

No. \_\_-\_\_

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In the  
**Supreme Court of the United States**

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COUNTY OF FULTON, PENNSYLVANIA, AND  
THOMAS J. CARROLL, ET AL.,  
*Petitioners,*

v.

SECRETARY OF THE COMMONWEALTH OF  
PENNSYLVANIA,  
*Respondent,*

and

DOMINION VOTING SYSTEMS, INC.,  
*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
PENNSYLVANIA SUPREME COURT

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Did the Pennsylvania Supreme Court err in allowing a Special Master to order that voting machines owned by the County of Fulton were to be placed in custody of a third party, where under Article I, section 4 of the United States Constitution, the Pennsylvania General Assembly delegated the exclusive power to manage procedures regarding elections and voting equipment to County Boards of Elections?
2. Did the Pennsylvania Supreme Court err in sanctioning the Petitioners and their attorneys for having experts analyze voting machines that the County Board of Elections bought under contract, where the Pennsylvania General Assembly has delegated its plenary constitutional authority pursuant to Article I, section 4 of the Constitution to appoint experts and examine and analyze voting machines to the county boards of elections, and pursuant to that authority Petitioners had such analyses performed for the purposes of fulfilling its delegated responsibilities under the Constitution?

## **PARTIES TO THE PROCEEDING**

Petitioners are, County of Fulton, Fulton County Board of Elections, and Randy H. Bunch, in his Official Capacity as Chair of the Fulton County Commissioners and Fulton County Board of Elections; and Fulton County Commissioners, Steven L. Wible, and Harvey P. Hann.

Respondent is Al Schmidt, the acting Secretary of the Commonwealth of Pennsylvania.

Intervenor / Respondent is Dominion Voting Systems, Inc., a private corporation performing a governmental function in the provision of voting machines to Petitioners and other governmental entities in Pennsylvania.

## **CORPORATE DISCLOSURE**

Petitioners Fulton County and the Fulton County Board of Elections are governmental entities and not a corporation pursuant to Rule 29.6.

Petitioners Randy H. Bunch, Steven L. Wible, and Harvey P. Hann, are individuals acting in their official capacities as members of the Fulton County Board of Commissioners and Fulton County Board of Elections, and thus are not corporate parties pursuant to Rule 29.6.

Petitioners Thomas J. Carroll and Stefanie Lambert are attorneys for Petitioners, and are individuals and thus are not corporate parties pursuant to Rule 29.6.

## **RELATED PROCEEDINGS**

Prior proceedings relative to this petition are:

- Petitioner, Fulton County, Fulton County Board of Elections, Commissioners Stuart L. Ulsh and Randy H. Bunch, filed a petition for review against Respondent, Secretary of the Commonwealth of Pennsylvania in the Commonwealth Court of Pennsylvania on August 18, 2021, Case No. 277 MD 2021;
- Respondent, Secretary of the Commonwealth of Pennsylvania filed an Appeal of the Commonwealth Court's decision to the Supreme Court of Pennsylvania on January 3, 2022, Case No. 3 MAP 2022.
- Respondent, Dominion Voting Systems, Inc., filed a motion to intervene in the Commonwealth Court, which was denied on January 10, 2022, in Case No. 277 MD 2021, and appealed by Dominion on January 19, 2022, in Case No. 4 MAP 2022. The Supreme Court of Pennsylvania ultimately granted Dominion's motion on March 21, 2022.
- Contempt proceedings were initiated by Respondent, Secretary of the Commonwealth, on October 18, 2022;
- Although part of the same appeal in the Pennsylvania Supreme Court, Case No. 3 MAP 2022, a Special Master was appointed and issued a report to the Supreme Court of Pennsylvania, which report is dated November 18, 2022.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioners, Fulton County and the Fulton County Board of Elections and Thomas Carrol, Attorney for Fulton County, petitions for a Writ of Certiorari to the Pennsylvania Supreme Court.

