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

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Docket No. 26, 27 and 28 MAP 2023

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SENATOR JAY COSTA, et al.,
Petitioners/Appellants,
v.
SENATOR JACK CORMAN III, et al,
Respondents/Appellees.

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COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners/Appellants,
v.
SENATOR CRIS DUSH, et al,
Respondents/Appellees.

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ARTHUR HAYWOOD AND JULIE HAYWOOD,
Petitioners/Appellants,
v.
VERONICA DEGRAFFENREID, et al,
Respondents/Appellees.

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# BRIEF OF APPELLANTS VOTER-INTERVENORS

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Appeal from Order of the Commonwealth Court of Pennsylvania at 310, 322 and 322 MD 2021 dated February 9, 2022

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## STATEMENT OF JURISDICTION

Pursuant to Rule 341(a) of the Pennsylvania Rules of Appellate Procedure, Petitioners may appeal as of right from any order that disposes of all claims and parties. Pursuant to Rule 1101(a) of the Pennsylvania Rules of Appellate Procedure, Petitioners may appeal as of right from any matter originally commenced in the Commonwealth Court. Petitioners timely appealed from the Commonwealth Court's Order of February 9, 2023.

## ORDER IN QUESTION

The February 9, 2023, Order of the Commonwealth Court, dismissing the petitions for review, reads as follows:

> AND NOW, this 9th day of February, 2023, the petitions for review filed in the above-captioned consolidated matters are DISMISSED.

A copy of the February 9, 2023, opinion accompanying the above order, and a copy of a related January 10, 2022, memorandum opinion, are attached to this Brief, in compliance with Rule 2111(b).

## STATEMENT OF SCOPE AND STANDARD OF REVIEW

Because the issues presented herein are questions of law, the scope of review is plenary and the standard of review is de novo. *Clifton v. Allegheny County*, 969

A.2d 1197, 1209 n.17 (Pa. 2009); *Castellani v. Scranton Times, L.P.* 945 A.2d 937, 943 (Pa. 2008).

## STATEMENT OF QUESTIONS INVOLVED

I. Did the Commonwealth Court err in ignoring binding precedent from the Pennsylvania Supreme Court requiring that the court balance the interests of the voters against the purported legislative interests of the Committee and implicitly holding that a legislative subpoena is not subject to citizens' right to privacy?

*Proposed answer: Yes, the Commonwealth Court below erred in failing to exercise its duty to balance the constitutionally protected privacy interests of the voters against the asserted legislative interests of the Committee.*

II. Did the Commonwealth Court err in declining to exercise equity jurisdiction over Voter-Intervenors' Petition for Review, failing to judicially review the constitutionality of the legislative subpoena, and leaving Pennsylvania voters without a remedy to protect their constitutional right to privacy in their voter-registration information, including driver's license and partial Social Security numbers?

*Proposed Answer: Yes, the Commonwealth Court below erred in failing to exercise jurisdiction, failing to review the constitutionality and legitimacy of the legislative subpoena and failing to provide a remedy for Pennsylvania voters to protect their constitutional right to privacy.*

III. Did the Commonwealth Court err in determining that the voters' constitutional challenge to the subpoena is not ripe because there has been no "confrontation," even though there is no other mechanism to give voters notice and an opportunity to be heard before they suffer an irreparable, constitutional privacy breach?

*Proposed Answer: Yes, the Commonwealth Court below erred in determining that a confrontation was required because there is no*

*other mechanism for voters to protect their constitutional right to privacy.*

## STATEMENT OF THE CASE

On September 15, 2021, the Intergovernmental Operations Committee of the Pennsylvania State Senate ("Committee") issued a subpoena *duces tecum* to the Acting Secretary of the Commonwealth seeking a wide variety of documents related to the November 2020 general election and the May 2021 primary election ("Subpoena") (R. 1863a-65a). Among the information requested was the personally-identifying information (including drivers' license numbers and the last four digits of social security numbers) of every registered voter in the Commonwealth. For example, it requested:

> A complete list containing the name, date of birth, driver's license number, last four digits of Social Security number, address, and date of last voting activity of all registered voters within the Commonwealth of Pennsylvania as of May 1, 2021, by County.

(R. 1863a, ¶4). The Subpoena further requested additional lists of the same information, broken down by individuals who voted in the November 2020 election and the May 2021 primary, and further broken down by the type of vote cast, i.e., in-person, mail-in ballot, absentee ballot or provisional ballot (R. 1863a-64a, ¶¶6-13). Thus, the Subpoena on its face seeks personally-identifying

information, including date of birth, driver's license number and partial Social Security number, of each of the approximately nine million registered voters in the Commonwealth.

The Petitioners in each of the above-captioned matters, including the then-Acting Secretary of the Commonwealth[1], the recipient of the Subpoena (hereinafter "Secretary"), filed Petitions for Review in the Commonwealth Court seeking relief from that Subpoena, and the court consolidated all cases. The court granted a coalition of individuals and voting rights organizations ("Voter-Intervenors" or "Voters")[2] leave to intervene in the consolidated proceedings (R. 4864a-68a). Voter-Intervenors argued that the request for voters' personally-identifying information violated their constitutional right to privacy, and raised privacy claims under both Sections 1 and 8 of Article 1 of the Pennsylvania Constitution (R. 24b-27b (Petition for Review, paras. 80-87)). The Petition recited the lack of demonstrated need by the Committee for this personally-identifying information, how other investigations into the November 2020 election did not request such information, the lack of explanation as to why the Committee sought personally-

[1] The Subpoena was addressed to Veronica Degraffenreid, then-Acting Secretary of the Commonwealth. Al Schmidt officially became Secretary on June 29, 2023.

[2] Voter-Intervnors include Roberta Winters, Nichita Sandru, Kathy Foster-Sandru, Robin Roberts, Kierstyn Zolfo, Michael Zolko, Ben Bowens, League of Women Voters of Pennsylvania, Common Cause Pennsylvania and Make the Road Pennsylvania.

identifying information for all nine million voters rather than for a subset or for a particular precinct, the lack of adequate controls by the committee to protect the confidentiality of the highly sensitive information, and the increased risk of identity theft and financial fraud associated with the transfer, storage and access to this vast amount of private data (R. 33b-45b). Voter-Intervenors asked the court to balance their privacy interests against the Committee's supposed interest in accessing their private, personally-identifying information, prevent the Committee from accessing that information, and block the Secretary from disclosing that information (R. 45b).

All parties filed cross-applications for summary relief in early 2021, and the court stayed discovery. In the Committee's cross-application, it specifically sought an order "compelling the Acting Secretary to respond to the Subpoena within 14 days" (R. 3433a-36a). In a memorandum opinion and order dated January 10, 2022 (R. 5722a-30a, and Exhibit B to this Brief), an *en banc* panel of the court denied all applications for summary relief, finding that "none of the parties have established a clear right to relief given the outstanding issues of material fact surrounding the issue of maintaining the privacy of voter information and infrastructure" (R. 5729a). Subsequently, Petitioners filed a motion to lift the discovery stay, but the court never ruled on that motion. Instead, on January 25, 2022, the court, *sua sponte*, raised questions of ripeness and jurisdiction and ordered the parties to file

briefs on those issues. The parties timely submitted briefs in February, 2022. After oral argument, the court entered its February 9, 2023, Order dismissing the Petitions (including the Voter-Intervenors' petition) for lack of jurisdiction and as unripe.

After the court denied the cross-applications for summary relief, in March 2022, the Committee filed a separate Petition for Review, docketed at 95 MD 2022, where it sought to compel the Secretary to produce the documents requested in the Subpoena (R. 6453a-77a). In both that separate action, and the consolidated proceedings, the Committee opposed Voter-Intervenors' applications to intervene (R. 1330a-37a; Answer to Application for Leave to Intervene, filed at Docket No. 95 MD 2022 on May 9, 2022, at 4:22:09).

In its February 9th opinion, the Commonwealth Court dismissed the consolidated proceedings for two reasons. First, because the Committee, as issuer of the Subpoena, had not tried to enforce the subpoena through either the legislature's contempt proceedings or its power to investigate under Article II, Section 11, the case was not "ripe" (Slip op. at 22). Second, the court declined to exercise equity jurisdiction to hear the parties' claims, including Voter-Intervenors' constitutional right to privacy claim, based on (1) the court's mistaken assertions that it should not interfere in the affairs of the legislature where the

parties might amicably resolve the dispute; (Slip op. at 20) and (2) that contempt proceedings provided the parties an adequate process to raise any claims (Slip op at 26). Both of these assertions, as discussed below, are incorrect.

## SUMMARY OF ARGUMENT

Voter-Intervenors press this appeal to protect and defend the constitutional privacy rights of Pennsylvania's approximately nine million voters and to encourage this Court to clarify that our courts have an unflagging obligation to safeguard citizens' constitutional rights, even against the Legislature. The Commonwealth Court's decision not only deprives voters of their right to privacy vis-à-vis the legislature, it denies voters a forum in which to assert and protect their rights in a meaningful and effective way. The court's abdication of its "paramount duty" to protect citizens' constitutional rights creates an imminent violation of the rights of all Pennsylvania voters, and exposes all voters to an increased risk of identity theft and financial fraud. Further, if allowed to stand, officials throughout the Commonwealth, relying on that opinion, may feel compelled to share citizens' private information with any other Commonwealth employee who requests it, or at least not take steps to protect the privacy of that information, and to do so before voters even know the data has been shared and have an opportunity to intercede.

Although couched as a decision on jurisdiction and ripeness, the Commonwealth Court's opinion implicitly held that Voter-Intevernors have no enforceable right to privacy in this context. The decision ignored this Court's precedent requiring that courts balance citizens' privacy rights and the purported governmental interest in disclosure *before* the information is shared, misinterpreted this Court's precedent to insulate legislative investigations from effective judicial scrutiny and thus adherence to constitutional strictures, and ignored the reality that their decision leaves voters no remedy or means to effectively protect their privacy rights. Instead, it "assume[d]" that the legislature will "be mindful" of voters' concerns, even though the Committee here has repeatedly rebuffed those concerns. In addition, the court suggested a novel theory opening the door to unregulated disclosure of individuals' highly sensitive private information among Commonwealth agencies, officials and employees.

The court erred in holding it lacked equity jurisdiction. It distinguished controlling law not on jurisdictional grounds, but on existence of a constitutional right. The lower court's finding that a "legislative process" precludes equity jurisdiction is simply wrong. The legislative process referenced by the court does not include any right to judicial review and, importantly, is not a process available to voters. This Court's precedent clearly establishes not only that the court has equitable jurisdiction over the voters' claims, but that this is the only available

forum. Absent court jurisdiction, voters have no mechanism to protect their constitutional rights.

The court also erred in finding that the dispute is not "ripe". The Subpoena has been issued, the Secretary already has raised objections to that Subpoena, and the Committee has twice sought to enforce its Subpoena. The fact that the Secretary's "heart may change" or that those parties could at some point resolve their dispute amicably does not render this dispute unripe, and in fact, is precisely the problem. If voters' claims are not heard now, a change of heart (especially by the Secretary), a settlement agreement, or successful enforcement of the Subpoena could result in a breach of voters' privacy rights before they have notice or an opportunity to contest the disclosure.

Voters Intervenors respectfully request that this Court clarify both that the legislative Subpoena implicates voters' constitutional privacy rights and that courts can and must adjudicate voters' privacy claims before protected information is divulged.

## ARGUMENT

This appeal seeks to overturn the Commonwealth Court's complete abdication of the role of the judiciary as a check on the legislature's power. Under the guise of the ripeness doctrine and its mistaken belief in the existence of an

adequate legislative process, the lower court dismissed these consolidated cases and deprived Voter-Intervenors of a judicial forum to assert their constitutional right to privacy. Implicit in the lower court's jurisdictional and ripeness holdings is the notion that Voter-Intervenors' right to privacy was not implicated in the information the Committee sought via the legislative Subpoena. That implicit holding flouts decades of Pennsylvania Supreme Court jurisprudence recognizing the right to privacy and establishing the balancing of interests necessary for a court to determine whether legislative action conforms with the restraints of the constitution. And it leaves voters with no remedy to assert and protect their constitutional rights. As explained more fully below, Voter-Intervenors' right to privacy is clearly implicated in the legislative Subpoena and judicial intervention is necessary to protect it. The Commonwealth Court erred in concluding otherwise.

## I. The Commonwealth Court Erred in Ignoring Binding Precedent from this Court Requiring That It Balance the Interests of the Voters Against the Purported Legislative Interests of the Committee, and Implicitly Holding That a Legislative Subpoena is Not Subject to Citizens' Right to Privacy.

### A. Citizens Have a Constitutional Right to Privacy in their Personally-Identifying Information, and Must Be Afforded Notice and an Opportunity to be Heard Before the Government Accesses or Discloses Such Information.

#### 1. The Right to Privacy Under the Pennsylvania Constitution

Pennsylvania's "Constitution has historically been interpreted to incorporate a strong right of privacy…." *Commonwealth v. Alexander*, 243 A.3d 177, 204 (Pa. 2020) (*quoting Commonwealth v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991)). *See also Commonwealth v. Gindlesperger*, 743 A.2d 898, 899 n.3 (Pa. 1999) ("strong notion of privacy" in Pennsylvania); *Commonwealth v. Waltson*, 724 A.2d 289, 292 (Pa. 1998) ("notion of enhanced privacy rights" in Pennsylvania); *Commonwealth v. Matos*, 672 A.2d 769, 773 (Pa. 1996) ("strong right of privacy"). The Court has characterized privacy as "the most comprehensive of rights and the right most valued by civilized [people]." *Denoncourt v. Commonwealth State Ethics Comm'n*, 470 A.2d 945, 948-49 (Pa. 1983) (*quoting Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion of J. Brandeis)). In Pennsylvania, therefore, this "right to privacy is as much property of the individual as the land to which he holds title and the clothing he wears on his back." *Pennsylvania State Educ. Ass'n v. Commonwealth Dep't of Cmty. & Econ. Dev.*, 148 A.3d 142, 151 (Pa. 2016) ("*PSEA*") (*citing Commonwealth v. Murray,* 223 A.2d 102, 109 (Pa. 1966)).

This decades-long commitment to safeguarding Pennsylvanians' privacy is rooted in the common law, the protection of "inherent and indefeasible rights" in Article I, Section 1 of the Pennsylvania Constitution, and the protection against unreasonable searches and seizures in Article 1, Section 8. *See, e.g., Stenger v.*

*Lehigh Valley Hosp. Ctr*., 609 A.2d 796, 800-02 (Pa. 1992); *Murray*, 223 A.2d at 109-10. Section 1 of the Constitution reads:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Similarly, Section 8 reads:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pennsylvania's longstanding commitment to safeguarding individuals' privacy is stronger than protections under the U.S. Constitution. This Court recently reaffirmed that, "Article 1, Section 1 of the Pennsylvania Constitution provides even 'more rigorous and explicit protection for a person's right to privacy'" than does the U.S. Constitution. *PSEA*, 148 A.3d at 151 (citation omitted). *See also Alexander*, 243 A.3d at 206 ("Article I, Section 8 affords greater protection to our citizens than the Fourth Amendment" and, referring also to Article I, Section I, "[w]e must consider our charter as a whole . . .").

The right to privacy includes what is referred to as the "right of informational privacy," described as "the right of the individual to control access

to, or the dissemination of, personal information about himself or herself." *PSEA*, 148 A.3d at 150. *See also In re T.R.*, 731 A.2d 1276, 1279 (Pa. 1999) (plurality) ("There is no longer any question that the United States Constitution and the Pennsylvania Constitution provide protections for an individual's right to privacy . . . [including] . . . the individual's interest in avoiding disclosure of personal matters . . ."). The personal information subject to constitutional protection includes the personally identifying information subpoenaed by the Committee, including voters' driver license numbers[3] and the last four digits of their Social Security numbers.[4]

[3] Regarding the confidential nature of drivers' license numbers, *see, e.g.,* Drivers Protection Privacy Act, 18 U.S.C. §§2721, 2725(3); 75 Pa.C.S. §6114; *Advancement Project v. Pennsylvania Dep't of Transp*., 60 A.3d 891, 895-97 (Pa. Commw. 2013); *Lancaster County District Attorney's Office v. Walker*, 245 A.3d 1197, 1205, 1206 (Pa. Commw. 2021) ("the driver's license and address information should be redacted").

