Received 6/16/2022 4:18:53 PM Supreme Court Middle District

Filed 6/16/2022 4:18:00 PM Supreme Court Middle District
3 MAP 2022

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 3 MAP 2022

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 RESIDENT, TAXPAYER AND ELECTOR OF FULTON COUNTY,

Appellees,

v.

SECRETARY OF THE COMMONWEALTH,

Appellant.

Appeal from the January 14, 2022
Single-Judge Order of the Commonwealth Court (Leavitt, J.),
No. 277 M.D. 2021

APPELLANT'S SUPPLEMENTAL BRIEF ADDRESSING APPELLATE JURISDICTION

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
Robert A. Wiygul (I.D. No. 310760)
John B. Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200

OFFICE OF ATTORNEY GENERAL
Josh Shapiro (I.D. No. 90101)
Karen M. Romano (I.D. No. 88848)
15th Floor, Strawberry Square
Harrisburg, PA 17120
Aimee D. Thomson (I.D. No. 326328)
1600 Arch St., Suite 300 Philadelphia, PA 19103
(717) 787-2717

(Additional counsel on signature pages)

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF FACTS RELEVANT TO THIS COURT'S JURISDICTION 4

III. ARGUMENT 7

A. The Commonwealth Court's Order Is Appealable as of Right Under Pa.R.A.P. 311(a)(4) Because It Denied the Secretary's Request for an Injunction 7

B. The Commonwealth Court's Order Is Appealable as of Right Under Pa.R.A.P. 313 Because It Satisfies the Elements of the Collateral Order Doctrine 13

C. Alternatively, This Court Should Review the Order Below Under Its Extraordinary Jurisdiction 15

IV. CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Banfield v. Cortés,
110 A.3d 155 (Pa. 2015) 12

Bayada Nurses, Inc. v. Commonwealth Department of Labor and Industry.,
8 A.3d 866 (Pa. 2010) 12

Ben v. Schwartz,
729 A.2d 547 (Pa. 1999) 13

In re Bruno,
101 A.3d 635 (Pa. 2014) 15

Commonwealth v. Cullen-Doyle,
164 A.3d 1239 (Pa. 2017) 12

Commonwealth v. Small,
238 A.3d 1267 (Pa. 2020) 12

Commonwealth v. Young,
265 A.3d 462 (Pa. 2021) 13

Crum v. Bridgestone/Firestone North America Tire, LLC,
907 A.2d 578 (Pa. Super. Ct. 2006) 14

McMullan v. Wohlgemuth,
281 A.2d 836 (Pa. 1971) 12

Olivetti Corp. of America. v. Silia Property, Inc.,
467 A.2d 321 (Pa. 1983) (*per curiam* order) 12

Pennsylvania Orthopaedic Society. v. Indepedence Blue Cross,
885 A.2d 542 (Pa. 2005) 10

Stander v. Kelley,
250 A.2d 474 (Pa. 1969) 15

Wynnewood Development, Inc. v. Bank & Trust Co. of Old York Rd.,
711 A.2d 1003 (Pa. 1998) 7

Statutes

25 P.S. § 3031.5(a) 12

25 P.S. § 3031.5(b) 12

42 Pa.C.S. § 726 15

42 Pa.C.S. § 7541(a) 12

Other Authorities

Black's Law Dictionary (11th ed. 2019) 11

PA. CONST. art. V, § 2(a) 15

Pa.R.A.P. 311(a)(4) .... *passim*

Pa.R.A.P. 313(a) 2, 13

In accordance with this Court's Order dated May 16, 2022, Appellant-Respondent, the Acting Secretary of the Commonwealth (the "Secretary"), respectfully submits this brief addressing the Court's appellate jurisdiction.

I. INTRODUCTION

This appeal presents significant questions of public importance: Should a county board of elections be permitted to turn over its electronic voting equipment to be manipulated and imaged by an unaccredited third party with no role in the administration of elections, notwithstanding that (1) Pennsylvania's chief election official, who is statutorily responsible for determining whether electronic voting systems are sufficiently secure, has issued a directive ("Directive 1 of 2021" or simply "Directive 1") expressly prohibiting such third-party access; and (2) the proposed imaging threatens to alter—irrevocably and potentially undetectably—key, one-of-a-kind evidence in the county's pending lawsuit against the Secretary?

