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310 MD 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 310, 322 & 323 MD 2021 (CASES CONSOLIDATED)

SENATOR JAY COSTA, ET AL.,
Petitioners,
v.
SENATOR JACOB CORMAN III, ET AL.,
Respondents.
***
COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Petitioners,
v.
SENATOR CRIS DUSH, ET AL.,
Respondents.
***
ARTHUR HAYWOOD, ET AL.,
Petitioners,
v.
VERONICA DEGRAFFENREID,
Respondent.

BRIEF OF RESPONDENTS SENATOR JAKE CORMAN, SENATOR CRIS DUSH, AND INTERGOVERNMENTAL OPERATIONS COMMITTEE IN SUPPORT OF ANSWER TO APPLICATIONS FOR SUMMARY RELIEF AND CROSS-APPLICATION FOR SUMMARY RELIEF

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I. INTRODUCTION & SUMMARY OF THE ARGUMENT

In this matter, a committee of the Senate *of the Commonwealth of Pennsylvania* issued a subpoena to the Acting Secretary of the Department of State *of the Commonwealth of Pennsylvania*. That is, one part of Commonwealth government wants information from another part of Commonwealth government. The subpoena seeks election-related records, the great bulk of which are subject to public access by ordinary citizens, let alone by persons elected to represent those citizens. And the portion of the records not otherwise readily accessible is information the Department has made available to other public and private entities. Thus, at bottom, the objections here are founded not on actual legal impediments to access, but on faulty alleged "motives."

In the end, divorced from rhetoric, this case is an ordinary government request for information from another part of the same government. It should be treated as such. Accordingly, Petitioners' Applications for Summary Relief should be denied, and the Cross-Application by Senator Jake Corman, Senator Cris Dush, and the Intergovernmental Operations Committee (collectively, "the Committee") should be granted.

II. QUESTION PRESENTED

Is the Intergovernmental Operations Committee entitled to receive, through a Senate subpoena, records held by the Acting Secretary of the Department State?

Suggested answer: yes.

III. STATEMENT OF THE CASE

The genesis of the matter before the Court revolves around the validity and enforcement of a legislative subpoena issued by the Pennsylvania Senate Intergovernmental Operations Committee requesting certain information from Acting Secretary of the Commonwealth Victoria Degraffenreid (the "Acting Secretary") and the Pennsylvania Department of State (the "Department"). In the weeks that followed three separate actions were filed by: (1) a group of Democratic Senators and their legislative caucus (the "Costa Petitioners"); (2) the Commonwealth of Pennsylvania, the Acting Secretary, and the Department; and (3) Arthur and Julie Haywood (the "Haywoods"). These actions were subsequently consolidated by Order of this Court dated October 4, 2021.

A. Act 77 of 2019 and Act 12 of 2020

On October 31, 2019, Governor Wolf signed into law Act 77 of 2019. Just a few short months later, on March 27, 2020, the Governor likewise signed into law Act 12 of 2020. Act 77 made "significant changes" to the Election Code. *In re Major*, 248 A.3d 445, 447 (Pa. 2021). It "created for the first time in Pennsylvania the opportunity for

all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on Election Day[.]" *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020). With Act 12, the Election Code was further revised, permitting, among other things, use of the Act 77 mail-in voting procedures in the June 2020 primary election and elections thereafter. *In re November 3, 2020 Gen. Election*, 240 A.3d 591, 595-96 (Pa. 2020). Overall, the changes to the Election Code made by Act 77 and Act 12 were "substantial," *see id.*, representing a wide-scale experiment in voting procedures previously not used by Pennsylvania voters or implemented by Pennsylvania election officials.

The changes to the Election Code were first stress-tested during the June 2020 presidential primary. But the effect of the changes to the Election Code from the new Acts were put on full display—and full dispute—with the November 2020 presidential election. *See generally id.* Indeed, in dozens of lawsuits filed between June and December of 2020, the State Republican and Democratic parties, along with their respective voters and candidates, challenged various aspects of the Commonwealth's electoral scheme. In the end, the November 2020

General Election resulted in increased civic engagement, producing record voter turnout; but it also engendered a record number of election-related legal challenges. *See* Kathryn Boockvar, Esq., *PA Elections 2.0: Lessons Learned and Where Do We Go from Here?*, Pa. Bar Inst., PBI No. 2021-11377, Ch. 1, § 1(I), at 5 (2021).

More recently, in the May 2021 municipal primary, Pennsylvania conducted its third election under the new electoral system. As a result of these elections, Pennsylvanians now have a body of data—from both high- and low-turnout municipal primaries to a record-turnout and highly contentious presidential general election—against which to assess Act 77, Act 12, and the Election Code generally. But only if that data is scrutinized by the body able to do something about it (*i.e.*, the General Assembly) can such a review yield meaningful results.

B. The September 9, 2021 Committee Hearing

To that end, on September 9, 2021, the Committee, chaired by Senator Cris Dush, convened a hearing for the express purpose of examining the need for potential remedial legislation related to Act 77 and Act 12. Most of the pertinent facts critical to the pending Applications for Summary Relief are relayed in Senator Dush's opening

statement during that hearing. Thus, that statement is set forth in large part here:

> SENATOR DUSH: Today's hearing and the investigation we are conducting in this committee are not about President Trump as some have – as some reports in the news have implied.
>
> This investigation is not about overturning the results of any election, as some would suggest. That horse is out of the barn as far as this investigation is concerned.
>
> Rather, this investigation is about looking intensely into the general election held November 2020 and the primary election held in May of 2021, to evaluate our election code is working and to confirm whether or not these things and their worth -- if there were things that need to be changed in the law to make our elections run better for everyone.
>
> It's particularly important that we perform these reviews as an aid in determining – determining if legislative changes are necessary now because the 2020 general election and '21 primary represent some of the first elections under Act 77 of 2020 [sic] and Act 12 of 2021 [sic]. I don't believe anyone would argue that Act 77 significantly changed how Pennsylvania conducts its elections at the municipal, county, and state levels of government.
>
> Consequently, the impacts and execution of our election code must be looked in – looked at to determine if further legislation is needed to correct any ambiguous sections, confusing sections, and/or sections that our sister branch of government deemed unconstitutional. That is our job as the legislative branch.
>
> ***

> We don't always see the impacts of the laws we create beforehand. We don't always see the second and third order impacts of what will happen before we make that vote.
>
> In those cases, we need to go back and investigate those impacts to improve the law. This is what we are doing here.
>
> The legislature did not fully see the impacts of 77 – Act 77 and what they would do to our electoral system, particularly when combined with a pandemic and how the people of Pennsylvania would feel about it before it was passed. Now we're going back to take a look and see if anything needs to change.

State PFR, Ex. B at 2:11-10:3 (Committee Sept. 9, 2021 hearing).

A review of legislation pending at the time of the hearing confirms the widespread interest in improving the Commonwealth's election laws. Specifically, within a nine-month period, over thirty bills to amend the Election Code have been introduced in the Senate alone.[1] Indeed, the Costa Petitioners are the prime sponsors of at least ten such proposals.[2]

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[1] Importantly, the fact that there has been so many proposed bills on these issues—none of which have been successfully enacted to date—demonstrates the significance of and need for ongoing investigatory work by the Legislature. Moreover, even if a bill were to be fully passed and enacted, it would be absurd to suggest that no further legislative investigation or activity on the resulting statute would ever be necessary.

[2] S.B. 59; S.B. 104; S.B. 128; S.B. 171; S.B. 309; S.B. 346; S.B. 404; S.B. 585; S.B. 862; S.B. 868.

As to the Committee's power to conduct investigations and the nexus between the information sought and potential legislative action, Senator Dush continued:

> Senate Rule 14 governs committee actions. While there may be details contained in it, Rule 14 specifically states, the standing committee is authorized to require public officials – "A standing committee is authorized to require public officials and employees and private individuals to appear before the standing committee for the purpose of submitting information to it." It goes on to say that this is necessary, as we discussed earlier, to enable us to write good and effective legislation because we need information to make the best decisions we can.
>
> This is also referred to as an investigation. It's not a criminal investigation, but rather an investigation to gather and study evidence on a particular topic. This hearing is on the impacts of Act 77 on the Pennsylvania elections.
>
> ***
>
> It cannot be disputed that elections are subject -- are a subject on which the legislation is appropriate. Our United States Constitution provides at Article I, Section 4, that at times – that the times, places, and manner of holding elections for senators and representatives are to be prescribed by the state legislatures.
>
> Our Pennsylvania Constitution contains an entire article, Article VII, on elections and specifically contemplates in Section 6, the passage of laws, regulating the holding of elections, placing certain parameters on those laws, and specifying the General Assembly's role in the passage of those general laws on elections. This committee, therefore, is clearly gathering information on a subject on which the legislature is permitted to enact laws.

> So with all that being said, this is why we find ourselves here today. To – continuing to investigate if our election laws are correct as written or if they need to be modified.

State PFR, Ex. B at 13:18-16:17. With regard to the need for remedial legislation, Senator Dush noted:

> Our big evidence that we need to be modified is the very fact that so many court cases were filed and litigated over the November 2020 election. Most of these cases were filed because the parties alleged an ambiguity in the law that related to the – that needed to be clarified and resolved for the operation of whatever – whatever upcoming election existed.
>
> Our sister branch of government ultimately decided there were ambiguous – ambiguous sections, confusing sections and/or unconstitutional sections.
>
> Therefore, we're going to gather as much evidence as necessary to figure out what our election laws need to be and to restore the faith of Pennsylvanians in that election system.

State PFR, Ex. B at 16:18-17:8.

After the above statement, the September 9 Committee hearing commenced; near the end of the hearing, Senator Dush noted for the record that Acting Secretary Degraffenreid was invited to testify, but declined. State PFR, Ex. B at 86:13-18, 87:15-19. Instead, the Acting Secretary submitted a letter, setting forth her rationale for refusing to testify, which letter was made part of the Senate record. State PFR, Ex.

B at 95:19-20 (letter attached to Committee Appendix at 0002a-0004a).[3] Secretary Dush then put on the record the various questions the Committee would have asked the Acting Secretary had the Acting Secretary appeared. State PFR, Ex. B at 88:14-95:3.

C. The September 15, 2021 Committee Hearing

After the Acting Secretary refused to participate in the September 9 hearing, the Committee called a second hearing on September 15, 2021, to consider whether to issue a subpoena for records that would begin to answer the Committee's questions. State PFR, Ex. C. As with the September 9 hearing, Senator Dush again stated on the Senate record the purpose of the legislative investigation and the purpose of the proposed subpoena:

> SENATOR DUSH: It has been made plain that the Department of State and Acting Secretary Degraffenreid are not willing to participate in this body's investigation into the 2020 general election and 2021 primary election and how the election code is working after the sweeping changes of Act 77 of 2020.
>
> In order to determine the necessity and scope, in terms of legislative action, it is essential that the Legislature have

[3] For convenience of the Court, the Committee has compiled, and uniformly numbered, various materials in an Appendix contemporaneously filed with this Brief. All materials in the Appendix are subject to judicial notice, as explained throughout this Brief.

> access to the relevant information in regarding -- in regard to the aforementioned elections.

State PFR, Ex. C at 4:10-21 (Committee Sept. 15, 2021 hearing).

Thereafter, the Committee fully debated the subpoena, and then voted 7-4 to issue it. The subpoena (hereafter, "the Subpoena") was duly issued and served on the Acting Secretary on September 15, 2021. State PFR, Exs. D-E.

D. The Subpoena

The Subpoena contains 17 specific requests for records, which have been covered at length in the opening briefs. But one critical aspect of the Subpoena has been downplayed: a meaningful portion of the requests seek ***public records***. Indeed, ***all parties***—including proposed intervenors and amici—acknowledge as much in their respective briefs. *See* Costa Brief at 26; State Brief at 30; Haywood Brief at12; Proposed Intervenor Brief at 28; House Dem. Amicus Brief at 6. The Acting Secretary's concession on this point is particularly worth emphasizing: "some of the information that the Subpoena demands ***is available to everyone*** on the Department's website, or through a Right-To-Know request." State Brief at 30 (emphasis added).

Despite every single filer acknowledging the public records at issue with the Subpoena, the Committee has received ***not one*** record from the Acting Secretary. Request 15 in particular underscores the absurdity of this state of affairs; it seeks: "A copy of the certified election results for each and every race and/or ballot question on the 2020 General or 2021 Primary elections." If the Acting Secretary, and the other parties, are to be believed, even this unquestionably public information cannot be had by the Committee.

E. Statutory Scheme Governing the Access to Information Contained in the Subpoena

Reduced to its essence, Petitioners' chief objections to the Subpoena is that it requests the name, address, date of birth, driver's licenses numbers (the "DLNs"), and the last four digits of voters' social security numbers (the "Partial SSNs"). However, under the Pennsylvania Administrative Code, all information under the custody of the Department is expressly subject to review and inspection by any committee of the General Assembly. Moreover, most of that data may be obtained by members of the public with minimal effort—and ***all*** of it is subject to inspection.

1. The Administrative Code of 1929 and related provisions

To begin, the Administrative Code of 1929 provides that "[t]he Department of State shall have the power and its duty shall be … : [t]o permit any committee of either branch of the General Assembly to inspect and examine the books, papers, records, and accounts, filed in the department, and to furnish such copies or abstracts therefrom, as may from time to time be required[.]" 71 P.S. § 272(a).[4] A nearly identical obligation is imposed by a statutory provision first enacted in 1791, which remains in effect today and is codified at 71 P.S. § 801, *see* Act of March 12, 1791, 3 Sm.L. 8, § 1.

2. Access to information under state statutes

In addition to the express statutory authority granted to the General Assembly and its committees to access the Department's records, robust public access to materials related to elections and voters is also guaranteed under State and Federal law. To begin, much of the objected-to data is available pursuant to Pennsylvania's voter registration statute (the "Voter Registration Law"). In this regard, it is important to distinguish between: (1) information that counties compile

[4] Act of April 9, 1929, P.L. 177, art. VIII, § 802.

in an easy-to-use medium, regularly update, and must make readily available to any qualified elector; and (2) voter registration records that are not published or kept for regular public access, but nevertheless, are public records subject to disclosure.

The first overarching class of publicly available materials include "street lists" and "public information lists." Specifically, under Section 1403, "not later than the 15th day prior to each election," counties are required to prepare street lists for each election district or precinct, which must contain "the names and addresses of all registered electors as of that date" and be arranged "[b]y streets and house numbers[,] [a]lphabetically by last name of each registered elector[,]" or "[i]n a manner whereby the location of the elector's residence can be identified." 25 Pa.C.S. § 1403(a). Once compiled, upon request, copies of these street lists must be distributed "to officials concerned with the conduct of elections[,] … political parties and political bodies[, or] candidates" free of charge,[5] and may also be distributed to "organized bodies of citizens" for a "reasonable fee." In addition to street lists, each

[5] *Hessley v. Campbell*, 751 A.2d 1211, 1215 (Pa. Cmwlth. 2000) (holding county was required to provide street list to political entity free of charge).

county must also "provide for computer inquiries concerning individual registered electors." 25 Pa.C.S. § 1404(a)(1). The system established by the county must, at a minimum, "contain the name, address, date of birth and voting history" of all registered electors within the county, *id.*, but may not include "the digitized or electronic signature" or unique computer-generated registration number of the registered elector. *Id.* § 1404(a)(3). Furthermore, upon request, the counties are obligated to "provide paper copies of the public information lists … to any registered elector in this Commonwealth within ten days of receiving a written request accompanied by payment of the cost of reproduction and postage." *Id.* § 1404(c)(1). In short, therefore, under Sections 1403 and 1404, counties are required to implement measures that allow qualified electors to obtain the name, address, date of birth, and voting history of every registered voter with only minimal effort and cost.

Other provisions, however, permit the public to access a much broader range of information. In particular, under Section 1207 of the Voter Registration Law, certain documents, including "[o]fficial voter registration applications[,]" must be "open to public inspection."

25 Pa.C.S. § 1207(a).[6] Furthermore, under the Pennsylvania Election Code, all "documents and records in [the] custody" of a county election board, with certain exceptions not implicated here, may be "inspected and copied by any qualified elector of the county during ordinary business hours[.]" 25 P.S. § 2648.

F. Previous Instances of Election Data Disclosures

Not only is information requested in the Subpoena publicly available under State law, but public records also demonstrate that ***all*** of that data, including the DLNs and Partial SSNs, have been released by the Commonwealth and the Department of State to other entities on multiple occasions.

