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310 MD 2021

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SENATOR JAY COSTA, SENATOR ANTHONY H. WILLIAMS, SENATOR VINCENT J. HUGHES, SENATOR STEVEN J. SANTARSIERO, AND SENATE DEMOCRATIC CAUCUS,	:	CASES CONSOLIDATED
Petitioners,	:	No. 310 MD 2021
vs.	:	
SENATOR JACOB CORMAN III, SENATE PRESIDENT PRO TEMPORE, SENATOR CRIS DUSH, AND SENATE SECRETARY-PARLIAMENTARIAN MEGAN MARTIN,	:	
Respondents.	:	
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF STATE And VERONICA DEGRAFFENREID, Acting Secretary of the Commonwealth of Pennsylvania,	:	
Petitioners,	:	No. 322 MD 2021

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

BRIEF OF ROBERTA WINTERS, NICHITA SANDRU, KATHY FOSTER-SANDRU, ROBIN ROBERTS, KIERSTYN ZOLFO, MICHAEL ZOLFO, PHYLLIS HILLEY, BEN BOWENS, THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, COMMON CAUSE PENNSYLVANIA AND MAKE THE ROAD PENNSYLVANIA IN RESPONSE TO THE COURT'S JANUARY 25, 2022, ORDER

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IN RESPONSE TO THE COURT'S JANUARY 25, 2022, ORDER

This Court has jurisdiction to hear the Petitions for Review in this consolidated matter. To hold otherwise would require the Acting Secretary to face potential contempt or other punitive measures before being able to seek relief, which is contrary to established case law. Moreover, and very significantly, declining jurisdiction would leave Intervenors ***without any recourse*** to prevent the disclosure of their personally-identifying information and the violation of their constitutional right to privacy. Under such circumstances, the Intervenors respectfully submit that the Court must adjudicate these Petitions.

A. Pennsylvania Supreme Court Precedent Demonstrates This Court's Jurisdiction Over the Instant Matter

Pennsylvania Supreme Court decisions, stretching back decades, confirm that courts in equity have jurisdiction to address alleged legislative overreach before the legislative committee initiates contempt proceedings. In *Annenberg v. Roberts*, 2 A.2d 612 (Pa. 1938), the Pennsylvania Supreme Court reviewed a challenge to a legislative subpoena investigating the regulation of devices used to transmit gambling-related information. The subpoena sought the personal, banking, and business records of 38 individuals. 2 A.2d at 617. The Court first

noted the constitutional rights at stake: "To compel an individual to produce evidence, under penalties if he refuses, is in effect a search and seizure, and unless confined to proper limits, violates his constitutional right to immunity in that regard." *Id.* The Court then addressed the question of *when* such constitutional questions should be raised. The Court was clear that a person asserting a constitutional right need ***not*** await contempt or habeas proceedings, but instead may seek relief in equity: "[t]he parties of whom an illegal demand for documents has been made "are not required . . . to test the alleged right of such person by forcibly resisting his unlawful efforts to seize the books and records of their administration, or, for defiance of the committee's subpœnas, by subsequently justifying their resistance in proceedings for contempt or in habeas corpus."" *Id.* at 618 (*quoting Brown v. Brancato*, 184 A. 89 (Pa. 1936)). The Court further noted that those whose rights are affected have a right to a "judicial hearing." *Id.* at 619. The Court concluded:

> Here, as before stated, the demands for the production of documents show on their face that they violate plaintiffs' constitutional rights; this being so, ***plaintiffs are entitled now to challenge them and to have them abated and set aside***, which is accordingly done.

Id. (emphasis added).

Similarly, in *Brown v. Brancato*, 184 A. 89 (Pa. 1936) (cited in *Annenberg*), petitioners filed a bill in equity against a House committee seeking to conduct an

investigation. The petitioners were seeking to protect not only their own information but the information owned by their clients. *Id.* at 91. The Court found that the petitioners were ***not*** required to await contempt or habeas proceedings, but instead could seek to restrain the investigation through a court of equity. *Id.* at 92. "***Equity has jurisdiction to restrain*** if the committee is without lawful authority in the premises." *Id.* (emphasis added). The Court, therefore, concluded that it had jurisdiction to hear the challenge and to restrain the committee.

