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,	:	CASES CONSOLIDATED
Petitioners,	:	No. 310 MD 2021
vs.	:	
SENATOR JACOB CORMAN III, SENATE PRESIDENT PRO TEMPORE, SENATOR CRIS DUSH, AND SENATE SECRETARY-PARLIAMENTARIAN MEGAN MARTIN,	:	
Respondents.	:	
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF STATE And VERONICA DEGRAFFENREID, Acting Secretary of the Commonwealth of Pennsylvania,	:	
Petitioners,	:	No. 322 MD 2021

vs.	:	
	:	
SENATOR CRIS DUSH, SENATOR JAKE CORMAN, and THE PENNSYLVANIA STATE SENATE INTERGOVERNMENTAL OPERATIONS COMMITTEE,	:	
	:	
Respondents.	:	
ARTHUR HAYWOOD JULIE HAYWOOD,	:	
	:	
Petitioners,	:	
	:	
vs.	:	No. 323 MD 2021
	:	
VERONICA DEGRAFFENREID, ACTING SECRETARY OF STATE, COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Respondents.	:	

REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY RELIEF PURSUANT TO Pa.R.A.P. 1532(b) AND IN OPPOSITION TO RESPONDENTS' CROSS-MOTION FOR SUMMARY RELIEF BY INTERVENOR-PETITIONERS ROBERTA WINTERS, NICHITA SANDRU, KATHY FOSTER-SANDRU, ROBIN ROBERTS, KIERSTYN ZOLFO, MICHAEL ZOLFO, PHYLLIS HILLEY, BEN BOWENS, THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, COMMON CAUSE PENNSYLVANIA AND MAKE THE ROAD PENNSYLVANIA

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Respondents are poised to violate the constitutional privacy rights of millions of Pennsylvania voters by obtaining their personally identifying information. Black-letter law requires that, before any private personal information can be divulged, Respondents must justify such an intrusion by advancing a compelling governmental interest, serious enough to warrant the disclosure of private, constitutionally-protected information, and demonstrating the request is narrowly tailored to that interest. Respondents have met neither burden.

Respondents barely even attempt to meet their burden. They fail to show any valid interest at all (let alone a compelling one) in obtaining the information they request, which includes partial Social Security numbers and driver's license numbers for millions of voters. Instead, they rely merely on their generic interest in improving the laws and on an unsubstantiated suggestion of unlawful voting in the 2020 election, neither of which comes close to justifying invading the privacy of nine million voters. Nor do Respondents show that a compelled data-dump of voters' home addresses, dates of birth and Social Security and driver's license

numbers is the least intrusive way of satisfying any purported legislative interest. Respondents have failed to establish that they are entitled to the subpoenaed voter information as a matter of law.

Rather than attempting to show that they are entitled to the requested information under the applicable interest-balancing test, Respondents mainly argue that voters have no right to privacy ***at all*** under the circumstances presented here. For example, Respondents suggest that the transfer of voters' information from an Executive Branch department – with longstanding privacy safeguards and a statutory duty to securely maintain that information – to a committee of the Legislature, does not constitute a "disclosure" of information because the Commonwealth government as a whole constitutes a single entity. Respondents' novel arguments, if adopted, would effectively nullify Pennsylvanians' constitutional right to privacy and, at least in the case of the "single-entity" theory, would vitiate the separation of powers. None of Respondents' theories provides any basis for this Court to deviate from the applicable balancing test—a test that, on this record, Respondents cannot meet as a matter of law. The Court should reject Respondents' unsupported demand for Pennsylvania voters' personal information.

I. Intervenors Are Entitled To Judgment Based On Their Constitutionally-Protected Right To Privacy in the Subpoenaed Information.

A. The Pennsylvania Constitution Protects Voters' Right To Privacy in the Subpoenaed Information.

The right to privacy is "the most comprehensive of rights and the right most valued by civilized [people]." *Denoncourt v. Commonwealth State Ethics Comm'n*, 470 A.2d 945, 949 (Pa. 1983) (*quoting Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion of J. Brandeis)). *See also Commonwealth v. Alexander*, 243 A.3d 177, 204 (Pa. 2020) (describing the right to privacy in Pennsylvania as "strong"); *Commonwealth v. Waltson*, 724 A.2d 289, 292 (Pa. 1998) ("enhanced"). Indeed, the Pennsylvania Constitution provides even more robust protection of this right than does the U.S. Constitution. *Pennsylvania State Educ. Ass'n v. Commonwealth Dep't of Cmty. & Econ. Dev.*, 148 A.3d 142, 151 (Pa. 2016) ("*PSEA*") (citation omitted); *accord Alexander*, 243 A.3d at 206. The right to privacy under the Pennsylvania Constitution includes "the right of the individual to control access to, or the dissemination of, personal information about himself or herself." *PSEA*, 148 A.3d at 150. Given these bedrock principles, there can be no reasonable dispute that partial Social Security numbers and driver's

license numbers, in particular, constitute precisely the type of personal information that is protected by the right to privacy.[1]

The personal information Respondents seek here is protected not just by the Constitution but by regulation as well. Respondents point out that ***some*** personal information contained in voting records may be disclosed under certain conditions, such as with "street lists" under 25 Pa.C.S. §1403(a), "computer inquiries concerning individual registered electors" under §1404(a)(1), and public information lists under §1404(c). *See* Respondents' Brief In Support of Answer to Applications for Summary Relief and Cross-Application for Summary Relief (hereinafter Opposition Brief), p. 13-14; *see also* Intervenors' Brief, p. 27 (discussing these provisions). However, the implementing regulations governing those forms of disclosure ***specifically and categorically exclude*** Social Security numbers and driver's license numbers. *See, e.g.*, 4 Pa. Code §183.13(c)(5)(iii) (driver's license numbers and Social Security numbers "***may not be made available***"); 4 Pa. Code §183.14(c)(3) (same). The regulations also prohibit disclosure of home addresses for certain categories of voters. §§183.14(c)(4) and (5). And even voter information that may be made publicly available under some

[1] For a more fulsome description of the constitutional right to privacy in Pennsylvania, and its application to Social Security numbers and driver's license numbers, Intervenors refer the Court to pages 15 to 23 of their October 13, 2021, Brief in Support of Motion for Summary Relief (hereinafter "Intervenors' Brief").

circumstances—which again expressly excludes Social Security and driver's license number information—only is available for limited purposes. *See, e.g.*, 25 Pa.C.S. §1404 (b)(3), (c)(2) (limiting review "only for purposes related to elections, political activities or law enforcement" and requiring the requester to confirm under oath that they will comply with this provision).