As the Secretary has previously observed, Petitioners' challenge to Directive 1 rests on an extraordinary proposition: that any Pennsylvania county is free to turn its electronic voting machines over to whomever it pleases, regardless of the consequences for the security of the electronic voting system at issue, and even where, as here, that voting system is used in many other counties. But Petitioners' position in this appeal is even more radical. Petitioners contend that they can disregard the Secretary's election-security directive even before their legal

challenges are fully decided. In denying the Secretary's applications to enjoin the proposed "inspection" and imaging by third party Envoy Sage, the single-judge Order of the Commonwealth Court below (the "Order") allowed Petitioners to do exactly that.

That Order was appealable as a matter of right. The Order denied applications by the Secretary that, on their face, sought to enjoin Petitioners from allowing the proposed Envoy Sage inspection to proceed. Accordingly, the Order falls squarely within the scope of Rule of Appellate Procedure 311(a)(4), which permits appeals as of right from interlocutory orders denying injunctions. Indeed, both the Commonwealth Court and Petitioners acknowledged that the Secretary had sought injunctive relief; they simply contended—erroneously—that the Secretary was not entitled to that relief.

The Order is also appealable under the collateral order doctrine set forth in Rule 313. As the Secretary pointed out below, allowing the Envoy Sage inspection to go forward would not only compromise the security of critical infrastructure in violation of Directive 1; it would also threaten to spoliate key evidence in this case by altering the electronic voting equipment at issue and/or the data stored thereon. Without immediate review of the Order, the Secretary's right to the preservation of this central evidence will be lost; to require the Secretary to defer an appeal until after a final order is entered would be tantamount to denying any right of appeal at

all. These are precisely the type of circumstances for which the collateral order doctrine was designed.

In the alternative, if this Court nonetheless concludes that the Order below is not appealable, the Secretary respectfully submits that the Court should review the Order under its extraordinary jurisdiction. That authority allows the Court to take cognizance of and adjudicate an issue of immediate public importance outside the scope of its appellate jurisdiction. Although this Court does not invoke its extraordinary jurisdiction lightly, its exercise is warranted here. As set forth in the Secretary's previous briefing, Petitioners' claims raise, for the first time, sweeping challenges to the Secretary's authority to protect the security of electronic voting systems. According to Petitioners' position, each county may allow any third-party entity it chooses to access and manipulate state-certified electronic voting equipment and copy confidential and proprietary software and data—notwithstanding that such activities, in the opinion of both the Secretary and the voting machine manufacturer, jeopardize the security of the voting system and render the specific equipment that was compromised unfit for future use. In Petitioners' view, the Secretary is powerless to prohibit such breaches *ex ante* and equally powerless to prohibit the continued use of compromised equipment after such breaches occur. The Secretary respectfully submits that Petitioners have seriously misconstrued the scope of her authority under the Election Code. At a

minimum, however, counties should not be allowed to violate the Secretary's election-security Directive—and expose state-certified electronic voting systems to third-party access—before this Court has an opportunity to adjudicate the Directive's validity. Avoiding that scenario is undeniably a matter of immediate public importance.

II. STATEMENT OF FACTS RELEVANT TO THIS COURT'S JURISDICTION

This case arose out of an unprecedented act: After the results of Pennsylvania's 2020 general election were certified, Petitioners secretly permitted Wake TSI, a third party with no election experience, to access and take images of key components of Fulton County's electronic voting equipment. In response to this breach of security, the Secretary prohibited the future use of the compromised equipment. To prevent similar breaches from occurring in the future, the Secretary also issued Directive 1 of 2021, clarifying what should already have been apparent: Because county boards of elections must physically secure and protect the integrity of state-certified electronic voting systems in their custody, they may not allow third-party entities, not involved in the administration of elections, to image the memory of electronic voting system components, download operating systems and software, copy confidential or proprietary information, or otherwise breach the integrity of Pennsylvania's election infrastructure.

