

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioner, :

v. :

Docket No. __ 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 :

**ORDER GRANTING PETITIONER’S
EMERGENCY APPLICATION FOR SPECIAL RELIEF
IN THE NATURE OF A PRELIMINARY INJUNCTION**

AND NOW, this __ day of _____, 2022, upon consideration of the
Emergency Application for Special Relief in the Nature of a Preliminary Injunction
filed by Representative Bryan Cutler, Leader of the Republican Caucus of the
Pennsylvania House of Representatives, the Application is hereby **GRANTED**.

It is hereby **ORDERED** that Respondents, Leigh M. Chapman, Acting
Secretary of the Commonwealth, the Pennsylvania Department of State, and the

Board of Elections of Allegheny County, and all persons working in concert with each of the above, are enjoined and barred from effectuating the writs of election issued on December 7, 2022 by Representative Joanna E. McClinton for the 32nd, 34th, and 35th Legislative Districts such that the Department of State and the Board of Elections may not proceed within holding the special elections.

BY THE COURT:

J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioner, :

v. :

Docket No. __ 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 EMERGENCY APPLICATION FOR SPECIAL RELIEF
IN THE NATURE OF A PRELIMINARY INJUNCTION**

Petitioner Bryan D. Cutler, in his capacity as 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 submit this Emergency Application for Special Relief in the Nature of a Preliminary Injunction pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), Pa.R.A.P. 1532(a), and requests this Court preliminarily enjoin Respondents, Leigh M.

Chapman, Acting Secretary of the Commonwealth (“Acting Secretary Chapman”), the Pennsylvania Department of State (“DOS”), and the Board of Elections of Allegheny County (“Board of Elections”) from effectuating the writs of election issued on December 7, 2022, by Joanna E. McClinton, the duly elected member of the House of Representatives for the 191st Legislative District and the Leader of the Democratic Caucus of the House of Representatives (“Representative McClinton”).

In support thereof, Representative Cutler states as follows:

PARTIES

1. Petitioner is Representative Cutler, in his capacity as the duly elected member of Pennsylvania House of Representatives for the 100th Legislative District and as Leader of the Republican Caucus of the House of Representatives.

2. Respondents are Leigh M. Chapman, Acting Secretary of the Commonwealth (“Acting Secretary Chapman”), the Pennsylvania Department of State (“DOS”), and the Board of Elections of Allegheny County (“Board of Elections”).

FACTUAL BACKGROUND and PROCEDURAL HISTORY

3. On December 9, 2022, Representative Cutler filed a Petition for Review in the Nature of a Complaint for Declaratory Judgment (“Petition for Review”) challenging the validity of the forementioned writs of election arising from three vacancies in the House of Representatives.

4. As prescribed in the Election Code,¹ Pennsylvania's 2022 General Election was held on November 8, 2022.

5. As with every general election, all 203 seats of the House of Representatives were up for election in the 2022 General Election.

6. The results of the 2022 General Election reflect that 102 of the Democratic Party's candidates won seats in the House of Representatives and that 101 of the Republican Party's candidates won seats in the House of Representatives.

7. On October 9, 2022, prior to the 2022 General Election, Anthony DeLuca, the duly elected member of the House of Representatives for the 32nd District and candidate for reelection ("former Representative DeLuca"), passed away.

8. Former Representative DeLuca's death occurred too close to the 2022 General Election to remove his name from the ballot.

9. As such, former Representative DeLuca's name appeared on the ballot for the 2022 General Election and, despite his death, he was reelected to the House of Representatives.

10. Former Representative DeLuca's pre-election death created a vacancy in the House of Representatives.

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

11. On November 30, 2022, the last day of the 206th General Assembly, then-Speaker Cutler issued a writ of election to DOS and the Board of Elections setting a special election for February 7, 2023, to fill former Representative DeLuca's seat in the General Assembly. A true and correct copy of the writ of election issued by then-Speaker Cutler on November 30, 2022 is attached hereto as Exhibit A.

12. DOS acknowledged receipt of the foregoing writ of election on the same day of its execution. *See id.*

13. With the pre-election death of former Representative DeLuca, the membership of the Democratic Caucus of the House of Representatives was comprised of 101 members of the House of Representatives on December 1, 2022, the start of the 207th General Assembly, which is one member short of a majority.

