**.

On August 23, 2023, the Special Master denied Petitioners' motion for a stay of the August 28th hearing, ruling that: "the Special Master will proceed as directed by the Supreme Court of Pennsylvania unless otherwise directed by the Supreme Court of the United States."

STATEMENT IN SUPPORT OF EMERGENCY STAY

A. Introduction

Congress has delegated authority to the individual states regarding time, place, and manner, for conducting national elections. U.S. Const. Art. I, section 4, clause 1. See also, *United States Term Limits v. Thornton*, 514 U.S. 779, 804-05, 115 S. Ct. 1842, 1855, 131 L.Ed.2d 881, 901 (1995) ("the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Art. I, § 4, cl. 1.). Pursuant to this delegated authority, the Pennsylvania General Assembly re delegated authority to Pennsylvania's counties, and particularly to county boards of elections, to conduct these elections. As part of that delegation, Section 2642 of the Pennsylvania Election Code, delegates to County Boards of Elections the following:

The county boards of elections, within their respective counties, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act, which shall include the following:

(c) *To purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines, and to procure ballots and all other supplies for elections.*

(f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary *for the guidance of voting machine custodians, elections officers and electors.*

(g) To instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

(i) To investigate election frauds, irregularities and violations of this act, and to report all suspicious circumstances to the district attorney. 25 Pa. Stat. Ann. § 2642.

Without legislative authority, Respondent Secretary decertified Petitioners' voting machines. This was after Petitioners had the voting machines examined by a third-party subsequent to the 2020 general election.

Petitioners filed a petition for review of the Secretary's actions. The Secretary filed a motion to enjoin further testing of the voting machines, which was denied. The Secretary filed an interlocutory appeal of that order.

Subsequent to the filing of the appeal, and in the process of determining how to fulfill its legislatively delegated authority concerning the provision of voting

machines, Petitioners had to consider the viability of continuing to use Dominion voting machines to fulfill its statutory duties to conduct elections. Fulton County also had to consider the status of and legitimacy of its contract with Dominion Voting Systems (“Dominion”). In these regards, Fulton County had another company analyze the Dominion voting machines. Fulton County then sued Dominion for breach of contract and breach of warranty because the inspection that was performed revealed that the Dominion voting machines were not fit for their intended use and purpose.

The Secretary filed a motion to hold Petitioners in contempt for violating the Court’s order placing an injunction on the previously scheduled testing. The contempt proceedings resulted in the Supreme Court’s decision to hold Fulton County and Fulton County’s attorneys in contempt and to dismiss the Secretary’s underlying appeal of the Commonwealth Court’s denial of the Secretary’s application to enjoin further inspections.

Among the constitutional errors asserted and central to the petition for review pending before the Supreme Court of the United States was this Court’s finding of contempt and award of sanctions where Petitioners were exercising their constitutionally delegated authority over their voting machines and systems. Petitioners submit that the dismissal deprived the citizens of the state of Pennsylvania, Fulton County, and the Secretary, of a fundamental decision

regarding the constitutional delegation by the Pennsylvania legislature to the county boards of elections to conduct national elections. Principally, as Fulton County had challenged in its petition for review, the Secretary did not and could not usurp the powers of Fulton County over voting machines – authority to “purchase, preserve, store, and maintain” voting machines was statutorily delegated to Fulton County by virtue of the constitutional delegation to the Pennsylvania General Assembly under Article I, section 4 of the Constitution.

B. Background

On January 17, 2019, the Secretary (then Kathy Boockvar), certified the use of Dominion’s “Democracy Suite 5.5A” voting system in Pennsylvania elections pursuant to 25 Pa. Stat. Ann. § 3031.5. According to the Secretary’s report, “[t]he Secretary appointed SLI Global Solutions (SLI) and the Center for Civic Design (CCD) as “professional consultants” to conduct the examination of Democracy Suite 5.5A. The United States Election Assistance Commission (EAC) provides for the accreditation of laboratories qualified to test voting systems to meet federal standards. While SLI is an EAC accredited testing laboratory, CCD does not appear on EAC’s directory of approved laboratories.

In April of 2019, Petitioners contracted with Dominion to purchase and begin using two Democracy Suite 5.5A voting systems. The Democracy Suite 5.5A system was used through the November 3, 2020 general election.

Section 2642 of the Pennsylvania Election Code, delegates to County Boards of

Elections the following authority:

The county boards of elections, within their respective counties, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act, which shall include the following:

(c) *To purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines, and to procure ballots and all other supplies for elections.*

(f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary *for the guidance of voting machine custodians, elections officers and electors.*

(g) To instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

(i) To investigate election frauds, irregularities and violations of this act, and to report all suspicious circumstances to the district attorney. 25 Pa. Stat. Ann. § 2642.

