

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, et al.

Petitioners,

v.

SENATOR JACOB CORMAN III, SENATE PRESIDENT PRO TEMPORE, and
SENATOR CRIS DUSH, et al.

Respondents.

**BRIEF OF THE COSTA PETITIONERS IN RESPONSE TO THE
COURT'S JANUARY 25, 2022 ORDER AND IN SUPPORT OF THE
COURT'S EXERCISE OF ITS EQUITY JURISDICTION**

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I. INTRODUCTION

On September 15, 2021, the Senate Intergovernmental Operations Committee (the “Committee”), led by Committee Chair Senator Cris Dush, issued a subpoena duces tecum (the “Dush Subpoena”) that seeks to compel the Acting Secretary of the Commonwealth (the “Acting Secretary”) to produce several categories of election-related materials from the Pennsylvania Department of State.

The Committee’s Democratic Members (“Costa Petitioners”)¹ brought their action to this Court to prevent violations of the Pennsylvania Election Code and the Pennsylvania Constitution and to protect the rights of the approximately 9 million Pennsylvanians who have registered to vote, including the 6.9 million who voted in the 2020 General Election. The Costa Petitioners’ action was consolidated with those of the Acting Secretary, who seeks to prevent the Subpoena’s enforcement against her, and those of Senator Arthur and Julie Haywood.² The intervening-petitioners (“Intervenors”) joined in the consolidated action to protect the confidential information of all of Pennsylvania voters.³

On October 13, 2021, the Petitioners in the three actions and the Committee Respondents filed cross applications for summary relief (the “Cross

¹ Specifically, the Costa Petitioners are Senators Jay Costa, Senator Anthony H. Williams, Senator Vincent J. Hughes, Senator Steven J. Santarsiero, and the Senate Democratic Caucus.

² The Court ordered the consolidation of these three cases on October 4, 2021.

³ The Court granted the Intervenors’ Application to Intervene on October 26, 2021.

Applications”). With its January 10, 2022 Order, this Court denied the Cross Applications. (“January 10 Order”).⁴ With its January 25, 2022 Order, this Court further directed the parties to submit briefs to address three questions related to the nature of the actions in equity: (1) whether the matters are ripe for review; (2) whether availability of an adequate remedy at law precludes the Court’s exercise of equity jurisdiction; and (3) whether any contempt authority is relevant to the Court’s jurisdiction. (“January 25 Order”). *See* Exhibit A.

Because no adequate remedy at law exists to address and protect the Costa Petitioners’ claims, the Costa Petitioners ask this Court to exercise its equity jurisdiction with the respect to the consolidated actions. The Court’s use of its equity jurisdiction would be consistent with Pennsylvania precedent and would promote an efficient and complete disposition of the issues before the Court.

II. STATEMENT OF THE CASE

A. RELEVANT FACTUAL BACKGROUND

On September 15, 2021, the Committee issued the Subpoena directing the Acting Secretary to produce several categories of material pertaining to the 2020 General and 2021 Primary Elections.

⁴ The Court granted the application of Senate Secretary-Parliamentarian Megan Martin seeking her dismissal from the consolidated actions.

Of greatest concern to the Costa Petitioners are the demands for the full identifying information, including the names, addresses, birth dates, driver's license numbers, and partial Social Security numbers for the over nine million registered voters in the Commonwealth. The Respondents have made clear that they intend to turn this information over to a third-party vendor, whose credentials are in question, for the apparent purpose of analyzing the subpoenaed information in some manner and for unclear purposes. The Republican members of the Committee voted to issue the Subpoena on September 15, 2021. Each of the Democratic members opposed the Subpoena.

