

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPRESENTATIVE BRYAN CUTLER, :
LEADER OF THE REPUBLICAN :
CAUCUS OF THE PENNSYLVANIA :
HOUSE OF REPRESENTATIVES :

Petitioner, :

v. :

Docket No. 588 M.D. 2022

LEIGH M. CHAPMAN, ACTING :
SECRETARY OF THE :
COMMONWEALTH, THE :
PENNSYLVANIA DEPARTMENT OF :
STATE, and THE BOARD OF :
ELECTIONS OF ALLEGHENY :
COUNTY :

Respondents :

**PETITIONER’S ANSWER IN OPPOSITION TO
THE EMERGENCY APPLICATION FOR DISPOSITION**

Petitioner Bryan D. Cutler, the duly elected member of the Pennsylvania House of Representatives for the 100th Legislative District and as Leader of the Republican Caucus of the House of Representatives (“Representative Cutler”), by and through his counsel, McNeese Wallace & Nurick LLC, hereby files this Answer in Opposition to the “Emergency Application for Disposition on Motion Pursuant to Pa.R.A.P. 1972” (“Application for Disposition”) filed by the Intervenor-Respondent, Joanna E. McClinton, the duly elected member of the House of

Representatives for the 191st Legislative District and Leader of the Democratic Caucus of the House of Representatives (“Representative McClinton”).

In her Application for Disposition, Representative McClinton submits that because the current Speaker of the House of Representatives, Mark Rozzi, the duly elected member of the House of Representatives for the 126th Legislative District, “reaffirmed and ratified” the writs of election at issue in this action, Representative Cutler’s challenge of the validity of those writs is now moot. (App. for Disposition ¶¶ 8, 14). However, this argument lacks legal foundation as there is no constitutional or statutory basis for suggesting that the Speaker of the House of Representatives has the authority to reaffirm writs that were invalid when signed. The actions of Speaker Rozzi cannot *ex post facto* validate Representative McClinton’s issuance of writs without authority to do so. Moreover, the argument contradicts the Stipulated Facts which Representative McClinton joined in presenting to this Court less than a week ago, agreeing that such writs need to be issued within 10 days of a vacancy.

For these reasons, and the reasons that follow, Representative Cutler respectfully requests the Application for Disposition filed by Representative McClinton be denied.

PRELIMINARY STATEMENT

At the center of this action are two writs of election issued by Representative McClinton on December 7, 2022. The writs of election in question scheduled special elections for February 7, 2022, to fill the vacant seats in the House of Representatives for the 34th and 35th Legislative Districts.

The authority to issue writs of election is set forth in the Pennsylvania Constitution. Article II, Section 2 of the Constitution provides that when a vacancy occurs in either chamber of the General Assembly, “the presiding officer [of that chamber] shall issue a writ of election to fill such vacancy for the remainder of the term.” PA. CONST. art. II, § 2. Likewise, Section 628 of the Pennsylvania Election Code¹ provides, in relevant part, that

[w]henever a vacancy shall occur in either house of the General Assembly whether or not it then be in session, the presiding officer of such house shall, within ten (10) days after the happening of the vacancy, issue a writ of election to the proper county board or boards of election and to the Secretary of the Commonwealth, for a special election to fill said vacancy, which election shall be held at the next ensuing primary, municipal or general election scheduled at least sixty (60) days after the issuance of the writ or such other earlier date which is at least sixty (60) days following the issuance of the writ as the presiding officer may deem appropriate

25 P.S. § 2778. The presiding officer of the House of Representatives is, in effect, the Speaker of the House.

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

Section 21.13 of the Act of January 10, 1968, P.L. 925, provides that “[i]f any vacancy shall occur during the recess of the Legislature in the office of the Speaker of the House of Representatives, the duties of said office shall be performed by the majority leader of the House of Representatives.” 46 P.S. § 41.121m. The Pennsylvania Supreme Court has held that Section 21.13 of the foregoing Act authorizes the Majority Leader of the House of Representatives to issue writs of election between the adjournment of the House and the start of the next legislative session. *Perzel v. Cortes*, 870 A.2d 759, 764 (Pa. 2005).

Thus, writs of election may be issued by the Speaker of the House of Representatives or, during a vacancy in the Office of Speaker, by the Majority Leader of the House.