14. Despite being one member short of a majority, Representative McClinton declared herself to be Majority Leader of the House of Representatives on December 7, 2022, and subsequently had a Judge of the Court of Common Pleas of Delaware County administer the oath of office to her on the House floor. A true and correct copy of a press release issued by Representative McClinton announcing her swearing in as Majority Leader is attached hereto as Exhibit B.

15. That same day, two members of the House of Representatives, Austin A. Davis, the duly elected member of the House of Representatives for the 35th

Legislative District and the Lieutenant Governor-elect (“former Representative Davis”), and Summer L. Lee, the duly elected member of the House of Representatives for the 34th Legislative District and member-elect of the United States House of Representatives (“former Representative Lee”), resigned their seats in the Pennsylvania House of Representatives. A true and correct copy of former Representative Davis’ resignation letter is attached hereto as Exhibit C. A true and correct copy of former Representative Lee’s resignation letter is attached hereto as Exhibit D.

16. The resignations of former Representatives Davis and Lee on December 7, 2022, reduced the membership of the Democratic Caucus of the House of Representatives to 99 members.

17. Notwithstanding the fact that the membership of the Democratic Caucus of the House of Representatives does not comprise a majority of the members of the House, Representative McClinton issued writs of elections on December 7, 2022, to DOS and the Board of Elections setting special elections for February 7, 2023, to fill the seats of former Representatives DeLuca, Davis, and Lee. True and correct copies of the writs of election issued by Representative McClinton on December 7, 2022, are attached hereto as Exhibits E, F, and G.

18. On the same day, but following the foregoing events, the non-partisan Pennsylvania Legislative Reference Bureau issued a “Legal Opinion” regarding the

question of “[w]hether the Democratic Caucus holds a majority of seats in the House of Representatives.” A true and correct copy of the Legal Opinion of the Legislative Reference Bureau is attached hereto as Exhibit H.

19. Upon review of the law and the results of the 2022 General Election, the Legislative Reference Bureau concluded that the Democratic Caucus does not hold a majority of seats in the House of Representatives. Exhibit H at 2.

20. In this regard, the Legislative Reference Bureau wrote that “[w]hile the Democratic Party won a total of 102 elections to the House of Representatives at the 2022 general election, the Democratic Caucus is able to seat only 101 members due to the death of a member-elect, falling short of the 102 members necessary for a majority.” *Id.*

21. That same day, Acting Secretary Chapman rejected the writ of election issued by then-Speaker Cutler regarding former Representative DeLuca’s seat as premature. A true and correct copy of Acting Secretary Chapman’s December 7, 2022 letter is attached hereto as Exhibit I.

22. Representative Cutler disputes that Acting Secretary Chapman was correct in rejecting the writ of election issued by him on November 30, 2022.

ACTION SOUGHT TO BE ENJOINED

23. Representative Cutler asks this Court to preliminary enjoin Respondents and all government officials employed by Respondents from

effectuating the writs of election issued on December 7, 2022 by Representative McClinton such that Respondents should not proceed with holding the February 7, 2023 special elections, until the Court can issue a decision on the merits.

STANDARD FOR PRELIMINARY INJUNCTION

24. The purpose of a preliminary injunction is “to preserve the status quo and prevent imminent and irreparable harm which might occur before the merits of the case can be heard and determined.” *Berger By and Through Berger v. W. Jefferson Hill Sch. Dist.*, 669 A.2d 1084, 1085 (Pa. Cmwlth. 1995).

25. Pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), this Court, upon application, may issue a preliminary injunction “in the interest of justice and consistent with the usages and principles of law.” Pa.R.A.P. 1532(a).

26. The requirements for obtaining a preliminary injunction under Pennsylvania Rule of Appellate Procedure 1532(a) are the same as those for obtaining a preliminary injunction under Pennsylvania Rule of Civil Procedure 1531, Pa.R.Civ.P. 1531. *Com. Ex rel. Pappert v. Coy*, 860 A.2d 1201, 1204 (Pa. Cmwlth. 2004); *see also* Pennsylvania Rule of Appellate Procedure 106, Pa.R.A.P. 106.

27. Pennsylvania Rule of Civil Procedure 1531 sets forth the procedural steps for obtaining a preliminary injunction. Rule 1531 provides that, generally, a

preliminary injunction will not issue until after notice and hearing. Pa.R.Civ.P. 1531.