1. Petitions for Review and Applications for Special Relief

On September 17, 2021, the Costa Petitioners filed their Petition for Review with this Court, challenging the Subpoena and asking the Court to prevent violation of the Pennsylvania Election Code and the Pennsylvania Constitution and to protect the privacy rights and expectations of Pennsylvania voters. Consistent with the urgency of the issues raised in their Petition for Review, the Costa Petitioners filed an Application for Special Relief on September 22, 2021 and asked the Court to enjoin Respondents from enforcing the Subpoena and from entering into a contract for the intended third-party vendor. The Respondents also

sought summary relief. The parties agreed to an expedited briefing schedule for the Cross Applications.

In the interim, the Costa Petitioners agreed that their Application for Special Relief would be held in abeyance pending this Court's resolution, and the Respondents agreed not to enforce the Subpoena pending resolution and any appeal.

2. This Court's January 10 and 25 Orders

With its January 10 Order, this Court denied the Cross Applications. The January 10 Order emphasized that the legislature's investigative role is broad but "is subject to the limitations placed by the Constitution on governmental encroachments on individual freedom and privacy." See January 10 Order, p. 3, quoting *Commonwealth ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 4 (Pa. 1974).

With its January 25 Order, this Court directed the parties to submit briefs to address its questions regarding ripeness and the extent of the Court's equity jurisdiction to address the issues raised.

The Costa Petitioners submit this brief to address the ripeness of the issues presented to the Court and the necessity and propriety of the Court's exercise of its equitable authority to resolve them.⁵

III. THIS CASE IS RIPE FOR EQUITABLE REVIEW

A. A CONTROVERSY EXISTS WHERE A LEGISLATIVE COMMITTEE ISSUES AN UNCONSTITUTIONAL SUBPOENA.

The doctrine of ripeness “is a judicially-created principle which mandates the presence of an actual controversy.” *Rayada Nurses, Inc. v. Dept. of Labor and Indus.*, 8 A.3d 866, 874 (Pa. 2010). As the Pennsylvania Supreme Court explained, a declaratory judgment action is ripe where “the issues are adequately developed” and the parties will suffer “hardships... if review is delayed.” *See id.* (citing *Tp. of Derry v. Dept. of Labor and Indus.*, 932 A.2d 56, 60 (Pa. 2007)).

In *Annenberg v. Roberts*, 2 A.2d 612, 619 (Pa. 1938), the Supreme Court specifically considered the ripeness of an action that challenged legislative subpoenas. There, a special legislative committee, a non-judicial body, was established to investigate gambling, and issued subpoenas that required the subpoena recipients to produce all records and communications between them and thirty-eight named individuals and fifty-two corporations. *See id.* at 617. In

⁵ The extensive explanation of factual background and legal argument set forth in the Costa Petitioners' Petition for Review, Application for Special Relief, and Cross Application are fully incorporated herein.

seeking to enjoin the subpoenas, the plaintiffs challenged the subpoenas' validity as overly broad. *See id.* at 618-19.

The subpoenas sought an extensive array of the recipients' confidential materials, which amounted to an unconstitutional search and seizure, and placed the recipients in immediate risk of harm. In considering the plaintiffs' request for an injunction to prevent enforcement of the legislative subpoenas, the Supreme Court held that the equitable challenge to a legislative subpoena was timely and not "prematurely brought" because "[u]nder our system of constitutional government it has become established that equity will restrain public officers from acting pursuant to legislation found to be unconstitutional and that relief will be granted on the application of one whose rights are injuriously affected," such as by violation of their constitutional rights. *Id.* at 618. The Court, in *Annenberg*, recognized that the special committee lacked the authority to issue the overly broad subpoenas and emphasized that "[e]quity has jurisdiction to restrain if the committee is without lawful authority[.]". *See id.* at 618-19 The Court elaborated:

A difference is to be noted between an unlawful demand contained in a subpoena duces tecum in cases pending in court and a demand made by a non-judicial body.... [P]roceedings before a non-judicial body are in a different class. Parties aggrieved in such proceedings must also have opportunity for judicial hearing if their rights are to be determined and preserved.... [P]laintiffs are entitled now to challenge them [the demands for documents] and to have them abated and set aside, which is accordingly done.

