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.	:	No. 310 M.D. 2021
Senator Kim Ward and Senator Jarrett Coleman, Respondents	:	
Commonwealth of Pennsylvania, Pennsylvania Department of State, and Leigh M. Chapman, Acting Secretary of the Commonwealth of Pennsylvania, Petitioners	:	
v.	:	No. 322 M.D. 2021
Senator Jarrett Coleman, Senator Kim Ward and The Pennsylvania State Senate Intergovernmental Operations Committee, Respondents	:	
Arthur Haywood Julie Haywood, Petitioners	:	
v.	:	No. 323 M.D. 2021 Argued: September 12, 2022
Leigh M. Chapman Acting Secretary of State Commonwealth of Pennsylvania, Respondent	:	

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE MARY HANNAH LEAVITT, Senior Judge

DISSENTING OPINION
BY JUDGE WOJCIK FILED: February 9, 2023

I dissent.

As noted by the Majority, subsequent to our denial of the parties' applications for summary relief in the above-captioned cases, we directed them to address three questions for disposition herein: (1) whether the petitions for review (PFRs) are ripe for review; (2) whether the availability of an adequate remedy at law precludes this Court's exercise of equity jurisdiction[1] over a challenge to the

[1] In the PFRs filed in these matters, the parties invoke our authority under the Declaratory Judgments Act (DJA), 42 Pa. C.S. §§7531-7541. As this Court has explained:

> Petitions for declaratory judgments are governed by the provisions of the [DJA]. Although the [DJA] is to be liberally construed, one limitation on a court's ability to issue a declaratory judgment is that the issues involved must be ripe for judicial determination, meaning that there must be the presence of an actual case or controversy. Thus, the [DJA] requires a petition praying for declaratory relief to state an actual controversy between the petitioner and the named respondent.
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> Declaratory judgments are not obtainable as a matter of right. Rather, whether a court should exercise jurisdiction over a declaratory judgment proceeding is a matter of sound judicial discretion. Thus, the granting of a petition for a declaratory judgment is a matter lying within the sound discretion of a court of original jurisdiction. As the Pennsylvania Supreme Court has stated:
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> > The presence of antagonistic claims indicating imminent and inevitable litigation coupled with a

(Footnote continued on next page…)

legislative subpoena; and (3) whether the General Assembly's enforcement power or the criminal contempt statute preclude this Court's exercise of equity jurisdiction. *See* Court Order, 1/25/2022. I firmly believe that the Majority has incorrectly answered each of the foregoing questions, and the Majority's attempt to distinguish precedent establishing a contrary conclusion is unavailing.

> clear manifestation that the declaration sought will be of practical help in ending the controversy are essential to the granting of relief by way of declaratory judgment. . . .
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> Only where there is a real controversy may a party obtain a declaratory judgment.
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> A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.

Brouillette v. Wolf, 213 A.3d 341, 357-58 (Pa. Cmwlth. 2019) (citations omitted). In addition, "an action seeking declaratory judgment is not an optional substitute for established or available remedies and should not be granted where a more appropriate remedy is available." *Pittsburgh Palisades Park, LLC v. Pennsylvania State Horse Racing Commission*, 844 A.2d 62, 67 (Pa. Cmwlth. 2004) (citation omitted). Nevertheless, as outlined below, this Court's consideration of the merits of the instant PFRs in our original jurisdiction is the most appropriate remedy for consideration of the claims raised herein. *See, e.g.*, *Commonwealth ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 5 n.4 (Pa. 1974) ("Had [the state trooper] 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 equity. *See McGinley v. Scott*, [164 A.2d 424 (Pa. 1960)]; *Annenberg v. Roberts*, [2 A.2d 612 (Pa. 1938)]."); *see also Camiel v. Select Committee on State Contract Practices of House of Representatives*, 324 A.2d 862, 866 (Pa. Cmwlth. 1974) ("As was held in [*Annenberg*], 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.").