[4] Regarding the confidential nature of Social Security numbers, s*ee PSEA*, 148 A.3d at 158 (*citing Times Publ'g Co. v. Michel*, 633 A.2d 1233, 1237-38 (Pa. Commw. 1993), and *Sapp Roofing Co. v. Sheet Metal Workers' Int'l Assn*, 713 A.2d 627 (Pa. 1998)). *See also Governor's Office of Admin. v. Purcell*, 35 A.3d 811, 813 (Pa. Commw. 2011) (Social Security number part of the "holy trinity" for identity theft and deserves special protection); *Curphey v. F&S Mgmt., LLC*, 2021 U.S. Dist. LEXIS 25829, at *14 (D. Az. 2021) ("The Court will not ask Defendants to violate their employees' informational privacy unnecessarily. Defendants are not required to produce the last four digits of employees' Social Security number."); *Watt v. Fox Rest. Venture, LLC*, 2019 U.S. Dist. LEXIS 26959, at *24 (C.D. Ill. 2019) ("Because the last four digits of Social Security numbers is of marginal use in locating putative collective members and the marginal use is outweighed by the privacy concerns of putative collective members, the Court will not order Defendants to provide such information"); *Figueroa v. Harris Cuisine LLC*, 2019 U.S. Dist. LEXIS 12271, at *19 (E.D. La. 2019) ("The disclosure of dates of birth and the last four digits of Social Security numbers raises significant privacy and Security concerns that outweigh the plaintiff's risk of failing to contact the potential class in this case, where notice will be provided via mail, email, and text message."); *Firneno v. Radner Law Grp., PPLC*, 2016 U.S. Dist. LEXIS 142907, at *10-11 (E.D. Mich. 2016) ("Plaintiffs persuasively argue that 'the invasion of privacy caused by the unauthorized viewing and retention of their personal credit and

Although Section 1 and Section 8 are distinct provisions, they both form part of the same overarching right to privacy. *Commonwealth v. Murray*, 223 A.2d 102, 109-10 (Pa. 1966) (plurality opinion) (the right to privacy is rooted in both Sections 1 and 8). *See also Commonwealth v. Nixon*, 761 A.2d 1151, 1156 (Pa. 2000) (referring to the "penumbra of rights"); *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020) (looking to "our charter as a whole"). The fact that this right emanates from multiple sources "is a recognition that the constitution of our Commonwealth embodies a commitment to principles that manifest themselves in a coherent pattern of protection of individual privacy." Seth F. Kreimer, *The Right to Privacy in the Pennsylvania Constitution*, THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES (Gormley, Ed. 2020), at 788-89. Further, courts have construed Section 1's right to informational privacy with reference to precedent based on Section 8's protections. *See, e.g., Sapp Roofing Co. v. Sheet Metal Workers' Int'l Assn*, 713 A.2d 627, 630 (Pa. 1998) (relying on Section 8 in the context of a Right to Know Law ("RTKL") request); *Denoncourt v. Com.,*

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other information' — including the last four digits of their Social Security number, their address, and the exact amount of debt owed to creditors — is a de facto injury that satisfies the injury-in-fact requirement."); *Acevedo v. WorkFit Med, LLC*, 2014 U.S. Dist. LEXIS 131269, at *30 (W.D.N.Y. 2014) ("Plaintiffs argue that they need the last four digits of the potential plaintiffs' Social Security numbers in order to locate potential plaintiffs if notices are returned as undeliverable. The Court is not persuaded that this rationale justifies disclosure of such sensitive information, particularly given that the Court has no way of knowing if and/or how many notices will be returned as undeliverable."); *White v. Integrated Elec. Techs., Inc.*, 2013 U.S. Dist. LEXIS 83298, at *41 (E.D. La. 2013) ("the Court recognizes the significant privacy and security concerns inherent in disclosing the last four digits of class members' Social Security numbers.").

*State Ethics Comm'n*, 470 A.2d 945, 948 (Pa. 1983) (in defining the limits of the right to privacy under section 1, referring to cases interpreting Section 8). As noted above, Voter-Intervenors made claims under both sections of the Constitution.

2. Those Whose Private Information May Be Disclosed Must Have Notice and Opportunity to be Heard So That Their Interests May be Balanced Against the Government's Stated Interest in Disclosure.

In the face of a potential violation of privacy rights, courts must provide citizens notice and an opportunity to be heard, and must balance the privacy interests of the affected citizens with the stated governmental or public interest in disclosure. *City of Harrisburg v. Prince*, 219 A.3d 602, 618, 619 (Pa. 2019) ("a court must engage in a balancing test where such information is requested," and before that balancing test can be performed, "the donors must be afforded notice and an opportunity to be heard"). *See also Easton Area Sch. Dist.*, 232 A.3d 716, 733 (Pa. 2020). And this Court repeatedly has held that our Constitution ***requires*** courts to permit individuals to assert their constitutionally-protected privacy rights, and then to balance those rights against the government's demonstrated interests in the information, ***before*** the disclosure of such information. *See, e.g.*, *Easton Area Sch. Dist.*, 232 A.3d at 733 ("Before the government may release personal information, it must conduct a balancing test to determine whether the right of informational privacy outweighs the public's interest in dissemination"); *Reese v.*

*Pennsylvanians for Union Reform*, 173 A.3d 1143, 1145-46 (Pa. 2017) ("Before disclosing any section 614 information, however, the State Treasurer must perform the balancing test set forth in [*PSEA*]"). *See also PSEA*, 148 A.3d at 154.

Given Pennsylvania's zealous protection of the right to privacy, this balancing test imposes a heavy burden on the party seeking disclosure:

> Privacy claims must be balanced against state interests. Our test of whether an individual may be compelled to disclose private matters, as we stated it in *Denoncourt,* is that "government's intrusion into a person's private affairs is constitutionally justified when the government interest is significant and there is no alternate reasonable method of lesser intrusiveness to accomplish the governmental purpose." 470 A.2d at 949. More recently, we have stated the test in terms of whether there is a compelling state interest. *Stenger,* 609 A.2d at 802. In reality, the two tests are not distinct. ***There must be both a compelling, i.e., "significant" state interest and no alternate reasonable method of lesser intrusiveness.***

*In re T.R.*, 731 A.2d at 1280 (1999) (emphasis added). This balancing test is in addition to any statutory restrictions such as those pursuant to the Right To Know Law, 65 P.S. §67.101 *et seq*, and applies to any government disclosure of personal information. *Reese*, 173 A.3d at 1159.

3. The Right to Privacy Applies to Legislative Investigations.

The right to privacy is not limited to Right to Know Law requests; rather, it applies to "all government disclosures of personal information." *Reese v.*

*Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159 (Pa. 2017) ("As such, the *PSEA* balancing test is applicable to all government disclosures of personal information, including those not mandated by the RTKL or another statute."). Thus, it should be no surprise that this Court has long held that, when necessary to protect citizens' privacy and other constitutional rights, courts must address alleged violations due to legislative overreach.

In *Annenberg v. Roberts*, 2 A.2d 612 (Pa. 1938), this Court reviewed a challenge to a legislative commission's subpoena investigating the regulation of devices used to transmit gambling-related information. The subpoena sought the personal, banking, and business records of 38 individuals. 2 A.2d at 617. The Court noted that legislative overreach could infringe on the right to privacy: "[t]o compel an individual to produce evidence, under penalties if he refuses, is in effect a search and seizure, and unless confined to proper limits, violates his constitutional right to immunity in that regard." *Id.* The Court further explained the importance of citizens' privacy rights in the context of government investigations:

> None of the rights of the individual citizen has been more eloquently depicted and defended in the decisions of the Supreme Court of the United States than the right of personal privacy as against unlimited and unreasonable legislative or other governmental investigations….

*Id*. at 617-18. Because the subpoena in that case allegedly threatened the citizens' privacy rights, the Court proceeded to evaluate the subpoena.

Similarly, in *Commonwealth ex rel. Carcaci v. Brandamore,* 327 A.2d 1 (Pa. 1974), Carcaci sought a writ against the Sergeant of Arms for the Pennsylvania House of Representatives after he was held in contempt for refusing to answer several questions posed by a House committee. The Court noted the limitations on legislative subpoenas, and balanced the interests of the legislature and the individual. *Id.* at 4. "Broad as it is, however, the legislature's investigative role, like any other governmental activity, is subject to the limitations placed by the Constitution on governmental encroachments on individual freedom and privacy." *Id.*

Finally, in *Lunderstadt v. Pennsylvania House of Representatives Select Comm*., 519 A.2d 408, 415 (Pa. 1986) (Opinion Announcing Judgment of the Court), a Pennsylvania Select Committee issued subpoenas to individuals who served as consultants on the Capitol Addition Project for the Capitol Complex. The Court cautioned against legislative "fishing expeditions," where there is no evidentiary basis to intrude upon privacy rights:

> Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct *fishing expeditions* into private papers on the possibility that they may disclose evidence of crime . . . . It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up.

> . . . The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it . . . . Some evidence of the materiality of the papers demanded must be produced.
>
> . . . We assume for present purposes that even some part of the presumably large mass of papers . . . may be so connected with charges . . . as to be relevant . . ., but that possibility does not warrant a demand for the whole.

519 A.2d at 413 *(quoting FTC. v. American Tobacco Co.*, 264 U.S. 298, 305-307 (1924) (emphasis added in *Lunderstadt*)). The Court further noted that the right to privacy is as important with respect to legislative investigations as it is with respect to criminal investigations. *Id.* at 414-15. The Court concluded that the subpoenas at issue were overbroad and thus invalid, and all Justices concurred in this result. *See also McGinley v. Scott*, 164 A.2d 424, 431 (Pa. 1960) ("[L]egislative investigations must be kept strictly within their proper bounds if the orderly and long-established processes of our coordinate branches of government are to be maintained"); *Brown v. Brancato*, 184 A. 89, 92 (Pa. 1936) (exercising jurisdiction to hear a challenge to demands for information by a House committee).

Thus, this Court has consistently found that the right to privacy applies to government investigations, and the courts, as the protectors of constitutional rights, must balance the government interests with the citizens' interest in privacy.

4. Whether the Legislature Has a Legitimate Purpose is a Separate Inquiry.

Any legislative subpoena or request for information is not valid unless it has a legitimate purpose. *Trump v. Mazars*, 140 S. Ct. 2019 (2020); *Barenblatt v. United States*, 79 S. Ct. 1081 (1959); *Watkins v. United States*, 77 S. Ct. 1173 (1957). This requirement is separate and distinct from the constitutional balancing test that governs all potential governmental invasions of privacy, described above.

The *Mazars* court identified three separate limitations to legislative investigations. The first limitation is that a subpoena must be "related to, and in furtherance of, a legitimate task of Congress" or serve a "valid legislative purpose." 140 S. Ct. at 2031. Second, the legislature may not subpoena records for the purposes of law enforcement, which is the province of the Executive. *Id*. at 2032. And third, "recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation." *Id.* Thus, while a valid legislative purpose is necessary for a subpoena to be enforceable in the first instance, the above-described constitutional analysis still applies when that subpoena infringes upon constitutional rights.

### B. The Commonwealth Court Effectively Held That the Voters May Not Enforce Their Constitutional Right to Privacy Vis-à-vis the Legislature.

#### 1. The Commonwealth Court Disregarded or Incorrectly Distinguished All of the Above Case Law.

The Commonwealth Court dismissed the line of cases discussing the right to privacy and the need to conduct a balancing test (*PSEA*, *City of Harrisburg, Easton Area School Dist., Reese*, etc.) as "inapposite" because they involved right-to-know requests rather than a legislative subpoena (Slip Op., p. 31 n.26). *See also* Slip Op., p. 8 (subpoena was issued under authority of constitution and "as such, bears no relation to a citizen request for information . . . under [the RTKL]."). Yet these cases clearly stand for the proposition that individuals have a ***constitutional*** right to privacy and government officials (such as the Secretary) ***cannot*** release such private information without affording individuals an opportunity to be heard. Here, Voter-Intervenors seek to preclude the Secretary from disclosing their personally-identifying information, so this line of cases is directly on point.

Moreover, the right to privacy was developed primarily as a check on government encroachment. *PSEA*, 148 A.3d at 349-50 ("This right of privacy typically arises when the government seeks information related to persons accused of crimes or other malfeasance, and requires an assessment of the extent to which the government's demands invade the bounds of the person's subject privacy interest . . ."). These rights are rooted in the Framers' experience with pernicious

"general warrants" carried out by British authorities, and their specific desire to limit *government access* to citizens' homes, persons and information. Leonard W. Levy, Origins of the Fourth Amendment, POLITICAL SCIENCE QUARTERLY, Vol. 114, No. 1, p. 79 (Spring 1999). A host of opinions apply these privacy rights to legislative investigations and subpoenas, outside the right-to-know context. *Lunderstadt v. Pa House of Rep. Select Committee*, 519 A.2d 408 (Pa. 1986) (opinion announcing the judgment of the court); *Denoncourt v. Commonwealth*, 470 A.2d 945 (Pa. 1983); *Commonwealth ex rel. Carcaci v. Brandamore*, 327 A.2d 1 (Pa. 1974); *Annenberg v. Roberts*, 2 A.2d 612 (Pa. 1938).

The lower court attempted to distinguish *Annenberg* and *Brandamore*, not on jurisdictional grounds, but rather, on whether citizens had a remedy at all for the alleged violation of their privacy rights.

Initially, the court limited *Annenberg v. Roberts,* 2 A.2d 612 (Pa. 1938), to circumstances where the legislature is investigating "personal affairs" or where the subpoenas "on their face" contemplate an unreasonable search and seizure (Slip Op., p. 14, 16, 22 n.20). First, voters' personally-identifying information (such as requested in the Subpoena) constitutes "personal affairs" just as much as the contracts, memoranda and other documents at issue in *Annenberg*. The fact that this personally-identifying information is being held by someone else under a position of trust (the Secretary) does not make those affairs any less personal;

indeed, all of the Right to Know Law precedent cited above involved personal information in the hands of a government entity. Second, the *Annenberg* court struck down the subpoena before it as facially invalid (rather than remanding for a hearing) because it had sufficient evidence at that time. Nothing in that opinion, however, limits the holding to facially invalid subpoenas. Citizens' constitutional rights apply to all government actions, not just those that are deemed facially invalid; to hold otherwise would be to read the well-recognized balancing test out of existence and to allow savvy legislatures to perform an end run around the Constitution.

The court below noted that the *Annenberg* Court analyzed its subpoena under Article I, Section 8, and did not mention Section 1 specifically. First, the Voter-Intervenors have alleged a right to privacy under both Sections 1 and 8 (R. 24b-27b), so this is a distinction without a difference. Further, the dispute in *Annenberg* focused on a legislative investigation (not a criminal investigation), and the court did not limit its holding as the lower court suggested:

> None of the rights of the individual citizen has been more eloquently depicted and defended in the decisions of the Supreme Court of the United States than ***the right of personal privacy as against unlimited and unreasonable legislative*** or other governmental investigations. . .

2 A.2d at 618 (emphasis added). That is precisely this case—an infringement pursuant to a legislative investigation. In any event, even if the Voter-Intervenors

were relying solely on Section 1, as noted above, courts look to cases interpreting Section 8 when evaluating claims under Section 1. *See, e.g., Sapp Roofing Co. v. Sheet Metal Workers' Int'l Assn*, 713 A.2d 627, 630 (Pa. 1998); *Denoncourt v. Com., State Ethics Comm'n*, 470 A.2d 945, 948 (Pa. 1983).

Finally, the court distinguished *Annenberg* on the grounds that the subpoena there was issued under statutory authority, whereas here, the Committee's Subpoena was issued under the Committee's constitutional authority (Slip Op., p. 14, 22 n.20) and because the subpoena in *Annenberg* was issued by " a 'commission, i.e., a separate entity,' not by the legislature." (Slip Op., p. 21). The source of the authority under which the government issues a subpoena that violates constitutionally-protected privacy rights is irrelevant. And in any event, the court later recognized that this Court extended *Annenberg*'s holding to subpoenas based on constitutional authority in *Lunderstadt* (Slip Op., p. 14-15). Similarly, the commission that issued the subpoena in *Annenberg* was a legislative commission that was formed for the purpose of investigating facts to aid in formulating legislation. 2 A.2d at 616. The Commonwealth court did not explain why the right to privacy analysis should be different when a legislative committee issues a subpoena directly rather than forming a commission to do so.

With respect to *Commonwealth ex rel. Carcaci v. Brandamore*, 327 A.2d 1 (Pa. 1974), upholding a contempt conviction for failure to answer questions

pursuant to a legislative subpoena, the court characterized *Brandamore*'s analysis of constitutional limits on the legislature's power as dicta (Slip Op., p. 11). It then tried to limit the scope of that analysis by focusing solely on one of the cases cited by that Court (*Barenblatt v. United States*, 79 S. Ct. 1081 (1959)) (p. 11-12). Yet *Barenblatt* dealt only with the issue of whether a legislative investigation had a legitimate purpose. Another case that *Brandamore* relied upon, but which the Commonwealth Court did not mention, was *Watkins v. United States*, 77 S. Ct. 1173 (1957), in which the Court specifically discussed the additional inquiry necessary when a legislative subpoena infringes on the right to privacy:

> *United States v. Rumely* [73 S. Ct. 543 (1953)] makes it plain that the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights. The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.

77 S. Ct. at 1185.

2. <u>The Commonwealth Court Effectively Ruled That Voters Have No Enforceable Right To Privacy Vis-à-vis the Legislature.</u>

"The judiciary's paramount duty . . . lies with the solemn obligation to protect, safeguard and uphold those [constitutional] rights." *Commonwealth v. Koehler*, 229 A.3d 915, 936 (Pa. 2020). *See also Kroger Co. v. O'Hara Tp.*, 392

A.2d 266, 270 (Pa. 1978) (noting the courts' "obligation to protect the constitutional rights of our citizens under the Pennsylvania constitution"); *National Land & Inv. Co. v. Kohn*, 215 A.2d 597, 607 (Pa. 1965) ("The time must never come when, because of frustration with concepts foreign to their legal training, courts abdicate their judicial responsibility to protect the constitutional rights of individual citizens.").

The Commonwealth Court acknowledged that legislative power is limited by citizens' individual freedoms (Slip Op., p. 10). Similarly, an *en banc* panel of that court previously concluded that the right to privacy applies to legislative investigations. Court's January 10, 2022 Opinion, at 3 ("Broad as it is however, the legislature's investigative role, like any other governmental activity, is subject to the limitations placed by the Constitution on governmental encroachments on individual freedom and privacy," citing *Brandamore*). And when the court was faced with cross-applications for summary relief on the merits of Voter-Intervenors' claims (and the claims of others), the *en banc* panel denied those applications finding material issues of fact.

