

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Senator Jay Costa, Senator Anthony H. Williams,
Senator Vincent J. Hughes, Senator Steven J.
Santarsiero, and Senate Democratic Caucus,
Petitioners,

v.

Senator Jacob Corman III, Senate Pro Tempore,
Senator Cris Dush, and Senate Secretary-
Parliamentarian Megan Martin,
Respondents.

Commonwealth of Pennsylvania, Pennsylvania
Department of State, and Leigh M. Chapman,
Acting Secretary of the Commonwealth of
Pennsylvania,

Petitioners,

v.

Senator Cris Dush, Senator Jake Corman, and the
Pennsylvania State Senate Intergovernmental
Operations Committee,
Respondents.

Arthur Haywood, Julie Haywood,
Petitioners,

v.

Leigh M. Chapman, Acting Secretary of the
Commonwealth of Pennsylvania,
Respondents.

CASES CONSOLIDATED

No. 310 MD 2021

No. 322 MD 2021

No. 323 MD 2021

BRIEF IN SUPPORT OF THE COURT'S JURISDICTION

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INTRODUCTION

These consolidated cases challenge a subpoena issued by the Senate Committee on Intergovernmental Operations to the Secretary of the Commonwealth. At issue, among other things, is whether the Committee can demand personally identifying information for more than nine million Pennsylvania voters despite lacking a proper and compelling legislative purpose.

On January 25, 2022, the Court asked the parties to address three questions related to the Court's jurisdiction: (1) whether these matters are ripe, (2) whether the availability of an adequate remedy at law precludes this Court's exercise of equitable jurisdiction, and (3) whether the General Assembly's contempt power or the criminal contempt statute bear on this Court's jurisdiction.

The Commonwealth Petitioners respectfully submit that this Court has jurisdiction to resolve these consolidated cases. The dispute between the Commonwealth Petitioners and the Committee is ripe for review and no adequate remedy at law exists that would preclude the Court's exercise of equity jurisdiction. The independent authority of the Committee to enforce the Subpoena through civil contempt and detention underscores the importance of judicial review now.

BACKGROUND

On September 15, 2021, the Senate Committee on Intergovernmental Operations issued a subpoena seeking 17 categories of documents from the Secretary of the Commonwealth. Among other material, the Subpoena requested personal information, including driver's license numbers and partial Social Security Numbers, for all registered voters in Pennsylvania.

Following the issuance of the Subpoena, the Commonwealth of Pennsylvania, the Department of State, and the Acting Secretary of the Commonwealth filed a Petition for Review in the Nature of a Complaint in Equity and for Declaratory Judgment, seeking to quash the Subpoena and enjoin the Committee from enforcing it. *See generally* Pa. Pet. for Review in the Nature of a Compl. in Equity and for Decl'y J. (Sept. 23, 2021). The petition contained seven counts alleging that the Subpoena: (1) violated the constitutional right to privacy; (2) violated Pennsylvanians' right to free elections and the right to vote; (3) lacked a legitimate legislative purpose; (4) was issued without proper authority; (5) sought critical infrastructure information protected from disclosure; (6) sought privileged material; and (7) was overbroad. *Id.* at ¶¶ 184-271. Commonwealth Petitioners sought declaratory and injunctive relief to declare the Subpoena unlawful, quash the Subpoena, and enjoin the Committee from enforcing it. *Id.* ¶ 18, Claims I-VII, & Prayer for Relief.

Two other petitions for review and a motion to intervene were filed. Costa Pet. for Review (Sept. 17, 2021); Haywood Pet. for Review (Sept. 26, 2021);¹ LWV Pet. for Review (Oct. 4, 2021). The Court consolidated the three petitions and granted the motion to intervene. Mem. Order (Oct. 26, 2021).

The parties filed a joint application to expedite the consideration of cross-applications for summary relief and to stay the deadline for respondents in the three matters to file responsive pleadings. *See* Joint App. at 4-5 (Oct. 6, 2021). In the joint application, the Committee stated that it would not enforce the Subpoena during adjudication of the applications and any subsequent appeals. *Id.* at 3. On October 26, the Court granted the joint application and stayed the deadline for responsive pleadings. Order (Oct. 26, 2021).

Concurrent with briefing the cross-applications for summary relief, the Commonwealth Petitioners attempted to negotiate with the Committee to narrow or moot portions of the Subpoena by voluntarily producing certain documents. *See* Petitioners' Letter to Respondents' Counsel (Oct. 26, 2021) (Ex. 1). The Committee refused to narrow or withdraw any portion of the Subpoena. *See* Respondents' Email to Petitioners' Counsel (Nov. 1, 2021) (Ex. 2). Despite the Secretary voluntarily providing 3,432 documents responsive to six paragraphs in

¹ The Committee subsequently intervened as respondents in the action brought by the Haywoods.

the Subpoena, the Committee insists it still intends to enforce the entire Subpoena.

Petitioners' Letter re: First Document Production (Nov. 18, 2021) (Ex. 3);

Petitioners' Letter re: Second Document Production (Dec. 24, 2021) (Ex. 4);

Petitioners' Letter re: Third Document Production (Jan. 27, 2022) (Ex. 5);

Respondents' Email to Petitioners' Counsel (Nov. 18, 2021) (Ex. 6).

Following argument before an *en banc* panel, the Court entered a *per curiam* Memorandum & Order denying all applications for summary relief, with the exception of the application filed by the Secretary-Parliamentarian. Mem. & Order (Jan. 10, 2022).² As a result, all claims raised in the consolidated petitions remain pending. No answer has been filed and discovery has not yet begun. To move the case forward, the Petitioners and Intervenor jointly filed an application to lift the stay of the deadline for respondents to file responsive pleadings. *See* Joint. App. at 7 (Jan. 19, 2022).