More recently, in *Commonwealth ex rel. Carcaci v. Brandamore,* 327 A.2d 1 (Pa. 1974), Carcaci sought a writ against the Sergeant of Arms for the Pennsylvania House of Representatives after he was held in contempt for refusing to answer several questions posed by a House committee. The Court noted the limitations on legislative subpoenas, and balanced the interests of the legislature and the individual. *Id.* at 4. Even though in that case Carcaci raised his challenge after a contempt proceeding, the Court explained that Carcaci might have sought judicial intervention rather than awaiting the committee's contempt proceedings: "had Carcaci wished to challenge the constitutionality of the committee's investigation without risking a contempt citation before the bar of the House, ***judicial recourse would have been available to him. Injunctive relief from the activities of the committee could have been sought in a court of equit***y." *Id.* at 5 n.4 (emphasis added).

Thus, the Pennsylvania Supreme Court has consistently found that equitable relief may be sought to prevent overreach in legislative investigations, and that the subjects of those investigations need not wait for contempt or other punitive proceedings before seeking judicial review.

B. The Cases Cited in the Court's January 25, 2022, Order Are Consistent with This Long-Standing Precedent.

In its January 25, 2022 Order, the Court identified two Supreme Court cases -- *In re Pennsylvania Crimes Comm'n*, 309 A.2d 401, 404-05 (Pa. 1973), and *Cathcart v. Crumlish*, 189 A.2d 243, 245-46 (Pa. 1963) -- and one Commonwealth Court case -- *Camiel v. Select Committee on State Contract Practices of the House of Representatives*, 324 A.2d 862, 865-71 (Pa. Cmwlth. 1974) -- and asked the parties to comment on the impact of those decisions on whether the present matter is ripe for review. As explained below, these decisions do not alter the above-cited Supreme Court precedent.

In *Pennsylvania Crimes Comm'n*, the Commission investigating potential corruption in the Philadelphia Police Department served a subpoena on the Commissioner of Police. Current and former police officers filed an action in equity in Philadelphia County Court of Common Pleas seeking to restrain compliance with the subpoena. The Commission subsequently instituted a separate enforcement proceeding against the Police Commissioner in Commonwealth Court. The officers

argued that the Commission must proceed in Common Pleas rather than Commonwealth Court because they filed their action first. *Id.* at 404. Realizing it would be unfair to allow other parties to limit the Commission's jurisdictional options, the court deemed the filing in Common Pleas "incapable of divesting the Commission of its legal right to proceed to seek enforcement in the forum of its choice as provided under the statutes." *Id.* at 404-05.

In so holding, the Court concluded that appellants could not challenge the subpoena "until the Commission invokes enforcement procedures in either the Courts of Common Pleas or the Commonwealth Court." *Id.* at 404. The Court explained that the Pennsylvania legislature had not conferred upon the Crime Commission the power to enforce compliance with the subpoena. *Id.* As a result, subpoena recipients were not subject to "fine or imprisonment unless [the failure to comply] continues after a court has ordered compliance." *Id.* (*citing Cathcart v. Crumlish*, 189 A.2d 243 (Pa. 1963); *Alpha Club of West Philadelphia v. Pennsylvania Liquor Control Board*, 68 A.2d 730 (Pa. 1949)). Thus, the Court reasoned that before any punishment could be imposed the challengers would have an opportunity for judicial review "in either the Courts of Common Pleas or the Commonwealth Court." As a result, it was unnecessary to address the question at that time.

In this case, there is only one consolidated proceeding, and there is no question of depriving the Committee of its choice of judicial jurisdiction. Further, the Committee need not seek judicial review to enforce the Subpoena; rather, it can enforce compliance based on its own non-judicial contempt proceedings, among other methods. *See* Article II, §11 of the Pennsylvania Constitution (granting each house of the legislature the power to punish people for contempt, or to "enforce obedience to its process"); Mason's Manual of Legislative Procedure §802.9 ("a person disobeying a subpoena of a legislative committee may be apprehended and brought before the committee by a sheriff under a warrant issued to the sheriff, and either prosecuted for a misdemeanor under a statute for failure to obey the subpoena or punished for contempt by the legislature. . ."). Indeed, there are both civil and criminal ramifications to refusing to comply with the Subpoena. *See* 18 Pa.C.S. §5110. Because the Acting Secretary is potentially at risk of arrest or contempt, the underlying rationale for the *Pennsylvania Crimes Commission* decision (that judicial review could be had at a later point without any intervening harm) is absent here, and in fact, that court specifically distinguished circumstances such as are present here.[1]

[1] The Court's January 25, 2022 Order also asked "whether the General Assembly's contempt power or the criminal contempt statute bear on this Court's jurisdiction over the petitions for review." In this respect, they certainly do. It was the absence of such powers, and the lack of judicial review prior to the imposition

Similarly, in *Cathcart v. Crumlish*, 189 A.2d 243, 245-46 (Pa. 1963), the Philadelphia Home Rule Charter provided a specific statutory procedure for assessing the validity of the subpoena, and that procedure specifically included judicial review. *Id.* at 245. The Court noted the long-standing rule that "where a remedy or method of procedure is provided by an act, those procedures should be followed exclusively." *Id.* at 245. The Court thus concluded that because that procedure had not been invoked, the subpoena could not yet be challenged. Here, there is no such exclusive statutory procedure.