Representative McClinton was neither Speaker nor Majority Leader of the House of Representatives when she issued the writs of election in question. Therefore, Representative McClinton issued the writs of election without constitutional or statutory authority. As such, Representative Cutler initiated this action to challenge the validity of the writs of election issued by Representative McClinton on December 7, 2022.

Through the instant Application for Disposition, Representative McClinton argues this action should be dismissed as moot. Representative McClinton submits

that because the current Speaker of the House of Representatives “reaffirmed and ratified” the writs of election issued by Representative McClinton, Representative Cutler’s challenge to the validity of the writs in question is now moot. (App. for Disposition ¶¶ 8, 14). However, Representative McClinton’s argument lacks legal foundation.

Representative McClinton has not provided any constitutional or statutory authority supporting the proposition that invalid writs of election can somehow be cured through reaffirmation or ratification by a member of the General Assembly with authority to issue writs of election.

To the extent Representative McClinton is arguing that the writs of election issued by Speaker Rozzi are valid stand-alone writs, that argument is unavailing as the writs issued by Speaker Rozzi suffer numerous fatal defects. For instance, Representative Cutler has already set special elections to fill the seats in the House of Representatives for the 34th and 35th Legislative Districts through validly issued writs of election issued on December 15, 2022.² As such, the writs of election issued by Speaker Rozzi are invalid as they are duplicative. Moreover, the writs of election

² At the time Representative Cutler issued the writs of election, he was the Majority Leader of the House of Representatives. The writs were issued in full compliance with the requirements of Section 628 of the Election Code – within ten days of the happening of the vacancies and the special election date chosen was the next ensuing primary which is at least 60 days after the issuance of the writ. The writs of election issued by Representative Cutler were, and continue to be, the only writs issued in compliance with the Constitution and the Election Code.

were issued more than 10 days after the vacancies in the House of Representatives occurred. The parties to this action, as well as the Proposed Intervenor-Respondent, the Pennsylvania Democratic Party, have stipulated that “[t]he ten-day statutory deadline to issue writs of election for special elections in the 34th and 35th Legislative Districts is now expired.” (Stipulated Facts³ ¶ 23). Thus, the writs of election are violative of Section 638 of the Election Code and Representative McClinton’s argument here is inconsistent with the Factual Stipulations. Finally, the writs issued by Speaker Rozzi are further violative of Section 638 of the Election Code because they schedule special elections for a date sooner than 60 days following the issuance of the writs. Accordingly, for the reasons set forth above, the writs of election issued by Speaker Rozzi, like the writs issued by Representative McClinton, albeit for different reasons, are invalid as a matter of law.

Based upon the foregoing, it is clear that the issuance of writs of election by Speaker Rozzi does not somehow moot Representative Cutler’s challenge to the validity of the writs of election issued by Representative McClinton.

³ On December 30, 2022, Counsel for Representative Cutler, Respondent Leigh M. Chapman, Acting Secretary of the Commonwealth, Respondent the Pennsylvania Department of State, Representative McClinton, and Proposed Intervenor-Respondent the Pennsylvania Democratic Party, on behalf of their clients, executed and filed with this Court a joint stipulation of facts.

ANSWER

In further response, Representative Cutler Answers the Application for Disposition as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.
8. Admitted in part and denied in part. It is admitted that Speaker Rozzi issued writs of election following his election as Speaker of the House of Representatives regarding the vacant seats in the House for the 34th and 35th Legislative Districts. It is specifically denied that Speaker Rozzi's writs "reaffirmed and ratified" the writs of election issued by Representative McClinton on December 7, 2022. There is no constitutional or statutory authority supporting the proposition that invalid writs of election can somehow be cured through subsequent reaffirmation or ratification by a member of the General Assembly with authority to issue writs of election. To the extent Representative McClinton is averring that the

writs of election issued by Speaker Rozzi are valid stand-alone writs, that averment is denied as the writs issued by Speaker Rozzi suffer numerous legal defects.

9. Denied. The writ of election quoted in this paragraph is a writing which speaks for itself. Any averments inconsistent therewith are specifically denied.

10. Denied. The writ of election referenced in this paragraph is a writing which speaks for itself. Any averments inconsistent therewith are specifically denied.