In response to these actions by the Secretary, Petitioners filed this lawsuit, seeking, among other things, a declaration that the Secretary (1) had no authority to prohibit the future use of the equipment compromised by Wake TSI's "inspection"; and (2) had no authority to restrict counties' ability to allow third parties to conduct "inspections" of their electronic voting systems. But before the pleadings in this case were even closed, Petitioners announced that they intended to turn over their electronic voting equipment to yet another unaccredited, unqualified third party, Envoy Sage, LLC, for an inspection that, so far as the Secretary could ascertain, would be even more intrusive than the one conducted by Wake TSI.

Because the planned inspection threatened the security of electronic voting systems—and posed an obvious and substantial risk of spoliating important evidence—the Secretary filed, on December 17, 2021, an Emergency Application to prohibit the inspection from going forward. Invoking Directive 1 (*see* R.375a-R.376a), the Application explained that the proposed inspection both "flout[ed] the directives of the Commonwealth's chief election official regarding fundamental matters of election security" and "grossly disregarded [Petitioners'] obligations as litigants to preserve evidence." (R.383a.) The Application asked the Commonwealth Court to "enjoin Petitioners' planned 'inspection'" and enjoin Petitioners "from providing any third party (other than Dominion Voting Systems [the manufacturer and owner of the equipment at issue]) with access to the

electronic voting machines in Fulton County's possession." (R.384a-R.390a (some capitalization omitted).)

On January 13, 2022, facing an inspection scheduled to proceed at 1:00 p.m. the next day, the Secretary filed a Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding. (R.1157a-R.1178a.) The Renewed Application again argued that the inspection "threatened [both] to spoliate key evidence in the case and [to] compromise [the security of] equipment and data designated as 'critical infrastructure' under federal law." (R.1158; *accord* R.1168a-R.1169a.) Explaining the inadequacy of the inspection protocols proposed by Petitioners, the Secretary noted that, among other flaws, they would allow "sensitive information that is a component of critical election infrastructure [to be] disseminated without limitation." (R.1176a.) The relief requested by the Secretary was clear: she asked for an order "enjoin[ing] the [proposed] inspection from proceeding." (R.1176a.)

By Order entered at approximately 10:00 a.m. on January 14, 2022, the Commonwealth Court (Leavitt, J.) dismissed the Secretary's January 13, 2022 Emergency Application, and denied the Secretary's December 17, 2021 Emergency Application. (R.1223a.) The Secretary immediately appealed that Order and asked this Court to enjoin the proposed third-party inspection from proceeding during the pendency of the appeal; that application was granted on a

temporary basis by a single justice, pending the full Court's consideration. In their opposition to the application, filed on January 18, 2022, Petitioners contended that the Order below was not appealable. *See* Petitioners/Appellees' Answer to Respondent/Appellant's Emergency Application at 6-8 (Jan. 18, 2022). By *per curiam* Order dated January 26, 2022, this Court noted probable jurisdiction; Justices Mundy and Brobson dissented. By *per curiam* Order dated January 27, 2022, the full Court granted the Secretary's application to enjoin the proposed inspection pending the disposition of this appeal; Justices Mundy and Brobson dissented.

III. ARGUMENT

A. The Commonwealth Court's Order Is Appealable as of Right Under Pa.R.A.P. 311(a)(4) Because It Denied the Secretary's Request for an Injunction

The Commonwealth Court's Order is immediately appealable under Pa.R.A.P. 311(a)(4), which authorizes, in pertinent part, "[a]n appeal … as of right … from[] … [a]n order that … denies an injunction." As this Court has explained, "the plain meaning of the words contained in Rule 311(a)(4) is that an order refusing a request for an injunction is an interlocutory order appealable as of right unless the order involves an injunction issued pursuant to two explicit provisions of the Divorce Code or the order is in the form of a *decree nisi*." *Wynnewood Dev., Inc. v. Bank & Trust Co. of Old York Rd.*, 711 A.2d 1003, 1005 (Pa. 1998).