On January 25, the Court ordered the parties to address three questions related to the Court's jurisdiction:

1. Whether these matters are ripe for review, in light of the holdings in *In re Pennsylvania Crimes Commission*, 309 A.2d 401, 404-05 (Pa. 1973); *Cathcart v. Crumlish*, 189 A.2d 243, 245-46 (Pa. 1963); and *Camiel v. Select Committee on State Contract Practices of the House of Representatives*, 324 A.2d 862, 865-71 (Pa. Cmwlth. 1974). *Cf. Camiel*, 324 A.2d at 866 (citing *Annenberg v. Roberts*, 2 A.2d 612, 618

² The Court entered a separate order the same day granting the Secretary-Parliamentarian's application for summary relief and dismissing her from the case. Order (Jan. 10, 2022).

(Pa. 1938) (commission subpoena duces tecum that on its face attempted an unlawful search and seizure could be restrained in advance of subpoena's enforcement)).

2. Whether the availability of an adequate remedy at law precludes the Court's exercise of equity jurisdiction over a challenge to a legislative subpoena. *See* Pa.R.Civ.P. 234.4 (providing for motion to quash a subpoena, hearing, and protective order); *Cathcart*, 189 A.2d at 245-46; *Lunderstadt v. Pennsylvania House of Representatives Select Committee*, 519 A.2d 408, 410 (Pa. 1986) (motions to quash legislative subpoenas as intrusive and unduly burdensome).

3. Whether the General Assembly's contempt power or the criminal contempt statute bear on this Court's jurisdiction over the petitions for review.

Order (Jan. 25, 2022) (footnotes omitted). Pending a decision on jurisdiction, the Court stayed all discovery and placed in abeyance the joint application to lift in the stay. *Id.*

ARGUMENT

In these consolidated cases, Petitioners ask this Court to uphold fundamental constitutional principles and prevent a legislative committee from seizing Pennsylvanians' private information for no purpose other than to cast doubt on the legitimacy of Pennsylvania's elections. The Court's jurisdiction to block this unlawful demand is clear: The matter is ripe for review, especially in light of the Committee's independent authority to enforce legislative subpoenas, and no adequate remedy at law exists that would preclude the Court's grant of equitable relief.

I. This matter is ripe for review because the Committee has served a subpoena it intends to enforce (Question 1).

The Commonwealth Petitioners' petition is ripe for review because there is an "actual controversy" between the Commonwealth Petitioners and the Committee. *See Bayada Nurses, Inc. v. Com., Dep't of Lab. & Indus.*, 8 A.3d 866, 874 (Pa. 2010). The Committee itself has not argued otherwise. Rather, it has made clear that it fully intends to enforce the entire Subpoena, and no statutory scheme limits the Committee's ability to effectuate its intent or subjects it to judicial review. To the contrary, the Committee, subject to the approval of the full Senate, can enforce the Subpoena independent of any court. This petition, therefore, is necessary to prevent the infringement of fundamental constitutional rights.

Unlike in *Camiel v. Select Comm. on State Cont. Pracs. of House of Representatives*, 324 A.2d 862 (Pa. Commw. Ct. 1974), there is confrontation between the Secretary and the Committee. In *Camiel*, an individual filed a petition in this Court to quash a subpoena *duces tecum* issued by a House of Representatives select committee. *Id.* at 864. But when the petition was filed, a number of open factual questions existed, including whether the select committee would withdraw the subpoena, accept whatever records the petitioner was willing to submit in satisfaction of the subpoena, enforce the subpoena, or agree with the petitioner's constitutional objections. *Id.* at 866. As a result, the dispute between the petitioner and the select committee did not yet present a justiciable issue and

the case was not yet ripe for judicial determination. *Id.* at 865; *see also In re Pennsylvania Crime Comm’n*, 309 A.2d 401, 404 (Pa. 1973) (court lacked jurisdiction until the Pennsylvania Crime Commission chose to enforce its subpoena under the provided statutory scheme, due to “the obvious possibility that the Commission may elect not to enforce its subpoena”); *Cathcart v. Crumlish*, 189 A.2d 243, 245 n.5 (Pa. 1963) (noting that an action to enjoin subpoenas “seem[ed] premature since there always remains the possibility that for one reason or another the district attorney will not bring an enforcement action in the common pleas court” under the provided statutory scheme).

This case suffers from none of these factual ambiguities. The Committee refuses to narrow or withdraw the Subpoena and has been insistent on enforcing it. In October, the Secretary offered to voluntarily produce certain documents to the Committee if the Committee would agree that the Subpoena is moot as to those items and would not seek to enforce those portions of the Subpoena. *See* Petitioners’ Letter to Respondents’ Counsel at 2 (Oct. 26, 2021) (Ex. 1). The Committee refused. *See* Respondents’ Email to Petitioners’ Counsel (Nov. 1, 2021) (Ex. 2) (“[T]he Committee will not agree to withdraw any portion of the subpoena.”). Nevertheless, the Secretary has voluntarily provided the Committee with 3,432 documents responsive to six paragraphs in the Subpoena. *See* Petitioners’ Letter re: First Document Production (Nov. 18, 2021) (Ex. 3);

Petitioners' Letter re: Second Document Production (Dec. 24, 2021) (Ex. 4);
Petitioners' Letter re: Third Document Production (Jan. 27, 2022) (Ex. 5). In
response, the Committee continues to "force[] the issue," *Camiel*, 324 A.2d at 866,
and insist that it intends to enforce the entire Subpoena, *see* Respondents' Email to
Petitioners' Counsel (Nov. 18, 2021) (Ex. 6) ("The Committee did not agree that it
will not seek to enforce the Subpoena in any way."); *see also* Comm. Reply Br. in
Supp. of. Cross-App. for Summ. R. at 56 (Nov. 22, 2021) ("[T]he Court should
specifically enter an order compelling the Acting Secretary to immediately respond
to the Subpoena.").