28. In addition to the procedural requirements, there are six prerequisites a moving party must demonstrate to obtain a preliminary injunction, which are as follows:

- (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages;
- (2) greater injury would result from refusing the injunction than from granting it, and concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings;
- (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;
- (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits;
- (5) the injunction is reasonably suited to abate the offending activity; and,
- (6) the preliminary injunction will not adversely affect the public interest.

SEIU Healthcare Pa. v. Commonwealth, 104 A.3d 495, 502 (Pa. 2014).

29. The moving party must establish each prerequisite before a preliminary injunction can be issued. *See Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004).

**REPRESENTATIVE CUTLER HAS A CLEAR RIGHT TO RELIEF
AND IS LIKELY TO PREVAIL ON THE MERITS**

30. As set forth more fully in paragraphs 1 through 71 of Representative Cutler's Petition for Review, Representative Cutler has a clear right to relief and a strong likelihood on the merits of his challenge to the validity of the writs of elections issued on December 7, 2022 by Representative McClinton for the following reasons:

A. Pursuant to the Pennsylvania Constitution, as well as the Election Code, the authority to issue writs of election rests with the presiding officer of the House of Representatives, which is, in effect, the Speaker of the House.

B. In the event of a vacancy in the Office of Speaker of the House of Representatives, the Act of January 10 1968, P.L. 925, authorizes the Majority Leader to carry out the duties of the Speaker of the House, including issuing writs of election.

C. Representative McClinton is neither the Speaker nor the Majority Leader of the House of Representatives.

D. Thus, Representative McClinton issued the writs of election at issue without constitutional or statutory authority.

REQUEST FOR INJUNCTION

31. Representative Cutler respectfully requests this Court preliminarily enjoin, pending further order of the Court, Respondents and all government officials employed by Respondents from effectuating the writs of election issued on December 7, 2022 by Representative McClinton.

32. A preliminary injunction preventing the effectuation of the writs of election at issue is necessary to prevent a possibly unlawful special election from being held, which would cause irreparable harm in several ways, including usurping Representative Cutler's authority as Leader of the Republican Caucus of the House of Representatives and possibly Majority Leader of the House of Representatives, which gives Representative Cutler the statutory authority to issue writs of elections.

33. An injunction would also prevent the possible waste of taxpayer resources by holding a possibly unlawful special election.

34. The deprivation of a constitutional or statutory right constitutes irreparable harm.

35. The harm caused by the effectuation of the writs of election cannot be remedied by damages.

36. Greater injury would result from refusing the injunction than from granting it because granting the injunction would maintain the status quo.

37. At the same time, granting the injunction would not harm Respondents because, as noted above, the injunction would simply preserve the status quo that existed before the writs of election were issued.

38. As noted above, and as set forth more fully in paragraphs 1 through 71 of Representative Cutler's Petition for Review, Representative Cutler has a clear right to relief and a strong likelihood on the merits of his challenge to the validity of the writs of elections issued on December 7, 2022 by Representative McClinton.

39. The injunction is reasonably suited to abate the offending activity.

40. The preliminary injunction will not adversely affect the public interest because, as noted above, the injunction will maintain the status quo while the matter can be decided on the merits. Furthermore, it will ensure that a lawful special election takes place for the 32nd, 34th, and 35th Legislative Districts.

41. Finally, given that DOS and the Board of Elections must begin their preparations for the February 7, 2023 special elections immediately, Representative Cutler is filing this Application on an emergency basis.

WHEREFORE, for the reasons set forth above, Representative Cutler respectfully request this Court preliminary enjoin Respondents and all government officials employed by Respondents from effectuating the writs of election issued on

December 7, 2022 by Representative McClinton such that that the Department of State and the Board of Elections may not proceed with holding the special elections.

McNEES WALLACE & NURICK LLC

Date: December 9, 2022

By: *Kandice K. Hull*

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
dcrompton@mcneeslaw.com
khull@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: December 9, 2022


By: 
Bryan D. Cutler

EXHIBIT A

WRIT OF ELECTION

TO LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH, AND
TO RICH FITZGERALD, BETHANY HALLAM, AND SAMUEL DeMARCO, III,
CONSTITUTING THE BOARD OF ELECTIONS OF ALLEGHENY COUNTY.

