IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CONSOLIDATED DOCKET NOS.

310 MD 2021
322 MD 2021; and
323 MD 2021

SENATOR JAY COSTA, SENATOR ANTHONY H. WILLIAMS, SENATOR VINCENT J. HUGHES, SENATOR STEVEN J. SANTARSIERO, AND SENATE DEMOCRATIC CAUCUS,
Petitioners,
v.
SENATOR JACOB CORMAN III, SENATE PRESIDENT PRO TEMPORE, SENATOR CRIS DUSH, AND SENATE SECRETARY- PARLIAMENTARIAN MEGAN MARTIN, Respondents.

OPPOSITION AND REPLY BRIEF OF THE PETITIONERS, SENATOR JAY COSTA, SENATOR ANTHONY H. WILLIAMS, SENATOR VINCENT J. HUGHES, SENATOR STEVEN J. SANTARSIERO AND THE SENATE DEMOCRATIC CAUCUS

Claude J. Hafner, II
Pa Id. No. 45977
Ronald N. Jumper
Pa. Id. No. 64346
Shannon A. Sollenberger
Pa. Id. No. 308878)
Democratic Caucus Senate of Pennsylvania
Room 535 Main Capitol Building
Harrisburg, PA 17120
(717) 787-3736
cj.hafner@pasenate.com
ron.jumper@pasenate.com
shannon.sollenberger@pasenate.com

Clifford B. Levine
Pa. Id. No. 33507
Emma F.E. Shoucair
Pa. Id. No. 325848
Matthew R. Barnes
Pa. Id. No. 328771
625 Liberty Avenue, 5th Floor
Pittsburgh, PA 15222-3152
(412) 297-4900
clifford.levine@dentons.com
emma.shoucair@dentons.com
matthew.barnes@dentons.com

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STANDARD OF REVIEW FOR CROSS-APPLICATIONS FOR SUMMARY RELIEF 3

III. THE COSTA PETITIONERS HAVE STANDING, BOTH IN THEIR LEGISLATIVE CAPACITIES AND AS INDIVIDUALS 5

A. Prerequisites For Standing Under Pennsylvania Law 5

B. The Costa Petitioners Have Standing In Their Legislative Capacity As Duly-Elected State Senators With Specific Responsibilities 7

C. As Individual Registered Pennsylvania Voters, The Costa Petitioners Have Standing To Seek To Protect Their Personal Identification Information From Disclosure To The Respondents And To An Unnamed Third-Party 13

IV. THE PERSONAL IDENTIFICATION INFORMATION SOUGHT WITH THE DUSH SUBPOENA IS NOT SUBJECT TO "PUBLIC ACCESS BY ORDINARY CITIZENS" BUT IS CAREFULLY PROTECTED TO ENSURE ITS PRIVACY 16

A. The Trove Of Information That The Dush Subpoena Demands Includes Personal Identification Information That Is Protected Under Pennsylvania Law 16

B. The Respondents' Request For Personal Identification Information Implicates The Due Process Rights Of All Pennsylvania Voters 19

C. The Respondents' Position That, Because Some Of The Information Requested With The Dush Subpoena May Be Public Or Made Available To Other Entities In Limited Circumstances, All Of The Information Must Be Made Available, Is Untenable 20

V. THE RESPONDENTS FAIL TO IDENTIFY ANY LEGITIMATE LEGISLATIVE PURPOSE FOR THEIR INTENDED INVESTIGATION 27

A. The Circumstances Surrounding The Respondents' Actions, And Not Simply The Subpoena Itself, Must Be Examined 27

B. The Respondents' Reliance On The Speech And Debate Clause Is Misplaced 28

C. Although Legislative Subpoena Power Is Broad, It Remains Subject To Clear Limitations 30

VI. ALTHOUGH THE RESPONDENTS INSIST THAT THEIR "INVESTIGATION" IS NOT AN "ELECTION CONTEST" OR AN "AUDIT," THEIR INTENDED "INVESTIGATION" BEARS ALL THE HALLMARKS OF AN ELECTION CONTEST/AUDIT 34

A. Courts Must Use A Functional Approach When Assessing Legislative Action 34

B. Despite Labeling It A Legislative Investigation, The Committee Is Attempting To Undertake An Untimely Election Contest 35

C. The Respondents' "Investigation" Would Include All The Elements Of An Audit 36

VII. THE 1929 ADMINISTRATIVE CODE DOES NOT CONFER ON THE COMMITTEE ANY AUTHORITY TO DEMAND UNFETTERED ACCESS TO THE PRIVATE INFORMATION OF MILLIONS OF PENNSYLVANIANS 38

A. The 1929 Administrative Code Cannot Be Construed To Require Disclosure Of Protected Personal Identification Information 38

B. The Respondents' Reliance On The 1929 Administrative Code As A Basis For Disclosure Of The Personal Identification Information Demanded With The Dush Subpoena Is Misplaced 41

VIII. COSTA PETITIONERS' CHALLENGE TO A CONTRACT WITH A THIRD PARTY, WHICH THE COMMITTEE FULLY INTENDS TO ENTER, IS RIPE.....43

IX. CONCLUSION.....45

TABLE OF AUTHORITIES

Page(s)

Cases

Bertram v. Unemployment Comp. Bd. Of Rev.,
206 A.3d 79 (Pa. Commw. Ct. 2019).....4

Com. by Packel v. Shults,
362 A.2d 1129 (Pa. Commw. Ct. 1976).....28

Com., Higher Ed. Assistance Agency v. Abington Mem. Hosp.,
387 A.2d 440 (Pa. 1978).....27

Commonwealth, Office of Governor v. Donahue,
98 A.3d 1223 (Pa. 2014).....6

Consumers Educ. And Prot. Ass'n v. Nolan,
368 A.2d 675 (1977).....28

Corman v. Nat'l Collegiate Athletic Ass'n,
74 A.3d 1149 (Pa. Commw. Ct. 2013).....11

Costa v. Cortes,
142 A.3d 1004 (Pa. Commw. Ct. 2016).....4

Dep't of Aud. Gen. v. State Empls. Ret. Sys.,
860 A.2d 206 (Pa. Commw. Ct. 2004).....36

Fumo v. City of Philadelphia,
972 A.2d 487 (Pa. 2009).....7

Governor's Office of Admin. v. Purcell,
35 A.3d 811 (Pa. Commw. Ct. 2011).....19

In re Hickson,
821 A.2d 1238 (Pa. 2003).....5, 6

In Robinson Twp. v. Commonwealth,
52 A.3d 463 (Pa. Commw. Ct. 2012).....8

Lancaster Cty. Dist. Attorney's Office v. Walker,
245 A.3d 1197 (Pa. Commw. Ct. 2021).....17

League of Women Voters of Pennsylvania v. Commonwealth,
177 A.3d 1000 (Pa. Commw. Ct. 2017).....28

Lunderstadt v. Pennsylvania House of Representatives Select Committee,
519 A.2d 408 (Pa. 1986).....31

Marcellus Shale Coalition v. Dep't of Env. Protection,
216 A.3d 448 (Pa. 2019).....3

Markham v. Wolf,
635 Pa. 288, 136 A.3d 134 (2016) 12

Mixon v. Com.,
759 A.2d 442 (Pa. Commw. Ct. 2000).....15

National Fed. of Independent Business v. Sebelius,
567 U.S. 519 (2012) 34

Pa. Liquor Control Bd. v. Beh,
215 A.3d 1046 (Pa. Commw. Ct. 2019).....17

Pa. State Educ. Ass'n (PSEA) v. C'wealth Dep't of Community and Econ. Dev.,
148 A.3d 142 (Pa. 2016).....16

Pennsylvania Protec. & Advoc., Inc. v. Dep't of Educ.,
609 A.2d 909 (Pa. Commw. Ct. 1992).....5

Phaff v. Gerner,
303 A.2d 826 (Pa. 1973).....5

Powell v. McCormack,
395 U.S. 486 (1969) 29

Precision Mktg., Inc. v. Com., Republican Caucus of the Senate of PA,
78 A.3d 667 (Pa. Commw. Ct. 2013).....43

Russ v. Com.,
60 A. 168 (Pa. 1905).....43

Schenck v. Twp. of Center, Butler County,
893 A.2d 849 (Pa. Commw. Ct. 2006).....40

Sweeney v. Tucker,
375 A.2d 698 (Pa. 1977).....29

Thornburg v. Lewis,
470 A.2d 952 (Pa. 1983).....42

Times Pub. Co. v. Michel,
633 A.2d 1233 (Pa. Commw. Ct. 1993).....17

Tribune-Review Pub. Co. v. Bodack,
961 A.2d 110 (Pa. 2008)..... 17, 22

Trump v. Mazars USA, LLP,
__U.S. __, 140 S.Ct. 2019 (2020) 27, 31

United States v. Constantine,
296 U.S. 287 (1935) 34

United States v. Morton Salt Co.,
338 U.S. 632 (1950) 33

United States v. Rumely,
345 U.S. 41 (1953) 28

Washington v. Davis,
426 U.S. 229 (1976) 29

Watkins v. United States,
354 U.S. 178 (1957) 31

Yocum v. Commonwealth Pennsylvania Gaming Control Bd.,
161 A.3d 228 (Pa. 2017)..... 43, 44

