

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

v.

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

Commonwealth of Pennsylvania, Pennsylvania
Department of State, and Veronica
Degraffenreid, Acting Secretary of the
Commonwealth of Pennsylvania,
Petitioners

v.

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

Arthur Harwood, Julie Haywood
Petitioners

v.

Veronica Degraffenreid, Acting Secretary of
State Commonwealth of Pennsylvania
Respondents

CASES CONSOLIDATED

No. 310 MD 2021

No. 322 MD 2021

No. 323 MD 2021

MEMORANDUM IN SUPPORT OF COMMONWEALTH PETITIONERS'
APPLICATION FOR SUMMARY RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF FACTS	4
I. The 2020 Election in Pennsylvania Was Fair, Secure, and Accurate	4
II. The 2020 Presidential Election Has Been Subjected to an Unprecedented Campaign of Unfounded Attacks, Including by Members of the Committee	7
III. The Committee Has Initiated an Unlawful “Investigation” of Pennsylvania’s Elections	16
IV. The Committee’s Only Hearing Supplies No Evidence of Fraud	19
V. The Committee Approves the Subpoena	20
VI. By Law and Practice, Pennsylvania Protects the Privacy and Security of Pennsylvania Voters’ Personal Information	23
ARGUMENT	27
I. The Subpoena Lacks a Legitimate Legislative Purpose	27
II. Elections are Outside the Committee’s Subject Matter Area and the Subpoena Was Issued Without Authority	34
III. The Subpoena Violates Pennsylvanians’ Constitutional Right to Privacy	38
A. The Subpoena Violates the Informational Privacy Rights of Nine Million Pennsylvanians	38
B. The Subpoena Invades a Reasonable Expectation of Privacy	47
IV. The Subpoena Interferes with Pennsylvanians’ Right to Fair Elections and the Free Exercise of the Right to Vote	50
V. The Subpoena Demands Protected Critical Infrastructure Information	57
VI. The Subpoena Demands Privileged Information	59
CONCLUSION	60

TABLE OF AUTHORITIES

Cases

<i>Advancement Project v. Pa. Dep’t of Transp.</i> , 60 A.3d 891 (Pa. Commw. Ct. 2013).....	42
<i>Annenberg v. Roberts</i> , 2 A.2d 612 (Pa. 1938)	47, 48
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992).....	51, 52, 57
<i>Camiel v. Select Comm. on State Contract Practices of House of Representatives</i> , 324 A.2d 862 (Pa. Commw. Ct. 1974).....	28
<i>Carpenter v. United States</i> , 138 S. Ct. 2206 (2018)	48
<i>City of Harrisburg v. Prince</i> , 219 A.3d 602 (Pa. 2019)	46
<i>Com. ex rel. Carcaci v. Brandamore</i> , 327 A.2d 1 (Pa. 1974)	28, 38
<i>Commonwealth v. DeJohn</i> , 403 A.2d 1283 (Pa. 1979)	48
<i>Commonwealth v. Nixon</i> , 761 A.2d 1151 (Pa. 2000)	40
<i>Commonwealth v. Vartan</i> , 733 A.2d 1258 (Pa. 1999).....	59, 60
<i>Democratic Nat. Comm. v. Republican Nat. Comm.</i> , 673 F.3d 192 (3d Cir. 2012)	52
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 502 F. Supp. 3d 899 (M.D. Pa. 2020)	10
<i>Donald J. Trump for President, Inc. v. Sec’y of Pa.</i> , 830 F. App’x 377 (3d Cir. 2020).....	11
<i>Greidinger v. Davis</i> , 988 F.2d 1344 (4th Cir. 1993)	52, 56
<i>Kelly v. Pennsylvania</i> , 141 S. Ct. 950 (2020)	11
<i>King v. Whitmer</i> , No. 20-13134, 2021 WL 3771875 (E.D. Mich. Aug. 25, 2021)	22
<i>Kisor v. Wilkie</i> , 139 S. Ct. 2400 (2019).....	29

<i>Kroptavich v. Pa. Power & Light Co.</i> , 795 A.2d 1048 (Pa. Super. Ct. 2002)	30
<i>Lancaster Cty. Dist. Attorney’s Office v. Walker</i> , 245 A.3d 1197 (Pa. Commw. Ct. 2021).....	41
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	51, 56
<i>Leibensperger v. Carpenter Techs., Inc.</i> , 152 A.3d 1066 (Pa. Commw. Ct. 2016)	30
<i>Lunderstadt v. Pa. House of Representatives Select Comm.</i> , 519 A.2d 408 (Pa. 1986).....	35, 47, 48, 49
<i>McGinley v. Scott</i> , 164 A.2d 424 (Pa. 1960)	35
<i>Middletown Twp. v. Lands of Stone</i> , 939 A.2d 331 (Pa. 2007)	29
<i>Minnesota Voters Alliance v. Mansky</i> , 138 S. Ct. 1876 (2018).....	51
<i>Moore v. Kobach</i> , 359 F. Supp. 3d 1029 (D. Kan. 2019).....	45
<i>Pa. State Educ. Ass’n v. Commonwealth Dep’t of Cmty. & Econ. Dev.</i> , 148 A.3d 142 (Pa. 2016)	39, 40, 43, 45
<i>Pa. State Univ. v. State Employees’ Ret. Bd.</i> , 935 A.2d 530 (Pa. 2007)	41
<i>Philadelphia Entm’t & Dev. Partners, L.P. v. City Council for City of Philadelphia</i> , 943 A.2d 955 (Pa. 2008).....	29
<i>Pub. Interest Legal Found. v. Boockvar</i> , 431 F. Supp. 3d 553 (M.D. Pa. 2019)	42
<i>Reese v. Pennsylvanians for Union Reform</i> , 173 A.3d 1143 (Pa. 2017).....	39, 43
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	50
<i>Sapp Roofing Co. v. Sheet Metal Workers’ Int’l Ass’n, Loc. Union No. 12</i> , 713 A.2d 627 (Pa. 1998).....	46
<i>Smith v. Meese</i> , 821 F.2d 1484 (11th Cir. 1987)	52
<i>Texas v. Pennsylvania</i> , 141 S. Ct. 1230 (2020)	11

<i>Times Pub. Co. v. Michel</i> , 633 A.2d 1233 (Pa. Commw. Ct. 1993).....	40
<i>Tribune-Review Pub. Co. v. Bodack</i> , 961 A.2d 110 (Pa. 2008)	39, 40
<i>True the Vote v. Hosemann</i> , 43 F. Supp. 3d 693 (S.D. Miss. 2014).....	43, 52, 53, 56
<i>Trump v. Mazars USA, LLP</i> , 140 S. Ct. 2019 (2020)	28, 32, 33, 59
<i>U.S. Dep’t of Justice v. Repts. Comm. For Freedom of Press</i> , 489 U.S. 749 (1989)	43
<i>Watkins v. United States</i> , 354 U.S. 178 (1957).....	34
<i>Yellin v. United States</i> , 374 U.S. 109 (1963)	34
Constitutions	
Pa. Cons. art. I, § 8	47
Pa. Const. art. I, § 5	50
Statutes and Legislation	
18 U.S.C. § 2721	42
18 U.S.C. § 2725	42
23 Pa. Const. Stat. §§ 6701-13.....	44
25 Pa. Cons. Stat. § 1102	24
25 Pa. Cons. Stat. § 1207	24, 42
25 Pa. Cons. Stat. § 1327	23
25 Pa. Cons. Stat. § 1328	23
25 Pa. Cons. Stat. § 1403	24, 41
25 Pa. Cons. Stat. § 1404	24, 41
25 Pa. Stat. § 2602(z.5)	42
25 Pa. Stat. § 2622	42

25 Pa. Stat. § 2627	37
25 Pa. Stat. § 2648	42
25 Pa. Stat. § 3146.9	41, 42
25 Pa. Stat. § 3150.17	41, 42
25 Pa. Stat. § 3555	33
42 U.S.C. § 405	42
42 U.S.C. § 5195c	57
5 U.S.C. § 552a note	42
52 U.S.C. § 21083	23, 40
6 U.S.C. § 671	57
6 U.S.C. § 673	58
6 U.S.C. §§ 671-674	57
65 Pa. Stat. § 67.708	42
71 Pa. Stat. § 279.6	37
73 Pa. Stat. §§ 2301-30	42
74 Pa. Stat. § 201	42
Pa. S. Res. No. 3, Session of 2021 (Jan. 5, 2021)	34
Pa. S. Res. No. 45, Gen. Assemb. Reg. Sess. (Feb. 28, 2011)	35
Pa. S. Res. No. 9, Gen. Assemb. Reg. Sess. (Jan. 20, 2021)	14
Regulatory Review Act, P.L. 657, No. 76 §1(c), 71 Pa. Stat. § 745.2(c) (2012).	36
S.B. 735 Gen. Assemb. Reg. Sess. (June 31, 2021)	30
S.B. 878 Gen. Assemb. Reg. Sess. (Sept. 17, 2021)	30, 37

Regulations

4 Pa. Code § 183.13 24, 42
4 Pa. Code § 183.14 24, 42, 45
6 C.F.R. § 29.859
6 C.F.R. §§ 29.1-29.9.....58

Other Authorities

49 Pa. B. 597 (Feb. 9, 2019)37
51 Pa. B. 775 (Feb. 13, 2021)37
Independent Regulatory Review Commission. 51 Pa. B. 775 (Feb. 13,
2021)36
Pa. S. Rule 14..... 34, 35

INTRODUCTION

This is not an ordinary subpoena dispute. For nearly a year, certain Pennsylvania legislators have actively promoted false claims that Pennsylvania's 2020 presidential election was fraudulent. They have done so despite repeated demonstrations that the election was conducted fairly, securely, and lawfully, and despite repeated confirmations that the results are accurate.

Now, in their latest effort to sow electoral distrust, some of those same legislators, including Respondents Senator Cris Dush and Senator Jake Corman, have used the Pennsylvania State Senate Intergovernmental Operations Committee to issue a sweeping subpoena to the Department of State that demands, among other items, personal identifying information, including partial Social Security numbers and driver's license numbers, for each of Pennsylvania's more than nine million registered voters.

The justification for demanding such a broad swath of information has been a moving target. The Senators have variously described this undertaking as a "forensic audit" of the 2020 election; as an attempt to answer unspecified "questions regarding the validity of people who have voted"; or as part of an effort to enact unknown election-related legislation. None of these ostensible explanations is plausible. The 2020 election already has been subject to two audits that confirmed the results. The far-fetched theories regarding the "validity of

people who voted” in the 2020 election already have been advanced and disproven. No one on the Committee has indicated what “questions” are being asked and by whom, much less pointed to any evidence substantiating them. And the General Assembly already is considering election legislation—it has been referred to the Senate’s State Government Committee, which, unlike this Committee, has authority over election matters.

Moreover, the Committee has provided virtually no explanation for why it needs the vast trove of personal information it has demanded, what will be done with that information, or, most importantly, how it will be protected. But the Committee has made clear that it will not (and certainly could not) analyze this personal information itself. Rather, an unknown third-party vendor or vendors will receive the data. The Committee has shared nothing about who those vendors might be and Senator Dush was unwilling to rule out that he would hire vendors with connections to the perpetrators of some of the most destructive lies about the 2020 election.