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[6] Voter registration applications—at least since 2002—have requested, among other identifying information, the voter's DLNs and SSNs. *See* 4 Pa. Code § 183.1; *see also* 42 U.S.C. § 1583(a)(5)(A)(i) and (iii). A copy of the most recent version of the voter registration application form approved by the Department is attached in the Appendix at 1222a-1225a. This Court can take judicial notice of that application, as it is a "public record[] maintained on the Department [of State]'s website." *In re Dawkins*, 98 A.3d 755, 759 (Pa. Cmwlth. 2014). Moreover, as the Dauphin County Court of Common Pleas, sitting as the Commonwealth Court, has recognized, courts may take judicial notice of application forms used by Commonwealth agencies. *See State Bd. of Podiatry Examiners v. Lerner*, 43 Pa. D. & C.2d 133, 135 (Dauphin C.P. 1967) (taking judicial notice of the application used by the Department of State's Bureau of Professional Licensure); *see generally Hosp. Mgmt. Corp. v. Commonwealth*, 171 A.3d 936, 942 n.8 (Pa. Cmwlth. 2017) ("Prior to the creation of Commonwealth Court, the Court of Common Pleas of Dauphin County served some functions akin to those served by the present Commonwealth Court, and we view those decisions as established precedent of this Court.").

1. To every county in the Commonwealth

A central component of the Voter Registration Law was the creation of a unified voter registration database throughout the Commonwealth. In furtherance of that goal, the statute provided for the creation of the Statewide Uniform Registry of Electors ("the SURE system") to serve as "the statewide database of voter registration maintained by the Department of State and administered by each county." *In re Morrison-Wesley*, 946 A.2d 789, 793 n.4 (Pa. Cmwlth. 2008), *aff'd sub nom. In re Nomination Pet. of Morrison-Wesley*, 944 A.2d 78 (Pa. 2008); *see also* 25 Pa.C.S. § 1222. As a result, most (if not all) of the objected-to data now resides in the SURE system, which contains, among other things, voter names, voter history, dates of birth, DLNs, and the Partial SSNs. 4 Pa. Code § 183.1 (definition of "personal information"); 4 Pa. Code § 183.4(b). Because the individual counties are tasked with administering the SURE system, each of the sixty-seven county voter registration offices has broad access to this central repository. *See* 25 P.S. § 1222(c); 4 Pa. Code § 183.4; *see also In re Morrison-Wesley*, 946 A.2d at 793 n.4.

2. To private vendors maintaining the SURE system

The SURE system is currently maintained and supported by a ***private*** vendor who has full access to the ***personal information*** maintained in the system. Indeed, on December 20, 2020, the Commonwealth of Pennsylvania entered into a multi-year contract with a South Dakota vendor named BPro, Inc. to support the SURE system. *See* BPro, Inc. Contract (Dec. 28, 2020) ("**THIS CONTRACT** is for the provision of **Statewide Uniform Registry of Electors (SURE) System**…") (Appendix at 0009a, complete contract at 0006a-0608a).[7] Notably, as reflected in the contract itself, that agreement was executed with the approval of the Attorney General as to its "form and legality[,]" (Appendix at 0011a), in accordance with the Commonwealth Attorneys Act. *See* 71 P.S. § 732-204(f). BPro, per the contract, will entirely replace the current SURE system with its own suite of products, and

[7] A*vailable at* https://patreasury.gov/transparency/e-library//ContractFiles/588822_DGS_4400023325_ContractFile.pdf. Contracts between the Department of State and its vendors are posted on the Department of Treasury's website pursuant to Chapter 17 of the Right-to-Know Law. *See* 65 P.S. § 67.1701 (requiring submission of certain contracts to the Treasurer); *see also* 65 P.S. § 67.1702 (requiring the Treasurer to make such contracts available on its website). Because the contract is a public record, the Court can take judicial notice of it. *See, e.g.*, *In re Dawkins*, 98 A.3d at 759 (taking judicial notice of "public records maintained on the Department [of State]'s website").

has been given access to *all of* the data in the SURE system: "Our plan for Pennsylvania is to extract as much data as possible from the state repository and then fill in any missing pieces from each of your 67 county databases. Data that may only reside in county systems would include images, signatures, and transactional history." (Appendix at 0380a & 0394a.) The data BPro is extracting expressly incudes driver's license numbers, dates of birth, and partial social security numbers. (Appendix at 0423a & 0479a.)

The BPro contract is *not* the first time a private vendor has had access to the SURE system; the system has in the past been maintained and supported by a private Maryland vendor.[8] *See* Diverse Technologies Corporation Contract (DTC) (2014-2017) (selected pages in Appendix at 0610a-0833a).[9] That contract was entered into in response to Request for Quotations 6100026485, which expressly noted the vendor would receive "full or partial social security numbers, driver's license numbers,

[8] The above instances of private vendors maintaining the SURE system are not intended to be exhaustive, but merely illustrative. In fact, given that Act 3 of 2002, which established the SURE system, contained detailed provisions governing procurements necessary for the "development, establishment and implementation of the [SURE] system," other private vendors likely have had access to the system since its inception nearly 20 years ago. *See* Act of Jan. 31, 2002, P.L. 18, § 3.

[9] *Available at* https://patreasury.gov/transparency/e-library//ContractFiles/285672_PO%20Notice%20to%20Proceed%20(R).pdf.

home addresses, home and cellular telephone numbers, personal email addresses, and other confidential personal identification information and data." (Appendix at 0639a.)[10] In its technical proposal, DTC made specific reference to access to driver's license and social security numbers. (Appendix at 0698a.)[11]

3. To the League of Women Voters

The Department has also furnished the data requested by the Subpoena to dozens (if not hundreds) of individuals and entities in connection with litigation related to statutory proof of identification provisions. *See* Act of March 14, 2012, P.L. 195, No. 18 ("Voter ID Law"). Specifically, in 2012, the League of Women Voters, which now seeks to intervene to prevent compliance with the Subpoena, and others (the "LWV Petitioners") commenced an action against the Department of State and the Secretary of the Commonwealth. *See Applewhite, et al. v. Commonwealth, et al.*, 330 M.D. 2012 (Pa. Cmwlth.).[12] In that case,

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[10] *Available at* https://patreasury.gov/transparency/e-library//ContractFiles/285672_6100026485%20SURE%20RFQ%20Final.pdf.

[11] *Available at* https://patreasury.gov/transparency/e-library//ContractFiles/285672_DTC%206100026485%20Technical%20Submittal_Redacted.pdf.

[12] The relevant filings from that matter are in the Appendix at 0835a-1027a. It is well-settled that courts can take judicial notice of the publicly available record in other proceedings. *See In re McFarland's Est.*, 105 A.2d 92, 97 (Pa. 1954) (taking judicial notice of proceedings instituted fifteen years earlier in a different matter); *see also Lycoming Cty. v. Pennsylvania Lab. Rels. Bd.,* 943 A.2d 333, 335 (Pa.

the LWV Petitioners sought "the complete records of all registered voters in the Commonwealth stored in the SURE database, including Social Security numbers, and the complete records of all individuals 17 years of age or older to whom [the Commonwealth] has issued a new or renewed Pennsylvania driver's license or non-driver photo ID, including Social Security numbers." Pet.'s Br. at 3 & Ex. A, *Applewhite*, 330 M.D. 2012 (Pa. Cmwlth. Apr. 15, 2013) (Appendix at 0859a; 0880a-0881a). These records, the LWV Petitioners explained, were critical to an accurate assessment of the number of voters who might be impacted by the Voter ID Law. (Appendix at 0858a.)

The Department **voluntarily produced all of the information requested for the millions of voters in the SURE database**, including the DLNs, except for the Partial SSNs, the disclosure of which, it contended, was prohibited under the federal Driver Privacy Protection Act. *See* 18 U.S.C. §§ 2721-2725. (Appendix at 0835a-0836a; 0838a-0854a.)

Cmwlth. 2007) ("[I]t is well settled that this Court may take judicial notice of pleadings and judgments in other proceedings where appropriate.").

Ultimately, this Court agreed that the LWV Petitioners were entitled to all of the SURE system information they had requested, including the Partial SSNs, and by Order dated April 29, 2013, instructed the Department to produce the "Voter Table; Name Table; Street Table; CityZip Table; Address Table; VoterID History Table; Votes History Table; DOT drivers or non-drivers identification numbers to the extent available in the SURE database; and, the last four digits of SSN without the need for further randomization or encryption." (Appendix at 0929a.) According to the LWV Petitioners' expert witness, a computerized file of all the requested information from the SURE system was supplied **within one week** of the April 29 Order. (Appendix at 0959a, ¶ 1 ("The Pennsylvania Voter Registration file ('SURE Database') was received on May 6, 2013, and contained the names, birthdates, last four digits of Social Security Number ('SSN'), addresses, and license numbers of all registered voters in Pennsylvania.").)[13]

[13] Assuming the production was designated as "Confidential Information," it was subject to certain data-security measures guaranteed by a Stipulated Protective Order approved by this Court on June 11, 2012. (Appendix at 0909a-0922a; as modified at 0931a-0932a.) Even so, however, under the Protective Order, the information could be made available to all parties, their counsel (including "all partners, associates, secretaries, paralegal assistants, and employees of such

4. To the Electronic Registration Information Center

Pennsylvania is a member-state of the Electronic Registration Information Center (ERIC), which is a non-profit corporation "with the sole mission of assisting states to improve the accuracy of America's voter rolls and increase access to voter registration for all eligible citizens." *See Electronic Registration Information Center*, https://www.ericstates.org, (last visited Oct. 21, 2021). ERIC advises that each member, like Pennsylvania, submits to ERIC "at a minimum its voter registration and motor vehicle licensee data. The data includes names, addresses, date-of-birth, last four digits of the social security number." *Id.* The Auditor General has specifically noted Pennsylvania's membership in ERIC and encouraged the Department of State to make additional use of ERIC's services. *See* Auditor General, *Performance Audit Report—Pennsylvania Department of State, Statewide Uniform Registry of Electors (SURE)*, at 48 n.74, 58 (Dec. 2019) (hereafter, SURE

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counsel"), any person "employed or consulted by counsel for litigation management purposes, including but not limited to, third-party photocopy or imaging services contactors[,]" and "[a]ny independent expert or consultant who is retained for the purpose of assisting counsel in [that] action." (Appendix at 0913a-0914a (definition 4); 0914a, ¶ 6.)

Report) (full SURE Report at Appendix at 1029a-1220a; cited pages at 1084a and 1094a).[14]

5. To the Auditor General

In 2018 and 2019, Auditor General DePasquale performed a performance audit—at the Department of State's express request (Appendix at 1187a; Interagency Agreement)—of the SURE system. In the course of his audit, the Auditor General was given access to the SURE system, including "the SURE electronic files of all currently registered voters and the history of all of the changes made to voter records during" the audit period. (Appendix at 1039a; 1187a, ¶ 1(b) ("DOS shall … to the extent feasible, provide the Auditor General with read-only, point in time access to the SURE system data").) The data provided by the Department of State to the Auditor General included voters names, dates of birth, driver's license numbers, and partial social security numbers (among other things). (Appendix at 1064a.)

[14] A*vailable at* https://www.paauditor.gov/Media/Default/Reports/Department%20of%20State_SURE%20Audit%20Report%2012-19-19.pdf. The Court can take judicial notice of the Auditor General's report. *See Springdale & Wilkins Townships v. Mowod*, 352 A.2d 194, 199 (Pa. Cmwlth. 1976) ("We are permitted to take judicial notice of the Report of the Auditor General."), *decree rev'd on other grounds*, 376 A.2d 983 (Pa. 1977).

Of note, the Auditor General, based on having this data, was able to identify *thousands* of instances where single voters had multiple entries in the SURE system, which duplicate entries the Auditor General concluded "could potentially allow a voter to vote more than once in an election." (Appendix at 1064a-1066a.)

IV. ARGUMENT COMMON TO ALL PETITIONS

A. To the extent Petitioners' arguments are based on the premise that the Senate cannot conduct an investigation or cannot issue a subpoena to the Acting Secretary, that premise is contrary to the Pennsylvania Constitution.

The Pennsylvania Constitution sets forth a foundational principle about our government: "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Pa. Const. art. II, § 1. The "legislative power" referenced in the Constitution, "in its most pristine form," is "the power 'to make, alter and repeal laws.'" *Blackwell v. Com., State Ethics Commn.*, 567 A.2d 630, 636 (Pa. 1989), *on reargument*, 589 A.2d 1094 (Pa. 1991). An "essential corollary" of this power to legislate is the "power to investigate." *Com. ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 3 (Pa. 1974). The power to so inquire "extends to every proper subject of legislative action." *Carcaci*, 327 A.2d at 3. And that power to investigate can be exercised by the legislature through, among other means, subpoenas. *See* Pa. Const. art. II § 11; 46 P.S. § 61 ("Each branch of the legislature shall have the power to issue their subpoena, as heretofore practiced, into any part of the commonwealth[.]"); 18 Pa.C.S. § 5110

(providing that failure to comply with a duly served legislative subpoena constitutes a misdemeanor of the third degree); *see also Annenberg v. Roberts*, 2 A.2d 612, 616 (Pa. 1938); *Camiel v. Select Comm. on State Contract Practices of H.R.*, 324 A.2d 862, 865-66 (Pa. Cmwlth. 1974); *Examination of Reports of Insurance Companies*, 64 Pa. D. & C.2d 627 (Office of Att'y Gen. 1973); Senate Rule 14(d)(3). Moreover, it is well-settled that the power of investigation—having been reposed in each chamber of the General Assembly—may be exercised by any of its committees. *See, e.g.*, *Camiel*, 324 A.2d at 865.

In this matter, all parts of the foregoing foundational principles are present. To begin, the Senate, through the Intergovernmental Operations Committee, is analyzing whether to make, alter, or repeal election laws. It is doing so through a factual investigation. That investigation is being conducted in part by subpoena. And the subject matter of the investigation—elections—is not only *arguably* within the Senate's power, but also *constitutionally committed* to the Senate's (and House's) purview in multiple sections. *See* Pa. Const. art. VII, §§ 1, 2, 3, 4, 6, 9, 11, 13, 14; *see also* U.S. Const. art. I, § 4, cl. 1. In fact, as previously mentioned, dozens of bills proposing amendments to the

Election Code are currently pending in the Senate, including at least ten that have been introduced by the Costa Petitioners.

Hence, though either lightly acknowledged or implicitly rejected by the Petitioners, *cf.* State Brief at 27; Costa Brief at 19; Haywood Brief at 14-16; Proposed Intervenors Brief at 39-41, the foregoing principles generally foreclose many of the objections to the Subpoena. Indeed, stated simply, the underlying presumption of this dispute is *not* that the Senate cannot perform this investigation, but that it *can*. Petitioners bear a heavy burden to show otherwise.

B. To the extent the claims suggest the validity of the Subpoena is the sole issue before the Court, those claims fail because the Committee also has an unrestricted statutory right to information from the Department of State.

Not only does the Committee have a *constitutional* right to solicit information from the Acting Secretary of the Department of State, but also it has an absolute *statutory* right to do so.

In fact, under two provisions of Title 71 of the Unconsolidated Statutes, the Acting Secretary and the Department share a duty to provide records to *any* committee of the General Assembly upon demand. For instance, Section 272 (Section 802 of the Administrative

Code) commands that the Department of State "shall have the power ***and its duty shall be***: (a) To permit any committee of either branch of the General Assembly to inspect and examine the books, papers, records, and accounts, filed in the department, and to furnish such copies or abstracts therefrom, as may from time to time be required[.]" 71 P.S. § 272 (emphasis added). That provision finds a companion elsewhere in Title 71 in specific reference to the Secretary, which provision states: "The following duties be enjoined on the secretary of the commonwealth … The books, papers and accounts of the secretary shall be open to the inspection and examination of committees of each branch of the legislature, and secretary shall furnish such copies, or abstracts, therefrom, as may from time to time be required." 71 P.S. § 801. Notably, these provisions are mirrored in the Senate Rules, which state that "[i]n order to carry out its duties, each standing committee is empowered with the right and authority to inspect and investigate the books, records, papers, documents, data, operation and physical plant of any public agency in this Commonwealth." Senate Rule 14(d)(2).

Against the foregoing Title 71 provisions—***none of which are cited in any movant's brief***—the dispute here absolutely does not rise and fall with the vitality of the Subpoena alone. To the contrary, under these provisions, the Acting Secretary has an absolute duty to respond to requests for information from the Committee—by subpoena *or otherwise*. *See Thornburgh v. Lewis*, 470 A.3d 952, 957-58 (Pa. 1983) (holding Governor was required to respond to information demanded by Minority Chairman of Senate committee under Administrative Code provision providing access to the information). Thus, insofar as Petitioners' claims concern purported procedural defects with the Subpoena, vindication on those arguments does not complete the analysis. To the contrary, Title 71 would and does further justify the Committee's information demands.

C. To the extent the claims are predicated on what *might* happen *if* this data is given to a third party vendor, those claims are not ripe.

Each Petition for Review appears to be predicated in part on what *might* happen if the data subpoenaed is given to a vendor, *see* Costa PFR ¶ 110; State PFR ¶ 218; Haywood PFR ¶¶ 44-47; State Brief at 38;

Costa Brief at 27; Haywood Brief at14-15; Proposed Intervenors Brief at 25-26, but such claims are not yet ripe for review.