## **OPINIONS BELOW**

On April 19, 2023, the Pennsylvania Supreme Court dismissed an appeal in an underlying case under Pennsylvania's Election Code, which had been brought by Respondent Secretary of the Commonwealth and issued an order of contempt and other sanctions against Fulton County and its attorneys. (App. 9a-214a).

A Special Master was appointed and issued a subsequent final order and opinion on October 27, 2023, approving of the sanctions and ordering Petitioners Fulton County to surrender possession of its voting machines. (App. 3a-8a).

The Pennsylvania Supreme Court affirmed the Special Master's decision on February 21, 2024. (App. 1a - 2a).

These decisions comprise the substantive rulings from which Petitioners seek a writ of certiorari.

## **JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C.S. § 1254(1).



## STATEMENT OF THE CASE

### *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 (the Elections Clause). *United States Term Limits v. Thornton*, 514 U.S. 779, 804-05 (1995) (“the Times, Places and Manner of holding Elections...shall be prescribed in each State by the Legislature thereof”). Pennsylvania’s General Assembly delegated this authority to Pennsylvania’s county boards of elections.

After Petitioners had their voting machines examined and inspected by a third party subsequent to the 2020 election, Respondent Secretary decertified the voting machines, rendering them unusable.

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 the court 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 brand 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. Fulton County had another company analyze the Dominion

brand voting machines. Fulton County then sued Dominion for breach of contract and breach of warranty because the Dominion brand voting machines were not fit for their intended use and purpose.

The Secretary filed a motion to hold Petitioners in contempt for violating the Supreme 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.

Among the constitutional errors committed by the Pennsylvania Supreme Court, and central to this petition for review, was the court's finding of contempt and award of sanctions where Petitioners were exercising their constitutionally delegated authority over their voting machines and systems. 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 is statutorily delegated to Fulton County by delegation from the Pennsylvania General Assembly under the Elections Clause.

***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 powers and 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:

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(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.*

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(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...to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

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(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 (§ 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 § 2642. This included measures to ensure security, perform maintenance, and preparations of the voting machines and 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 § 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, who was the sole individual to remove or replace ballots in the ballot carts.

In its “Fulton County Election System Analysis,” 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 § 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, evidence that changes had been 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 issuance of a 90 million dollar bond to cover costs for new voting machines in 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 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). That 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.

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(c) 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).

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, 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 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, 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 under § 2642(g), 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. Under this count, Petitioners further 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. Again citing § 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 contended 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 expert to examine and analyze its voting machines.

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 expert's examination to go forward. The examination 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 analysis and any other third-party examination 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 examination and analysis 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.

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 § 2642(c), the County had a separate examination performed on the now defunct and decertified Dominion brand 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 brand 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 its Dominion brand 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<sup>1</sup> in which Petitioners were forced to provide testimony and

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<sup>1</sup> Expedited is an understatement. The Secretary filed the application for contempt on October 18, 2022 and the court ordered that Petitioners' response be filed by October 20, 2022. The court then appointed the Special Master on October 21, 2022 and she issued an extremely expedited scheduling order for Petitioners to litigate with Dominion's attorneys and those of the

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.

The 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 exceeded the scope of its contempt powers by forcing 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 analyses conducted in July 2022 did not violate the plain language of the Pennsylvania Supreme Court's stay orders.

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State of Pennsylvania. The scheduling order, which the Special Master issued on October 24, 2022, including a full round of discovery, and the scheduling of depositions was to take place before the first scheduled hearing on November 9. Additional days of hearings occurred on November 10 and November 14, 2022.

Petitioners further argued that they were authorized and required by Pennsylvania law, to wit, § 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 contract for the examination and analysis of voting equipment, and make necessary preparations for upcoming elections. *Id.*, § 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. (App. 9a). 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. (App. 69a). 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 examinations and analysis 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. (App. 70a). The court ordered Petitioners Fulton County and Petitioners' attorney, Thomas Carroll to be jointly responsible for attorneys' fees incurred by the Secretary and Dominion. (App. 71a). 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. Attorney Carroll was not the original attorney on the case, but appeared after Fulton County's Petition for Review and appeal had been filed.