Nevertheless, in its February 9, 2023, opinion, while speaking of jurisdiction and ripeness, the court effectively held that there is no remedy for violations of these constitutional rights. It inappropriately dismissed substantial authority that provided mechanisms for enforcing those rights (*PSEA, City of Harrisburg, Easton*

*Area School Dist., Reese*), ignored the traditional balancing test (*Denoncourt, Stenger, T.R.*), and misinterpreted the authority finding the right to privacy equally applicable to legislative investigations (*Annenberg, Brandamore, McGinley, Brown, Lunderstadt*). It also ignored the court's prior *en banc* ruling recognizing that the right to privacy was applicable to legislative investigations and finding material issues of fact. While it characterized its ruling as based on principles of jurisdiction and ripeness, its rationale and ruling effectively is on the merits and bars ***any*** consideration or review of the voters' constitutional right to privacy.

Rather than provide for some mechanism of review, the Commonwealth Court held that it could not "assume" that the Committee would not protect those rights:

> This Court cannot assume that the Senate Committee will not be mindful of the informational privacy interests of registered voters . . . To assume that the Pennsylvania Senate, a body more susceptible to the will of the people than our appellate courts, will have less sensitivity to the informational privacy interest of registered voters 'would in truth be judicial arrogance.'

(Slip Op., p. 30) (*citing In re motions to Quash Subpoenas and Vacate Service*, 146 F. S. 792, 795 (W.D. Pa. 1956)). But denying review based on the assumption that other branches will "be mindful" of citizens' rights means there is no remedy if they are not. As the *Watkins* Court said, "[w]e cannot simply assume, however, that every congressional investigation is justified by a public need that

overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly." 77 S. Ct. at 1185. In guarding against "judicial arrogance," the lower court refused to analyze the asserted violation of voters' constitutional rights, thus abandoning its "paramount duty."

### 3. To the Extent the Commonwealth Court Adopted the Committee's "Single Entity" Theory, It Effectively Held that Voters Have No Right to Privacy Vis-à-vis the Commonwealth.

In its footnote 11 (on page 7), the Commonwealth Court addresses the Committee's "single-entity theory"—the idea that this case does not involve a "disclosure" at all because the Secretary and the Committee are both part of the Commonwealth—a single entity. In the context of the parties' cross-applications for summary relief, the Committee argued that every Commonwealth branch, agency and official has unfettered access to information possessed by any other branch, agency or official, and thus, there can be no privacy claims with respect to "inter-governmental sharing." Although the *en banc* panel denied the Committee's application for summary relief, and although this theory is not relevant to the question of jurisdiction or ripeness, the court nevertheless includes a discussion of that theory in this footnote.

To the extent the court purported to adopt this theory, this ruling likewise strips voters of their constitutional right to privacy in a substantial amount of personal information. Although the court found that the Secretary offered no authority *in opposition to* this theory, the Committee offered no authority *in support of* that theory. Rather, it is a brand new theory never before addressed. And contrary to this theory, as Voter-Intervenors argued to the court below, Pennsylvania "state government" is not a monolith. Rather, the branches of government operate independently from one another. That is by design: "The cornerstone of our republican democracy is the principle of government divided into three ***separate***, co-equal branches that both empower ***and constrain*** one another." *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 435 (Pa. 2017) (emphasis added). *See also Commonwealth v. Sutley*, 378 A.2d 780, 786 (Pa. 1977) ("***separate and autonomous*** branches" (emphasis added)); *L.J.S. v. State Ethics Comm'n*, 744 A.2d 798, 800 (Pa. Commw. 2000) ("***separate,*** equal, ***and independent*** branches of government" (emphasis added)); *Eshelman v. Commissioners of County of Berks*, 436 A.2d 710, 712 (Pa. Commw. 1981) ("three ***separate***, equal, ***and independent*** branches of government" (emphasis added)). *See also Loving v. United States*, 116 S. Ct. 1737, 1743-44 (1996) ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another"); *Kremer v. State Ethics*

*Comm'n*, 469 A.2d 593, 595 (Pa. 1983) (legislature's attempt to impose rules on judiciary held to violate the separation of powers).

Sharing information and data within agencies of the executive branch that exist under the Governor's jurisdiction is significantly different than sharing that information outside of the executive branch. Executive agencies are governed by common policies and subject to regulations relating to government procurement and IT data security. The General Assembly, including the state Senate, is a separate entity outside of the Governor's jurisdiction. It operates under a separate set of rules and is funded with a separate budget. Treating separate and co-equal branches of government as a "single entity" in the manner the Committee suggests would flout the fundamental separation of powers on which our form of government rests.

This litigation itself demonstrates the fallacy of the single-entity theory. If the Committee and the Secretary were a single entity, the Committee would not need a subpoena at all. Further, if all these agencies and branches participating in this litigation were a single entity, they would not need separate counsel. And they would not participate in this litigation as different and discrete parties and amici.[5]

[5] The Republican Caucus of the Pennsylvania House of Representatives submitted an amicus brief on October 22, 2021 at docket number 310 MD 2021.

But the positions of the various government agencies and branches differ precisely because they serve different functions and have different interests.

Although there is no case law discussing this novel theory, several cases have recognized the right to privacy when both the requesting party and the receiving party are government officials or entities. *Denoncourt* itself involved a disclosure of financial information by public employees (incumbent school directors) to the government. Citing to cases applying both Sections 1 and 8 of Article I, the Court specifically concluded that the right to privacy applies to *governmental* intrusions. 470 A.2d at 948-949. Similarly, *Com. Ex rel. Carcaci v. Brandamore*, 327 A.2d 1 (Pa. 1974), involved an attempt by a Pennsylvania House Committee to compel testimony from a Lieutenant of the Pennsylvania State Police. In addressing the attempt to compel testimony to a *government body*, the Court noted:

> Broad as it is, however, the legislature's investigative role, like any other governmental activity, is subject to the limitations placed by the Constitution on governmental encroachments on individual freedom and privacy . . . We approach this case with a full awareness of the threat that wide-ranging legislative investigations may pose to these protected interests.

327 A.2d at 4.

Voters have no choice but to disclose to the Secretary this personally-identifying information if they wish to exercise their constitutional right to vote. But when registering to vote, voters do not agree to dissemination of their private information to others within the government for other purposes; rather, they provide that information for a very limited purpose. To hold otherwise would be to suggest that voters implicitly surrender their right to privacy in order to exercise their right to vote. *Simmons v. United States*, 390 U.S. 377, 394 (1968) (finding it "intolerable" to suggest that "one constitutional right should have to be surrendered in order to assert another").

In addition, as a policy matter, this theory, if adopted, would set a dangerous precedent and fundamentally alter constitutional rights. Citizens' private information is often in the possession of some Commonwealth agency. Our tax returns, including detailed information about our finances, are maintained by the Department of Revenue. Certain medical information is maintained by the Department of Health, and certain employment information is maintained by the Department of Labor & Industry. Driver's license numbers and Social Security numbers are themselves issued by government entities. Because someone within the Commonwealth maintains all this information, the Committee's theory effectively concludes that there is no right to informational privacy as against the Commonwealth. If such were the law, surely the Committee or the court would be

able to cite to some authority for that proposition. To the contrary, as explained above and in briefing in the court below, myriad decisions demonstrate that the Constitution protects against government encroachment, and this includes information in the possession of a government agency or officer. *City of Harrisburg, supra*; *Easton Area Sch. Dist., supra; Reese, supra; PSEA, supra.*

Voter-Intervenors have a clear constitutional right and the courts must provide them an opportunity to be heard. The Commonwealth Court's decision concludes that this substantial authority is inapplicable to legislative subpoenas, at least in this context, and thus renders voters' constitutional right to privacy unenforceable and illusory. In this, the court erred.

## II. The Commonwealth Court Erred in Declining to Exercise Equity Jurisdiction over Voter-Intervenors' Petition for Review, and Leaving Pennsylvania Voters Without a Remedy to Protect Their Constitutional Right to Privacy.

Once it is acknowledged that voters have a constitutional right to privacy, and that this right applies to legislative investigations, the questions of jurisdiction to hear those claims and when they become ripe, become very straightforward. Decisions of this Court clearly hold that the courts have jurisdiction over claimed violations of constitutional rights, including claims against legislative bodies. Indeed, if that is not the case, voters have no mechanism for enforcing their

constitutional right to privacy vis-à-vis the state legislature, which means that the right to privacy exists in name only. The only exception to this rule is where there is an alternative mechanism for judicial review, which is not the case here.

### A. Pennsylvania Supreme Court Precedent Demonstrates the Commonwealth Court Has Jurisdiction Over the Instant Matter.

Pennsylvania Supreme Court decisions, stretching back decades, confirm that courts in equity have jurisdiction to address alleged legislative overreach before the legislative committee initiates contempt proceedings. *Annenberg v. Roberts*, 2 A.2d 612, 617 (Pa. 1938), involved a challenge to a legislative subpoena that sought the personal, banking, and business records of thirty-eight individuals. After noting that legislative overreach could infringe on citizens' right to privacy (as discussed above), the Court then addressed the question of *when* such constitutional questions should be raised. The Court was clear that a person asserting a constitutional right need ***not*** await contempt or habeas proceedings, but instead may seek relief in equity: "[t]he parties of whom an illegal demand for documents has been made 'are not required . . . to test the alleged right of such person by forcibly resisting his unlawful efforts to seize the books and records of their administration, or, for defiance of the committee's subpœnas, by subsequently justifying their resistance in proceedings for contempt or in habeas corpus.'" *Id.* at 618 (*quoting Brown v. Brancato*, 184 A. 89 (Pa. 1936)). The Court further noted

that those whose rights are affected have a right to a "judicial hearing." *Id.* at 619. The Court concluded:

> Here, as before stated, the demands for the production of documents show on their face that they violate plaintiffs' constitutional rights; this being so, ***plaintiffs are entitled now to challenge them and to have them abated and set aside***, which is accordingly done.

*Id.* (emphasis added).

Similarly, in *Brown v. Brancato*, 184 A. 89 (Pa. 1936) (cited in *Annenberg*), petitioners filed a bill in equity against a House committee that was attempting to conduct an investigation. The petitioners were seeking to protect not only their own information but the information owned by their clients. *Id.* at 91. The Court found that the petitioners were ***not*** required to await contempt or habeas proceedings, but instead could seek to restrain the investigation through a court of equity. *Id.* at 92. "***Equity has jurisdiction to restrain*** if the committee is without lawful authority in the premises." *Id.* (emphasis added). The Court, therefore, concluded that it had jurisdiction to hear the challenge and to restrain the committee.

More recently, in *Commonwealth ex rel. Carcaci v. Brandamore,* 327 A.2d 1 (Pa. 1974), Carcaci sought a writ against the Sergeant of Arms for the Pennsylvania House of Representatives after he was held in contempt for refusing

to answer several questions posed by a House committee. As discussed above, the Court noted the limitations on legislative subpoenas, and balanced the interests of the legislature and the individual. *Id.* at 4. Even though in that case Carcaci raised his challenge after a contempt proceeding, the Court explained that Carcaci might have sought judicial intervention rather than awaiting the committee's contempt proceedings: "had Carcaci wished to challenge the constitutionality of the committee's investigation without risking a contempt citation before the bar of the House, ***judicial recourse would have been available to him. Injunctive relief from the activities of the committee could have been sought in a court of equity***." *Id.* at 5 n.4 (emphasis added). Thus, this Court consistently has found that the subjects of improper legislative investigations may seek judicial review to prevent constitutional violations, and need not wait for contempt or other punitive proceedings.

While the lower court attempted to distinguish *Annenberg* as to whether it applied to this case at all (see Section II(B), *supra*), none of the alleged distinctions related to that court's finding as to jurisdiction. Similarly, although the lower court labelled *Brandamore*'s discussion of the limits of legislative investigations as dicta (see Section II(B), *supra*), it did not attempt to distinguish its finding that equity had jurisdiction over any pre-confrontation claim that Carcari might wish to make.

The lower court distinguished *Brown*, finding that it's holding was based on two rationales: (1) the subject of the bill was charitable trusts; and (2) the committee's power to act had ended. Contrary to the lower court's finding, the second issue had nothing to do with the court's ruling on jurisdiction. Rather, it was the basis for dismissing the complaint once it had accepted jurisdiction. 184 A. 92-93. As to the first issue, the lower court is correct that the *Brown* holding was based in part on the fact that the dispute involved charitable trusts, but that does not seem to be the entire analysis. Rather, the court said:

> They are not required to test the alleged right of such person by forcibly resisting his unlawful efforts to seize the books and records of their administration, or, for defiance of the committee's subpoenas, by subsequently justifying their resistance in proceedings for contempt or in habeas corpus . . ., or by suffering themselves to be indicted . . . Equity has jurisdiction to restrain if the committee is without lawful authority in the premises.

184 A. 92 (citations omitted). In any event, even if *Brown* is distinguishable on this basis, *Annenberg* and *Brandamore* undoubtedly support the exercise of jurisdiction.[6]

[6] In its analysis of jurisdiction, the court also tried to distinguish *Trump v. Mazars*, 140 S. Ct. 2019 (2020), which was cited by the dissent. But *Mazars* addresses the appropriate balancing of interests when the President's papers are involved; it did not analyze the question of jurisdiction. In *Mazars*, the U.S. Supreme Court first identified the limitations on legislative subpoenas, including the fact that recipients of subpoenas retain their constitutional rights. 140 S. Ct. at 2032. After providing that context, the Court went on to assess whether these same rules applied with respect to a Congressional Subpoena for the President's personal papers. The Court rejected the President's contention that the general rules for legislative subpoenas should be

Although the court attempted to distinguish *Annenberg, Brandamore* and *Brown*, other than general statements about the power of the legislature to investigate and to enforce its subpoenas, it does not cite ***any*** cases that describe how it believes constitutional claims should be addressed in the context of legislative subpoenas. Instead, the Commonwealth Court concluded that it did not have to address the constitutional claims ***at all*** because it "cannot assume that the Senate Committee will not be mindful of the informational privacy interests of registered voters" (Slip Op., p. 30). Such wishful thinking is not a basis in law to conclude that the courts lack jurisdiction to address claims of constitutional violations. In other words, without a shred of law to justify its position, the Commonwealth Court would abdicate the courts' traditional role as the protector of constitutional rights on a hunch that everything may turn out fine.

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disregarded (*Id.* at 2032-33), but also rejected the House's contention that subpoenas for the President's personal papers did not involve additional concerns (*Id.* at 2033-34). Instead, the Court charted a "balanced approach" that took into account the "unique position" of the President. *Id.* at 2035.

The lower court failed to recognize *Mazars*' recitation of the "usual" rules for legislative subpoenas, which clearly are applicable here. Instead, it noted that the discussion regarding the President's personal papers is not germane here, and interpreted the dissent as requiring "judicial review and approval of every legislative subpoena issued to a state agency before the legislature can expect compliance with its subpoena" (Slip Op., p. 28). Not so. Rather, setting aside special rules for the President's personal papers, *Mazars* is consistent with the other case law cited above holding that legislative subpoenas must have a valid legislative purpose and are subject to citizens' constitutional rights.

### B. The Commonwealth Court Erred in Concluding That It Had No Jurisdiction Because the Committee Has Its Own Process.

Ultimately, the Commonwealth Court concluded that it had no jurisdiction because the legislature has its own process for enforcing the subpoena. "In short, the existence of a legislative process for the enforcement of the Senate Committee's enforcement of its subpoena precludes this Court's exercise of equity jurisdiction" (Slip Op, p. 23). This ruling flies in the face of *Annenberg*, *Brown*, *Brandamore* and *Mazars*. In each of those cases, the same processes were available, and those courts all concluded that they had jurisdiction to hear challenges to legislative demands.

Nevertheless, the lower court believed that, by allowing the legislature's own process to play out, the dispute may (more wishful thinking) resolve itself. For example, the Secretary may choose to produce the requested information. Or the Committee may decide not to enforce its Subpoena. Or the legislature itself will hear the Secretary's constitutional arguments.

> In short, in the event the Acting Secretary chooses not to produce the voter registration information and in the event the Senate Committee chooses to exercise its constitutional enforcement powers, the Acting Secretary will be able to raise constitutional arguments in a proceeding that must provide due process. That proceeding could be brought under the legislature's constitutional enforcement powers, in accordance with the contempt statutes.

(Slip Op., p. 26). Yet the Secretary already has chosen not to produce the voters' personally-identifying information and instead filed a Petition for Review to confirm their right to refuse (R. 6453a-6577a). Further, the Committee already chose to enforce its Subpoena by filing a cross-application for summary relief, where it sought enforcement of its Subpoena, and by filing an entirely separate action to enforce its Subpoena (R. 3433a-36a). And the Secretary already raised their constitutional objections numerous times, and each time, the Committee rejected them (R. 1a-108a; 6405a-52a). While there always is a possibility that a dispute may resolve on its own, that is not a basis for refusing jurisdiction.

Moreover, setting aside whether the legislature's own processes are sufficient to protect the interests of the Secretary, they most assuredly are not sufficient to protect the constitutionally-protected privacy rights of the voters. The voters have no seat at the table and no ability to protect their interests if the Committee and the Secretary work out a deal to resolve their dispute. And the voters will have no right to participate in contempt proceedings that could follow if the Committee and Secretary cannot reach a resolution.

Although the court did not mention it, there are some circumstances when the availability of an alternative process may warrant the refusal to accept jurisdiction. But the cases supporting that result are very different from the instant

matter, and specifically distinguished circumstances such as are present here. These cases help demonstrate why, here, jurisdiction is appropriate and necessary.