Second, legislative subpoenas are not subject to a mandatory antecedent
"statutory procedure" that allows a court to test their validity. *Cf. Cathcart*, 189
A.2d at 245; *accord In re Pennsylvania Crime Comm'n*, 309 A.2d at 404. In
Cathcart, subpoena recipients sued to enjoin subpoenas issued by the Philadelphia
district attorney under authority given in the Philadelphia Home Rule Charter.
Cathcart, 189 A.3d at 244. The Supreme Court held that the Court of Common
Pleas lacked jurisdiction because the Charter "prescribes a specific statutory
procedure wherein the validity of subpoena issued under this section may be
tested." *Id.* at 245. Likewise, Pennsylvania law created a "specific statutory
remedy" for the Pennsylvania Crime Commission "to pursue when an individual
refused to obey a Commission subpoena." *In re Pennsylvania Crime Comm'n*, 309

A.2d at 404. The courts lacked jurisdiction to adjudicate the validity of a Commission subpoena “[u]ntil the Commission invokes the aid of a court to enforce compliance.” *Id.*

Here, no mandatory statutory scheme limits the legislature’s power to enforce its subpoenas or subjects legislative subpoenas to judicial review.³ Instead, the “power of the Houses of the General Assembly to vindicate their authority and processes by punishing acts of contempt committed in their presence is inherent in the legislative function.” *Com. ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 4 (Pa. 1974); *see* Pa. Const. art. II, § 11 (“Each House shall have power to determine the rules of its proceedings and punish its members or other persons for contempt or disorderly behavior in its presence, [and] to enforce obedience to its process[.]”). The Committee has independent authority to seek to enforce properly issued subpoenas without intervention by this or any court.⁴

³ As discussed below, 46 Pa. Stat. § 61 establishes a procedure for the General Assembly to enforce subpoenas through civil detention of the contemnor. But the statute is not the source of the legislature’s enforcement authority and the procedure is not mandatory nor subject to ex ante judicial review. *See Com. ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 4-5 (Pa. 1974).

⁴ In light of the litigation, the Committee has voluntarily refrained from exercising its enforcement authority. Joint App. at 3 (Oct. 6, 2021) (“Accordingly, pending disposition of this Application, the Committee agrees that enforcement of the subpoena is stayed. Further, should the Court grant the relief requested herein, the Committee agrees that enforcement of the subpoena will be stayed pending adjudication of the cross-applications by this Court and any subsequent appeal thereof.”).

This authority includes “the power to commit a contemnor to prison.” *Sweeney v. Tucker*, 375 A.2d 698, 710 n.25 (Pa. 1977). If a person refuses to comply with a legislative subpoena, the relevant house can “issue to the sergeant-at-arms a warrant of commitment to the prison of Dauphin county,” which is “authorized and required to receive and confine such delinquent so committed until discharged in due course.” 46 Pa. Stat. § 61; *see Carcaci*, 327 A.2d at 5 (affirming warrant for contempt of the House).⁵

Because the Committee can enforce the Subpoena without first going to court, the Secretary “must [] have opportunity for judicial hearing if [her] rights are to be determined and preserved.” *Annenberg v. Roberts*, 2 A.2d 612, 619 (Pa. 1938) (*per curiam*). Without judicial review, the Secretary will only be able to test “the validity of the demand for documents” at her peril. *Cathcart*, 189 A.2d at 246; *cf. id.* at 245-46 (because the district attorney could not enforce compliance, “appellants are not placed in the unfortunate dilemma of having to disobey the district attorney’s subpoenas at their peril in order to contest their validity”); *In re Pennsylvania Crime Comm’n*, 309 A.2d at 404 (“Failure to comply is not punishable by fine or imprisonment unless it continues after a court has ordered compliance.”). Indeed, the Supreme Court recognized in *Carcaci* that the petitioner

⁵ Although the legislature has independent enforcement authority, “the manner in which a legislative body exercises its inherent power to vindicate its authority and processes must satisfy the requirements of procedural due process.” *Carcaci*, 327 A.2d at 5.

could have avoided the contempt citation by seeking “judicial recourse” in a “court of equity.” 327 A.2d at 56 n.4; *see also Lunderstadt v. Pennsylvania House of Representatives Select Comm.*, 519 A.2d 408, 415 (Pa. 1986) (quashing legislative subpoena prior to enforcement); *Brown v. Brancato*, 184 A. 89, 91-92 (Pa. 1936) (enjoining proposed legislative subpoena prior to issuance).