Harnessing the legislature’s power to promote a false narrative is both unprecedented in Pennsylvania and an illegitimate use of that power. Worse, because the Committee has demanded sensitive personal information without implementing robust—or any—security measures, the Committee’s subpoena threatens two fundamental rights that all Pennsylvanians enjoy: the right to privacy

and the right to free and equal elections. The Committee has put forward no interest that justifies treading on constitutionally protected privacy rights and Pennsylvania voters are justifiably concerned about seeing their private, personal data misused. And allowing a legislative body, on a purely partisan basis, to collect such personal data and expose voters to the potential misuse of that data will discourage future participation in the electoral process.

On their own, each of these concerns justifies quashing the subpoena. Taken together, they show just how dangerous and misguided this effort really is. The lack of any legitimate purpose, along with the haphazard way in which the Committee has approached securing the personal information it demands, has stoked voters' legitimate fears about the consequences of the Department complying with the subpoena. An inevitable outcome of producing the demanded information will be decreased trust in the Commonwealth's elections and a sustained erosion of the guarantee that those elections be "free and equal."

The Committee's actions are unwarranted and improper. Judgment should be granted in favor of the Commonwealth Petitioners, and the Subpoena should be quashed.

STATEMENT OF FACTS

I. The 2020 Election in Pennsylvania Was Fair, Secure, and Accurate

Despite the unique challenges wrought by a global pandemic, Pennsylvania's 2020 elections were fair, secure, and accurate. More than 6.9 million people voted in Pennsylvania's 2020 general election, including more than 2.2 million voters who cast a mail-in ballot and nearly 375,000 who voted by absentee ballot. Pa. Dep't of State, *Report on the 2020 General Election* (May 14, 2021) at 8 (Ex. F-1). Pennsylvania voters awarded the Commonwealth's 20 electoral votes to Joe Biden, who won by more than 80,000 votes. Pa. Certificate of Ascertainment of Presidential Electors (Nov. 24, 2021) (Ex. F-2).

State and county officials securely administered the 2020 general election in accordance with the Commonwealth's Election Code. There is absolutely no evidence of any election irregularity that could have changed the outcome of the election. Nor was there voter fraud on any meaningful scale. Despite significant attention on the issue, there were just three alleged cases of individual voter fraud in Pennsylvania during the 2020 general election. *Report on the 2020 General Election* at 8. In the 2020 presidential election, President Biden's margin of victory in Pennsylvania was large enough that the statutory basis for a statewide recount was not triggered; no court of common pleas ordered a recount or recanvass; and

no election contest was initiated. *Dep't of State Certifies Presidential Election Results*, Penn. Pressroom (Nov. 24, 2020) (Ex. F-3).

Official post-election audits and reviews confirmed the accuracy of the 2020 election results. As a routine part of the canvassing process that county boards of elections perform under the Election Code, every Pennsylvania county conducted a statistical recount of randomly selected ballots. 25 Pa. Stat. § 3031.17. After certification of the results, 63 of the Commonwealth's 67 counties also voluntarily participated in a risk-limiting audit that examined more than 45,000 randomly sampled ballots to ensure the accuracy of the presidential election results. *Risk-Limiting Audit Pilot of November 2020 Presidential Election Finds Strong Evidence of Accurate Count*, Penn. Pressroom (Feb. 5, 2021) (Ex. F-4). The results of both audits confirmed the accuracy of the presidential vote count.

Numerous unbiased experts also concluded that there was no meaningful fraud. The Election Infrastructure Government Coordinating Council Executive Committee concluded that the 2020 general election “was the most secure in American history,” that there was “no evidence” that election systems were compromised, and that it had “the utmost confidence in the security and integrity of our elections[.]” *Joint Statement From Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees* (Nov. 12, 2020) (Ex. F-5). Chris Krebs, the head of the U.S.

Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency, wrote that “[t]he 2020 election was the most secure in U.S. history.” Christopher Krebs, *Trump fired me for saying this, but I’ll say it again: The election wasn’t rigged*, Wash. Post, (Dec. 1, 2020) (Ex. F-6). Similarly, then-Attorney General William Barr said, “[W]e have not seen fraud on a scale that could have effected a different outcome in the election.” Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud*, AP (Dec. 1, 2020) (Ex. F-7).

Following the audits and reports from unbiased experts, both chambers of Pennsylvania’s legislature conducted numerous hearings, heard testimony from witnesses, and issued multiple reports. *See generally* House State Government Committee, *A Comprehensive Review of Pennsylvania’s Election Laws* (“*House Report*”) (May 10, 2021) (Ex. F-8); Senate Special Committee on Election Integrity and Reform, *Report on the Special Committee’s Findings and Recommendations to the Senate and the Senate State Government Committee* (“*Senate Report*”) (June 2021) (Ex. F-9). The House’s report was issued after ten hearings held between January 21, 2021 and April 15, 2021, at which more than 50 witnesses testified—some multiple times. *House Report* at 8, 81-83. Witnesses included former Secretary of the Commonwealth Kathy Boockvar, Auditor General Timothy DeFoor, and Jonathan Marks, the Department’s Deputy Secretary

for Elections and Commissions, who testified at six of the ten hearings. *Id* at 81-83. The House’s report covered topics such as the Department’s election guidance, the Statewide Uniform Registry of Electors (SURE) system, election audits, and no-excuse mail-in balloting. *See generally id.* The Senate’s report was issued after three hearings, held in March and April 2021 and after opening an online survey for anyone to share their experience with mail-in voting. *Senate Report* at 2. Twenty-one witnesses testified before the Senate, including Acting Secretary Veronica Degraffenreid and Mr. Marks. *Id.* at 14. The report covered best practices for election integrity, Pennsylvania’s election administration, and election administration in Philadelphia and Allegheny Counties in particular. *See generally id.* Neither report identified any fraud or irregularity during the 2020 election that would have affected the results.

II. The 2020 Presidential Election Has Been Subjected to an Unprecedented Campaign of Unfounded Attacks, Including by Members of the Committee

The 2020 presidential election was the first time in our nation’s modern history that the losing candidate refused to acknowledge the results of a free and fair election. Former President Trump and his allies repeatedly have claimed—without a shred of evidence—that President Biden’s victory was “rigged” or “stolen.” As recently as this month, former President Trump and his supporters

have made these false statements to undermine the legitimacy of the 2020 election and generate mistrust about future elections.

In the weeks leading up to Election Day, former President Trump began asserting that “[t]he only way we’re going to lose this election is if the election is rigged.” Terrance Smith, *Trump has longstanding history of calling elections ‘rigged’ if he doesn’t like the results*, ABC News (Nov. 11, 2020) (Ex. F-10). During a presidential debate televised to more than 73 million Americans, former President Trump falsely stated that “[i]t’s a rigged election,” that Democrats “cheat,” and that “bad things happen in Philadelphia. Bad things.” Presidential Debate Transcript (Sept. 29, 2020) (Ex. F-11). The morning after Election Day, the former President falsely claimed that he was the victim of widespread voter fraud, posting tweets saying “[w]e are up BIG, but they are trying to STEAL the election,” Donald J. Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 12:49 a.m.) (Ex. F-12), and later that day that “[t]hey are working hard to make [our] 500,000 vote advantage in Pennsylvania disappear—ASAP[,]” Donald J. Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 12:01 p.m.) (Ex. F-13). On November 28, 2020, well after election results confirmed President Biden’s victory, former President Trump falsely claimed that he had won Pennsylvania “by a lot, perhaps more than anyone will ever know” and that “1,126,940 votes were

created out of thin air.” Donald J. Trump (@realDonaldTrump), Twitter (Nov. 28, 2020, 12:09 a.m.) (Ex. F-14).

Pennsylvania has been a primary target of this disinformation campaign. Many Pennsylvania lawmakers—including members of the Committee that were on the ballot in 2020—have contributed to the spread of misinformation about the results of the 2020 presidential election rather than correct it. Like former President Trump, Senator Dush, Senator Corman, and other members of the Committee have worked persistently to undermine confidence in the integrity of Pennsylvania’s 2020 presidential election by supporting frivolous lawsuits, encouraging state and federal officials to disregard the votes of their constituents, and pushing for needless and redundant “audits” to investigate baseless allegations of fraud. Indeed, Senator Dush recently asserted that “nobody in the Commonwealth of Pennsylvania can tell you who the winner was in any of these races from November 2020”—even though he represents the 25th District having been elected in November 2020. Jan Murphy, *Pa. Sen. Cris Dush Talks About Election Review, His Doubts of the Vote Count and How Donald Trump ‘Is Watching’*, Penn Live (Aug. 27, 2021) (Ex. F-15).

Senator Dush and Senator Corman are not alone. Soon after unofficial results showed that President Biden won the 2020 presidential election, Senator Doug Mastriano—a member of the Committee—claimed at a rally that

“[Democrats] want to cheat in the election, and they will.” Stephen Caruso, *State Lawmakers, militia Rally at State Capitol Staring Down Trump Loss*, Penn. Capital Star (Nov. 7, 2020) (Ex. F-16). Three weeks after the election, Senator Mastriano staged an event in Gettysburg, joined by former President Trump, Rudolph Giuliani, and other members of the former President’s legal team, to air unsubstantiated claims of phantom ballots, hacked machines, and dead voters that they said led to a stolen election. Eliza Griswold, *Trump’s Battle to Undermine the Vote In Pennsylvania*, The New Yorker (Nov. 27, 2020) (Ex. F-17). Mr. Giuliani has since said under oath that it was his obligation to repeat claims he encountered of election fraud rather than take time to investigate them. Giuliani Dep. at 114-127, *Coomer v. Donald J. Trump for President* (Colo. Dt. Ct. Aug. 14, 2021) (Ex. F-18).

Under the cover of their own false narrative, attorneys for former President Trump and his allies tried to block or overturn the official election results through dozens of lawsuits that were universally rejected by courts. For instance, one federal district court dismissed an action seeking to block certification of Pennsylvania’s presidential election because the suit was based on “strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence.” *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 906 (M.D. Pa. 2020). On appeal, the Third Circuit

wrote of the same lawsuit that “calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.” *Donald J. Trump for President, Inc. v. Sec’y of Pa.*, 830 F. App’x 377, 381 (3d Cir. 2020).

Despite numerous court rulings dismissing unsubstantiated claims of widespread voter fraud, members of the Pennsylvania General Assembly, including Senators Dush and Mastriano, filed an amicus brief with the U.S. Supreme Court urging that the Court issue an injunction to prevent certification of the 2020 presidential election results. *See Br. for Members of the Pennsylvania General Assemb. as Amicus Curiae, Kelly v. Pennsylvania*, No. 20A98 (S. Ct. Dec. 4, 2020) (Ex. F-19). After the Supreme Court refused to do so, *Kelly v. Pennsylvania*, 141 S. Ct. 950 (2020), Senators Corman, Mastriano, David Argall, Scott Hutchinson, and Judy Ward—all members of the Committee—filed an amicus brief in support of Texas’s unprecedented request that the U.S. Supreme Court disenfranchise millions of Pennsylvanians. *Br. on Behalf of Certain Select Pennsylvania State Senators as Amici Curiae, Texas v. Pennsylvania*, No. 22O155 (S. Ct. Dec. 10, 2020) (Ex. F-20). The Supreme Court also rejected that suit. *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020).