Although not cited by the Majority, the United States Supreme Court has squarely addressed the role of the judiciary where, as here, there is a challenge to an interbranch legislative subpoena that is directed to another separate and coequal branch of government. In *McLaughlin v. Montana State Legislature*, 493 P.3d 980, 985-86 (Mont. 2021), the Montana Supreme Court[2] recently summarized the relevant United States Supreme Court precedent as follows:

> The legislative branch is not a law enforcement agency; its inquiry "must be related to, and in furtherance of, a legitimate task of the [Legislature]." *Watkins* [*v. United States*, 354 U.S. 178, 187 (1957)]. To serve a "valid legislative purpose," the subpoena "must 'concern[] a subject on which legislation "could be had."' [*Trump v.*] *Mazars* [*USA, LLP*, 140 S. Ct. 2019, 2031 (2020)] (quoting *Eastland v.* [*United States*] *Servicemen's Fund*, 421 U.S. 491, 506 [(1975)]). "The investigatory power of a legislative body is limited to obtaining information on matters that fall within its proper field of legislative action." [P. Mason, Manual of Legislative Procedure], §797.7 at 567 [(2020)]. "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins*,

[2] In *McLaughlin*, the Court Administrator for the Montana Judicial Branch initiated an original proceeding in the Montana Supreme Court seeking to quash and permanently enjoin a series of interbranch legislative subpoenas issued by the Montana Legislature to obtain a number of items including the Court Administrator's and another judicial branch employee's emails, and a poll of the members of a judicial organization that the Court Administrator had facilitated relating to a bill that was then pending before the Legislature. *See McLaughlin*, 493 P.3d at 983-84. Relevant to our discussion herein is the court's summary of United States Supreme Court precedent controlling a court's consideration in an original action seeking to quash an interbranch legislative subpoena, as outlined above. *See, e.g.*, *Commonwealth v. Stilp*, 905 A.2d 918, 940-44 (Pa. 2006) (citing relevant United States Supreme Court and Illinois Supreme Court precedent while considering the separation of powers doctrine with respect to the constitutional protection against diminishing judicial compensation); *see also Delaware Valley Landscape Stone, Inc. v. RRQ, LLC*, 284 A.3d 459, 463 n.5 (Pa. Super. 2022) ("This Court may rely on the decisions of other states for persuasive authority. *See Hill v. Slippery Rock Univ*[*ersity*], 138 A.3d 673, 679 n.3 (Pa. Super. 2016) (noting that 'the decisions of other states are not binding authority for this Court, although they may be persuasive' (citation omitted))").

354 U.S. at 178[.] And "'there is no congressional power to expose for the sake of exposure.'" *Mazars*, 140 S. Ct. at 2032 (quoting *Watkins*, 354 U.S. at 200[]).

In *Mazars*, the Court examined Congressional subpoenas seeking the President's information under the lens of separation of powers, announcing a non-exhaustive series of safeguards—in contrast to the generally applicable presumption stated in *McGrain* [*v. Daugherty*, 273 U.S. 135 (1927)]—when the legislative subpoena authority is directed at another branch of government. "First, courts should carefully assess whether the asserted legislative purpose warrants the significant step" of issuing the subpoena, because "occasion[s] for constitutional confrontation between the two branches should be avoided whenever possible." *Mazars*, 140 S. Ct. at 2035 (citation, internal quotations omitted). In this regard, the legislative body may not compel information from a coequal branch of government "if other sources could reasonably provide" the information necessary for "its particular legislative objective." *Mazars*, 140 S. Ct. at 2035-36.

Second, "to narrow the scope of possible conflict between the branches," the subpoena must be "no broader than reasonably necessary to support [the] legislative objective." *Mazars*, 140 S. Ct. at 2036.

Third, courts must examine the asserted legislative purpose and the "nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose." *Mazars*, 140 S. Ct. at 2036. The legislative body must "adequately identif[y] its aims and explai[n] why the [requested] information will advance its consideration of the possible legislation." *Mazars*, 140 S. Ct. at 2036. "[D]etailed and substantial . . . evidence of . . . legislative purpose" is "particularly" important when the legislative body "contemplates legislation that raises sensitive constitutional issues, such as legislation concerning the Presidency" or—in this case—the Judiciary. *Mazars*, 140 S. Ct. at 2036.