"Ripeness is defined as the presence of an actual controversy. The ripeness doctrine requires an evaluation of the fitness of the issues for determination, as well as the hardship to the parties of withholding judicial consideration." *In re Penneco Env't Sols., LLC*, 205 A.3d 401, 403 (Pa. Cmwlth. 2019) (citations and internal quotations omitted). "[T]he doctrine of ripeness concerns the timing of a court's intervention in litigation. The basic rationale underlying the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1217 (Pa. Cmwlth. 2018) (citations and internal quotations omitted).

This case is quintessentially unripe, at least in material part. Specifically, all objectors before the Court seek relief related to what might happen if an unidentified vendor gets access to the information under an as yet unsigned contract. No party has identified the terms of the contract or the security controls of the vendor; they did not because they *cannot*. While admittedly the Committee does intend to use a

vendor, the Committee has not done so yet. Thus, it is wildly premature for this Court to opine on the vendor-related claims before the metes and bounds of the relationship are even subject to basic facts (*really basic* facts, such as who it is and what the contract says). *See Alaica v. Ridge*, 784 A.2d 837, 843 (Pa. Cmwlth. 2001) ("Because plaintiffs' constitutional claims are both fact intensive and premised on events that may never occur, those claims are not at present 'fit for judicial review.'"). When the cement is set on these details, an actual controversy may arise. But, so far, the parties have simply been guessing what the controversy might be and this Court should decline the invitation to partake in this game of conjecture.[15]

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[15] Even assuming *arguendo* this issue was ripe for review (which it clearly is not), it is indisputable that the Senate or its component "Caucus" parts, and particularly the Committee, have the power and authority to contract with a third-party vendor and, upon receipt of the subpoenaed information from the Department of State, make the information available to that vendor. Indeed, Petitioners cite to no Senate Rule or other legal authority that prohibits the Senate or the Committee from entering into a contract with a third-party vendor to aid and assist in the data received from the Department, nor can they. To the contrary, it is routine and common practice for the Senate to enter into such third-party vendor contracts to assist the Senate in the performance of its legislative function and the administration of its legislative business, as is the case here. *See Russ v. Com.*, 60 A. 169, 171 (Pa. 1905) (holding Senate committee on military affairs had power to enter into contract with third-party to provide food and beverage at monument dedication for General U.S. Grant); *Precision Mktg., Inc. v. Com., Republican Caucus of the Senate of PA/AKA Senate of PA Republican Caucus*, 78 A.3d 667, 675 (Pa. Cmwlth. 2013) (holding majority caucus of the Senate was entitled to sovereign immunity in breach of contract suit brought by third-party vendor to provide computer consulting and programming services to caucus). And, in negotiating any

D. Petitioners' application should be denied to the extent the Court needs to rely on the appended "evidence."

Despite moving for summary relief before any discovery has even begun (let alone been completed), the various Petitioners append a host of "evidence" that is absolutely disputed; thus, to the extent this "evidence" is material to the Court's analysis, summary relief must be denied.[16] To illuminate, summary relief can only be granted "if a party's right to judgment is clear *and no material issues of fact are in dispute*." *Hosp. & Healthsystem Ass'n of Pa. v. Com.*, 77 A.3d 587, 602 (Pa. 2013) (quotations removed; emphasis added). A few of the many examples from the filings now before the Court show why the record is disputed. For instance, the Petitioners rely on multiple declarations—some purportedly factual, some purportedly "expert"—to support their claims for relief. *See* Costa Brief at 2, 5, 7, 17-19, 22, 24 (relying on DePasquale declaration); State Brief at 23, 24, 42, 44, 58 (relying on Marks declaration); State Brief at 40, 41, 43-47, 53, 57-59 (relying on Ferrante declaration); State Brief at 55 (relying on Arkoosh, Bloomingdale,

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contract with a third-party vendor, the Senate can and will, as it has done in the past, adequately address any legitimate security or confidentiality concerns.

[16] None of this "evidence" is necessary or material to the legal issues properly before the Court, and hence the Court can and should simply ignore it.

Charles, and Ellis-Marseglia declarations); Proposed Intervenors Brief at 10, 11, 13, 14, 20, 24, 25, 36, 38 (relying on Haldeman declaration); *see generally* Haywood Brief at 2-3 (discussing various facts not of record or in Haywood PFR). None of these declarants has yet been subject to examination during a deposition, nor—to the extent the declarants claim themselves to be experts—have their statements been subject to the discovery permitted under Rule of Civil Procedure 4003.5 or subject to examination and refute from a counter-expert.

Hence, just based on the various declarations alone—and without belaboring the Court with the obvious defects of relying on the other so-called evidence (including absolute hearsay)—the applications cannot be granted if the Court considers such "evidence" material to the legal analysis. *See Pennsylvania Protec. & Advoc., Inc. v. Dept. of Educ.*, 609 A.2d 909, 911 (Pa. Cmwlth. 1992) (denying summary relief where affidavits demonstrated disputed material facts).

V. ARGUMENT IN *COSTA V. CORMAN*

A. The Costa Petitioners lack standing.

As a threshold matter, the Costa Petitioners are not entitled to relief because they have not articulated the requisite legal interest—

either as legislators, or as individual voters—relative to any of their three claims and, thus, cannot establish their standing.

It is axiomatic that "[p]rior to judicial resolution of a dispute, an individual must as a threshold matter show that he has standing to bring the action." *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 659 (Pa. 2005). To establish standing, the party must have an interest in the cause of action that is: (1) "substantial," so as to "surpass[] the common interest of all citizens in procuring obedience to the law[,]"; (2) "direct," which means that the "asserted violation and the harm complained of" are causally linked; and (3) "immediate," such that "the causal connection is not remote or speculative." *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1215 (Pa. Cmwlth. 2018) (*en banc*).

1. The Costa Petitioners lack standing in their legislative capacities.

As there is no "special category of standing for legislators[,]" legislators who bring an action in their official capacity must satisfy the same criteria as any other litigant. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). The Costa Petitioners cannot satisfy the elements of

standing with respect to any of their claims and, thus, are not entitled to relief.

With regard to Count I, which alleges that the Committee is seeking to hold a "*de facto* election contest" in violation of the Judiciary's exclusive jurisdiction over contested elections, *see* Costa PFR ¶ 81, even assuming *arguendo* a review of the materials enumerated in the Subpoena could somehow constitute an "election contest"—which it cannot—the "contest" would affect the interests of the Judiciary, whose powers are allegedly going to be usurped, and/or the specific elected officials, whose election would purportedly become the subject of the contest. But the Costa Petitioners are not the Judiciary, and have failed to explain how any of the interests unique to them, as legislators, would be affected—let alone impaired.

Nor do the Costa Petitioners allege that their election—or, in the case of the Senate Democratic Caucus, the election of any of its members—would be the subject of the "*de facto* election contest." Accordingly, setting aside the numerous legal flaws in their assertions, *see infra*, the Costa Petitioners have failed to allege a concrete and particularized interest in the forthcoming "*de facto* election contest"

they aver. In short, the Costa Petitioners' interest in forestalling the purported election contest is indistinguishable from "the common interest of all citizens in procuring obedience to the law[,]" *Phantom Fireworks*, 198 A.3d at 1215, and, thus, cannot confer standing. *Accord Fumo v. City of Philadelphia*, 972 A.2d 487, 501 (Pa. 2009) (holding legislators lack standing "in actions seeking redress for a general grievance about the correctness of governmental conduct").[17]

Turning to Count II, which alleges that the Subpoena invades the exclusive authority of both the Auditor General and the Secretary of the Commonwealth to conduct "audits," the Costa Petitioners similarly lack standing. Insofar as the authority of either the Auditor General or the Secretary has been usurped or diminished, the injury is to those respective officers—not the Costa Petitioners' legislative powers and responsibilities. As such, the Costa Petitioners are seeking nothing more than "redress for a general grievance about the correctness of governmental conduct[,]" which is insufficient to confer standing on

[17] Because the Costa Petitioners have failed to satisfy the principal element of standing, further analysis of the remaining factors is unnecessary. But even if some harm to the Costa Petitioners' legislative powers could be gleaned from their generalized allegation, given the remote nature of their claim, the injury is neither direct nor immediate.

anyone. *See Fumo*, 972 A.2d at 501 (holding legislators, like all other litigants, lack standing in cases involving such generalized grievances).

Similarly, even assuming *arguendo* that compliance with the Subpoena would violate the statutory provisions referenced in Count III, *see* 25 Pa.C.S. §§ 1101, *et seq.*, the Costa Petitioners' legislative interests would not be impacted. Specifically, in terms of the governmental interests involved, that statutory scheme concerns the relationship between counties and the Department of State; it does not touch or concern the legislative power. *Compare* 25 Pa.C.S. § 1103 ("This part applies to all counties."), *with* 25 Pa.C.S. § 1108 ("The [D]epartment [of State] shall administer this part."). As such, the Costa Petitioners have failed to allege *any* injury to the legislative power—let alone one that is "a discernible and palpable infringement on their authority as legislators" that would afford them standing. *Fumo*, 972 A.2d at 501.

2. The Costa Petitioners lack standing in their personal capacities.

The Costa Petitioners also lack standing to maintain this action in their individual capacities. Assuming the Costa Petitioners seek to rely (in whole, or in part) on taxpayer standing in pursing this action as

voters, a taxpayer may be able to challenge a governmental action even without having a substantial, direct, and immediate interest if: (1) conduct would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of matter are beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no other persons are better situated to assert the claim. *See Stilp v. Com., Gen. Assembly*, 940 A.2d 1227, 1233 (Pa. 2007).

The Costa Petitioners cannot satisfy any of the elements of taxpayer standing. First, given the perennial election-related litigation involving specific candidates, it is unfathomable that not a single elected official (whose election would, under the Costa Petitioners' theory, be jeopardized if the Subpoena is complied with) would elect to challenge an unconstitutional attempt to undo a duly certified election. Nor is it likely that such a usurpation of judicial authority would go unaddressed by the Judicial Branch. Indeed, where a legislative act has threatened the Judiciary's independence, the Supreme Court has not hesitated in the past to address such a violation *sua sponte*. *See In re 42 Pa.C.S. § 1703*, 394 A.2d 444, 446 (Pa. 1978) (relaying, in a published

opinion in the form of a letter addressed to the General Assembly, that a statute violated the State Constitution as applied to the Judiciary).

Second, those directly and immediately affected by an unconstitutional election contest—*i.e.*, the Judicial Branch and elected officials whose election would be in peril—would not be beneficially affected if the purported *de facto* contest proceeded and would, therefore, be inclined to challenge the contest, eliminating the need for general taxpayer-initiated litigation. Along these same lines, the fifth factor is also not satisfied, since the Judiciary and/or an impacted official would be best situated to challenge any unauthorized *de facto* contest. As for the third requirement, judicial relief is inappropriate for the multitude of reasons set forth herein. Finally, redress through other channels is available, since the Costa Petitioners can take a variety of legislative actions to prevent the constitutional crisis they portend.

Taxpayer standing is similarly unavailable for Count II. As to the Auditor General's powers, the Supreme Court has previously held that taxpayer standing does not exist to advance the Auditor General's interest because "the Auditor General, an elected official, is a far-better situated party to bring an action seeking a declaratory judgment that

the Department of the Auditor General does, or does not, have the authority to audit the financial accounts of the General Assembly." *See Stilp*, 940 A.2d at 1234 (holding taxpayer standing did not exist to vindicate the Auditor General's power to audit the Legislative Branch).

Similarly, to the extent Petitioners are seeking to vindicate the interests of the Secretary of the Commonwealth, taxpayer standing is inappropriate given that, in her seven-count PFR, the Acting Secretary is herself seeking declaratory and injunctive relief that subsumes the Costa Petitioners' claims—at least as it pertains to the Acting Secretary's power of administering elections.

Finally, with regard to Count III, as noted above, the duty of administering the voter registration statutory scheme is vested exclusively in the Department of State. *See* 25 Pa.C.S. § 1108. Indeed, Chapter 18 of the statute in question, aptly titled "Enforcement," *see* 25 Pa.C.S. §§ 1801-1804, sets forth a specific enforcement mechanism, generally vesting the Department of State with authority to take any action necessary to secure compliance with the statute, *see* 25 Pa.C.S. §§ 1803-1804, and delineating the respective powers of the Attorney General, *see* 25 Pa.C.S. § 1801, and District Attorneys, *see* 25 Pa.C.S.

§ 1802, in prosecutions for criminal violations. As this Court has explained, "where the General Assembly commits the enforcement of a regulatory statute to a government body or official, this precludes enforcement by private individuals." *Lerro ex rel. Lerro v. Upper Darby Twp.*, 798 A.2d 817, 822 (Pa. Cmwlth. 2002) (holding no private right of action exists for seeking enforcement of the State Dog Law, where that power is expressly vested in the Secretary of the Agriculture); *see also Quirk v. Schuylkill Cty. Mun. Auth.*, 422 A.2d 904, 905 (Pa. Cmwlth. 1980) (holding individual lacked standing to obtain injunctive relief to secure compliance with a statute because, under the relevant provisions, "when any violation of the [enactment] occurs, the Commonwealth is the only party authorized to enforce the requirements of [its provisions]"); *Elizabeth Twp. v. Power Maint. Corp.*, 417 A.2d 1285, 1289 (Pa. Cmwlth. 1980) (same). Accordingly, the Costa Petitioners lack standing to seek enforcement of 25 Pa.C.S. §§ 1101, *et seq*.

Moreover, even if this Court were to overlook this settled precedent, the injury the Costa Petitioners allege—*i.e.*, access to their private information—is insufficient to confer standing. To begin, as

explained above, much of the information in question can be accessed by the general public at any time and has been made available to a range of individuals and entities other the Department. Accordingly, the "harm" from allowing a coequal branch of government to review those materials available to all citizens is not only insubstantial, but it is nonexistent. Furthermore, to the extent the alleged injury arises out of the possibility that the Committee—or someone connected with it—may, at some point in the future, provide this information to a third-party contractor for review and analysis, that harm is both remote and speculative, since the vendor has not yet been identified.

In sum, the Costa Petitioners' interest in this action is not "substantial," so as to "surpass[] the common interest of all citizens in procuring obedience to the law." *Phantom Fireworks*, 198 A.3d at 1215. Rather, it is precisely the type of "action[] seeking redress for a general grievance about the correctness of governmental conduct[,]" *Fumo*, 972 A.2d at 501, which is insufficient to establish standing for any litigant—legislative or otherwise.

B. Count I: The Committee is not conducting an impermissible election contest.

Count I of the Costa PFR is not ripe because the Subpoena cannot be read to suggest even a remote possibility that an election contest is going to occur. On its face, the Subpoena seeks, *inter alia*, lists of registered voters and individuals who voted in the November 2020 and May 2021 elections, certified results of the races, and copies of guidances and directives issued from the Department prior to the November 2020 and May 2021 elections. Nowhere does the Subpoena mention an election contest. Further, the Costa PFR does not identify a specific office for which an election contest could even occur.

The Costa Petitioners' reliance upon select statements from certain legislators to establish a subjective motivation purportedly supportive of an election contest underlying the issuance of the Subpoena is irrelevant. The documents requested in the Subpoena are the only relevant consideration for determining the validity of the subpoena. *See Com. by Packel v. Shults*, 362 A.2d 1129, 1135 (Pa. Cmwlth. 1976) (holding it was inappropriate "to allow the validity of the subpoena to turn on the subjective intent of an agency's staff attorneys"). Further, as explained more fully *infra*, the Committee has a

legitimate legislative purpose for its issuance of the Subpoena and the Costa Petitioners' contention that the Committee is seeking to hide its "true purpose" in issuing the Subpoena is without merit. *See* Costa Brief at 15.

Even if these comments could be properly considered, which they cannot, the Costa Petitioners do not identify a specific office that allegedly would be contested, nor do they aver that the Senate intends to take an official action declaring winners and losers in elections or enforce the same. Further, even if they could be considered, the statements in issue do not indicate the intention to hold an election contest, but an intent to investigate elections generally and potential errors therein in order to carry out a "responsibility as a legislature to create legislation which will prevent that from happening in future elections." Costa PFR ¶ 51. A legislative probe into election processes does not equate to an election contest.

The Costa Petitioners' reliance upon select caselaw for the proposition that the Subpoena exceeds the bounds of legislative authority is misplaced. While legislative subpoenas must be reasonably tailored, there is nothing that renders a subpoena per se invalid if the

investigation could entail alleged wrongdoing. *See Com. ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 3 n.2 (Pa. 1974); *Camiel v. Select Comm. on State Cont. Pracs. of House of Representatives*, 324 A.2d 862, 865 (Pa. Cmwlth. 1974).

Therefore, Count I of the Costa PFR fails as a matter of law.

C. Count II: The Committee's investigation is not an unlawful audit.

There is no indication in the Costa PFR that the issuance of the Subpoena is an "audit." Nothing in Senator Dush's statements even use the word audit to describe the investigation. *See* Costa PFR ¶ 89. Because there is no indication that the issuance of the Subpoena alone constitutes an audit, the Costa Petitioners' claim that the Committee has infringed upon others' authority to conduct an election audit or that the Committee lacks the authority to audit is without merit.