Id. at 619 (concluding that the legislative committee’s broad demand for private materials and communications was an unreasonable search and seizure in violation of the recipients’ constitutional rights).

B. THE COSTA PETITIONERS’ ACTION IS RIPE BECAUSE THE COMMITTEE HAS ISSUED A SUBPOENA THAT VIOLATES THE PENNSYLVANIA CONSTITUTION.

In bringing their action to this Court, the Costa Petitioners seek to prevent the Committee’s violation of Pennsylvania constitutional law. The Committee, a non-judicial body, issued a broad legislative subpoena seeking to obtain confidential information belonging to 9 million Pennsylvanians, thus placing the constitutionally-protected privacy rights of 9 million Pennsylvanians in jeopardy. The Subpoena seeks to compel production of 9 million Pennsylvanians’ names, addresses, driver’s license numbers, and partial social security numbers, among other private information. The Committee has never presented a factually compelling justification for their efforts at constitutional encroachment.

As in *Annenberg*, this action is ripe because once the Committee issued the Subpoena on September 15, 2021, it infringed on the Costa Petitioners’ and Intervenors’ constitutional rights to privacy and implicated the Committee’s proper authority as a body that may not issue subpoenas that trample on the privacy rights of Pennsylvanians. Once the unconstitutional Subpoena was issued, the Costa Petitioners’ action required the “opportunity for judicial hearing.” *Annenberg*, 2

A.2d 612 at 619. The Costa Petitioners' matter is therefore ripe for this Court's review.

IV. THIS COURT'S EXERCISE OF EQUITY JURISDICTION IS APPROPRIATE.

A. COURTS MAY EXERCISE EQUITY JURISDICTION WHERE NO ADEQUATE LEGAL REMEDY EXISTS.

As a general principle, a court's exercise of equity jurisdiction is unnecessary where the parties can pursue an adequate remedy at law. *See, e.g., Cathcart v. Crumlish*, 189 A.2d 243, 245 (Pa. 1963); *In re Pennsylvania Crime Commission*, 309 A.2d 401, 404 (Pa. 1973). In subpoena actions, an adequate legal remedy exists where: (1) the government cannot punish the subpoena's recipient until the enforcement action's resolution; and (2) the subpoena's recipient will not risk waiver of its legal claims by awaiting the subpoena's enforcement at law. *See Cathcart*, A.2d at 245 (the Supreme Court declined to exercise equity jurisdiction where a specific statutory scheme governed procedures to challenge subpoenas that the Philadelphia District Attorney had issued); *Crime Commission*, 309 A.2d at 404 (holding that equity jurisdiction was unnecessary in a subpoena action where the party issuing the subpoena lacked enforcement power).

The parties to an enforcement action at law are the subpoena's issuer and the subpoena's recipient. *See, e.g., Cathcart*, A.2d at 245 (dispute between the issuing-district attorney and the subpoena's recipients); *Crime Commission*, 309

A.2d at 404 (dispute between the issuing-Crime Commission and the subpoena's recipients).

B. NO ADEQUATE LEGAL REMEDY EXISTS FOR THE COSTA PETITIONERS.

The Costa Petitioners have challenged the Subpoena because of the impact it would have on the privacy rights of Pennsylvania voters. Because the Subpoena is addressed to the Acting Secretary, not the Costa Petitioners or Intervenors, an enforcement action at law would be between the subpoena's issuer (here, the Committee) and the subpoena's recipient (here, the Acting Secretary). *See, e.g., Cathcart*, A.2d at 245 *Crime Commission*, 309 A.2d at 404. The Costa Petitioners and Intervenors would not be parties to an enforcement action, which renders reliance on an enforcement action here not only unavailable to the Costa Petitioners and Intervenors, but would harm the constitutional arguments that they are entitled to make under Pennsylvania law.