Undeterred, members of the Committee attempted to prevent counting the Electoral College votes. Senator Mastriano explicitly stated that “[w]e’re going to take our power back; we’re going to seat the [Trump] electors,” claiming that

Secretary Boockvar and other Democrats “cheated.” Jon Alexander, *Pa. state senator urges GOP to vote in Trump electors*, Morning Call (Nov. 28, 2020) (Ex. F-21). Sixty members of the General Assembly, including Senators Dush, Mastriano, and Judy Ward, asked Pennsylvania’s congressional delegation to take the unprecedented step of rejecting the electors for President Biden. Ltr. from Rep. Seth Grove, et al. to Hon. Bob Casey, et al. (Dec. 4, 2020) (Ex. F-22). Senator Dush co-wrote a letter to former Vice President Mike Pence asking him “to consider and weigh the validity of purported Electors and Electoral votes representing the Commonwealth of Pennsylvania” and explicitly asking the Vice President “to reject the Electoral College votes received” from the Commonwealth on January 6, 2021. Ltr. from Russ Diamond, et al. to Vice President Michael R. Pence (Dec. 23, 2020) (Ex. F-23). Senator Dush added that he and his fellow Senators “are prepared to appoint Electors for President and Vice President, if called upon to do so.” *Id.* Senators Dush, Mastriano, and Judy Ward wrote a substantially similar letter to Senator Mitch McConnell asserting that the “2020 presidential election should not have been certified in Pennsylvania” because of “election irregularities and extensive potential fraud,” and that Senator McConnell should use his powers to “dispute the certification until an investigation is completed.” Ltr. from Sen. Doug Mastriano, et al. to Senator Mitch McConnell (Dec. 30, 2021) (Ex. F-24). On January 4, 2020, Senators Corman and Dush, along

with other members of the Pennsylvania Senate, wrote a letter to Senator McConnell and Representative Kevin McCarthy asking that Congress delay certification of the election results based on alleged “inconsistencies.” Ltr. from Sen. Jake Corman, et al. to Sen. Mitch McConnell and Rep. Kevin McCarthy (Jan. 4, 2021) (Ex. F-25).

Five days before the January 6 insurrection, Senator Dush asserted without basis that “THERE WAS NOT A LAWFUL ELECTION IN PENNSYLVANIA NOVEMBER 3rd” and that “there have been many reports of unlawful acts as well as malfeasance, misfeasance and possible fraudulent activities,” which he claimed would justify taking action to prevent certification of the election results. Sen. Cris Dush, Facebook (Jan. 1, 2021) (Ex. F-26). According to Senator Dush, “[T]here was no election. There was a scam.” *Id.* A day before the January 6 insurrection, at a rally in Harrisburg to encourage state legislators to decertify President Biden’s electoral victory, Senator Dush repeated his assertion that the November election was “unlawful.” Penn Live, “*Hear Us Roar*” Rally on Pa. Capitol Steps, Facebook (Jan. 5, 2021) (Ex. F-27) (comments in embedded video). He urged people to take action against the certification of the presidential electors: “Let’s get spines in the backs of people who are called lesser magistrates, if someone tries to enforce something . . . the lesser magistrates have a responsibility not to comply.” *Id.*

The day that President Biden was inaugurated, Senator Dush introduced Senate Resolution 9, declaring that Pennsylvania’s election was “unlawful, void ab initio and invalid.” Pa. S. Res. No. 9, Gen. Assemb. Reg. Sess. (Jan. 20, 2021).

Unable to prevent the transition of power, former President Trump and his supporters—including members of the Committee—have shifted their focus. Nearly a year after the 2020 presidential election, they are conducting sham reviews of state elections to further stoke distrust of that election’s outcome. In Arizona, insistence that the results of the 2020 presidential election were fraudulent inspired some state senators to subpoena ballots and election equipment from Maricopa County to perform a “forensic audit.” The Arizona State Senate hired Cyber Ninjas, a company with no experience auditing elections, to lead the “audit.” Cyber Ninjas’ review of the 2020 election results was marred by a lack of transparency, questionable methodologies, bizarre practices—such as scouring ballots for bamboo fibers as a sign of Chinese involvement—and troubling security concerns. *Assessing the Election “Audit” in Arizona and Threats to American Democracy: Hearing Before H. Comm. Oversight and Reform*, 117 Cong. (Oct. 7, 2021) (statement of Gowri Ramachandran, Senior Counsel Brennan Center for Justice) (Ex. F-28). During the review, the Arizona State Senate and Cyber Ninjas made easily disproven claims about what their review had purportedly revealed, including that there were 74,000 “extra” ballots voted in the county. Steve

Goldstein & Mark Brodie, *How 2 Arizona Journalists Debunked Cyber Ninjas' Claim About 74,000 Ballots*, KJZZ (Aug. 4, 2021) (Ex. F-29). Cyber Ninjas' team included CEO Doug Logan, a supporter of former President Trump who has pushed unfounded election fraud claims, and Dr. Shiva Ayyadurai, who has promoted a wild conspiracy theory that 4.2 percent of former President Trump's votes were stolen by fans of a popular science fiction novel. Jack Healy et al., *Republican Review of Arizona Vote Fails to Show Stolen Election*, N.Y. Times (Sept. 24, 2021) (Ex. F-30).

Cyber Ninjas recently delivered its report to the Arizona Senate. Despite confirming that President Biden won the county, the report nevertheless sought to undermine the legitimacy of the election by implying the existence of widespread election irregularities—all of which were immediately disproven by actual election officials and experts. For instance, the report insinuated that 23,344 voters improperly voted in Maricopa County after they had moved elsewhere. *Maricopa County Analysis of Senate Review* (Oct. 6, 2021) (Ex. F-31). But that misleading claim was based on an inherently faulty database comparison and ignores the fact that many voters, such as college students and military members, move to temporary locations while still voting legally at the address where they are registered. *Id.* These misleading claims have caused lasting damage to Arizona's democratic institutions. *Assessing the Election "Audit" in Arizona and Threats to*

American Democracy: Hearing Before H. Comm. Oversight and Reform, 117 Cong. (Oct. 7, 2021) (statement of Jack Sellers, Chairman of Maricopa County Board of Supervisors) (Ex. F-32).

III. The Committee Has Initiated an Unlawful “Investigation” of Pennsylvania’s Elections

In the latest step of this enduring effort to undercut the results of the 2020 presidential election, the Intergovernmental Operations Committee has begun an “investigation” into the November 2020 and May 2021 elections.

The Committee’s current effort began earlier this summer, when Senator Mastriano, as Committee Chair, publicly pushed to “audit” Pennsylvania’s recent elections. In June 2021, Senators Dush and Mastriano toured Cyber Ninjas’ Maricopa County “audit.” Marley Parish & Stephen Caruso, *Mastriano, Pa. state lawmakers visit Arizona election audit*, Penn. Capital-Star (June 2, 2021) (Ex. F-33). Former President Trump lauded Senators Dush and Mastriano after they visited the Maricopa County “audit,” and stated, “[n]ow the Pennsylvania Senate needs to act.” Donald J. Trump, *Statement by Donald J. Trump, 45th President of the United States of America* (June 4, 2021) (Ex. F-34).

After his visit, Senator Mastriano wrote that “[a] county audit like the one authorized by the Arizona State Senate is critically necessary for our Commonwealth.” Sen. Doug Mastriano, *Observations after touring Arizona’s Election Audit Operation*, SenatorMastriano.com (June 9, 2021) (Ex. F-35).

Senator Dush praised Cyber Ninjas' review as "very professional," Sen. Cris Dush, *Sen. Dist. 25 Telephone Town Hall*, Facebook (July 13, 2021) (Ex. F-36) (comments in embedded video), and opined that it "is what we should be doing here in Pennsylvania," Marcie Schellhammer, *Pa. state senator visits Ariz., pushes for election audit*, Olean Times Herald (June 5, 2021), (Ex. F-37). Senator Dush added that Cyber Ninjas was "going to set the standard for any future forensic audits of elections." Sen. Cris Dush, *My Trip to Arizona and Other Updates*, Facebook (June 4, 2021) (Ex. F-38) (comments in embedded video).

The next month, Senator Mastriano, still as Chair, issued requests for information to the Boards of Elections of Philadelphia, Tioga, and York counties, which he claimed were designed to permit a "forensic investigation of the election results and processes for the 2020 General Election and 2021 Primary." Ltr. from Sen. Mastriano to Lisa Deeley at 3 (July 7, 2021) (Ex. A).¹ All three counties informed Senator Mastriano that they would not comply with the requests for information. Ltr. from Julie Wheeler, et al. to Sen. Mastriano (July 14, 2021) (Ex. F-39); Ltr. from Christopher P. Gabriel to Sen. Mastriano (July 29, 2021) (Ex. F-40); Ltr. from Lisa Deeley to Sen. Mastriano (July 30, 2021) (Ex. F-41). The counties noted that they had been transparent and accountable and had complied with all state and federal laws and procedures. *Id.* The Tioga County Board of

¹ Exhibits A-E are attached to the Petition for Review.

Election commissioners received death threats because they would not participate in the “forensic audit.” See John Beauge, *Election audit supporter condemns death threats received by Tioga County commissioners*, Penn Live (Aug. 2, 2021) (Ex. F-42); Rhea Jah, *Tioga County officials reportedly received death threats amidst election audit debate*, WETM (July 22, 2021) (Ex. F-43).

After all three counties refused Senator Mastriano’s request, Senator Corman stripped Senator Mastriano of his Chairmanship and staff and appointed Senator Dush to replace him as Committee Chair. Sen. Jake Corman, *Corman Issues Statement on Forensic Investigation of Recent Elections, Mastriano Obstruction* (Aug. 20, 2021) (Ex. F-44). Senator Corman subsequently explained that the Committee’s “investigation” would continue, stating that former President Trump is “comfortable with where we’re heading and so we’re going to continue that work.” Marc Levy & Sam Dunklau, *Hearings in election ‘investigation’ to begin this week, Corman says*, WITF (Aug. 23, 2021) (Ex. F-45). Senator Corman justified the investigation by explaining, “I don’t necessarily have faith in the [election] results. . . . I think there were many problems in our election that we need to get to the bottom of.” Andrew Seidman, *Top Pa. GOP lawmaker says hearings will begin this week to start ‘forensic investigation’ of 2020 election*, Phila. Inquirer (Aug. 24, 2021) (Ex. F-46). Likewise, Senator Dush said that President Trump had “congratulated me and said that he wanted to have

confidence in me,” and that the former President was “going to be watching me.” Sara Murray, *Republican state senator kicks off audit push in Pennsylvania*, CNN (Sept. 9, 2021) (Ex. F-47).

Within two weeks, Senator Dush announced that the Committee was conducting an “investigation into Pennsylvania’s election system” and “into the 2020 General Election and the 2021 Primary Election.” Pa. Senate Republicans, *Senate Intergovernmental Operations Committee Plans First Public Hearing of Election Investigation* (Sept. 2, 2021) (Ex. F-48). That same day, Senator Dush also launched a website to “encourag[e] Pennsylvanians to share any potential violations of election law or voting irregularities they ha[d] witnessed personally.” *Id.*; Penn. Senate Intergovernmental Operations Comm., *Election Investigation Sworn Testimony* (Ex. F-49). Senator Dush launched this website even though the Senate Special Committee on Election Integrity and Reform had already received more than 20,000 public comments on the 2020 election without identifying a single credible allegation of widespread fraud or misconduct. *Senate Report* at 7.