> Finally, in the context of considering the burden an interbranch subpoena imposes, courts must "carefully scrutinize[]" such subpoenas, "for they stem from a rival political branch" with "incentives to use subpoenas for institutional advantage." *Mazars*, 140 S. Ct. at 2036.[3]

The Majority's attempt to limit the application of a *Mazars* analysis to a legislative subpoena directed to obtain the personal papers of an executive branch official is simply incorrect. As indicated, in *McLaughlin*, the legislative subpoena was directed to judicial branch officials to obtain records maintained by that separate and coequal branch in the furtherance of its governmental function. Likewise, the records sought herein relate to the private information of the more than 9,000,000 registered electors of this Commonwealth that are maintained by the Acting Secretary of State as part of her governmental function.

The Majority's reliance on *Camiel v. Select Committee on State Contract Practices of House of Representatives*, 324 A.2d 862 (Pa. Cmwlth. 1974), is simply misplaced because that case did not involve an interbranch legislative

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[3] In *McLaughlin*, after conducting the foregoing analysis, the court ultimately held:

> Acknowledging the Legislature's authority to obtain information in the exercise of its legislative functions under the Montana Constitution, we conclude that the subpoenas in question are impermissibly overbroad and exceed the scope of legislative authority because they seek information not related to a valid legislative purpose, information that is confidential by law, and information in which third parties have a constitutionally protected individual privacy interest. We hold further that, if the Legislature subpoenas records from a state officer like the Court Administrator auxiliary to its legislative function, whether those records be in electronic or other form, a Montana court—not the Legislature—must conduct any needed *in camera* review and balance competing privacy and security interests to determine whether records should be redacted prior to disclosure.

McLaughlin, 493 P.3d at 983.

subpoena such as the one at issue in the above-captioned matters.[4] Moreover, *Camiel* does not support judicial abdication as the Majority suggests because, unlike this case, *Camiel* was not an action seeking equitable relief. *See Camiel*, 324 A.2d at 866 ("As was held in *Annenberg v. Roberts*, [2 A.2d 612 (Pa. 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."). Thus, regardless of the standard to be applied herein, *i.e.*, either a *Mazars* analysis or the "materiality" analysis set forth in *Lunderstadt v. Pennsylvania House of Representatives Select Committee*, 519 A.2d 408 (Pa. 1986),[5] judicial intervention is appropriate at this point and we need not wait until a further "confrontation" occurs.

Furthermore, where, as here, an interbranch legislative subpoena seeks the Acting Secretary of State's records containing constitutionally protected private and confidential information, the legislative necessity for the records' release must be weighed against the constitutional right to informational privacy. Indeed, as the Pennsylvania Supreme Court has observed:

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[4] Equally troubling is the Majority's citation to the single-judge order in *Applewhite v. Commonwealth* (Pa. Cmwlth., No. 330 M.D. 2012, order filed April 29, 2013), to support the disclosure of this constitutionally protected private and confidential information that predates the Pennsylvania Supreme Court's opinion in *Pennsylvania State Education Association v. Department of Community and Economic Development*, 148 A.3d 142 (Pa. 2016).

[5] *See Lunderstadt*, 519 A.2d at 414 ("[W]e believe that the views of Mr. Justice Holmes [in *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 305-07 (1924),] are persuasive insofar as they reflect a need to protect individuals from 'fishing expeditions,' and, likewise, to the extent that a requirement as to the 'materiality' of subpoenaed records should be imposed. Such protections for privacy interests can, however, be afforded under the Pennsylvania Constitution."); *see also Annenberg*, 2 A.2d at 617-18 ("[I]t is uniformly held that a legislative body is not invested with any general power to inquire into private affairs and to compel disclosures but only with such limited right of inquiry as is pertinent to the obtaining of information upon which proposed legislation is to be based.").