In *In re Pennsylvania Crimes Comm'n*, 309 A.2d 401, 404-05 (Pa. 1973), the Commission investigating potential corruption in the Philadelphia Police Department served a subpoena on the Commissioner of Police. Current and former police officers filed an action in equity in Philadelphia County Court of Common Pleas seeking to restrain compliance with the subpoena. The Commission subsequently instituted a separate enforcement proceeding against the Police Commissioner in Commonwealth Court. The officers argued that the Commission must proceed in Common Pleas rather than Commonwealth Court because they filed their action first. *Id.* at 404. Realizing it would be unfair to allow other parties to limit the Commission's jurisdictional options, the court deemed the filing in Common Pleas "incapable of divesting the Commission of its legal right to proceed to seek enforcement in the forum of its choice as provided under the statutes." *Id.* at 404-05.

In so holding, the Court concluded that appellants could not challenge the subpoena "until the Commission invokes enforcement procedures in either the Courts of Common Pleas or the Commonwealth Court." *Id.* at 404. The Court explained that the Pennsylvania legislature had not conferred upon the Crime Commission the power to enforce compliance with the subpoena. *Id.* As a result,

subpoena recipients were not subject to "fine or imprisonment unless [the failure to comply] continues after a court has ordered compliance." *Id.* (*citing Cathcart v. Crumlish*, 189 A.2d 243 (Pa. 1963); *Alpha Club of West Philadelphia v. Pennsylvania Liquor Control Board*, 68 A.2d 730 (Pa. 1949)). Thus, the Court reasoned that before any punishment could be imposed the challengers would have an opportunity for judicial review "in either the Courts of Common Pleas or the Commonwealth Court." As a result, it was unnecessary to address the question at that time.

In this case, there is only one consolidated proceeding, and there is no question of depriving the Committee of its choice of judicial jurisdiction (it chose to seek relief in these proceedings). Further, the Committee need not seek judicial review to enforce the Subpoena; rather, it can enforce compliance based on its own non-judicial contempt proceedings, among other methods. *See* Article II, §11 of the Pennsylvania Constitution (granting each house of the legislature the power to punish people for contempt, or to "enforce obedience to its process"); Mason's Manual of Legislative Procedure §802.9 ("a person disobeying a subpoena of a legislative committee may be apprehended and brought before the committee by a sheriff under a warrant issued to the sheriff, and either prosecuted for a misdemeanor under a statute for failure to obey the subpoena or punished for contempt by the legislature. . ."). Indeed, there are both civil and criminal

ramifications to refusing to comply with the Subpoena. *See* 18 Pa.C.S. §5110. Because the Secretary is potentially at risk of arrest or contempt, the underlying rationale for the *Pennsylvania Crimes Commission* decision (that judicial review could be had at a later point without any intervening harm) is absent here, and in fact, that court specifically distinguished circumstances such as are present here. And here, there is no procedure for the voters to be heard absent the Committee changing its position.

Similarly, in *Cathcart v. Crumlish*, 189 A.2d 243, 245-46 (Pa. 1963), the Philadelphia Home Rule Charter provided a specific statutory procedure for assessing the validity of the subpoena, and that procedure specifically included judicial review. *Id.* at 245. The Court noted the long-standing rule that "where a remedy or method of procedure is provided by an act, those procedures should be followed exclusively." *Id.* at 245. The Court thus concluded that because that procedure had not been invoked, the subpoena could not yet be challenged. Here, there is no such exclusive statutory procedure.

The *Cathcart* court likewise found that the challengers had an adequate remedy at law. In particular, they could await the statutory procedure and would suffer no harm by waiting. The Court noted:

> Unlike a judicial subpoena, public officers who are allegedly vested with subpoena power under section 8-

> 409 are not given the power to enforce compliance. Disobedience is not punishable by imprisonment or fine unless it continues after a court has ordered compliance. See Annotation to § 8-409, Philadelphia Home Rule Charter. Therefore, appellants are not placed in the unfortunate dilemma of having to disobey the district attorney's subpoenas at their peril in order to contest their validity.

*Id.* at 245. Indeed, the Court distinguished those cases where the subpoena recipient could be subject to penalties without a court order. *Id*. at 245-46 (citing *Annenberg*). Here, as explained above, the Committee does have the power to punish and enforce obedience, including through legislative contempt proceedings and through arrest and detention. Therefore, the present case is governed by *Annenberg* rather than *Cathcart*.

Read together with *Annenberg*, *Brown* and *Brandamore*, *PA Crimes Comm'n* and *Cathcart* compel the conclusion that the lower court had jurisdiction here. The "alternative" procedure is for the Committee to enforce the Subpoena itself, through civil or criminal contempt proceedings. There is no judicial review as part of that process, and the Secretary could be subject to fine or imprisonment without the opportunity for review. And significantly, as discussed further below, there is no procedure whereby the voters can participate in those proceedings and be heard with respect to their constitutional rights. Thus, deferring to this

legislative process leaves the voters without a remedy to protect their constitutional rights.[7]

### C. *Camiel* is Inconsistent With Supreme Court Case Law and In Any Event, Carves Out an Exception for Infringement on Constitutional Rights.

The court below relied heavily on its own prior decision in *Camiel v. Select Committee on State Contract Practices of the House of Representatives*, 324 A.2d 862, 865-71 (Pa. Commw. 1974). There, the Chairman of the Democratic Committee of Philadelphia County filed a petition to quash a subpoena issued by a Select Committee of the House of Representatives. Although recognizing the "real issues" raised by *Camiel*, the court expressed "grave reservations concerning the jurisdiction of this Court to entertain a petition to quash a subpoena . . . ***before a citizen's constitutional rights are actually affected***." *Id.* at 865 (emphasis added).

The court there noted that "there ha[d] been no confrontation" because the Committee had not yet chosen to enforce the subpoena. The court further noted that the subpoena could be withdrawn before any legislative hearing, and the subject of the subpoena could raise his constitutional questions at that hearing. *Id.*

[7] The court cited *Payne v. Clark*, 187 A.2d 769, 771 (Pa. 1963), for the proposition that "[e]quity is discretionary with the court and should only be exercised [in certain identified circumstances]" (Slip Op. at 23). Contrary to the court's citation, *Payne* held that a *decree of specific performance* is discretionary, not that the exercise of equitable jurisdiction is discretionary. The court did not cite any support for the idea that courts may refuse equity jurisdiction where the petitioner has no other remedy.

at 866. The court therefore concluded that the matter was not yet ripe for determination. The court further explained:

> Courts should not interfere with the investigatory powers of the Legislature necessary to carry out its legislative function ***until some citizen's constitutional rights are affected and asserted as a reason for noncompliance or refusal to honor a legislative subpoena***.
>
> As we held in Annenberg v. Roberts, 333 Pa. 203, 2 A.2d 612 (1938), ***a court sitting in equity may restrain public officers to protect a citizen's constitutional rights after service of a subpoena and before a confrontation***; but the action before us is not in equity.

*Id*. (emphasis added). *See also id.* at 870 ("a constitutional issue may be raised by a citizen at that point in the proceedings when his or her constitutional rights are affected").

*Camiel*'s holding that, absent impact on citizens' constitutional rights, a subpoena recipient must allow the legislature's non-judicial enforcement procedures to begin, is inconsistent with this Court's precedent. As discussed above, this Court consistently has held that parties need *not* await such legislative proceedings, and they only depart from that standard where the recipient of the subpoena would be entitled to seek judicial review after the legislature conducts its enforcement procedures.

In any event, even in *Camiel*, the court excluded cases where citizens' constitutional rights are at stake, which is clearly the case here. When constitutional rights are at stake and where a subpoena recipient will face punishment before judicial review, this Court consistently has held that equitable jurisdiction exists. *See* Section II(A) of this Brief, *supra.*

### D. The Voters Have No Other Remedy.

Even if the recipient of a subpoena should simply await enforcement proceedings and respond if and when they are instituted (which is not the law as explained above), that path is not available to interested parties who are not themselves the recipient of the subpoena. No legislative or statutory mechanism exists for Intervenors' participation in any "confrontation" held before the Committee, and there is no avenue for judicial review of Intervenors' arguments in such a proceeding. As such, Intervenors have no available, alternative remedy even though the Committee seeks their private information.

The lower court again relies on wishful thinking when it proposes that voters can "request intervention" in any legislative proceeding where their information is at stake (Slip Op., p. 31). No established mechanism for any such intervention exists, the court cites to no such process, and the Committee ***opposed*** voters' intervention both in these Consolidated Proceedings and the related proceeding at

95 MD 2022 (R. 1330a-37a; Answer to Application for Leave to Intervene, filed at Docket No. 95 MD 2022 on May 9, 2022, at 4:22:09). Further, the Committee has announced its position that voters have no privacy rights in the requested information and has maintained that the response to a subpoena is not a disclosure for which a balancing of interests is required (R. 3446a, 3513a-28a, 3578a-81a). Given these positions, the suggestion that voters can protect their constitutionally-protected rights by "requesting intervention" in the Committee's proceedings, is unreasonable and untenable. And, regardless, reliance on the whim or good will of the legislature cannot possibly constitute an adequate basis to deny citizens the ability to protect their constitutionally-protected privacy rights from government intrusion.

Not only do Voter-Intervenors lack any mechanism to participate in any legislative proceeding relating to the Subpoena, but they also lack any mechanism to preclude the Secretary from voluntarily producing their personally-identifying information, or agreeing to some production that infringes upon their constitutional rights. Indeed, the court justifies its refusal to hear this dispute because the legislative subpoena is "capable of being resolved by negotiation and compromise or change of heart," slip op. at 20, or "hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive,'" *Id*. (quoting *Trump v. Mazars USA, LLP,* 140 S. Ct. 2019, 2029 (2020)). That is

precisely the problem. Voter-Intervenors requested relief against not only the Committee, but also against the Secretary, to prohibit them from disclosing their personally-identifying information in response to the Committee's request. *See* Petition for Review (wherefore clause). If Voter-Intervenors do not have the right to present their argument to a court pre-disclosure, they would have no way to protect their constitutional right to privacy, whether as a result of proceedings within the legislature, by voluntary production by the Secretary, or by agreement between the Secretary and the Committee. Indeed, Voter-Intervenors may not even know about such a disclosure until after it happens and after their information is placed at risk of identity theft or financial fraud. This is precisely why Voter-Intervenors require judicial intervention now, at this stage, to protect their constitutional privacy interests.

Declining to exercise equity jurisdiction here in favor of simply trusting the legislature to do the right thing is a complete abandonment of the court's role, and renders the constitutional right to privacy illusory. The lower court's ruling should be reversed so that voters have a chance to enforce their rights through the courts, rather than crossing their fingers and hoping that the government changes its mind and does the right thing.

## III. The Commonwealth Court Erred in Determining That the Voters' Constitutional Challenge to the Subpoena is Not Ripe Because There Has Been No "Confrontation," Even Though There is No Other Mechanism to Give Voters Notice and an Opportunity To Be Heard Before They Suffer an Irreparable, Constitutional Privacy Breach.

The Committee issued a Subpoena demanding voters' personally-identifying information (R. 1863a-65a). It sought affirmative relief enforcing its Subpoena in the consolidated proceedings (R. 3433a-36a), and even filed its own petition for review to enforce the Subpoena (R. 6453a-6577a). The court nevertheless concluded that challenges to this Subpoena were not yet ripe for review (Slip Op., p. 16).

The conclusion that the dispute is not yet ripe is inconsistent with *Annenberg* and *Brandamore*, described above. *Annenberg v. Roberts*, 2 A.2d at 618 ("[t]he parties of whom an illegal demand for documents has been made 'are not required . . . to test the alleged right of such person by forcibly resisting his unlawful efforts to seize the books and records of their administration, or, for defiance of the committee's subpœnas, by subsequently justifying their resistance in proceedings for contempt or in habeas corpus.'"(*quoting Brown v. Brancato*, 184 A. 89 (Pa. 1936)); *Brandamore,* 327 A.2d at 5 n.4 ("had Carcaci wished to challenge the constitutionality of the committee's investigation without risking a contempt citation before the bar of the House, judicial recourse would have been available to him. Injunctive relief from the activities of the committee could have been sought

in a court of equity."). This conclusion also is inconsistent with the basic premise that courts must consider constitutional privacy claims, and balance the interests of the parties, ***before*** the right to privacy is violated. *See, e.g.*, *Easton Area Sch. Dist.*, 232 A.3d at 733 ("Before the government may release personal information, it must conduct a balancing test to determine whether the right of informational privacy outweighs the public's interest in dissemination"); *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1145-46 (Pa. 2017) ("Before disclosing any section 614 information, however, the State Treasurer must perform the balancing test set forth in [*PSEA*]"). *See also PSEA*, 148 A.3d at 154.

In assessing ripeness, courts typically consider "whether the issues are adequately developed and the hardships that the parties will suffer if review is delayed." *Bayada Nurses, Inc. v. Com., Dep't of Lab. & Indus.*, 8 A.3d 866, 874 (Pa. 2010) (*quoting Twp. Of Derry v. Pa. Dep't of Lab. & Indus.*, 932 A.2d 56, 60 (Pa. 2007)). The purpose of the ripeness doctrine is to avoid entanglement into "abstract disagreements" and to "protect the agencies from judicial interference until an administrative decision has been formalized." *Western Pennsylvania Water Co. v. Pennsylvania Public Utility Comm'n*, 370 A.2d 337, 363 (Pa. 1977) (dissenting opinion). Here, the Committee issued its Subpoena, so the decision has been formalized and is not merely an "abstract disagreement." And it already attempted to enforce its Subpoena in this litigation and in a separate proceeding

before the Commonwealth Court. The legislative demand for information is clear (although the governmental interest in the information remains obscure), the issues are adequately developed, and the harm from the disclosure of voters' personally-identifying information is readily apparent. *Annenberg*, *Brandamore*, *Easton Area School District* and *Reese*, and the imminent violation of voters' constitutional rights, compel review now.

In concluding that the claims here were not ripe, the Commonwealth Court relied on *Department of Environmental Resources v. Marra*, 594 A.2d 646 (Pa. 1991). In *Marra*, a lower court issued an injunction requiring a party to disclose certain facts, but had not taken any steps to enforce that injunction. The Supreme Court specifically held that "the lower court has not yet had an opportunity to hear appellant's Fifth Amendment claim, and the appellant herein does not risk the imposition of greater sanctions by waiting the enforcement proceeding." *Id.* at 648. The Court distinguished another case where a Fifth Amendment claim had been asserted and rejected because in that case "requiring petitioners to wait until enforcement proceedings were commenced would be to require them to risk enormous fines and imprisonment." *Id.* Thus, in *Marra*, judicial review already was available in the lower court, and there was no risk of fines or imprisonment in allowing the lower court to hear the claims in the first instance. Here, of course, there is no judicial review as part of the legislative contempt process and the

Secretary does risk fines and imprisonment—precisely what several courts have found should not be allowed. Voters also risk significant repercussions – they risk disclosure of their constitutionally-protected private information.

The court also relied on *Camiel*, as holding that "the mere issuance of a legislative subpoena does not create a controversy that was ripe for review" (Slip Op., p. 17). Yet as noted above, *Camiel* is inconsistent with a line of this Court's precedent that provides for review of legislative subpoenas. Moreover, the court ignored *Camiel*'s caveat about constitutional rights. As explained above, citizens' constitutional rights are affected here and have been asserted as a reason for noncompliance or refusal to honor the Subpoena. Thus, as *Camiel* itself notes, it is appropriate to hear those claims "after service of a subpoena and before a confrontation."

The lower court also cited *Trump v. Mazars*, 140 S. Ct. 2019 (2020), to support the idea that the court should leave this dispute to be "hashed out in the hurly-burly, the give-and-take of the political process between the legislative and executive" (Slip Op., p. 20). Yet, that quote did not relate to the issue of ripeness; it involved the question of whether the dispute was judiciable at all. *Id.* at 2029-31. And the Court noted that both parties agreed that the dispute was judiciable, so it went on to hear the dispute. *Id.* at 2031. Ripeness simply was not at issue in

*Mazars*. Further, it makes no sense to leave this dispute to the political process when voters are not part of that process and their constitutional rights are at stake.

Finally, the lower court relied on *In re Motions to Quash Subpoenas and Vacate Service*, 146 F. Supp. 792 (W.D. Pa. 1956), another case that had nothing to do with ripeness. There, petitioners (who served as secretaries of two organizations) received subpoenas for certain documents within those organizations regarding attempts to "revise, repeal and influence" certain Acts—efforts that the Committee on Un-American Activities considered to be potentially subversive. Although the subpoenas were challenged under the First Amendment, it was not apparent from the face of the subpoenas that they sought any information that would violate petitioners' constitutional rights--the subpoenas sought organizational documents, not personal documents, and were limited to meeting minutes and communications between two organizations. *Id.* at 793. The court's opinion does not reflect any evidence that petitioners communicated with the committee in an effort to exclude from the subpoena whatever information they believed would infringe upon their constitutional rights. After noting that the committee issuing the subpoenas had not even been served with petitioners' motion, the court found that the danger to petitioners was "as yet unknown" and denied the petition. *Id.* That is a far cry from the Subpoena here, which on its face

demands the personally-identifying information of nine million Pennsylvania voters--the only information that Voter-Intervenors seek to preclude.