IV. The Committee’s Only Hearing Supplies No Evidence of Fraud

Senator Dush’s “investigation” began with a public hearing on September 9, 2021. The only witness to testify was Fulton County Commissioner Stuart Ulsh. Senate Intergovernmental Operations Committee. *See generally* Hr’g Tr. (Sept. 9, 2021) (Ex. B).

Earlier this year, at the behest of Senators Mastriano and Judy Ward, Fulton County surreptitiously allowed an outside organization associated with Cyber Ninjas to “audit” its handling of the 2020 election. Jeremy Duda, *Group led by ‘kraken’ lawyer Sidney Powell hired the firm recounting AZ’s election to probe election in Fulton Co.*, Penn. Capital-Star (May 24, 2021) (Ex. F-50); Jeremy Duda, *Wake Technology Services audited a Pennsylvania election as part of the #StopTheSteal movement*, Ariz. Mirror (May 21, 2021) (Ex. F-51). Commissioner Ulsh testified at the September 9 hearing that the company he authorized to “investigate” how Fulton County conducted the 2020 general election did not identify any fraud in Fulton County’s election. Hr’g Tr. (Sept. 9, 2021) at 52:10-55:10, 63:3-16, 66:9-13.

V. The Committee Approves the Subpoena

On September 15, 2021, the Committee met to authorize the issuance of a subpoena for, among other things, voters’ personally identifying private information. In introducing the subpoena, Senator Dush framed the Committee’s investigation as “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.” Hr’g Tr. (Sept. 15, 2021) at 4:14-16 (Ex. C). In response to questions, however, Senator Dush described a very different focus: an audit to verify the identity of Pennsylvanians who voted in the 2020 general election and

their eligibility to vote. He explained that Social Security and drivers' license numbers were needed "to verify the identity of individuals and their place of residence and their eligibility to vote." *Id.* at 17:6-8. Questioning the eligibility of Pennsylvania voters has been a common refrain for former President Trump. *E.g.*, Eliza Griswold, *Trump's Battle to Undermine the Vote In Pennsylvania*, *The New Yorker* (Nov. 27, 2020) (reporting on former President Trump's comments at the Gettysburg event that dead people were voting).

Throughout the hearing, Senator Dush did not identify any *evidence* of fraud or other material irregularities in the 2020 or 2021 elections that would justify the subpoena. In fact, Senator Dush conceded that the prior election audits were done properly and accurately, on a bipartisan basis, and that election commissioners of both parties acknowledge that the audits were done accurately and effectively. *Id.* at 60:4-25. He further conceded that he was "not responding to proven allegations"; instead, he claimed to be "investigating the allegations to determine whether or not they are factual." *Id.* at 17:17-20. But Senator Dush and other Committee members provided no details about these allegations besides stating that "there have been questions regarding the validity of people who have voted, whether or not they exist." *See id.* at 17:15-20; *id.* at 56:18-20 (Sen. Judy Ward referring to the unanswered "questions" of her "outraged" constituents). These unspecified "questions" are the same ones pushed relentlessly by former President

Trump and his supporters—including Senators Dush and Corman—to falsely claim that President Biden did not win Pennsylvania in the 2020 general election.

When questioned, Senator Dush indicated that he would retain a third-party vendor to conduct the investigation. *Id.* at 20:12-14. Senator Dush declined to identify which vendors he was considering for the job, would not describe the vetting process, and would not say what access the vendor would have to the information requested. *Id.* at 20:6-26:17. He would not rule out retaining vendors associated with former Trump campaign lawyer Sidney Powell, who has been sanctioned for an election-related lawsuit, or those who had worked for candidates in the elections under investigation. *Id.* at 25:21-26:11, 39:10-40:11; *see also King v. Whitmer*, No. 20-13134, 2021 WL 3771875, at *41 (E.D. Mich. Aug. 25, 2021) (imposing sanctions). Despite plans to turn over private voter information to a third party, Senator Dush revealed that neither he nor the Committee have established basic security protocols to minimize the risk of unauthorized disclosure and misuse of the information requested in the subpoena. *Id.* at 20:6-14, 23:13-24:21. Senator Dush also indicated that the investigation would be open ended, noting that it “has the potential to grow.” *Id.* at 62:8.

The Committee voted on party lines to authorize Senator Dush to issue the contested subpoena (the “Subpoena”). *Id.* at 65:1-66:12. After its vote, the Committee issued and served the Subpoena, demanding that the Secretary produce

17 categories of documents. Subpoena (Ex. D). The Subpoena seeks detailed information about *every* Pennsylvania registered voter, including names, addresses, dates of birth, detailed voting history, driver's license numbers, and partial Social Security numbers. *Id.* at ¶¶ 4-14. The Subpoena also seeks information about the Department's communications with county election officials; election procedures and policies; materials used to train election workers; a copy of the certified results of the November 2020 general election and 2021 primary election; reports of audits and/or reviews of the SURE system; and 2021 voter registration reports submitted to the Department. *Id.* at ¶¶ 1-3, 15-17.

VI. By Law and Practice, Pennsylvania Protects the Privacy and Security of Pennsylvania Voters' Personal Information

To vote in Pennsylvania, a qualified resident must provide their county of residence with certain personal information, including the resident's address, date of birth, and either their driver's license number or the last four digits of their Social Security number. *See* 52 U.S.C. § 21083(a)(5)(A); 25 Pa. Cons. Stat. § 1327. Each county reviews, verifies, approves, and retains voter registration applications. 25 Pa. Cons. Stat. § 1328. After a county has approved an application to register, the voter's personal information is stored in SURE Voter Registration (SURE VR), a component of the SURE system. Marks Decl. ¶¶ 6-7, 19 (Ex. G). The Department manages the SURE system, which is Pennsylvania's centralized

voter registration and election management system. 25 Pa. Cons. Stat. § 1222; Marks Decl. ¶ 4.

Pennsylvania law protects the personal information that voters must supply. For example, although the law requires the Department to release certain voter information on “public information lists” and “street lists,” 25 Pa. Cons. Stat. §§ 1403, 1404; 4 Pa. Code §§ 183.13, 183.14, the lists cannot include driver’s license or Social Security numbers, *see* 25 Pa. Cons. Stat. §§ 1403(a), 1404(a)(1) ; 4 Pa. Code §§ 183.13(a), (c)(5)(iii), 183.14(c)(3). In addition, these lists are not truly “public.” For one, the lists can be used only for purposes related to elections, political activities, or law enforcement, and a person obtaining the list must confirm compliance in writing under penalty of perjury. 25 Pa. Cons. Stat. § 1102 (defining “election”); 25 Pa. Const. Stat. § 1404(b)(3), (c)(2); 4 Pa. Code § 183.14(b)(4)-(5), (c)(2). For another, the lists cannot be published on the internet, 4 Pa. Code § 183.14(k), and cannot be used for commercial purposes, 25 Pa. Cons. Stat. § 1207(b).

The SURE system includes several portals and interfaces that Pennsylvania residents can use to register to vote, update or verify registration information, and search public voter rolls. Marks Decl. ¶¶ 10-17. But these portals and interfaces cannot access driver’s license or Social Security numbers and do not provide direct or indirect access to SURE VR. *Id.* ¶¶ 10, 16-17.

For example, SURE kiosks located in county election offices, in courts, and at the Department allow the public to search public countywide or statewide voter registration rolls. *Id.* ¶ 12. To search voter rolls, the user must first attest under penalty of perjury that the information will be used only for purposes related to elections, political activities, or law enforcement. *Id.* Even then, kiosks display only a limited number of voter records. *Id.*

Similarly, the Online Voter Registration Web Application Programming Interface (OVR Web API) allows Pennsylvania agencies, organizations, and political campaigns to develop their own applications (i.e., “apps”) to help residents register to vote. *Id.* ¶ 13. Pennsylvania agencies such as the Department of Health, the Department of Human Services, and the Department of Labor and Industry have built apps using OVR Web API to enable a resident to register to vote while also applying for other benefits, such as public assistance. *Id.* ¶ 14. An app built with OVR Web API functions similarly to the Department’s online voter registration website: the app allows a qualified resident to submit a voter registration application to the Department, which forwards the application to the respective county boards of elections. *Id.* ¶ 15. Any app built with Web API does not connect to, or have any access to, SURE VR. *Id.* ¶ 16. Likewise, the Pennsylvania agency, organization, or political campaign that built the app does not connect to, or have any access to, SURE VR. *Id.* ¶ 17.

Because SURE VR contains sensitive personal information for all Pennsylvania's registered voters, only individuals authorized by the Department or a county board of election can access it. *Id.* ¶¶ 6, 22-24. The Department performs background checks before authorizing anyone to access the SURE system. *Id.* ¶ 24. When election administration necessitates that the Department allow additional access to SURE VR or the data it houses, the Department contractually limits that access, restricts how personal voter information can be used, and prohibits retention or dissemination of any information. *Id.* ¶¶ 23-24. When a court needs to access the SURE system as part of a nomination challenge or other election matter, the Department directs counties to either use a portal that does not show driver's license and Social Security numbers, or ask the court to turn the project off. *Id.* ¶ 28.

Even when the Department works with outside entities to improve its election administration, the Department does not provide unencumbered access to voters' personal information. For example, in June 2018, the Department asked the Pennsylvania Department of Auditor General to perform an audit of the SURE system to assess its accuracy, operability, and efficiency. *Id.* ¶ 40. The audit was conducted pursuant to an interagency agreement restricting the access to, use of, and retention of any data from the SURE system. *Id.* ¶¶ 40, 43. As part of the privacy and security protocols established to protect data integrity and chain of

custody, the Department prepared a copy of several tables from SURE VR, saved them to an encrypted external hard drive, and stored it in a secure lockbox within a locked cabinet at the Department. *Id.* ¶¶ 45-46. Government auditors could review the copy only in a room at the Department, on Department hardware, and in the presence of Department personnel. *Id.* ¶ 48. The Department also provided the auditors with read-only credentials to SURE VR, which also could only be used in a room at the Department, on Department hardware, and in the presence of Department personnel. *Id.* ¶¶ 47-48.

ARGUMENT

Without a legitimate purpose or authority to do so, the Committee has issued a Subpoena that would trample on nine million Pennsylvanians’ most basic rights: to privacy and to vote freely. The Subpoena also demands classes of information that are protected under federal law and the deliberative process privilege. For all these reasons, the Subpoena must be quashed.

I. The Subpoena Lacks a Legitimate Legislative Purpose

The Committee issued the Subpoena as part of an “investigation” that is the latest phase in a prolonged effort to cast doubt on the results of the 2020 presidential election generally, and the Pennsylvania results in particular. Tellingly, the Committee has been unable to commit to a rationale for the Subpoena, and the various reasons it has given are not credible. Even if one or

more of the Committee’s ostensible purposes for the Subpoena could be legitimate in another context, the documents actually demanded do not further those purposes and therefore do not constitute a legitimate legislative purpose for *this* Subpoena. The Subpoena therefore must be quashed in its entirety.