> In [*Pennsylvania State Education Association v. Department of Community and Economic Development*, 148 A.3d 142 (Pa. 2016) (*PSEA*)], this Court examined Pennsylvania's constitutional protections for informational privacy and the scope of the "personal security" exception in [S]ection [] 708 of the [Right-to-Know Law (RTKL).[6]] Reviewing numerous prior decisions of both this Court and our intermediate appellate courts, we reaffirmed that the citizens of this Commonwealth, pursuant to [a]rticle I, [s]ection 1 of the Pennsylvania Constitution,[7] have a right to informational privacy, namely the right of an individual to control access to, and dissemination of, personal information about himself or herself. *PSEA*, 148 A.3d at 150. Accordingly, we ruled that ***before the government may release personal information, it must first conduct a balancing test to determine whether the right of informational privacy outweighs the public's interest in dissemination***. *Id.* at 144. In so ruling, we were clear that while this balancing test has typically been located in the "personal security" exemption of the [predecessor to the RTKL, (and later in the RTKL)], it is not a statutory, but rather a constitutional requirement, and ***it is required even in the absence of any statutory requirement***. *Id.* at 156. As such, ***the PSEA balancing test is applicable to all government disclosures of personal information, including those not mandated by the RTKL or another statute***.

Reese v. Pennsylvanians for Union Reform, 173 A.3d 1143, 1159 (Pa. 2017) (emphasis added). Thus, any purported ***statutory*** requirement that the Acting

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[6] Act of February 14, 2008, P.L. 6, 65 P.S. §67.708.

[7] Pa. Const. art. I, §1. Article I, section 1 states:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Secretary must release all of the requested records pursuant to Section 1 of the Act of March 12, 1791,[8] or Section 802(a) of The Administrative Code of 1929[9] must be balanced against the ***constitutional*** privacy rights that the over 9,000,000 electors have in their personal information contained in the Acting Secretary's records. *Id.*[10]

In light of the foregoing, and contrary to the Majority's conclusions, I am convinced that (1) the PFRs are ripe for review because the interbranch conflict between the executive and legislative branches of our Commonwealth government precipitated by the Senate Committee's subpoena remains extant; (2) the availability of an adequate remedy at law via participation or intervention in an enforcement proceeding does not preclude this Court's exercise of equity jurisdiction over a challenge to the legislative subpoena; and (3) the General Assembly's enforcement

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[8] Act of March 12, 1791, 3 Sm.L. 8, 71 P.S. §801. Section 1 states, in relevant part, that "[t]he books, papers and accounts of the [S]ecretary [of the Commonwealth] shall be open to the inspection and examination of committees of each branch of the legislature, and [the S]ecretary shall furnish such copies, or abstracts, therefrom, as may from time to time be required."

[9] Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §272(a). Section 802(a) states, in pertinent part, that "[t]he Department of State shall . . . permit any committee of either branch of the General Assembly to inspect and examine the books, papers, records, and accounts, filed in the [Department of State], and to furnish such copies or abstracts therefrom, as may from time to time be required[.]"

[10] Both the Pennsylvania Supreme Court and the Pennsylvania General Assembly have recognized that some of the information requested by the interbranch legislative subpoena constitutes the protected, private, personal information of the Commonwealth's registered electors. *See, e.g.*, Pa. R.J.A. 509(b)(2) ("All financial records are accessible to the public except . . . any part of a record setting forth a person's social security number, home address, home telephone number, date of birth, operator's license number, e-mail address, or other personal information[.]"); Section 708(b)(6)(i)(A) of the RTKL, 65 P.S. §67.708(b)(6)(i)(A) ("Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act: . . . The following personal identification information: . . . A record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.").

power or the criminal contempt statute does not preclude this Court's exercise of equity jurisdiction. In sum, contrary to the Majority, I would not abdicate this Court's constitutional and statutory responsibility[11] to review the merits of the constitutional and statutory claims raised in the instant PFRs as a separate independent and coequal branch of this Commonwealth's government.