GREETINGS: WHEREAS, A VACANCY EXISTS IN THE OFFICE OF
REPRESENTATIVE OF THE COMMONWEALTH OF PENNSYLVANIA FOR THE
THIRTY-SECOND LEGISLATIVE DISTRICT OF THE COUNTY OF ALLEGHENY,
CAUSED BY THE DEATH OF ANTHONY M. DeLUCA, THE REPRESENTATIVE
FROM SAID DISTRICT, ON THE 9TH DAY OF OCTOBER, TWO THOUSAND
TWENTY-TWO.

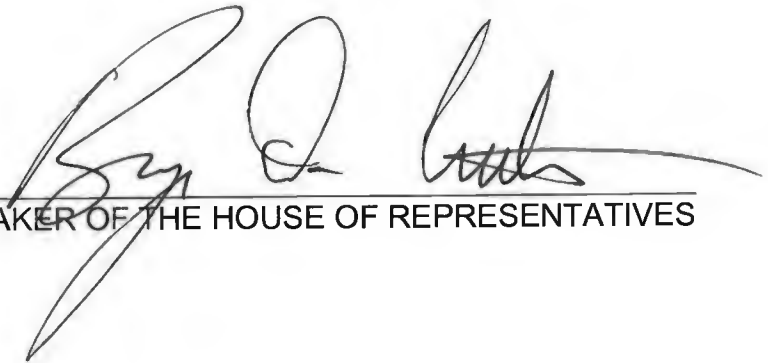
NOW, THEREFORE, I, BRYAN CUTLER, SPEAKER OF THE HOUSE OF
REPRESENTATIVES BY VIRTUE OF THE AUTHORITY VESTED IN ME BY THE
CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, AND BY THE
ACT OF ASSEMBLY IN SUCH CASE MADE AND PROVIDED, DO HEREBY
COMMAND:

THAT YOU CAUSE AN ELECTION TO BE HELD IN THE SAID COUNTY OF
ALLEGHENY, ON THE 7TH DAY OF FEBRUARY, TWO THOUSAND TWENTY-THREE
TO CHOOSE A PERSON TO REPRESENT SAID LEGISLATIVE DISTRICT IN THE
HOUSE OF REPRESENTATIVES OF PENNSYLVANIA, FOR THE REMAINDER OF
THE TERM EXPIRING NOVEMBER 30TH, TWO THOUSAND TWENTY-FOUR, AND

THAT YOU GIVE DUE AND PUBLIC NOTICE OF SAID ELECTION THROUGHOUT SAID DISTRICT, IN THE FORM AND MANNER DIRECTED BY LAW.

GIVEN UNDER MY HAND AND THE SEAL OF THE HOUSE OF REPRESENTATIVES AT HARRISBURG, PENNSYLVANIA, THIS 30 DAY OF November, TWO THOUSAND TWENTY-TWO.





SPEAKER OF THE HOUSE OF REPRESENTATIVES

ATTEST:



CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

SERVICE OF THE WRITTEN WRIT AND RECEIPT OF SAME IS HEREBY

ACKNOWLEDGED THIS 30th DAY OF November 2022

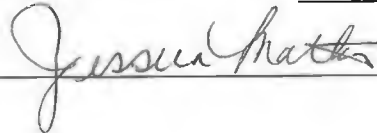
BY _____.

EXHIBIT B

McClinton sworn in as House Majority Leader

Rep. Joanna E. McClinton December 7, 2022

HARRISBURG, Dec. 7 – Today, state Rep. Joanna McClinton, D-Phila./Delaware, was sworn in for the 2023/24 legislative session. As House majority leader, McClinton becomes the House’s presiding officer. She is the first woman in Pennsylvania history to serve in that role.

House Democrats won the majority of districts in the Nov. 8 General Election. As majority leader, McClinton’s appointment as presiding officer is established by law and consistent with legal precedent set in 2004, when the majority leader, Republican Sam Smith, R-Jefferson, served as the House’s presiding officer on Dec. 9, 2004, to schedule a special election to fill a seat vacated by a Republican lawmaker in the 189th legislative district.

“Pennsylvanians cast their ballots in the free and fair 2022 General Election. The results of that election are not in dispute and in the majority of legislative districts - 102 out of 203 - the people of Pennsylvania voted to elect a Democrat to represent them in the House of Representatives. Pennsylvania’s voters have spoken, and the will of the people is the ultimate authority in this Commonwealth,” McClinton said.