The lower court found that the instant dispute was not ripe because it could be resolved by settlement or one of the parties may change their position. "In short, this Court will not decide issues raised by a legislative subpoena that are capable of being resolved by negotiation and compromise or change of heart." (Slip Op., p. 20). That could be said of any dispute at all. If the possibility of settlement or "changing hearts" were sufficient to render a dispute unripe, few matters would remain for judicial consideration. And here, the Committee has explicitly rejected voters' arguments. It has repeatedly stated that voters have no privacy rights in the requested information and has maintained that the response to a subpoena is not a disclosure for which a balancing of interests is required (R. 3446a, 3513a-28a, 3578a-81a).

This is not "some danger as yet unknown" (Slip Op., p. 22). To the contrary, the danger here is quite clear. If the Secretary's "heart changes" and he produces voters' personally-identifying information, if he enters into a compromise with the Committee that includes disclosure of voters' personally-identifying information, or if the Committee successfully enforces its Subpoena, then the constitutional right to privacy of nine million Pennsylvanians will have been violated, and voters will be exposed to a substantially increased risk of identity theft and voter fraud.

Since the initial Petitions were filed in the underlying proceedings, a new administration is in place and a new Secretary has been appointed. If the Commonwealth Court's incorrect opinion is allowed to stand, the Secretary, relying on that opinion, whether in response to the Subpoena or in response to a new demand for information, could decide that he need not or should not resist the Committee's efforts to access voters' personally-identifying information. The lower court's opinion must be vacated so that voters' personal information is not left to the whim of government officials, who may rely on the misstatements of law from the court below.

The Subpoena has been issued and served. If Intervenors do not have the right to present their argument now, then, whether as a result of proceedings within the legislature, by voluntary production by the Secretary, or by agreement between the Secretary and the Committee, Intervenors' rights could be eviscerated without any notice or opportunity to be heard. Indeed, Intervenors may not even know about such a disclosure until after it happens and after their information is placed at further risk of identity theft or financial fraud.

Given that the voters' hearing must occur before disclosure, and given that they may not even know about disclosure if and when it happens, there are no other options. Voters have no other recourse. Their constitutional claims became ripe once the Committee served the Subpoena demanding their personally-

identifying information. Dismissing this matter on jurisdictional or ripeness grounds denies voters any right to challenge this constitutional deprivation, and therefore effectively strips them of their constitutional rights.

## CONCLUSION

The Commonwealth Court's opinion effectively strips Pennsylvania voters of their right to privacy vis-à-vis the legislature. If that opinion is not overturned, voters could be irreparably harmed by disclosure of their personally-identifying information without any notice and opportunity to be heard, subjecting them to an increased risk of identity theft and financial fraud. Other government officials also may feel compelled to follow the erroneous rationale of that opinion, exposing additional private information to unwarranted disclosure. Voter-Intervenors request that this Court overturn the Commonwealth Court's opinion, reinstate their Petition for Review, and make clear that voters have a right to privacy in their personally-identifying formation, specifically with respect to legislative investigations and subpoenas.

Dated: July 31, 2023

Respectfully submitted,

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CONFIDENTIAL DOCUMENTS CERTIFICATION

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

*/s/ Keith E. Whitson*
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## CERTIFICATE OF COMPLIANCE

I hereby certify that the Voter-Intervenors' Brief In Support of Appeal was filed (or attempted to be filed) with the Commonwealth Court of Pennsylvania's PACFile System and is an accurate and complete representation of the paper version of the Brief filed by Intervenor-Petitioners. I further certify that the foregoing Brief complies with the length requirements set forth in Rule 2135(a) of the Pennsylvania Rules of Appellate Procedure as the Brief contains 13,502 words, not including the supplementary matter identified in Rule 2135(b), based on the word count of Microsoft Word 2010, the word processing system used to prepare the brief. It has been prepared in 14-point font.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| Senator Jay Costa, Senator Anthony H. Williams, Senator Vincent J. Hughes, Senator Steven J. Santarsiero and Senate Democratic Caucus,<br>Petitioners | : | **CASES CONSOLIDATED** |
| v. | : | No. 310 M.D. 2021<br>Argued: September 12, 2022 |
| Senator Kim Ward and Senator Jarrett Coleman,<br>Respondents | : | |
| Commonwealth of Pennsylvania, Pennsylvania Department of State, and Leigh M. Chapman, Acting Secretary of the Commonwealth of Pennsylvania,<br>Petitioners | : | |
| v. | : | No. 322 M.D. 2021 |
| Senator Jarrett Coleman, Senator Kim Ward and The Pennsylvania State Senate Intergovernmental Operations Committee,<br>Respondents | : | |
| Arthur Haywood<br>Julie Haywood,<br>Petitioners | : | |
| v. | : | No. 323 M.D. 2021 |
| Leigh M. Chapman<br>Acting Secretary of State<br>Commonwealth of Pennsylvania,<br>Respondent | : | |

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE MARY HANNAH LEAVITT, Senior Judge

OPINION
BY SENIOR JUDGE LEAVITT FILED: February 9, 2023

Before the Court are the consolidated petitions for review filed by the Commonwealth of Pennsylvania, Department of State, and the Acting Secretary of the Commonwealth, Leigh M. Chapman[1] (collectively, Acting Secretary); Senators Jay Costa, Anthony H. Williams, Vincent J. Hughes, and Steven J. Santarsiero, and the Senate Democratic Caucus (collectively, Democratic Senators); and Arthur Haywood and Julie Haywood (collectively, the Haywoods) (collectively, Petitioners).[2] Intervention was granted to the League of Women Voters of Pennsylvania, Common Cause Pennsylvania, Make the Road Pennsylvania, and eight registered voters (collectively, Voter Intervenors). Petitioners and Voter Intervenors challenge a subpoena *duces tecum* issued on September 15, 2021, by the Pennsylvania State Senate Intergovernmental Operations Committee (Senate Committee or Committee) to the Acting Secretary of the Commonwealth, to produce copies of certain election-related documents and deliver them to the General Counsel of the Senate Republican Caucus.[3] Petitioners and Voter Intervenors seek to enjoin the subpoena. For the reasons that follow, we dismiss the petitions for review.

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[1] At the time this matter was initiated, the Acting Secretary was Veronica Degraffenreid, and she was followed by Acting Secretary Leigh M. Chapman.

[2] The Haywoods filed their petition for review against the Acting Secretary. However, they essentially seek to restrain enforcement of the legislative subpoena.

[3] After the 2023-2024 legislative session was convened, a praecipe to substitute certain senator parties was filed. No party has requested dismissal of the consolidated petitions for review on grounds of mootness.

## Background

The Senate Committee's subpoena *duces tecum* seeks the production of 17 categories of election-related documents filed with and maintained by the Department of State. Included therein is a request for a list of all electors who voted in the November 2020 general election, by county, and the manner of their vote whether in person, by mail-in ballot, by absentee ballot, or by provisional ballot. The subpoena requests the same list, in the same format, for the May 2021 primary election. This requested information is contained in the Statewide Uniform Registry of Electors (SURE) system, 25 Pa. C.S. §1222[4] (as identified in what is known as the Pennsylvania Voter Registration Act, 25 Pa. C.S. §§701-3302). The subpoena requests a list of voter registration changes made in the SURE system between May 31, 2020, and May 31, 2021, and copies of the Department of State's audits of the SURE system between 2018 and 2021. Finally, the subpoena requests a copy of the certified results for the two elections.

Petitioners and Voter Intervenors seek to enjoin the subpoena because they believe it does not have a valid legislative purpose. They assert that the Senate Committee's true purpose is to challenge the outcome of the 2020 presidential election, which is a matter conferred exclusively upon the judiciary and governed by

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[4] The SURE system is a single, uniform, integrated computer system that includes a database of all registered electors in the Commonwealth. To ensure the integrity and accuracy of all voter registration records, the SURE system assigns a unique registration number to each individual registered to vote in the Commonwealth; provides for the electronic transfer of completed voter registration applications and changes of address; permits the auditing of each registered elector's registration record; identifies the election district to which a qualified elector or registered elector should be assigned; produces reports as required; identifies duplicate voter registrations on a countywide and statewide basis; identifies registered electors who have been issued absentee ballots under the Pennsylvania Election Code (Election Code), Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2600-3591; and identifies registered electors who vote in an election and the method by which their ballots were cast. *See* 25 Pa. C.S. §1222(c).

the Election Code.[5] Further, because the requested database includes voters' names, addresses, dates of birth, driver's license numbers, and the last four digits of their social security numbers, compliance with the subpoena may compromise the informational privacy rights of registered voters that are protected by the Pennsylvania Constitution.[6]

More specifically, the Acting Secretary's injunction petition asserts that the subpoena *duces tecum* is invalid and unenforceable because it:

i. Was not issued for a legitimate legislative purpose;
ii. Concerns matters outside the Committee's subject matter area;
iii. Was issued without probable cause to seek information in which Pennsylvanians have a reasonable expectation of privacy;
iv. Demands information protected by the deliberative process privilege; and
v. Is overbroad.

Acting Secretary's Petition for Review, Prayer for Relief at 74. The Democratic Senators' injunction petition also asserts that the Senate Committee issued the subpoena to contest the 2020 general election or to do an election audit, either of which violates the separation of powers doctrine.[7] Further, the requested voter

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[5] Section 1758 of the Election Code, 25 P.S. §3458, provides that an election outcome can be contested by filing a petition with the court having jurisdiction over the matter.

[6] Article I, section 1 of the Pennsylvania Constitution states that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, §1. This provision creates a right to informational privacy.

[7] In regard to the concept of separation of powers, our Supreme Court recently stated:

> In our Commonwealth, the roots of the separation of powers doctrine run deep. The delineation of the three branches of government, each with distinct and independent powers, has been inherent in the structure of Pennsylvania's government since its genesis - the constitutional convention of 1776. Indeed for most of our

information is protected from public disclosure by the voter's constitutional right of informational privacy. Also asserting a right to informational privacy, the Haywoods seek to enjoin the Acting Secretary from disclosing their voter registration information contained in the SURE system. Voter Intervenors support the above-listed injunction petitions on the theory that the subpoena request is overbroad, is not for a valid legislative purpose, and implicates the informational privacy rights of the individual Voter Intervenors and the members of the association intervenors.

Petitioners and Voter Intervenors filed applications for summary relief requesting an immediate and permanent injunction.[8] The Senate Committee responded with its own application for summary relief, asserting that the Pennsylvania Constitution permits the legislature to conduct an investigation that may aid legislators in determining whether, or in what manner, they should consider amendments to the Election Code. The Senate Committee asserted that the informational privacy rights of registered voters are not implicated when information in the possession of the executive branch is shared with another branch of the Commonwealth government, whether legislative or judicial.

In a memorandum opinion and order filed on January 10, 2022, this Court denied all the applications for summary relief because the parties did not

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> Commonwealth's history, our Court has vigorously maintained separation of the powers of the branches[.]

*Renner v. Court of Common Pleas of Lehigh County*, 234 A.3d 411, 420 (Pa. 2020) (internal citations omitted).

[8] Democratic Senators also filed a request for a preliminary injunction. However, that request was stayed by an agreement of the Senate Committee not to enforce the subpoena while the Court considered the injunction petitions and the applications for summary relief.

establish a clear right to the relief they sought.[9] *Costa v. Corman* (Pa. Cmwlth., No. 310 M.D. 2021, filed January 10, 2022); *Pennsylvania Department of State v. Dush* (Pa. Cmwlth., No. 322 M.D. 2021, filed January 10, 2022); *Haywood v. Chapman* (Pa. Cmwlth., No. 323 M.D. 2021, filed January 10, 2022) (cases consolidated).

Subsequent to the denial of summary relief, the Court directed the parties to address three questions: (1) whether the petitions for review were ripe for review; (2) whether the availability of an adequate remedy at law precludes the Court's exercise of equity jurisdiction over a challenge to a legislative subpoena; and (3) whether the General Assembly's constitutional enforcement power or the criminal contempt statute precludes the Court's exercise of equity jurisdiction. Court Order, 1/25/2022. Briefs were filed by all parties.

In her brief, the Acting Secretary argues that the matter is ripe for review because an actual controversy was created by the mere issuance of the subpoena *duces tecum*. The General Assembly's enforcement power exposes the Acting Secretary to arrest, detention, and criminal sanctions should this Court not exercise its equity jurisdiction. Democratic Senators, the Haywoods, and Voter Intervenors echo these arguments. Applying principles developed under the Right-to-Know Law,[10] they argue that the Acting Secretary cannot disclose the voters' driver license numbers and last four digits of their social security numbers to a third party without balancing the private informational interest against the public interest in disclosure. *See Pennsylvania State Education Association v. Commonwealth Department of Community and Economic Development*, 148 A.3d 142, 158 (Pa.

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[9] However, the Court granted the cross-application for summary relief filed by the Senate Secretary-Parliamentarian Megan Martin. The Court agreed that the Democratic Senators did not state a claim against her, and, thus, she was dismissed as a named respondent.

[10] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

2016) (*PSEA*) (holding that "[t]he right to informational privacy is guaranteed by [a]rticle I, [s]ection 1 of the Pennsylvania Constitution, and may not be violated unless outweighed by a public interest favoring disclosure"). Until the Senate Committee explains how the voter database information relates to potential legislation, the Acting Secretary cannot do this balancing of public and private interests, as she must before disclosing this information to a third party, *i.e.*, the Senate Committee. Democratic Senators, the Haywoods, and Voter Intervenors observe that the Senate Committee's enforcement of the subpoena may provide the Acting Secretary a proceeding in which to raise her constitutional objections to the subpoena; however, because they have not been issued a subpoena, they are not guaranteed the opportunity to challenge the subpoena.

The Senate Committee responds that the legislature is not a third party, as suggested by the Acting Secretary. The General Assembly is the Commonwealth of Pennsylvania, as is the Secretary of the Commonwealth.[11] The subpoena *duces*

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[11] As we have explained, the "Commonwealth is a single entity that has organized itself into agencies and instrumentalities to perform specific functions." *Gillen v. Workers' Compensation Appeal Board (Pennsylvania Turnpike Commission)*, 253 A.3d 362, 370 (Pa. Cmwlth. 2021). In *Lyness v. State Board of Medicine*, 605 A.2d 1204, 1209 (Pa. 1992), the Supreme Court noted that "each administrative board and judge is ultimately a subdivision of a single entity, the Commonwealth of Pennsylvania." The Acting Secretary offers no authority for her position that the Department of State cannot share records it is required by statute to maintain with the legislative branch of a single entity, the Commonwealth of Pennsylvania, or that this sharing constitutes "public" disclosure or implicates informational privacy. *See also J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (noting that "our Federal Constitution and state Constitutions of this country divide the governmental power into three branches . . . [which are] coordinate parts of one government . . . .").

Voter Intervenors observe that in *Chester Housing Authority v. Polaha*, 173 A.3d 1240 (Pa. Cmwlth. 2017), informational privacy was implicated where a township requested a list of voucher recipients from the housing authority. This case is inapposite because it does not address two branches of one government. Rather, a housing authority and a township are separate entities, each created by the legislature in a separate enactment.

*tecum* was issued under the express authority of the Pennsylvania Constitution and, as such, bears no relation to a citizen request for information presented to the Department of State under authority of a statute, *i.e.*, the Right-to-Know Law. The Senate Committee also questions the sincerity of the informational privacy claim, noting that one of the Voter Intervenors, the League of Women Voters, subpoenaed this very same voter registration information in its challenge to the voter identification law on grounds that the statute would suppress the exercise of the franchise. *See Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012). In that litigation, this Court directed the Department of State to provide this voter information in discovery so that the League of Women Voters' consultant could prepare an expert report for use in the litigation. *Applewhite v. Commonwealth* (Pa. Cmwlth., No. 330 M.D. 2012, filed April 29, 2013) (Simpson, J., single-judge order) (directing the Department of State to disclose the names, addresses, partial Social Security numbers, and driver's license and non-driver's identification numbers, of all voters in the SURE system, along with information from the Pennsylvania Department of Transportation's database that included date of birth, current address, county code, sex, and prior name and address).

Nevertheless, the Senate Committee asserts that this Court need not address the merits of the constitutional arguments raised by Petitioners and Voter Intervenors at this juncture. There has been no "confrontation," which is required in order to have an actual controversy ripe for judicial review. When, and if, the Senate Committee takes action to enforce its subpoena in accordance with its constitutional enforcement power, the Acting Secretary then may raise any and all of her legal and constitutional claims. The civil and criminal contempt statutes also provide legal remedies that preclude this Court from exercising equity jurisdiction.

On September 12, 2022, Petitioners, Voter Intervenors, and the Senate Committee presented oral argument on the questions raised by this Court's January 25, 2022, order. Oral argument was heard seriately with *Pennsylvania Senate Intergovernmental Operations Committee v. Pennsylvania Department of State*, __ A.3d __ (Pa. Cmwlth., No. 95 M.D. 2022, filed February 9, 2023).

**Legislative Subpoena Power**

We begin with a review of the principles that govern a legislative subpoena. This includes a review of the circumstances where the judiciary has become involved in the enforcement of a legislative subpoena.

"The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." PA. CONST. art. II, §1. "Each House shall have power to determine the rules of its proceedings and . . . to enforce obedience to its process . . . and shall have all other powers necessary for the Legislature of a free State." *Id*. §11.[12]

Among the powers "necessary for the Legislature" is the power to conduct investigations. PA. CONST. art. II, §11. Our Supreme Court has explained that the legislature's "power to investigate is an essential corollary of the power to legislate" and that "[t]he scope of this power of inquiry extends to every proper

[12] It reads, in its entirety:

> Each House shall have power to determine the rules of its proceedings and punish its members or other persons for contempt or disorderly behavior in its presence, to enforce obedience to its process, to protect its members against violence or offers of bribes or private solicitation, and, with the concurrence of two-thirds, to expel a member, but not a second time for the same cause, and shall have all other powers necessary for the Legislature of a free State. A member expelled for corruption shall not thereafter be eligible to either House, and punishment for contempt or disorderly behavior shall not bar an indictment for the same offense.