Not only is the information sought here private, but Intervenors and other petitioners have presented evidence showing the serious, real-world risks voters would face if the Court permitted disclosure of their private information. *See* Verified Petition for Review, and Exhibits attached to Intervenors' Motion for Summary Relief. In particular, partial Social Security numbers and driver's license numbers can be used to commit identity theft and financial fraud (Exhibit I, ¶¶18-19, 22), and potentially interfere with the right to vote itself. *See also* Intervenors' Brief, p. 13-15, 38-39. Respondents offer the Court no assurance that they have taken steps to protect against those serious risks.

B. Respondents' Proffered Justification For Their Requested Invasion of Voters' Right to Privacy Fails as a Matter of Law.

Under black-letter Pennsylvania law, any attempt to override the right to informational privacy is subject to a balancing test that guards that right from unwarranted intrusion. *See PSEA*, 148 A.3d at 151; *see also, e.g.*, *Easton Area Sch.*

Dist. v. Miller, 232 A.3d 716, 732–33 (Pa. 2020); *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1145–46 (Pa. 2017). That balancing analysis must take into account the rights and arguments of the individuals whose private information is threatened with disclosure. *City of Harrisburg v. Prince*, 219 A.3d 602, 605 (Pa. 2019). To justify their request for millions of voters' personally-identifying information, Respondents must show that "the government interest [in the information sought] is significant and there is no alternate reasonable method of lesser intrusiveness to accomplish the governmental purpose." *Denoncourt*, 470 A.2d at 949; *accord In re T.R.*, 731 A.2d 1276, 1280 (Pa. 1999); *Stenger v. Lehigh Valley Hosp. Ctr.*, 609 A.2d 796, 802 (Pa. 1992).[2]

Respondents fail to satisfy that standard as a matter of law.

[2] Although Respondents appear to acknowledge this test in passing (Opposition Brief, p. 53-54, 62), and even cite to *Denoncourt* and *Reese*, Respondents elsewhere seems to posit a different test—that the information sought merely be "reasonably relevant" to its purpose (p. 85-86, 120). Respondents confuse the standard that applies generally to all legislative subpoenas, which requires that the requested information must be relevant to the issuing body's purpose, with the separate and distinct constitutional balancing test that governs all potential governmental invasions of privacy.

1. Respondents Have Not Demonstrated a Compelling Interest Significant Enough to Override Intervenors' Privacy Rights.

As for their proffered governmental interest, Respondents mainly rely on an alleged general interest in evaluating current law and investigating potential new areas of legislation. *See* Opposition Brief, p. 54 ("in investigating the operation of existing legislation and evaluating the need for new legislation"); p. 62 ("to gather information and review recently enacted election laws to determine whether there is a need for legislative action"); p. 84-85 ("to review recently enacted election laws and whether changes to the same were needed"); p. 120 ("to investigate areas of legislation"). But this generic, ever-present interest is insufficient as a matter of law. If the legislature's generalized interest in evaluating current laws and considering new ones were sufficient to override constitutional rights, then the balancing test that our Supreme Court has repeatedly emphasized would be rendered meaningless, and individuals effectively would have no right to privacy vis-a-vis the legislature. Because it would eviscerate the right to privacy, Respondents unsurprisingly cannot cite any support for their argument.

Respondents also claim that the Subpoena seeks "voter registration information including driver's license numbers and social security numbers of all registered voters because that information is critical to determining whether only

qualified electors are participating in elections" (Opposition Brief, p. 75-76).[3] But on that front, Respondents have presented ***no evidence whatsoever*** to show that their asserted interest has any basis in fact. As Senator Dush previously acknowledged, the Committee's inquiry is in response to unspecified "questions," supposedly raised by unidentified individuals, regarding whether other unspecified and unidentified individuals may have voted without authorization (Intervenors' Exhibit C, 17:15-20). Although they have had numerous opportunities to do so, Respondents have failed to offer any factual basis at all for such questions or allegations, and all of the prior hearings, investigations and litigation around this topic have uncovered no factual basis (Intervenors' Brief, p. 34-35). Respondents have failed to meet their burden of coming forward with ***facts*** showing some specific (let alone compelling) basis for their request for millions of voters' confidential information.[4] To allow an infringement of fundamental constitutional

[3] The Committee's professed desire to explore possible wrongdoing implicates the protections against unreasonable searches and seizures that underlie the right to privacy. And Respondents have offered no evidence that would even approach a standard akin to probable cause *Lunderstadt v. Pennsylvania House of Representatives Select Comm.*, 519 A.2d 408, 415 (Pa. 1986) (opinion announcing Judgment of the Court) (phrasing the burden as one of showing probable cause).