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. (App. 105a). The court also ordered Petitioners to transfer the voting equipment to a neutral escrow agent pursuant to an agreement between the parties. (App. 110a).

### **REASONS FOR GRANTING THE PETITION**

1. The Pennsylvania Supreme Court's finding of contempt violates the Elections Clause because Fulton County was fulfilling an exclusively delegated authority under Article I, section 4, clause 1. The

Elections Clause delegates authority to the state legislatures regarding “time, manner, and place” for conducting national elections. U.S. Const. Art. I, sec. 4, cl. 1. Under this clause, “the Legislature” is a representative body that, when it prescribes election regulations, may be required to do so within the ordinary lawmaking process, “but *may not be cut out of that process.*” *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 841, 135 S. Ct. 2652, 2687, 192 L.Ed.2d 704, 747 (2015) (emphasis added) (Roberts, J., dissenting). It is a “grant of authority to issue procedural regulations....” *Cook v. Gralike*, 531 U.S. 510, 527, 121 S. Ct. 1029, 1040, 149 L.Ed.2d 44, 59 (2001). Its “substantive scope is broad; ‘Times, Places, and Manner...are comprehensive words, which embrace authority to provide a complete code for congressional elections.’” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9, 133 S. Ct. 2247, 2253, 186 L.Ed.2d 239, 250 (2013). “[I]t invests the States with responsibility for the mechanics of congressional elections.” *Id.*

The Elections Clause, therefore, authorizes state legislatures to redelegate these “mechanics” to local governmental entities for purposes of fulfilling the constitutional role of the state to manage the time, place, and manner. *Id.* The procedures concerning the conducting of a national election in state counties is a function of the manner in which elections are held pursuant to the authority delegated to the states via the Elections Clause. Likewise, the procedures and regulatory authority delegated to counties to ensure that the manner in which votes are both cast and tabulated is similarly within the sole province of the state legislature’s plenary powers over such matters.

As such, no other authority, and here, particularly, a single elected official running an administrative agency, can usurp or otherwise limit the legislature's grant to the counties to perform those necessary functions of the manner in which elections are conducted. *Ariz. State Legis., supra*. This of course would include the authority provided to the counties to manage, examine, and inspect the electronic systems used for voting in national elections. To allow a secretary of state to circumvent the "time, place, and manner" of the conducting of national elections in a manner contrary to a statutory grant of authority, and worse, in opposition to an express grant provided by the legislature to the county would be a direct violation of and in in contravention of the Elections Clause. Yet, the latter is exactly what has occurred in this case.

The county, not the Secretary, is mandated to "purchase, preserve, store, *and maintain*, primary and election equipment of *all kinds*." 25 Pa. Stat. Ann. § 2642(c). Through this provision, the county, not the Secretary, is delegated authority to maintain equipment. Even the Secretary's earlier guidance from 2016 and 2019 explicitly acknowledged this.

The county, not the Secretary, is further delegated sole authority to "make and issue" rules, regulations, and instructions, "*as they may deem necessary* for the guidance of *voting machine custodians, elections officers, and electors*." *Id.*, § 2642(f).

Further, the county, not the Secretary, shall "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.” *Id.*, § 2642(g) (emphasis supplied).

Finally, the county, not the Secretary, is delegated sole authority “[t]o investigate election frauds, irregularities and violations of this act, and to report all suspicious circumstances to the district attorney.” *Id.*, § 2642(i).

When Petitioners contracted with Wake TSI to conduct the expert analysis of its election machines after the November 2020 elections, it was directly fulfilling all of these aforementioned mandated roles that the Pennsylvania General Assembly, pursuant to its plenary powers under the Elections Clause, had delegated to its board of elections. See *Inter Tribal Council of Ariz., Inc.*, 570 U.S. at 8-9. Those duties and functions cannot be taken from the legislature (and here, from the county as delegate) by the Secretary of the Commonwealth. *Ariz. State Legis.*, 576 U.S. at 841. Likewise, when the County undertook investigation of the defunct Dominion voting machine systems in July of 2022 to assess its contractual relationship with Dominion and its future obligation to provide voting machines to its constituents by hiring Speckin Forensics, LLC, (Speckin) it was then exercising its exclusively delegated constitutional authority.