PA. CONST. art. II, §11.

subject of legislative action." *Commonwealth ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 3 (Pa. 1974) (*Brandamore*). "It is well established that a function of legislative committees is to find facts and to make recommendations to the legislature for remedial legislation and other appropriate action." *Lunderstadt v. Pennsylvania House of Representatives Select Committee*, 519 A.2d 408, 410 (Pa. 1986) (plurality opinion). As our Supreme Court has explained:

> The right to investigate in order to acquire factual knowledge concerning particular subjects which will, or may, aid the legislators in their efforts to determine if, or in what manner, they should exercise their powers, is an inherent right of a legislative body, ancillary to, but distinct from, such powers.

*McGinley v. Scott*, 164 A.2d 424, 429 (Pa. 1960). Nevertheless, there are limits to the legislature's investigations, lest the legislature impermissibly encroach upon a citizen's individual freedoms.

In *Brandamore*, 327 A.2d 1, our Supreme Court considered the appeal of Angelo J. Carcaci, a lieutenant in the Pennsylvania State Police who refused to answer questions put to him by a special committee of the House of Representatives investigating law enforcement agencies in the Commonwealth. The Supreme Court upheld Carcaci's conviction for contempt and his commitment until expiration of the legislative session unless "he should sooner purge himself by testifying before the committee." *Id*. at 2. Accordingly, it affirmed the dismissal of Carcaci's petition for a writ of habeas corpus. Finally, the Court rejected Carcaci's claim that the subpoena lacked a legislative purpose. After examining the House resolution authorizing the investigation, the Supreme Court concluded that "[l]aw enforcement and the administration of justice are public functions" and "proper subjects for legislative action." *Id*. at 4. It also rejected Carcaci's challenge to his conviction for

contempt of the House of Representatives, concluding that it fully comported with due process.

In *obiter dictum*, the Supreme Court acknowledged that the legislature's broad investigatory powers are subject to "limitations placed by the Constitution on governmental encroachments on individual freedom and privacy." *Brandamore*, 327 A.2d at 4. With regard to that limitation, the Supreme Court explained that there must be a "balance between the protection of the rights of the individual and the avoiding of unnecessary restraint upon the State in the performance of its legitimate governmental purposes." *Id*. (quoting *In re Pennsylvania Crime Commission*, 309 A.2d 401, 407 (Pa. 1973)).

For this balancing test, our Supreme Court drew upon the United States Supreme Court's holding in *Barenblatt v. United States*, 360 U.S. 109 (1959), which reviewed Barenblatt's contempt conviction for refusing to answer questions about his participation in Communist Party activities. The United States Supreme Court acknowledged that where "First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Id*. at 126. The United States Supreme Court concluded that because the investigation related to a valid legislative purpose, the witness could be required to disclose his political and private relationships. It rejected Barenblatt's contention that "the true objective of the [c]ommittee" was "exposure," not legislation, explaining that "the [j]udiciary lacks authority to intervene on the basis of the motives which spurred the exercise of the power." *Id*. at 132.[13] The remedy for "a

[13] *See also Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 508 (1975) ("In determining the legitimacy of congressional [subpoena], we do not look to the motives alleged to have prompted it."); *Committee on Ways and Means, United States House of Representatives v.*

wrong motive or purpose" lies "not in the abuse by the judicial authority of its functions, but in the people[.]" *Id*. at 132-33. The United States Supreme Court upheld Barenblatt's conviction for contempt of Congress.

To be sure, a subpoena can be restrained where it seeks to "investigate the personal affairs" of the subpoena's recipient without advancing a legislative purpose. *Annenberg v. Roberts*, 2 A.2d 612, 617 (Pa. 1938). In *Annenberg*, the subpoena in question was found to effect a warrantless search and seizure in violation of the Fourth Amendment.[14] As such, the commission had unlawfully set itself up "as a court or grand jury." *Id*.

The controversy had its origins in the governor's convening of a special session of the General Assembly to consider "[m]aking illegal the use of devices or methods of transmission of information or advices in furtherance of gambling." *Id*. at 614. The special session enacted the Act of October 11, 1938, P.L. 77, No. 27 (Act 27), which set up a six-person commission to investigate and make recommendations for improvements in the criminal gambling laws. The statute gave the commission the power to issue subpoenas and provided for penalties as "provided by the laws of this Commonwealth in such cases," without specifying those laws. *Annenberg*, 2 A.2d at 615.

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*United States Department of Treasury*, 45 F.4th 324, 333 (D.C. 2022) (*Committee on Ways and Means*) ("The mere fact that individual members of Congress may have political motivations as well as legislative ones is of no moment.")

[14] The Fourth Amendment to the United States Constitution provides that

> the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The plaintiff, John Annenberg, filed a bill of equity in the Court of Common Pleas of Dauphin County to challenge the constitutionality of Act 27 and to restrain the subpoena directing him to produce

> "*all records, including* contracts, stock certificates, agreements of trust, agreements of partnership, ledgers, journals, check-books, *cancelled checks, bank deposit books, pass books, accounts,* evidence of ownership, and memoranda, including letters, telegrams, messages and memoranda received from, and copies of letters, telegrams, messages and memoranda sent to" thirty-eight named individuals, "*showing [his] connection with or interest in*, either directly or indirectly, *any or all companies, holding companies, corporations, partnerships or associations, directly or indirectly, engaged in or having to do with the dissemination of sporting news in all forms and by any means, including horse racing results distributed in the State of Pennsylvania or elsewhere in the United States [or] Canada*, newspapers, racing sheets, dope sheets, form sheets, racing records and statistics, and particularly with respect to the following corporations or companies," naming fifty-two corporations.

*Annenberg*, 2 A.2d at 617 (quoting subpoena) (emphasis added). Annenberg argued that the commission's investigation into his personal financial affairs could be done only pursuant to a court-approved search warrant, after a showing of probable cause, or by a grand jury. Our Supreme Court agreed:

> It would seem scarcely necessary to marshal authorities to establish, as a proposition of constitutional law, that *a witness cannot be compelled, under the guise of a legislative study of conditions bearing upon proposed legislation, to reveal his private and personal affairs, except to the extent to which such disclosure is reasonably required for the general purpose* of the inquiry. To compel an individual to produce evidence, under penalties if he refuses, is in effect a search and seizure, and, unless confined to proper limits, violates his constitutional right to immunity in that regard.

*Id*. (emphasis added).

The Supreme Court rejected Annenberg's various challenges to the constitutionality of Act 27. However, it held that the subpoena's demands for production of documents violated Annenberg's rights under the United States and Pennsylvania Constitutions. *Annenberg*, 2 A.2d at 619. Citing precedent from other state appellate courts and the United States Supreme Court, our Supreme Court explained that individuals are entitled to protection "in the enjoyment of life, liberty and property and from *inquisitions into private affairs*." *Id*. at 618 (quoting *Attorney General v. Brissenden*, 171 N.E. 82, 86 (Mass. 1930)) (emphasis added). The information requested of Annenberg was found irrelevant to the "matters properly being inquired into by the commission." *Annenberg*, 2 A.2d at 618. Instead, the court found that "[t]he subpoenas show *on their face* that they contemplate an unreasonable search and seizure." *Id*. (emphasis added).[15] Because the subpoena *duces tecum* sought to do the work of a grand jury, it lacked a valid legislative purpose. *Id*.

*Annenberg* concerned a subpoena authorized by statute. However, in *Lunderstadt*, 519 A.2d at 413, our Supreme Court applied the *Annenberg* principles to a legislative subpoena issued under authority of the Pennsylvania Constitution because of the importance of "an individual's interest in maintaining privacy, under

[15] In *Commonwealth v. Costello*, 21 Pa. D. 232 (1912), the Court of Quarter Sessions of the Peace of Pennsylvania in Philadelphia County dismissed the criminal indictment against an individual who refused to testify before a Senate committee. "Although the action of the Senate must be presumed to have had a legitimate object, *if it is capable of being so construed, and the court has no right to assume that the contrary was intended*, . . . its resolution, in our opinion, bears on its face plain indications that when it was adopted the Senate had no proper legislative purpose in view." *Id*. at 234-35 (citation omitted). The court concluded that the Senate had established itself as an extraordinary tribunal to exercise a judicial function. Further, the committee could not act after the legislature had adjourned *sine die*. *Id*. at 237.

the Fourth Amendment and under article I, section 8 of the Pennsylvania Constitution[.]"[16] The Supreme Court warned:

> [T]hat legislative investigations may, through *inquisitions into private affairs*, assume a character that is of questionable relevance to legitimate legislative purposes . . . . Indeed, in their proper realm, legislative committees are not to set themselves up as courts or as grand juries rather than as entities intended to investigate and report on conditions for the information of members of the legislature.

*Lunderstadt*, 519 A.2d at 413 (emphasis added). Where the legislature intrudes on "one's private affairs," a subpoena cannot issue "except upon a showing of probable cause that the particular records sought contain evidence of civil or criminal wrongdoing." *Id*. at 414-15. The Supreme Court reversed this Court's refusal to quash the subpoena to Carl Lunderstadt, a consultant for the Capitol addition project, to produce five years of his checking account and personal financial records and those of his family members. The concurring opinion of Justice Hutchinson would have quashed the subpoena on another ground:

> *This resolution does not contain even a hint that the investigation seeks to determine whether and what new law is needed to correct abuses in state construction contracts*. The function of this investigating committee is limited to checking compliance with existing law. That function is reserved to prosecutors, police and grand juries.

*Id*. at 416 (Hutchinson, J., concurring) (emphasis added).

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[16] Article I, section 8 of the Pennsylvania Constitution provides that "the people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, not, without probable cause, supported by oath or affirmation subscribed to by the affiant." PA. CONST. art. I, §8.

In sum, neither a legislative committee nor a commission established by statute may set itself up as a grand jury or assume the function of a prosecutor. *Annenberg*, 2 A.2d at 617. Any "inquisition" into private affairs will be presumed to have a "questionable" legislative purpose. *Lunderstadt*, 519 A.2d at 413.

With these principles in mind, we turn to the question of whether the Court should exercise its equity jurisdiction to intervene in the Senate Committee's subpoena for documents held by the Department of State at this juncture.

**Analysis**

**I.**

The first question raised by this Court's order of January 25, 2022, was whether the legislative subpoena is ripe for this Court's review.

"Ripeness has been defined as the presence of an actual controversy; it requires a court to evaluate the fitness of the issues for judicial determination, as well as the hardship to the parties of withholding court consideration." *Borough of Centralia v. Commonwealth*, 658 A.2d 840, 842 (Pa. Cmwlth. 1995). "Court rulings applying the ripeness doctrine are premised on policies of sound jurisprudence; courts should not give answers to academic questions, render advisory opinions, or make decisions based on assertions of hypothetical events that might occur in the future." *Philips Brothers Electrical Contractors, Inc. v. Pennsylvania Turnpike Commission*, 960 A.2d 941, 945 (Pa. Cmwlth. 2008).[17] To determine whether a matter is ripe, the Supreme Court has instructed as follows:

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[17] In *Philips Brothers*, a prospective bidder petitioned for this Court's review of the Turnpike Commission's dismissal of its bid protest, which was filed one year prior to the Commission's solicitation of bids on a proposed turnpike facility. This Court affirmed the Turnpike Commission. We held that the prospective bidder could pursue a bid protest in accordance with the timetable set forth in the Commonwealth Procurement Code, 62 Pa. C.S. §§101-2311, when and if it chooses to do so. *Philips Brothers*, 960 A.2d at 946.

> The factors we consider under our "adequately developed" inquiry include: whether the claim involves *uncertain and contingent events that may not occur as anticipated or at all*; the amount of fact finding required to resolve the issue; and whether the parties to the action are sufficiently adverse.

*Township of Derry v. Pennsylvania Department of Labor and Industry*, 932 A.2d 56, 58 (Pa. 2007) (internal quotation omitted) (emphasis added).

In *Department of Environmental Resources v. Marra*, 594 A.2d 646 (Pa. 1991), a landowner sought to restrain enforcement of this Court's injunction that required him to disclose the location of certain paint solvents and waste removed from his property, on grounds that the order violated his Fifth Amendment right against self-incrimination.[18] The Supreme Court held that the matter was not ripe for review, explaining as follows:

> *In the present case, the Commonwealth has not sought to enforce its injunction*, the lower court has not yet had an opportunity to hear appellant's Fifth Amendment claim, and appellant herein does not risk the imposition of greater sanctions by awaiting the enforcement proceeding. *It is possible that such proceedings will never be initiated.*

*Id*. at 648 (emphasis added).

In *Camiel v. Select Committee on State Contract Practices of House of Representatives*, 324 A.2d 862 (Pa. Cmwlth. 1974), this Court was presented with a request to quash a legislative subpoena on constitutional grounds. In an *en banc* decision, we held that the mere issuance of a legislative subpoena does not create a controversy that was ripe for review.

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[18] The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. CONST. amend. V.

In *Camiel*, the Pennsylvania House of Representatives, by resolution, formed a select committee to

> examine, investigate and make a complete study for the purpose of informing the House of Representatives in the discharge of its constitutional legislative functions and duties of any and all matters pertaining to: (1) the administration, activities, methods of operations, use of appropriations, use of funds and expenditures thereof, policies, accomplishments and results, deficiencies or failures, eff(i)ciency and effectiveness of State agencies responsible for the purchasing, leasing, contracting, and disposal of Commonwealth supplies, properties and services; and (2) individuals, corporations, consultants, advisors, authorities and entities within or outside the Commonwealth, related to, involved in, or affecting the purchasing, leasing, construction and disposal of Commonwealth property, supplies and services[.]

*Id.* at 864. The select committee issued a subpoena *duces tecum* to the custodians of records for the Republican and Democratic county committees of 12 counties in the Commonwealth. The subpoena issued to Peter J. Camiel, the Chairman of the Democratic County Executive Committee of Philadelphia County, sought

> *books, documents, accounts, records, indices, tapes, logs, ledgers, and any and all other data pertaining to*: (a) *all contributions* received on or after January 1, 1966 through May 13, 1974, including but not limited to, any monies, goods, services, or any other thing or things of value by the Democratic County Executive Committee of Phila[delphia] County or any other committee, group, or person operating under the authority of the aforementioned committee; [and] (b) the name and address of each of said contributors. The date, amount, and method of payment (cash, check, money order, etc.)[.]

*Id*. at 864-65 (emphasis added). Camiel filed a petition for review to restrain the subpoena.

Camiel's petition asserted that the request was so broad and indefinite that it violated his constitutional rights. Quoting *Barenblatt*, 360 U.S. at 111-12, we acknowledged that "[b]road as it is, the power (to investigate) is not, however, without limitations . . . more particularly [] the relevant limitations in the Bill of Rights." *Camiel*, 324 A.2d at 868. We further acknowledged that "Camiel has raised real issues which may some day have to be decided by the courts[;]" however, we concluded "that this case does not yet present a justiciable issue and therefore is not ripe for a decision on the merits." *Id.* at 865. Accordingly, we dismissed the petition for review.

In so holding, we began with separation of powers, explaining as follows:

> We view this point to be of a very serious nature. If there is any one principle of constitutional law which supports and protects our form of government, including all of our constitutional rights, it is the separation of powers among the three branches of government. Every crack in this foundation weakens the entire structure.

*Camiel*, 324 A.2d at 866. We distinguished a legislative subpoena from a subpoena issued by a "commission, *i.e.*, a separate entity," which acts "under specific statutory authority." *Id*. By contrast, in *Camiel*:

> *We are asked here to interfere with the legislative process*, and we believe we must question whether we have the jurisdiction and the power to interfere at this point in the proceedings.

*Id*. (emphasis added). The "point in the proceedings" considered in *Camiel* was the service of the legislative subpoena. However, notwithstanding the service of a "subpoena *duces tecum* upon Camiel, [] *there has been no confrontation*." *Id*. (emphasis added).

We reasoned that a citizen must be able to raise constitutional defenses at the "point in the proceedings when his or her constitutional rights are affected[.]" *Id*. at 870. However, "[c]ourts should not decide a citizen's constitutional rights in a vacuum." *Id*. This is because

> *we do not know whether the Select Committee will force an issue*, for that is certainly within its discretion. Absent a confrontation and a record made showing the factual posture of the matter, it is our position that it is *improper for this Court to dispose of all the potential constitutional issues which might be raised*[.]

*Id*. at 866 (emphasis added). In short, this Court will not decide issues raised by a legislative subpoena that are capable of being resolved by negotiation and compromise or change of heart.

In *Trump v. Mazars USA, LLP,* __ U.S. __, __, 140 S. Ct. 2019, 2030 (2020), the United States Supreme Court observed that historically "congressional demands for the President's information have been resolved by the political branches without involving this Court." These disputes are "hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive.'" *Id.* at __, 140 S. Ct. at 2029. (citation omitted). For example, when a House subcommittee of the Congress subpoenaed documents from the Department of the Interior, President Ronald Reagan directed these documents to be withheld because they involved confidential presidential communications with subordinates. After the subcommittee voted to hold the Secretary of the Interior in contempt, "an innovative compromise soon followed." *Id*. at __, 140 S. Ct. at 2030. It is this "tradition of negotiation and compromise without the involvement of [the] court," *id*., that largely informed our Court's decision in *Camiel*, 324 A.2d at 866.