Finally, the *Camiel* Court expressed concern about exercising jurisdiction when no question had been raised about the select committee’s authority to issue the subpoenas and where a “scant record” meant the Court lacked “sufficient information” about whether any constitutional rights would be infringed. *Camiel*, 324 A.2d at 865-66, 870. Neither defect exists here. The Commonwealth Petitioners have challenged the Subpoena for exceeding the Committee’s authority. Pa. Pet. for Review in the Nature of a Compl. in Equity and for Decl’y J. ¶¶ 222-46. And the Commonwealth Petitioners include the Commonwealth of Pennsylvania and the Department of State, who stand as *parens patriae* to protect the constitutional rights of Pennsylvania citizens to privacy and to vote in free and equal elections. *Id.* ¶¶ 189, 216; *see Commonwealth v. Monsanto Co.*, No. 668 M.D. 2020, 2021 WL 6139209, at *7, *12 (Pa. Commw. Ct. Dec. 30, 2021) (*en banc*) (affirming *parens patriae* standing of the Commonwealth and several Pennsylvania agencies). Commonwealth Petitioners have pleaded detailed facts about how compliance with the Subpoena will infringe on privacy rights and chill

exercise of the franchise, affecting many “citizen[s] constitutional rights.” *Camiel*, 324 A.2d at 866; *see* Pa. Pet. for Review in the Nature of a Compl. in Equity and for Decl’y J. ¶¶ 173-221. But any legislative contempt proceeding would be directed solely at the Secretary. Judicial review by this Court, therefore, may provide the Commonwealth and the Department with their only meaningful opportunity to raise these weighty constitutional questions.

No additional information or factual development will sharpen the confrontation here. The Committee refuses to narrow or withdraw the Subpoena, insists it will enforce the whole Subpoena, and has the authority to seek to enforce it without recourse to the judiciary. As such, the case is “ripe for determination.” *Camiel*, 324 A.3d at 866.

II. The Court can exercise equity jurisdiction over this challenge to a legislative subpoena (Question 2).

No adequate remedy at law exists that could preclude this Court’s exercise of equity jurisdiction over the Commonwealth Petitioners’ petition.

This Court’s authority to enjoin unlawful legislative subpoenas is well established. In *Annenberg*, for example, the General Assembly had created an investigative commission and empowered it to issue subpoenas. 2 A.2d at 614-15. The commission then issued subpoenas to plaintiffs for various documents. *Id.* at 617. The plaintiffs filed bills of equity to enjoin the committee from enforcing the subpoenas on the grounds that “the nature of the documents called for indicates

that the real object of the commission is not to collect information for legislative purposes, but to investigate the personal affairs of plaintiffs,” which “can have no bearing upon any proposed legislation.” *Id.* The Supreme Court agreed, affirming that “[e]quity has jurisdiction to restrain if the committee is without lawful authority in the premises.” *Id.* at 617-18; *see also Lunderstadt*, 519 A.2d at 415 (exercising jurisdiction over and sustaining equitable challenge to quash legislative subpoena); *Carcaci*, 327 A.2d at 5 n.4 (observing that contemnor could have asked the Court to enjoin the legislative subpoena prior to being held in contempt); *Brown*, 184 A. at 91-92 (enjoining legislative subpoena for falling outside of the committee’s authority).

No remedy at law, much less an adequate one, precludes the Court’s exercise of equity jurisdiction here. *Cf. Cathcart*, 189 A.2d at 245-46; *In re Pennsylvania Crime Comm’n*, 309 A.2d at 404. As discussed in Part I, *supra*, *Cathcart* involved a “specific statutory procedure” to test the validity of the Philadelphia district attorney’s subpoenas. *Id.* at 245. Because the district attorney was not authorized to enforce the subpoenas himself, the petitioners would not face “imprisonment or fine” until after a court had ordered compliance. *Id.* The Supreme Court found this “adequate remedy at law” precluded an ex ante equitable remedy. *Id.* Likewise, the existence of a “specific statutory remedy” deprived the court of jurisdiction until the Pennsylvania Crime Commission “invoke[d] the aid

of a court to enforce compliance with its subpoenas.” *In re Pennsylvania Crime Comm’n*, 309 A.2d at 404.

But as explained in Part I, no statutory scheme limits the authority of the General Assembly to enforce its subpoenas, which it can do without recourse to any court. Pa. Const. art. II, § 11; 46 Pa. Stat. § 61; *Carcaci*, 327 A.2d at 4. The Secretary is “not required . . . to test the alleged right” of the Committee by “forcibly resisting [its] unlawful efforts to seize the books and records of [her] administration, or, for defiance of the committee’s subpoenas, by subsequently justifying [her] resistance in proceedings for contempt or in habeas corpus.” *Annenberg*, 2 A.2d at 618 (internal quotations omitted); *see also Cathcart*, 189 A.2d at 245-46 (distinguishing *Annenberg* on this ground). Instead, “equity will restrain public officers from acting” without authority and “relief will be granted on the application of one whose rights are injuriously affected.” *Annenberg*, 2 A.2d at 618.

Pennsylvania Rule of Civil Procedure 234.4 is not an “adequate remedy at law” that could preclude an equitable remedy here. Rule 234.4 applies to subpoenas issued in the context of civil litigation already before a court; here, the Committee purported to issue the Subpoena under its independent legislative authority. But even if Rule 234.4 applied to legislative subpoenas, it does not create a specific remedy or required procedure for challenging the Subpoena. *Cf.*

Cathcart, 189 A.2d at 245-46; *In re Pennsylvania Crime Comm'n*, 309 A.2d at 404. To the contrary, Rule 234.4 allows only for the filing of a *motion* to quash, which requires an antecedent lawsuit in which to file the motion. Commonwealth Petitioners have filed such a lawsuit under this Court's original jurisdiction and asked the Court to quash, and enjoin the Committee from enforcing, the Subpoena. 42 Pa. Cons. Stat. § 761(a)(1), (2) (establishing this Court's original jurisdiction); Pa. R. App. P. 1516 (requiring action under this Court's original jurisdiction to be brought as a petition for review); Pa. R. App. P. 1502 (replacing an action of equity with the petition for review); Pa. Pet. for Review in the Nature of a Compl. in Equity and for Decl'y J. ¶ 18, Claims I-VII, & Prayer for Relief.