[4] Not only do Respondents fail to come forward with any facts, but at other points in their brief, they actually ***disclaim*** any interest in investigating potential wrongful voting (Opposition Brief, p. 84 n.27 (attempting to distinguish case law on the ground that in those cases the subpoena was investigating wrongdoing, and noting "the foregoing scenarios are simply not at issue here"), p. 63 ("the

rights based on nothing more than unsubstantiated speculation would render those rights illusory.[5] Respondents' request for millions of Pennsylvania voters' personally identifying information, with no factual basis whatsoever to support the intrusion on privacy rights, is precisely the type of "fishing expedition" that the courts prohibit. *Lunderstadt*, 519 A.2d at 413 (opinion announcing Judgment of the Court); *Pennsylvania State Education Ass'n by Wilson v. Commonwealth*, 981 A.2d 383, 386 (Pa. Commw. 2009).

In contrast, Intervenors presented evidence to support their reasonable expectation of privacy in this confidential information, particularly the partial Social Security numbers and driver's license numbers, and the risks of disclosure of that information, which could result in substantial harm. Intervenors also introduced evidence of the ***lack*** of substantiation for the allegations cited by Respondents, including prior hearings, reports of prior investigations and litigation.[6] Respondents say that they "dispute" this evidence, but offer no counter-

information [the Subpoena] seeks is not about criminal wrongdoing by a particular person")).

[5] To be clear, even if unsubstantiated allegations could form an appropriate basis ***for a legislative investigation more generally***, they cannot provide a basis ***for violating constitutional rights*** while conducting that investigation.

[6] Respondents contend that various parties are challenging their "motivations" (Opposition Brief, p. 44), and they try to confuse legitimate legislative interest with motives (p. 81-82). Even if their subjective "motivations" were valid (and as other petitioners point out, there is reason to doubt even that),

evidence that would create a genuine dispute of material fact sufficient to defeat Intervenors' motion for summary relief. And Respondents' reliance on evidence-free allegations certainly is not sufficient to support their cross-motion for summary relief.[7]

2. Respondents Have Not Demonstrated That Their Request For Constitutionally-Protected Private Information is Narrowly Tailored to Achieve a Compelling Governmental Interest.

Respondents have not demonstrated any interest at all, let alone a compelling one. Nor have they come forward with any reason why a massive dump of millions of voters' personally identifying information into the

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mere motivations are never enough to overcome voters constitutional right to privacy. Rather, a governmental body, legislative or otherwise, that seeks private, protected information must come forward with a factually based, compelling need for such protected information. The Committee has not done so here.

[7] Respondents chastise Intervenors and other petitioners for presenting evidence (Opposition Brief, p. 33-34). But Respondents themselves previously agreed that the matter could be resolved by cross-motions for summary relief (October 6, 2021, Joint Application to Expedite, ¶11) and recognize that evidence can be used to support or oppose such cross motions (Respondents' Appendix runs 1276 pages). Indeed, the use of affidavits at the summary judgment stage is commonplace and entirely appropriate. *See* Pa. R.C.P. 1035.1 (defining record for motions for summary judgment to include affidavits and expert reports); Rule 1035.4 ("Supporting and opposing affidavits shall be made on personal knowledge . . ."); *Phaff v. Gerner*, 303 A.2d 826, 828-30 (Pa. 1973) (discussing difference between summary judgment proceedings and relying solely on the pleadings). *See also* 210 Pa. Code §1532, Official Note (comparing Motion for Summary Relief under Rule 1532(b) to the rules of civil procedure relating to motions for summary judgment).

Committee's hands is the least intrusive way to address any such interest. If the purpose of the Committee's investigation is to evaluate the implementation of Act 77 and Act 12, Social Security numbers and driver's license numbers (which voters were required to provide both before and after those Acts) are not at all necessary. If the purpose of the investigation is to search for potential duplicates in the voter registration records, the Department of State can simply identify any duplicates without unnecessarily disclosing to countless unnamed people the personally-identifying information of approximately nine million voters. Whatever the purpose, Respondents have not even tried to explain why a wholesale release of nine million voters' Social Security numbers, driver's license numbers, and other information is necessary.

In challenging whether this issue is even ripe for the Court's determination, Respondents acknowledge that they have not yet identified a vendor to maintain the requested information, or the terms under which such a vendor will be engaged. Their failure to do so demonstrates the dangers of disclosure here, and the lack of any tailoring of Respondents' request in order to minimize potential privacy harms. Respondents seek the confidential information of nine million registered voters but have not yet taken the basic steps necessary to protect that information. They have not determined who will have access to the information, what they will do with the information, the period of time for which they will maintain that information,

where it will be maintained, what protective orders or other security measures if any should be in place, and how the information will be handled at the completion of Respondents' investigation. Respondents cannot possibly show that their demand for voters' confidential information is narrowly tailored and that there are no less-intrusive means available without answering these basic questions. Their cavalier approach to voters' personally-identifying information is not a defense to the Subpoena—it is strong confirmation that they have failed to establish their entitlement to the requested information under the governing legal standard.

Because Respondents cannot satisfy the applicable balancing test as a matter of law, the Court should enter summary judgment in favor of Intervenors.

II. This Dispute is Ripe and Judicial Review is Essential Before Any Data Transfer Occurs.

Respondents try to evade any challenge to their Subpoena by arguing that this dispute is not ripe because Respondents have not yet identified the third-party vendor with whom they will share voters' confidential information. But this matter is assuredly ripe for disposition now.

Respondents' Subpoena currently demands a disclosure of confidential information to the Respondents themselves, which in itself is a violation of the right to privacy. *See supra* Part I *and infra* Part III. That alone is an injury, ***in addition to*** any other harm that may result from the Committee's subsequent,

further sharing of that information. *Easton Area Sch. Dist.*, 232 A.3d at 731-32 (the "right to informational privacy" is protected "in addition" to any "safety concerns" arising from disclosure). *See also In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 629 (3d Cir. 2017) ("Even without evidence that the Plaintiffs' information was in fact used improperly, the alleged disclosure of their personal information created a *de facto* injury. Accordingly, all of the Plaintiffs suffered a cognizable injury."). Intervenors do not need to wait for a second disclosure, or an actual theft of their identity, before seeking to protect their privacy interests. Their challenge to the initial disclosure is ripe now.