“If there was a mandate delivered to the General Assembly, it is to work together in a bipartisan manner. Our caucus embraces this mandate, because it means we’re going to have to fundamentally change the way our chamber operates. Our caucus will govern in a way that is representative of our diverse commonwealth. Rather than bottling up bills in committee just because they were introduced by the opposing party, we’ll welcome debate on policy ideas to strengthen and improve them. We will stay grounded in the needs of the Pennsylvanians who sent us to Harrisburg to represent them, not partake in political games at the expense of our communities. Rather than take advantage of parliamentary procedure to advance a partisan agenda, we will collaborate with our partners across the aisle, across the building in the Senate, and with the incoming gubernatorial administration.

“After more than a decade of Republican management, today is a fresh start. A day for new leaders, new perspectives and new collegiality. I am confident that together we can do amazing things to advance our commonwealth.”

As majority leader and presiding officer, McClinton’s first official action was to set the date for three special elections to replace lawmakers from Allegheny County. Special elections for the 32nd district, vacated by Rep. Tony DeLuca, who died in October; the 34th district vacated by Rep. Summer Lee, who was elected to Congress; and the 35th district, vacated by Lt. Governor-elect Austin Davis are set for Feb. 7, 2023.

“To ensure every Pennsylvanian has representation and to restore the state House to its full complement as quickly as possible, I set the special elections for early February,” McClinton said. “By having all three elections on the same day, hopefully we can maximize voter awareness and participation.”

In her role as majority leader, McClinton will also serve as acting speaker until a speaker is elected. This is consistent with precedent set during the 2003/04 session when Majority Leader John Perzel, R-Phila., served as acting speaker for several weeks following the death of Speaker Matt Ryan, R-Delaware.

In her role as acting speaker, McClinton set the House session schedule for the first 60 days of the legislative session. McClinton has served the 191st district, which includes portions of southwest and west Philadelphia and Yeadon and Darby boroughs in Delaware County since August 2015, when she won a special election. In 2018, she was elected the House Democratic Caucus chair, the first woman and African American to hold that post, and in 2020 she was elected to serve as Democratic leader. McClinton is the first woman to serve as a floor leader of either party in the 246-year history of the state House of Representatives.

Recent News



[PA House LGBTQ+ Equality Caucus celebrates step forward in state’s nondiscrimination policies](#) (16 hours ago)



[Krajewski elected as vice chair to Sentencing Commission](#) (16 hours ago)



[Rabb, Miller announce legislation to prevent union busting using public funds](#) (16 hours ago)



[McClinton applauds, welcomes newest members to House Democratic Caucus](#) (22 hours ago)



[Philadelphia House Delegation praises the release of Brittney Griner from Russian prison](#) (1 day ago)



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EXHIBIT C

AUSTIN DAVIS, MEMBER
35TH LEGISLATIVE DISTRICT

216 IRVIS OFFICE BUILDING
P.O. BOX 202035
HARRISBURG, PENNSYLVANIA 17120-2035
(717) 783-1018
FAX: (717) 780-4779

627 LYSLE BOULEVARD
MCKEESPORT, PENNSYLVANIA 15132
(412) 664-0035
FAX: (412) 664-0039

3905 MAIN STREET
MUNHALL, PENNSYLVANIA 15120
(412) 476-3046
FAX: (412) 476-3048



House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

COMMITTEES

APPROPRIATIONS
INSURANCE
CONSUMER AFFAIRS
TRANSPORTATION
POLICY

DELEGATIONS

ALLEGHENY COUNTY HOUSE DEMOCRATIC
DELEGATION, *CHAIRMAN*

CAUCUSES

CAREER & TECHNICAL EDUCATION
PA LEGISLATIVE BLACK CAUCUS
EARLY CHILDHOOD EDUCATION
CRIMINAL JUSTICE REFORM
MANUFACTURING
AFTER SCHOOL
BLUEGREEN
CLIMATE
HUNGER
STEEL
YMCA
SAFE

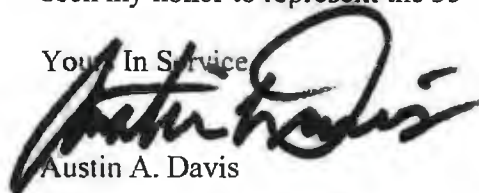
December 6, 2022

Honorable Joanna McClinton
Majority Leader
Pennsylvania House of Representatives
423 Main Capitol
Harrisburg, PA 17120

Leader McClinton:

I, Austin A. Davis, hereby resign my position as a Pennsylvania State Representative for the 2023-2024 legislative session effective at 10:30 AM on Wednesday, December 7, 2022. It has been my honor to represent the 35th Legislative District in Allegheny County.