In a petition for review of a legislative subpoena, where the legality of the subpoena is the sole issue before the Court, quashing the subpoena and enjoining the legislature from enforcing the subpoena are two sides of the same coin. No statutory or legal remedy deprives the Court of authority to provide this relief.

III. The General Assembly's contempt power demonstrates why this matter is ripe for review (Question 3).

As explained in Part I, *supra*, the General Assembly's independent contempt power underscores why this case is ripe for judicial determination. The Committee has independent authority to seek to enforce its Subpoena without recourse from the judiciary. Pa. Const. art. II, § 11; 46 Pa. Stat. § 61; *Carcaci*, 327 A.2d at 4. This independent authority includes the power to issue a warrant for the Secretary's

arrest and detention in Dauphin County prison. 46 Pa. Stat. § 61; *Sweeney*, 375 A.2d at 710 n.25.

Noncompliance with a valid subpoena could also expose the recipient to criminal liability. 18 Pa. Cons. Stat. § 5110. That the Committee cannot itself criminally prosecute the Secretary under § 5110 does not deprive the Senate of its power to hold the Acting Secretary in contempt without court involvement. *See, e.g., Carcaci*, 327 A.2d 1 (legislative contempt proceeding brought without reference to 18 Pa. C.S. § 5110); H.R. 164, Gen. Assemb., Sess. of 1974 (Pa. 1974) (resolution of the House of Representatives holding Carcaci in contempt pursuant to its constitutional authority and ordering him detained in Dauphin County prison for nine months.).

In either case, the Secretary is “not required” to “subsequently justify[]” her “resistance in proceedings for contempt or in habeas corpus . . . or by suffering [herself] to be indicted.” *Annenberg*, 2 A.2d at 618 (internal quotations omitted). To the contrary, “[e]quity has jurisdiction to restrain if the committee is without lawful authority.” *Id.*

Finally, the Commonwealth Petitioners have also sought relief under the Declaratory Judgments Act, the purpose of which “is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” 42 Pa. Cons. Stat. § 7541(a); *see* Pa. Pet. for Review in the Nature of a

Compl. in Equity and for Decl’y J. ¶ 18, Claims I-VII, & Prayer for Relief . The Supreme Court has “noted as early as 1925 that the enactment [of the Declaratory Judgments Act] was designed to curb the courts’ tendency to limit the availability of judicial relief to only cases where an actual wrong has been done or is imminent.” *Bayada Nurses*, 8 A.3d at 874. Where a controversy is ripe, as it is here, a party need not wait to be subject to contempt proceedings before seeking judicial review.

CONCLUSION

For the reasons set forth above, the Commonwealth Court has jurisdiction to hear this matter.

Dated: February 15, 2022

Respectfully submitted,

Josh Shapiro
Attorney General
Commonwealth of Pennsylvania

/s/ Michael J. Fischer

John C. Dodds (Bar. No. 44423)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Place
Philadelphia, PA 19103
john.dodds@morganlewis.com
215.963.5000

Susan Baker Manning
(appearing *pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
susan.manning@morganlewis.com

Michael J. Fischer (Bar No. 322311)
Chief Counsel and Executive Deputy
Attorney General
Aimee D. Thomson (Bar No. 326328)
Jacob B. Boyer (Bar No. 324396)
Deputy Attorneys General
Stephen R. Kovatis (Bar No. 209495)
Senior Deputy Attorney General
PENNSYLVANIA OFFICE OF
ATTORNEY GENERAL
1600 Arch Street, Suite 300
Philadelphia, PA 19103
mfischer@attorneygeneral.gov

202.739.3000

Aaron Scherzer

(appearing *pro hac vice*)

Christine P. Sun

(appearing *pro hac vice*)

STATES UNITED

DEMOCRACY CENTER

572 Valley Road, No. 43592

Montclair, NJ 07043

aaron@statesuniteddemocracy.org

862.367.6480

christine@statesuniteddemocracy.org

615.574.9108

Attorneys for Petitioner Pennsylvania

Department of State and

Petitioner/Respondent Acting Secretary

of the Commonwealth Leigh M.

Chapman

athomson@attorneygeneral.gov

jboyer@attorneygeneral.gov

215.560.2171

Keli M. Neary (Bar. No. 205178)

Executive Deputy Attorney General

Karen M. Romano (Bar No. 88848)

Chief Deputy Attorney General

Stephen Moniak (Bar No. 80035)

Senior Deputy Attorney General

PENNSYLVANIA OFFICE OF

ATTORNEY GENERAL

15th Floor

Strawberry Square

Harrisburg, PA 17120

Attorneys for Petitioner

Commonwealth of Pennsylvania,

Petitioner Pennsylvania Department of

State and Petitioner/Respondent Acting

Secretary of the Commonwealth Leigh

M. Chapman

CERTIFICATE OF COMPLIANCE

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

Dated: February 15, 2022

/s/ Michael J. Fischer

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CERTIFICATE OF LENGTH

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Excluding matters identified in Pennsylvania Rule of Appellate Procedure 2135(b), this brief is 3,924 words. I have relied on Word's word count function to determine the length of this brief.