Here, through the issuance of Directive 1 and by prohibiting Petitioners from hiring third-party vendors to inspect, maintain, and investigate voting machine systems, and in decertifying Petitioner’s



systems, the Secretary cut out the General Assembly's plenary authority by encroaching upon and exercising those powers reserved to and delegated to Petitioners. Directive 1 purports to "preserve, store, and maintain" election equipment. This is a function of the Petitioners, not the Secretary. See 25 Pa. Stat. Ann. § 2642(c). The Secretary's Directive 1 prohibits "physical, electronic, or internal access to third parties seeking to copy and/or conduct an examination of state-certified electronic voting systems." It is a function of Petitioners, not the Secretary, to "inspect, systematically and thoroughly" the conduct of elections" and "to investigate election frauds, irregularities, and violations" of the Election Code. See 25 Pa. Stat. Ann. § 2642((g) and (i). Likewise, the Pennsylvania Supreme Court's finding of contempt usurps the County's continuing constitutional duties with respect to election voting machine systems. This is especially true because Petitioners have an ongoing breach of contract claim against Dominion in which they have alleged that the machines are defective, insecure, and not fit for their intended use and purpose.

Respondent's citation to 25 Pa. Stat. Ann. § 3031.5(a) as ostensibly providing the Secretary with these powers is a non-starter. It only authorizes the Secretary to examine voting machines systems *prior* to their certification and use in the counties. At best, it allows the Secretary to issue "directives and instructions for *implementation*" of the use of electronic voting machines introduced into counties. Nowhere in that provision is "Time, Place, and Manner" of the actual conducting of elections delegated to the Secretary.

Subsection (c), which Respondent wisely avoided in the pleadings below, further demonstrates that it is only applicable to primary approval to allow the use of a particular vendors' voting machines systems. And, indeed, where a system fails to meet the preliminary approval process, as the Dominion systems did here (before and after the 2020 election), the Secretary is *required* to disallow use of the entire system in the state of Pennsylvania upon reexamination. See 25 Pa. Stat. Ann. § 3031.5(a) and (c).

These provisions nowhere delegate to the Secretary the manner in which electronic election machines systems are to be stored, preserved, inspected, maintained, and investigated when employed by the counties in the conducting of elections. The latter is a sole function of the state legislature under Article I, section 4, clause 1, and that function was delegated by the Pennsylvania General Assembly to Petitioners. This power may not be usurped by Respondent. *Ariz. State Legis.*, 576 U.S. at 841.

The Pennsylvania Supreme Court ignored the Petitioners' constitutional argument made in its defense in the contempt proceedings. The County argued it had an independent duty and obligation, and an exclusive constitutional authority, to perform ongoing examinations, tests, maintenance, and investigation of voting machine systems in considering its relationship with Dominion and future obligations to conduct elections. This exclusive constitutional authority served as the basis for Petitioners' defense that it was not violating the

court's stay orders. Clearly, if the court had addressed this argument, it would have had to address the constitutional question.

The significance of this case cannot be understated, because it provides an example of the multiple instances in the many states in which unelected or undelegated officials are taking regulatory control over all aspects of "Time, Place, and Manner" of elections with zero delegated authority from the state legislature, and therefore in contravention of the Elections Clause. This allows carte blanche reformation of the mechanism established by the Constitution for the proper conducting of elections. It also allows manipulation of the rules, regulations, and methods by which votes are cast and tabulated. Finally, it removes oversight powers from the counties, which powers are explicitly delegated to the counties by the state legislatures, again, under the latter's plenary authority over Time, Place and Manner of conducting elections.