Indeed, the Pennsylvania Supreme Court repeatedly has held that our Constitution ***requires*** courts to permit individuals to assert their constitutionally-protected privacy rights, and then balance those rights against the government's demonstrated interests in the information, ***before*** the disclosure of such information. *See, e.g.*, *Easton Area Sch. Dist.*, 232 A.3d at 733 ("Before the government may release personal information, it must conduct a balancing test to determine whether the right of informational privacy outweighs the public's interest in dissemination"); *Reese*, 173 A.3d at 1145–46 ("Before disclosing any section 614 information, however, the State Treasurer must perform the balancing test set forth in [*PSEA*]"). In short, Intervenors need not wait until Respondents

invade their privacy before they may challenge Respondents' efforts to invade their privacy.

III. Respondents' Subpoena Is Not Exempt from the Constitutional Right to Privacy.

Rather than engage with the applicable legal standard and articulate a compelling governmental reason to violate millions of voters' privacy rights, Respondents argue that the right to privacy categorically does not apply to their Subpoena. Each of their novel theories, if adopted, would open a dangerous chasm in Pennsylvanians' cherished constitutional right to privacy. Respondents bear the heavy burden of establishing their novel defenses. They have failed to meet that burden, as their theories are unsupported by the facts, and, in any event, each one fails as a matter of law.

A. The Fact That Some Voting Records are Publicly Available Does Not Vitiate Voters' Right to Privacy.

First, Respondents incorrectly assert that all voter information is publicly available under state law, citing 25 Pa.C.S. §1207(a), which provides generally that voter registration applications are open to public inspection, and 25 P.S. §2648, which provides generally that "documents and records" housed with county election boards may be inspected and copied (Opposition Brief, p. 15-16). For one, those arguments ignore the express prohibitions on disclosing confidential

information such as Social Security and driver's license numbers. *See* 4 Pa. Code §183.13(c)(5)(iii) (Social Security numbers and driver's license numbers "may not be made available"); §183.14(c)(3) (same).[8] For another, they gloss over the fact that Respondents are not seeking to inspect individual paper records (*i.e.*, what the provisions they cite might allow), but instead seek to compel a massive digital data dump containing millions of Pennsylvanians' personal information. The statutes upon which the Respondents rely would not allow a member of the public to obtain a digital copy of millions of voting records and certainly do not afford Respondents any preferential treatment.

And in any case, even if the provisions Respondents cite applied here (they do not), statutes and regulations cannot undo or invalidate the constitutional right to privacy. *Robinson Twsp. v. Pa. Pub. Util. Comm'n*, 83 A.3d 901, 975 (Pa. 2013)

[8] Respondents do not appear to believe their own argument that these provisions render all information they seek—even Social Security and driver's license numbers—public, as numerous times throughout their brief they acknowledge that some of the subpoenaed information is in fact not public. *See, e.g.*, Opposition Brief at 1 ("election-related records, the great bulk of which are subject to public access"); p. 11 ("a meaningful portion of the requests seek public records"); p. 52 ("a large majority of the information sought in the Subpoena is already subject to public access"); p. 65-66 ("there is no reasonable expectation of privacy when it comes to inter-government disclosure of this information or any of the remaining information that is not publicly available").

(citing *Page v. Allen*, 58 Pa. 338, 338 (1868)).[9] In the absence of some compelling reason, government agencies have a constitutional duty to prevent "***all government disclosures of personal information*"** even in the absence of any specific statutory requirement to do so. *Reese*, 173 A.3d at 1159 (emphasis added).[10] Similarly, although the National Voter Registration Act provides that "all records" relating to voting must be publicly available, courts still require redaction of Social Security numbers and driver's license numbers from voter registration records before allowing access to such files. 52 U.S.C. §20507(i)(1); *see, e.g., Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp.3d 553, 562-63 (M.D. Pa 2019) (noting that driver's license numbers are nevertheless protected by other statutes); *Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp.2d 697, 711-12 (E.D. Va. 2010) (requiring redaction of social security numbers), *aff'd*, 682 F.3d 331 (4th Cir. 2012). The broadly-worded statutory provisions Respondents cite did not intend to, and could not, erase the constitutional right to privacy.

[9] Indeed, in construing statutory language, the General Assembly is presumed not to intend to violate the Constitution. 1 Pa.C.S. §1922; *Tremont Twsp. Sch. Dist. v. W. Anthracite Coal Co.*, 73 A.2d 670, 673 (Pa. 1950).

[10] Respondents' alleged distinction between a public records request, on the one hand, and an "official demand," on the other hand, fails for the same reason (Opposition Brief, p. 52). The constitutional right of privacy applies to "all government disclosures of personal information."

B. The Fact that the Secretary of the Commonwealth Has Disclosed Certain Information Under Different Circumstances Does Not Undermine the Right to Privacy.

Respondents next erroneously suggest that prior "disclosures" by the Secretary of the Commonwealth somehow mean that voters no longer have a constitutional right to informational privacy (Opposition Brief, p. 16-25). But the "disclosures" referenced by Respondents are not disclosures at all—and certainly not public disclosures of millions of voters' Social Security and driver's license information. Instead, they were efforts by the Department of State to maintain the database of voter information and, in fact, to ensure the accuracy, integrity and security of the information contained within that database.