Zemprelli v. Thornburg,
457 A.2d 1326 (Pa. Commw. Ct. 1983).....7, 8

Statutes

18 U.S.C. § 2725(3) 40
18 U.S.C. §§ 2721-2725 18
42 U.S.C. § 405(c)(2)(C)(viii)(I) 40
52 U.S.C. § 21083(a)(5)(A) 21
Pa. Const. art. 2, § 15 2
1 Pa. C.S. § 1932..... 40, 41
1 Pa. C.S. § 1936.....39

25 Pa. C.S. § 1222 22
25 Pa. C.S. § 1327 21
25 Pa. C.S. § 1403(a) 21
25 Pa. C.S. § 1403(d) 21
25 Pa. C.S. § 1404(a) 21
25 Pa. C.S. § 1404(b)(3) 21
25 Pa. C.S. §§ 1403-1404 21
25 Pa. C.S. §§ 1404(a)(1), 1403(a) 18
42 Pa. C.S. § 7541(a) 6
75 Pa. C.S. § 6114 18
25 P.S. § 3150.2(b)(1) 11
25 P.S. §§ 3146.9(b)-(c), 3150.17(b)-(c) 18
25 P.S. §§ 3146.9(a); 3150.17(a); 2602(z.5) 18
65 P.S. §§ 67.101 17
65 P.S. § 67.706 40
65 P.S. § 67.708(b)(6)(i)(A) 17
65 P.S. §§ 67.708(b)(6)(i)(A) 40
65 P.S. §§ 101 40
71 P.S. § 240 42
71 P.S. § 272(a) 39
71 P.S. § 272(a) 42

Rules

Pennsylvania Rule of Appellate Procedure 2135(a) 47

Regulations

4 Pa. Code §§ 183.13(a), 13(c)(5)(iii), 183.14(c)(3) 18
4 Pa. Code §§ 183.13, 183.14 21
67 Pa. Code § 95.2(c) 18

I. INTRODUCTION

The Democratic members of the State Senate Intergovernmental Operations Committee ("Committee") and the Senate Democratic Caucus ("Costa Petitioners") have explained in their Petition for Review and in their Application for Summary Relief why the so-called investigation that the Republican members of the Committee ("Respondents") seek to undertake is, by any name, an ill-disguised and untimely election contest and an election audit that the Respondents have no authority to conduct. The September 15, 2021 Subpoena that the Respondents issued to the Acting Secretary of State ("Dush Subpoena"), as part of their illegal investigatory effort, must be declared unlawful and unenforceable. The Respondents' stated intent to provide the information they acquire to a third-party must also be forestalled.

With their answers to the applications for summary relief and cross-application, the Respondents attempt to create the impression that the Dush Subpoena is simply a routine request for "public records," from one part of the Commonwealth's government to another. It is not. The bulk of the "election-related records" that the Respondents demand of the Department of State ("DOS") are categories of materials from the Statewide Uniform Registry of Electors ("SURE") system – including the names, dates of birth, driver's license numbers, portions of Social Security numbers and addresses of all registered Pennsylvania

voters. Contrary to the Respondents' assertion, this personal identification information is not subject to "public access by ordinary citizens" but is carefully protected to ensure its privacy and should not be made available for the Respondents to conduct an unwarranted fishing expedition for putative election fraud that does not exist.

The Respondents offer no legitimate legislative purpose for their "investigation" or any reason why a legitimate legislative investigation would require the information that the Dush Subpoena demands. The Respondents also seem to maintain that what they term as an investigation is not really an election contest or an audit, simply because they have carefully avoided use of those terms. Despite the words they use, they are unable to refute the fact that their efforts to revisit the 2020 election actually constitute an impermissible election contest and an unauthorized audit.

The Respondents attempt to avoid confronting the Costa Petitioners' challenge by questioning their standing. Pennsylvania's Democratic Senators clearly have standing to challenge the Dush Subpoena, both as duly-elected senators, and members of the Committee, who are compelled to participate in an unconstitutional legislative process here and are entrusted with responsibility to protect the privacy interests of their constituents. They also have standing as individual Pennsylvania voters whose personal identification information the Dush

Subpoena puts in jeopardy. The Respondents rely on the 1929 Administrative Code, which predates the creation of Social Security numbers, as a basis for their claim that the DOS must provide them with access to voters' personal identification information, which would then be provided to an unidentified third-party. Their effort to contrive authority from the 1929 Administrative Code ignores constitutional privacy rights and subsequently created statutory protections for personal identification information.

With the Dush Subpoena, the Respondents seek access to the personal identification information of nine million Pennsylvania voters for impermissible, non-legislative purposes. For the reasons set forth here and in their Petition for Review and Application for Summary Relief, the Costa Petitioners ask this Court to find the Dush Subpoena be unlawful and unenforceable.

II. STANDARD OF REVIEW FOR CROSS-APPLICATIONS FOR SUMMARY RELIEF

Where cross-applications for summary relief are presented under this Court's original jurisdiction, relief is only appropriate "where there are no disputed issues of material fact and it is clear that the applicant is entitled to the requested relief under the law." *Marcellus Shale Coalition v. Dep't of Env. Protection*, 216 A.3d 448, 458 (Pa. 2019). In evaluating each application, the Court is to review the record "in the light most favorable to the nonmoving party, resolving all doubts as to the existence of material facts against the moving party." *Id.* Applications

for summary relief may be filed any time after a petition for review is filed, without waiting for the pleadings to close or discovery to be conducted.

The Declaration of Eugene DePasquale, as submitted with the Costa Petitioners' Application, is plainly relevant to the legal issues here, including whether Respondents have a valid legislative purpose for the Dush Subpoena and whether the Respondent's proposed investigation is, in fact, an illegal election audit. When evaluating the Respondents' Application for Summary Relief, the Court must draw all inferences in favor of the Petitioners. Not considering the evidence the Petitioners have proffered would constitute a "capricious disregard of evidence" in the absence of any evidence to the contrary, because the DePasquale Declaration presents "competent and relevant evidence that one of ordinary intelligence could not possibly have avoided in reaching a result." *Troiani Group et al. v. City of Pittsburgh Bd. of Appeals et al.*, __A.3d __, 2021 WL 4126451, at *9 (Pa. Commw. Ct. July 1, 2021), quoting *Bertram v. Unemployment Comp. Bd. Of Rev.*, 206 A.3d 79, 83 (Pa. Commw. Ct. 2019)).

The Respondents make a vague and unsupportable assertion that the Court should ignore this competent evidence. Yet, as this Court explained in *Costa v. Cortes*, 142 A.3d 1004 (Pa. Commw. Ct. 2016), "[i]n evaluating a request for summary relief, the Court applies the same standards that apply on summary judgment." *Id.* at 1009. Further, the Pennsylvania Supreme Court has held that, on

summary judgment, where the record did not include any counter-affidavit in the record, an affidavit resolving a factual question is sufficient to justify a grant of summary judgment. *Phaff v. Gerner*, 303 A.2d 826, 828 (Pa. 1973).

The Respondents cite *Pennsylvania Protec. & Advoc., Inc. v. Dep't of Educ.*, 609 A.2d 909, 911 (Pa. Commw. Ct. 1992) for the well-established principle that when affidavits demonstrate that material facts are in dispute, summary relief cannot be granted. The Costa Petitioners do not disagree. However, this is not a case where multiple affidavits suggest disputed facts. The Respondents have offered no affidavit or declaration to dispute the facts set forth in the Declaration of former Auditor General DePasquale. Thus, those are the operative facts by which to judge both the Costa Application and the Respondents' Application.

III. THE COSTA PETITIONERS HAVE STANDING, BOTH IN THEIR LEGISLATIVE CAPACITIES AND AS INDIVIDUALS

A. PREREQUISITES FOR STANDING UNDER PENNSYLVANIA LAW

Very recently, in *Firearm Owners Against Crime v. Papenfuse*, __ A.3d __, 2021 WL 4890413, No. 29 MAP 2020 (Pa. Oct. 20, 2021), the Pennsylvania Supreme Court reiterated the principles of standing under Pennsylvania law. To bring an action, a plaintiff must "demonstrate that he or she has been 'aggrieved' by the conduct he or she challenges." *Id.* at *10, quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). A plaintiff has been aggrieved when its interest in the

cause of action is: (1) "substantial," meaning that it "surpasses the interest of all citizens in procuring obedience to the law;" (2) "direct," because "the asserted violation shares a causal connection with the alleged harm;" and (3) "immediate," because "the causal connection with the alleged harm is neither remote nor speculative." *Id.*, quoting *Commonwealth, Office of Governor v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014). Unlike in federal court, the doctrine of standing in Pennsylvania "is 'a prudential, judicially-created tool,' affording discretion to courts." *Id.* at *10, quoting *In re Hickson*, 821 A.2d at 1243.