The Order below plainly satisfies this test. Petitioners and the Commonwealth Court have conceded, as they must, that the Secretary's Emergency Application filed on January 13, 2022, expressly sought to enjoin the Envoy Sage inspection, on the grounds that, among other things, it would "compromise [the security of] equipment and data designated as 'critical infrastructure' under federal law." (R.1158a); *see* Petitioners/Appellees' Answer to Respondent/Appellant's Emergency Application ¶ 15 (Jan. 18, 2022); (R.1276a). As shown above, the Secretary's December 17, 2021 Emergency Application also expressly sought to "enjoin" the Envoy Sage inspection and, indeed, to prohibit Petitioners from providing "any third party (other than Dominion Voting Systems) with access to [Fulton County's] electronic voting machines." (R.384a, R.390a.) Further, the desired injunction was not sought under the Divorce Code or in the form of a *decree nisi*. On its face, then, the Order denying the Secretary's applications is appealable under Rule 311(a)(4).

Notwithstanding the Secretary's express requests for a prohibitory injunction preventing Petitioners from engaging in certain specified conduct—namely, turning over their electronic voting machines to third parties like Envoy Sage—the Commonwealth Court found, and Petitioners urge, that injunctive relief was not available because (1) the Secretary purportedly sought to bind parties that were not before the court, and (2) the Secretary had not filed an underlying pleading

supporting a request for a preliminary injunction. But these arguments do not defeat this Court's appellate jurisdiction under Pa.R.A.P. 311(a)(4) for at least two reasons. First, these go to the merits of the Commonwealth Court's refusal to issue an injunction, rather than to the jurisdictional question of whether the Order below did, in fact, refuse a request for an injunction. Second, even assuming *arguendo* that the arguments spoke to jurisdiction, these arguments are meritless.

Petitioners and the Commonwealth Court relied on the fact that "[n]either the [Intergovernmental Operations] Committee" that purportedly engaged Envoy Sage "nor Envoy Sage [itself] were sued so as to make them a party to any proceeding for a preliminary injunction." Petitioners/Appellees' Answer to Respondent/Appellant's Emergency Application at 6 (Jan. 18, 2022); *accord* (R.1280a) (opining that the Secretary was seeking "what would essentially be an *ex parte* injunction purported to bind Envoy Sage, among others"). But that is immaterial. The Secretary did not seek an order enjoining the Committee or Envoy Sage. The Secretary sought an order enjoining Petitioners—who *are* a party subject to the Court's jurisdiction, based on their lawsuit against the Secretary—from further compromising the security of critical election infrastructure, in violation of Directive 1, as well as spoliating key evidence in this case, by providing Envoy Sage with access to the electronic voting machines in Petitioners' custody. The relief requested by the Secretary does not require the

joinder of any other parties. If Petitioners, who are currently in possession of the voting machines at issue, are prohibited from turning them over to Envoy Sage (or any other similar third party), the inspection cannot go forward. Accordingly, to the extent that the Commonwealth Court found that it lacked jurisdiction to enter the injunction sought because of the absence of necessary parties, that conclusion was plainly erroneous.

Nor was an injunction precluded by the lack of an "underlying pleading to support a preliminary injunction request." (R.1280a.) As an initial matter, the Secretary is not aware of any Pennsylvania authority for the proposition that, to give rise to an appealable order, an application for injunctive relief must relate to relief requested in a pleading. *See Pa. Orthopaedic Soc. v. Indep. Blue Cross*, 885 A.2d 542, 547 (Pa. 2005) (court's order prohibiting certain parties from "communicating directly or indirectly with … class members" for a certain period, which was not relief requested in any party's pleading, was an order granting an injunction, and thus immediately appealable as of right under Rule 311(a)(4)).[1] As the case law indicates, the term "injunction" in Rule 311(a)(4) should be given a functional definition: "An order which grants a request to enjoin certain conduct … is an interlocutory matter specifically authorized for appeal as of right by Rule

[1] Indeed, such a requirement would mean that respondent or defendant could *never* apply for an injunction unless it brought a cross-claim. The rules impose no such requirement.

311." *Id.*; *see also* Black's Law Dictionary (11th ed. 2019) (defining "injunction" as "[a] court order commanding or preventing an action"). That is precisely the sort of order the Secretary sought here—namely, an order prohibiting Petitioners from turning over Fulton County's voting machines to a third party—and that the Commonwealth Court denied.