Furthermore, the Costa Petitioners' interpretation of the term "audit," if adopted, would deprive the legislature of all investigative powers. This is so because any well-run legislative investigation is ostensibly "an objective and systematic examination of evidence for the purpose of providing an independent assessment of the performance of a government organization, program, activity or function in order to

provide information to improve public accountability and facilitate decision-making by parties with responsibility to oversee or initiate corrective action." Costa PFR ¶ 92; Costa Brief at 20 (quoting *Dep't of Aud. Gen. v. State Empls. Retirement Sys.*, 860 A.2d 206, 210 (Pa. Cmwlth. 2004)). The Costa Petitioners' assertion that any systematic examination of evidence by the Legislature for the purpose of legislative investigation constitutes an audit outside of its purview would render the legislative subpoena power useless.

Even if the process at issue were an audit, there is no basis for concluding that the Auditor General is the only officer that can conduct an election "audit" unless another executive agency has been designated. Indeed, the constitutional and statutory provisions governing the Auditor General's authority provide the Auditor General with the power and duty to audit executive offices, including the Department of State, and entities that receive state funds to the extent the audit relates to the use of those funds. Pa. Const. art. VIII, § 10; 72 P.S. §§ 402, 403. These provisions do not provide independent authority for an election audit, as elections are not run solely by an executive office and are not conducted by an entity that receives state

funding for all actions taken in the performance of that function; thus, the Costa Petitioners' assertions that the legislature is infringing upon the Auditor General's audit authority are without merit even if they had sufficiently alleged that an audit is occurring.

Therefore, Count II of the Costa PFR does not state a claim.

D. Count III: The information sought in the Subpoena is not protected from disclosure to the Committee by the Election Code or regulations.

The Costa Petitioners' claim for relief in Count III is based upon the alleged "intent" of the Committee to provide the information it receives as a result of the Subpoena to a third-party contractor. The Costa PFR does not aver that the Committee has actually hired a third-party contractor, the terms of what that agreement may be, and to what information the third-party contractor could have access. Because these allegations are based upon an alleged intent alone, rather than an existing contract, Count III is not ripe.

Even on its merits, the Costa Petitioners in Count III incorrectly conflate information that counties are required to make readily available to the public with information to which the public is allowed to have access. *See supra.* Reading the numerous provisions of the

Election Code and Title 25 of the Consolidated Statutes together, the records sought in the Subpoena are subject to public inspection, albeit with varying privacy safeguards. In relevant part, the Subpoena essentially seeks lists of registered voters as of May 1, 2021 and November 1, 2020; and lists of all individuals who voted in person, by mail-in ballot, by absentee ballot, and by provisional ballot in the November 2020 and May 2021 elections. *See* Subpoena ¶¶ 4-13. Numerous statutory provisions—along with their corresponding regulations—provide that registered elector's name, address, voting history, party registration, and date of birth must be made available to the public with only minimal barriers. To offer just a few examples, Title 25 grants access to the following:

a. general registers, which include lists of registered electors, ward and election district of the elector's residence, the elector's street address, and the date of each election at which the registered elector votes, 25 Pa.C.S. § 1401(a);
b. district registers, which includes names of registered electors arranged by election district, the elector's address, the

elector's political party, and an indication of the elector's active status, 25 Pa.C.S. § 1402(b)(2);

c. street lists, which lists the names and addresses of all registered electors in each district, 25 Pa.C.S. § 1403; and

d. public information lists, which contains the name, address, date of birth, and voting history of each registered elector in the county, 25 Pa.C.S. § 1404.

Further, the Election Code provides public access to the following:

a. "records of each county board of elections, general and duplicate returns, tally papers, affidavits of voters and others, nomination petitions, certificates and papers, other petitions, appeals, witness lists, accounts, contracts, reports and other documents and records in its custody . . . ." 25 P.S. § 2648;

b. all absentee ballots and, for each elector who makes an application for an absentee ballot, the elector's name and voter registration address, and various dates regarding the application for and receipt of the absentee ballot, 25 P.S. § 3146.9; and all mail-in ballots and, for electors who make

an application for a mail-in ballot, the elector's name and voter registration address, and various dates regarding the application for and receipt of the mail-in ballot. 25 P.S. § 3150.17.

Finally, as it relates to the DLNs and Partial SSNs, the Voter Registration Law permits inspection of all voter registration applications. *See* 25 Pa.C.S. § 1207 (designating applications as public records); *see* also Appendix at 1222a-1225a (current voter registration form). Indeed, the Costa Petitioners' suggestion that the Department is categorically prohibited from providing this type of information is belied by *Applewhite*, discussed *supra*, where this Court directed production of the Partial SSNs and the Department ***voluntarily*** furnished the DLNs for all voters to the LWV Petitioners.

Moreover, even if the DLNs and Partial SSNs are not subject to *public* access, 4 Pa. Code § 183.14, the Costa Petitioners fail to recognize that a Senate Committee *is not the general public* but a coequal branch of the Commonwealth that seeks this information for a legitimate legislative purpose. They also fail to recognize that this

information is *already* provided by the Commonwealth, through the Department of State, to private parties. *See supra.*

Finally, while the Costa Petitioners argue in their Brief that the Subpoena violates Article I, Section 8 of the Pennsylvania Constitution, they do not aver a violation of Article I, Section 8 or any other constitutional provision in their PFR. Even if the Costa Petitioners re-characterized their claims in constitutional terms, they cannot maintain a reasonable expectation of absolute privacy in the information that they have given to the Department of State. As set forth above, a large majority of the information sought in the Subpoena is already subject to public access; therefore, no individual has an expectation of absolute privacy in this information.

Hence, Count III also fails to state a claim as a matter of law.

VI. ARGUMENT IN *COM. V. DUSH*

A. Count I: The Subpoena seeks the inter-government production of records and does not compromise the right to privacy in Sections 1 or 8 of Article I of the Pennsylvania Constitution.

The Subpoena seeks information that may generally be accessed by any member of the public and, in any event, whatever non-public information it requests is routinely shared by the Department of State

with third parties for election-related purposes. To begin, given the Acting Secretary's repeated omission in this regard, it bears reiterating that the Subpoena is not a public records request from a citizen, but an official demand by a Senate Committee to a Commonwealth agency for a legitimate legislative purpose—a demand which the Department would be required to comply with even in the absence of subpoena. *See* 71 P.S. §§ 202 & 801. Furthermore, because the state interest outweighs any privacy interest implicated here and there is no reasonable expectation of privacy with respect to disclosure of this information to the Committee, the Subpoena does not violate Sections 1 or 8 of Article I. Pa. Const. art. I, §§ 1, 8.

(a) The Subpoena is not a public records request but a demand for information that the Department of State has already recognized may be disclosed to third parties in pursuit of a state interest.

Article I, Section 1 requires "a balancing of an individual's right to privacy against a countervailing state interest," in order to ensure that there is no "gratuitous intrusion" on the individual's right to privacy. *Denoncourt v. Com.*, 470 A.2d 945, 948-49 (Pa. 1983). The information may be disclosed where the state interest outweighs the interest in

privacy. *See Reese v. Pennsylvanians for Uniform Reform*, 173 A.3d 1143, 1159 (Pa. 2017). Here, the Committee's stated interest in investigating the operation of existing legislation and evaluating the need for new legislation outweighs a privacy interest in information that is either already public or has previously been shared with third parties. As set forth above, *supra*, the vast majority (if not all) of the information requested in the Subpoena is subject to access. *See* 25 Pa.C.S. §§ 1207(a), 1401(a), 1402(b)(2), 1403, 1404; 25 P.S. §§ 2648, 3146.9, 3150.17. Therefore, there is no intrusion on the right to privacy, let alone a gratuitous intrusion, that outweighs a state interest.[18]

While contending that the individual's right to privacy outweighs the state's interest in a balance under Article I, Section 1, the Acting Secretary largely ignores that the government, including the Department itself, has already found occasion where disclosure of this same information to third parties is in the state's interest. The Department regularly contracts with third-parties and provides those third-parties access to this exact same identifying information. As noted

[18] Moreover, given that most of this information is already subject to public access for election-related purposes, the Subpoena is not an "unauthorized access" to voter records under the Election Code. *Cf.* House Dem. Amicus Curiae Brief at 8-9.

above, the Department of State contracts with the private vendor BPro, Inc. for the maintenance of the SURE system and provides BPro with access to all of the data in the SURE system, including the identifying information the Department of State now contends is protected from disclosure. (Appendix at 0394a, 0423a, 0479a.) BPro is not the first vendor that the Department of State has contracted with that was given access to the SURE system in order to maintain and support the system. Indeed, before BPro, the Department of State contracted with DTC for SURE system maintenance and even expressly provided in its Request for Quotations that the third party vendor DTC would receive "full or partial social security numbers, driver's license numbers, home addresses, home and cellular telephone numbers, personal email addresses, and other confidential personal identification information and data." (Appendix at 0639a.) Beyond the Department of State's contracts with third parties, this information is shared with ERIC, a non-profit to which Pennsylvania submits voter registration data, including "names, addresses, date of birth, [and] last four digits of the social security" as part of an effort to improve the accuracy of voter rolls. *See Electronic Registration Information Center*.

This Court itself has even recognized that information maintained in the SURE system can be disclosed to **private** parties that require it for an election-related inquiry. *See Applewhite v. Comm*onwealth, 330 M.D. 2012. As mentioned above, in the context of a challenge to the Voter ID Law, the petitioners in *Applewhite* sought in discovery the Department of State's database records, including the last four digits of social security numbers and complete driver's license numbers for the purpose of determining the number of registered voters who did not have a photo identification for voting. The petitioners intended to provide this information to a third-party expert for this analysis. This Court granted that request, requiring the Department of State to provide the requested records to the petitioners, including partial social security numbers and driver's license numbers. *See* Order, *Applewhite*, 330 M.D. 2012 (Pa. Cmwlth. Apr. 29, 2013) (Appendix at 0928a-0930a). Indeed, the Court's decision to invalidate the Voter ID Law was based largely—if not entirely—on expert analysis that was able to be conducted only because of access to the SURE system. *See Applewhite v. Com.*, No. 330 MD 2012, 2014 WL 184988, at *4-5 (Pa. Cmwlth. Jan. 17, 2014) (single judge opinion).

While the Acting Secretary acknowledges that the Department of State works with third-party entities for maintenance of the SURE system, the Acting Secretary nonetheless attempts to distinguish that from the present scenario based upon the security measures it maintains, which, the Acting Secretary alleges, the Committee will not. In so doing, the Acting Secretary challenges speculative security measures for a third-party contract that ***does not yet exist*** and jumps ahead of the present issue, which is not whether there will be sufficient security measures to protect any information that could be disclosed to a third-party in the future, but whether the Acting Secretary must comply with a lawfully issued Subpoena and produce the information to the Senate in the first place.[19]

Relying primarily upon *Pennsylvania State Education Association v. Commonwealth Department of Community and Economic*

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[19] Moreover, while the Committee has no reason to doubt that the Department's vendors are taking every proper precaution in safeguarding the data, inadvertent disclosure of a voter's private information can occur even when the information is in the hands of State agencies tasked with administering elections. *See Moore v. Kobach*, 359 F. Supp. 3d 1029, 1032 (D. Kan. 2019) (relaying, by way of background, that the mishandling of voter data by the State's top election official resulted in advertent disclosure of personal information for at least 945 voters); *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1322 (N.D. Ga. 2018) ("Plaintiffs shine a spotlight on the serious security flaws and vulnerabilities in the State's DRE system – including unverifiable election results, outdated software susceptible to malware and viruses, and a central server that was already hacked multiple times.").

Development, 148 A.3d 142 (Pa. 2016) (*PSEA*), the Acting Secretary's Article I, Section 1 argument is founded upon a faulty premise: that the Committee is akin to the general public. The Subpoena does not present a question of *public* access to personal information, like the request at issue in *PSEA* or the related cases that the Acting Secretary relies upon.[20] The Court in *PSEA* and the Courts applying *PSEA* analyzed the right to privacy under the Right-to-Know Law (RTKL), a statutory scheme founded on the presumption that documents are public. 65 P.S. § 67.305.

There can be no meaningful comparison between the RTKL and other requests for documents, such as subpoenas or routine discovery requests. "The purpose of the [RTKL] was to make certain information available to members of the public," and whether information should be produced for judicial proceedings "involves entirely different

[20] Indeed, the majority of the cases relied upon by the Acting Secretary interpret Article I, Section 1 in the context of *public* access under the Right-to-Know Law or its predecessor, the Right-to-Know Act. *See City of Harrisburg v. Prince*, 219 A3d 602 (Pa. 2019); *Reese v. Pennsylvanians for Uniform Reform*, 173 A.3d 1143 (Pa 2017); *Tribune Review Pub. Co. v. Bodack*, 961 A.2d 110 (Pa. 2008); *Pa. State Univ. v. State Empls. Retirement Bd.*, 935 A.2d 530 (Pa. 2007); *Sapp Roofing Co., Inc. v. Sheet Metal Workers' Intern. Ass'n, Local Union No. 12*, 713 A.2d 627 (Pa. 1998); *Lancaster Cty. District Attorney's Office v. Walker*, 245 A.3d 1197 (Pa. Cmwlth. 2021); *Times Pub. Co., Inc. v. Michel*, 633 A.2d 1233 (Pa. Cmwlth. 1993).

considerations." *Ben v. Schwartz*, 729 A.2d 547, 554 (Pa. 1999) (quoting *Com. v. Kauffman*, 605 A.2d 1243, 1246 (Pa. Super. 1992)) (declining to conclude that subpoenaed records from the Bureau of Occupational Affairs were privileged under the RTKL because the RTKL is not applicable to discovery proceedings). To conclude otherwise "would insulate from discovery all information possessed by governmental agencies … unless that same information were also available upon request to any and all citizens of the Commonwealth." *Ben*, 729 A.2d at 554. This is not consistent with the legislative intent of the RTKL. *Id.*; *see also Van Hine v. Dep't of State*, 856 A.2d 204, 208 n.5 (Pa. Cmwlth. 2004) (rejecting an assertion of privilege based upon the Right-to-Know Act where the petitioner served a non-party subpoena on the Office of Inspector General). While the Subpoena is not issued pursuant to the Rules of Civil Procedure, it is substantially more similar to a discovery request than a public records request. Thus, the Acting Secretary's assertion that this information cannot be made available to the Committee in a legislative investigation simply because it cannot be made available to any individual member of the public is without merit.

Moreover, because this is not a public records request, but a lawfully issued subpoena for a legislative purpose, the Acting Secretary's argument overlooks the critical distinction between the government sharing an individual's information with the public and the government sharing an individual's information with another branch of government. For example, the Acting Secretary cites Section 2721(a)(1) of the United States Code for the proposition that driver's license numbers are protected from public disclosure, but fails to mention Section 2721(b)(1) expressly provides that a permissible disclosure of this information includes "[f]or use by any government agency … in carrying out its functions." 18 U.S.C. § 2721(b)(1). Moreover, that precise argument was offered as a basis for withholding the information from the LWV Petitioners in *Applewhite*—and rejected by this Court.[21]

To illustrate the protections afforded to Social Security numbers, the Acting Secretary relies on the federal Privacy Act, *see* 5 U.S.C.

[21] It is also notable—and inexplicable—that the Department **voluntarily** produced the DLNs to the private litigants in *Applewhite*, only objecting to the production of the Partial SSNs, but seeks to withhold a broader range of information from a coequal branch of the Commonwealth in this matter. (Appendix at 0835a-0836a (relaying that "[the Department] and the [Department of Transportation] have agreed to voluntarily disclose the driver license numbers in their databases (this includes all drivers in DOT's database and approximately 9l% of the registered voters in the DOS database).".)

§ 552a, as an example of a statute designating social security numbers and driver's license numbers as protected from public disclosure. State Brief at 42 n.3. But far from aiding her argument, this provision highlights the critical distinction that disclosure by an agency to the legislature is not synonymous with disclosure to the public. While the Privacy Act generally prohibits a federal agency from publicly disclosing records containing an individual's identifying information without that individual's prior written consent, the Acting Secretary again does not acknowledge the enumerated exception for disclosure "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee." 5 U.S.C. § 552a(b)(9). Indeed, in upholding an agency disclosure to a congressional subcommittee under this exception, the Second Circuit refused to read a motive requirement into the exception, allowing the disclosure even if the agency knew or should have known the information would subsequently become public. *Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000).

Thus, the Privacy Act and its interpretation underscore the central point here: that a statute prohibiting disclosure to the public is not implicated by disclosure to the legislature or its committees. *See id.* at 552 (noting the legislative history for this exception explained that "[o]ccasionally, it is necessary to inquire into such subjects for legislative and investigative reasons"). The Committee, a fellow government entity, is seeking information from another government entity for a legitimate legislative purpose and, therefore, the Acting Secretary's compliance with the subpoena does not infringe upon any individual's right to privacy.