Because a legislative body’s power to investigate is a corollary of its power to legislate, the investigative power “extends to every proper subject of legislative action.” *Com. ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 3 (Pa. 1974). But the source of investigative power also operates as a limit on that power. As the U.S. Supreme Court has explained in the federal context, “a congressional subpoena is valid only if it is ‘related to, and in furtherance of, a legitimate task of the Congress.’” *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)). Decisions of the U.S. Supreme Court have guided Pennsylvania courts’ review of legislative subpoenas. *E.g.*, *Carcaci*, 327 A.2d at 3-4. In Pennsylvania too, the exercise of “legislative authority cannot be so broad as to negate any legitimate legislative purpose.” *Camiel v. Select Comm. on State Contract Practices of House of Representatives*, 324 A.2d 862, 869 (Pa. Commw. Ct. 1974).

The ostensible purpose of the Subpoena, and the investigation it purportedly advances, has been a moving target. At the opening of the September 15 hearing, Senator Dush framed the Committee’s investigation as a review of Pennsylvania’s

most recent elections to assess “how the election code is working” after Act 77. Hr’g Tr. (Sept. 15, 2021) at 4:14-16. When questioned, however, Senator Dush described an entirely different focus: an audit to verify the identity of Pennsylvanians who voted in the 2020 general election and their eligibility to vote. *Id.* at 16:22-17:20; 19:12-13; 20:2-5. He explained that the subpoena requested Social Security and drivers’ license numbers “to verify the identity of individuals and their place of residence and their eligibility to vote.” *Id.* at 17:6-8. That verification is necessary, Senator Dush asserted, “because there have been questions regarding the validity of people who have voted, whether or not they exist.” *Id.* at 17:15-17:20.²

None of the articulated explanations constitutes a legitimate legislative purpose. To begin, Senator Dush already has given four different reasons for the

² After the hearing—and after this petition was filed—Senator Dush offered several new reasons for the Subpoena. In a statement responding to this lawsuit, Senator Dush said, referencing a 2019 report from the Auditor General, that “[t]he purpose of our review is to find the flaws in the [SURE] system and identify how to address them, and we cannot do that properly without access to the information we subpoenaed.” *Dush Responds to Attorney General’s Lawsuit, Arizona Audit Report* (Sept. 24, 2021) (Ex. F-52). Four days later, Senator Dush said the Committee actually is “digging into the stuff that was brought out during Gene DePasquale’s investigation ... when he was the Auditor General. And the stuff that was brought out during the two hearings that we had before.” Transcript of Interview with Sen. Cris Dush (Sept. 29, 2021) (Ex. F-53). On the day this brief was due, Senator Dush published an op-ed stating that the purpose “is to cross match and verify whether or not our voter registration system has duplicate voters, dead voters and/or illegal voters.” Cris Dush, *Your View by Republican leading Pennsylvania election audit: A meteor strike is more likely than a breach of your election info*, Morning Call (Oct. 13, 2021) (Ex. M-1). Courts regularly discount the legitimacy of post-hoc rationalizations of government action. *E.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019); *Philadelphia Entm’t & Dev. Partners, L.P. v. City Council for City of Philadelphia*, 943 A.2d 955, 965 (Pa. 2008); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007).

Subpoena. His shifting justifications signal the insincerity of the publicly professed purposes. *E.g., Leibensperger v. Carpenter Techs., Inc.*, 152 A.3d 1066, 1077 (Pa. Commw. Ct. 2016) (explaining inconsistency is often evidence of pretext); *Kroptavich v. Pa. Power & Light Co.*, 795 A.2d 1048, 1059 (Pa. Super. Ct. 2002) (same).

Moreover, for either of the Committee's contemporaneous justifications, the work that the Committee claims to be doing already has been done. Two different reviews of the 2020 presidential election already have confirmed its results. *Supra* at 5. Both legislative chambers have held comprehensive hearings and published reports addressing Act 77, the 2020 election, and suggested avenues for reform. *Supra* at 6-7. In fact, there already is election legislation under consideration in the State Government Committee, S.B. 878 Gen. Assemb. Reg. Sess. (Sept. 17, 2021), as well as a resolution—introduced by five members of the Committee—to amend provisions of the Pennsylvania Constitution that govern voter qualifications, S.B. 735 Gen. Assemb. Reg. Sess. (June 31, 2021).

Beyond that, some of the information that the Subpoena demands is available to everyone on the Department's website, or through a Right-To-Know request. Resorting to a Subpoena to obtain information that the Committee could easily access with far less fanfare communicates an interest in something other than the requested information.

Finally, the Committee has no authority over elections. *Infra* at 34-38. That the Committee has reached into a matter over which it has no responsibility further betrays the illegitimacy of its investigation.

In reality, the Subpoena is inseparable from the effort by former President Trump and his supporters, including Senators Corman and Dush, to promote distrust in the 2020 presidential election. Senators Dush and Corman have been unshakeable in their commitment to that bad faith objective, *supra* at 7-16, and this investigation is yet another step to appease the former President. Indeed, before Senator Corman appointed Senator Dush as Committee Chair, former President Trump made a thinly veiled political threat against Senator Corman, asking “Why is State Senator Jake Corman of Pennsylvania fighting so hard that there not be a Forensic Audit of the 2020 Presidential Election Scam? . . . I feel certain that if Corman continues along this path of resistance, with its lack of transparency, he will be primaried and lose by big numbers.” Donald J. Trump, *Statement by Donald J. Trump, 45th President of the United States of America* (June 14, 2021) (Ex. F-54). Since launching this new phase of the “investigation,” Senators Dush and Corman have said explicitly that the former President is “comfortable” with the investigation and is watching closely. *Supra* at 18-19.

Further, the Pennsylvania Republican Party has promoted the investigation as part of the “fight to uncover the truth about Pennsylvania’s 2020 elections,”

Republican Party of Pennsylvania, Facebook (Aug. 1, 2021) (Ex. F-55), and asking for “contribution[s] to [the] Election Integrity Fund to help [the] party continue the fight to restore integrity to Pennsylvania’s elections,” PAGOP: Secure Our Elections (last visited October 11, 2021) (Ex. F-56). Falsely claiming that Pennsylvania’s elections lack integrity and that the Committee’s investigation is needed to uncover the “truth” has been a central feature of the coordinated effort to undermine public confidence in the electoral system.

The Court’s review of the Subpoena cannot avoid this context. As the U.S. Supreme Court recently said about an interbranch conflict at the center of a federal legislative subpoena, “we would have to be blind not to see what all others can see and understand: that the subpoenas do not represent a run-of-the-mill legislative effort but rather a clash between rival branches of government over records of intense political interest for all involved.” *Mazars*, 140 S. Ct. at 2034 (cleaned up). The same is true here. This is not a run-of-the-mill subpoena. It is one that emanates from, and continues, an extended effort to erode confidence in election integrity.

Even taking the Committee’s shifting justifications at face value, the information the Subpoena demands is not related to those purposes. If the Committee is investigating whether specific individuals who voted in the 2020 general election were eligible to do so, that is not a legislative function. Rather,

investigating possible violations of the Election Code—or any law—is an executive branch responsibility. *See, e.g.,* 25 Pa. Stat. § 3555; *see also Mazars*, 140 S. Ct. at 2032 (explaining that legislative branch cannot issue subpoena for law enforcement purposes). Alternatively, if the Committee truly desired to review Act 77, there is no discernible reason—and the Committee has not articulated one—why the Committee must obtain the partial Social Security number, driver’s license number, address, and date of birth for more than nine million Pennsylvania voters to take legislative action. Nor is there any reason why the Committee needs information about each individual voter’s method of voting or a year’s worth of voter record changes to act. Subpoena at ¶¶ 4-14. Multiple reviews of the 2020 election have been ably performed, and several election bills have been introduced, all without voters’ personal information. *Supra* at 6-7, 30-31.

Nor, if they could be considered, is there any plausible connection between the demanded information and Senator Dush’s post-hoc explanations. If the Committee is genuinely seeking to assess how the Department responded to the Auditor General’s recommendations, or the functioning of the SURE system generally, the Subpoena would not demand stale data.

At bottom, the Subpoena advances an investigation that is just the next step in an ongoing effort to manufacture mistrust about Pennsylvania’s elections. That unfortunate endeavor is not a legitimate legislative activity.

II. Elections are Outside the Committee’s Subject Matter Area and the Subpoena Was Issued Without Authority.

The Subpoena also is unenforceable in its entirety because elections are outside the Intergovernmental Operations Committee’s subject area, which is government regulatory reform.

Each of the Pennsylvania State Senate’s 22 Standing Committees conducts oversight in a particular subject matter area. *See* Pa. S. Rule 14(a)(1); Pa. S. Res. No. 3, Session of 2021 (Jan. 5. 2021). And each Standing Committee may “maintain a continuous review of the work of the Commonwealth agencies concerned with their subject areas and the performance of the functions of government within each such subject area.” Pa. S. Rule 14(d)(1). A committee’s subpoena authority is tied to its subject area-specific duties. *See* Pa. Senate Rule 14(d)(3) (“In order to carry out its duties, each standing committee or special committee . . . may issue subpoenas, subpoenas duces tecum and other necessary process. . . .”); *see also* *Watkins v. United States*, 354 U.S. 178, 206 (1957) (“Plainly these [legislative] committees are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere.”).

At the federal level, internal Senate rules are judicially enforceable. *Yellin v. United States*, 374 U.S. 109, 114 (1963). Likewise, in Pennsylvania “legislative investigations must be kept strictly within their proper bounds if the orderly and

long-established processes of our coordinate branches of government are to be maintained.” *McGinley v. Scott*, 164 A.2d 424, 431 (Pa. 1960); *see also Lunderstadt v. Pa. House of Representatives Select Comm.*, 519 A.2d 408, 415 (Pa. 1986) (announcing judgment of the court) (explaining that legislative subpoena must be “within the authority of the issuing party”).

Here, the Committee’s subject area is limited to regulatory reform, a point underscored by the Committee’s history. The Senate established the Intergovernmental Operations Committee in 2011 at a time when it was focused on regulatory reform. *See* Pa. S. Res. No. 45, Gen. Assemb. Reg. Sess. (Feb. 28, 2011). The Senate’s former President Pro Tempore explained at the Committee’s inception that it would review plans to overhaul state agencies or to redirect their operations. *Senator Smucker Named Committee Chairman, States News Service* (Jan. 4, 2011) (Ex. F-57). The Committee’s inaugural Chair echoed this, announcing that the Committee would “have jurisdiction over proposals to restructure state government, such as consolidating state agencies, with the purpose of cutting costs and improving efficiency.” *Id.* Ahead of the Committee’s first meeting, Senator Smucker stressed that the Committee would look to “valuable lessons about the financial and practical upsides and downsides of cutting back substantially on state government operations.” *Potential for Consolidation of State Agencies and Services to be Aired, States News Services* (Mar. 9, 2011) (Ex. F-

58). Senator Mastriano, the Committee’s immediate past Chair, described it as “responsible for reviewing proposals to reform state government, reduce costs and enhance government efficiencies.” *Mastriano Named Chair of Intergovernmental Operations Committee, Appointed to 5 Others* (June 19, 2021) (Ex. F-59).

The most significant matter in the Committee’s portfolio is oversight of the Independent Regulatory Review Commission. 51 Pa. B. 775 (Feb. 13, 2021). That Commission was created pursuant to the Regulatory Review Act, and it analyzes agency regulations with an eye towards the costs and burdens placed on small business. Regulatory Review Act, P.L. 657, No. 76 §1(c), 71 Pa. Stat. § 745.2(c) (2012).