In accordance with the legislative purpose of the Declaratory Judgments Act, the Supreme Court has taken a broad view of standing in declaratory judgment actions. *Id.* The Court specifically noted in *Papenfuse* that the legislature provided that "the Declaratory Judgments Act is 'remedial,' and 'its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Id.*, quoting 42 Pa. C.S. § 7541(a). The Court has thus concluded that the Act is to be "'liberally construed and administered.'" *Id.*, quoting 42 Pa. C.S. § 7541(a).

Pursuant to these principles, the Costa Petitioners have standing in this declaratory judgment action, both as legislators and individuals.

B. THE COSTA PETITIONERS HAVE STANDING IN THEIR LEGISLATIVE CAPACITY AS DULY-ELECTED STATE SENATORS WITH SPECIFIC RESPONSIBILITIES

1. "Legislative Standing" Must Be Recognized Where Legislators Seek To Protect Their Legislative Rights And To Challenge Unconstitutional Actions

Legislators may bring actions and assert standing in their legislative capacity where a "discernible and palpable infringement on their authority as legislators" exists. *Fumo v. City of Philadelphia*, 972 A.2d 487, 501 (Pa. 2009) (state legislators challenged the City of Philadelphia's grant of a casino license, asserting that the legislature had sole authority to issue the license). "Legislative standing" allows legislators to seek redress for injuries they have "suffered in [their] official capacity, rather than as . . . private citizen[s]." *Id*. The Pennsylvania Supreme Court noted in *Fumo* that legislative standing has not been recognized in actions where a legislator seeks redress "for a general grievance about the correctness of government conduct." *Id.* The Court held, however, that legislative standing does exist when asserted "to protect a legislator's right to vote" or to prevent the "diminution or deprivation of the legislator's . . . power or authority." *Id*. These legislative rights made the interests of the state legislators "substantial" and beyond the interests of other citizens.

In *Zemprelli v. Thornburg*, 457 A.2d 1326 (Pa. Commw. Ct. 1983), this Court considered whether five state senators had legislative standing to contest the

nomination and the vote confirming certain executive nominees. The Court found that the Senate Rules required the senators to vote under penalty of contempt. *Id.* at 1330. It concluded that the "compulsion to vote" on the executive nominations conveyed on the individual senators "an interest greater than, and distinguishable from, the general citizenry of this Commonwealth" and thus that the senators had standing to contest the nominations. *Id.* Because the senators challenged the constitutionality of the manner in which the vote took place, their "exercise of the vote" did not extinguish the "senators' legal interest in this controversy." *Id.*

This Court has also recognized the legislative standing of members of a municipal governing body who challenged the constitutionality of an oil and gas law. In *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 476 (Pa. Commw. Ct. 2012), *aff'd in part, rev'd in part in Robinson Twp., Washington County v. Com.,* 83 A.3d 901 (Pa. 2013), this Court held that the supervisors had legislative standing because they "**would be required to vote** on the passage of zoning amendments to comply" with the oil and gas law, which they believed was unconstitutional. 52 A.3d at 476 (emphasis added).[1]

Pennsylvania courts have thus made clear that legislative standing must be recognized where legislators are compelled to take an unconstitutional vote as part

[1] The Pennsylvania Supreme Court did not reach the question of whether the supervisors had legislative standing, but it confirmed this Court's "persuasive" analysis that addressed the supervisors' interests in the outcome of the litigation. 83 A.3d at 918 n.9.

of an unconstitutional action, or when they would be compelled to vote on unconstitutional actions in the future.

2. The Costa Petitioners Have Legislative Standing

Each of the individual Costa Petitioners are duly-elected State Senators who serve on the Committee and hold positions on other Senate committees that determine the future of election legislation, which do not include the Committee. (Costa Pet. at ¶¶ 3-6). As members of the Committee, they are compelled to vote on and participate in the Committee's activities. Senate Rule 16(1) compels the Costa Petitioners to attend all Committee meetings and vote on every question before the Committee. If one of the Costa Petitioners were to refuse to attend meetings or to vote on questions before the Committee, they would face punishment in their official capacities under Senate Rule 20(a). That rule provides that refusal to attend meetings or to vote "shall be deemed a contempt of the Senate."[2] Under Senate Rule 27(b), refusal to attend a Committee meeting could result in a Senator being "sent for and taken into custody by the Chief Sergeant-at-Arms . . . [and] brought before the bar of the Senate, where the Senator . . . shall be publicly reprimanded by the presiding officer for neglect of duty."

[2] Although Senate Rule 20(a) focuses on the activities of the Senate as a whole, Senate Rule 18 clarifies that penalties under Senate Rule 20(a) also apply to committees. *See* Senate Rule 18 ("[A]ll motions made in committee shall be governed and take the same precedence as those set forth in these Rules.")

As set forth in the Costa Petition, the Dush Subpoena and the Committee's investigatory efforts are illegal and unconstitutional. (Costa Pet. at ¶¶ 60-94). The Costa Petitioners are members of the Committee and are compelled to vote on and participate in the Committee's ongoing illegal activity. Each of the Costa Petitioners, in their legislative capacities, thus has a substantial, direct, and immediate interest in this action. The Costa Petitioners are not seeking merely to prevent government misconduct that is disconnected from their roles as legislators. They are challenging illegal and unconstitutional Committee activities in which they have been required to participate. Like the plaintiffs in *Zemprelli*, the Costa Petitioners' votes against the Dush Subpoena did not extinguish their interest in having the Committee's actions declared to be illegal.

The Costa Petitioners' claim to legislative standing is even more compelling than the interest the senators asserted in *Zemprelli* because the Costa Petitioners here are compelled to participate in the Committee's *ongoing* unconstitutional activities. If the Costa Petitioners could not challenge the Committee's actions, they would be forced to continue participating in unconstitutional activities as the Respondents proceed to enforce the Dush Subpoena, hire a third party and move forward with an illegal election audit. As this Court found in *Robinson Township*, legislators have standing where they would be required to vote on future legislation that they believe to be unconstitutional.

Because the Costa Petitioners are compelled to participate in Committee meetings and to vote on issues before the Committee, like the legislators in *Zemprelli*, they have a substantial interest in the legality of the Committee's actions and have standing to challenge those actions.

3. Additional Basis For The Legislative Standing Of Senator Costa As The Senate Minority Leader

All of the Costa Petitioners have legislative standing because of their positions on the Committee. Senator Costa also has statutory duties under the Election Code that confer an additional basis for legislative standing. *See Corman v. Nat'l Collegiate Athletic Ass'n*, 74 A.3d 1149, 1161 (Pa. Commw. Ct. 2013) (this Court held that Senator Corman, as Chair of the Senate Appropriations Committee, had legislative standing to challenge potential expenditures under the Endowment Act because of his "statutory duties for overseeing" those funds).

Like Senator Corman in *Nat'l Collegiate Athletic Ass'n*, the Election Code requires Senator Costa, as the Senate Minority Leader, to appoint one of the members of the SURE System Advisory Board. 25 P.S. § 3150.2(b)(1). Because the legislature invested Senator Costa with specific statutory obligations to oversee the SURE system, he holds an additional interest in this action that is substantial, direct, and immediate.[3]

[3] The Costa Petition for Review was brought pursuant to the Declaratory Judgements Act, in an effort to "settle and afford relief" from the immediate impacts of the Respondents' actions on the

4. The Respondents' Efforts To Challenge The Costa Petitioners' Standing Are Without Merit

Respondents cite two cases that set forth general legal standards of legislative standing, but they fail to examine the facts in either case. (Resp. Br. at 35-38). Citing *Fumo*, Respondents maintain that the Costa Petitioners seek "nothing more than 'redress for a general grievance about the correctness of government conduct.'"[4] *Id.* at 37. Yet, Respondents do not address the fact that, here, the Costa Petitioners have legislative standing because they – unlike the general citizenry of the Commonwealth – were compelled to vote on the illegal and unconstitutional Dush Subpoena, and because the vote itself was part of the Committee's ongoing illegal election audit. Unlike in *Fumo*, this is not a case where the legislators have claimed standing to assert that the actions of another branch are generally inconsistent with the law. Rather, the Costa Petitioners' duty as legislators to perform their official responsibilities in a constitutional manner is under continuing assault by the ongoing illegal actions of other members of their very own institution. Without the ability to challenge the Committee's actions, the

---

Costa Petitioners' rights and responsibilities. As the Supreme Court noted in *Papenfuse*, courts are to take a broad view of standing in declaratory judgment actions and that standard should be applied here. *Papenfuse*, at *10.

[4] In *Markham v. Wolf*, 635 Pa. 288, 306, 136 A.3d 134, 145 (2016), the Court again explained the legal standards for legislative standing and concluded, based on the facts of that case, that plaintiffs lacked legislative standing to challenge an executive action because the action did not "inhibit or in any way impact [their] ability to propose, vote on, or enact legislation." Here, of course, the Dush Subpoena and the Committee's ongoing "investigation" have a significant impact on the Costa Petitioners' legislative roles and duties.