11. Denied. The averments in this paragraph are conclusions of law to which no response is required.

12. Denied. The averments in this paragraph are conclusions of law to which no response is required.

13. Admitted in part and denied in part. It is admitted that Speaker Rozzi issued writs of election following his election as Speaker of the House of Representatives regarding the vacant seats in the House for the 34th and 35th Legislative Districts. The remaining averments in this paragraph are denied. It is specifically denied that Speaker Rozzi's writs "confirmed . . . ratified, authorized, endorsed, and approved" the writs of election issued by Representative McClinton on December 7, 2022. There is no constitutional or statutory authority supporting the proposition that invalid writs of election can somehow be cured through

subsequent confirmation, ratification, authorization, endorsement, or approval by a member of the General Assembly with authority to issue writs of election. To the extent Representative McClinton is averring that the writs of election issued by Speaker Rozzi are valid stand-alone writs, that averment is denied as the writs issued by Speaker Rozzi suffer numerous legal defects.

14. Denied. The averments in this paragraph are conclusions of law to which no response is required. By way of further response, the writs of election issued by Speaker Rozzi suffer from several legal defects that make them invalid as a matter of law.

15. Admitted upon information and belief.

16. Denied. The averments in this paragraph are conclusions of law to which no response is required.

17. Denied. The averments in this paragraph are conclusions of law to which no response is required.

18. Denied. The averments in this paragraph are conclusions of law to which no response is required.

19. Admitted in part and denied in part. It is admitted that Representative McClinton is seeking expedited disposition. Representative McClinton's legal

justifications for seeking expedited disposition are conclusions of law to which no response is required.

20. Admitted.

WHEREFORE, Representative Cutler respectfully requests this Court deny the Application for Disposition filed by Representative McClinton.

McNEES WALLACE & NURICK LLC

Date: January 6, 2023

By:  _____


Kandice Kerwin Hull
I.D. No. 86345
Drew Crompton
I.D. No. 69227
Ryan Gonder
I.D. No. 321027
Austin D. Hughey
I.D. 326309
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 237-8000
khull@mcneeslaw.com
dcrompton@mcneeslaw.com
rgonder@mcneeslaw.com
ahughey@mcneeslaw.com

Attorneys for Petitioner

VERIFICATION

I, Bryan D. Cutler, hereby certify that the facts in the foregoing are true and correct to the best of my knowledge and belief. I make this statement subject to the penalties of Section 4904 of the Crimes Code, 18 Pa.C.S. § 4904, relating to unworn falsification to authorities

Dated: January 6, 2023

By: 
Bryan D. Cutler

CERTIFICATE OF COMPLIANCE

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

McNEES WALLACE & NURICK LLC

Date: January 6, 2023

By: 
Kandice K. Hull

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons below via email and the Court's PACFile System, which satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121, Pa.R.A.P. 121:

Justin Weber, Esquire
Adam Martin, Esquire
Troutman Pepper Hamilton Sanders LLP
100 Market Street, Suite 200
P.O. Box 1181
Harrisburg, PA 17108

John Schweder, Esquire
Samuel Harrison, Esquire
Troutman Pepper Hamilton Sanders LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103

*Counsel for Leigh M. Chapman, Acting Secretary of the Commonwealth, and the
Pennsylvania Department of State*

George M. Janocsko, County Solicitor
Allan J. Opsitnick, Assistant County Solicitor
Lisa G. Michel, Assistant County Solicitor
Allegheny County Law Department
300 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
gjanocsko@alleghenycounty.us
aopsitnick@opsitnickslaw.com
lisa.michel@alleghenycounty.us

Counsel for the Board of Elections of Allegheny County

Kevin Greenberg, Esquire
Peter Elliot, Esquire
Greenberg Traurig, LLP
1717 Arch Street, Suite 400
Philadelphia, PA 19103

Clifford B. Levine, Esquire
Conor Daniels, Esquire
Dentons Cohen & Grigsby P.C.
625 Liberty Avenue, 5th Floor
Pittsburgh, PA 15222

Counsel for Proposed Intervenor-Respondent Pennsylvania Democratic Party

Daniel T. Brier, Esquire
Donna A. Walsh, Esquire
Richard L. Armezzani, Esquire
Myers, Brier & Kelly, LLP
425 Biden Street, Suite 200
Scranton, PA 18503

Michael A. Comber, Esquire
Reisinger Comber & Miller LLC
300 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219

Counsel for Proposed Intervenor-Respondent Joanna E. McClinton

McNEES WALLACE & NURICK LLC

Date: January 6, 2023

By: 

Kandice K. Hull