The Costa Petitioners and Intervenors have the right to challenge the issuance of a legislative subpoena where the subpoena threatens their constitutional rights. *See, e.g., Lunderstadt v. Pennsylvania House of Rep. Select Comm.*, 519 A.2d 408, 415 (Pa. 1986) (“[W]hen the legislature undertakes to investigate a matter, and in the course thereof it seeks to obtain records in which one has a reasonable expectation of privacy, a subpoena therefor should not issue except

upon a showing of probable cause that the particular records sought contain evidence of civil or criminal wrongdoing”; reversing Commonwealth Court’s order refusing to quash overly-broad legislative subpoena duces tecum); *Camiel v. Select Comm. on State Contract Practices of House of Rep.*, 324 A.2d 862, 866 (Pa. Commw. Ct. 1974) (“[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**”) (emphasis added). Under *Lunderstadt*, the Court must undertake “a balancing of the interests of the legislature versus the interests of individuals in maintaining privacy,” privacy that is constitutionally guaranteed to Pennsylvania citizens. *See Lunderstadt*, 519 A.2d at 412.

This Court’s exercise of equity jurisdiction would protect the Costa Petitioners and the Intervenors from risking waiver of their rights to equitable relief. *Cf. Honey Brook Tp. v. Alenovitz*, 243 A.2d 330, 333 (Pa. 1968) (Pennsylvania Supreme Court held that landowners waived their right to raise zoning defenses where owners had not exhausted claims and defenses before the appropriate tribunal prior to the township’s enforcement action seeking an injunction against them). In that case, the Court held that the landowners should have raised their constitutional challenges before the zoning board on their own initiative instead of waiting until the township sued them before a magistrate. *See id.* Similarly, the Costa Petitioners and Intervenors have no guarantee that they

will not forfeit their equitable claims if they must rely on a Committee enforcement action against the Secretary, an action to which the Costa Petitioners and the Intervenors would not be parties, and their ability to participate would not be clear, despite the potential impact such an enforcement action would have on their privacy rights as voters and, with respect to the Costa Petitioners, their right to seek judicial clarification as to the appropriateness of an on-going “investigation,” being undertaken without disclosure to the members of the Committee and without respect for the requirements of the Pennsylvania Constitution. *See id.*

As set forth in the Costa Petitioners’ Petition for Review, Application for Special Relief, and Cross Application, the Dush Subpoena violates the constitutionally protected privacy of not only the Costa Petitioners, but of 9 million other Pennsylvanians. This case is the precise circumstance where the Court may “restrain public officers [the Committee] to protect a citizen’s constitutional rights **after service and before a confrontation [a legal enforcement action].”** *See Camiel*, 324 A.2d at 866 (emphasis added). Further, as the Committee’s so called “investigation” continues without adequate involvement of the Committee members, including the Costa Petitioners, the threats of malfeasance continue unabated and unchecked. A legal remedy is not only unavailable to the Costa Petitioners and Intervenors here; a lack of equity jurisdiction would be harmful to

their rights under Pennsylvania law because it would risk waiver of their ability to raise these arguments.

The Costa Petitioners' constitutional challenges to the Subpoena, by their nature, require the court to conduct an equitable balancing test. *See Lunderstadt*, 519 A.2d 408, 415 (Pa. 1986) (invalidating overly broad subpoena because the "balance between the protection of the rights of the individual" and preventing "unnecessary restraint upon the State in the performance of its legitimate governmental purposes" weighed in favor of the individuals' rights). This Court, sitting in equity, can better address the governing equitable balancing test than a court strictly sitting in law to enforce a subpoena. Further, the Committee likely would have to file an enforcement action against the Acting Secretary in this Court, since the Acting Secretary represents this Commonwealth's executive branch. *See* 42 Pa. C.S.A. § 761 ("The Commonwealth Court shall have original jurisdiction of all civil actions or proceedings against the Commonwealth government, including any officer thereof, acting in his official capacity").