For example, Respondents note that county voter registration offices and private vendors have "access" to the SURE system. But in both instances, such "access" is in furtherance of the duty to maintain and protect the integrity of the information housed securely within the SURE system. As Respondents themselves state, "the individual counties are tasked with administering the SURE system," (Opposition Brief, p. 17),[11] and "the SURE system is currently maintained and

[11] Each county has the ability to add, modify or cancel voter registration records for electors who reside within that county. While counties have the ability to search the entire database, they do not administer records outside of their own county primarily to maintain the integrity of the database and for security reasons. Moreover, only certain county employees have access to the driver's license and last four digits of the social security numbers. *See* Declaration of Jonathan M.

supported by a private vendor" (*Id.* at 18). Similarly, the Department of State provides information to the Electronic Registration Information Center (ERIC) and the Auditor General for the purpose of ensuring the accuracy and security of the data it maintains.[12] Such efforts to maintain a secure voter database by providing access to other entities tasked with maintaining the database cannot reasonably be construed as "disclosures" that undermine voters' interest in the confidentiality of their Social Security and driver's license numbers. Rather, such attention to the security, accuracy and functionality of the SURE system confirms that voters are justified in their expectation of confidentiality.

Respondents also refer to the *Applewhite* litigation and argue that "[t]he Department had furnished the data requested by the Subpoena to dozens (if not hundreds) of individuals and entities" in the context of challenges to the Voter ID law (Opposition Brief, p. 20). But that is false. Indeed, contrary to Respondents'

Marks, ¶¶ 7, 23 (Exhibit G to Commonwealth Petitioners' Motion for Summary Relief).

[12] When providing information to ERIC, the Department of State does not share information that would allow ERIC access to individual social security numbers or driver's license numbers. Rather, this information is encrypted and anonymized to protect the confidentiality of that information. *See* ERIC Tech and Security Brief (April 1, 2021), found at: https://ericstates.org/wp-content/uploads/2021/04/ERIC_Tech_and_Security_Brief_v4.0.pdf.

arguments, the *Applewhite* litigation demonstrates the stringent standard required of any party seeking the disclosure of highly confidential personal information.

Applewhite[13] involved a challenge to Pennsylvania's now defunct voter photo-identification law ("voter ID"). The law required voters to show a photo ID from a narrow list of acceptable forms of photo ID in order to vote. A central issue in the litigation involved determining how many Pennsylvania voters did not possess a PennDOT-issued ID, and thus would likely be disenfranchised by the newly-enacted voter ID law (Respondents' Appendix, 842a, 857a, 886a). The court in *Applewhite* eventually allowed petitioners to obtain voter information to answer that question, but only after ***multiple*** attempts to obtain the answer directly from the Department of State or through the use of other data sources, and then only after the adoption of a ***strict protective order*** that was so restrictive only petitioners' expert—not the lawyers, and not the petitioners themselves—was allowed access to the data.

With respect to their need for the information, petitioners in *Applewhite* first attempted over the course of a lengthy evidentiary hearing on their preliminary injunction motion to use survey data and certain public information to determine

[13] Attorneys Walczak and Schneider, who are counsel for Intervenors in this case, were also counsel for Petitioners in *Applewhite.*

how many Pennsylvania voters lacked a PennDOT-issued ID (*Id.* at 857a-858a). When the court noted the lack of precision from this method, petitioners demonstrated that a statistical comparison of the PennDOT and voter registration databases was the best and only way to accurately determine the number of affected voters (*Id.* at 858a-859a). Petitioners asked the Department of State to perform the matching analysis itself (*Id.* at 858a-859a), but the Department refused. ***Only then*** did petitioners seek disclosure of the necessary information in the context of discovery in that pending litigation (*Id.* at 858a, 886a). And Petitioners demonstrated – including through the production of an expert declaration (*Id.* at 899a-903a) – why Social Security numbers and driver's license numbers in particular were critical to the matching process they had to perform in order to create the factual record necessary to pursue their claims (*Id.* at 858a-859a, 868a-869a, 887a). The court agreed and required the production of this information "for use in this litigation only," cautioning that "privacy concerns will be robustly addressed" (*Id.* at 928a-929a).

In particular, the Court, acknowledging that the existing Stipulated Protective Order (dated June 11, 2012) in the case was inadequate to protect the privacy concerns implicated in the production of voters' sensitive personal information, noted that the parties would amend the Stipulated Protective Order to incorporate additional privacy protections (*Id.* at 929a-930a). The parties then

amended the Stipulated Protective Order, and the Court approved the amendments on May 6, 2013 (*Id.* at 931a-946a).[14]

Significantly, these strict security protocols were in place ***before*** the Secretary of State transferred any data. In compliance with the amended protective order, only petitioners' expert and certain of his employees accessed the data sets containing driver's license numbers and partial Social Security numbers. ***None of the lawyers and none of the Petitioners in the case had access to the data.*** Neither the League of Women Voters, its directors, staff or members, or any other Petitioners or their lawyers ever had access to the data (*Id.*, 865a-866a, 931a-932a).[15] Additionally, after performing his analysis of the data, petitioners' expert reported only aggregate results – *i.e.*, the number of voters who did not possess PennDOT-issued IDs; he did not share any confidential personally-identifying

[14] In their Brief, Respondents discuss the original June 11, 2012 Protective Order (Respondents' Appendix, 909a-911a), but chose not to call the Court's attention to the revised protective order, which was much more restrictive than the original and, more importantly, applied to the production of partial Social Security numbers and driver's license numbers (931a-946a).

[15] Therefore, the Committee's claim that "dozens (if not hundreds) of individuals and entities" had access to driver's license numbers and partial Social Security numbers in *Applewhite* is demonstrably false.

information for any individual voter with the Petitioners or their lawyers (958a-1027a).[16]

Judges Simpson and McGinley, who presided over the *Applewhite* litigation, did not deviate from the well-established privacy-rights analysis; they faithfully applied that analysis by insisting that the petitioners demonstrate a compelling need for the private information, an inability to satisfy that need via less-intrusive means and a detailed plan to protect the information produced. This contrast shows the fatal deficiencies in Respondents' arguments. Unlike the petitioners in *Applewhite*, Respondents have not demonstrated any compelling need for the requested voter information, nor shown precisely why the disclosure of driver's license and partial Social Security numbers are necessary to serve that need. Unlike the petitioners in *Applewhite*, Respondents have not set forth basic parameters for

[16] Contrary to Respondents' suggestion, this history shows the steps taken by both petitioners and respondents in that action to protect the right to privacy. As the Department of Transportation itself stated in the *Applewhite* litigation:

> DOT zealously protects the privacy rights of those who entrust personal information with it as part of its driver license and identification card programs. DOS likewise goes to great lengths to protect confidential information that is provided through the voter registration application process. This protection is considered a fundamental mission of both DOT and DOS in view of the fraud and identity theft that can occur when personal information is released.