In light of the foregoing, the state interest in the Subpoena outweighs any privacy interest that may exist under Article I, Section 1.

(b) There is no reasonable expectation of privacy in primarily public records, particularly from disclosure within the government for a legitimate legislative purpose.

As set forth more fully *infra*, the Subpoena is lawfully issued in furtherance of a legitimate legislative purpose: to gather information and review recently enacted election laws to determine whether there is a need for legislative action. Although the Acting Secretary likens the

requirements for the Subpoena to those in *Lunderstadt v. Pa. H.R. Select Comm'n*, 519 A.2d 408, 410 (Pa. 1986) (plurality) or *Annenberg v. Roberts*, 2 A.2d 612, 616 (Pa. 1938), which required a showing of probable cause, those legislative subpoenas were directed to individual persons. Here, the Committee issued the Subpoena to a state agency for the purpose of investigating areas of legislation, and the information it seeks is not about criminal wrongdoing by a particular person. Further, the Subpoena does not compromise the right to privacy under Article I, Section 8, as there is no reasonable expectation of privacy in this information in this context.

While Article I, Section 8 has often been interpreted to provide greater protections than its federal counterpart, "that fact does not command a reflexive finding in favor of any new right or interpretation asserted.'" *Com. v. Duncan*, 817 A.2d 455, 459 (Pa. 2003) (quoting *Com. v. Glass*, 754 A.2d 655, 660 (Pa. 2000)). In analyzing the scope of protection of information under Article I, Section 8, the Supreme Court applies the two-part test established by the United States Supreme Court, which requires an individual to "(1) have established a subjective expectation of privacy and (2) have demonstrated that the expectation

is one that society is prepared to recognize as reasonable and legitimate." *Duncan*, 817 A.2d at 463.

Initially, there is no reasonable expectation of privacy under Article I, Section 8 in certain identifying information, such as an individual's name and address, which does not reveal anything about a person's "personal affairs, opinions, habits or associations," but is "innocuous information." *Duncan*, 817 A.2d at 463; *see also Com. v. Campbell*, 862 A.2d 659, 665 (Pa. Super. 2004) (relying on *Duncan* and concluding that inquiring about a passenger's identity in a traffic stop is reasonable because a person's name is "revealed in a variety of daily interactions and there is no legitimate expectation of privacy associated with one's identity"). Furthermore, there is no reasonable expectation of privacy in an elector's name, address, and date of birth,[22] because it is

[22] Notwithstanding the clear language of Section 1404 of the Voter Registration Law, which provides that the elector's date of birth is part of the "public information list" and must be furnished upon request within ten days, *see* 25 Pa.C.S. § 1404, the Acting Secretary also suggests that voters have a privacy interest in their dates of birth. *See* State Brief at 43. But the Acting Secretary is unable to cite a single decision where any court has held that this information is ***constitutionally*** protected. Specifically in *Governor's Office of Admin v. Purcell*, 35 A.3d 811 (Pa. Cmwlth. 2011), this Court concluded, based on *the RTKL*, a government employee's date of birth was protected from disclosure. Similarly, in *True the Vote v. Hoesmann*, 43 F. Supp. 3d 693 (S.D. Miss. 2014), the District Court held that a Mississippi *statute* expressly exempting a voter's date of birth from disclosure was not pre-empted by Federal law. These distinguishable decisions aside, nearly every court that has been presented with this question has held that a

among the information subject to public inspection under Title 25, the Election Code, and the corresponding regulations. *See* 25 Pa.C.S. §§ 1401(a), 1402(b)(2), 1403, 1404; 25 P.S. §§ 2648, 3146.9, 3150.17.

The Acting Secretary's assertion that these lists are not "truly 'public'" is a distinction without a difference, State Brief at 24, as the plain language of these provisions mandate their public nature. *See, e.g.*, 25 P.S. § 2648 (certain records "shall be open to public inspection"); 25 P.S. § 3146.9 (absentee ballot documentation is "designated and declared to be public records"); 4 Pa. Code § 183.13 (street lists "will be available for public inspection and copying"), 4 Pa. Code § 183.14 ("the Department will make copies of the public information lists available for public inspection…."). This remains the general rule, regardless of any reasonable limitations or safeguards established surrounding the general public's right to access. Moreover, as established above, the Committee is not the general public seeking this information through a public records request. Thus, there is no reasonable expectation of

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person has no ***constitutional*** right of privacy in "in her driver's license information, namely, her address, picture, date of birth, eye color, height, weight, and driver's license number." *Loeffler v. City of Anoka*, 79 F. Supp. 3d 986 (D. Minn. 2015); *accord, e.g.*, *Collier v. Dickinson*, 477 F.3d 1306, 1308 (11th Cir. 2007) (holding no constitutional right of privacy in drivers' license information).

privacy when it comes to inter-government disclosure of this information or any of the remaining information that is not publicly accessible.

The "constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all the surrounding circumstances." *Com. v. Kane*, 210 A.3d 324, 330 (Pa. Super. 2019). As the Acting Secretary acknowledges, electors must provide their driver's license number, last four digits of the Social Security number, date of birth, and address to the Department of State in order to register to vote. State Brief at 40. Despite this, the Acting Secretary contends that electors have a privacy interest in preventing data that they voluntarily gave to the government from being provided to another agency of the same government. Under the totality of the circumstances, this is not a reasonable subjective or objective expectation of privacy under Article I, Section 8. Further, because there is no reasonable expectation of privacy in this information under Article I, Section 8, which is interpreted to provide more protection than the federal counterpart, *see Duncan*, 817 A.2d at 459, there is also no

reasonable expectation of privacy under the Fourth Amendment to the United States Constitution.

In light of the primarily public nature of much of this information and the surrounding circumstances of who has requested the information and for what purpose, there is neither a subjective nor objective expectation of privacy that would preclude inter-government disclosure of the information demanded in the Subpoena. Therefore, the Subpoena is not an unlawful search under Article I, Section 8.

B. Count II: The claims under Article I, Section 5 and the U.S. Constitution fail as a matter of law.

Count II of the Acting Secretary's PFR claims that the Subpoena "interfere[s] with the free exercise of the right of suffrage" because "[i]f the Committee receives and shares" the information sought via the Subpoena, "with an unknown third party" the voters will "fear that voting will risk the intentional or unintentional misuse of private, personal, information[,]" and thus, "will be discouraged from exercising their fundamental right to vote." State PFR ¶¶ 218-220. According to the Acting Secretary, "compliance with the Subpoena would violate both" Article I, Section 5 of the Pennsylvania Constitution and the right

to vote under the United States Constitution. *Id.* ¶ 221. This claim fails as a matter of law.

(a) Article I, Section 5 does not apply to the Subpoena because the Subpoena is an investigative tool that does not touch upon the electoral process.

Article I, Section 5 does not apply to the Subpoena because the Subpoena is an investigative tool that does not affect the freedom or equality of the electoral process.

Article I, Section 5 contains two clauses that provide related protections: (1) "elections shall be free and equal" and (2) "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. A quick review of the caselaw and constitutional history reveals that Section 5 was intended "to prevent any outside interference with the free ***conduct of elections***." Thomas Raeburn White, *Commentaries On The Constitution of Pennsylvania*, at 349 (1907) (emphasis added).[23]

The Pennsylvania Supreme Court, in *Winston v. Moore*, 91 A. 520 (Pa. 1914), observed that elections are "free and equal" when: "they are

[23] *Available at* https://www.google.com/books/edition/Commentaries_on_the_Constitution_of_Penn/yxmJAAAAMAAJ?hl=en&gbpv=1&printsec=frontcover.

public and open to all qualified electors alike;" "every voter has the same right as any other voter;" "each voter under the law has the right to cast his ballot and have it honestly counted;" "the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial;" and "no constitutional right of the qualified elector is subverted or denied him." *Id.* at 523. And more recently, in *League of Women Voters v. Com.*, 178 A.3d 737 (Pa. 2018), the Court viewed the words "free and equal" "as indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *Id.* at 804. Thus, the constitutional history and caselaw make clear the framers intended to ensure a free and equal ***electoral process***.

Article I, Section 5's second clause, which provides "and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage[,]" Pa. Const. art. I, § 5, was added in the 1873

Constitution. The debates at the 1873 Constitutional Convention reveal the clause was considered in response to an incident where "the military were called out in the city of Philadelphia … to help perpetrate election frauds[.]" Mr. Brodhead, Minutes of Constitutional Convention of 1873 at 671; *see also* Mr. Cuyler, Minutes of Constitutional Convention of 1873 at 674.[24]

This history makes clear that Article I, Section 5's second clause was added to remedy a specific harm—*i.e.*, "this provision declares that the military and civil power of the country shall not interfere with" the right to suffrage. *Id.* at 672.

Read in its entirety then, Article I, Section 5 is best interpreted as follows:

> By declaring that elections shall be free and equal, the constitutional guaranty is not only that 'the voter shall not be physically restrained in the exercise of his right by either civil or military authority' (*Com. v. Reeder*, 171 Pa. 505, 33 Atl. 67, 33 L. R. A. 141), but it is that by no intimidation, threat, improper influence, or coercion of any kind shall the right be interfered with. The test of the constitutional freedom of elections is the freedom of the elector to deposit his vote as the expression of his own unfettered will, guided only by his own conscience, as he may have had it properly enlightened.

[24] *Available at* https://www.paconstitution.org/wp-content/uploads/2019/10/DEBATES-A-VOL-4.pdf.

Oughton v. Black, 212 Pa. 1, 4 (1905). The constitutional history and caselaw demonstrate that Article I, Section 5 was intended to safeguard the "***conduct of elections***[,]" Raeburn White, *Commentaries*, at 349 (emphasis added), and ensure that "all aspects ***of the electoral process***, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth[.]" *League of Women Voters*, 178 A.3d at 804 (emphasis added). Against this backdrop, Article I, Section 5 cannot apply to a Subpoena that does not involve or touch upon the electoral process.

To begin, the Subpoena is, on its face, an investigative tool used by the Committee to gather information about the effectiveness of Act 77. *See* State PFR, Ex. C at 4:10-16. The Subpoena does not at all purport to regulate the electoral process. The only link between the Subpoena and elections is the subject matter of the documents sought by the Subpoena. But that does not cause the Subpoena to affect the conduct of elections or the electoral process.

To the extent the Acting Secretary argues Article I, Section 5 applies to the Subpoena because Section 5 is very broadly interpreted, that argument is misplaced. *See* State Brief at 50-51. Article I, Section

5's broad interpretation is confined to matters that concern ***election conduct*** or the ***electoral process***. And the Subpoena does not touch upon either. The Acting Secretary has failed to allege how a Subpoena, an investigative tool, can interfere with qualified voters' right to enter the polls and cast a ballot for the candidate of their choice. At bottom, the next election (and each one thereafter) remains open to all qualified electors, all voters maintain identical rights, and each voter is guaranteed the right to cast a ballot "and have it honestly counted." *Winston*, 91 A. at 523. Article I, Section 5 therefore cannot apply to the Subpoena. Thus, Count II of the Petition for Review fails as a matter of law.

(b) If the Subpoena implicates Article I, Section 5, it is a constitutionally permissible exercise of legislative authority.

In the event Article I, Section 5 applies here, the Subpoena is a permissible legislative act necessary for the General Assembly to perform its constitutional duty to regulate elections. The General Assembly is constitutionally obligated to regulate elections pursuant to Article VII. *See e.g.*, Pa. Const. art. VII, §§ 1, 2, 4, 6, 9, 11, 13.

Critically, the "Constitution is an integrated whole," and therefore "effect must be given to all of its provisions whenever possible." *Jubelier v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (quotation and citation omitted). As such, Article I, Section 5 must be read conterminously with Article VII. *See Mixon v. Com.*, 759 A.2d 442, 450 (Pa. Cmwlth. 2000) ("Article VII, Section 1 … must be read *in pari materia* with Article I, Section 5."). Taken together, the General Assembly has a duty to regulate elections consistent with Article VII, which is subject only to Article I, Section 5's command. *See Patterson v. Barlow*, 60 Pa. 54, 75 (1869); *Banfield v. Cortes*, 110 A.3d 155, 176-77 (Pa. 2015). The General Assembly's discretion in this context is considered broad, and will not be disturbed "except in a case of plain, palpable and clear abuse of the power which actually infringes the rights of the electors." *Patterson*, 60 Pa. at 75. Indeed, "[i]t is not possible, nor does the Constitution require, that this freedom and equality of election shall be a perfect one." *Id.*; *see also Winston*, 91 A. at 522 ("Errors of judgment in the execution of the legislative power, or mistaken views as to the policy of the law, or the wisdom of the regulation, do not furnish grounds for declaring an election law invalid[.]"). The Pennsylvania Supreme Court has routinely

upheld the constitutionality of election regulations that are subject to Article I, Section 5 challenges. *See League of Women Voters*, 178 A.3d at 809 (recognizing the Court "has infrequently relied on [Article I, Section 5] to strike down acts of the legislature pertaining to the conduct of elections, the qualifications of voters to participate therein, or the creation of electoral districts[.]").

Against this backdrop three fundamental principles have emerged: (1) the General Assembly is constitutionally required to promulgate legislation to regulate elections, subject only to Article I, Section 5's command that elections remain "free and equal"; (2) the General Assembly's discretion in this area is broad, and legislation will not be struck down by courts unless it clearly, plainly, and palpably violates the Constitution; and (3) courts have been reluctant strike down legislative acts on the basis that they violate Article I, Section 5.

With these principles in mind, the Subpoena is a reasonable exercise of the General Assembly's duty to regulate elections for three reasons.

First, and unlike *Patterson*, *Winston*, *Mixon*, *Banfield* and *League of Women Voters* cited above, the Subpoena is not **legislation**

purporting to regulate the election. The Subpoena is an investigative tool used as part of the Committee's investigation into Act 77. In this light, the Subpoena is even *less likely* to violate Article I, Section 5 because it does not touch directly upon either the conduct of elections or the electoral process. Because the Subpoena is an investigative tool it cannot be said to interfere with a voter's exercise physically or through "intimidation, threat, improper influence, or coercion[.]" *Oughton*, 212 Pa. at 4. In fact, the Subpoena "denies no qualified elector the right to vote[.]" *Winston*, 91 A.2d at 523. The Court should therefore be *more* reluctant to strike down the Subpoena on the basis of Article I, Section 5.

Second, though, the Subpoena is a reasonable exercise of legislative authority like the legislation in *Patterson*, *Winston*, *Mixon*, and *Banfield*. Recall the Committee's investigation relates to "the 2020 general election and 2021 primary election and how the election code is working after the sweeping changes of Act 77." *See* State PFR, Ex. C at 4:10-16. 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.[25] Act 77 implemented sweeping changes to the election process, including allowing no excuse mail-in voting, and in the wake of these changes, the Committee has a constitutional obligation "to secure freedom and equality by such regulations as will exclude the unqualified, and allow the qualified only to vote." *Patterson*, 60 A. at 76. The Subpoena will aid the Committee in upholding that duty.

To the extent, the Acting Secretary asserts that the fact the Committee intends to hire a third-party vendor to help in its investigation will undermine the security of the voter registration information, that argument is meritless. Initially, the Acting Secretary's argument is based on a faulty premise that an "unknown" third-party vendor is somehow incapable of safely and securely handling the information. The Acting Secretary's argument is also based on the alleged inadequacies of a non-existent contract. The Acting Secretary has no basis to argue that the selected vendor will not be contractually obligated to have in place robust security measures. The

[25] *See* SURE Report (describing driver license numbers as "a key element for determining whether an individual already has a voter record") (Appendix at 1067a).

transfer of information to a vendor cannot be sufficient to prove the Subpoena violates Article I, Section 5 because the Department of State routinely allows third-parties to have access to voter information. *See supra*.

Third, the Court should conclude the Subpoena is a constitutional exercise of the Committee's legislative authority because such a result is consistent with the language of both Article I, Section 5 and Article VII. Indeed, if the Court determines the Subpoena is considered a violation of Article I, Section 5, the Committee risks violating its Article VII obligations because, for example, an "election is not free and equal where the true electors are not separated from the false; where the ballot is not deposited in safety, or where it is supplanted by fraud." *Patterson*, 60 A. at 75. The Court should therefore interpret Article I, Section 5 conterminously with Article VII so as to avoid any conflict. *See Mixon*, 759 A.2d at 450 ("Article VII, Section 1 . . . must be read *in pari materia* with Article I, Section 5.").

(c) The Subpoena does not violate the United States Constitution.