Finally, and quite importantly, I firmly believe that the instant matter should be considered, and disposed of, by an en banc panel of the commissioned judges of this Court. As it has been explained:

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[11] Indeed, as the *McLaughlin* Court explained:

> The Supreme Court's decisions on Congressional subpoenas make clear that the courts have a role regardless of the office or the government stature of the subject to whom the subpoena pertains. [*See, e.*]*g.*, *Mazars*, 140 S. Ct. at 2035 ("[S]eparation of powers concerns are no less palpable here simply because the subpoenas were issued to third parties. Congressional demands for the President's information present an interbranch conflict no matter where the information is held."). The *Mazars* Court harkened the two-century tradition of the political branches "resolv[ing] information disputes using the wide variety of means that the Constitution puts at their disposal." *Mazars*, 140 S. Ct. at 2035. But it did so in preface to its prescription of the "balanced approach" the courts must take when the branches reach impasse, accounting for "both the significant legislative interests of Congress and the 'unique position' of [in that case] the President." *Mazars*, 140 S. Ct. at 2035. ***The "practice of the government" to avoid such interbranch confrontation informs the courts' consideration of the controversy but does not abrogate their obligation to decide it***. Although the *Mazars* Court examined Congressional subpoenas to the Executive, its articulated "balanced approach" extends logically to subpoenas to the judicial branch, which raise similar "interbranch confrontation" concerns.

McLaughlin, 493 P.3d at 987-88 (emphasis added).

> Cases assigned to an en banc court for argument and decision will generally involve:
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> 1. Substantial questions of federal or state constitutional law;
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> 2. Substantial questions of state-wide importance;
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> 3. Substantial questions of first impression involving statutory or regulatory interpretation; and
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> 4. The possibility of overruling Commonwealth Court precedent.

G. Darlington, K. McKeon, D. Schuckers, K. Brown, & P. Cawley, Pennsylvania Appellate Practice §3103:6 (West 2022-2023 ed.) (footnotes omitted); *see also* Pa. R.A.P. 2543 ("Reargument before an appellate court is not a matter of right, but of sound judicial discretion, and reargument will be allowed only when there are compelling reasons therefor."); *Gajkowski v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 548 A.2d 533, 535 (Pa. 1988) ("*In Dozer Agency, Inc. v. Rosenberg*, [246 A.2d 330, 331 (Pa. 1968)], the Court filed an opinion on March 22, 1966, and remanded for a re-evaluation of damages. A petition for reargument was timely filed and denied. 'Sometime thereafter, this Court, *sua sponte* determined that reargument should be held limited to the question of the adequacy of the damages awarded by the court below and such reargument was held.'"); *Charles v. Giant Eagle Markets*, 510 A.2d 350 (Pa. 1986) ("[T]he Court, *sua sponte*, orders that the above matter be reargued during the September 1986 Session in Pittsburgh."); *Farnell v. Winterloch Corporation*, 527 A.2d 204, 205 (Pa. Cmwlth. 1987) ("Argument on this case was held before a panel . . . in December of 1985. We *sua sponte* ordered reargument before the court en banc which was held in December of 1986. The matter is now ready for our disposition."); *Alliston v. City of Allentown*, 455 A.2d 239, 240 n.2 (Pa. Cmwlth.

1983) ("This case was originally argued before a panel but was set down for reargument before the court en banc in September 1982 because of the important issue presented in this appeal."); *Bern Township Authority v. Hartman*, 451 A.2d 567, 568 (Pa. Cmwlth. 1982) ("This case has been reargued before the court en banc because it poses these two important questions . . . ."). Because the disposition of these cases involves substantial fundamental constitutional and statutory questions, they should be resolved by an en banc panel of the commissioned judges of this Court.

Accordingly, as outlined above, the above-captioned matters should be reargued before, and disposed of by, an en banc panel of the commissioned judges of this Court. In the alternative, on the merits, unlike the Majority, I would not deny and dismiss the PFRs filed in these cases.

MICHAEL H. WOJCIK, Judge