In dismissing Camiel's petition, our Court acknowledged the holding in *Annenberg*, 2 A.2d at 618, noting that "a court sitting in equity *may* restrain public

officers to protect a citizen's constitutional rights after service of a subpoena and before a confrontation[.]" *Camiel*, 324 A.2d at 866 (emphasis added). However, we found *Annenberg* distinguishable. First, *Annenberg* involved a subpoena issued by a "commission, *i.e.*, a separate entity," not by the legislature. *Camiel*, 324 A.2d at 866. Second, *Annenberg* raised a search and seizure of a citizen's private financial records, which was not raised in *Camiel*.

Federal case law also favors judicial restraint when faced with a challenge to a Congressional subpoena before confrontation. In *In re Motions to Quash Subpoenas and Vacate Service*, 146 F. Supp. 792 (W.D. Pa. 1956), a subpoena *duces tecum* was issued to Bessie Steinberg and Allan McNeil to testify about their activities to end sedition laws. They filed a motion to quash the subpoenas, and the District Court denied relief, despite the contention that the subpoenas violated their right of free speech and association.[19] In denying the requested relief, the District Court stated:

> We would be naive indeed if we did not recognize the difference of opinion regarding the subversive investigations of the last few years. That *Congress has the duty to consider remedial legislation in order to best effectuate our defenses against subversion* is only to state the obvious. That *Congress and the courts should be ever vigilant to protect our individual rights is no less clear*.
>
> * * *
>
> *Here the petitioners are asking for protection against some danger as yet unknown*. They claim a constitutional impairment not now clear. They presume a limitation of their constitutional privileges not yet threatened. *For us to presume that the House*

[19] U.S. CONST. amend. I. It states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id*.

> *of Representatives, the body most susceptible to the will of the people, will be less sensitive to the constitutional rights of the citizen than will be this Court* would authorize a presumption I am not prepared to accept. This would not be exercising a judicial prerogative or a judicial restraint, but *would in truth be judicial arrogance*[.]

*Id.* at 795 (emphasis added). The District Court concluded that this request for relief was premature.

We conclude that, as in *Camiel*, this matter is not ripe for this Court's review because there has been no confrontation. Likewise, the *Annenberg* circumstances do not pertain because that case concerned a subpoena issued under authority of statute and, thus, did not implicate "interference" with "legislative process." *Camiel*, 324 A.2d at 866.[20] The Senate Committee has not taken any steps to enforce its subpoena *duces tecum* under article II, section 11 of the Pennsylvania Constitution or to hold the Acting Secretary in contempt. *See Marra*, 594 A.2d at 648. As the United States District Court aptly observed in *In re Motions to Quash Subpoenas and Vacate Service*, 146 F. Supp. at 795, "the petitioners are asking for protection against some danger as yet unknown."

**II.**

Relying principally on *Annenberg*, 2 A.2d 612, the Acting Secretary asserts that this Court should exercise its jurisdiction in equity to restrain the Senate Committee's subpoena *duces tecum*. Democratic Senators, the Haywoods, and Voter Intervenors agree, noting also that they have no other vehicle for advancing their informational privacy claims. The Senate Committee rejoins that the existence

[20] The *Annenberg* subpoena was issued under authority of a statute by an entity created by statute, and the *Annenberg* subpoena effected an "inquisition" into "the private affairs" of the subpoena's recipient. By contrast, the Senate Committee's subpoena has nothing to do with the Acting Secretary's private affairs, and it was issued under authority of the Pennsylvania Constitution.

of a remedy at law precludes equity jurisdiction. Further, the "manner in which a legislative body exercises its inherent power to vindicate its authority and processes must satisfy the requirements of procedural due process." *Brandamore*, 327 A.2d at 5. In short, the existence of a legislative process for the enforcement of the Senate Committee's enforcement of its subpoena precludes this Court's exercise of equity jurisdiction.[21]

There is a difference between subject matter jurisdiction and equity jurisdiction, as this Court has explained:

> Jurisdiction is the power of a court to enter into an inquiry on a certain matter . . . . A careful distinction must be made between subject matter jurisdiction, which we have just defined, and equity jurisdiction, which describes the remedies available in equity . . . .
>
> Hence, *if there is an adequate non-statutory remedy at law, equity may withhold its remedies* and the matter will be transferred to the law side[.]

*Lashe v. Northern York County School District*, 417 A.2d 260, 262 (Pa. Cmwlth. 1980) (citations omitted) (emphasis added). Equity is discretionary with the court and should be exercised only "where the facts clearly establish the plaintiff's right thereto; where no adequate remedy at law exists; *and where the chancellor believes that justice requires it*." *Payne v. Clark*, 187 A.2d 769, 771 (Pa. 1963) (emphasis added). "In other words, *such a decree is of grace and not of right*." *Id*. (emphasis added).

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[21] On March 11, 2022, the Senate Committee filed a petition for review in the nature of a complaint in mandamus, which, alternatively, sought this Court's enforcement of the Senate Committee's subpoena. That petition was argued before us, seriately with the present matter, on September 12, 2022, and is addressed in a separate opinion and order at *Pennsylvania Senate Intergovernmental Operations Committee*, __ A.3d at __, slip op. at 1-20.

In *Brown v. Brancato*, 184 A. 89, 91 (Pa. 1936), our Supreme Court held that there was "no doubt of the jurisdiction in equity to entertain the bill" brought by the directors of charitable trusts in the City of Philadelphia to challenge a proposed investigation by a committee of the House of Representatives. The Court explained that

> plaintiffs aver that defendants propose, by subpoena *duces tecum* to require production of the records, books, accounts, and other documents of plaintiff directors, *to the general disorganization of their trust administration*. Various prayers for restraint were made. The order dismissing the bill, made by the learned court below, cannot be sustained.

*Id*. (emphasis added). There were two reasons for the Supreme Court's decision to grant relief in equity to the directors of the Philadelphia charitable trusts.

First, the subject of the bill in equity was charitable trusts. The Supreme Court explained that "[f]rom the earliest days chancery has exercised jurisdiction over charitable trusts . . . . Chancery powers over trusts were exercised in this [C]ommonwealth 'as part of our own common law' prior to the [Act of June 16, 1836,] P.L. 784[, repealed by the Act of April 28, 1978, P.L. 202]." *Brown*, 184 A. at 91 (citations omitted). The directors of the Philadelphia charitable trusts had the fiduciary responsibility to preserve trust property with a value of $93 million. The records and accounts sought to be delivered to the House Committee would create "general disorganization of their trust administration." *Id*. The Supreme Court held that the directors were "not to be molested" in the exercise of their fiduciary responsibilities. *Id*. at 92.

Second, the House Committee's power to act ended when the legislature adjourned *sine die* on June 21, 1935. The legislative action that triggered the bill in equity occurred after that date. The Supreme Court observed that it was

doubtful that the House Committee could act under a resolution that was never submitted to the Senate. But even if it could, "after the adjournment, the power of the House complained of in this suit was done once and for all." *Brown*, 184 A. at 93. For that reason, the Supreme Court held that the House Committee was "without lawful authority in the premises." *Id*. at 92. The Supreme Court remitted the matter to the trial court with instructions to issue the injunction.

The Acting Secretary argues that because the Senate Committee has "the power to issue a warrant for the [Acting] Secretary's arrest and detention in Dauphin County prison," this Court must exercise equity jurisdiction. Acting Secretary Brief at 15-16. She argues that "a party need not wait to be subject to contempt proceedings before seeking judicial review." *Id*. at 15, 17. Further, the Senate Committee has refused to narrow or withdraw its subpoena but, rather, has noted its authority to enforce a subpoena "without recourse to the judiciary." *Id*. at 12. Stated otherwise, the Acting Secretary believes that the Committee's possible enforcement of the subpoena warrants judicial intervention in equity and in advance of confrontation. We are not persuaded.

The Pennsylvania Constitution vests the legislature with the power to enforce its subpoenas. PA. CONST. art. II, §11. The mere existence of this constitutional enforcement power does not warrant judicial intervention. Rather, separation of powers requires that the "legislative process" be respected by the judiciary. *Camiel*, 324 A.2d at 865.

Further, due process does not require that a "finding of contempt must be made in a judicial forum." *Brandamore*, 327 A.2d at 4. To the contrary,

> [t]he power of the Houses of the General Assembly to vindicate their authority and processes by punishing acts of contempt committed in their presence *is inherent in the legislative function*.

*Id*. (emphasis added). In *Brandamore*, our Supreme Court concluded that the House of Representatives had properly followed the procedures in Section 1 of the Act of June 13, 1842, P.L. 491, 46 P.S. §61, in holding Carcaci in contempt. To be sure, "the manner in which a legislative body exercises its inherent power to vindicate its authority and processes must satisfy the requirements of procedural due process." *Brandamore*, 327 A.2d at 5. The Supreme Court concluded Carcaci received the process he was due from the House of Representatives.

In short, in the event the Acting Secretary chooses not to produce the voter registration information and in the event the Senate Committee chooses to exercise its constitutional enforcement powers, the Acting Secretary will be able to raise constitutional arguments in a proceeding that must provide due process. *Brandamore*, 327 A.2d at 5. That proceeding could be brought under the legislature's constitutional enforcement powers, in accordance with the contempt statutes. *See* 46 P.S. §61; 18 Pa. C.S. §5110.[22]

The dissent argues that there is an "interbranch conflict" presented in this case that supports judicial intervention before confrontation. It believes that any legislative subpoena issued to an executive branch agency should be reviewed by the judiciary, using the principles announced in *Mazars*, __ U.S. __, 140 S. Ct. 2019.

*Mazars* involved four House subpoenas seeking personal financial information from President Donald J. Trump and his children and affiliated businesses, including his accounting firm, Mazars USA, LLP. The United States Supreme Court concluded that this intrusion into the "personal affairs" of a sitting

[22] "A person is guilty of a misdemeanor of the third degree if he is disorderly or contemptuous in the presence of either branch of the General Assembly, or if he neglects or refuses to appear in the presence of either of such branches after having been duly served with a subpoena to so appear." 18 Pa. C.S. §5110.

President required limits. *Cf. Annenberg*, 2 A.2d 612; *Lunderstadt*, 519 A.2d 408. Under these limits, courts must do a careful assessment of (1) whether the subpoena's "legislative purpose warrants the significant step of involving the President and his papers;" (2) whether the subpoena is "no broader than necessary to support Congress' legislative objective;" (3) whether the subpoena for the President's information clearly "advances a valid legislative purpose;" and (4) the extent of "the burdens imposed on the President by a subpoena." *Mazars*, __ U.S. at __, 140 S. Ct. at 2035-36. *Mazars* is inapposite.

First, "the *Mazars* test was created with a sitting President in mind." *Committee on Ways and Means*, 45 F.4th at 335 (applying *Mazars* test to a request of committee chairman for tax returns of President Donald J. Trump submitted under authority of a Federal statute and authorizing the release of the tax returns to Congress). *Mazars* addressed the potential for an "unnecessary intrusion into the operation of the Office of the President," *Mazars*, __ U.S. at __, 140 S. Ct. at 2036, caused by subpoenas seeking over a decade of personal financial information from a period of time that predated his presidency. It was the burden of production that created the "interbranch conflict," which was particular to the President, who "is the only person *who alone composes a branch of government*." *Id*. at __, 140 S. Ct. at 2034 (emphasis added).

Second, *Mazars* acknowledged, throughout, that the courts "have a duty of care that we not needlessly disturb the compromises and working arrangements" of the two political branches. *Id*. at __, 140 S. Ct. at 2031. The principle of separation of powers requires the courts to show the "respect due the coordinate branches of government." *Baker v. Carr*, 369 U.S. 186, 217 (1962). It was this

same concern that led our Court in *Camiel* to conclude that it should not become involved prematurely in the enforcement of a legislative subpoena.

Third, *Mazars*' four-part test does not fit the Senate Committee's subpoena. This subpoena does not seek personal financial information from the President (or even the Governor), let alone present a request so broad in scope that mere compliance interferes with "the operation of the Office of the President." *Mazars*, __ U.S. at __, 140 S. Ct. at 2036.[23] Only where such considerations pertain does *Mazars* require Congress to explain "why the President's information will advance its consideration of possible legislation." *Id*.

Here, unlike *Mazars*, we address a legislative subpoena issued to a state agency for government records, not a request of Pennsylvania's chief executive for his personal papers. Rather than apply *Mazars*' holding to the particular circumstance for which it was devised, the dissent would require judicial review and approval of every legislative subpoena issued to a state agency before the legislature can expect compliance with its subpoena. This turns separation of powers on its head by making the legislative process subordinate to the judiciary. This is contrary to "the respect due a coordinate branch of government." *Baker*, 369 U.S. at 217.

[23] Ironically, *Annenberg*, 2 A.2d 612, and *Lunderstadt*, 519 A.2d 408, are more protective of personal financial information than is *Mazars*, and they protect any citizen, not just the President or Governor. The dissent in *Mazars* would limit Congressional subpoenas for personal financial information to its impeachment powers and not allow such inquiries for the purpose of preparing and proposing legislation. "I would hold that Congress has no power to issue a legislative subpoena for private, nonofficial documents – whether they belong to the President or not." *Mazars*, __ U.S. at __, 140 S. Ct. at 2047 (Thomas, J., dissenting).

Each branch, including the judiciary, must take care not "to exceed the outer limits of its power." *I.N.S. v. Chudha*, 462 U.S. 919, 951 (1983).[24]

In Pennsylvania jurisprudence, the circumstances that have authorized judicial intervention in a legislative subpoena have been exceptional and rare. It must be apparent from the face of the subpoena, or the authorizing legislative resolution, that there is not "even a hint that the investigation" has a legislative purpose. *Lunderstadt*, 519 A.2d at 416 (Hutchinson, J., concurring). Judicial intervention may be appropriate where the legislative committee lacks any power to act because the legislature had adjourned before the committee acted. *Brown*, 184 A. at 92. Equity can be invoked to restrain legislative subpoenas that show "on their

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[24] The dissent cites the Montana Supreme Court's decision in *McLaughlin v. Montana State Legislature*, 493 P.3d 980 (Mont. 2021), for its summation of federal law on the role of the judiciary and interpretation of *Mazars*. Out-of-state decisions may be cited, at most, for their persuasive authority. *Shedden v. Anadarko E&P Company, L.P.*, 88 A.3d 228, 233 n.3 (Pa. Super. 2014). However, *McLaughlin* is inapposite.

In *McLaughlin*, the Montana Supreme Court quashed legislative subpoenas demanding four months of all emails between the Court Administrator for the Montana Judicial Branch and state judges and justices, as well as the production of state-owned computers and telephones used to communicate with justices on legislation or other matters that could come before Montana courts for a decision. The Montana Supreme Court held that an *in camera* review was needed to "balance competing privacy and security interests" in advance of production. *McLaughlin*, 493 P.3d at 983. The concurring opinion observed that "separation of powers does not tolerate the control, interference or intimidation of one branch of government by another." *Id*. at 997 (McKinnon, J., concurring). The concurrence argued that the subpoena was issued to investigate "purported judicial misconduct" and "expose violation by judges, if not the entire judicial branch of ethical codes, state law and state policy . . . ." *Id*. at 1002. As such, the legislature's investigation was "incongruous to Montana's Constitution and the constitutionally created method for addressing the discipline and removal of judges for misconduct." *Id*.

By contrast, here, no party asserts that an inference of intimidation can be drawn from the Senate Committee's subpoena. Further, to make Pennsylvania's legislative process subordinate to the judiciary is incongruous with separation of powers under our Constitution, as construed by our Supreme Court in *Brandamore*, 327 A.2d 1. *See also Camiel*, 324 A.2d at 866.

face that they contemplate an unreasonable search and seizure" in violation of the Fourth Amendment. *Annenberg*, 2 A.2d at 618. Unlike informational privacy, which can be waived by the government where that privacy interest is outweighed by the public interest in disclosure, *PSEA*, 148 A.3d at 158, the government can never waive a citizen's immunity against an unlawful search and seizure. Only the citizen has that power. This is not a Fourth Amendment case, and neither Petitioners nor Voter Intervenors so claim.

This Court cannot assume that the Senate Committee will not be mindful of the informational privacy interests of registered voters:

> *For us to presume that the House of Representatives, the body most susceptible to the will of the people, will be less sensitive to the constitutional rights of the citizen than will be this Court* would authorize a presumption I am not prepared to accept. This would not be exercising a judicial prerogative or a judicial restraint, but *would in truth be judicial arrogance*[.]

*In re Motions to Quash Subpoenas and Vacate Service*, 146 F. Supp. at 795 (emphasis added). The same may be said here.[25] To assume that the Pennsylvania Senate, a body more susceptible to the will of the people than our appellate courts, will have less sensitivity to the informational privacy interests of registered voters "would in truth be judicial arrogance." *Id*.

The subpoena issued by the Senate Committee does not inquire into the Acting Secretary's private and personal affairs or in any way compromise her Fourth Amendment right. The subpoena does not interfere with the Acting Secretary's duties, as agency head, with respect to the Department's administration of the SURE system because the Senate Committee seeks copies, not original documents. In

[25] Notably, the Senate Committee's subpoena directed delivery of the documents to counsel, not to the entire Committee. This measure demonstrates "sensitivity" to the information privacy rights of voter information in the SURE system.

*Brown*, 184 A. at 91, by contrast, the House Committee sought the original accounting ledgers and records from the directors of the charitable trusts thereby creating "general disorganization of their trust administration." Finally, the Acting Secretary does not contend that the Senate Committee issued its subpoena after the legislature had adjourned *sine die*, *i.e.*, that it lacked "lawful authority in the premises." *Id.* at 92.