Moreover, even assuming *arguendo* that Rule 311(a)(4) applied only to denials of injunction applications directly related to the merits relief requested in the pleadings, the Rule would still apply here. As the Amended Petition for Review makes clear, Petitioners are seeking a declaratory judgment that the Secretary lacks authority to prohibit counties from granting third parties, not involved in the administration of elections, with certain access to electronic voting systems. (*See, e.g.*, R.308a-R.309a ¶ 71.) In this litigation, the Secretary is defending her authority to do just that. But rather than obtain an adjudication of this issue by the courts (as Petitioners initially appeared to recognize as the proper course of action), Petitioners decided to attempt to force through their own answer by turning over their electronic voting machines to Envoy Sage before the pleadings were even closed[2]—in direct violation of Directive 1 of 2021. In this

[2] As discussed in the Secretary's previous briefs, at the time the Secretary filed the Emergency Applications resolved by the Commonwealth Court's January 14, 2022 Order, the Secretary's Preliminary Objection was pending before that court. The Preliminary Objection argued that the court should dismiss Petitioners' challenge to Directive 1 as a matter of law. On May 23, 2022, a three-judge panel of the Commonwealth (Judges McCullough, Leavitt, and Dumas) overruled that Preliminary Objection. That decision, of course, is not an adjudication of

sense, the Secretary's Emergency Applications were classic preliminary injunction requests seeking to preserve the status quo pending a final adjudication of the merits. *See McMullan v. Wohlgemuth*, 281 A.2d 836, 841 (Pa. 1971) (observing that "[a] preliminary injunction is generally simply preventive, maintaining the status quo until the rights of the parties are determined after a full examination and hearing").[3] For this reason, too, the Commonwealth Court's Order denying the

---

the merits of Petitioners' challenge, and Directive 1 remains in full effect. Further, the Secretary respectfully submits that the panel's opinion is flawed in significant respects. Among other issues, the opinion is improperly dismissive of this Court's decision in *Banfield v. Cortés*, 110 A.3d 155 (Pa. 2015), which explained that the Election Code vested the Secretary, Pennsylvania's "chief election official," with broad discretionary authority regarding the security of electronic voting systems; the opinion relies on an untenably cramped interpretation of the Secretary's authority under 25 P.S. § 3031.5(a), *see* Initial Brief of Appellant at 25-26; and the opinion fails to meaningfully address the authority granted to the Secretary under 25 P.S. § 3031.5(b), *see* Initial Brief of Appellant at 26-27, 30-31. In any event, whether Directive 1 falls within the scope of the Secretary's authority is an issue of statutory interpretation that will ultimately be subject to *de novo* review by this Court. *See Commonwealth v. Cullen-Doyle*, 164 A.3d 1239, 1241 (Pa. 2017). As the Secretary has previously argued, pending a final adjudication of that question, counties should not be allowed to violate the Directive.

[3] A rule that denials of injunctive relief are appealable only if the requested relief was based on an affirmative claim in a pleading would lead to arbitrary results, particularly in declaratory judgment actions like the one at bar. Generally speaking, a declaratory-judgment claim may be brought to resolve a live controversy between two parties regarding a disputed legal "right, status, [or] other legal relations" that creates uncertainty or insecurity. 42 Pa.C.S. § 7541(a); *Bayada Nurses, Inc. v. Commonwealth, Dept. of Labor & Indus.*, 8 A.3d 866, 874 (Pa. 2010). There can be no question that if the Secretary had filed an action against Petitioners seeking a declaration that Directive 1 was valid and enforceable, denial of the Secretary's subsequent request for a preliminary injunction prohibiting a proposed third-party inspection would be immediately appealable. Here, however, the Secretary had no occasion to file such an action because Petitioners themselves had already filed a pending declaratory-judgment claim regarding Directive 1's validity. In her initial pleading, which took the form of a Preliminary Objection, the Secretary joined the issue by setting forth her position that Directive 1 should be upheld as a lawful exercise of the Secretary's statutory authority. Under these circumstances, requiring the Secretary to have filed an affirmative claim as a prerequisite to her request for injunctive relief would improperly exalt form over substance. *See, e.g.*, *Commonwealth v. Small*, 238 A.3d 1267, 1280 n.9 (Pa. 2020) (refusing to "exalt form over substance"); *Olivetti Corp. of Am. v. Silia Prop., Inc.*, 467 A.2d 321, 322 (Pa. 1983) (*per curiam* order) (same). That might be

Emergency Applications was the denial of an injunction appealable under Rule 311(a)(4).