Costa Petitioners would continue to be compelled to participate in the Committee's illegal and unconstitutional activity.

If the Court were to conclude that the Costa Petitioners do not have standing, then they would effectively be compelled to become respondents, as members of the Committee. This would place the Costa Petitioners in the perverse situation of defending the Committee's illegal actions, and the injuries to the Costa Petitioners' right to vote and oaths to obey the Constitution. That outcome would be unjust, incompatible with Pennsylvania's prudential approach to standing and inconsistent with the remedial nature of the Declaratory Judgments Act.

C. AS INDIVIDUAL REGISTERED PENNSYLVANIA VOTERS, THE COSTA PETITIONERS HAVE STANDING TO SEEK TO PROTECT THEIR PERSONAL IDENTIFICATION INFORMATION FROM DISCLOSURE TO THE RESPONDENTS AND TO AN UNNAMED THIRD-PARTY

The Dush Subpoena seeks the confidential, personal information of every registered Pennsylvania voter, including the Costa Petitioners, and the Committee intends to provide that information to an unnamed third party. The Election Code and the DOS's regulations protect that information from disclosure. The Costa Petitioners are not simply interested in the general legality of the Dush Subpoena, as legislators. The Costa Petitioners also seek to protect their own personal, confidential information, which the Subpoena and the Committee's "investigation"

put at risk of disclosure.[5] As registered voters, who provided their personal information in accordance with the DOS regulations, and with the expectation that the information would be protected from disclosure, the Costa Petitioners have a substantial, direct and immediate interest in seeking to protect their personal information in their personal capacities.

The Costa Petitioners meet all of the standards that the Supreme Court articulated for individual standing in *Papenfuse*. As registered voters, their interests are "substantial" because they surpass "the interest of all citizens in procuring obedience to the law." *Papenfuse*, at *22; *see id*. at *33 (plaintiffs, who owned firearms, had substantial interest because their "interest is greater than citizens who do not own or possess firearms within the City").

The interest of the Costa Petitioners in protecting their personal identification information is also "immediate" and "direct." The Respondents have taken, and intend to continue taking, illegal actions that could jeopardize the confidentiality of that information, which the Election Code and the DOS regulations closely guard. If the DOS were to comply with the Dush Subpoena, that information would be at immediate of risk of exposure, particularly where Respondent Dush has expressed his intention to turn all of the information

[5] The Costa Petitioners assert standing in their individual capacities only with respect to Count III of their Petition, which challenges the Subpoena under the Election Code and DOS regulations.

acquired to a third party, without any plan to safeguard the security of the information. *See Papenfuse*, at *15 (although plaintiffs had not been prosecuted, they had standing to challenge allegedly unconstitutional gun restrictions because city officials publicly declared their intent to enforce the ordinances).

Respondents also argue that the Costa Petitioners lack personal standing as to Count 3 because "the duty of administering the voter registration statutory scheme is vested exclusively in the Department of State." (Resp. Br. at 41). The Costa Petitioners, however, do not seek to "administer" the voter registration system. They seek only to protect the confidential information that they were required to provide to DOS to register to vote. Contrary to Respondents' assertions, this Court has held that a plaintiff may bring a claim under Pennsylvania's election laws, including the voter registration provisions. *See, e.g.*, *Mixon v. Com.*, 759 A.2d 442 (Pa. Commw. Ct. 2000) (a group of convicted felons challenged DOS's interpretation of the voter registration section of the Election Code, which prevented them from voting and/or registering to vote).[6]

[6] Respondents cite cases where plaintiffs did not have standing to sue under laws that expressly state that no private right of action existed. (Resp. Br. at 42). Because individuals have the right to sue to protect their rights under the Election Code, those cases simply do not apply.

IV. THE PERSONAL IDENTIFICATION INFORMATION SOUGHT WITH THE DUSH SUBPOENA IS NOT SUBJECT TO "PUBLIC ACCESS BY ORDINARY CITIZENS" BUT IS CAREFULLY PROTECTED TO ENSURE ITS PRIVACY

A. THE TROVE OF INFORMATION THAT THE DUSH SUBPOENA DEMANDS INCLUDES PERSONAL IDENTIFICATION INFORMATION THAT IS PROTECTED UNDER PENNSYLVANIA LAW

The bulk of the "election-related records" that the Respondents demand of the DOS are categories of materials from the SURE system – including the names, dates of birth, driver's license numbers, portions of Social Security numbers and addresses of all registered Pennsylvania voters. Although technically "public records" within the possession of the DOS, this personal identification information is far from being subject to "public access by ordinary citizens," as the Respondents assert, and is expressly protected from disclosure under the Pennsylvania Constitution and Pennsylvania law.

Article I, section 1 of the Pennsylvania Constitution protects "informational privacy," which the Pennsylvania Supreme Court has described as the right of an individual "to control access to, of the dissemination of, personal information." *Pa. State Educ. Ass'n (PSEA) v. C'wealth Dep't of Community and Econ. Dev.*, 148 A.3d 142, 150 (Pa. 2016). The Court has also recognized that disclosing some types of information "would operate to the prejudice or impairment of a person's privacy, reputation or personal security and thus intrinsically possess a palpable

weight." *Tribune-Review Pub. Co. v. Bodack*, 961 A.2d 110, 115 (Pa. 2008). Pennsylvania courts have consistently recognized that disclosure of driver's license and partial Social Security numbers, specifically, would intrinsically implicate protected privacy rights. *See, e.g.*, *PSEA*, *Bodack*, *Times Pub. Co. v. Michel*, 633 A.2d 1233, 1237 (Pa. Commw. Ct. 1993) (disclosure of Social Security numbers raises personal privacy concerns because those numbers allow for the "retrieval of extensive amounts of personal data").

Under Pennsylvania's Right-to-Know Law, 65 P.S. §§ 67.101, *et seq*., public records are, generally, to be made available, subject to enumerated exemptions. Specifically exempt from disclosure are "public records" that contain "**all or part of a person's Social Security number [and] driver's license number**, . . ." 65 P.S. § 67.708(b)(6)(i)(A) (emphasis supplied). Where a public record that contains personal identification information is to be disclosed, that information must be redacted. *See, e.g.*, *Lancaster Cty. Dist. Attorney's Office v. Walker*, 245 A.3d 1197 (Pa. Commw. Ct. 2021) (acknowledging that driver's license numbers and address information must be redacted under Right to Know Law because of the private nature of the information sought); *Pa. Liquor Control Bd. v. Beh*, 215 A.3d 1046, 1062 (Pa. Commw. Ct. 2019) (PLCP was not required to provide requester with redacted personal address information because it is exempt from disclosure under RTKL Section 708).

In addition to the Pennsylvania Constitution and the Right-to-Know Law, the Election Code itself provides clear privacy protections for driver's license numbers and Social Security numbers. In multiple provisions throughout the Election Code, DOS and counties are specifically prohibited from providing access to driver's license numbers and Social Security numbers:

- 25 Pa. C.S. §§ 1404(a)(1), 1403(a); 4 Pa. Code §§ 183.13(a), 13(c)(5)(iii), 183.14(c)(3) (voter records laws that do not permit disclosure of driver's license numbers and Social Security numbers on "public information lists" or "street lists");
- 25 P.S. §§ 3146.9(b)-(c), 3150.17(b)-(c) (counties may not provide driver's license numbers and Social Security numbers on lists of information about mail voters)
- 25 P.S. §§ 3146.9(a); 3150.17(a); 2602(z.5) (counties must allow public inspection of records in controlled circumstances, but they may not make driver's license numbers and Social Security numbers available for public inspection); and
- DOS allows public inspection of election-related information and records, but does not make driver's license or partial Social Security numbers available. *See* Declaration of Jonathan Marks, Exhibit G to the Secretary's Application for Summary Relief, ¶¶ 12, 25, 27.

Because the Election Code contains these specific protections, when voters register to vote in Pennsylvania, they do so with the reasonable – and statutory – expectation that their personal identification information will not be disclosed.[7]

[7] The Department of Transportation ("PennDOT") also protects driver's license information from disclosure. *See* 75 Pa. C.S. § 6114, 67 Pa. Code § 95.2(c), 18 U.S.C. §§ 2721-2725.