Democratic Senators, the Haywoods, and Voter Intervenors assert that they lack a remedy to challenge the legislative subpoena.[26] However, the private parties may request intervention in whatever enforcement proceeding is undertaken by the Senate Committee, should the matter not be "hashed out in the hurly-burly, the give-and-take of the political process between the legislative and the executive." *Mazars*, __ U.S. at __, 140 S.Ct. at 2029. Democratic Senators will participate in that "hurly-burly" process and in the enforcement proceeding should one ever take place.

More to the point, it is the SURE system that has created the risk of exposure of the voter registration information that they seek to protect. 25 Pa. C.S. §1222(c)(5) (permitting "each commission and the department to have instant access to a commission's registration records maintained in the system"). Further, "[r]ecords of a registration commission" may "be inspected during ordinary business hours[.]" 25 Pa. C.S. §1207(a)(1)-(b). Likewise, county election commissions shall prepare street lists for "all registered electors" in each election district for both

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[26] The dissent cites *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143 (Pa. 2017), in support of its opinion. *Reese* is inapposite. *Reese* involved a private party's record request under authority of statute, *i.e.*, the Right-to-Know Law. This matter concerns the legislature's request for records under authority of our Constitution. Notably, public disclosure of records that implicate informational privacy will be allowed "where the public interest favor[s] disclosure." *PSEA*, 148 A.3d at 158.

political bodies and candidates. 25 Pa. C.S. §1403(a)-(c). It is the SURE system that exposes Democratic Senators, the Haywoods, and Voter Intervenors to disclosure of their voter registration information.[27] The SURE system can be accessed by any number of county and state employees, as well as the third-party private consultants engaged by the Department of State and by county commissions that from time to time use that database of voter information.[28] Equity is the vehicle for challenging the constitutionality of a statute that does not sufficiently protect informational privacy. *See*, *e.g.*, *Lynch v. Owen J. Roberts School District*, 244 A.2d 1, 3 (Pa. 1968); *Annenberg*, 2 A.2d 617 (challenging constitutionality of Act 27 that created the commission to study gambling). However, Democratic Senators, the Haywoods, and Voter Intervenors do not challenge the constitutionality of any disclosure provision in the Election Code.

The Acting Secretary has been served in her official capacity as custodian of government records within the Department of State, which is a creature of the legislature. *See* Section 801 of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 271. The Department has been established to serve as a repository of documents, from corporate charters to professional licenses as well as election-related materials, which are the subject of the subpoena. *See also* Section 802 of The Administrative Code of 1929, 71 P.S. §272 (establishing duty in Department of State to furnish records that a legislative committee may

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[27] Both Democratic Senators and Voter Intervenors had the very same opportunity to make these arguments and participated in argument before the Court in the Committee's enforcement attempt, as addressed in *Pennsylvania Senate Intergovernmental Operations Committee*, __ A.3d at __, slip op. at 5.

[28] Likewise, the Pennsylvania Department of Transportation, the Social Security Administration, and the Internal Revenue Service hold this personal information of registered voters, which is accessed by employees and agents of those government agencies.

request from time to time).[29] A legislative subpoena for government records is not measured by *Annenberg* or *Lunderstadt*, which address requests for private financial documents.

The Senate Committee cannot set up itself as a court of law to set aside certified election results.[30] *Commonwealth v. Costello*, 21 Pa. D. 232, 237 (1912). Nor can the Senate Committee set up itself as a grand jury or prosecutor. *Annenberg*, 2 A.2d at 617. However, it cannot be inferred from the face of the Committee's subpoena for election-related records that its investigation lacks even a "hint" of a legislative purpose but only a law enforcement purpose. *Lunderstadt*, 519 A.2d at 416 (Hutchinson, J., concurring). Indeed, the Committee's subpoena "must be presumed to have had a legitimate object, if it is capable of being so construed, and the court has no right to assume that the contrary was intended[.]" *Costello*, 21 Pa. D. at 234-35. Finally, the Senate Committee did not issue the subpoena after the

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[29] Section 802 of The Administrative Code of 1929 provides, in pertinent part, as follows:

> The Department of State shall have the power and its duty shall be:
>
> (a) *To permit any committee of either branch of the General Assembly to inspect and examine the books, papers, records, and accounts, filed in the department, and to furnish such copies or abstracts therefrom, as may from time to time be required*;
>
> (b) To furnish to any person, upon request and the payment of such charges as may be required and fixed by law, certificates of matters of public record in the department, or certified copies of public papers or documents on file therein.

71 P.S. §272 (emphasis added).

[30] Relying on statements of individual Senators, Petitioners and Voter Intervenors assert that the true motive of the Senate Committee is a "concerted effort to cast doubt on the results of the 2020 presidential election[.]" Acting Secretary's Petition for Review, ¶140. However, "the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt*, 360 U.S. at 132 (cited with approval in *Brandamore*, 327 A.2d at 4). *See also United States v. O'Brien*, 391 U.S. 367, 383 (1968) (inquiries into legislative motives "are a hazardous matter").

legislature's adjournment, at a time when it was "without lawful authority in the premises." *Brown*, 184 A. at 92.

The exceptional circumstances that warrant the exercise of equity jurisdiction to restrain a legislative subpoena before confrontation are not present in this case. When, and if, the Senate Committee chooses to enforce the subpoena *duces tecum*, the Acting Secretary can be heard and her concerns addressed in a proceeding that must conform to due process. *Brandamore*, 327 A.2d at 5. If the Senate Committee's enforcement proceeding does not provide the Acting Secretary due process, that is the "point in the proceeding" at which to involve the judiciary. *Camiel*, 324 A.2d at 866.

**Conclusion**

We are asked to interfere with legislative process. As this Court has explained,

> [i]f there is any one principle of constitutional law which supports and protects our form of government, including all of our constitutional rights, it is separation of powers among the three branches of government. Every crack in this foundation weakens the entire structure.

*Camiel*, 324 A.2d at 866. When it comes to the legislature's enforcement of its process, our Supreme Court has directed that "[a] proper respect for the limits of the judicial function and the doctrine of separation of powers dictates that we leave matters to the legislature." *Brandamore*, 327 A.2d at 4. Consistent with *Camiel* and in respect of the separation of powers, we decline to exercise this Court's equity jurisdiction to restrain enforcement of the Senate Committee's subpoena in advance of confrontation. Judicial intervention at this juncture may only "needlessly disturb the compromises and working arrangements" of the political branches. *Mazars*, __ U.S. at __, 140 S.Ct. at 2031. Accordingly, the consolidated petitions for review challenging the subpoena *duces tecum* issued by the Senate Committee, and seeking declaratory and injunctive relief, are dismissed.

s/ Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Judge McCullough, Judge Covey, Judge Fizzano Cannon and Judge Wallace did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| Senator Jay Costa, Senator Anthony H. Williams, Senator Vincent J. Hughes, Senator Steven J. Santarsiero and Senate Democratic Caucus, Petitioners | : | **CASES CONSOLIDATED** |
| v. | : | No. 310 M.D. 2021 |
| Senator Kim Ward and Senator Jarrett Coleman, Respondents | : | |
| Commonwealth of Pennsylvania, Pennsylvania Department of State, and Leigh M. Chapman, Acting Secretary of the Commonwealth of Pennsylvania, Petitioners | : | |
| v. | : | No. 322 M.D. 2021 |
| Senator Jarrett Coleman, Senator Kim Ward and The Pennsylvania State Senate Intergovernmental Operations Committee, Respondents | : | |
| Arthur Haywood Julie Haywood, Petitioners | : | |
| v. | : | No. 323 M.D. 2021 |
| Leigh M. Chapman Acting Secretary of State Commonwealth of Pennsylvania, Respondent | : | |

**O R D E R**

AND NOW, this 9th day of February, 2023, the petitions for review filed in the above-captioned consolidated matters are DISMISSED.

s/ Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Order Exit
02/09/2023

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| Senator Jay Costa, Senator Anthony H. Williams, Senator Vincent J. Hughes, Senator Steven J. Santarsiero and Senate Democratic Caucus, Petitioners | : | **CASES CONSOLIDATED** |
| v. | : | |
| Senator Jacob Corman III, Senate President Pro Tempore, Senator Cris Dush and Senate Secretary-Parliamentarian Megan Martin, Respondents | : | No. 310 M.D. 2021<br>Argued: December 15, 2021 |
| Commonwealth of Pennsylvania, Pennsylvania Department of State, and Veronica Degraffenreid, Acting Secretary of the Commonwealth of Pennsylvania, Petitioners | : | |
| v. | : | |
| Senator Cris Dush, Senator Jake Corman, and The Pennsylvania State Senate Intergovernmental Operations Committee, Respondents | : | No. 322 M.D. 2021 |
| Arthur Haywood Julie Haywood, Petitioners | : | |
| v. | : | |
| Veronica DeGraffenreid Acting Secretary of State Commonwealth of Pennsylvania, Respondent | : | No. 323 M.D. 2021 |

**PER CURIAM**

## MEMORANDUM & ORDER

Before the Court for disposition are Applications for Summary Relief[1] filed by Petitioners, Senators Jay Costa, Anthony H. Williams, Vincent J. Hughes, Steven J. Santarsiero, and the Senate Democratic Caucus (collectively, Senate Democrats); the Commonwealth of Pennsylvania, the Pennsylvania Department of State, and the Acting Secretary of the Commonwealth, Veronica Degraffenreid (collectively, Acting Secretary); Arthur Haywood and Julie Haywood (collectively, the Haywoods); and the League of Women Voters of Pennsylvania, Common Cause Pennsylvania, Make the Road Pennsylvania and eight registered voters[2] (collectively, Intervenors), seeking an order to quash a *subpoena duces tecum* issued by the Pennsylvania State Senate Intergovernmental Operations Committee (Senate Committee) to Veronica Degraffenreid, Acting Secretary of the Commonwealth. Respondents, Senators Jake Corman and Cris Dush and the Senate Committee (collectively, Senate Republicans), filed a Cross-Application for Summary Relief requesting a judgment that the Acting Secretary has not presented a basis for quashing the *subpoena duces tecum*. All applications for summary relief are denied.

The Senate Committee's subpoena seeks the production of 17 categories of election-related materials in the possession of the Department of State, some of which include the names, addresses, dates of birth, driver's license numbers, and partial social security numbers of all registered voters in the Commonwealth.

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[1] At any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear. PA. R.A.P. 1532(b). "The court may grant a motion for summary relief if a party's right to judgment is clear and there are no material issues of fact in dispute." *Peake v. Commonwealth*, 132 A.3d 506, 516 n.13 (Pa. Cmwlth. 2015).

[2] The eight registered voters are Roberta Winters, Nichita Sandru, Kathy Foster-Sandru, Robin Roberts, Kierstyn Zolfo, Michael Zolfo, Phyllis Hilley, and Ben Bowens.

The petitioning parties assert various reasons why the subpoena, or portions thereof, should be quashed. The Acting Secretary seeks the broadest relief, *i.e.*, that the subpoena be quashed in its entirety because it was not issued to advance a legitimate legislative purpose, and an investigation to improve Pennsylvania's election laws falls outside the bounds of the Senate Committee's purview.

"The power to investigate is an essential corollary of the power to legislate." *Commonwealth ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 3 (Pa. 1974). "The scope of this power of inquiry extends to every proper subject of legislative action." *Id*. A function of legislative committees is to make recommendations to the legislature for remedial legislation and other appropriate action. *Lunderstadt v. Pennsylvania House of Representatives Select Committee*, 519 A.2d 408, 410 (Pa. 1986) (plurality opinion). Our Supreme Court has stated:

> The right to investigate in order to acquire factual knowledge concerning particular subjects which will, or may, aid the legislators in their efforts to determine if, or in what manner, they should exercise their powers, is an inherent right of a legislative body, ancillary to, but distinct from, such powers.

*McGinley v. Scott*, 164 A.2d 424, 429 (Pa. 1960). "Broad as it is, however, the legislature's investigative role, like any other governmental activity, is subject to the limitations placed by the Constitution on governmental encroachments on individual freedom and privacy." *Brandamore*, 327 A.2d at 4.

The General Assembly's power of inquiry extends to every proper subject of legislative action, including potential amendments to the Pennsylvania Election Code.[3] Accordingly, the Court cannot conclude that the Acting Secretary has established a clear legal right to quash the subpoena on the theory that it furthers

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

no legitimate legislative purpose. To the extent she argues that the authority to investigate elections falls outside of the Senate Committee's assigned subject matter, we decline the Acting Secretary's invitation to interfere with internal Senate Rules and leave that matter to the legislature. *See Brandamore*, 327 A.2d at 4 (objections that committee's investigation might overlap with the work of other committees and commissions were for the legislature not the court).

The Acting Secretary acknowledges that "some of the information that the [s]ubpoena demands is available to everyone on the Department[ of State's] website, or through a Right-to-Know [Law][4] request." Acting Secretary's Brief at 30. In addition, the Election Code specifically classifies many of the subpoenaed records as "open to public inspection," including street lists (names and address of all registered electors), individual registered electors' inquiries (name, address, date of birth, and voting history), and official voter registration applications. 25 Pa. C.S. §§1207, 1403-1404. Other laws may permit similar disclosure.[5] If the public may access the information sought in the subpoena, there is no reason the records cannot be provided to the Senate Committee.

The Acting Secretary also raises questions of national security, maintaining that compliance with the subpoena could result in the release of "critical infrastructure information"[6] about Pennsylvania's election systems. Critical

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[4] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

[5] Senate Republicans point to The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§51-732, which requires the Department of State to permit "any committee of either branch of the General Assembly to inspect and examine the books, papers, records, and accounts, filed in the department, and to furnish such copies or abstracts therefrom, as may from time to time be required[.]" Section 802 of the Administrative Code, 71 P.S. §272(a).

[6] Critical infrastructure information is

> information not customarily in the public domain and related to the security of critical infrastructure or protected systems--

infrastructure information, she argues, is protected from disclosure by federal law, 6 U.S.C. §§671-674, and may only "be accessed in accordance with strict safeguarding and handling requirements . . . ." Acting Secretary's Brief at 58. Senate Republicans rejoin that according to the Department of Homeland Security, the information requested by the subpoena can be provided by the Acting Secretary to other branches of Pennsylvania State government. Senate Republicans' Brief at 97-98. They further argue that the Acting Secretary does not understand the difference between critical infrastructure information and protected critical infrastructure information, which are treated differently under the relevant federal statutes.

There is a substantial factual question surrounding the federal protection requirements and the capability of the Senate Committee's contracted vendor, Envoy Sage, LLC, to protect the infrastructure information.[7] This renders summary relief on this question inappropriate.

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> (A) actual, potential, or threatened interference with, attack on, compromise of, or incapacitation of critical infrastructure or protected systems by either physical or computer-based attack or other similar conduct (including the misuse of or unauthorized access to all types of communications and data transmission systems) that violates Federal, State, or local law, harms interstate commerce of the United States, or threatens public health or safety;
>
> (B) the ability of any critical infrastructure or protected system to resist such interference, compromise, or incapacitation, including any planned or past assessment, projection, or estimate of the vulnerability of critical infrastructure or a protected system, including security testing, risk evaluation thereto, risk management planning, or risk audit; or
>
> (C) any planned or past operational problem or solution regarding critical infrastructure or protected systems, including repair, recovery, reconstruction, insurance, or continuity, to the extent it is related to such interference, compromise, or incapacitation.

6 U.S.C. §671.

[7] In their reply brief, Senate Republicans indicate that the Senate Committee recently contracted with Envoy Sage to aid the Committee in its use and review of the subpoenaed information. Senate Republicans' Reply Brief at 9-10.

The petitioning parties also assert that the production of documents containing drivers' license numbers and partial social security numbers violates individual voters' rights to privacy guaranteed by Article I, Section 1 of the Pennsylvania Constitution.[8] PA. CONST. art. I, §1. Some petitioners maintain the act of transferring these documents from the Department of State to the Senate Committee offends this constitutional right; others maintain the privacy right will be violated when the Senate Committee provides this information to its third-party vendor for analysis. The Senate Republicans assert that the Senate Committee, as a co-equal branch of government, is entitled to any and all information held by the Acting Secretary. The privacy interests of voters are not implicated where the government obtains this information, noting that the Department of State and the Pennsylvania Department of Transportation, two executive branch agencies, hold this information. They also assert that the Senate Committee can establish protocols to prevent this voter information from being shared with any unauthorized person.

The Court concludes that none of the parties have established a clear right to relief given the outstanding issues of material fact surrounding the issue of maintaining the privacy of voter information and infrastructure. For these reasons, the Court issues the following Order:

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[8] Article I, Section 1 sets forth the inherent rights of mankind: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, §1. Our Supreme Court has held that the citizens of this Commonwealth, pursuant to Article I, Section 1 of the Pennsylvania Constitution, have a right to informational privacy, namely the right of an individual to control access to, and dissemination of, personal information about himself or herself. *Pennsylvania State Education Association v. Department of Community and Economic Development*, 148 A.3d 142 (Pa. 2016).

**O R D E R**

AND NOW, this 11th day of January, 2022, the Applications for Summary Relief filed by the Senate Democrats, the Acting Secretary, the Haywoods, and Intervenors, and the Cross-Application for Summary Relief filed by the Senate Republicans, are **DENIED**.

Order Exit
01/10/2022

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via PACFile and/or email, this 31st day of July, 2023, upon the following:

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*/s/ Keith E. Whitson*
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