Dated: February 15, 2022

/s/ Michael J. Fischer

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Exhibit 1

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COMMONWEALTH OF PENNSYLVANIA

OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

1600 ARCH STREET
SUITE 300
PHILADELPHIA, PA 19103

October 26, 2021

By Email

Matt Haverstick
Joshua Voss
Kleinbard, LLC
1717 Arch Street, Floor 5
Philadelphia, PA 19103

Clifford B. Levine
Dentons, Cohen, Grigsby, P.C.
625 Liberty Avenue
Pittsburgh, PA 15222

Erik Anderson
Post & Schell, P.C.
17 N. Second Street, 12th Floor
Harrisburg, PA 17101

Tamika Washington
Law Offices of Tamika Washington
100 S. Broad Street, Suite 1523
Philadelphia, PA 19102

Keith Whitson
Schnader, Harrison, Segal & Lewis, LLP
120 5th Avenue, Suite 2700
Pittsburgh, PA 15222

Re: *Commonwealth v. Dush*, No. 322 MD 2021 (Pa. Commw. Ct.)

Dear Counsel:

I am writing on behalf of the Acting Secretary of the Commonwealth to follow up on our October 6, 2021, discussion about the Subpoena issued by the Senate Committee on Intergovernmental Operations on September 15, 2021.

As explained in the petition for review and application for summary relief filed in the above matter, the Subpoena is not justified by a legitimate legislative purpose. Rather, it seeks to further a false narrative about the 2020 election in Pennsylvania and undermine confidence in the Commonwealth's electoral process. It is regrettable that, nearly a full year after the 2020 election and after the results in Pennsylvania have been shown to be accurate through numerous court decisions, two audits, and multiple prior legislative investigations, the Committee continues to give fuel to these false narratives.

As we have previously discussed—and as members of the Committee surely are aware—certain of the materials demanded are publicly available without a subpoena. Some could be obtained through a request under the Pennsylvania Right to Know Law (RTKL), and others are available on the Department’s website. Therefore, in an attempt to narrow the issues before the Court, the Department is willing to voluntarily provide certain items to the Committee, provided that the Committee will agree to not seek to enforce the subpoena with respect to those items and that the Committee and all other parties to the litigation expressly agree that such production is voluntary and does not waive any argument as to the illegitimacy of the Subpoena or the requests therein, including those arguments set forth in the petition for review and application for summary relief, and that the Subpoena is therefore moot with respect to the items produced. Furthermore, consistent with the arguments put forward in Petitioners’ pleading in *Commonwealth v. Dush*, the Department will not provide the Committee with protected critical infrastructure information, nor will it produce materials that are protected from disclosure by the RTKL, the deliberative process privilege, or any other applicable privilege.

If all parties agrees to the above conditions, the Department agrees to provide the following materials to the Committee:

Request 1 (*“Any and all communications (emails, letters, notes of calls and/or meetings, or otherwise) from the Department of State to any County Election Director or member of a County’s Elections Board between May 1, 2020 and May 31, 2021.”*)

Subject to the above conditions, the Department will voluntarily provide the Committee with non-privileged, non-protected materials in its possession that are responsive to Request 1.

Request 2 (*“A copy of each and every version of all directives, guidance(s), policies, or procedures in effect at any time between August 1, 2020 and June 30, 2021 relating to elections, election systems, mail-in ballot applications, ballots, voting, compliance with state or federal election laws, polling places, and/or poll watchers.”*)

Subject to the above conditions, the Department will voluntarily provide the Committee with non-privileged, non-protected materials in its possession that are responsive to Request 2.

Request 3 (*“All training materials used to train County election workers, poll workers, poll watchers, Judges of Election, inspectors, clerks, and all persons who staffed voting offices between August 1, 2020 and May 31, 2021.”*)

Subject to the above conditions, the Department will voluntarily provide the Committee with non-privileged, non-protected materials in its possession that are responsive to Request 3.

Request 15 (*“A copy of the certified results for each and every race and/or ballot question on the 2020 General or 2021 Primary elections.”*)

Subject to the above conditions, the Department will voluntarily provide the Committee with the certified results for those races and/or ballot questions from the 2020 General and 2021 Primary Elections that are in its possession. Please be aware that the Department is not responsible for certifying the results of “each and every race and/or ballot question” from those elections, and will only provide certified results for the races and/or ballot questions for which it is responsible for certifying the results.

Request 16 (“A copy of all reports of audits and/or reviews of the SURE system conducted by or for the Department of State between 2018 and the present, including, but not limited to, any audits conducted under 25 Pa.C.S. 1803(a).”)

Subject to the above conditions, the Department will voluntarily provide the Committee with non-privileged, non-protected materials in its possession that are responsive to Request 16. Please be aware that the non-public version of the 2019 report of the Auditor General on the SURE System contains protected critical infrastructure information and will not be provided.

Request 17: (“A copy of the annual reports submitted to the Department in 2021 pursuant to 4 Pa. Code 183.17.”)

Subject to the above conditions, the Department will voluntarily provide the Committee with non-privileged, non-protected materials in its possession that are responsive to Request 17.

Please respond in writing as to whether your clients consent to the above proposal.

Requests 4 through 13 seek detailed personal information, including driver’s license numbers and partial Social Security numbers, for all Pennsylvanians who registered to vote and who exercised their right to vote in either the 2020 General Election or the 2021 Primary Election. Request 14 seeks “all changes to voter records,” which would necessarily entail producing similar personal information about voters in the Commonwealth, including driver’s license numbers and partial Social Security numbers. As explained in the Petitioners’ pleadings in *Commonwealth v. Dush*, this personal information is protected by the privacy rights contained in the Pennsylvania Constitution, and producing it would discourage participation in future elections. Moreover, the Committee has not shown any legitimate basis or compelling interest for demanding confidential information of millions of Pennsylvania voters, nor has it demonstrated that it has the capacity to ensure that such confidential information is adequately protected. Indeed, the Committee has not yet publicly identified the vendor or vendors with whom it apparently intends to share this information, much less informed the Department or the public what, exactly, the vendor will do with any information it receives. As a result, the Department will not be producing the requested materials.