B. <u>The Commonwealth Court's Order Is Appealable as of Right Under Pa.R.A.P. 313 Because It Satisfies the Elements of the Collateral Order Doctrine</u>

The Commonwealth Court's Order is also appealable under the collateral order doctrine insofar as the applications denied by the Order sought to prohibit the proposed Envoy Sage inspection for the purpose of preserving key evidence in this case. *See* Pa.R.A.P. 313. For purposes of that doctrine, a collateral order "is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost." Pa.R.A.P. 313(a).

The doctrine recognizes that sound judicial policy should allow for the immediate appeal of orders that, while interlocutory, are distinct from the merits questions left to be adjudicated, and that, if erroneous and not immediately reviewed, would work irreparable harm to the party against whom they operate. *See, e.g.*, *Ben v. Schwartz*, 729 A.2d 547, 551-52 (Pa. 1999) (orders directing

---

defensible if the plain language of Pa.R.A.P. 311(a)(4) or the official commentary thereto required such an arbitrary distinction, but it does not. *Cf. Commonwealth v. Young*, 265 A.3d 462, 472-74 (Pa. 2021) (enforcing Pa.R.A.P. 341(a)'s "bright-line mandatory instruction to practitioners to file separate notices of appeal" for each docket).

disclosure of information over assertion of privilege are appealable collateral orders); *Crum v. Bridgestone/Firestone N. Am. Tire, LLC*, 907 A.2d 578, 583-84 (Pa. Super. Ct. 2006) (orders directing disclosure of information asserted to be a confidential trade secret are appealable collateral orders).

The Commonwealth Court's Order falls squarely into this category. Whether Envoy Sage's inspection should be prohibited so as to preserve key evidence from spoliation is a question distinct from the merits of this case. Moreover, if immediate review is denied and the inspection goes forward, the Secretary's claimed right to preserve the evidence inviolate will be irreparably lost. Indeed, as the Secretary's expert has testified, the Envoy Sage inspection might well spoliate the evidence in a way that is difficult, if not impossible, to determine. (R.458a-R.459a.) Finally, the right involved—the Secretary's right to evidence relevant to her defense of this action and her efforts to preserve the security of critical election infrastructure—is too important to be denied review.

Petitioners have argued that the Commonwealth Court's Order is not a collateral order because the electronic voting machines at issue are not, in Petitioners' view, relevant evidence in this case, and thus there was no basis to enjoin the inspection on anti-spoliation grounds. Petitioners/Appellees' Answer to Respondent/Appellant's Emergency Application at 7 (Jan. 18, 2022). But that contention goes to the merits of the Commonwealth Court's Order, not its

appealability. Further, as the Secretary has previously demonstrated, Petitioners are wrong. *See* Initial Brief of Appellant at 37-43; Reply Brief of Appellant at 19-21.

C. **Alternatively, This Court Should Review the Order Below Under Its Extraordinary Jurisdiction**

Although the Secretary believes that the single-judge Order below was appealable as a matter of right, if this Court concludes otherwise, it should review the Order under its extraordinary jurisdiction. That jurisdiction permits this Court, in which is "reposed the supreme judicial power of the Commonwealth," PA. CONST. art. V, § 2(a), "to take cognizance, *sua sponte* or upon petition of a party, of any matter pending before an inferior tribunal 'involving an issue of immediate public importance.'" *In re Bruno*, 101 A.3d 635, 665 (Pa. 2014) (quoting 42 Pa.C.S. § 726); *see also id.* at 666 (explaining that this Court "possesses 'every judicial power that the people of the Commonwealth can bestow under the Constitution of the United States,' whether enumerated in the Constitution or residual" (quoting *Stander v. Kelley*, 250 A.2d 474, 487 (Pa. 1969))).