Before the Subpoena, the Committee had not taken a single vote on any election related matter in its nine-year existence. *See* Senate Committee Roll Call Votes: Intergovernmental Operations 2011-2012 Regular Session (Ex. F-60); Senate Committee Roll Call Votes: Intergovernmental Operations 2013- 2014 Regular Session (Ex. F-61); Senate Committee Roll Call Votes: Intergovernmental Operations 2015-2016 Regular Session (Ex. F-62); Senate Committee Roll Call Votes: Intergovernmental Operations 2017-2018 Regular Session (Ex. F-63); Senate Committee Roll Call Votes: Intergovernmental Operations 2019-2020 Regular Session (Ex. F-64); Senate Committee Roll Call Votes: Intergovernmental Operations 2021-2022 Regular Session (Ex. F-65).

It is the State Government Committee that handles election matters. That committee regularly reviews regulations related to the Department and election matters. *See, e.g.*, 51 Pa. B. 775 (Feb. 13, 2021); 49 Pa. B. 597 (Feb. 9, 2019). Similarly, the Department often works with and reports to the State Government Committee on election and voting matters. *E.g.*, 71 Pa. Stat. § 279.6 (requiring the Department to issue a report to the State Government Committee with statistics on the 2020 general primary election, including the number of absentee ballot and mail-in ballot applications); 25 Pa. Stat. § 2627 (mandating that the Department submit written plans to the State Government Committee on disapproval and decertification of voting apparatuses). Unlike the Committee, the State Government Committee has held four votes in 2021 alone that involve voting and election procedures. *See* Senate Committee Roll Call Votes: State Government 2021-2022 Regular Session (Ex. F-66). As recently as September 17, 2021, a bill was introduced to amend Pennsylvania election law and promptly referred to the State Government Committee. S.B. 878 Gen. Assemb. Reg. Sess. (Sept. 17, 2021).

To justify the Committee's recent actions, Senator Dush has asserted that "an appropriate focus for the Intergovernmental Operations Committee is legislation and laws that involve multiple levels of government." Hr'g Tr. (Sept. 9, 2021) at 12:25-13:3. Several months ago, Senator Mastriano likewise claimed that the Committee has "oversight and investigatory responsibilities regarding activities

relating to or conducted between two or more governments or levels of government, including the administration of elections across the Commonwealth.” Ltr. from Sen. Mastriano to Lisa Deeley (July 7, 2021). There is no precedent for these assertions of authority, which, if accepted, would give the Committee nearly limitless investigatory power, contrary to Senate Rule 14, the Committee’s mandate, and consistent Senate practice over the past decade.

Because the Committee has no authority over elections or voting matters, the Subpoena is unenforceable and must be quashed in its entirety.

III. The Subpoena Violates Pennsylvanians’ Constitutional Right to Privacy

A. The Subpoena Violates the Informational Privacy Rights of Nine Million Pennsylvanians

Paragraphs 4 through 14 of the Subpoena demand that the Department disclose to the Committee and its still unidentified third-party vendor the highly sensitive personal information of more than nine million Pennsylvania voters. Complying with that request would violate the Pennsylvania Constitution because the Committee has no public interest in voters’ personal information that outweighs voters’ informational privacy rights. Since a legislative body’s investigative power is “subject to the limitations placed by the Constitution on governmental encroachments on individual freedom and privacy,” *Carcaci*, 327 A.2d at 4, the Subpoena’s demands for personal information must be quashed.

Article I, Section 1 of the Pennsylvania Constitution protects the right of Pennsylvanians to informational privacy, which is the “right of the individual to control access to, or the dissemination of, personal information about himself or herself.” *Pa. State Educ. Ass’n (PSEA) v. Commonwealth Dep’t of Cmty. & Econ. Dev.*, 148 A.3d 142, 150 (Pa. 2016). This state-based constitutional right is stronger than any similar protection derived from the U.S. Constitution. *Id.* at 151. Under this constitutional protection, there are some “types of information whose disclosure, by their very nature, would operate to the prejudice or impairment of a person’s privacy, reputation, or personal security, and thus intrinsically possess a palpable weight.” *Tribune-Review Pub. Co. v. Bodack*, 961 A.2d 110, 115-16 (Pa. 2008) (cited approvingly in *PSEA*). For these types of information, the right to informational privacy is not dependent on proving “that each person or entity who may be affected will potentially suffer a threat to privacy, reputation, or personal security.” *Id.* at 117.

Whether Article I, Section 1 allows disclosure of personal information is context specific: personal information may be disclosed only if the public’s interest in that specific disclosure outweighs the interest in informational privacy. *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159 (Pa. 2017). This balancing test is “applicable to all government disclosures of personal information, including those not mandated by the [Right-to-Know Law] or another statute.” *Id.*

Only a “compelling” state interest can overcome the interest in informational privacy. *Commonwealth v. Nixon*, 761 A.2d 1151, 1156 (Pa. 2000).

Here, the Subpoena demands the driver’s license number, last four digits of the Social Security number, date of birth, and address of each of the more than nine million registered voters in Pennsylvania. Subpoena ¶¶ 4-13. While Pennsylvania voters must provide this information to the Department when registering to vote, *see* 52 U.S.C. § 21083(a)(5)(A); 25 Pa. Cons. Stat. § 1327, their exercise of the franchise does not forfeit their constitutionally protected privacy interest in that information, *see PSEA*, 148 A.3d at 363 (noting that public school employees “should not be required to forfeit their privacy merely as a precondition to, or by virtue of, their decision to be employed as public school employees”).

The first two classes of information—driver’s license and partial Social Security numbers—are the “types of information whose disclosure, by their very nature, would operate to the prejudice or impairment of a person’s privacy, reputation, or personal security, and thus intrinsically possess a palpable weight.” *Bodack*, 961 A.2d at 115-16; *see also* Ferrante Decl. ¶¶ 15-32, 51-55 (Ex. H). As this Court has previously explained, disclosure of Social Security numbers raises personal privacy concerns because those numbers allow for the “retrieval of extensive amounts of personal data.” *Times Pub. Co. v. Michel*, 633 A.2d 1233, 1237-38 (Pa. Commw. Ct. 1993) (cited approvingly in *PSEA*); *see also Pa. State*

Univ. v. State Employees' Ret. Bd., 935 A.2d 530, 539 (Pa. 2007) (explaining it would be difficult to conclude that a public need for someone's Social Security number would outweigh the right to privacy); *Lancaster Cty. Dist. Attorney's Office v. Walker*, 245 A.3d 1197, 1206 (Pa. Commw. Ct. 2021) (requiring redaction of driver's license numbers). Driver's license and Social Security numbers are also frequently used to commit identity theft and financial fraud because they are used by federal, state, and local agencies, as well as by financial institutions and other businesses, as a means of identification. *See* Ferrante Decl. ¶¶ 21-23. Algorithms can use publicly available data and partial Social Security numbers to predict full Social Security numbers. *Id.* ¶¶ 24-27.

Because of the significant privacy and security risks associated with disclosure of driver's license and all or part of Social Security numbers, federal and state laws carefully guard against their release. In the voter records context, Pennsylvania law does not permit disclosure of voters' driver's license or Social Security numbers on "public information lists" and "street lists" that are otherwise accessible under some conditions. 25 Pa. Cons. Stat. §§ 1404(a)(1), 1403(a); 4 Pa. Code §§ 183.13(a), (c)(5)(iii), 183.14(c)(3). Similarly, counties may not provide driver's license numbers or partial Social Security numbers on lists of information about mail-in and absentee voters. 25 Pa. Stat. §§ 3146.9(b)-(c), 3150.17(b)-(c). Counties also must allow public inspection by a Pennsylvania voter of certain

records in controlled circumstances, 25 Pa. Stat. § 2648; 25 Pa. Cons. Stat. § 1207, but cannot make partial Social Security numbers or driver’s license numbers available for public inspection, 25 Pa. Stat. §§ 3146.9(a); 3150.17(a); 2602(z.5). The Department must likewise allow public inspection, 25 Pa. Stat. § 2622; 25 Pa. Cons. Stat. § 1207, but does not make partial Social Security or driver’s license numbers available, Marks Decl. ¶¶ 25, 27.

Outside the voter records context, Social Security numbers³ and driver’s license numbers⁴ are likewise scrupulously protected from public view. These protections work to limit the effect of statutes that might otherwise be read to allow access to such sensitive personal information. *E.g.*, *Pub. Interest Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 563 (M.D. Pa. 2019) (concluding that the Driver’s

³ *See, e.g.*, 42 U.S.C. § 405(c)(2)(C)(viii)(I) (designating Social Security numbers collected under federal laws enacted after 1999 as confidential and restricting disclosure); 42 U.S.C. § 405(c)(2)(C)(ii) (limiting state use); 5 U.S.C. § 552a note (limiting the ability of states to require disclosure to receive a right, benefit, or privilege); 5 U.S.C. § 552a (limiting disclosure by federal agencies); 18 U.S.C. § 2721(a)(2) (restricting release by state departments of motor vehicles as “highly restricted personal information”); 18 U.S.C. § 2725(3) (defining personal information to include Social Security number); 65 Pa. Stat. § 67.708(b)(6)(i)(A) (exempting from disclosure under the Right-To-Know Law); 74 Pa. Stat. § 201 (criminalizing the public posting or public display by a person, entity, Commonwealth agency, or political subdivision); 73 Pa. Stat. §§ 2301-30 (mandating disclosure of data breach to any resident whose Social Security number may have been accessed).

⁴ *See, e.g.*, 18 U.S.C. § 2721(a)(1) (restricting release of driver’s license numbers by state departments of motor vehicles); 65 Pa. Stat. § 67.708(b)(6)(i)(A) (exempting from disclosure under the Right-To-Know Law); 73 Pa. Stat. §§ 2301-30 (mandating disclosure of data breach to any resident whose driver’s license number may have been accessed); *Advancement Project v. Pa. Dep’t of Transp.*, 60 A.3d 891, 895-97 (Pa. Commw. Ct. 2013) (ruling that 75 Pa. Cons. Stat. § 6114 makes driver’s license non-disclosable through a Right-To-Know request).

Protection Privacy Act prohibits access to driver's license numbers that the National Voter Registration Act might otherwise allow).

Demanding that the Secretary produce a single package that includes not only partial Social Security numbers and driver's license numbers, but also the home addresses and dates of birth for more than nine million Pennsylvanians, sharpens the privacy interests at stake. *E.g.*, Ferrante Decl. ¶¶ 15-18, 20-22, 28-29, 54-55; *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 764 (1989) (noting the “vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information”).

The Supreme Court of Pennsylvania already has ruled that people have “constitutionally protected privacy interests in their home addresses.” *PSEA*, 148 A.3d at 157. And it has cited with approval a decision of this Court concluding that disclosure of someone's month and date of birth would jeopardize “personal security.” *Reese*, 173 A.3d at 1159 (citing *Governor's Office of Admin. v. Purcell*, 35 A.3d 811, 821 (Pa. Commw. Ct. 2011)); *see also True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 736 (S.D. Miss. 2014) (finding that disclosure of voters' “birthdates raises serious concerns similar to disclosure of SSNs” particularly

“when combined with other identifying information available in voter registration records”).