In ignoring Petitioners' constitutional arguments, the Pennsylvania Supreme Court left this question largely unanswered. Further, in a now familiar habit, the court once again exceeded its authority and went beyond the scope of its own contempt proceeding to order the sequestration of their voting machines, despite the pending breach of contract action by Petitioners against Dominion. While the lower court ostensibly ruled that Petitioners could conduct further examinations, the constitutional legitimacy of Directive 1 and the Secretary's subsequent action in decertifying the county's voting systems, and simultaneously prohibiting any funding to purchase

new systems, have been left unanswered. In this posture, Directive 1 is in effect and ostensibly controlling in Pennsylvania to this day, even though it places the sole authority over all aspects of voting machine integrity and use during elections in the hands of the Secretary, who has not been delegated this authority by the Pennsylvania General Assembly as required by the Constitution.

2. The basis for the Supreme Court of Pennsylvania's contempt against Petitioners ignored their argument that they were mandated by law to perform the functions of examining and analyzing voting machines and performing the investigations required to ensure that they complied with Pennsylvania's Election Code. The Court found that the Petitioners violated its order enjoining the County from contracting with experts to examine and analyze the integrity of its voting machines, but it ignored the argument that by law the Petitioners had a continuing duty to its constituency.

Both the Secretary and County Boards of Elections and their "members, took an oath to uphold the constitutions of the United States and Pennsylvania and the law." *Chapman v. Berks Cty. Bd. of Elections*, 2022 Pa. Commw. Unpub. LEXIS 390, at \*31 (Cmwlth. Aug. 19, 2022). The Election Code protects the constitutional rights of all citizens to free and fair elections and the Legislature has delegated that exclusive responsibility to the county boards of elections. *Id.*

Petitioners' act of contracting with an expert to analyze its defunct and no longer serviceable voting

machines to determine future actions and to provide its citizenry with functioning election equipment was in keeping with its constitutional and statutory duties and a delegated responsibility and the exclusive function of a county board of elections. *In re Petition for Agenda Initiative*, 206 A.3d 617, 624 (Pa. Cmwlth. 2019). The exercise of such a duty cannot serve as the basis for contempt where there must be a finding of wrongful intent. “In civil contempt cases, the complaining party has the burden of proving non-compliance with the court order by a preponderance of the evidence.” *Stahl v. Redcay*, 2006 PA Super 55, ¶ 15, 897 A.2d 478, 489 (2006), citing *Mrozek v. James*, 2001 PA Super 199, ¶ 8, 780 A.2d 670, 673 (2001).

“To be punished for contempt, a party must not only have violated a court order, but that order must have been ‘definite, clear, and specific – leaving no doubt or uncertainty in the mind of the contemnor of the prohibited conduct.’” *Id.* “The order forming the basis for contempt must be strictly construed.” *Id.* Therefore, “[a]ny ambiguities or omissions in the order must be construed in favor of the defendant.” *Id.* (emphasis added). In such cases, a contradictory order, or “an order whose specific terms have not been violated will not serve as the basis for a finding of contempt.” *Id.*

The Pennsylvania General Assembly has delegated exclusive authority to county election boards to perform several functions related to purchasing, maintenance, inspection and investigation of voting equipment. The testing and examination of election machines is a mandated obligation on the part of a county board of elections.

The election boards are charged with the duty and responsibilities of providing functional election equipment to protect the voting rights of their respective citizens.

Petitioners cannot be held in contempt for its delegated measures to protect the constitutionally guaranteed rights of its citizens and to ensure that the elections it carries out as required by law are safe and secure, so that citizens can have faith in the reliability and outcome of future elections. The Pennsylvania Supreme Court's January Orders did not prohibit Fulton County from conducting such lawful examinations with the help of experts of its defunct and decertified voting machines that had already been decommissioned and were never going to be used again. They could not have prohibited the exercise of lawfully delegated and exclusive powers.