In every respect, the circumstances of this case present an issue of immediate public importance. This case arose from an unprecedented act: a county board of elections secretly turned over its electronic voting equipment to be manipulated and imaged by an unaccredited, unqualified third party that, so far as the available evidence shows, was paid not by the county but by one or more

outside groups. Petitioners' legal claims are equally unprecedented: they assert that the Secretary has no authority to require counties to protect the integrity of state-certified electronic voting equipment—designated as critical infrastructure under federal law—in their custody. And Petitioners now seek, in direct violation of the Secretary's election-security Directive, to allow yet another unsanctioned third party to access and image the entirety of the same voting system—notwithstanding that the Directive remains in full effect. That third party, Envoy Sage, has no election experience and no apparent physical presence. *See* Initial Brief of Appellants at 11. Its president has trafficked in conspiracy theories and refuses to identify the individuals who would actually perform the inspection. *See id.* And neither Petitioners nor anyone else has been able to explain what question or questions the proposed inspection is intended to answer, let alone what purpose requires imaging the entirety of the electronic voting system.

This case reaches far beyond just one county. Here, as previously noted, though the at-issue voting machines reside in Fulton County, the same voting system is used by 13 other boards of elections, in Armstrong, Bedford, Carbon, Clarion, Crawford, Erie, Fayette, Jefferson, Luzerne, Montgomery, Pike, Warren, and York counties. *See id.* at 6 n.1. Thus, should Envoy Sage's "inspection" proceed without the benefit of this Court's review, the repercussions will echo across the Commonwealth. Moreover, the third-party incursions into Fulton

County's voting equipment (actual and proposed) have occurred in the context of nationwide efforts to discredit the results of the 2020 presidential election, efforts which have sometimes included compromises of the very security protocols critical to preserving election security.

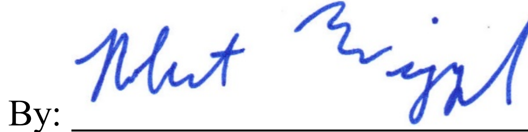
At bottom, the question posed by this case is whether the Secretary, the state official statutorily charged with evaluating and ensuring the security of electronic voting systems, has the authority to impose common-sense measures to protect the integrity of those systems, or whether each county has *carte blanche* to turn over its electronic voting equipment to whomever it sees fit, whenever it sees fit, and for whatever reason it sees fit. Petitioners should not be able to violate Directive 1 before this Court has an opportunity to rule on this important question, which has profound implications for the security of the Commonwealth's election infrastructure. Accordingly, if the single-judge Order below would otherwise evade this Court's review, the Court should exercise its extraordinary jurisdiction.

IV. CONCLUSION

This Court has appellate jurisdiction to review the Commonwealth Court's January 14, 2022 Order under Rules 311(a)(4) and 313 of the Pennsylvania Rules of Appellate Procedure. In the alternative, the Secretary respectfully submits that this Court should review the Order under this Court's extraordinary jurisdiction.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER



By: ________________________

Dated: June 16, 2022

Robert A. Wiygul (I.D. No. 310760)
John B. Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300

OFFICE OF ATTORNEY GENERAL

Karen M. Romano (I.D. No. 88848)
15th Floor, Strawberry Square
Harrisburg, PA 17120
Aimee D. Thomson (I.D. No. 326328)
1600 Arch St., Suite 300
Philadelphia, PA 19103
(717) 787-2717

PENNSYLVANIA GOVERNOR'S OFFICE OF
GENERAL COUNSEL

Kenneth L. Joel (I.D. No. 72370)
333 Market St., 17th Floor
Harrisburg, PA 17101
(717) 787-9348

PENNSYLVANIA DEPARTMENT OF STATE

Kathleen M. Kotula (I.D. No. 86321)
306 North Office Bldg., 401 North St.
Harrisburg, PA 17120-0500
(717) 783-1657

Counsel for Respondent/Appellant

CERTIFICATE OF COMPLIANCE WITH Pa.R.A.P. 127

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

Dated: June 16, 2022

/s/ *Robert A. Wiygul*
Robert A. Wiygul