In September of 2016, the Secretary issued to the counties “Guidance on Electronic Voting System Preparation and Security”. This guidance document contemplated and expected that the counties would use “third-party vendors” to conduct the necessary “*purchase, preserve, store and maintain primary and election equipment*” that was expressly delegated and mandated to the counties pursuant to 25 Pa. Stat. Ann. 2642. This included measures to ensure security,

perform maintenance, and preparations of the voting machines systems in use by the counties. Details of the Secretary's guidance included the procedures for third-party vendors to perform file transfers. Further, the Secretary's guidance "applie[d] to any vendor that is providing technical support to the counties for any component of the system involved in the canvass of the election." The Secretary's guidance was updated on October 13, 2020 and again contemplated the use of outside vendors to perform election preparation and maintenance on the voting systems.

Pursuant to 25 Pa. Stat. Ann. 2642, Petitioners hired Wake Technology Services, Inc. (Wake TSI), a managed service provider specializing in data center, network, server and desktop systems design, and cybersecurity and management, to include voting systems technology. Petitioners requested Wake TSI to assist it in an investigation and assessment of Fulton County's voting systems and processes that were utilized in the November 2020 general election. Wake TSI's reviewed the Dominion Democracy Suite 5.5A operating and application systems, file data, log files, ballot images, and related files.

Pursuant to the Secretary's 2016 and 2020 guidance, Wake TSI ensured that proper chain of custody of the equipment was maintained at all times through the presence of Fulton County's Election Director (Commissioners and other staff were

also present), who was the sole individual to remove or replace ballots in the ballot carts.

Wake TSI issued its “Fulton County Election System Analysis,” report (the Wake TSI Report) dated February 19, 2021. In its report, Wake TSI concluded that the 2020 General Election was well run and conducted, in a diligent and effective manner. This seemingly fulfilled Petitioners’ duties as set forth in 25 P.S. § 2642(g).

In its report, however, Wake TSI also found several problems with the Democracy Suite 5.5A system. Among these were errors in the ballot scanning, a failure of the system to meet Commonwealth Certification requirements, non-certified database tools on the system, changes made to Dominion’s entire election management system (EMS) three weeks before the 2020 election, and a lack of commonwealth logic and accuracy inspections L&A inspections of the Dominion Voting Systems.

Several months after the publication of the Wake TSI Report, on July 8, 2021, Respondent Secretary issued “Directive 1 of 2021,” which provided as follows:

County Boards of Elections shall not provide physical, electronic, or internal access to third parties seeking to copy and/or conduct an examination of state-certified electronic voting systems, or any components of such systems, including but not limited to: election management software and systems, tabulators, scanners; counters, automatic tabulating equipment, voting devices, servers, ballot marking devices, paper ballot or ballot card printers, portable memory media devices (thumb drives, flash

drives and the like), and any other hardware, software or devices being used as part of the election management system.

Directive 1 also provided for the revocation of funding for counties whose machines are decertified under the Directive, stating “[t]he Commonwealth of Pennsylvania will not reimburse any cost of replacement voting equipment for which certification or use authority has been withdrawn pursuant to this directive.”

In February of 2020, the Pennsylvania Economic Development authority voted to approve a \$90 Million bond issuance to cover costs for new voting machines across the Commonwealth of Pennsylvania. Petitioners claimed that the Secretary had no authority to withhold such funding pursuant to Directive 1.

Following the issuance of Directive 1, and without the opportunity for a hearing or other due process, the Secretary issued a letter (constituting an adjudication or “order”) to Petitioners (addressed to the County Solicitor) dated July 20, 2021, stating:

As a result of the access granted to Wake TSI, Fulton County’s certified system has been compromised and neither Fulton County; the vendor, Dominion Voting Systems; nor the Department of State can verify that the impacted components of Fulton County’s leased voting system are safe to use in future elections. Due to these actions and after careful consideration ... I have no other choice but to decertify the use of Fulton County’s leased Dominion Democracy Suite 5.5A voting system last used in the November 2020 election.

Respondent’s July 20, 2021 letter further stated that, “based on our discussions and correspondence with Fulton County officials, it appears that the contents of the

Democracy Suite 5.5A that were used during the 2020 November election were subjected to a post-election review by a third-party in violation of Pennsylvania's Election Code."

On August 18, 2021, Petitioners sought review of the Secretary's July 20, 2021 decertification of Petitioner's Dominion "Democracy Suite 5.5A voting systems. And amended petition was filed on September 17, 2021.