During our previous conversation, counsel for the Committee stated that the Committee is unwilling to narrow the Subpoena in any way. It is unclear why the Committee continues to demand much of the information identified in the Subpoena, and in particular the personal information and other records on the Commonwealth's nine million registered voters, particularly in light of the justifications offered in the Committee's brief in support of its cross-application for summary relief. Should the Committee's position change, we remain willing to engage in additional discussions regarding the Subpoena in the hope of further narrowing the issues before the Court.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mike J. Fischer", with a long horizontal flourish extending to the right.

Michael J. Fischer
Chief Counsel and Executive Deputy Attorney General
Pennsylvania Office of Attorney General

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Exhibit 2

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Boyer, Jacob B.

From: Joshua Voss <jvoss@kleinbard.com>
Sent: Monday, November 1, 2021 3:02 PM
To: Fischer, Michael J.
Cc: Boyer, Jacob B.; Kovatis, Stephen R.; John dodds; Matt Haverstick; 'Levine, Clifford'; Anderson, Erik; 'twashington'; 'Whitson, Keith Edward'; 'Vic Walczak'; Shohin Vance
Subject: [EXTERNAL] RE: Commonwealth v. Dush, 322 MD 2021

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Mike,

Following up on your letter below, the Committee will accept any public records the Department wishes to voluntarily produce, the Committee will agree the Department is not waiving any substantive objections to the subpoena by producing public records, but the Committee will not agree to withdraw any portion of the subpoena. As discussed on our call last week, the Committee expressly reserves the right to pursue full, un-redacted copies any redacted or withheld records.

Please advise when, and in what format, we can expect the production.

Thanks.

Josh

From: Fischer, Michael J. [<mailto:mfischer@attorneygeneral.gov>]
Sent: Tuesday, October 26, 2021 10:07 PM
To: Joshua Voss <jvoss@kleinbard.com>; Matt Haverstick <mhaverstick@kleinbard.com>; 'Levine, Clifford' <clifford.levine@dentons.com>; Anderson, Erik <EAnderson@postschell.com>; 'twashington' <twashington@legislawyers.com>; 'Whitson, Keith Edward' <KWhitson@Schnader.com>; 'Vic Walczak' <vwalczak@aclupa.org>
Cc: Boyer, Jacob B. <jboyer@attorneygeneral.gov>; Kovatis, Stephen R. <skovatis@attorneygeneral.gov>; John dodds <john.dodds@morganlewis.com>
Subject: Commonwealth v. Dush, 322 MD 2021

Counsel-

Please see the attached correspondence in the above matter regarding our previous discussion of the subpoena issued by the Senate Committee on Intergovernmental Operations.

With respect to the Court's order today on the motion to expedite, we propose that we schedule a call this week to discuss how to proceed. At the very least, we believe it makes sense to agree on new dates for the filing of Petitioners' opposition/reply and Respondents' reply, in light of the fact that argument is now scheduled for December. I'll suggest Thursday for a call, so please let me know your availability then.

Best,
Mike

Michael J. Fischer
Chief Counsel & Executive Deputy Attorney General
Pennsylvania Office of Attorney General
1600 Arch Street
Suite 300
Philadelphia, PA 19103
P: (215) 560-2171
C: (215) 347-3929
mfischer@attorneygeneral.gov

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Exhibit 3

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COMMONWEALTH OF PENNSYLVANIA

OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

1600 ARCH STREET
SUITE 300
PHILADELPHIA, PA 19103

November 18, 2021

By Email

Matt Haverstick
Joshua Voss
Kleinbard, LLC
1717 Arch Street, Floor 5
Philadelphia, PA 19103

Re: *Commonwealth v. Dush*, No. 322 MD 2021 (Pa. Commw. Ct.)

Dear Counsel:

I am writing on behalf of the Acting Secretary of the Commonwealth to voluntarily provide the Senate Committee on Intergovernmental Operations with certain election-related documents. This will be the first in a rolling set of voluntary productions. The documents included in today's production are being produced based upon agreement between the parties and under the conditions set forth in Mr. Fischer's October 26, 2021 letter. The Acting Secretary is thus producing these documents on the condition that the Committee will not seek to enforce the September 15 subpoena with respect to the items being produced, that this production is voluntary and does not waive any argument as to the illegitimacy of the subpoena or the requests therein, including those arguments set forth in the petition for review and application for summary relief, and that the subpoena is moot with respect to the items produced. We acknowledge that, pursuant to Mr. Voss's email of November 1, 2021, the Committee reserves the right to pursue full, unredacted copies of any documents not produced or produced in redacted form.

This voluntary production includes the following:

- In response to the category of material described in Request 2 of the subpoena, 16 guidance documents or directives that were in effect between August 1, 2020, and June 30, 2021.

- In response to the category of material described in Request 3 of the subpoena, nine documents that the Department made available for counties between August 1, 2020, and May 31, 2021 to use as additional resources to supplement their own poll worker training.
- In response to the category of material described in Request 15 of the subpoena, the certified election results from the 2020 general election and the 2021 primary election.
- In response to the category of material described in Request 16 of the subpoena, a copy of the Auditor General's December 2019 report following its audit of the Statewide Uniform Registry of Electors.
- In response to the category of material described in Request 17 of the subpoena, a copy of the Department's 2020 Report to the General Assembly titled *The Administration of Voter Registration in Pennsylvania*.

With respect to the category of material described in Requests 1 and 2 of the subpoena, the Department has identified 30 custodians who may have relevant material. Of just the ten custodians most likely to have relevant material, there are roughly 500,000 documents to review. The Department is currently reviewing for all documents that may be relevant to Requests 1 and 2. We will provide a further update about this review.