B. THE RESPONDENTS' REQUEST FOR PERSONAL IDENTIFICATION INFORMATION IMPLICATES THE DUE PROCESS RIGHTS OF ALL PENNSYLVANIA VOTERS

The Respondents attempt to characterize their request as a routine request for "public records" that would be available to the "ordinary citizen." Yet, they demand access to information which, because of its very nature, Pennsylvania law protects from disclosure – under the Constitution, the Right-to-Know Law and the Election Code. Without citation to any authority, the Respondents maintain that these protections do not apply because, they, as part of the Commonwealth's government, have made the request for the information through the Dush Subpoena, and not through a Right-to-Know Law request.[8]

In *Governor's Office of Admin. v. Purcell*, 35 A.3d 811 (Pa. Commw. Ct. 2011), this Court considered a Right-to-Know Law request for the birth dates of all Pennsylvania employees. The Court concluded that the requested information was protected from disclosure under the Right-to-Know Law's personal security exemption. In concurring with the Court's decision, Judge Kevin Brobson wrote separately to express his concern as to how a Right-to-Know Law request could violate a third party's rights under the Pennsylvania Constitution, as heightened by the absence of a third-party notice provision in the Right-to-Know Law and the

[8] This argument is particularly dubious where the Respondents have made clear their intent to provide the information to an unnamed third-party vendor, which is not part of the government and, would, apparently, not be subject to any necessary security measures.

inability of a third party to assert their constitutional right to oppose a request for personal, private information. Judge Brobson expressly opined that the "General Assembly lacks the authority to compel an agency to disclose a third-party's information in the agency's possession where doing so would violate the rights afforded the third-party under the Pennsylvania Constitution." 35 A.3d at 821.

Here, every one of Pennsylvania's nine million registered voters has an interest in protecting their own personal identification information from disclosure to the Committee and to the unnamed entity that would review that information. The Respondents' demand for the information, through the Dush Subpoena, implicates the same right to privacy and the same due process rights of those voters as would a Right-to-Know Law request. As Judge Brobson recognized, the General Assembly cannot compel disclosure of that information, in violation of the rights afforded to the voters under the Pennsylvania Constitution.

C. THE RESPONDENTS' POSITION THAT, BECAUSE SOME OF THE INFORMATION REQUESTED WITH THE DUSH SUBPOENA MAY BE PUBLIC OR MADE AVAILABLE TO OTHER ENTITIES IN LIMITED CIRCUMSTANCES, ALL OF THE INFORMATION MUST BE MADE AVAILABLE, IS UNTENABLE

1. "Street List" Information

When registering to vote, a voter is required to provide to the DOS certain information including their name, address, date of birth, and either their driver's license number or the last four digits of their Social Security number. The DOS

maintains this information in the SURE system database. *See* 52 U.S.C. § 21083(a)(5)(A); 25 Pa. C.S. § 1327. The DOS makes a subset of this information available to the public in the form of "public information lists" and "street lists." 25 Pa. C.S. §§ 1403-1404; 4 Pa. Code §§ 183.13, 183.14. Street list information contains only the name and address of registered electors, organized by street and house numbers. 25 Pa. C.S. § 1403(a). County Boards of Election are to make street lists available on request of officials, political parties, candidates, and other organized bodies of citizens. 25 Pa. C.S. § 1403(d). The public may also make inquiries into individual registered electors, and may see the names, addresses, date or birth, and voting history of individual electors. 25 Pa. C.S. § 1404(a). However, any person requesting voter list information must attest that they will use the list only for purposes related to elections, political activities, or law enforcement. 25 Pa. C.S. § 1404(b)(3). Any other use is impermissible. *Id.* As the statute makes clear, these lists do not include the driver's license and Social Security numbers of registered voters.

Respondents seem to assert that, because some the information that the Dush Subpoena requests would be made available in a street list, all of the information that the Subpoena demands must also be made available to the Respondents. This is patently false, as a matter of law, because the sensitive voter information, the

driver's license numbers and partial Social Security numbers, are regularly withheld from public inspection.

2. DOS Contract With BPro For Maintenance Of The SURE System

Under the Election Code, the DOS is charged with maintenance of the SURE System, which it engages a vendor to accomplish. 25 Pa. C.S. § 1222. The DOS has entered a contract with BPro, Inc. ("BPro") for this service. BPro, which was established in 1985, provides software supporting "online and offline voter registration and list maintenance, election management, campaign finance, election night reporting" and other election-related services. http://bpro.com/about-bpro. Pursuant to its contract with the DOS, BPro's responsibilities include maintenance, support and hosting of the SURE System; election night reporting; stress and load testing; and data validation. *See* Resp. App'x at 0006a-0008a. With that responsibility, as set forth in detail in its contract with DOS, BPro must observe significant data security measures, including background checks for all employees and subcontractors; Commonwealth-mandated inspections; daily error log review; independent vulnerability assessments; and daily data backups, among other measures. *Id.* at 0115-17a. The meticulously detailed security measures in the contract require BPro to handle sensitive voter data with the utmost care. Access to voter data is restricted, subject to robust security measures.

Respondents cite to the DOS's contract with BPro to suggest that third parties are routinely granted access to the SURE System and that the BPro contract somehow justifies the provision of voter data to third parties, generally. As the extensive DOS-BPro contract makes clear, however, access to the SURE System, pursuant to the contact and under DOS supervision, is not the same as simply transferring sensitive voter data to an unnamed third party. Further, unlike the DOS, which is required under the Election Code to maintain the SURE System, the Respondents have no comparable authorization.

Although the Respondents demand access to the same information and fully intend to provide that information to a third party, they make no mention of any type of security measures that would be put in place to protect the data they seek. The DOS's contract with BPro to maintain and administer the SURE System does not support the Respondents' position that they, too, should be permitted to provide sensitive voter data to an unnamed third party. The BPro contract actually demonstrates how that information must be protected.

3. Information Provided In The *Applewhite* Litigation

The *Applewhite* litigation before this Court in 2012, Docket No. 330 M.D. 2012, involved a challenge to the voter identification law that would have required every voter to have photo identification. In preparation for trial, the petitioners sought to determine how many registered Pennsylvania voters the law would

disenfranchise because they did not have photo identification. *See* Resp. App'x at 0889a. The petitioners sought to match voters in the SURE System with driver's license numbers from PennDOT to determine how many voters lacked photo identification. *Id*. PennDOT agreed to produce the driver's license numbers. One of the petitioners' experts noted that name, address, and birthdate could be used for file-matching purposes, even absent driver's license numbers or partial Social Security numbers as identifiers. *Id*. at 0848a.

This Court determined that the partial Social Security numbers would be helpful to compare against the driver's license numbers and ordered DOS to produce them. *Id*. at 0929a. The sensitive information was produced not only under the Court's protective order to which the parties stipulated, but also with additional security protocols, including that the petitioners' lawyers would not even have access to the data. *Id*. at 0865a, 0929a-0930a.

In contrast, the Respondents here have not articulated an actual need for driver's license numbers and partial Social Security numbers, other than their public statements that they "need" to investigate the identity of voters who participated in the 2020 General Election and the 2021 Primary Election. *See* Costa Pet., ¶¶ 40, 41. Unlike the petitioners in *Applewhite*, the Respondents have offered no legitimate reason for seeking to expose the sensitive personal identification information of nine million voters beyond what is publicly available.

4. The ERIC Reports

Respondents also note that Pennsylvania is a member of the Electronic Registration Information Center ("ERIC") and provides voter information to ERIC. (Resp. Br. at 23). ERIC member states submit voter registration and motor vehicle licensee data to ERIC, and in return, ERIC generates "reports that show voter who have moved within their state, voters who have moved out of state, voters who have died, duplicate registrations in the same state and individuals who are potentially eligible to vote but are not yet registered." "What Data does ERIC Collect from Member States?" and "What Reports do States Receive from ERIC?" http://ericstates.org. ERIC provides an information security brief detailing its security efforts and updates. *See* http://ericstates.org/wp-content/uploads/2021/04/ERIC_Tech_and_Security_Brief_v4.0.pdf.

The Respondents claim that they seek the data for the same purpose as the ERIC reports. Dush Editorial, Exhibit M-1, Secretary's Application for Summary Relief ("The reason why the Senate Intergovernmental Operations Committee subpoenaed this information is to cross match and verify whether or not our voter registration system has duplicate voters, dead voters, and/or illegal voters."). Yet, Respondents fail to offer any indication as to why the ERIC reports are not insufficient to accomplish their ostensible legislative aims.

5. The Auditor General's Audit

The Costa Petitioners have submitted extensive detail regarding the audit that the Auditor General undertook in 2019, which involved the SURE System data. *See* DePasquale Decl., ¶¶ 21-33; Marks Decl. ¶¶ 40-53. During the Auditor General's audit, selected auditors received only a statistical sample of voter registrations, not the entire voter file. DePasquale Decl. at ¶ 28. A DOS staff member was physically present when the auditors reviewed the data, and the information the auditors viewed was limited to only the necessary information to protect voter privacy. *Id*.

Respondents point to the Auditor General's 2019 audit, which involved analysis of SURE System data, to argue that because access to sensitive voter information was permitted for the Auditor General's audit, access to that data must always be permissible, regardless of the third party viewing the information and regardless of whether the appropriate DOS security measures are in place and enforced. (Resp. Br. at 24-25). The fact that the Auditor General conducted a lawful audit of the SURE System and that DOS has entered into contracts for the SURE System's maintenance hardly suggests that the personal identification information of all Pennsylvania voters is freely accessible to "any ordinary citizen," as the Respondents maintain.