The Secretary claimed to have the authority to decertify Petitioners' voting machine system via the regulatory "Directive 1 of 2021". The Secretary further claimed to have authority to issue Directive 1 pursuant to the Pennsylvania Election Code, 25 Pa. Stat. Ann. § 3031.5(a). The statute provides in pertinent parts, as follows:

- (a) Any person or corporation owning, manufacturing or selling, or being interested in the manufacture or sale of, any electronic voting system, may request the Secretary of the Commonwealth to examine such system if the voting system has been examined and approved by a federally recognized independent testing authority and if it meets any voting system performance and test standards established by the Federal Government. The costs of the examination shall be paid by the person requesting the examination in an amount set by the Secretary of the Commonwealth. Any ten or more persons, being qualified registered electors of this Commonwealth, may, at any time, request the Secretary of the Commonwealth to reexamine any electronic voting system theretofore examined and approved by him. Before any reexamination, the person, persons, or corporation, requesting such reexamination, shall pay to the Treasurer of the Commonwealth a reexamination fee of four hundred fifty dollars (\$ 450). The Secretary of the Commonwealth may, at any time, in his discretion, reexamine any such system therefore examined and approved by him. The Secretary of the Commonwealth

may issue directives or instructions for implementation of electronic voting procedures and for the operation of electronic voting systems.

(b) No electronic voting system not so approved shall be used at any election, and if, upon the reexamination of any such system previously approved, it shall appear that the system so reexamined can no longer be used safely by voters at elections as provided in this act or does not meet the requirements hereinafter set forth, the approval of that system shall forthwith be revoked by the Secretary of the Commonwealth, and that system shall not thereafter be used or purchased for use in this Commonwealth. 25 Pa. Stat. Ann. § 3031.5(a) and (c).

(c)

The Secretary cited subsection (a) for the authority to decertify Petitioners’

Dominion voting system even though that provision does not provide for any such authority. Remarkably, the Secretary did not cite subsection (c) when making the decision to decertify Petitioners’ Dominion voting system, likely because any withdrawal of approval of such voting systems would mean that the entire system “shall not thereafter be used or purchased for use” in the state of Pennsylvania.

Despite the findings contained in Respondent’s July 20 2021, letter, Wake TSI’s analysis of Fulton County’s election systems was conducted in a manner that was bi-partisan and transparent. Petitioners’ analysis and investigation of its voting system with the assistance of Wake TSI was conducted in accordance with the requirements of the Pennsylvania Election Code as well as the then-current Guidance issued by the Respondent. Wake TSI’s analysis and examination of the Fulton County system and machine was conducted at the Petitioners’ administrative offices and at no point did any of the physical components of the

voting system leave the custody or control of the Fulton County Board of Elections or its employees. The Election Director for Fulton County, or an Election Board Commissioner, remained in the room with the ballots throughout the entire course of Wake TSI's review. According to Wake TSI, the Election Director was the only person removing and replacing ballots in the ballot carts. Petitioners' IT Support Technician, or an Election Commissioner, remained with the technical team during the assessment of the voting system. Contrary to the Secretary's assertion, Wake TSI asserts that it did not conduct a full technology forensic audit of the operating system or the EMS.

In the first count of their petition for review, Petitioners sought a declaratory judgment that the Secretary failed to reexamine the voting system prior to decertification as required by 25 Pa. Stat. Ann. § 3031.5(b). The Petitioners alleged further that the Secretary's decision to decertify Petitioners' Democracy Suite 5.5A voting system was arbitrary, capricious, and an error of law because she failed to comply with the mandatory provisions of the Election Code and exceeded her statutory authority.

In a second count for declaratory judgment, Petitioners alleged that they were authorized by law and by the Secretary's own guidance to use the assistance of a third-party vendor to analyze the security of their voting systems. Petitioners demonstrated that Pennsylvania law mandates that they inspect systematically and

thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.” 25 P.S. § 2642(g). Under this count, Petitioners alleged that the Secretary exceeded her authority in prohibiting the Petitioners from using third-party vendors to conduct an examination of the components of electronic voting systems being used by counties.

In a third count, Petitioners alleged that the Secretary had usurped the power and authority delegated to Petitioners by the Pennsylvania Election Code. Petitioners demonstrated that the Secretary’s July 8, 2021 Directive 1 prohibited any county from using third-party vendors to assist in the inspection of state-certified electronic voting systems and system components. Citing 25 Pa. Stat. Ann. § 2642(g), Petitioners asserted that the Pennsylvania Election Code mandates that County Boards of Elections “inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.”

In its fourth and final count, Petitioners sought a declaratory judgment that the Secretary could not withhold funding for the purchase of new voting machines. Petitioners further alleged that by the Respondent’s unauthorized directive

withholding funding, they would be adversely affected and were deprived of their due process rights.

Petitioners noted the Secretary's actions were even more suspect because there was no demonstration that the voting systems used by Petitioners had ever been certified in the first instance, and in fact, the certification had been called into question by Wake TSI.

Neither the Secretary, or any agent acting on her behalf, ever physically examined or reexamined the Democracy Suite 5.5A voting systems of Fulton County, despite the clear mandate to do so prior to revoking a system's approval. 25 Pa. Stat. Ann. § 3031.5(b). In this regard the authority of the Secretary speaks to only "systems". *Id.* The provision provides that the Secretary "shall examine the system and make and file a report with the Pennsylvania Department of State, attested by her signature and the seal of her office, stating whether the system so reexamined can be safely used in elections." 25 P.S. § 3031.5(b). No such report or certification as to the system was made.