The United States Constitution does not contain an explicit provision that protects the individual voter's rights, "nor does it set any

minimum standards for a state's conduct of the electoral process[.]" *See League of Women Voters*, 178 A.3d at 804. The United States Constitution thus contains no analogous provision to Article I, Section 5. As such, the protections offered by the United States Constitution are not as robust as those provided under the State charter. However, the Constitution does recognize "that all qualified voters have a constitutionally protected right to vote, and to have their vote counted." *Reynolds v. Simms*, 377 U.S. 533, 554 (1964) (citation omitted). For the reasons developed *supra*, the Subpoena does not interfere with the right of qualified voters to access the polls or have their vote counted.

To the extent the Acting Secretary argues the constitutional violation stems from a "chilling" effect on voters, this claim is misplaced. The United States Supreme Court has concluded constitutional violations—specifically First Amendment violations—can "arise from [a] deterrent, or 'chilling' effect of government regulation[.]" *Laird v. Tatum*, 408 U.S. 1, 11 (1972). However, in none of those cases "did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those

activities, the agency might in the future take some other and additional action detrimental to that individual." *Id.* Here, the allegations that voters will be discouraged from voting because the Committee issued the Subpoena is not sufficient to violate the U.S. Constitution. *See* State Brief at 54-55.

Moreover, the *Laird* Court concluded "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]" *Id.* at 13-14. Thus, to the extent the "chilling" effect is applicable outside the First Amendment context, the Acting Secretary's claim that voters will subjectively fear voting in future elections is not sufficient. *See* State Brief at 54-55 (citing references to subjective fears of voters). The voters' fears are based solely on speculation. The Committee has yet to select a vendor, and the Committee has yet to identify what security measures it will require the vendor to adhere to. Also, the cases relied on by the Acting Secretary that concluded public disclosure of personal information—including partial social security numbers—"chill[ed] voters' willingness to exercise" the right to vote are inapposite because the Committee and any third-party vendor will not ***publicly*** disclose

voter registration information. *See* State Brief at 52 (citing *Greidinger v. Davis*, 988 F.2d 1344, 1353-54 (4th Cir. 1993)). The Acting Secretary's allegations are nothing more than subjective speculations that are insufficient to state a claim under the U.S. Constitution.

Finally, the Acting Secretary's attempt to analogize this case to First Amendment cases, where the Supreme Court has held the right to speech must yield when it interferes with the right of suffrage, is misplaced. For example, the Acting Secretary relies on *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality), which upheld a state law that prohibited certain political speech within 100 feet of a polling place. However, *Burson* is distinguishable because political speech in such close proximity to a polling places is the type of intimidation that the Constitution seeks to prevent. The Subpoena, on the other hand, is an investigative tool that cannot intimidate a voter as they enter the poll to exercise their right of suffrage.

C. Count III: The Subpoena is in furtherance of a legitimate legislative purpose.

Count III of the Acting Secretary's Petition for Review claims that the Subpoena is not in furtherance of a "legitimate legislative purpose,"

and therefore is purportedly "unenforceable," State PFR ¶ 234; State Brief at 27-33; this claim should be rejected for several reasons.

To begin, above all else the Acting Secretary asks the Court to examine the purported "true" motives of the Committee in issuing the Subpoena, *see* State PFR ¶ 229-232, State Brief at 30-31, but this inquiry is foreclosed.[26] As the U.S. Supreme Court held in a case relied upon by the Acting Secretary in Count III, the motives of individual legislators will "not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purposes is being served." *Watkins v. U.S.*, 354 U.S. 178, 200 (1957) (cited at State PFR ¶ 225 and State Brief at 28). Stated otherwise by the U.S. Supreme Court, "[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt v. U.S.*,

[26] As part of its impermissible motives analysis, the Acting Secretary notes that some of the data requested by the Subpoena is publicly available, through the Right-to-Know Law or otherwise, and suggests the Committee should just get the information elsewhere. *See* State Brief at 30. This position is noteworthy for two reasons: (1) despite acknowledging that some of the data is absolutely public, the Acting Secretary still produced *nothing* in response to the Subpoena; and (2) this very logic—"you can get it elsewhere"—has been expressly rejected by the Pennsylvania Supreme Court in the context of a legislative demand for information. *See Thornburgh v. Lewis*, 470 A.3d 952, 957 (Pa. 1983) ("That the information is inexistence elsewhere in no way relieves the Governor of the duty to affirmatively 'make available' the particular information requested.").

360 U.S. 109, 132 (1959). These holdings are utterly in accord with Pennsylvania law, which, due to the Speech or Debate Clause, Pa. Const. art. II, § 15, likewise prohibits examination of the alleged motives of legislators in taking legislative action. *See Sweeney v. Tucker*, 375 A.2d 698, 704 (Pa. 1977) ("The Clause 'prohibits inquiry into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts.'"); *see also Pennsylvania State Lodge v. Com., Dep't of Labor & Indus.*, 692 A.2d 609, 614 (Pa. Cmwlth. 1997); *League of Women Voters v. Com.*, 177 A.3d 1000, 1005 (Pa. Cmwlth. 2017) (single judge opinion).

In light of the above, the Court cannot proceed with the "motives" analysis requested. The Committee stated on the record, repeatedly, the legislative purpose of its investigation—to examine the application of Act 77 and Act 12 in the two most-recent elections and to examine whether the modification of election laws were needed in light thereof. State PFR, Ex. B at 3:2-3:18, 9:22-10:3, 14:5-10 (Committee Sept. 9, 2021 hearing); Ex. C at 4:10-21 (Committee Sept. 15, 2021 hearing). That purpose is inarguably a subject matter within the General Assembly's constitutional purview. *See* Pa. Const. art. VII, §§ 1, 2, 3, 4,

6, 9, 11, 13, 14; *see also* U.S. Const. art. I, § 4, cl. 1. Thus, there is no need, and no lawful ability, to look to individual legislators' purported motives in assessing the validity of the Subpoena. In short, Count III cannot succeed on the rationale claimed by the Acting Secretary.

Next, Count III also cannot succeed because the Subpoena was issued utterly in accord with the basic requirements of Pennsylvania law as it pertains to legislative investigations. On that front, as explained by our Supreme Court, "the justification for a legislative investigation, whether conducted by one or both of the houses of the General Assembly, is the ascertainment of facts and other relevant information to aid the members of the legislative bodies in formulating, drafting and enacting remedial or other beneficial laws." *See McGinley v. Scott*, 164 A.2d 424, 430 (Pa. 1960). The Court has further explained that the "power to investigate is an essential corollary of the power to legislate. The scope of this power of inquiry extends to every proper subject of legislative action." *Com. ex rel. Caraci v. Brandamore*, 327 A.2d 1, 3 (Pa. 1974); *see also Camiel v. Select Committee on State Contract Practices*, 324 A.2d 862, 870 (Pa. Cmwlth. 1974) ("Our reading of the cases permits us to conclude that there is no constitutional

impediment per se to a broadly authorized and wide-ranging legislative inquiry so long as the inquiry is to develop information consistent with the exercise of legislative power…."); *see generally Watkins*, 354 U.S. at 187 (describing Congress' power to investigate as "broad"); *Trump v. Mazars USA, LLP*, 140 S.Ct. 2019, 2031 (2020) (citing *Watkins*). Furthermore, the General Assembly's power to investigate potential laws is "basic and fundamental" and is "a power which should be liberally construed and sustained in safeguarding and preservation of a Republican form of government." *McGinley*, 164 A.3d at 433; *see also Camiel*, 324 A.2d at 865 (noting "separation of powers" concerns implicated by request to quash legislative subpoena).[27]

Applying the foregoing here, the Committee stated repeatedly on the Senate record the purpose of its investigation: to gather information

[27] Critically, research reveals that to date Pennsylvania authority in this arena (*i.e.*, challenges to legislative subpoenas) appears to place limits on legislative inquiries *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. *See, e.g.*, *Lunderstadt*, 519 A.2d at 410; *Carcaci*, 327 A.2d at 4-5; *McGinley*, 164 A.2d at 431; *Annenberg*, 2 A.2d at 617-18; *Camiel*, 324 A.2d at 864-65; *Shelby v. Second Nat'l Bank*, 19 Pa. D. & C. 202, 204 (Fayette C.P. 1933); *Com. v. Costello*, 21 Pa. D. 232, 232 (Quarter Sessions Phila. 1912). The foregoing scenarios are simply not at issue here: no individual person is being investigated for wrongdoing and the Subpoena is not directed at a particular person. It is a subpoena from one part of government to another part of the same government.

to review recently enacted election laws and whether changes to the same were needed. State PFR, Ex. B at 3:2-3:18, 9:22-10:3, 14:5-10; Ex. C at 4:10-21. This is certainly an appropriate subject matter for a Senate investigation, *see* Pa. Const. art. VII, §§ 1, 2, 3, 4, 6, 9, 11, 13, 14; *see also* U.S. Const. art. I, § 4, cl. 1, and the manner used—a subpoena soliciting records from a Commonwealth agency—is an appropriate way to ascertain facts and relevant information to aid the members of the Committee and the Senate in forming, drafting, or enacting legislation. *See* Pa. Const. art. II § 11; 46 P.S. § 61; Senate Rule 14(d)(3). Hence, it is an appropriate investigation, and to the extent Count III suggests otherwise, that claim is not meritorious.

Finally, if Count III is intended to be a mere relevance challenge, *see* State PFR ¶ 228 (alleging "no discernable reason" for requests) and State Brief at 33 (discussing "plausible connection"), that claim likewise fails. Pennsylvania law appears to call for a three-part inquiry to determine the validity of a legislative subpoena, the third part of which touches on relevance: (1) whether the inquiry is "within the authority" of the body; (2) whether the demand for information is "too indefinite"; and (3) whether the information solicited is "reasonably relevant" to the

investigation. *See In re Semeraro*, 515 A.2d 880, 882 (Pa. 1986); *see also Lunderstadt v. Pa. House of Representatives Select Committee*, 519 A.3d 408, 411 (Pa. 1986) (opinion announcing judgment of the Court); *id.* at 417 (Zappala, J., concurring); *see generally Trump*, 140 S.Ct. at 2032 (***rejecting*** argument that legislative committee subpoenas to President for private records required a showing of (1) "demonstrated, specific need" or (2) that the records were "demonstrably critical" to a "legislative purpose"). As is material here, the third prong is a "minimal evidentiary burden" and requires only that "there must be some evidence establishing that the testimony sought will likely touch upon the subject matter of the underlying investigation." *In re Semeraro*, 515 A.2d at 882 (quotations removed).

Under the test as applied here, the Subpoena satisfies all three parts.

First, the inquiry into election laws is within the authority of the Senate generally, and within the authority of the Committee specifically. *See* Pa. Const. art. VII, §§ 1, 2, 3, 4, 6, 9, 11, 13, 14; *see also* U.S. Const. art. I, § 4, cl. 1; *see also infra* (regarding Count IV).

Second, the demand for information has not been claimed by any Petitioner to be too indefinite; indeed, all parties have proceeded as if the demands were clearly understood.

Third, the information is reasonably relevant to the investigation because it will reveal: exactly how people voted in response to the options created by Act 77 and Act 12; what problems they encountered, if any; and whether the new laws permitted (or are susceptible to) unlawful double voting due to known defects in the SURE system. *See* SURE Report *supra*.[28]

In disputing the legislative purpose, the Acting Secretary repeatedly references the successes of Act 77. But this argument misses the mark because as sound as the current electoral scheme may be, this Court need look no further than its own dockets—which were crowded

[28] The Acting Secretary also suggests that all of the recommendations in the SURE Report have been implemented. Judicially noticeable public documents, however, demonstrate that in its statutorily mandated formal response indicating whether the recommendations have been adopted and, if not, the reasons for not doing so, the Department generally avoided addressing any of the recommendations. (Appendix 1267a.) Indeed, then-Secretary Boockvar's one-page letter can hardly be considered "a response to the department detailing adoption of such recommendations, or the reason why recommendations have not been adopted, within one hundred and twenty business days of the publication of the audit[,]" as is required by statute, *see* 72 P.S. § 403, and stands in stark contrast to responses submitted by other executive agencies during that time-period under the same provision. (*Cf.* Appendix 1269a-1274a.)

with dozens of election-related actions filed by both political parties—to be convinced that the Election Code is not a model of perfection beyond good-faith legislative scrutiny. Furthermore, rare or not, the Acting Secretary's own filings acknowledge that malfeasance, misfeasance, or simple mistakes do occur. In fact, just this month, an Information was filed in the United States District Court for the Eastern District of Pennsylvania,[29] charging a judge of elections in Philadelphia with various election-related criminal offenses. (Appendix at 1236a-1247a.)[30] *See also* Karen Shuey, *Berks County elections officials turn possible voter fraud case over to district attorney*, Reading Eagle (Sept. 23, 2021) (noting that single voter who had two registrations voted once by mail and once in person during the 2020 election).[31]

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[29] As previously noted, the Court can take judicial notice of publicly available records from other proceedings. *See supra*.

[30] In July of 2020, another judge of elections in the City of Philadelphia, along with a former congressman, were also indicted for similar conduct. (Appendix at 1249a-1265a.)

[31] *Available at* https://www.readingeagle.com/2021/09/23/berks-elections-officials-voter-fraud-case/. While the substance of allegations in newspaper articles cannot be judicially noticed, this Court has recognized that judicial notice of newspaper articles to support a finding of notoriety and or publicity surrounding a subject may be appropriate. *See Tilghman v. Com.*, 366 A.2d 966, 967 (Pa. Cmwlth. 1976) ("We believe that it is proper here to take judicial notice of the numerous newspaper articles and news broadcasts which have publicized the 'Harristown' project, the Commonwealth's role in the project and the agreements of October 29, 1974 and October 14, 1975."), *decree aff'd*, 374 A.2d 535 (Pa. 1977).

In sum, for all of the foregoing reasons, Count III of the Acting Secretary's PFR should fail as a matter of law.

D. Count IV: The Acting Secretary's claim that the Subpoena is "outside of the Committee's subject matter area and issued without authority" fails as a matter of law.

Count IV of the Acting Secretary's Petition for Review claims that the Subpoena is unenforceable because election-related matters are allegedly outside of the "Committee's subject matter area" and the Committee allegedly "did not have authority to issue the Subpoena" under the Pennsylvania Senate's Rules. State PFR at ¶¶ 235-46. According to the Acting Secretary, the responsibility for election-related matters lies solely with the State Government Committee. *See id.* Count IV fails as a matter of law for at least three reasons.

First, and most importantly, any review by this Court of the alleged scope of a Senate Committee's "subject matter area," let alone the alleged "subject matter area" of the Intergovernmental Operations Committee, is prohibited by the political question doctrine. Likewise, any purported inquiry by this Court into a Senate Committee's alleged "authority" to issue a legislative subpoena under the Senate's Rules is equally barred by the political question doctrine. Indeed, Article II,

Section 11 of the Pennsylvania Constitution states that "each House shall have power to determine the rules of its proceedings." Both this Court and the Pennsylvania Supreme Court have applied this constitutional provision to make clear that: "Under the political question doctrine, courts generally refuse to scrutinize a legislature's choice of, or compliance with, internal rules and procedures." *Blackwell v. City of Philadelphia*, 684 A.2d 1068, 1071 (Pa. 1996); *Common Cause/Pennsylvania v. Com.*, 710 A.2d 108, 118 (Pa. Cmwlth. 1998) ("Without doubt, the General Assembly has exclusive power over its internal affairs and proceedings."), *aff'd*, 757 A.2d 367 (Pa. 2000). As such, "the question of whether the legislature violated its own internal rules is generally non-justiciable since the courts cannot interfere with the internal workings of the legislature without expressing the lack of respect due coordinate branches of government." *Blackwell*, 684 A.2d at 1071 (internal quotations and citation omitted).[32]

[32] Both *Blackwell* and *Common Cause* identify an exception to this general rule if constitutional violations in the legislative process are alleged. 684 A.2d at 1071; 710 A.2d at 118. In this case, however, the Acting Secretary is *not* challenging the constitutionality of the Senate Rules or the process by which they were enacted. Rather, the Acting Secretary is merely challenging the Committee's alleged compliance with, or violation of, the Senate's own internal Rules, which is expressly prohibited by the political question doctrine. *See id.*

Here, as in *Blackwell*, the Acting Secretary is seeking to have this Court "interfere in a solely legislative matter concerning the day-to-day affairs of" the Legislature. 684 A.2d at 1073. In fact, the Acting Secretary is seeking to have this Court determine the jurisdiction and "subject matter" authority of two separate Senate Committees, to have this Court interpret and apply the Senate's own Rules so as to limit the scope and authority of the Intergovernmental Operations Committee, and to declare that *only* the State Government Committee has jurisdiction and "subject matter" authority over election-related matters. But here, as in *Blackwell*, such "judicial interference in the legislature's conduct of its own internal affairs" would be improper under the political question doctrine. *Id.* (holding question of whether discharge of former special assistant was in violation of city council internal rules was non-justiciable political question).