Brief filed by the Department of Transportation (Respondents' Appendix, 843a).

who will have access to such confidential information, what they will do with it, and how they will safeguard it from misuse or worse—let alone agreed to a protective order prohibiting members of the Committee or their lawyers from accessing the information. *Applewhite* does not support Respondents' position here. Just the opposite.

C. Voters Do Not Waive Their Right to Privacy When They Supply Information on a Voter Registration Application.

Respondents next argue that registering to vote is a voluntary waiver of voters' constitutional right to privacy because voters "voluntarily gave to the government" the information they were required to include in their voter registration applications (Opposition Brief, p. 66, 119). That argument fails for multiple reasons.

For one, Respondents cannot establish waiver as a matter of law. A citizen does not waive a constitutional right unless he or she does so knowingly, intelligently and voluntarily. Where the state requires voters to disclose Social Security numbers or other confidential personal data to register to vote, such disclosure is not a ***voluntary*** waiver of the right to privacy (Intervenors' Brief, p. 27-28). Indeed, it is "intolerable" in our system of laws to suggest that "one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). Yet that is Respondents'

argument: that by exercising one constitutional right (voting), voters necessarily give up another (privacy).

Nor is there any factual basis to conclude that voters knowingly and voluntarily waived their constitutional rights. Respondents offer no such evidence, and as Intervenors' verified pleadings make clear, Intervenors did not agree to dissemination of their private information (disclosed as a precondition to exercising their constitutional right to vote) beyond those necessary to maintain and secure it. *See* Intervenors' Verified Petition for Review, at ¶89. That makes sense, as voters are provided every assurance that the Secretary will maintain this information confidentially (Intervenors' Brief, p. 28-29). Waiver is an affirmative defense as to which Respondents bear the burden of proof. *See* Pa. R. Civ. P. 1030(a); *see, e.g.*, *Wagner v. Knapp*, 2014 Pa. Super. Unpub. LEXIS 2295, at *11-*12 (Oct. 14, 2014) (affirming summary judgment in favor of plaintiff where defendants failed to "put forth evidence to support" their waiver defense). Respondents have not met their burden here.

Respondents also incorrectly suggest that, when voters provide their information on the voter registration form, they sacrifice any reasonable expectation of privacy in that information. But on that point, *Commonwealth v. DeJohn*, 403 A.2d 1283 (Pa. 1979), which held that an individual has a reasonable expectation of privacy in their personal information even when that information is

supplied to a third party, controls. *Id*. at 1287-89 (sharing info with bank did not void privacy interest); *see also Commonwealth v. Melilli*, 555 A.2d 1254, 1258-59 (Pa. 1989) (sharing phone number dialed with telephone company does not void the privacy interest); *Commonwealth v. Shaw*, 770 A.2d 295, 299 (Pa. 2001) (blood test in possession of hospital does not void privacy interest).

Respondents claim that *DeJohn* is distinguishable because it did not involve a lawful subpoena, as here (Opposition Brief, p. 119), but that is a distinction without a difference. Under *DeJohn*, voters have a reasonable expectation of privacy in their personal information, even when in the hands of a third party. A court only can compel production of that information – whether by subpoena or otherwise – where the requesting party satisfies the applicable constitutional balancing test. And as explained already, Respondents do not come close to satisfying that test here.

For all these reasons, there is no basis for a finding of waiver, either as a matter of fact or as a matter of law.

D. The Fact that Respondents Seek Information from Another Government Entity Does Not Eliminate the Right to Privacy.

Finally, Respondents argue, notably without citation to relevant authority, that the government can never violate the constitutional right to privacy when it requests private information, holds private information, or when two government entities share private information. Respondents are wrong. Citizens possess a broad constitutional right to informational privacy regardless of who possesses their information or who requests it. *See, e.g.*, *PSEA*, 148 A.3d at 150.

1. There is No Distinction Between the Government and the "Public" in the Context of the Right to Privacy.

Respondents first posit a distinction between "public access" and "government access" in the context of the right to privacy, suggesting that "government access" does not implicate privacy rights (Opposition Brief, p. 58). *See also* Opposition Brief, p. 51 ("a Senate Committee is not the general public"). But the cases do not support such a distinction. Indeed, the constitutional right to privacy clearly (if not primarily) protects personal information from access ***by government actors***.

Pennsylvania's right to informational privacy is based on the common law, on Article I, Section 1 of the Pennsylvania Constitution, and on Article I, Section 8, which protects against unreasonable searches and seizures. *See, e.g.*, *Stenger v. Lehigh Valley Hops. Ctr.*, 609 A.2d at 800-02; *Commonwealth v. Murray*, 223

A.2d 102, 109-10 (Pa. 1966). Such protections—on which the entire constitutional concept of probable cause is based—are rooted in the Framers' experience with pernicious "general warrants" carried out by British authorities, and their specific desire to limit ***government access*** to citizens' homes, persons and information. Leonard W. Levy, Origins of the Fourth Amendment, POLITICAL SCIENCE QUARTERLY, Vol. 114, No. 1, p. 79 (Spring 1999). *See also* PSEA, 148 A.3d at 349-50 ("This right of privacy typically arises when the government seeks information related to persons accused of crimes or other malfeasance, and requires an assessment of the extent to which the government's demands invade the bounds of the person's subject privacy interest . . ."). . The many cases imposing limits specifically on legislative subpoenas (*i.e.*, government requests for access to information just like the one here) directly contradict Respondents' suggestion that privacy principles do not limit such requests. *Lunderstadt v. Pennsylvania House of Representatives Select Comm.*, 519 A.2d at 415; *Commonwealth ex. Rel. Carcaci v. Brandamore*, 327 A.2d 1, 4 (Pa. 1974); *McGinley v. Scott*, 164 A.2d 424, 431 (Pa. 1960); *Annenberg v. Roberts*, 2 A.2d 612, 617-18 (Pa. 1938). There is no legitimate basis to distinguish requests by government entities from requests by any other persons or entities.