The Secretary filed Preliminary Objections demurring only to Count III. The Secretary emphasized that the General Assembly delegated to the Secretary the authority to examine, approve, and reexamine voting systems and to issue directives or instructions for electronic voting procedures. The Secretary also noted that the General Assembly tasked the Secretary with determining whether a

county's EMS “can be safely used by voters at elections as provided” in the Election Code.

As the petition for review was pending, the Fulton County Board of Commissioners voted on a motion to allow the Pennsylvania Senate Intergovernmental Operations Committee (“Senate Committee”) to examine the County’s voting equipment. The County then indicated that it was going to enlist another entity to perform an inspection.

In the meantime, Senator Cris Dush, who had replaced Senator Doug Mastriano as Chair of the Pennsylvania Senate Committee, wrote the County seeking permission to collect the digital data from the election computers and hardware used by Petitioners in the November 2020 election as part of the Senate Committee’s investigation of the Commonwealth’s election system.

On December 14, 2020, the Secretary learned that Fulton County had voted the same day to permit the inspection to go forward. The inspection was scheduled for December 22 and was to be conducted by Envoy Sage, LLC.

On December 17, 2021, the Secretary sought a protective order from the Commonwealth Court barring that inspection and any other third-party inspection during the litigation. The court denied relief.

The Secretary appealed that ruling to the Pennsylvania Court, and a single justice entered a temporary order, to prevent the inspection and to preserve the status quo during review of the Secretary's appeal. The order stated:

IT IS FURTHER ORDERED that the inspection of Fulton County's electronic voting equipment *that is currently scheduled to begin at 1:00 p.m. on January 14, 2022*, is hereby STAYED and ENJOINED pending further Order of the Court. (emphasis added).

On January 27, the full Court entered another order, providing as follows:

AND NOW, this 27th day of January, 2022, [Respondent's] "Emergency Application to Stay Third-Party Inspection of Electronic Voting System Scheduled to Begin at 1:00 p.m. on January 14, 2022" is GRANTED. The single-Justice Order entered on January 14, 2022, staying the lower court's ruling and enjoining the proposed third-party inspection of Fulton County's electronic voting equipment, shall remain in effect pending the disposition of the above-captioned appeal....

Petitioners were left at this point with no voting machine system and a dilemma with what to do with the existing contract it had with Dominion. In the course of fulfilling its statutorily delegated duties to *purchase, preserve, store and maintain primary and election equipment* pursuant to 25 Pa. Stat. Ann. § 2642(c), the County had a separate inspection performed on the now defunct and decertified Dominion voting machines. The report was issued by Speckin Forensics, LLC, on September 15, 2022 (the Speckin Report).

On September 21, 2022, Fulton County sued Dominion for breach of contract and breach of warranty because the Speckin Report revealed that the Dominion

voting machines were not fit for their intended use and purpose. *Fulton County v. Dominion Voting Systems, Inc. and U.S. Dominion, Inc.*, Case No. 1:22-cv-01639 (M.D. Penn.).

In the breach of contract action, Fulton County alleges that it contracted with Dominion to provide “voting systems services, software licenses and related services,” to Fulton County for the conducting of elections in Fulton County. Fulton County addresses the findings in several forensics reports and independent analyses of Dominion voting machines to allege that the machines did not perform as promised to Fulton County in their written agreement.

Among the reports cited was the Speckin Report commissioned by Fulton County in July 2022, and received in September 2022, which detailed the deficiencies in and inadequacies of Dominion’s voting systems, equipment, hardware, software, and services. Specifically, Petitioners show that the “security measures necessary to harden and secure” the Dominion machines was not completed; showing the last update or security patch to have been performed in April 2019” (a full year-and-a-half *before* the November 2020 election).

Petitioners also discovered that external USB hard drives had been inserted in the machines on several occasions, and that there was no known list of approved external drives that could have been or were used or inserted into the machines. In

this regard, there was no way to determine whether and to what extent these unauthorized drives compromised the data or the voting system.

Petitioners also demonstrated that there had been “substantial changes” to the drives as seen with the inclusion of over 900 .dll files and links created since the date of installation of the Dominion software and these pathways constituted a security breach due to the introduction of an unauthorized “script” into the Dominion voting systems used in Fulton County. Petitioners further demonstrated that a “python script” had been installed onto the systems *after* the Secretary’s supposed “certification,” and not only should such a script have been added to the system, but “[t]his python script can exploit and create any number of vulnerabilities” including, external access to the system from foreign sources, data export of the tabulations, or introduction of other metrics not part of or allowed by the certification process.” Petitioners further discovered that each of the drives of the Dominion machines were “interconnected in a system to one another” and that this would be required to share data and counts between devices. This networking, allowing unauthorized access [to] any one device, and therefore allowed unauthorized access to any device connected to the network. Further, the Petitioners determined that an external IP address linked with Canada was found on the machines, which shows that at least one of the network devices was connected to an external device on an external network. This was the same device that the

post-certification python script was found on. The report also revealed that log files for the adjudication device showed an IP address of 172.102.16.22, which was from a location in Quebec, Canada. This was direct evidence of remote connections to a foreign country. Remarkably, Petitioners found that the machines and devices only had Windows Defender protection dating to July 2016 and that no other updates to this software had been made.