The United States Constitution provides that the State Legislatures have the primary authority to establish Time, Manner and Place, for the conducting of elections. U.S. Const., Art. I, § 4, cl. 1. The Constitution gives state legislatures exclusive authority to enact those rules concerning the conducting of elections. See U.S. Const. Art. I, sec. 4, cl. 1; U.S. Const. Art. I, sec. 1, cl. 2; U.S. Const., amend. X. Pursuant thereto, the Pennsylvania General Assembly has delegated this exclusive authority to the County Board of Elections to, *inter alia*, "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;" "[t]o appoint their own employees, voting machine

custodians, and machine inspectors;” and “[t]o investigate election frauds, irregularities, and violations of this act....” 25 Pa. Stat. Ann. § 2642(c), (d), and (i) (emphasis added).

“The Pennsylvania Constitution reserves the power to provide, by general law, the use and choice of voting machines to the General Assembly.” “[T]he General Assembly has enacted the Election Code which delegates said power to the County’s Board of Elections.” “[T]he Election Code is the final authority on voting machines in this Commonwealth. Thus, the Elections Board has the exclusive control over election equipment.” *In re Petition for Agenda Initiative*, 206 A.3d 617, 624 (Pa. Cmwlth. 2019).

The courts are instructed to “constru[e] the Election Code to ascertain the General Assembly’s intent, which is the object of all interpretation and construction of statutes, Section 1921(a) of the Statutory Construction Act of 1972 (SCA), 1 Pa. C.S. § 1921(a).” *Chapman v. Berks Cty. Bd. of Elections*, 2022 Pa. Commw. Unpub. LEXIS 390, at \*44 (Cmwlth. Aug. 19, 2022). “[T]he clearest indication of legislative intent is a statute’s plain language, and if the words are clear and free from ambiguity, the letter should not be disregarded under the pretext of pursuing its spirit. 1 Pa. C. S. § 1921(b).” *Id.* at \*46.

To effectuate the Pennsylvania General Assembly’s constitutional delegation of exclusive authority over the conducting of elections and the operation of voting machines and equipment, the plain language of the election code requires liberally

construction to effectuate the purposes of the Election Code. *Id.*

Section 2643 of the Election Code, 25 Pa. Stat. § 2643 provides:

- (a) All actions of a county board shall be decided by a majority vote of all the members, except as may be otherwise provided herein.
- (b) Each county board may appoint ... such other employees and assistants as, from time to time, the board may deem necessary to carry out the provisions of this act.

This latter provision does not require a vote of the Petitioners to hire experts to examine, analyze and perform maintenance, and/or investigations upon voting machine systems. In furtherance of the precise authority delegated to counties under the Election Code, 25 Pa. Stat. § 2642 provides, in relevant part, as follows:

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:

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- (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.

(d) To appoint their own employees, voting machine custodians, and machine inspectors.

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(i) To investigate election frauds, irregularities and violations of this act.... 25 Pa. Stat. Ann. § 2642 (c), (d), and (i).

It is a well-settled rule of statutory construction that “[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the [Legislature]....” 1 Pa. C.S. § 1921(a). The Courts have long held that the Pennsylvania Election Code must be construed liberally “so as not to deprive an individual of his right to run for office, or the voters of their right to elect a candidate of their choice.” *Nomination Petition of Ross*, 411 Pa. 45, 190 A.2d 719, 720 (Pa. 1963); accord *In re Nomination Petition of Vodvarka*, 636 Pa. 16, 140 A.3d 639, 641 (Pa. 2016); *In re Nomination Petition of Paulmier*, 594 Pa. 433, 937 A.2d 364, 371 (Pa. 2007); *In re Nomination in re Grimaud*, 167 A.3d 305 (Pa. Cmwlth. 2017).

Governmental bodies delegated with broad and exclusive powers by the General Assembly “must be given deference in the administration and interpretation of its own statutory authority.” See, e.g., *Reich v. Berks Cty. Intermediate Unit No. 14*, 861 A.2d 1005, 1012 (Pa. Cmwlth. 2004). As § 2643 clearly gives Fulton County the authority “to appoint such other employees and assistants as, from time to time, the board may deem necessary to carry out the

provisions” of the Election Code. 25 Pa. Stat. § 2643(b). Section 2642 explicitly provides that a county board of elections may “appoint their own employees, voting machine custodians, and machine inspectors.”

