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August 2, 2021

Kory Langhofer
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Re: Objections to Arizona Senate Subpoena to Dominion Voting Systems, Inc.

Dear Mr. Langhofer:

On behalf of Dominion Voting Systems Inc. (“Dominion”), we are responding to the legislative subpoena (the “Subpoena”) issued by the Arizona Senate to Dominion on July 26, 2020.¹ From the day it issued, the Subpoena was legally defective because it violated—and continues—to violate the U.S. Constitution, Arizona Constitution, and the Arizona statutes concerning legislative subpoenas, A.R.S. §§ 41-1151 through 41-1155 (collectively, the “Legislative Subpoena Statutes”).

Subsequent events have confirmed that the Subpoena is invalid and unenforceable. We have learned that on July 29, 2021, the Arizona Senate returned the Dominion precinct tabulator machines that were previously in its possession to Maricopa County. This action clearly extinguished the Arizona Senate’s claimed interest in obtaining Dominion security keys and passwords (which was non-existent to begin with) and rendered the Subpoena moot. According to the Subpoena, the entire purpose of demanding the security keys and passwords was to allow “administrator access” on these machines.

Given all this, and for the reasons discussed below, Dominion will not provide the requested property or appear at the Arizona State Capitol on August 2, 2021.

¹ The Subpoena also purports to name U.S. Dominion Inc. and Dominion Voting Systems Corporation. To our knowledge, however, neither of these entities have been served with the Subpoena. These entities are also not required to maintain, and do not have, any statutory agent in Arizona.

A. **The Subpoena is unconstitutional.**

The constitutional defects with the Subpoena are numerous, but, at a minimum,² include the following:

1. The Subpoena violates Dominion's procedural due process rights under the U.S. and Arizona Constitutions.

The Fourteenth Amendment to the U.S. Constitution and article 2, section 4 of the Arizona Constitution both prevent the State from depriving life, liberty or property without due process of law. Here, the Subpoena seeks to deprive Dominion of its protected property interest in its security keys and accompanying, confidential passwords (and apparently transfer such property to an unaccredited vendor, Cyber Ninjas). However, the Subpoena sets forth no procedures whatsoever for Dominion to raise or to be heard regarding its objections to the Subpoena. The Subpoena does not indicate, for instance, that an actual hearing will be held on August 2, 2021. Likewise, the Legislative Subpoena Statutes do not provide any process to Dominion to raise or to be heard regarding its various Subpoena objections.³

2. The Subpoena violates Dominion's Fourth Amendment rights against unreasonable searches and seizures.

The Subpoena violates the Fourth Amendment in at least three respects. First, neither the Subpoena itself, nor the Legislative Subpoena Statutes, describe any process under which Dominion can obtain judicial review concerning the reasonableness of the Subpoena (or lack thereof) before the imposition of penalties for non-compliance.⁴ Second, because Dominion has a reasonable expectation of privacy in its security keys and accompanying, confidential passwords, a subpoena could only issue upon a showing of probable cause that the keys and passwords will somehow lead to evidence of election fraud or some other election irregularities.⁵ Such a showing

² Dominion reserves the right to raise additional defects with the Subpoena in any future judicial, legislative, or other proceeding.

³ Cf. *Dornan v. Sanchez*, 978 F. Supp. 1315, 1323 (C.D. Cal. 1997) ("*Dornan II*") (holding that subpoenas provided sufficient due process when authorizing statutes in the Federal Contested Elections Act expressly gave parties and witnesses the opportunity to "move to quash or modify the subpoena" (citing 2 U.S.C. § 388(e))).

⁴ See, e.g., *See v. City of Seattle*, 387 U.S. 541, 544-45 (1967) (holding that Fourth Amendment requires that a "subpoenaed party" have the ability to "obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply").