Sincerely,

/s/ Jacob Boyer

Jacob Boyer

Deputy Attorney General

Pennsylvania Office of Attorney General

cc without enclosures:

Clifford B. Levine

Erik Anderson

Keith Whitson

Tamika Washington

Exhibit 4

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COMMONWEALTH OF PENNSYLVANIA

OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

1600 ARCH STREET
SUITE 300
PHILADELPHIA, PA 19103

December 24, 2021

By Email

Matt Haverstick
Joshua Voss
Kleinbard, LLC
1717 Arch Street, Floor 5
Philadelphia, PA 19103

Re: *Commonwealth v. Dush*, No. 322 MD 2021 (Pa. Commw. Ct.)

Dear Counsel:

I am writing on behalf of the Acting Secretary of the Commonwealth to voluntarily provide the Senate Committee on Intergovernmental Operations with certain election-related documents. This is the second in a rolling set of voluntary productions. Like the November 18, 2021 production, the documents included in today's production are being produced based upon agreement between the parties and under the conditions set forth in Mr. Fischer's October 26, 2021 letter. We acknowledge that, pursuant to Mr. Voss's email of November 1, 2021, the Committee reserves the right to pursue full, unredacted copies of any documents not produced or produced in redacted form.

This voluntary production includes some of the communications from the Department of State to County Election Directors or members of County Boards of Elections between May 1, 2020 and May 31, 2021.

Sincerely,

/s/ Jacob Boyer

Jacob Boyer
Deputy Attorney General
Pennsylvania Office of Attorney General

cc without enclosures:

Clifford B. Levine
Erik Anderson
Keith Whitson
Tamika Washington

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Exhibit 5

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COMMONWEALTH OF PENNSYLVANIA

OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO
ATTORNEY GENERAL

1600 ARCH STREET
SUITE 300
PHILADELPHIA, PA 19103

January 27, 2022

By Email

Matt Haverstick
Joshua Voss
Kleinbard, LLC
1717 Arch Street, Floor 5
Philadelphia, PA 19103

Re: *Commonwealth v. Dush*, No. 322 MD 2021 (Pa. Commw. Ct.)

Dear Counsel:

I am writing on behalf of the Acting Secretary of the Commonwealth to voluntarily provide the Senate Committee on Intergovernmental Operations with certain election-related documents. This is the third in a rolling set of voluntary productions. Like the November 18, 2021 and December 24, 2021 productions, the documents included in today's production are being produced based upon agreement between the parties and under the conditions set forth in Mr. Fischer's October 26, 2021 letter. We acknowledge that, pursuant to Mr. Voss's email of November 1, 2021, the Committee reserves the right to pursue full, unredacted copies of any documents not produced or produced in redacted form.

This voluntary production includes some of the communications from the Department of State to County Election Directors or members of County Boards of Elections between May 1, 2020 and May 31, 2021.

Sincerely,

/s/ Jacob Boyer

Jacob Boyer
Deputy Attorney General
Pennsylvania Office of Attorney General

cc without enclosures:

Clifford B. Levine
Erik Anderson
Keith Whitson
Tamika Washington

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Exhibit 6

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Boyer, Jacob B.

From: Joshua Voss <jvoss@kleinbard.com>
Sent: Thursday, November 18, 2021 5:00 PM
To: Boyer, Jacob B.; Levine, Clifford (clifford.levine@dentons.com); Whitson, Keith Edward (KWhitson@Schnader.com); Tamika Washington (twashington@legislawyers.com); Anderson, Erik (EAnderson@postschell.com)
Cc: Fischer, Michael J.; Matt Haverstick
Subject: [EXTERNAL] RE: Voluntary production on behalf of the Acting Secretary

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Thanks for the response and the link. Separately, I write to object to your letter as written. The Committee did not agree that it will not seek to enforce the Subpoena in any way. To the contrary, pasted below is the full text of my November 1 email, which sets forth the entirety of the Committee's agreement.

Mike,

Following up on your letter below, the Committee will accept any public records the Department wishes to voluntarily produce, the Committee will agree the Department is not waiving any substantive objections to the subpoena by producing public records, but the Committee will not agree to withdraw any portion of the subpoena. As discussed on our call last week, the Committee expressly reserves the right to pursue full, un-redacted copies any redacted or withheld records.

Please advise when, and in what format, we can expect the production.

Thanks.

Josh

From: Boyer, Jacob B. [<mailto:jboyer@attorneygeneral.gov>]
Sent: Thursday, November 18, 2021 4:24 PM
To: Levine, Clifford (clifford.levine@dentons.com) <clifford.levine@dentons.com>; Whitson, Keith Edward (KWhitson@Schnader.com) <KWhitson@Schnader.com>; Tamika Washington (twashington@legislawyers.com) <twashington@legislawyers.com>; Anderson, Erik (EAnderson@postschell.com) <EAnderson@postschell.com>
Cc: Fischer, Michael J. <mfischer@attorneygeneral.gov>; Matt Haverstick <mhaverstick@kleinbard.com>; Joshua Voss <jvoss@kleinbard.com>
Subject: Voluntary production on behalf of the Acting Secretary

Counsel –

Please see the attached letter in regards to the Acting Secretary's voluntary production of documents.

Sincerely,

—
Jacob Boyer
Deputy Attorney General | Impact Litigation Section
Pennsylvania Office of Attorney General
1600 Arch Street, Suite 300
Philadelphia, PA 19103
Desk: (267) 768-3968 | Cell: (215) 528-4057
jboyer@attorneygeneral.gov

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