Petitioners' findings confirmed that many of the "conditions" in the certification report which were required to be met for certification were not met and were not present before, during and after the November 2020 election and up to the present. Among other findings, this constituted a direct violation of and failure of the conditions required for certification of the Dominion voting machines in the state of Pennsylvania for the 2020 election and beyond. Fulton County's allegations show that Dominion breached its agreement to provide reliable and secure voting systems services, software licenses and related services.

This is ongoing litigation by and between Intervenor Dominion and Fulton County respecting the performance of and adequacy of the defunct and now useless Dominion machines.

Because Fulton County had Speckin analyze the Dominion machines, the Secretary filed an "Application for an Order Holding [Petitioners] in Contempt and Imposing Sanctions" in the underlying appeal, 3 MAP 2022. Despite the pendency

of the Petitioners' petition for review of the Secretary's purported authority to (1) prohibit any examination of the voting machine system by any county (pursuant to Directive 1); and (2) its decision to decertify the Dominion voting machine systems being used by Petitioners, the Court appointed a special master to make an evidentiary record and to provide proposed findings of fact, conclusions of law, and sanctions to aid in this Court's resolution of the allegations at issue.

After an expedited evidentiary hearing in which Petitioners were forced to provide testimony and evidence, despite the ongoing underlying litigation by and between Fulton County and Dominion, who intervened in the proceedings, and over the objections of Petitioners' counsel on grounds that the decision to proceed with such a hearing prior to a decision by the special master on the legal question of whether the language of the Pennsylvania Supreme Court's orders had even been violated, the Pennsylvania Supreme Court issued its opinion and order, dismissing the underlying appeal, and finding Petitioners and their counsel in contempt of court and imposing sanctions.

This Court also ordered the impoundment of the Dominion voting machine systems, despite the breach of contract action in which Petitioners are suing Dominion for the failed voting machine system it provided to Fulton County prior to the 2020 election.

In this regard, the Court forced Petitioners to agree to surrender possession of evidence that could be critical to the claims in the breach of contract proceedings.

During the contempt proceedings, Petitioners argued that the subsequent inspection conducted in July 2022 did not violate the plain language of the Pennsylvania Supreme Court's stay orders. Petitioners further argued that they were authorized and required by Pennsylvania law, 25 Pa. Stat. Ann. § 2642, to inspect, examine and investigate the voting systems and voting machines so that they could make decisions about employing voting machines in future elections. Petitioners specifically argued that pursuant to Article I, section 4, clause 1 of the United States Constitution, the Pennsylvania General Assembly had mandated that they were to conduct inspections and make necessary preparations for upcoming elections. 24 Pa. Stat. Ann. § 2642(c), (d), and (i). They could not therefore be held in contempt for fulfilling this exclusive, delegated constitutional duty.

The Petitioners further argued that the contempt proceedings violated their rights to privileges and confidentialities because of the ongoing breach of contract suit against intervenor Dominion, based on Dominion's alleged failure to provide Petitioners with reliable voting equipment. See *Fulton County v. Dominion Voting Systems, Inc. and U.S. Dominion, Inc.*, Case No. 1:22-cv-01639 (M.D. Penn.).

The Court found Petitioners in contempt of its stay orders. The Court ruled that the language of the orders applied to future testing of the Petitioners' voting

systems and that in conducting the July 2022 examination, Petitioners had violated its orders. Regarding Petitioners' argument that they were not violating the language of the court's January orders, the court reasoned that the spirit of the order applied to any and all future testing. The court ignored Petitioners' argument that the constitutional delegation by the Pennsylvania General Assembly to the counties under Article I, section 4, clause 1 of the United States Constitution allowed it to perform additional inspections of voting machine systems.

The court ruled only on the argument regarding the scope of its January orders and found Petitioners had deliberately, willfully, and wrongfully violated those orders. The court ordered Petitioners Fulton County and Petitioners' attorney, Thomas Carroll to be jointly responsible for attorneys' fees incurred by the Secretary and Dominion. The court ordered commencement of the attorneys' fees assessment as to Fulton County as of December 17, 2021 and as of April 13, 2022 for Attorney Carroll.

The court also referred Attorney Carroll to Pennsylvania's Attorney Disciplinary Board for "examination of his conduct throughout the litigation" of the appeal of the court's stay order and the contempt proceedings. The court also ordered Petitioners to transfer the voting equipment to a neutral escrow agent pursuant to an agreement between the parties.

REASONS FOR GRANTING THE APPLICATION
FOR AN EMERGENCY STAY

The Petitioners will suffer irreparable harm should tax funds be utilized to hold a hearing to place its election equipment in the custody of a third-party vendor which will result in the data on the equipment being deleted or destroyed. Such injury is imminent unless this Court grants the stay pending a decision on Petitioners' petition for a writ of certiorari before the United States Supreme Court in Case No. 23-96.