V. THE RESPONDENTS FAIL TO IDENTIFY ANY LEGITIMATE LEGISLATIVE PURPOSE FOR THEIR INTENDED INVESTIGATION

A. THE CIRCUMSTANCES SURROUNDING THE RESPONDENTS' ACTIONS, AND NOT SIMPLY THE SUBPOENA ITSELF, MUST BE EXAMINED

When assessing legislative action, courts regularly look to the "circumstances under which" the action was undertaken and legislative history. *See, e.g.*, *Com., Higher Ed. Assistance Agency v. Abington Mem. Hosp.*, 387 A.2d 440, 444 (Pa. 1978); *see also Trump v. Mazars USA, LLP*, __U.S. __, 140 S.Ct. 2019, 2031 (2020) (considering the face of subpoenas and memorandum from Oversight Committee Chairman).

The Respondents suggest here that the Court should take a "nothing to see here, folks" approach in considering their actions in issuing the Dush Subpoena and in announcing their intention to retain a third party to review the information acquired. They would have the Court limit its assessment of their actions by examining only the Subpoena itself, on its face, while ignoring the circumstances under which they issued the Dush Subpoena and their clearly articulated motivations, as expressed in their public statements and statements in the Committee's hearing.[9]

---

[9] *See, e.g.*, Senator Corman stated: "We need to get the voter rolls, we need to get the ballots – things of that nature – so we can match them up to see: who voted, where were they living, were they alive?" Costa Pet., ¶¶ 40. Chairman Dush stated that the 2020 "election was done unlawfully." *Id*. at ¶41.

Essentially, Respondents ask this Court to be "blind" to "what '[a]ll others can see and understand'" and to assume that the Dush Subpoena represents a "run-of-the-mill legislative effort" and not what it is – a "clash between rival branches of government over records of intense political interest for all involved." *Mazars*, 140 S. Ct. at 2034 (quoting *United States v. Rumely*, 345 U.S. 41, 44 (1953)). The Respondents' statements and the surrounding circumstances make clear that the Respondents' motivation for their investigatory efforts are not legislative.[10]

B. THE RESPONDENTS' RELIANCE ON THE SPEECH AND DEBATE CLAUSE IS MISPLACED

The Speech and Debate clause of the Pennsylvania Constitution provides in relevant part that "The members of the General Assembly. . . for any speech or debate in either House. . . shall not be questioned in any other place." Pa. Const. art. 2, § 15. In *League of Women Voters of Pennsylvania v. Commonwealth*, 177 A.3d 1000 (Pa. Commw. Ct. 2017), this Court recognized the Pennsylvania Supreme Court's determination that "the scope of Pennsylvania's Speech and Debate Clause is indistinguishable from its counterpart in the United States Constitution." *Id.* at 1003, citing *Consumers Educ. And Prot. Ass'n v. Nolan*, 368

[10] Respondents cite to *Com. by Packel v. Shults*, 362 A.2d 1129 (Pa. Commw. Ct. 1976), courts are not permitted to consider motive in assessing a legislative subpoena. However, in *Shults*, this Court did not allow the motivations of staff attorneys (not members) to invalidate a subpoena which the Court had already found to be within the power of the issuing agency. Here, the Costa Petitioners are arguing both that the Dush Subpoena exceeds the power of the Committee and that the members' motivations were impermissible.

A.2d 675, 681 (1977)). As one commentator explained, "[f]irst and foremost, the Clause has been interpreted as providing Members with general immunity from liability for all 'legislative acts' taken in the course of their official responsibilities." Todd Garvey, *Understanding the Speech or Debate Clause*, Congressional Research Service, December 1, 2017 at 1. The Speech and Debate Clause also encompasses "a broad documentary nondisclosure privilege to protect Members from the perils and burdens of revealing written legislative materials, even when the documents are not used as evidence against the member." *Id*. at 2.

The Speech and Debate Clause does not, however, prohibit a court from considering legislative history or legislators' public statements. To hold so would obviate, for example, Equal Protection jurisprudence, where challengers to a law must make a showing of discriminatory intent on the part of the legislature. *See Washington v. Davis*, 426 U.S. 229, 241-42 (1976). Pennsylvania courts have confirmed this interpretation of the Speech and Debate Clause. In *League of Women Voters*, this court held that the Clause prohibited it from "compel[ling] testimony or the production of documents relative to [the legislators'] intentions, motivations, and activities." 177 A.3d at 1005. In *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977), the Supreme Court noted that the Clause "does not. . . bar all judicial review of legislative acts." 375 A.2d at 704, quoting *Powell v. McCormack*, 395 U.S. 486, 503 (1969).

The Respondents make much of the Speech and Debate Clause, claiming that the Clause bars any examination of legislative motivation. (Resp. Br. at 81-82). Petitioners here, however, do not assert individual liability of the Respondents. They do not seek documents from Respondents that might implicate the Clause. To the contrary, the Costa Petitioners ask this Court to consider Respondents' public statements and statements during debate about the issuance of the Dush Subpoena.[11] The Court should look past Respondents' pretextual assertions that they would somehow use the information to "legislate."[12] For these reasons, the Respondents' reliance on the Speech and Debate Clause to evade scrutiny of their public statements is misplaced.

C. ALTHOUGH LEGISLATIVE SUBPOENA POWER IS BROAD, IT REMAINS SUBJECT TO CLEAR LIMITATIONS

The United States Supreme Court recently restated the long-settled principle that, although the legislative subpoena power is broad, it is "subject to several limitations." *Mazars USA, LLP*, __U.S. __, 140 S.Ct. at 2031. A legislative

[11] It should be noted that Respondents themselves urge the Court to consider Chairman Dush's statements in the September 15, 2021 hearing. *Id.* at 85.

[12] Even if the Speech or Debate Clause barred suit against Senators Corman and Dush, the Supreme Court noted in *Powell* that, in prior cases, "we did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued." 395 U.S. at 506. Costa Petitioners have also brought suit against the Secretary-Parliamentarian.

subpoena is valid "only if it is 'related to, and in furtherance of, a legitimate task'" of the legislature. *Id*., quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957).

Respondents essentially argue that the legislature's subpoena power is unlimited. They assert that they issued the Dush Subpoena "in accord with the basic requirements of Pennsylvania law" because they used words in the record that connote a legislative purpose. (Resp. Br. at 82-83). They seem to maintain that their use of the phrase "legislative purpose" deprives this Court of the responsibility to determine whether Respondents have embarked on an impermissible "fishing expedition." *See Lunderstadt v. Pennsylvania House of Representatives Select Committee*, 519 A.2d 408, 412 (Pa. 1986) ("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."). This fishing expedition is particularly egregious when the privacy of nine million registered voters is at stake. *See id.* at 412-13 (discussing the balancing of legislative need for information with privacy rights).

As the Costa Petitioners have explained, the Dush Subpoena is not related to a legitimate task of the General Assembly. (Costa Pet., ¶¶ 75, 93; Costa Pet. Brief at 15). The Court has the responsibility to examine the Dush Subpoena to determine that it exceeds the authority of the Committee as part of an untimely

election contest and an unlawful election audit, responsibilities expressly delegated to other branches.

The Costa Petitioners have also demonstrated why the Respondents' stated purpose is pretextual. The Respondents have not attempted to hide their intent to conduct an "Arizona-style" audit of the 2020 elections results. When he was the Chairman of the Committee, Senator Mastriano directed Fulton County to conduct an outside audit of its voting machines and ballots, using a company tied to Sidney Powell, with the result that it was necessary to decertify the voting machines to which the third party "investigator" had access. DePasquale Decl., ¶¶ 69, 70, 73. Senators Mastriano and Dush visited the site of the Arizona audit, after which Senator Dush stated that Pennsylvania should follow Arizona's example. *Id.* ¶¶ 75, 76.[13] Senator Mastriano then attempted to obtain voting machines and ballots from three counties. *Id.* ¶ 79.[14] The issuance of the Dush Subpoena followed these events, which illustrate the actual intent of the Respondents' "investigation."

Respondents point to the Auditor General's conclusion that the SURE System contains errors. (Resp. Br. at 25). They offer no explanation as to why these audit results are insufficient for effective legislation and they have, in fact,

---

[13] Of course, the Arizona audit did not lead to the discovery of any fraud and thus cannot provide a legitimate justification for the Committee's actions.

[14] These facts are fully set forth in the Costa Petitioners' Application for Summary Relief at 8-10 and Attachment A.

proposed legislation without claiming any need to re-do the audit. The Respondents fail to explain why they cannot use, for their "legislative purposes," the reports from ERIC, which contain precisely the information they claim to seek through the Dush Subpoena. They offer no explanation as to why, the Committee would need this individual data – personal identification information of all of Pennsylvania's voters – to craft legislation, when this information has never before been necessary. The Respondents' sudden discovery that the available information is now insufficient for legislative purposes reinforces the pretextual nature of their demand for voters' personal identification information.

In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the United States Supreme Court laid out the test for determining whether a legislative subpoena is enforceable. The court must examine whether "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Id.* at 652. Here, the Respondents cannot establish that any of these criteria have been met.