The *Cathcart* court likewise found that the challengers had an adequate remedy at law. In particular, they could await the statutory procedure and would suffer no harm by waiting. The Court noted:

> Unlike a judicial subpoena, public officers who are allegedly vested with subpoena power under section 8-409 are not given the power to enforce compliance. Disobedience is not punishable by imprisonment or fine unless it continues after a court has ordered compliance. See Annotation to § 8-409, Philadelphia Home Rule Charter. Therefore, appellants are not placed in the unfortunate dilemma of having to disobey the district attorney's subpoenas at their peril in order to contest their validity.

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of such punishment that led to the decisions in *Pennsylvania Crimes Commission*, and *Cathcart, infra*. Here, the General Assembly's contempt power and the potential for criminal liability demonstrates why those cases are distinguishable and why this Court's review is necessary and appropriate.

Id. at 245. Indeed, the Court distinguished those cases where the subpoena recipient could be subject to penalties without a court order. *Id*. at 245-46 (citing *Annenberg*). Here, as explained above, the Committee does have the power to punish and enforce obedience, including through legislative contempt proceedings. Therefore, the present case is governed by *Annenberg* rather than *Cathcart*.

Finally, this Court cited its own prior decision in *Camiel v. Select Committee on State Contract Practices of the House of Representatives*, 324 A.2d 862, 865-71 (Pa. Commw. 1974). There, the Chairman of the Democratic Committee of Philadelphia County filed a petition to quash a subpoena issued by a Select Committee of the House of Representatives. Although recognizing the "real issues" raised by *Camiel*, the court expressed "grave reservations concerning the jurisdiction of this Court to entertain a petition to quash a subpoena . . . ***before a citizen's constitutional rights are actually affected***." *Id.* at 865 (emphasis added).

The Court noted that "there has been no confrontation" because the Committee had not yet chosen to enforce the subpoena. The Court further noted that the subpoena could be withdrawn before any legislative hearing, and *Camiel* could raise his constitutional questions at that hearing. *Id.* at 866. The Court therefore concluded that the matter was not yet ripe for determination by the Court. The Court further explained:

> Courts should not interfere with the investigatory powers of the Legislature necessary to carry out its legislative function ***until some citizen's constitutional rights are affected and asserted as a reason for noncompliance or refusal to honor a legislative subpoena***.
>
> As we held in Annenberg v. Roberts, 333 Pa. 203, 2 A.2d 612 (1938), ***a court sitting in equity may restrain public officers to protect a citizen's constitutional rights after service of a subpoena and before a confrontation***; but the action before us is not in equity.

Id. (emphasis added). *See also, id.* at 870 ("a constitutional issue may be raised by a citizen at that point in the proceedings when his or her constitutional rights are affected").

Camiel's holding that, absent impact on citizens' constitutional rights, a subpoena recipient must allow the legislature's non-judicial enforcement procedures to begin, is inconsistent with the Supreme Court precedent cited above. The Supreme Court's opinions consistently hold that parties need *not* await such legislative proceedings, and they only depart from that standard when judicial review nevertheless is still provided.

In any event, even in *Camiel*, the Court excluded cases where citizens' constitutional rights are at stake, which is clearly the case here, as more fully described below. When constitutional rights are at stake and where a subpoena recipient will face punishment prior to judicial review, the Pennsylvania Supreme Court consistently finds equitable jurisdiction.

C. The Intervenors are Not the Subpoena Recipients and Have No Other Recourse.

Intervenors' Petition, in particular, is ripe for review because, absent this Court's review, Intervenors' personally-identifying information could be disclosed without notice and without an opportunity to be heard, contrary to their constitutional right to privacy and established case law.

There is no question that Intervenors' personally-identifying information is at stake. The disclosure of Intervenors' private, personally-identifying information is a violation of their constitutional rights, as set forth in Intervenors' prior briefing, and the disclosure itself is a de facto injury. *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 731-32 (Pa. 2020) (the "right to informational privacy" is protected "in addition" to any "safety concerns" arising from disclosure). *See also In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 629 (3d Cir. 2017) ("Even without evidence that the Plaintiffs' information was in fact used improperly, the alleged disclosure of their personal information created a *de facto* injury. Accordingly, all of the Plaintiffs suffered a cognizable injury.").