⁵ See, e.g., *United States v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013) (noting that "confidential business documents . . . are expected to be kept private and this expectation is one that society is prepared to recognize as reasonable"); *Lunderstadt v. Pennsylvania House of Representatives Select Committee*, 519 A.2d 408, 415 (Pa. 1986) ("[W]hen the legislature undertakes to investigate a matter, and in the course thereof it seeks to obtain records in which one has a reasonable

has never been attempted here and, in any event, cannot be made. Third, the Subpoena's demands are unreasonable in that they lack any relevant purpose.⁶ Because the Arizona State has returned the precinct tabulators, it has no legitimate reason to access such machines through security keys and confidential passwords.

3. The Subpoena violates Dominion's rights under the Private Affairs Clause of the Arizona Constitution.

Under article 2, section 8 of the Arizona Constitution (the "Private Affairs Clause"), "[n]o person shall be disturbed in his private affairs, or have his home invaded, without authority of law." Here, Dominion's "private affairs" plainly include the security measures for its voting machines, including its security keys and confidential passwords.⁷ Dominion closely guards such property, sharing it only with authorized recipients, such as federally-accredited Voting System Test Laboratories ("VSTLs"), which are qualified, independent labs specifically approved by the U.S. Election Assistance Commission ("EAC") to test and review voting systems.⁸ Dominion would never voluntarily share its security keys or confidential passwords with an inexperienced, unaccredited, and plainly biased company like Cyber Ninjas.⁹ This is particularly concerning considering election infrastructure has been designated as critical infrastructure by the U.S. Department of Homeland Security ("I have determined that election infrastructure in this country should be designated as a subsector of the existing Government Facilities critical infrastructure sector. Given the vital role elections play in this country, it is clear that certain systems and assets of election infrastructure meet the definition of critical infrastructure, in fact and in law." – *then DHS Secretary Jeh Johnson*).¹⁰

In addition, there is no "authority of law" to support the Subpoena's attempted invasion of Dominion's private affairs. The Legislative Subpoena Statutes, by themselves, are insufficient to

expectation of privacy, a subpoena therefor should not issue except upon a showing of probable cause that the particular records sought contain evidence of civil or criminal wrongdoing.").

⁶ See, e.g., *See*, 387 U.S. at 544 (in order to comply with Fourth Amendment, a subpoena must be "relevant in purpose").

⁷ See *State v. Mixton*, 250 Ariz. 282, 478 P.3d 1227, 1237 ¶ 40-41 (2021), *petition for certiorari filed* 20-8321 (June 15, 2021) (discussing meaning of "Private Affairs," which involve matters in which a person (or corporation) has a reasonable expectation of privacy.)

⁸ As you are likely aware, Maricopa County has already conducted two forensic audits involving federally-accredited VSTLs.

⁹ Dominion has previously detailed how Cyber Ninja's owner, Doug Logan, has repeatedly promoted baseless conspiracy theories. See <https://www.dominionvoting.com/latest-news-dominion-statement-audit-maricopa-countys-2020-election-results/>. Dominion anticipates that discovery would further reveal Cyber Ninja's incompetence and bias, should litigation ever become necessary.

¹⁰ <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical>.

meet this constitutional requirement.¹¹ The Private Affairs Clause instead requires a determination from a neutral decisionmaker that the Subpoena's demands are warranted (which they clearly are not), and there has been no such determination here.¹²

4. The Subpoena is untethered to any valid legislative purpose.

The Arizona Legislature's constitutional authority to legislate (under article 4, section 1 of the Arizona Constitution) certainly includes some authority to investigate. However, there must be a valid legislative purpose for the investigation, and the specific information demands in a legislative subpoena must be pertinent to that purpose.¹³ The subpoena power should never be used as a tool of harassment.

The Subpoena here fails these standards. The Arizona Senate's general interest in election administration and integrity cannot justify transferring Dominion's security keys and passwords to Cyber Ninjas—which, again, is inexperienced, unaccredited, and plainly biased.¹⁴ Dominion agrees with Maricopa County that the County “has already provided everything competent auditors would need to confirm the accuracy and security of the 2020 election.”¹⁵ In any event, the Arizona Senate's decision to return the precinct tabulators to Maricopa County clearly extinguished any claimed interest in accessing those machines through security keys or passwords.