Respondents suggest that the Dush Subpoena must be valid because it meets the test for enforceability. (Resp. Br. at 85-86). Yet, the personal identification information sought with the Subpoena is not "reasonably relevant" to the act of legislating changes to the Election Code. As Respondents concede, a large amount of legislating around the Election Code has occurred without any need for this

information. (Resp. Br. at 7 & n.1). Respondents also concede that most of the information they seek is publicly available. If they seek to conduct an investigation of the SURE System, they can investigate voters using the publicly available information, or examine the results of audits that the Auditor General and the Secretary have undertaken. The Respondents have not articulated a purpose for which the social security numbers or the driver's license numbers of millions of Pennsylvania registered voters are "reasonably relevant."

Respondents assert that their authority to issue subpoenas is boundless, so long as they make sure a pretextual reason that is entered into the legislative record. Yet, it is long established that the legislative subpoena power has limits and the Dush Subpoena exceeds the limits of Respondents' authority.

VI. ALTHOUGH THE RESPONDENTS INSIST THAT THEIR "INVESTIGATION" IS NOT AN "ELECTION CONTEST" OR AN "AUDIT," THEIR INTENDED "INVESTIGATION" BEARS ALL THE HALLMARKS OF AN ELECTION CONTEST/AUDIT

A. COURTS MUST USE A FUNCTIONAL APPROACH WHEN ASSESSING LEGISLATIVE ACTION

Courts are to use a functional approach when assessing legislative action. *National Fed. of Independent Business v. Sebelius*, 567 U.S. 519, 565 (2012). Instead of simply accepting self-serving labels, "the character" of a legislative action is "disclosed by its purpose and operation, regardless of name." *United States v. Constantine*, 296 U.S. 287, 294 (1935). Courts must examine the action's

"purpose and operation" and cannot simply accept whatever self-serving label a proponent seeks to affix to it.

B. DESPITE LABELING IT A LEGISLATIVE INVESTIGATION, THE COMMITTEE IS ATTEMPTING TO UNDERTAKE AN UNTIMELY ELECTION CONTEST

As the Court has held, an election contest is the prescribed method for determining whether an election "accurately and honestly ascertain[ed] and record[ed] the will of the electorate." *In re Petition to Contest Primary Election of May 19, 1998*, 721 A.2d 1156, 1159 (Pa. Commw. Ct. 1998) (internal citation omitted). When a party alleges that fraud involving the casting or counting of votes occurred in an election, an election contest is the proper mechanism to pursue the allegations. *Id*.

Respondents have made these precise allegations, questioning whether the 2020 election "accurately and honestly" ascertained and recorded the will of Pennsylvania voters. Senator Corman noted his intent to match up the voter rolls to ballots to see "who voted, where were they living, were they alive?" (Costa Pet. ¶ 40). Senator Dush stated: "What I will say about the election results because the election was done unlawfully because they did not follow the letter of Title 25, nobody in the Commonwealth of Pennsylvania can tell you who the winner was in any of these races from November 2020." (*Id.* ¶ 41). At the September 15, 2021

hearing, Senator Dush thus acknowledged that the request for voters' personal identification information is an effort to fish for fraud. (*Id*. ¶ 51).

Respondents maintain that their intended investigation into putative "election fraud" is not an election contest because no election for any specific office has been contested. (Resp. Br. at 45.). Yet, Respondents have openly challenged the validity of the 2020 General Election, in its entirety, without identifying any race in which any claimed fraud might exist. As the Costa Petitioners explained, Respondents' efforts bear all the hallmarks of an election challenge. (Costa Pet. Br. at 12-16). Despite their efforts to call it by other names, Respondents' efforts to undertake an untimely election contest must be rejected.

C. THE RESPONDENTS' "INVESTIGATION" WOULD INCLUDE ALL THE ELEMENTS OF AN AUDIT

This Court has adopted the United States Comptroller General's definition of "audit." *Dep't of Aud. Gen. v. State Empls. Ret. Sys*., 860 A.2d 206, 210 (Pa. Commw. Ct. 2004). An audit is: "an objective and systematic examination of evidence for the purpose of providing an independent assessment of the performance of a government organization, program, activity or function in order to provide information to improve public accountability and facilitate decision-making by parties with responsibility to oversee or initiate corrective action." *Id*.

Respondents argue that what they describe as the "Petitioners'" definition of an audit would subsume all legislative investigations and render the legislature's

power to investigate void. (Resp. Br. at 46). They fail, however, to confront the fact that the definition of which they complain is that of the United States Comptroller General, which this Court adopted in *State Empls. Ret. Sys.* This definition necessarily contemplates that the party who conducts the audit is separate from the "parties with responsibility to oversee or initiate corrective action," i.e., the General Assembly. The General Assembly's purpose in conducting investigations, at least ostensibly, is to legislate and not to "provide information" or "improve public accountability." The definition of "audit" is not as expansive as the Respondents argue.

The Court's definition of "audit" encompasses all aspects of what the Respondents seek to accomplish with their "investigation." They propose to allow a third-party to systematically process huge amounts of personal identification information to evaluate the SURE system. Although Respondents assert that their ultimate aim is to enact legislation, they fail to address the fact that they have managed to consider election-related legislation without examining the personal identification information of all Pennsylvania voters.

No statutory authority provides the Committee with any authority to audit the SURE system and Respondents fail to cite any authority that supports their assertion that the General Assembly can conduct any audit it elects to undertake. (Resp. Br. at 47). They fail to identify any other instance where the General

Assembly has attempted to conduct the type of audit the Committee envisions. *See DePasquale Decl.* at ¶ 73. The Respondents also maintain that the constitutional delegation of audit authority to the Auditor General and Secretary of the Commonwealth does not deprive the General Assembly of authority to conduct audits. Contrary to this assertion, however, the General Assembly is only granted authority to audit itself. *Id.* at ¶ 69.

Respondents appear to argue by fiat. Because they say that their proposed action is not an election contest or an audit, they maintain that it is, therefore, not an election contest or an audit. The Dush Subpoena and Respondents' stated goals for the Subpoena are consistent with actions beyond the scope of the Committee's power. This Court should not take Respondents at their word without evaluating the evidence.

VII. THE 1929 ADMINISTRATIVE CODE DOES NOT CONFER ON THE COMMITTEE ANY AUTHORITY TO DEMAND UNFETTERED ACCESS TO THE PRIVATE INFORMATION OF MILLIONS OF PENNSYLVANIANS

A. THE 1929 ADMINISTRATIVE CODE CANNOT BE CONSTRUED TO REQUIRE DISCLOSURE OF PROTECTED PERSONAL IDENTIFICATION INFORMATION

Section 802 of the Administrative Code was passed in 1929, before the creation of Social Security numbers, and has remained unchanged since its promulgation. *Cf.* Section 802 of Act 177 of 1929 with 71 P.S. § 272 (West

2021).[15] Section 802(a) of the 1929 Administrative Code, 71 P.S. § 272, states that the Department of State is to permit "committees of the General Assembly" to "**inspect and examine** the books, papers, records, and accounts filed in the [State] department, and to furnish such copies or abstracts therefrom, **as may from time to time be required**." 71 P.S. § 272(a) (emphasis supplied). Section 802(b) provides that the Department of State is "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**." (emphasis supplied). Although it requires the payment of fees for copies, this section critically does not include the qualifying phrase "as may from time to time be required" and would allow "any person" access to any "public papers or documents." *Id*.

Under Pennsylvania law, "[s]tatutes are to be construed in harmony with the **existing law and as part of a general and uniform system of jurisprudence**."

[15] Respondents also reference a near identical provision memorialized at 71 P.S. § 801. (Resp. Br. at 29). Because these statutory provisions cover the same subject matter and utilize similar language, and because 71 P.S. § 272 (part of Act 177 of 1929) was enacted almost 130 years later than 71 P.S. § 801 (part of the Act of March 12, 1791), Costa Petitioners' analysis correctly focuses on the provision enacted later in time. *See* 1 Pa. C.S. § 1936 (requiring that courts engaging in statutory construction favor more recent acts of the General Assembly over older acts of the General Assembly). *See also* West Editors' Explanatory Note, 71 P.S., Pt. I, Ch. 8 (West 2021) ("Certain laws incorporated in this chapter relative to various departmental administrative boards and commissions, etc., comprise legislation prior to the enactment of the Administrative Code of 1929 . . . Some of this legislation is undoubtedly supplied in whole or in part, or even impliedly repealed, by various provisions of the Administrative Code of 1929.").

Schenck v. Twp. of Center, Butler County, 893 A.2d 849, 853 (Pa. Commw. Ct. 2006) (citing 1 Pa. C.S. § 1932) (emphasis supplied). Section 802 of the Administrative Code was passed in 1929 and has remained unchanged. Since 1929, however, Social Security numbers were created and first issued in November 1936.[16] Those personal identification numbers have been designated "confidential," with significant restrictions on disclosure. *See, e.g.,* 42 U.S.C. § 405(c)(2)(C)(viii)(I). Under the Violent Crime Control and Law Enforcement Act of 1994, "personal information" has been defined to include "Social Security numbers." 18 U.S.C. § 2725(3).