Benjamin R. Cotton cautioned in his August 24, 2023, Affidavit (**Attachment C**) that the election data can be modified remotely if the election machines/equipment is powered on. More specifically, Cotton states that Cellular Modems, WiFi Modems, and Network Interface Cards are installed on the Motherboard of the Dominion voting equipment and can automatically connect to remote locations when the machines are powered on. Furthermore, Cotton cautions that by simply powering on the election machines/equipment, the election machines/equipment will alter dates and time of files, overwrite log file entries, modify system configuration settings, and change data file contents due to the system automatically changing logs and performing automated processes like antivirus scans, scheduled tasks, and other operations.

Petitioners have demonstrated that Fulton County will suffer irreparable harm by holding costly hearings on third-party custodians when Fulton County believes it will win its appeal before the United States Supreme Court. The data on

the election equipment will be destroyed and deleted upon going into custody of a third party and the Fulton County tax funds to pay for the instant hearing before the special master as well as all fees associated with moving the equipment to a third party will result in irreparable harm. *Hollingsworth v. Perry*.

There is no prejudice to Respondents by having the Special Master to hold off on an evidentiary hearing which will, as described above, irreparably destroy the evidence relied upon by Petitioners, should they prevail on their petition for certiorari to the United States Supreme Court, Case No. 23-96.

Petitioners, in their petition for certiorari have presented the grounds upon which they reasonably believe they will prevail upon their appeal to this Court.

PRAYER FOR RELIEF

Accordingly, Petitioners respectfully request an immediate Stay of the Special Master Hearing scheduled today August 28, 2023, until the appeal by Petitioners to the United States Supreme Court has been decided, as irreparable harm will occur unless said stay is granted. Petitioners filed this emergency application seeking an immediate ruling from the court today, August 28, 2023.

Respectfully submitted by:

/s/ Thomas J Carroll

Attorney ID: 53296

Attorney for Petitioners

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Date: August 28, 2023

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 | : | No. 277 M.D. 2021 |
| in his capacity as a resident, taxpayer | : | No. 3 MAP 2022 |
| 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/Appellees | : | |
| | : | |
| v. | : | |
| | : | |
| Secretary of the Commonwealth, | : | |
| Respondent/Appellant: | : | |

ORDER

NOW, August 28, 2023, upon consideration of Petitioner/Appellant’s (collectively, Fulton County) Emergency Motion to Adjourn Proceedings (Motion) requesting an emergency stay of the scheduled August 28, 2023 evidentiary hearing, the Motion is DENIED and the Special Master hereby ORDERS as follows:

1. The evidentiary hearing for purposes of the Special Master’s appointment of a neutral third-party escrow agent currently fixed for Monday, August 28, 2023, at 9:00 a.m. in Courtroom 3001, Third Floor, Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania, shall RECONVENE at 1:00 p.m. today, August 28, 2023, in the same place.

2. Attorney Thomas J. Carroll (Attorney Carroll) may attend and participate in the evidentiary hearing via WebEx Video Conferencing (WebEx). The Special Master notes that the Motion

does not contain any direct representation that Attorney Carroll's present medical conditions prevent his participation in the evidentiary hearing other than that Attorney Carroll "was prescribed . . . medication [with] warnings to not drive or operate machinery while taking it." Motion ¶ 3.

3. Attorney James M. Stein, who is presently counsel of record representing Fulton County, may attend the evidentiary hearing in person or remotely via WebEx.

4. The County may direct any attorney licensed to practice in the Commonwealth of Pennsylvania to enter an appearance in this matter and appear at the evidentiary hearing. Counsel unable to attend the evidentiary hearing in person may appear via WebEx. Counsel intending to appear via WebEx shall immediately provide their email address and telephone number to CommCourtRemote@pacourts.us, Bridget.Holbein@pacourts.us and Paul.Ritchey@pacourts.us.

5. Fulton County's attorney(s) chosen pursuant to Paragraph 2, 3, or 4 of this Order is directed to join the hearing 15 minutes before the starting time. To facilitate participation in the hearing, various WebEx applications are available for download at pacourts.webex.com. Please see Protocol for WebEx Video Hearings, attached to this Order. In the event of technical difficulties, the attorney may contact the Court's IT staff at 717-255-1626. The Court will immediately send Attorney Stein and Attorney Carroll WebEx invitations in the event they participate in the hearing remotely.