Fulton County was conducting a lawful and authorized act when it had the defunct Dominion machines inspected and analyzed. The Secretary argued below that the decision to conduct the analysis was required to be put to a vote. However, while § 2643(a) states “[a]ll actions of a county board shall be decided by a majority vote” it then says “except as may be otherwise provided herein”. Subsection (b) then specifically excepts from this mandatory provision that a board of elections “...may appoint...such other employees and assistants as, from time to time, the board may deem necessary to carry out the provisions of this act.” In furtherance of this, subsection (d) of § 2642 then specifies that a board of elections may “appoint their own employees, voting machine custodians, and machine inspectors.

A plain reading of these provisions in para materia leads to no other conclusion than that a county board of elections is empowered to appoint and hire voting machine inspectors to continue to perform its constitutional and statutory duties, which includes the continuing obligation to ensure that there will be sufficient and reliable voting equipment to conduct subsequent elections. *Chapman v. Berks Cty. Bd. of Elections*, 2022 Pa. Commw. Unpub. LEXIS 390, at \*44 (Cmwlth. Aug. 19, 2022). Under the requisite liberal construction of the Election Code accorded by Pennsylvania courts, there can be no other reading because to do so would result in unconstitutional

limitations on the constitutional authority delegated to Pennsylvania counties. See *Nomination Petition of Ross, supra*.

Moreover, when so construed “to effectuate the purposes of the Election Code” see *Chapman, supra*, and the intent of the General Assembly to delegate full and exclusive authority to a county board of elections in the conducting of elections, see *Petition for Agenda Initiative*, 206 A.3d at 624, Fulton County and its members could not have been committing an intentionally wrongful act because they were performing their exclusive and authorized functions under the County board of elections provisions and within the election code.

This is especially true when directing a body that is given delegated and exclusive authority of a deliberative and discretionary nature. “Where a person or body is clothed with judicial, deliberative, or discretionary powers, and he or it has exercised such powers according to his or its discretion, mandamus will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion, though, in fact, the decision may have been wrong.” *Citizens Comm. to Recall Rizzo v. Bd. of Elections*, 470 Pa. 1, 12, 367 A.2d 232, 237 (1976). Determining whether “shall” is mandatory or directory is the purpose behind the provision and whether compliance is required in order to fulfill that purpose.

One does not have to speculate in the instant case, because not only is the “shall” used in “shall” vote devolved to a deliberative body with exclusive and discretionary authority to conduct voting machine

examinations and to hire its own experts to do so, but subsection (b) of § 2643 explicitly excepts such hiring decisions from the “shall” vote requirement.

Finally, Petitioners’ decision to sue Dominion came from the results of the analysis performed by Speckin, and that decision was put to a vote and a majority of the Fulton County members voted on that decision. While the Secretary made much about spoliation, this was a red herring because none of the claims in the underlying litigation concern the extent to which the machines were or were not compromised. The only question that remains there is the Secretary’s constitutional authority to have decertified Fulton County’s voting machines and penalize it by ordering a withholding of funding so that it could purchase additional voting machine systems. The latter is as much an usurpation of Petitioners exclusively delegated constitutional authority to ensure efficient and proper conducting of elections.

Moreover, the Secretary claimed that third-party inspections would compromise other the security of voting systems used in other Pennsylvania counties. However, the specific Dominion brand voting machines upon which Fulton County employed its own experts to analyze had been decertified and were no longer in use. There was no threat to the security of other voting systems.

The issues in the underlying suit are purely concerning the legal question of who, among the Secretary and the County Board of Elections, had authority to perform the acts of having the Dominion machines inspected in the first place. The actual

integrity of the machines, and the extent to which they were inspected and/or compromised by the Wake TSI analysis or the one conducted by Speckin is not at issue in the underlying litigation.

**CONCLUSION AND RELIEF REQUESTED**

Petitioners respectfully request the Court to grant their petition.

Respectfully submitted,

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