In Pennsylvania, the Right-to-Know Law, 65 P.S. §§ 101, *et seq.*, creates a comprehensive and uniform framework for allowing access to "public records," while also protecting personal and confidential information. Under the Right-to-Know Law, "personal identification information," which includes "all or part of a person's Social Security number [and] driver's license number," is explicitly exempt from disclosure. 65 P.S. §§ 67.708(b)(6)(i)(A). When a response to a Right-to-Know Law request includes records that contain exempt information, that information is to be redacted from the records. 65 P.S. § 67.706.

---

[16] *See* "Historical Background and Development of Social Security," SOCIAL SECURITY ADMINISTRATION, *available at* https://www.ssa.gov/history/briefhistory3.html (last visited October 29, 2021).

B. THE RESPONDENTS' RELIANCE ON THE 1929 ADMINISTRATIVE CODE AS A BASIS FOR DISCLOSURE OF THE PERSONAL IDENTIFICATION INFORMATION DEMANDED WITH THE DUSH SUBPOENA IS MISPLACED

Respondents complain that the Costa Petitioners failed to cite the 1929 Administrative Code and attempt to use the provisions of that outdated statute to support their unwarranted demand for the personal identification information of all of Pennsylvania's registered voters from the DOS. The Respondents maintain that Section 802(a) statutorily entitles "committees of the General Assembly" to "inspect and examine" all of the information the Dush Subpoena demands. They seem to imply that a privilege to "inspect and examine" necessarily includes a right to turn over any and all information to a third party. The Respondents also fail to address the illogic of their reliance on Section 802, which, under Section 802(b) would empower "any person" to receive the driver's license and partial social security number of every registered voter in the Commonwealth. To assert that the 1929 Administrative Code today provides a massive loophole to 2009 Right-to-Know Law is absurd. These laws must be read together. *Schneck*, 893 A.2d at 853, 1 Pa. C.S. § 1932. In the absence of any appropriate interest, the personal identification information requested cannot be disclosed, to the Committee or to any individual.

It is unsurprising that Respondents cite only to a single inapposite case related to support their argument. In *Thornburg v. Lewis*, 470 A.2d 952 (Pa. 1983), the Pennsylvania Supreme Court considered a completely different provision of the Administrative Code, 71 P.S. § 240. Under that provision, "the Governor shall make available any other budgetary data as may be requested from time to time by the Majority and Minority Chairman of the Appropriation Committees." Instead of disclosure when it may "be required" (71 P.S. § 272(a)), the provision in *Thornburg* required disclosure "as may be requested." The Court concluded that the Governor had waived his arguments as to whether he, in fact, had a substantive duty to respond to the specific request at issue. *Thornburg*, 470 A.2d at 958 ("For purposes of this appeal, the issue must be considered waived."). Contrary to Respondents' representation, by no means does *Thornburg* support the Respondents' claim that the Department of State has an "absolute duty" to respond to the Subpoena. (Resp. Br. at 30).

Although the Costa Petitioners did not reference it in their brief, the language of the 1929 Administrative Code actually underscores the reasons for the Costa Petitioners' challenge and the Respondents' complete failure to enunciate an appropriate justification for why the information they demand is "required." (Costa Pet. at ¶¶ 50-51).

VIII. COSTA PETITIONERS' CHALLENGE TO A CONTRACT WITH A THIRD PARTY, WHICH THE COMMITTEE FULLY INTENDS TO ENTER, IS RIPE

Respondents readily admit that the Committee "does intend to use a vendor" to analyze the personal, confidential data requested with the Dush Subpoena, regardless of the fact that the vendor would otherwise be forbidden access under Pennsylvania law. (Resp. Br. at 31-32). The Costa Petitioners' challenge to that forthcoming vendor contract is ripe, regardless of the specific contents of any contract that the Committee enters.[17]

The Pennsylvania Supreme Court has rejected similar ripeness challenges. In *Yocum v. Commonwealth Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 237 (Pa. 2017), the Gaming Control Board argued that an employee's constitutional challenge to a statutory employment restriction on board employees was not ripe, because of certain unknowns, specifically it was "unknown how long petitioner will stay in her current job . . . or the subsequent employment petitioner might secure might not even be … within the scope of the statute." The Supreme Court held that, "even though the details of her potential future departure from Board

[17] Respondents cite only two cases for the general proposition that the Pennsylvania Senate or a subset thereof may enter into contracts with third party vendors. If the contract with a third party that the Respondents intend to enter were to be limited to food and beverage service (*Russ v. Com.*, 60 A. 168, 171 (Pa. 1905)) or computer data management of publicly available information (*Precision Mktg., Inc. v. Com., Republican Caucus of the Senate of PA*, 78 A.3d 667 (Pa. Commw. Ct. 2013)), these cases might apply. They are, however, inapposite here where Respondents seek to provide confidential information to a third party, which Pennsylvania law would otherwise bar.

employment are not yet known," the matter was still ripe for adjudication. *Id.* The Court noted that the constitutional challenge was a discrete question of law capable of review. *Id.*

The Supreme Court reaffirmed its holding in *Yocum* regarding ripeness in its October 20, 2021 decision in *Papenfuse*. In that case, the City of Harrisburg argued that a challenge to its local firearm ordinance was not yet ripe because none of the challengers had claimed they had been arrested for violating the ordinance or changed their behavior to comply with the ordinance, and that fears based on potential future harms were insufficient. *Id.* at * 8. The Supreme Court rejected this argument, holding that, again, the challenge was a discrete question of law capable of review.

Consistent with the Court's holdings in *Yocum* and *Papenfuse*, the Costa Petitioners here have asserted a ripe challenge to the contract that Respondents fully intend to enter with a third party. Respondents: 1) intend to subpoena private, confidential information without a proper purpose; and 2) turn that information over to a non-governmental, third party who would otherwise be barred from accessing that information. (Costa Pet. at ¶¶ 50-51). Under the standards set forth in *Yocum* and *Firearm Owners*, the question of whether the Committee has any authority to enter a contract a third-party is ripe for review.

IX. CONCLUSION

For the foregoing reasons, the Costa Petitioners ask this Court to grant its Application for Summary Relief and to deny the Respondents' Application.

Respectfully submitted,

DENTONS COHEN & GRIGSBY P.C.

By: /s/ Clifford B. Levine

Clifford B. Levine
Pa. I.D. No. 33507
Emma F.E. Shoucair
PA I.D. No. 325848
Matthew R. Barnes
PA I.D. No. 328771
625 Liberty Avenue, 5th Floor
Pittsburgh, PA 15222-3152
(412) 297-4900
clifford.levine@dentons.com
emma.shoucair@dentons.com
matthew.barnes@dentons.com

Claude J. Hafner, II
PA ID No. 45977
Ronald N. Jumper
PA ID No. 64346
Shannon A. Sollenberger
PA ID No. 308878
Democratic Caucus
Senate of Pennsylvania
Room 535 Main Capitol Building
Harrisburg, PA 17120
(717) 787-3736
cj.hafner@pasenate.com
ron.jumper@pasenate.com
shannon.sollenberger@pasenate.com
Attorneys for Petitioners

Dated: November 8, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a), I hereby certify that this brief has a word count of 10,320, as counted by Microsoft Word's word count tool.

s/ Clifford B. Levine
Clifford B. Levine

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via PACfile, this 8th day of November, 2021, upon the following:

Michael J. Fischer
Aimee D. Thompson
Jacob B. Boyer
Stephen R. Kovatis
Pennsylvania Office of Attorney General
1600 Arch Street, Suite 300
Philadelphia, PA 19103
mfischer@attorneygeneral.gov
athomson@attorneygeneral.gov
jboyer@attorneygeneral.gov

Keli M. Neary
Karen M. Romano
Stephen Moniak
Pennsylvania Office of Attorney General
15th floor, Strawberry Square
Harrisburg, PA 17120

John C. Dodds
Morgan, Lewis & Bockius LLP
1701 Market Place
Philadelphia, PA 19103
John.dodds@morganlewis.com

Susan Baker Manning
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Susan.manning@morganlewis.com

Aaron Scherzer
Christine P. Sun
States United Democracy Center
572 Valley Road, No. 43592
Montclair, NJ 07043
aaron@statesuniteddemocracy.org
christine@statesuniteddemocracy.org

Matthew H. Haverstick
Joshua J. Voss
Shohin H. Vance
Samantha G. Zimmer
Kleinbard LLC
Three Logan Square
1717 Arch Street, 5th floor.
Philadelphia, PA 19103
mhaverstick@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com
szimmer@kleinbard.com

Tamika N. Washington
LEGIS GROUP LLC
3900 Ford Road, suite B
Philadelphia, PA 19131
twashington@legislawyers.com

Erik R. Anderson
Erin R. Kawa
James John Kutz
Post & Schell PC
17 N. Second Street, 12th Floor
Harrisburg, PA 17101
eanderson@postschell.com
ekawa@postschell.com
jkutz@postschell.com

By /s/ Clifford B. Levine