B. The Subpoena Fails to Comply with Arizona's Legislative Subpoena Statutes.

The Subpoena is also facially defective because it conflicts with different Legislative Subpoena Statutes in A.R.S., Title 41.

1. The Subpoena is not “addressed to [a] witness,” as required by A.R.S. § 41-1151.

¹¹ See, e.g., *State v. Miles*, 156 P.3d 864, 869-70 ¶¶ 19-21 (Wash. 2007); see also *Mixton*, 478 P.3d at 1235 ¶ 29 (noting that the Private Affairs Clause “was adopted verbatim from the Washington State Constitution.”) (citing Wash. Const. art. 1, § 7).

¹² See *Mixton*, 478 P.3d at 1235 ¶ 29.

¹³ See, e.g., *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031-32 (2020); *Connecticut Indem. Co. v. Superior Court*, 23 Cal. 4th 807, 813 (2000).

¹⁴ The fact that the Arizona Legislature has adjourned *sine die*, and will not return to session until January 2022, further confirms that the specific demands in the Subpoena are not pertinent to any valid legislative purpose.

¹⁵ <https://www.azcentral.com/story/news/politics/arizona/2021/07/26/arizona-audit-republicans-subpoena-maricopa-county-election-information/5381877001/>.

The ability to give testimony is the defining feature of a “witness.”¹⁶ The Legislative Subpoena Statutes provide no procedure for a corporate entity to give testimony. Thus, to comply with A.R.S. § 41-1151, a natural person must be identified in the Subpoena. Because the Subpoena only names corporate entities, it is facially invalid.¹⁷

2. The Subpoena violates A.R.S. § 41-1154.

The Subpoena’s request for “security keys or tokens” is foreclosed by A.R.S. § 41-1154, which limits legislative subpoenas to either: (a) testimony on “material or proper question[s]”; or (b) “material and relevant books, papers or documents.” Put simply, Dominion’s security keys/tokens are not “books, papers, or documents.” Moreover, for the reasons discussed above, the Subpoena’s demands are not “material and relevant” to any valid legislative purpose, particularly given the Arizona Senate’s recent decision to return the precinct tabulators to Maricopa County.

Conclusion

Dominion has no intention to cooperate with a legislative subpoena that violates its constitutional rights and that exceeds the Legislature’s constitutional and statutory authority. Doing so would cause grave harm. As Dominion previously explained:

Releasing Dominion’s intellectual property to an unaccredited, biased, and plainly unreliable actor such as Cyber Ninjas would be reckless, causing irreparable damage to the commercial interests of the company and the election security interests of the country. No company should be compelled to participate in such an irresponsible act.

These concerns are far from theoretical: as a result of the Arizona Senate’s “audit,” Maricopa County has already been forced to decommission hundreds of Dominion machines that the Arizona Senate subpoenaed and, instead of following proper chain of custody protocols, turned over to uncertified contractors.¹⁸

¹⁶ “According to Black’s Law Dictionary, ‘witness’ is defined as ‘One who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit.’” *Ryan v. San Francisco Peaks Trucking Co., Inc.*, 228 Ariz. 42, 50 ¶ 29 (2011) (quoting Black’s Law Dictionary 1633 (8th ed.1999)).

¹⁷ As a constitutional and statutory matter, the Legislative Subpoena Statutes do not have extraterritorial application. The Arizona Legislature thus has no authority to issue subpoenas to persons outside Arizona, including Dominion employees or other agents.

¹⁸ <https://www.maricopa.gov/CivicAlerts.aspx?AID=2336>.

Because the Subpoena is illegal and unenforceable, Dominion hopes that litigation over the Subpoena will not be necessary. Should litigation result, however, Dominion intends to pursue all remedies available to it, including (but not necessarily limited to) recovery of its attorneys' fees, expenses, and damages under A.R.S. § 12-348, A.R.S. § 12-349, Rule 11 of the Arizona Rules of Civil Procedure, or other applicable law. In addition, Dominion will seek discovery of all materials related to Cyber Ninjas and other contractors' copying, review, transfer, storage and any other use of Dominion's physical and intellectual property.

Very truly yours,

Snell & Wilmer



Eric H. Spencer