The prospect of an enforcement action at law is unavailable to the Costa Petitioners and the Intervenors. Further, if the Committee attempts to file an enforcement action against the Acting Secretary, this Court would be the only appropriate venue for that action. As the Court recognized in its January 10 Order, in reviewing the constitutionality of the Subpoena, the Court will be required to

balance the governmental and constitutional interests at play. *See* January 10 Order, p. 3, quoting *Brandamore*, 327 A.2d 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.”); *see also Lunderstadt*, 519 A.2d at 415. Were this Court to dismiss these matters for lack of equity jurisdiction, the result would be a later round of litigation – before this Court and governed by the same legal standards – but without a guarantee that the Costa Petitioners and Intervenors would receive a complete disposition of the significant challenges that they have properly presented to the Court. A denial of equity jurisdiction here is not required by law, would jeopardize the Costa Petitioners and Intervenors’ rights, and would fail to promote judicial economy.

V. THE GENERAL ASSEMBLY’S CRIMINAL CONTEMPT POWER PLACES THE PETITIONERS IN RISK OF IMMEDIATE HARM.

A. THE GENERAL ASSEMBLY MAY INVOKE ITS CRIMINAL CONTEMPT POWER TO ENFORCE THE SUBPOENA.

The General Assembly possesses a potent form of enforcement power through the contempt and criminal contempt statutes. The criminal contempt statute specifically provides: “A person is guilty of a misdemeanor of the third degree if he... neglects or refuses to appear in the presence of either [branch of the General Assembly] after having been duly served with a subpoena to so appear.”

18 Pa. C.S. § 5110. Thus, the General Assembly could seek to hold the Acting Secretary in criminal contempt for non-compliance with the Dush Subpoena by attempting to categorize noncompliance with the Subpoena as “failing to appear” after having been “duly served with a subpoena.” *See id.* *See also Brandamore*, 327 A.2d at 4-5 (affirming the General Assembly’s authority to exercise its criminal contempt power).

B. THE COMMITTEE’S INVOCATION OF CRIMINAL CONTEMPT PROCEEDINGS AGAINST THE ACTING SECRETARY WOULD UNDERMINE AN EFFICIENT AND COMPLETE DISPOSITION OF THESE MATTERS.

The General Assembly’s potential invocation of its criminal contempt power would jeopardize the rights of the Costa Petitioners and Intervenors to raise their constitutional challenges to the subpoena’s constitutional validity, even if indirectly. *Cf. Honey Brook Tp.*, 243 A.2d at 333. The Costa Petitioners and Intervenors would not be parties to an action arising from the Committee’s actions taken against the subpoena’s sole recipient, the Acting Secretary. Like an enforcement action, a criminal contempt matter would be strictly between the Committee and the Acting Secretary. Yet, the claims of the Costa Petitioners, the Acting Secretary, and the Intervenors converge on the material issue governing this consolidated case: whether issuance of the subpoena is constitutionally invalid because it is overly broad under the *Lunderstadt* balancing test. *See Lunderstadt*,

519 A.2d at 415. This Court's exercise of its equity jurisdiction would thus prevent the inefficient fragmentation of these materially similar cases and would allow for the complete disposition of the Costa Petitioners and the Intervenors' claims.

VI. CONCLUSION

This matter is ripe for the Court's exercise of equitable review because no legal adequate legal remedy exists for the Costa Petitioners and the Intervenors. Reliance on a legal enforcement action would also place the Acting Secretary in immediate risk of harm and jeopardize the claims, rights, and defenses presently available to the Costa Petitioners and the Intervenors. This Court's exercise of equity jurisdiction is supported by Pennsylvania law and would promote the efficient and complete disposition of this case. For these reasons, the Court should retain its equity jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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.

Submitted by: Clifford B. Levine

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Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a), I hereby certify that this brief has a word count of 3,148, as counted by Microsoft Word's word count tool.

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I hereby certify that a true and correct copy of the foregoing document was served via PACfile Proof of Service, this 15th day of February, 2022, upon all counsel.

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