Pennsylvania and federal law exhibit similar concern for public access to voter information. For example, state and federal judges, state and federal law enforcement officers, state prosecutors, parole officers, correctional employees, individuals with a Protection from Abuse order, individuals granted a protection order due to stalking, and other individuals who can demonstrate a threat to personal safety can request that their home addresses not be disclosed on public voter lists. 4 Pa. Code § 183.14(c)(4)-(5). Likewise, the Address Confidentiality Program protects the addresses of victims of domestic violence, sexual assault, and stalking and their families by requiring use of substitute addresses in the SURE system. 23 Pa. Const. Stat. §§ 6701-13; Marks Decl. ¶ 31. And as discussed above, *supra* at 24, 42, “public information lists” are not truly “public”; instead, recipients of these lists must adhere to limitations on use and dissemination.

The Committee’s demand for unrestricted access to a thorough package of personal voter information exacerbates risks to both individual personal and financial security and to national security. Ferrante Decl. ¶¶ 21-23, 28-31, 51-55. The number of data breaches in 2021 to date has already surpassed all of 2020. *Id.* ¶ 30. Identity theft cost victims \$56 billion in 2020—\$13 billion in traditional identity fraud and \$43 billion in identity fraud scams. *Id.* ¶ 31. Reactive remedies,

such as credit monitoring, are no guarantee of future security. *Id.* ¶ 54. The requested personal information also increases the risk of potential tampering with an individual’s voter registration, Pa. Dep’t of State, *Voter Registration Application* (Ex. F-67)—such as by changing the voter’s name, address, and party affiliation, or by requesting a mail-in ballot for the voter and having it sent to a different mailing address, Ferrante Decl. ¶ 55. These risks explain why one court held that a state program to collect partial Social Security numbers, full names, addresses, and birth dates to perform interstate checks of voter rolls violates the federal right to informational privacy. *Moore v. Kobach*, 359 F. Supp. 3d 1029, 1049-50 (D. Kan. 2019). Of course, Pennsylvania’s right to informational privacy is even stronger than the federal right at issue in *Moore*. See *PSEA*, 148 A.3d at 151.

The significant privacy interest voters have in their partial Social Security number and driver’s license number, as well as the complete package of personal information demanded, heavily outweighs any public interest the Committee purports to have in obtaining—and disclosing to a yet-unknown third-party vendor—the personal information of all Pennsylvania voters.

For one, the Committee’s interest in the requested information is not in furtherance of a legitimate legislative purpose, *supra* at 27-34, and so cannot outweigh the privacy interests of over nine million Pennsylvanians. Nor is there

any plausible connection between the partial Social Security number, driver's license number, address, and date of birth for more than nine million Pennsylvania and legislative action. The "unproven ability of the release of the requested information to assist" the requester's supposed needs weighs against release. *Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 12*, 713 A.2d 627, 630 (Pa. 1998) (plurality opinion) (performing balancing in context of Right-to-Know request). In fact, there is "little benefit to the public from a disclosure of 'bulk' personal information in response to 'generic requests based upon no criteria other than'" the person's exercise of the franchise. *City of Harrisburg v. Prince*, 219 A.3d 602, 618 (Pa. 2019).

The Committee's interest in the requested information also does not outweigh the risks attendant to the Committee's, or an unidentified third party's, access to over nine million Pennsylvanians' private, personal information, where access to that personal information can be used to commit identity theft or financial fraud or to change voters' addresses and mail-in ballot requests. *Supra* at 41-43, 45. This is especially true because the Committee has not demonstrated any ability to protect the personal voter information it has demanded. Ferrante Decl. ¶¶ 33-38. And the Committee's plan to disclose voters' personal information to an unknown third-party vendor on unknown terms and to perform unspecified tasks magnifies these risks. *Id.* ¶ 39. For this reason, the data security expert retained by the

Department has concluded that if the Department is forced to comply with the Subpoena, “there is a high likelihood” that personal voter information “will be subject to theft by malicious actors and leveraged for nefarious purposes, resulting in the harm of potentially millions of Pennsylvania citizens and the Pennsylvania SURE election system.” Ferrante Decl. ¶ 14.

Because the Subpoena violates the informational privacy rights of more than nine million Pennsylvania voters, paragraphs 4 through 14 must be quashed.

B. The Subpoena Invades a Reasonable Expectation of Privacy

Additionally, paragraphs 4-14 of the Subpoena are unconstitutional because they seek to perform an unreasonable search.

The Pennsylvania Constitution protects Pennsylvanians’ reasonable expectations of privacy from unreasonable searches. Pa. Cons. art. I, § 8. Unreasonable violations of privacy interests are no less objectionable because they are accomplished by the legislature rather than law enforcement. *Annenberg v. Roberts*, 2 A.2d 612, 617–18 (Pa. 1938); *Lunderstadt*, 519 A.2d at 414-15 (announcing judgment). A contrary rule would put individuals at risk of legislative “fishing expeditions.” *Lunderstadt*, 519 A.2d at 414 (announcing judgment).

To guard against unreasonable invasions of privacy, the legislature must affirmatively demonstrate the need for any invasion of privacy and any demand for private information must be tailored to that need. That heightened protection of the

Pennsylvanians’ privacy rights has been described both as demanding that the legislature establish “probable cause that the particular records sought contain evidence of civil or criminal wrongdoing,” *id.* 519 A.2d at 415 (announcing judgment), and as a requirement that the information sought be definite and “reasonably relevant” to an investigation within the authority of the legislature, *id.* at 417 (Zappala, J., concurring); *see also Annenberg*, 2 A.2d at 617 (explaining that a legislature cannot invade expectations of privacy “except to the extent to which such disclosure is reasonably required for the general purpose of the inquiry”). Either way, a legislative body cannot issue sweeping subpoenas disconnected from any documented need. *Lunderstadt*, 519 A.2d at 415 (announcing judgment); *id.* at 416-17 (Zappala, J., concurring). The Fourth Amendment of the U.S. Constitution, which offers less protection than Article I, Section 8, *see Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979), requires a showing of probable cause for subpoenas that demand records from a third party in which persons have a reasonable expectation of privacy, *Carpenter v. United States*, 138 S. Ct. 2206, 2222 (2018).

By any standard—probable cause or reasonable relevance—the Committee’s demand for personal information is unjustified. Pennsylvanians have a reasonable expectation of privacy in their driver’s license number, last four digits of their Social Security number, and birthdate. The many federal and state laws that protect

this information from disclosure or limit its use, *supra* at 42-43 & nn. 3&4, confirm both voters' subjective expectation of privacy and society's recognition that this expectation is reasonable.

The Committee has not demonstrated, and cannot demonstrate, either probable cause that the requested personal information contains evidence of civil or criminal wrongdoing, or that it is tailored and relevant to whatever investigation the Committee is performing. Senator Dush has explained that the Committee is requesting Social Security and driver's license numbers "[b]ecause there have been questions regarding the validity of people who have voted, whether or not they exist" and because the Committee wants to assess the "veracity of the individual voters and whether or not they were authorized." Hr'g Tr. (Sept. 15, 2021) at 15:10-24, 16:18-21. But there are no credible allegations or evidence of such voter fraud. *Supra* at 5-7. Therefore there is no support for the relevance of a "sweeping" request for the personal information of every registered voter, *see Lunderstadt*, 519 A.2d at 417 (Zappala, J., concurring), and certainly not probable cause that a significant number of people voted in recent elections who "did not exist" or who were not authorized to vote.

Because the Committee has not demonstrated either probable cause to demand voters' personal information, or the reasonable relevance of that demand, paragraphs 4 through 14 must be quashed.

IV. The Subpoena Interferes with Pennsylvanians' Right to Fair Elections and the Free Exercise of the Right to Vote

The Subpoena's demand for voters' personal information also interferes with Pennsylvanians' right to free elections and to freely exercise the right to vote. Demanding the disclosure of a voter's personal information, including driver's license and partial Social Security numbers, imposes an undue burden by chilling voters' willingness to exercise their franchise.

The freedom to vote is a fundamental right, which both the Pennsylvania Constitution and the U.S. Constitution safeguard. Pa. Const. art. I, § 5; *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (“[A]ll qualified voters have a constitutionally protected right to vote.”). The right is fundamental because voting “is of the essence of a democratic society.” *Reynolds*, 377 U.S. at 555. Burdens on the right to vote thus “strike at the heart of representative government.” *Id.* Both the Pennsylvania Constitution and the U.S. Constitution prohibit activities that discourage voting without, at least, adequate justification.

Pennsylvania's protections of the right to vote are especially extensive. Elections here “shall be free and equal; 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. This provision's sweeping language ensures 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 v. Commonwealth*, 178 A.3d

737, 804 (Pa. 2018). To honor that purpose, courts give Article I, Section 5 “the broadest interpretation, one which governs all aspects of the electoral process.” *Id.* at 814.

Article I, Section 5’s proscriptions are clear. It forbids any “undue influences by which elections may be assailed,” including influences that “shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.* at 809 (quoting Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania. Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883)). Article I, Section 5 also prohibits acts that “discourage[e] voters from participating in the electoral process.” *Id.* at 814.

The U.S. Constitution likewise carefully protects against acts that might discourage an individual from exercising the right to vote. For example, the U.S. Supreme Court has recognized that political speech—to which the First Amendment gives “its fullest and most urgent application”—must yield if it might interfere with someone’s right to vote. *Burson v. Freeman*, 504 U.S. 191, 196-208 (1992) (plurality opinion) (upholding Tennessee law that prohibited certain forms of political speech within 100 feet of a polling place); *see also Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018) (agreeing that a state’s interest in preserving safe access to the ballot box could justify restricting First Amendment rights). The most compelling First Amendment rights, the Court reasoned, must

give way to ensure that there are no undetected “acts of interference” in the electoral process that might “drive the voter away.” *Burson*, 504 U.S. at 207. For this reason, people may bring claims if they have been or may be discouraged from exercising the right to vote. *Smith v. Meese*, 821 F.2d 1484, 1488-94 (11th Cir. 1987); *cf. Democratic Nat. Comm. v. Republican Nat. Comm.*, 673 F.3d 192, 209 (3d Cir. 2012) (describing purpose of consent decree as to “help ensure that potential minority voters are not dissuaded from going to the polling station to vote”).

Federal courts have recognized that disclosure of voters’ personal information chills voters’ willingness to exercise that right. For example, a state law that demanded a voter provide their Social Security number to register, then permitted public inspection and disclosure of that Social Security number, constituted a “profound invasion of privacy when exercising the fundamental right to vote” and thus imposed a substantial burden. *Greidinger v. Davis*, 988 F.2d 1344, 1353-54 (4th Cir. 1993).⁵ Likewise, voters’ reasonable concerns about access to their personal information is also why courts have interpreted the National Voter Registration Act *not* to require disclosure of Social Security numbers. *See True the Vote*, 43 F. Supp. 3d at 739; *Project Vote/Voting For Am.*,

⁵ Internal use of a Social Security number for only election administration purposes does not impose the same burden. *Greidinger*, 988 F.2d at 1354 n.10.

Inc. v. Long, 752 F. Supp. 2d 697, 712-13 (E.D. Va. 2010). An alternative conclusion would run counter to “the voter registration goals of the NVRA” because allowing “uniquely sensitive” information that is “vulnerable to abuse” to be disclosed would make voters understandably hesitant to register in the first place. *Project Vote*, 752 F. Supp. 2d at 712-13. As another court reasoned, requiring unredacted disclosure of personal information, such as birthdates, names, and addresses creates “a substantial likelihood that many may decline to register altogether, thus depressing voter registration.” *True the Vote*, 43 F. Supp. 3d at 739.