Second, even if the political question doctrine did not bar this Court from meddling in the Senate's own internal committee affairs (which it does), the Acting Secretary points to no Senate Rule or other legal authority that limits, let alone expressly forbids, the jurisdiction or "subject matter" authority of the Intergovernmental Operations

Committee to issue subpoenas for election-related matters. The Acting Secretary cites to a number of media statements, press releases, and roll call votes as support for an alleged "long-standing understanding that election matters fall under the jurisdiction of the State Government Committee." State PFR at ¶¶ 235-46. However, nowhere in the Senate's Rules—the single, controlling authority for Senate Committee business—is either the Intergovernmental Operations Committee's jurisdiction limited or is the State Government Committee granted *exclusive* jurisdiction over election-related matters. To the contrary, Senate Rule 14(d)(3) provides that each Committee, without any express limitation, "may issue subpoenas, subpoenas *duces tecum* and other necessary process to compel the attendance of witnesses and the production of any books, letters or other documentary evidence desired by the committee." *See also* Mason's Manual of Legislative Procedure, § 795, ¶ 4 ("Legislative committees may be created to investigate *any* subject legitimately within the scope of functions, powers, and duties *of the legislature*." (emphasis added)) (relevant provisions in Appendix at 1227a-1234a). Again, nothing in the Senate Rules expressly forbids the Intergovernmental Operations Committee

from issuing subpoenas for election-related matters, nor do the Senate Rules curtail the Intergovernmental Operations Committee in any way from doing so.[33] And, moreover, the Chair of the State Government Committee, who also serves on the Intergovernmental Operations Committee, publicly stated on the Senate record that he supports the Committee's issuance of the Subpoena because of "workload" issues and the need to "balance the labor" with the State Government Committee on election-related matters.[34]

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[33] The reasoning behind why the Subpoena was issued by this particular Committee was aptly explained by Senator Dush at the Committee's September 9, 2021 hearing:

> The Intergovernmental Operations Committee, although we can certainly understand if the general public might not immediately associate the committee's name with elections. However, the meaning of [] intergovernmental is multiple levels of government and how they interact.
>
> So while our local government committee focuses just on municipal and county government issues, and our state government committee focuses on state government issues, an appropriate focus for the Intergovernmental Operations Committee is legislation and laws that involve multiple levels of government.
>
> I already mentioned how elections are a multilevel enterprise that runs the entire gamut of levels of government. Election law and execution of all federal, state, county, and municipal governments, which fits right into the definition of intergovernmental, multiple [] levels of government.

State PFR, Ex. B at 12:15-13:3.

[34] Specifically, Senator Argall stated on the record at the Committee's September 15, 2021 hearing:

Third, and finally, even assuming *arguendo* that the Senate Rules specified that subpoenas for election-related matters had to be issued by the State Government Committee as opposed to the Intergovernmental Operations Committee (which the Senate Rules do not), the Subpoena would still be valid and enforceable. Indeed, the Rules of Parliamentary Practice in Mason's Manual of Legislative Procedure—which pursuant to Senate Rule 26 govern "the Senate in all cases to which they are applicable"—expressly provide that "the fact that a house acted in violation of its own rules or in violation of parliamentary law in a matter clearly within its power does not make its action subject to review by the judiciary." Mason's, § 15, ¶ 4 ("Failure of a House of the Legislature to Conform to Its Rules Does Not Invalidate Its Acts"). Mason's further provides that "[t]he judiciary cannot declare an act of a legislature void on account of noncompliance with rules of procedure made by itself to govern its own deliberations[.]" Mason's, § 73, ¶ 3

> As Chairman of the State Government Committee, I suggested several months ago, because of a considerable workload with State Committee congressional redi[stri]cting, lobbying reform, election reform legislation that I'm moving ahead with the minority chairman, Senator Sharif Street, and a host of other issues, that it would be helpful to balance the labor and, in my mind, this committee makes perfect sense to move forward on this issue.

State PFR, Ex. C at 58:24-59:7.

("Powers of the Judiciary over Legislative Bodies Generally"). And Mason's is entirely consistent with established Pennsylvania Supreme Court precedent. *See Com. ex rel. Fox v. Chace*, 168 A.2d 569, 571 (Pa. 1961) (holding "[t]he mere failure to conform to some defined parliamentary usage will not invalidate the action when the requisite number of members have agreed on the particular measure[,]" and further noting "[t]he members of the body alone have the right to object to the violation of the parliamentary rule"). As such, even if the Intergovernmental Operations Committee's issuance of the Subpoena did somehow violate one or more of the Senate Rules (which it does not), that violation would be legally insufficient to invalidate the Subpoena.

Accordingly, for any one of the three reasons stated above, Count IV of the Acting Secretary's Petition for Review should be dismissed as a matter of law.

E. Count V: The Acting Secretary's claim that Paragraph 16 of the Subpoena "demands critical infrastructure information" protected from disclosure under federal statute fails as a matter of law.

Count V of the Acting Secretary's PFR claims that Paragraph 16 of Subpoena[35] is unenforceable because it purportedly demands protected election system "critical infrastructure information" that cannot be disclosed under the Critical Infrastructure Information Act of 2002, 6 U.S.C. §§ 671-674 (the "CII Act"), and the USA PATRIOT Act, 42 U.S.C. § 5195c. State PFR ¶¶ 248-57; State Brief at 57-58. The Acting Secretary's argument, however, ignores direct guidance provided by the Department of Homeland Security itself and is based on a faulty interpretation of each of the foregoing federal statutes. On the latter point, the Acting Secretary fails to present the vital difference between critical infrastructure information ("CII") and protected critical infrastructure information ("PCII"). Accordingly, Count V fails as a matter of law for at least the following four reasons.

[35] Paragraph 16 contains the following request: "[a] copy of all reports of audits and/or review 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)."

First, the U.S. Department of Homeland Security has already informed the Commonwealth through the Auditor General that the requested audit and report information at issue in Paragraph 16 can be provided to other state branches of the Pennsylvania government. Indeed, in 2018, the Department of State lodged identical arguments to those raised here in Count V, which were refuted by the Department of Homeland Security, as set forth below:

> DOS repeatedly advised us that the security assessments were not to be provided because Homeland Security had designated election infrastructure as "critical infrastructure" which prevented DOS from releasing the reports to DAG. Despite repeated requests over six months for a statement in support of this contention, DOS claimed they were unable to obtain such a statement form Homeland Security. ***During the course of our audit, we were able to determine that these types of reports are provided to auditors in another state as noted below, Homeland Security did not have concerns about DOS sharing the reports with DAG***.
>
> In a letter dated August 17, 2018, DOS' Chief Counsel denied DAG's request to review the security assessment reports on the SURE system issued by Homeland Security and other outside entities citing that pursuant to the USA Patriot Act, Homeland Security designated election systems as part of critical infrastructure as defined under the Critical Infrastructure Information Act of 2002 (CIIA). It was the opinion of DOS' Office of Chief Counsel that the outside security assessment reports were protected critical infrastructure information (PCII) and could only be accessed by those with an absolute "need to know" in order to perform

> homeland security duties. ***The Auditor General traveled to Washington, D.C. to meet with representative from Homeland Security who stated, however, that sharing the reports was left up to the discretion of each particular state.***

SURE Report (Appendix at 1057a) (emphasis added; footnotes omitted).

In other words, the audit reports at issue in Paragraph 16 are not "protected critical infrastructure information" in this context in the eyes of the very federal organization tasked with protecting such information. This nullifies the Acting Secretary's Count V at the outset.

Second, the reason the Department of Homeland Security took the foregoing position is simple: a state government cannot shield its own information from itself by claiming the information is PCII. The CII Act's PCII prohibitions against disclosure apply only to information in the hands of the governmental recipient (*i.e.*, in this case, the federal government); it does not apply to information in the hands of the "submitter" (*i.e.*, in this case, the Pennsylvania government).

The foregoing principle was laid out in *Cty. of Santa Clara v. Superior Ct.*, 89 Cal. Rptr. 3d 374, 382-87 (Cal. Ct. App. 2009), which seems to be the only case on point on this very issue. In *Santa Clara*, the County of Santa Clara refused to provide a geographic information

system "basemap" to a third-party entity, the California First Amendment Coalition. *Id.* at 379-80. The County argued that disclosure of the basemap was prohibited because it had been validated as PCII under the CII Act. *Id.* at 382. In other words, the County made the exact same argument that the Acting Secretary makes here in relation to the audit reports sought by Paragraph 16. *Compare id.*, *with* State PFR ¶¶ 248-57.

The *Santa Clara* court directly refuted the foregoing argument. *Santa Clara*, 89 Cal. Rptr. 3d at 386-387. The court performed an in-depth analysis of the CII Act, its intent, and its legislative history and held the CII Act does not apply because the County was the ***submitter*** of CII, not a recipient of PCII. *Id.* The court analyzed the language of the CII Act and its associated regulations, Code of Federal Regulations, volume 6, part 29, and held as follows: "[a]s we interpret [Section 673], it draws a distinction between the submission of CII and the receipt of PCII. *In the hands of the submitter, the nature of the information remains unchanged; in the hands of the governmental recipient, it is protected from disclosure*." *Id.* at 386 (emphasis added).

The court concluded by stating "[i]n this case, the information at issue was submitted by the County, not to it. Because the County is a submitter of CII, not a recipient of PCII, neither the CII Act nor the accompanying regulations apply here." *Id.* at 387 (emphasis added).

Here, just like the County in *Santa Clara*, the Department of State is the submitter of CII (the audit reports at issue in Paragraph 16), not a recipient of PCII. In fact, the factual situation at bar exceeds the situation in *Santa Clara* because unlike the two unrelated entities in that case, the two parties here are part of the same entity: the Commonwealth government. The Commonwealth's Executive Branch is part of the very same government as the Legislative Branch. As a submitter of CII, the state government cannot avail itself of the CII Act against itself. Accordingly, the Acting Secretary cannot make use of 6 U.S.C. § 673 or 42 U.S.C. § 5195c here as a matter of law.

Third, the Acting Secretary has failed to even plead that the complained-of audit reports requested by Paragraph 16 exist and have even been labeled PCII as required by law to put these statutes into play. State PFR ¶¶ 248-57. Under the CII Act, written information only receives protection when it is submitted with the following label: "This

information is voluntarily submitted to the Federal government in expectation of protection from disclosure as provided by the provisions of the Critical Infrastructure Information Act of 2002." 6 U.S.C. § 673(a)(2); 6 C.F.R. § 29.5(a)(3)(i); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 249 F. Supp. 3d 516 (D.D.C. 2017).

The Acting Secretary never alleges that existing audit reports contain this required statement, nor does the Acting Secretary contend that they were subsequently marked as Protected Critical Infrastructure Information by a relevant DHS official. State PFR ¶¶ 248-57; 6 C.F.R. § 29.2(g). Accordingly, the Acting Secretary's claim fails procedurally.

Fourth, the federal statutes asserted by the Acting Secretary cannot be used as private causes of action, which renders Count V a nullity. 6 U.S.C. § 674 explicitly states that nothing in the Critical Infrastructure Information Act of 2002, 6 U.S.C. §§ 671-674, "may be construed to create a private right of action for enforcement of any provision of this chapter." 6 U.S.C. § 674. Moreover, courts have rejected private causes of action purportedly brought under 42 U.S.C. § 5195c, including actions for injunctive relief.

For example, in *Detroit Int'l Bridge Co. v. Fed. Highway Admin.*, 666 F. Supp. 2d 740, 747 (E.D. Mich. 2009), the court held that "the Critical Infrastructures Protection Act fails to address issues regarding disclosure of information and does not appear to create individual rights enforceable in a civil suit." The Acting Secretary is not permitted to utilize federal statutes as private causes of action when those very statutes strictly forbid such action. Count V fails for this additional procedural reason.

Accordingly, for any one of the four reasons stated above, Count V of the Acting Secretary's PFR should be dismissed as a matter of law.

F. Count VI: The deliberative process privilege does not apply.

Count VI of the Acting Secretary's PFR claims the Subpoena is unenforceable because the "[m]aterials covered by paragraphs 2 and 16 [of the Subpoena] are deliberative in character and that were made before the relevant deliberative process was completed." State PFR ¶ 265-66. As a threshold matter, the Acting Secretary's argument (at least with regard to Paragraph 2 of the Subpoena) aptly encapsulates the pure conjecture underlying most of this action. Specifically, while the Acting Secretary acknowledges that the Subpoena could be

interpreted as "refer[ring] only to final directives, guidance, policies, and procedures," the Acting Secretary posits that "the Committee ***may*** intend the Subpoena to reach draft documents and discussions about those drafts." Yet, the Acting Secretary did not agree to produce public documents that would be encompassed by the narrow interpretation she proffers, relying instead on a construct that somehow makes the entirety of the request objectionable. Recourse to the judiciary under these circumstances is, as this Court has noted, inappropriate. *Camiel*, 324 A.2d at 866 (explaining that "[a]t this point, we do not know whether the Select Committee may be willing to accept those records which Camiel and the Democratic County Executive Committee of Philadelphia may be willing to submit" and noting that, "[a]t a confrontation, the Select Committee could decide not to force the issue or even to seek a contempt citation").

But even if some or all of the documents sought by the Subpoena are not "final" directives, guidances, policies, and procedures, the Committee's argument fails as a matter of law.

First, the Acting Secretary cannot invoke deliberative process privilege—or any privilege—against the Committee. In fact, the Acting

Secretary has a duty to allow the Committee to inspect its books and papers, under the provisions of Title 71, quoted at length above. *See* 71 P.S. § 272(a); 71 P.S. § 801. These provisions make plain that the Acting Secretary is statutorily obligated to provide the Committee with the materials sought via the Subpoena. And because the statute's language allows for unequivocal access to Petitioner's records, no privilege applies.

To illuminate, in *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204 (Pa. 2014), the Pennsylvania Supreme Court held that attorney-client privilege did not apply in the context of a nearly identical provision in the Commonwealth Attorney's Act (the "CAA"). *See* 71 P.S. §732-208 ("The Office of the Attorney General shall have the right to access at all times to the books and papers of any Commonwealth agency necessary to carry out his duties under this act."). In that matter, the Attorney General issued a subpoena on the Pennsylvania Turnpike Commission (the "PTC") seeking access to various materials. *See In re Thirty-Third*, 86 A.3d at 206. The PTC filed a motion for a protective order seeking to prevent disclosure of some of the requested materials because it alleged they were protected by

attorney-client privilege. *See id.* The Court observed that the CAA had a "broad scope" because unlike other statutory regimes, the CAA did not expressly "provide an exception for allegedly privileged material." *Id.* at 216. The Court further stated that the CAA "lists only one condition on the mandate of production: the material sought must be 'necessary' for execution of the OAG's duties." *Id.*; *see id.* at 224.

Here, Section 272 of Title 71, is even broader than the CAA because not only does it not provide an exception for allegedly privileged material, but also it does not contain any limiting language akin to "necessary." The General Assembly therefore intended Section 272 to provide very broad access to the records of the Acting Secretary and the Department of State. As such, consistent with the rationale of *In re Thirty-Third*, the Acting Secretary cannot claim privilege here.[36]

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[36] In briefing to the Supreme Court by the Attorney General, the justification for not recognizing the PTC's ability to claim privilege in spite of the books-and-papers provision of the CAA was explained as follows; this explanation applies perfectly to the present dispute as it concerns the Title 71 provisions:

> The books and papers provision does not include exceptions for materials that might be the subject of the attorney-client and work-product privileges, and it makes sense that the Act does not include such exceptions. First, agencies and independent agencies of the Commonwealth exist solely to benefit the taxpayers and, therefore, cannot have a legitimate interest in withholding their books and papers from inspection by the taxpayers' duly elected representative - in this case, the Attorney General. Second, the ability of agencies and

Second, the deliberative process privilege has never been adopted by a majority of the Pennsylvania Supreme Court. In *Commonwealth v. Vartan*, 733 A.2d 1258 (Pa. 1999)[37], a plurality of the Court first applied deliberative process to preclude a contractor from deposing Former Chief Justice Nix regarding his decision to cancel a contract for the construction of a Commonwealth Court courthouse. *See id*. at 1266. However, since *Vartan*, a majority of the Supreme Court has not recognized deliberative process privilege. *See LaValle v. Office of General Counsel of Com.*, 769 A.2d 449, 457 (Pa. 2001) (recognizing *Vartan* as a plurality decision, and noting "[t]he Court has not definitively adopted the deliberative process privilege"). To date, the Right-to-Know Law (the "RTKL") is the only context in which

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> independent agencies of the Commonwealth to shield their books and papers from inspection would cause substantial and irreparable harm to OAG's ability to carry out its statutory duties of investigation and, when appropriate, prosecution. Finally, as noted above, recognizing such exceptions would essentially allow agencies and independent agencies of the Commonwealth to cloak the development of their processes and procedures in secrecy and also preclude any truly meaningful oversight of their operations and decisions. Accordingly, this Court should reject the PTC's suggestion that the attorney-client and work-product privileges be incorporated into the books and papers provision of the Act.

See Brief of Commonwealth of Pennsylvania, *In re Thirty-Third Statewide Investigating Grand Jury*, 2012 WL 8718351, at *13.