Respondents next argue that the nature of the *recipient* of the request for private information – here, the Department of State – makes a difference because,

Respondents incorrectly posit, citizens have no privacy interest at all in information in the possession of a government entity. This argument flies in the face of the reality that courts consistently have invoked the constitutional right to privacy to protect against disclosures of confidential, personally-identifying information held by government entities. Indeed, much of the law around the right to privacy developed in the context of requests under the Right to Know Law ("RTKL"), which by definition are requests to government agencies. *See, e.g.*, *Easton Area Sch. Dist.*, 232 A.3d at 733; *City of Harrisburg*, 219 A.3d at 619. It also defies elementary civics—constitutions are restraints on *governmental* power. The fact that a Commonwealth agency holds the information does not mean that constitutional rights are thrown out the window.

Respondents suggest that the constitutional right to privacy evaporates where both the party that requests the private information and the party that receives the request are "Commonwealth entities." They implicitly suggest that what they call "inter-governmental sharing" can never result in a violation of constitutionally-protected privacy rights. But again, the constitutional right to privacy does not depend on the nature of the requester or the nature of the recipient of the request, but solely on the disclosure of confidential information. And calling such disclosure "sharing" does not make the unwanted provision of a person's confidential information any less of a disclosure. This especially is so in the

context of a subpoena—a compelled "sharing"—requisitioning voters' private information over the objection of the separate state agency tasked by law with keeping that information confidential and secure.

Respondents offer no authority in support of their novel position that the right to privacy ceases to exist in the face of "inter-governmental sharing." Rather, they cite to a few administrative code provisions stating that the Department of State (and the Secretary) must allow inspection of their books and records (71 P.S. §272(a); 71 P.S. §801), and suggest that those provisions mandate the disclosure of voters' confidential information held by the Secretary (such as Social Security and driver's license numbers) regardless of the voters' interests and constitutional rights. But those code provisions are limited by other code provisions that expressly prohibit the Department of State from making public "any data or information in the possession of the Commonwealth that is declared by law to be confidential." 71 P.S. §280(a).[17] And as previously noted, such provisions cannot override constitutional rights. *See supra* Part III(A).

[17] Respondents' attempts to rely on federal law provisions relating to the sharing of information with Congress by federal agencies are similarly unavailing. Those provisions do not apply on their face because Respondents are not Members of Congress, and the Commonwealth is not the U.S. government. Nor could the statutes they cite help them in any event, as they specifically prohibit "intergovernmental sharing" except in certain enumerated circumstances, 5 U.S.C.

2. Respondents Offer No Support for Their "Single Entity" Theory and It Would Set a Dangerous Precedent.

Not stopping there, Respondents next argue that when two "Commonwealth entities" are involved, those entities should be treated as a "single entity," and therefore, there is no disclosure at all. *See, e.g.*, Opposition Brief, at p. 43 (no "harm" in allowing a "co-equal branch of government" to review).

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

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§552a, and could not mandate disclosure that would infringe upon constitutional rights, as explained above.

proposition. To the contrary, myriad decisions demonstrate that the Constitution protects against government encroachment. *See supra* Part III(D)(1), and Intervenors' Brief, p. 15-17. The Court must reject Respondents' theory.

Respondents cite no authority in support of their argument. And contrary to their suggestion, Pennsylvania "state government" is not a monolith. Rather, the branches of government operate independently from one another. That is by design: "The cornerstone of our republican democracy is the principle of government divided into three ***separate***, co-equal branches that both empower ***and constrain*** one another." *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 435 (Pa. 2017) (emphasis added). *See also Commonwealth v. Sutley*, 378 A.2d 780, 786 (Pa. 1977) ("***separate and autonomous*** branches" (emphasis added)); *L.J.S. v. State Ethics Comm'n*, 744 A.2d 798, 800 (Pa. Commw. 2000) ("***separate,*** equal, ***and independent*** branches of government" (emphasis added)); *Eshelman v. Commissioners of County of Berks*, 436 A.2d 710, 712 (Pa. Commw. 1981) ("three ***separate***, equal, ***and independent*** branches of government" (emphasis added)). *See also Loving v. United States*, 116 S. Ct. 1737, 1743-44 (1996) ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another"); *Kremer v. State Ethics Comm'n*, 469 A.2d 593, 595 (Pa. 1983) (legislature's attempt to impose rules on judiciary held to violate the separation of powers).