Here, the Committee demands a package of voters’ personal information, including their driver’s license and partial Social Security numbers. Even without the Subpoena, voters are leery of sharing some of the personal information required to register to vote. *See* Intervenor’s Verified Pet. for Review ¶¶ 52, 70. Any transfer of that sensitive information to new entities amplifies the risk. *See* Ferrante Decl. ¶¶ 32, 39.

Even worse, the Committee insists upon receiving highly sensitive information without having implemented basic security protocols to ensure that the information demanded remains secure and is not misused. *Id.* ¶¶ 33-39, 48-50. Instead, Senator Dush, his staff, Senate Republican legal counsel, and possible outside counsel intend to transfer the requested information to an unknown third-

party vendor. Hr’g Tr. (Sept. 15, 2021) at 20:8-21:22; 23:13-25:12. Senator Dush refused to share any information about the prospective vendors, whether they are qualified to securely handle the sensitive personal information of more than nine million Pennsylvania voters, how they might do so, and whether they have conflicts of interest. *Id.* at 20:6-26:17; 39:10-40:11.

Enforcing the Subpoena would thus introduce the possibility that any future participation in Pennsylvania’s electoral process comes with the risk that, on a purely partisan basis, political actors and unknown third parties can access the very information that voters are already reluctant to turn over just to election administrators. And those political actors will be able to demand access despite the complete absence of standards to keep the information safe.

That fear is already spreading across the electorate. Senate Majority Leader Kim Ward reacted to the Committee’s demand for personal information as being “intrusive and overreaching.” Deb Erdley, *Pennsylvania Democrats ramp up effort to derail GOP election subpoenas*, TribLive (Sept. 23, 2021) (Ex. F-68). And Senate Majority Leader Ward expressed the reasonable fear of Pennsylvania voters who do not know what will happen if the Committee gets access to their private information: “And yeah, (the last four digits of your Social Security is) scary — and the license. So, I don’t know what’s going to happen with those things.” Bob

Mayo, Voters' private info subpoenaed by State Senate Republicans; Democrats challenge move in court, WTAE Pittsburgh (Sept. 21, 2021) (Ex. F-69).

Senate Majority Leader Ward is hardly alone. In the 10 days after the Committee voted to issue the Subpoena, 549 people, including individuals from both major political parties, contacted the Office of Attorney General's constituent services to express concern about the disclosure of their personal information to an unknown vendor, and the attendant risk of identity theft. Charles Decl. ¶¶ 11, 13-24. (Ex. I). More than 300 Bucks County voters contacted their Board of Elections to express a similar concern. Ellis-Marseglia Decl. ¶¶ 6-8 (Ex. J). Members of the Pennsylvania AFL-CIO's affiliates, a group of about 750,000 people, have expressed "grave concerns" about the Subpoena because of the risk that their personal information will be misused. Bloomingdale Decl. ¶¶ 1, 9-10 (Ex. K).

One woman who contacted the Office of Attorney General expressed in particular that the "real threat" of the Subpoena "is the potential discouragement from voting in the future." Charles Decl. ¶ 18 (Ex. I). Organizations dedicated to registering voters already have stated that they will have a harder time doing so because of fears that private, personal information will be published. Intervenor's Verified Petition for Review ¶¶ 53, 71. Counties expect the same challenges in their voter registration efforts. Ellis-Marseglia Decl. ¶ 16 (Ex. J); Arkoosh Decl. ¶ 6 (Ex. L).

The pall that would hang over future participation in the electoral process if the Subpoena is enforced will discourage voters from exercising their democratic rights. And no justification, let alone an adequate one, has been given in defense of that burden on the right to vote. *Supra* at 27-34, 46-47.

Discouraging voters from exercising their right to vote in such an unjustified manner violates Article I, Section 5 of the Pennsylvania Constitution. *See League of Women Voters*, 178 A.3d at 814. All aspects of the electoral process will no longer be kept open “to the greatest degree possible.” *See id.* at 804. Compliance with the Subpoena would thus be an “undue influence[] by which elections may be assailed,” that would “impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.* at 809 (quoting Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania. Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883)).

For the same reasons, the Subpoena is an affront to the U.S. Constitution. Making the risk of public disclosure of personal information a condition of registering to vote burdens that right and will chill qualified voters from participating in future elections. *Greidinger*, 988 F.2d at 1354; *True the Vote*, 43 F. Supp. 3d at 739; *Project Vote*, 752 F. Supp. 2d at 712-13. Whatever minimal interest might be conjured in defense of the Subpoena, that interest must give way

to avoid “acts of interference” in the electoral process that might “drive the voter away.” *Burson*, 504 U.S. at 207.

Because the Subpoena’s unjustified demand for voters’ personal information infringes upon the fundamental right to vote, paragraphs 4 through 14 must be quashed.

V. The Subpoena Demands Protected Critical Infrastructure Information

Paragraph 16 of the Subpoena demands protected critical infrastructure information (PCII) protected from disclosure under federal law.

Federal law protects critical infrastructure and critical infrastructure information. 6 U.S.C. §§ 671-674; 42 U.S.C. § 5195c; *see* Ferrante Decl. ¶¶ 40-43, 57-59. “Critical infrastructure” are “systems and assets” that are “so vital to the United States” that their incapacity or destruction “would have a debilitating impact on security, national economic security, national public health[,] or safety.” 42 U.S.C. § 5195c. Election systems are one type of critical infrastructure. U.S. Dep’t of Homeland Security, *Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector* (Jan. 6, 2017) (Ex. F-70). “Critical infrastructure information” is nonpublic information “related to the security of critical infrastructure,” including “security testing, risk evaluation thereto, risk management planning, or risk audit.” 6 U.S.C. § 671(3).

The PCII Program protects critical infrastructure information from public disclosure. 6 U.S.C. § 673; 6 C.F.R. §§ 29.1-29.9; *see generally* Cybersecurity & Infrastructure Security Agency, Protected Critical Infrastructure Information (PCII) Program (Ex. F-71). If a State has voluntarily and properly submitted critical infrastructure information to the PCII Program, then the information cannot be used without written consent or used other than for the purpose of protecting critical infrastructure or protected systems. 6 U.S.C. § 673(a)(1)(E); 6 C.F.R. § 29.8. In accordance with federal law and U.S. Department of Homeland Security practice, the Department has properly submitted critical infrastructure information about the SURE system to the PCII Program. Marks Decl. ¶ 37.

Paragraph 16 of the Subpoena demands disclosure of records that constitute PCII under federal law; specifically, records that provide detail about the Department's IT architecture and identify potential risks and vulnerabilities in the SURE system and the Department's IT infrastructure. *Id.* ¶ 39. These records would create a roadmap about how to attack the SURE system. *Id.*; *see* Ferrante Decl. ¶¶ 57-59. As a result, those records can be accessed only in accordance with strict safeguarding and handling requirements, and only by those with an absolute need to know in order to perform homeland security duties. Marks Decl. ¶ 39; Ferrante Decl. ¶¶ 41-43.

The Committee is not authorized to access PCII under federal law: it does not perform homeland security duties, it is not requesting the information for the purpose of protecting critical infrastructure, and it has not demonstrated an ability to protect PCII. Ferrante Decl. ¶¶ 46-50. The Subpoena must be quashed to the extent it demands PCII.

VI. The Subpoena Demands Privileged Information

Finally, paragraph 16 of the subpoena appears to request material protected by the deliberative process privilege. And although the best reading of paragraph 2 refers only to final directives, guidance, policies, and procedures, the Committee may intend the Subpoena to reach draft documents and discussions about those drafts. To the extent it seeks protected material, that paragraph must be quashed because subpoena recipients “retain common law and constitutional privileges” in the course of a legislative investigation. *Mazars*, 140 S. Ct. at 2032.⁶

That deliberative process privilege “benefits the public” because it “allow[s] the free exchange of ideas and information within government agencies.” *Commonwealth v. Vartan*, 733 A.2d 1258, 1264 (Pa. 1999). Under the privilege, “confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice” are exempt from disclosure. *Id.* at 1263.

⁶ To the extent that any aspect of the subpoena seeks privileged or otherwise protected information, the Commonwealth Petitioners object and do not waive any privilege or protection against disclosure.

Materials are protected by the deliberative process privilege if they satisfy two criteria. First, they “must have been made before the deliberative process was completed.” *Id.* at 1264. And, second, they “must be deliberative in character.” *Id.* That is, the material must “make[] recommendations or express[] opinions on legal or policy matters.” *Id.*

Materials demanded by paragraph 16 include discussions within the Department regarding the SURE system that are deliberative in character and were conducted prior to the completion of the relevant deliberative process. As a result, those materials are exempt from disclosure. To the extent that paragraph 16—or any other paragraph—seeks material protected by the deliberative process privilege, it must be quashed.

CONCLUSION

For the reasons set forth above, Commonwealth Petitioners’ Application for Summary Relief should be granted, and the Subpoena should be quashed.

Dated: October 13, 2021

Respectfully submitted,

Josh Shapiro
Attorney General
Commonwealth of Pennsylvania

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

/s/ Michael J. Fischer
Michael J. Fischer (Bar. No. 322311)
Chief Counsel and Executive Deputy
Attorney General
Aimee D. Thomson (Bar. No. 326328)
Jacob B. Boyer (Bar. No. 324396)

Susan Baker Manning
(*pro hac vice* application pending)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
susan.manning@morganlewis.com
202.739.3000

Aaron Scherzer
(*pro hac vice* application pending)
Christine P. Sun
(*pro hac vice* application pending)
STATES UNITED
DEMOCRACY CENTER
572 Valley Road, No. 43592
Montclair, NJ 07043
aaron@statesuniteddemocracy.org
862.367.6480
christine@statesuniteddemocracy.org
615.574.9108

*Attorneys for Petitioner Pennsylvania
Department of State and
Petitioner/Respondent Acting Secretary
of the Commonwealth Veronica
Degraffenreid*

Deputy Attorneys General
Stephen R. Kovatis (Bar No. 209495)
Senior Deputy Attorney General
PENNSYLVANIA OFFICE OF
ATTORNEY GENERAL
1600 Arch Street, Suite 300
Philadelphia, PA 19103
mfischer@attorneygeneral.gov
athomson@attorneygeneral.gov
jboyer@attorneygeneral.gov
215.560.2171

Keli M. Neary (Bar. No. 205178)
Executive Deputy Attorney General
Karen M. Romano (Bar. No. 88848)
Chief Deputy Attorney General
Stephen Moniak (Bar. No. 80035)
Senior Deputy Attorney General
PENNSYLVANIA OFFICE OF
ATTORNEY GENERAL
15th Floor
Strawberry Square
Harrisburg, PA 17120

*Attorneys for Petitioner
Commonwealth of Pennsylvania,
Petitioner Pennsylvania Department of
State and Petitioner/Respondent Acting
Secretary of the Commonwealth
Veronica Degraffenreid*

CERTIFICATE OF COMPLIANCE

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

Dated: October 13, 2021

/s/ Michael J. Fischer

Michael J. Fischer

CERTIFICATE OF LENGTH

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Excluding matters identified in Pennsylvania Rule of Appellate Procedure 2135(b), this brief is 13,862 words. I have relied on Word's word count function to determine the length of this brief.

Dated: October 13, 2021

/s/ Michael J. Fischer

Michael J. Fischer