6. The evidentiary hearing shall proceed at 1:00 p.m. as scheduled and, if no Pennsylvania counsel are able to attend on behalf of Fulton County, the Special Master will expect Attorney Russell M. Newman, who was admitted pro hac vice on August 24, 2023, to fully represent Fulton County during the hearing. *See* Pa.R.Civ.P. 1012.1(d)(2) ("Upon [pro hac vice admission] being granted, the sponsor. . . shall attend all proceedings before the court **unless excused by the court**"). *See also* *Cty. of Fulton v. Sec. of Commonwealth*, 292 A.3d 974, 991 n.69 (Pa. 2023) (*Fulton County*

D).¹ Counsel admitted to practice in Pennsylvania may enter an appearance on behalf of Fulton County at any time during the evidentiary hearing.



RENÉE COHN JUBELIRER, President Judge of the Commonwealth Court of Pennsylvania Appointed as Special Master

Order Exit
08/28/2023

¹ In *Fulton County I*, the Supreme Court addressed a similar situation where Attorney Carroll filed a Motion to Adjourn Oral Argument two days before the September 14, 2022 argument scheduled before that Court, wherein Mr. Carroll “assert[ed] emergent personal reasons that allegedly prevented him from ‘prepar[ing] for oral argument ... and/or associat[ing] other counsel as a substitute this close to the time for the presentation of oral argument.’” *Fulton County I*, 292 A.2d at 991. In the accompanying footnote, the Supreme Court stated:

Attorney Carroll had not yet informed this Court that Attorney Lambert was his co-counsel, nor had he sought her admission pro hac vice below or in this Court. Although the rules governing pro hac vice representation direct that the sponsoring attorney must be in attendance at all court proceedings in connection with the representation, that **requirement is qualified by a carve-out** when sponsoring counsel is ‘excused by court.’ See Pa.R.Civ.P. 1012.1(d)(1).) This is not to say that we would have granted such a request. But, had Attorney Lambert been admitted pro hac vice, **it would have given Attorney Carroll a good-faith alternative to filing a disfavored, last-minute request for a continuance reflecting no contingency planning.**

Id., at 991 n.69 (emphasis added). In the instant proceedings, the Special Master granted Attorney Newman admission pro hac vice four days prior to the scheduled hearing, which gives Attorney Carroll a good-faith alternative to filing “a disfavored, last minute request for a continuance....” *Id.*



Protocol for WebEx Video Hearings

Protocol BEFORE the hearing:

Twenty-four (24) hours before the scheduled hearing, the Court shall provide counsel, any pro se party, and the court reporter with the information for connecting to the video hearing, including the date and time of the hearing. This invitation will be sent by email.

It is the responsibility of counsel to provide the connection information to their clients and witnesses. It is the responsibility of any pro se party to provide the connection information to their witnesses.

It is the responsibility of all parties to provide the Court with their contact information. An email address will be required to join the video.

A witness list must be provided to the Court by the date set forth in the court's scheduling order, and otherwise no later than forty-eight (48) hours before the hearing, with a valid email address for each witness. The Court will provide the attorneys with a contact email to which the witness list should be sent. The witness list shall include the case caption and docket number and the full name of each prospective witness.

All participants must appear by video connection unless otherwise authorized by the Court.

Email invitations will be sent to participants at least 24 hours before the hearing. If a participant has not received the email invitation from the Court, please check your SPAM or Junk folder before contacting the Court.

All parties and witnesses must connect to the hearing or call into the video system at least 15 minutes before the scheduled start time.

Minimum Technology requirements:

All counsel and pro se parties appearing before the Court must have one of the following:

A computer with a functioning web camera, microphone and speakers;

A video conferencing system that supports Session Initiation Protocol (SIP) calling;

A tablet device that supports Cisco WebEx with a functioning forward facing camera, microphone and speakers; or

An alternative device used to connect to Cisco WebEx in the past.

If you experience audio issues with your computer/tablet audio, the Court recommends that you have our system call you by using the option listed in 0 below.

The Court's IT Department will endeavor to contact counsel, any pro se party, and witnesses in advance of the hearing to test their connection to the WebEx platform.

Ground Rules and Video Conferencing Etiquette:

When not speaking, please mute your microphone. This helps prevent background noise.

Earbuds or headphones are preferable to avoid feedback.

Be aware of your behavior. Because you are on a video conference, people can see what you are doing at all times and *WebEx video conferences are recorded*. Further, others may view the proceedings via public livestream web link that will be provided to the parties and posted to the Court's website in advance of the proceeding.

If connecting from a laptop, plug in the laptop wall power.

Follow all instructions in the video conference invitation and note important supplemental information, such as a backup phone number in case you are disconnected.

Please be respectful; speak slowly and only one at a time.

Try not to speak over other parties. There is a slight delay when using video technology.

The Court appointed crier will be on the call to open and close court and to swear-in witnesses if needed.

Technical Support

If you have any questions or need technical assistance, contact 717-255-1626.

Invitation from the Court:

Prior to your scheduled hearing, you will receive an email from the Court with connection instructions. Please make sure to monitor your SPAM or Junk folder so that you receive the message. It should come from @pacourts.us. Here is the information from a sample invitation.

Commonwealth Court Legal Systems invites you to join this Webex meeting.