[37] The Acting Secretary relies on *Vartan* to support the deliberative process claim, however the Acting Secretary fails to disclose that it is a plurality decision.

deliberative process is recognized. *See* 65 P.S. § 67.708(b)(10)(i)(A). This provision of the RTKL, and the caselaw interpreting it, do not apply in this non-RTKL context.

Third, in the event deliberative process applies, the Acting Secretary has not satisfied the burden of proving the materials are within the privilege's scope. The government has the initial burden to prove the privilege applies; the government "must present more than a bare conclusion or statement that the documents sought are privileged. Otherwise the agency, not the court, would have the power to determine the availability of the privilege." *Redland Soccer Club, Inc. v. Dep't of the Army of the United States*, 55 F.3d 827, 854 (3d Cir. 1995). In the RTKL context, affidavits or privilege logs are considered "sufficient evidence to establish an exemption" from disclosure. *McGowan v. Pa. Dep't of Envmtl. Prot.*, 103 A.3d 374, 381 (Pa. Cmwlth. 2014).

Applied here, the Acting Secretary has not satisfied the burden of proving the deliberative process privilege is triggered because the Acting Secretary did not "submit evidence of specific facts showing how the information relates to the deliberation of a particular decision." *McGowan*, 103 A.3d at 383.

Finally, the deliberative process privilege "is not absolute[,]" *Redland Soccer Club*, 55 F.3d at 854[,] and the Committee can "overcome the privilege by showing a sufficient need for the material in the context of the facts or the nature of the case[.]" *Id.* When the Court balances the interests of the two parties it should consider "at least the following factors: '(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; [and] (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.'" *Id.* (quoting *First Eastern Corp. v. Mainwaring,* 21 F.3d 465, 468 n.5 (D.C. Cir. 1994)).

These considerations weigh in favor of disclosure. The materials sought in Paragraphs 2 and 16 are highly relevant to the Committee's investigation and they are the only source of evidence that will provide detailed insight into the SURE system's operation. As for the remaining considerations, the information sought by the Subpoena concerns a very serious matter because election security is fundamental to our democracy; and the Department should not fear future disclosures

because this is a unique context where the information is exchanged ***between governmental*** entities, and not released to the public at large.

Therefore, the materials sought in Paragraphs 2 and 16 are not protected by the deliberative process privilege.

G. Count VII: The Subpoena is narrowly tailored, as it identifies specific information and requests information that has been previously produced within one week.

Finally, to the extent the Acting Secretary continues to maintain that the Subpoena is overbroad, that claim is similarly unavailing. First, for the reasons set forth *supra*, the Subpoena is related to a legitimate legislative purpose and, thus, is not overbroad. Nor does the Acting Secretary's PFR suggest that any of the Subpoena's requests are in any way ambiguous. Moreover, even if this Court were to find any aspect of the Subpoena is overbroad, the appropriate remedy is not a wholesale quashal of the Subpoena, but rather, a judicial narrowing. *See Trump v. Mazars USA LLP*, No. 19-CV-01136 (APM), 2021 WL 3602683, at *22 (D.D.C. Aug. 11, 2021) (holding that the proper remedy for an overbroad congressional subpoena is not invalidation, but rather

"a judicial narrowing"). Accordingly, the Acting Secretary's request to invalidate the Subpoena for overbreadth fails.

VII. ARGUMENT IN *HAYWOOD V. COM.*

A. The Haywoods do not have a ripe claim for chilled speech and the claim fails as a matter of law.

The Haywoods' contention of possible chilled speech resulting from any disclosure of information fails for two reasons.

First, the claim fails for lack of ripeness. The Haywoods' PFR and Brief are premised entirely on events that *may* happen. *See* Haywood Brief at 14-15; Haywood PFR ¶¶ 52, 54. Therefore, it is entirely speculative whether the Haywoods and similar individuals will ever have a claim.

Second, even if these claims were ripe, the Haywoods' assertion that the chilling effect may violate the fundamental right to vote is without merit for all the reasons set forth fully above.

B. The Haywoods have no right to relief under Article I, Section 1 of the Pennsylvania Constitution.

The Haywoods seek relief for alleged privacy violations under Article I, Section 1 of the Pennsylvania Constitution and adopt arguments in support thereof that are substantively similar to those asserted by the Acting Secretary in support of Count II of the State

PFR. Therefore, the Committee adopts the reasoning set forth above, with respect to these arguments and addresses only the specific arguments not raised by the Acting Secretary.

On that front, the Haywoods' reliance upon the Commonwealth's Privacy Policy to establish a violation of Article I, Section 1 is misplaced. The Commonwealth's Privacy Policy contemplates public disclosure to third parties, not inter-government sharing of information. In fact, the portion of the policy that the Haywoods cite is specifically labeled "Public Disclosure." *See Privacy Policy & Disclaimers*, https://www.pa.gov/privacy-policy/ (last visited Oct. 21, 2021). As explained *supra*, there is a critical distinction between disclosing information to the public and disclosing it to another government entity for a legitimate legislative purpose. Because the Committee seeks from the Department of State information that voters already disclosed to the government, there is no *public* disclosure by the state in violation of the Commonwealth's Privacy Policy.

For the foregoing reasons and all those set forth elsewhere in this Brief, the Haywoods have no claim for a violation of Article I, Section 1.

C. The Haywoods' claim pursuant to the Pennsylvania Breach of Personal Information Notification Act is waived, and, in any event, fails on the merits.

The Haywoods assert for the first time in their Brief that the Acting Secretary will violate the Pennsylvania Breach of Personal Information Notification Act (the "Act"), 73 P.S. § 2302, *et. seq*., because the "disclosure of … personal information to an unauthorized and unnamed third party, would constitute a **breach** of the security of [the SURE] system[.]" Haywood Brief in Support of Summary Relief at 19 (emphasis in original). This claim fails for two reasons.

First, the claim is waived because the Haywoods did not raise it in their Petition for Review. It is well-settled that an original jurisdiction petition for review must include, *inter alia*, "a general statement of material facts upon which the cause of action is based" and "a short statement of the relief sought[.]" Pa.R.A.P. 1513(e)(4)-(5). An application for summary relief "authorizes immediate disposition of a petition for review[.]" Pa.R.A.P. 1532, cmt. Summary relief is proper only "if the right of the applicant thereto is clear." Pa.R.A.P. 1532(b). And a court considers an application for summary relief by "review[ing] the record in the light most favorable to the opposing party[.]" *Phantom*

Fireworks, 198 A.3d at 1220. Thus, in order for relief to be clear based on a review of the record, a petitioner must assert the claim for relief in the petition for review. Otherwise, the argument is not part of the record, and relief on that basis cannot be clear.

Here, the Haywoods sought declaratory and injunctive relief on only one claim: that the "Committee subpoena requests information protected from disclosure by the Pennsylvania Election Code and regulations of the Department of State[.]" Haywood PFR at 8 (capitalization omitted). No other claim was stated; no other relief sought. However, the Haywoods now state a claim based on the Act, which is different from their initial claim because the Act is not a part of either the "Pennsylvania Election Code and regulations of the Department of State[.]" Haywood PFR at 8 (capitalization omitted). This new claim is therefore waived because the Court cannot address the issue based on the record. *Cf.* Pa.R.A.P. 1513(d)(5) (claim waived in appellate petition for review if the court is unable "to address the issue based on the certified record"). Even if not technically waived, the Haywoods are not entitled to summary relief based on their new claim

because the argument is not part of the record and therefore relief on that basis cannot be clear.

Second, in the event the claim is not waived, it nevertheless fails because compliance with the Subpoena is not a "breach of the security system" as defined by the Act. *See* 73 P.S. § 2302 (defining "breach of the security of the system" as the "unauthorized access" of personal information; and excluding from that definition the "[g]ood faith acquisition of personal information by an employee or agent of the entity for the purposes of the entity is not a breach of the system if the personal information is not used for a purpose other than the lawful purpose of the entity and is not subject to further unauthorized disclosure."). To begin, there is no "unauthorized access" here because the Committee is explicitly authorized to access the Department of State's records. 71 P.S. § 272(a); *see also* 71 P.S. § 801.

Moreover, the Committee was authorized to issue the Subpoena pursuant to its investigation of the effect of Act 77 on recent elections. *See* Senate Rule 14(d)(3); *see also* Mason's, § 795, ¶ 4.

Thus, and contrary to the Haywoods' claim, the Department would not violate the Act if it complies with the Subpoena because the

Committee is expressly authorized to access the information, and issue a subpoena consistent with that right.

To the extent the Haywoods argue the Acting Secretary would violate the Act by disclosing voters' personal information to "an unauthorized and unnamed third party," Haywood Brief at 19, that claim fails because the Acting Secretary is not disclosing the information to a third-party, but she is disclosing it—pursuant to her statutory obligation—to the Committee—who is authorized to review it. In any event, the third-party vendor whom the Committee ultimately selects to assist its investigation cannot be considered an "unauthorized" party. The third-party will be contractually authorized to access the information, and will be bound to have in place robust security protocols. In this way, any access given to a third-party vendor is no different from the access routinely given to various third-party entities by the Acting Secretary. *See* BPro, Inc. Contract *supra*. As such, any third-party who contracts with the Committee will be an "authorized" entity or fall within Section 2302's exception as a good faith employee or agent. *See* 73 P.S. § 2302 (excluding from the definition of "breach of the security of the system" the "[g]ood faith

acquisition of personal information by an employee or agent of the entity for the purposes of the entity is not a breach of the system if the personal information is not used for a purpose other than the lawful purpose of the entity and is not subject to further unauthorized disclosure.").

Finally, the Haywoods' reliance on *Dittman v. UPMC*, 196 A.3d 1036 (Pa. 2018) is misplaced. In *Dittman*, the Pennsylvania Supreme Court recognized a common law duty for employers to exercise reasonable care "in collecting and storing [employees'] personal and financial information on its computer systems." *Id.* at 1048. The Court based its holding on an existing common law duty that places a duty on actors "in scenarios involving [the] actor's affirmative conduct," *i.e.*, the employer's requirement that employees provide it with personal information. *Id.* at 1046-47.[38] However, *Dittman* does not preclude an actor from securely transferring personal information pursuant to a statutory obligation and a lawful subpoena. In this light, the secure transfer of information to the Committee itself is not a breach of the

[38] The Pennsylvania Supreme Court has yet to decide whether this common law duty applies outside of the employer-employee relationship. Therefore, the Haywoods' request to apply it outside of that context should be denied.

common law duty recognized in *Dittman*. As such, the Haywoods' claim fails.

VIII. ARGUMENT IN RESPONSE TO PROPOSED INTERVENORS

A. The Proposed Intervenors' claims under Sections 1 and 8 of the Pennsylvania Constitution fail for all the reasons the Acting Secretary's claims fail.

The Proposed Intervenors seek relief for alleged privacy violations under Sections 1 and 8 of the Pennsylvania Constitution and adopt arguments in support thereof that are substantively the same as most of those asserted by the Acting Secretary in support of Count II of the State PFR.[39] Therefore, the Committee adopts its reasoning set forth above with respect to these arguments and addresses the following specific points raised by the Proposed Intervenors that are not raised by the Acting Secretary.

[39] The Proposed Intervenor's Petition to Intervene, which the Committee opposes, is pending as of this filing. Nonetheless, the Proposed Intervenors filed an Application for Summary Relief in accordance with the parties' joint briefing schedule. Accordingly, in the interest of time and judicial efficiency, the Committee addresses the Proposed Intervenors' arguments.

B. The Proposed Intervenors' assertion that there has been no waiver of the constitutional right to privacy is without merit.

Initially, the Proposed Intervenors' contention that there was no waiver of the right to privacy to justify disclosure is premised upon the voters' alleged expectation of privacy. As addressed above, there is no reasonable expectation of privacy that the information voluntarily provided to a state agency will not be shared within the state for state purposes. *See supra*.

Moreover, because this information is not being disclosed to a third party but from one state agency to another state entity, this is distinguishable from the cases relied upon by the Proposed Intervenors, such as *Commonwealth v. DeJohn*, 403 A.2d 1283 (Pa. 1979), where the Court held that an individual has a reasonable expectation of privacy in bank records. In *DeJohn*, the Supreme Court considered whether there was a reasonable expectation of privacy in bank records compelled for production by an admittedly unlawful subpoena. *Id.* at 1287. In holding that an individual has an expectation of privacy in bank records, the Court emphasized that "[a] bank could always be compelled to turn over customer's records when served with a valid search warrant or some

other type of valid legal process, such as a lawful subpoena." *Id.* at 1283. In other words, the Supreme Court determined there is no waiver of privacy allowing a *warrantless* search in a criminal investigation merely because an individual provides certain documents to a third party. The present Subpoena is not a warrantless search by law enforcement for evidence of criminal wrongdoing. It is a lawful subpoena issued for a legitimate legislative purpose and seeks inter-government disclosure of information that is either public or that voters have already voluntarily provided to the government.

Furthermore, the Supreme Court distinguished *DeJohn* when it held that an individual has no reasonable expectation of privacy in his or her name and address. *Duncan*, 817 A.2d at 462. As the Court explained, "[t]he disclosure of a mere name and address … is different in kind from the disclosure of substantive bank records" at issue in *DeJohn*, as a name and address do not reveal anything about an individual's personal habits or associations. *Id.* at 463. Here, as explained more fully above, the Subpoena demands either information that is already publicly available or, if not, is information that has already been disclosed to the government and is not being publicly

disclosed, but shared within the government. Therefore, the Proposed Intervenors' contention that there is no knowing waiver justifying disclosure of this information is without merit.

C. The Proposed Intervenors' challenge to the tailoring of the Subpoena fails because it is premised on a mischaracterization of the Subpoena's purpose.

The Proposed Intervenors' challenge to the breadth of the Subpoena is premised upon a mischaracterization of the purpose of the Subpoena. As explained above, the Subpoena is issued for a legitimate legislative purpose to investigate areas of legislation. *See supra*. Moreover, to the extent that the Proposed Intervenors appear to challenge the relevance of the information sought in the Subpoena by asserting that the Subpoena is not narrowly tailored, the Proposed Intervenors do not succeed because the Subpoena satisfies the three-part inquiry to determine its validity. *See supra*.

For these reasons and all those set forth above, the Proposed Intervenors have not established a clear right to relief on their proposed PFR under Sections 1 and 8 of the Pennsylvania Constitution.

IX. ARGUMENT IN SUPPORT OF COMMITTEE CROSS-APPLICATION

As discussed at length above, none of the arguments raised by Petitioners or the Proposed Intervenors warrant entry of summary relief in their favor. Rather, as set forth in detail *supra*, all counts of each Petition for Review filed by Petitioners and the Proposed Intervenors fail as a matter of law. Indeed, not only is the Intergovernmental Operations Committee legally and constitutionally authorized to issue the Subpoena at issue here, but it is statutorily entitled to the documents sought under Title 71 of the Unconsolidated Statutes. And, contrary to the speculative and conspiratorial claims of Petitioners and the Proposed Intervenors, the Committee's requests are *not* an election contest, an unlawful audit, a public records request, or some other sinister invasion of privacy rights. Again, the Committee is simply exercising its constitutional and statutory authority to obtain information that is either readily available to the general public or already has been made available to public and private entities by the Department of State.

Accordingly, the Committee's Cross-Application for Summary Relief should be granted and each of the Petitions for Review should be

dismissed in their entirety as a matter of law. Moreover, in order to ensure that the Committee receives the information to which it is constitutionally and statutorily entitled, this Court must direct the Acting Secretary to immediately respond to the Committee's Subpoena, without limitation.

As the Pennsylvania Supreme Court has recognized, in our system of jurisprudence, "the party subpoenaed must either comply with the subpoena or refuse to comply and litigate the propriety of the subpoena[.]" *Pennsylvania Hum. Rels. Comm'n v. Jones & Laughlin Steel Corp.*, 394 A.2d 525, 526 (Pa. 1978). Here, the Acting Secretary has chosen the latter route and, based upon the foregoing, has unsuccessfully litigated the propriety of the Committee's Subpoena. As such, this Court must compel compliance by the Acting Secretary within 14 days of granting the Committee's cross-application for summary relief. *See Nat'l Apartment Leasing Corp. v. Com., Pennsylvania Hum. Rels. Comm'n*, 425 A.2d 499, 500-01 (Pa. Cmwlth. 1981) (holding PHRC was not required to bring an original action in order to compel enforcement of subpoena).

X. CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' Applications for Summary Relief, and should grant the Committee's Cross-Application for Summary Relief. In doing so, the Court should specifically enter an order compelling the Acting Secretary to immediately respond to the Subpoena.

Respectfully submitted,

Dated: October 22, 2021

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WORD COUNT CERTIFICATION

I hereby certify that the above brief complies with the word count limit set by the Court's Order of October 15, 2021 (permitting 28,000 words). Based on the word count feature of the word processing system used to prepare this brief, this document contains 25,437 words, exclusive of the cover page, tables, and the signature block.

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