When their rights may be violated, Intervenors ***must*** be provided notice and an opportunity to be heard. *City of Harrisburg v. Prince*, 219 A.3d 602, 618 (Pa. 2019). *See also Easton Area Sch. Dist.*, 232 A.3d at 733 (Pa. 2020). And the

Pennsylvania Supreme Court repeatedly has held that our Constitution ***requires*** courts to permit individuals to assert their constitutionally-protected privacy rights, and then balance those rights against the government's demonstrated interests in the information, ***before*** the disclosure of such information. *See, e.g.*, *Easton Area Sch. Dist.*, 232 A.3d at 733 ("Before the government may release personal information, it must conduct a balancing test to determine whether the right of informational privacy outweighs the public's interest in dissemination"); *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1145–46 (Pa. 2017) ("Before disclosing any section 614 information, however, the State Treasurer must perform the balancing test set forth in [*PSEA*]"). *See also Camiel v. Select Committee on State Contract Practices of the House of Representatives*, 324 A.2d 862, 866 (Pa. Commw. 1974) (*citing Annenberg* and holding "a court sitting in equity may restrain public officers to protect a citizen's constitutional rights after service of a subpoena and ***before a confrontation***" (emphasis added)).

Here, there is no legislative mechanism for enforcement of the subpoena against Intervenors or for Intervenors' arguments to be heard. Even if the recipient of a subpoena should simply await enforcement proceedings and respond if and when they are instituted (which is wrong as explained above), that path is not available to interested parties who are not themselves the recipient of the subpoena. No legislative or statutory mechanism exists for Intervenors' participation in any

"confrontation" held before the Committee, and there is no avenue for judicial review of Intervenors' arguments in such a proceeding. As such, Intervenors have no available, alternative remedy.

Nor do Intervenors have any other mechanism to preclude the Acting Secretary from voluntarily producing Intervenors' personally-identifying information, or agreeing to some production that infringes upon Intervenors' constitutional rights. Intervenors requested relief against not only the Respondents but also against the Acting Secretary, to prohibit her from disclosing Intervenors' personally-identifying information. *See* Petition for Review (wherefore clause).

The Subpoena has been issued and served. If Intervenors do not have the right to present their argument now, then, whether as a result of proceedings within the legislature, by voluntary production by the Acting Secretary, or by agreement between the Acting Secretary and the Respondents, Intervenors' rights could be eviscerated without any notice or opportunity to be heard. Indeed, Intervenors may not even know about such a disclosure until after it happens and after their information is placed at further risk of identity theft or financial fraud.

Intervenors have no other recourse. Their constitutional claims became ripe once the Committee served the Subpoena demanding their personally-identifying information. Dismissing this matter on jurisdictional grounds denies Intervenors

any right to challenge this constitutional deprivation, and therefore effectively strips them of their constitutional rights.[2]

For the above reasons, this Court has jurisdiction over these consolidated proceedings and should adjudicate the Petitions.

[2] The Court's January 25, 2022 order also cites to Pa.R.C.P. 234.4 and *Lunderstadt v. PA House of Rep. Select Committee*, 519 A.2d 408, 410 (Pa. 1986), and asks whether "an adequate remedy at law precludes the Court's exercise of equity jurisdiction." Intervenors have no adequate remedy at law, as explained above. A motion to quash seeks equitable relief, not damages, and in any event, Intervenors' Petition seeks to quash the subpoena (see Petition for Review, wherefore clause). Moreover, *Annenberg*, *Brown* and *Carcaci* all make clear that equitable relief is available under these circumstances.

Dated: February 15, 2022

Respectfully submitted,

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CONFIDENTIAL DOCUMENTS CERTIFICATION

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

/s/ Keith E. Whitson
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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief in Support of Application to Intervene was filed with the Commonwealth Court of Pennsylvania's PACFile System and is an accurate and complete representation of the paper version of the Brief filed by Intervenor-Petitioners. I further certify that the foregoing Brief complies with the length requirements set forth in Rule 2135(a) of the Pennsylvania Rules of Appellate Procedure as the Brief contains 2,828 words, not including the supplementary matter identified in Rule 2135(b), based on the word count of Microsoft Word 2010, the word processing system used to prepare the brief. It has been prepared in 14-point font.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via PACFile, this 15th day of February, 2022, upon the following:

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