Meeting number (access code): 613 778 564 ③
Meeting password: Cy54FR39aBE

Wednesday, March 25, 2020
8:00 am | (UTC-04:00) Eastern Time (US & Canada) | 10 mins

[Join meeting](#) ①

Join by phone
Tap to call in from a mobile device (attendees only)
[1-855-244-8681](#) Call-in toll-free number (US/Canada) ②
[1-650-479-3207](#) Call-in toll number (US/Canada)
[Toll-free calling restrictions](#)

Join from a video system or application ④
Dial [613778564@pacourts.webex.com](tel:613778564@pacourts.webex.com)
You can also dial 173.243.2.68 and enter your meeting number.

Join using Microsoft Lync or Microsoft Skype for Business ⑤
Dial [613778564.pacourts@lync.webex.com](tel:613778564.pacourts@lync.webex.com)

In the invitation, there are multiple connection options:

WebEx: Click on the Green *Join Meeting* button. ①

Phone: Dial either of the numbers listed under *Join by phone*. ②

When prompted, enter the Meeting number (access code) listed near the top of the invitation. ③

Use the SIP dial in connection number provided for non-WebEx devices such as video conferencing systems. ④

Microsoft Lync/Skype for Business connection information is also provided. ⑤

Controls while connected to WebEx:

Once connected to a meeting, if you move your mouse, the below control panel should appear. These are the normal controls, but some of them may be disabled which means they will not appear. The icons will be the same.



From left to right, the controls are:

Mute/unmute microphone

Turn on/off camera

Share your desktop

Recording control (Only available to the Court)

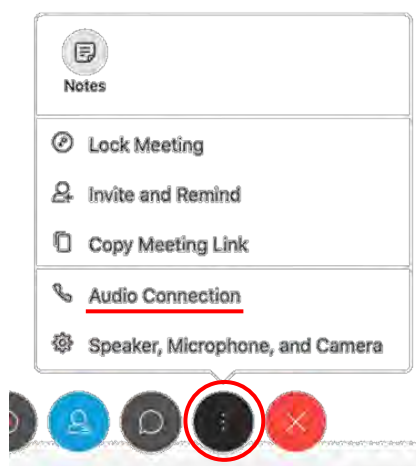
Open/Close the participant list

Chat windows

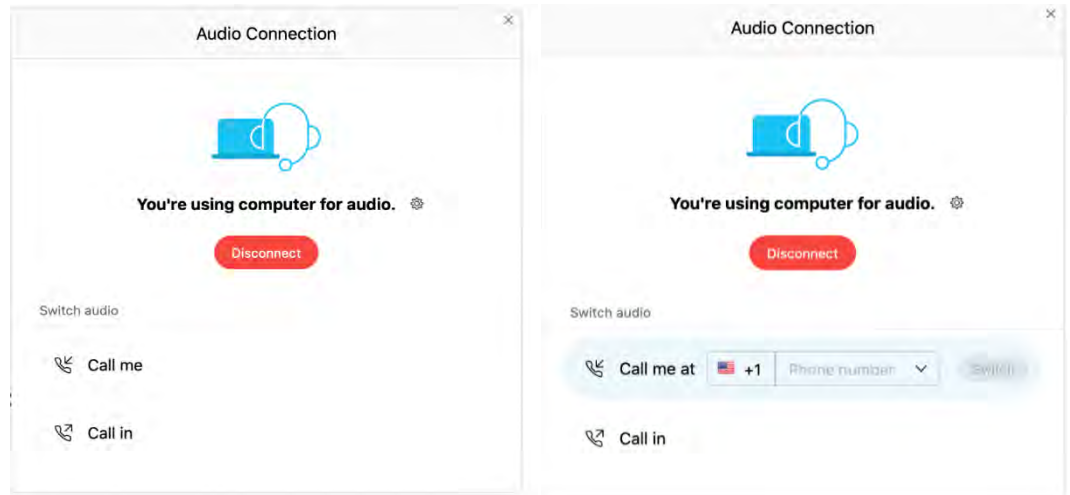
Options – has more controls available

End Meeting

Under the More Options button (7 above, the 3 dots icon). If you are having audio difficulties with your computer audio, you can have the system call you. Click on the 3 dots icon and then choose Audio Connection.



Click on the option “Call Me.” Enter the phone number that the system should call and press the switch button. When the call comes in, you will be prompted to press “1” to connect.



At the end of your call, press the red X to be disconnected.

Procedures regarding Exhibits:

Exhibits should be pre-marked numerically: i.e., P-1, P-2, etc.; and R-1, R-2, etc.

Be aware of personal identifying or confidential information contained in exhibits used during a video hearing, and redact where appropriate consistent with the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*.

No later than the date on any order of the Court, or in the absence of a specific date, twenty-four (24) hours prior to the hearing, counsel and any pro se party shall upload all exhibits intended for use during the hearing to the link provided and should email the Court at CommCourtRemote@pacourts.us to confirm all exhibits have been successfully uploaded. Parties 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.