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

This litigation itself demonstrates the fallacy of the single-entity theory. If Respondents and the Secretary were a single entity, Respondents would not need a subpoena at all. Further, if all these agencies and branches participating in this litigation were a single entity, they would not need separate counsel. And they would not participate in this litigation as different and discrete parties and amici. But involvement of the various government agencies and branches differ precisely because they serve different functions and have different interests.[18]

[18] As noted elsewhere, Respondents cite to a number of provisions that outline circumstances when the Department of State should allow the General Assembly to inspect its books and records (Opposition Brief, p. 12-16). If the

The Committee plainly views itself as a separate entity with separate interests for purposes of the subject matter of the Subpoena at issue. The Committee established its own separate website, www.paelectioninvestigation.com. The Committee also is contemplating entering into a contract (on its own) with a third-party vendor. To date, Senator Dush has refused to even identify the vendors who are under consideration (Exhibit C, p. 21), and has refused to let other members of the same Committee (let alone from the Executive branch) participate in the vetting process (Exhibit C, p. 20-21 (only Senator Dush and "his team" will select a vendor and enter into a contract with that vendor, and the team consists of Senator Dush's staff and Senate Republication legal counsel)). *See also* Pa. GOP Lawmaker vowed transparency, but negotiations for election probe are private, Pennsylvania Capital-Star (October 20, 2021), at: https://www.penncapital-star.com/government-politics/pa-gop-lawmaker-vowed-transparency-but-negotiations-for-election-probe-are-private/ (noting that Senator Dush does not have to follow the same procurement practices as executive branch offices and quoting a spokesperson for Senator Corman as saying "contracting with the Legislature is a unique circumstance"). Thus, Senator Dush does not even view

Commonwealth were a single entity, why would such provisions be necessary at all?

the Committee, let alone the Commonwealth more generally, as a single entity for purposes of sharing information.

Indeed, Respondents' Opposition Brief demonstrates that they do not believe their own "single-entity" theory. They use the term "inter-government" sharing, rather than "intra-government" (Opposition Brief, p. 52, 66, 67, 111, 119). They also refer to the Committee as a separate "government entity" seeking information from "another government entity" (Opposition Brief, p. 62). *See also* Opposition Brief, at 109 ("this is a unique context where the information is exchanged *between governmental entities*"); p. 111 ("disclosing it to *another government entity* for a legitimate legislative purpose"); p. 118 ("from one state agency to *another state entity*"). Respondents even argue that the Costa Petitioners do not have standing to raise claims that belong to other branches of government (Opposition Brief, p. 34-43). These arguments, acknowledging the obvious distinction between the branches of government, undermine Respondents' claim that all government agencies are a single entity.

For all these reasons, it is not surprising that Respondents can cite no authority to support their "single-entity" theory. Adopting such a theory makes little sense. More importantly, it essentially would cancel voters' constitutional right to privacy entirely.

3. There is No Distinction Between Legislative Subpoenas and Other Disclosure Mechanisms For Purposes of the Right to Privacy.

Respondents try to distinguish controlling precedent by positing a distinction between RTKL requests, on the one hand, and "other requests for documents, such as subpoenas or routine discovery requests," on the other (Opposition Brief, p. 58). But the balancing test set forth in *PSEA* "is applicable to all government disclosures of personal information." *Reese*, 173 A.3d at 1159. *See also In re Fortieth Statewide Investigating Grand Jury in re R.M.L.*, 220 A.3d 558, 570 (Pa. 2019) (discussing privacy interest in context of court proceedings). Respondents point to the policy considerations for allowing discovery in litigation (*Id.* at p. 59), but this matter involves a legislative subpoena, not a court subpoena or discovery request in the context of pending litigation. *Annenberg* and *Lunderstadt* applied the constitutional right to privacy in the specific context of legislative subpoenas, so Respondents' argument is directly contrary to Supreme Court precedent. In any event, whatever policy considerations might support a general rule in favor of broad discovery in the context of ordinary litigation has no application here, where the issue is not entitlement to discovery. Rather, the issue is whether Respondents' have met their burden under the constitutionally required balancing test to demonstrate that the transfer of a massive database containing nine million

citizens' personal information is necessary, and if so whether the request is narrowly tailored. Respondents have failed on both accounts.

Respondents also argue that legislative subpoenas are subject to privacy limitations "*only* when the subpoena's inquiries are directed to particular persons, as opposed to government agencies, and *only* when those subpoenas potentially implicate persons in wrongdoing." (Opposition Brief, p. 84 n.27 (first emphasis in original, second added)). The first attempted distinction merely rehashes Respondents' meritless contentions about the supposed privileged status of "intergovernmental sharing." The second is not a distinction at all inasmuch as one of Respondents' asserted interests is to explore potential wrongful voting (*see supra* Part I(A)), but the case law does not recognize such a distinction in any event. None of the legislative subpoena cases limit themselves as Respondents suggest, nor was the rationale of those cases dependent on these alleged distinctions. To the contrary, these cases make clear that the limitations on legislative overreach apply whenever individual liberties are at stake. *See, e.g.*, *Carcaci*, 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"); *Annenberg*, 2 A.2d at 617-18 ("None of the rights of the individual citizen has been more eloquently depicted and defended in the decisions of the Supreme Court

of the United States than the right of personal privacy as against unlimited and unreasonable legislative or other governmental investigations….").

CONCLUSION

The Committee has not met, and cannot meet, its burden of showing a significant or compelling interest in the constitutionally-protected personal information of nine million Pennsylvanians. The Committee has not identified any factual basis for its asserted interest, offering instead only unsubstantiated allegations, which, as a matter of law, cannot overcome constitutional rights. Nor can the Committee satisfy its burden of showing that its Subpoena is narrowly tailored to meet any legitimate interest. Respondents' efforts to avoid this balancing test are baseless and would seriously undermine voters' constitutional right to privacy. Summary relief is appropriate, and Intervenors request that the Court grant the relief requested in their Petition for Review.

Dated: November 8, 2021

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CONFIDENTIAL DOCUMENTS CERTIFICATION

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

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief in Support of Motion for Summary Relief was filed with the Commonwealth Court of Pennsylvania's PACFile System and is an accurate and complete representation of the paper version of the Brief filed by Intervenors. I further certify that the foregoing Brief complies with the length requirements set forth in Rule 2135(a) of the Pennsylvania Rules of Appellate Procedure as the Brief contains 8,198 words, not including the supplementary matter identified in Rule 2135(b), based on the word count of Microsoft Word 2010, the word processing system used to prepare the brief. It has been prepared in 14-point font.

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