Yours In Service


Austin A. Davis

2022 DEC -7 AM 11:31

HOUSE
LEGISLATIVE SERVICES

EXHIBIT D

SUMMER LEE, MEMBER
34TH LEGISLATIVE DISTRICT

258 EAST WING
P.O. BOX 202034
HARRISBURG, PENNSYLVANIA 17120-2034
(717) 783-1914
FAX: (717) 705-2564

501 BRADDOCK AVENUE, SUITE #105
BRADDOCK, PENNSYLVANIA 15104-9998
(412) 273-3400
FAX: (412) 273-3434



House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

COMMITTEES

EDUCATION
HEALTH
JUDICIARY
POLICY COMMITTEE

PENNSYLVANIA LEGISLATIVE BLACK CAUCUS
VICE CHAIR
ALLEGHENY COUNTY DELEGATION
CLIMATE CAUCUS
PA SAFE CAUCUS
WOMEN'S CAUCUS
WOMEN'S HEALTH CAUCUS

December 6, 2022

Dear Majority Leader Joanna McClinton –

I, Summer Lee, hereby resign my position as a Member of the Pennsylvania House of Representatives for the 2023-2024 legislative session effective 10:00 AM on Wednesday, December 7, 2022.

Sincerely Yours,

A handwritten signature in cursive script that reads "Summer Lee".

Summer Lee
Representative
Pennsylvania House District 34

HOUSE
LEGISLATIVE SERVICES
2022 DEC -7 AM 11:31

EXHIBIT E

WRIT OF ELECTION

**TO LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH,
AND TO RICH FITZGERALD, BETHANY HALLAM, AND SAM DÉMARCO, III,
CONSTITUTING THE BOARD OF ELECTIONS OF ALLEGHENY COUNTY.**

**GREETINGS: WHEREAS, A VACANCY EXISTS IN THE OFFICE OF
REPRESENTATIVE OF THE COMMONWEALTH OF PENNSYLVANIA FOR
THE THIRTY-SECOND LEGISLATIVE DISTRICT OF THE COUNTY OF
ALLEGHENY, CAUSED BY THE DEATH OF ANTHONY M. DELUCA, THE
REPRESENTATIVE-ELECT FROM SAID DISTRICT ON THE 9TH DAY OF
OCTOBER, TWO THOUSAND TWENTY-TWO.**

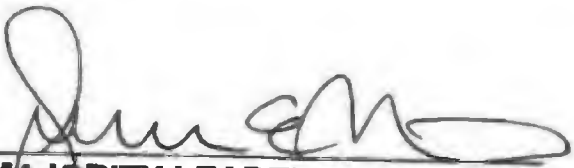
**NOW, THEREFORE, THE HOUSE OF REPRESENTATIVES BEING
ADJOURNED SINE DIE AND THUS A VACANCY CURRENTLY EXISTING IN
THE OFFICE OF SPEAKER, I, JOANNA E. MCCLINTON, MAJORITY LEADER
OF THE HOUSE OF REPRESENTATIVES, BY VIRTUE OF THE AUTHORITY
VESTED IN ME BY THE CONSTITUTION OF PENNSYLVANIA AND BY THE
ACTS OF ASSEMBLY IN SUCH CASE MADE AND PROVIDED, DO HEREBY
COMMAND:**

**THAT YOU CAUSE AN ELECTION TO BE HELD IN THE THIRTY-SECOND
LEGISLATIVE DISTRICT OF THE COUNTY OF ALLEGHENY ON THE 7TH**

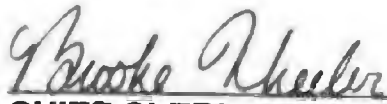
DAY OF FEBRUARY, TWO THOUSAND TWENTY-THREE, TO CHOOSE A PERSON TO REPRESENT THE LEGISLATIVE DISTRICT IN THE HOUSE OF REPRESENTATIVES OF PENNSYLVANIA FOR THE REMAINDER OF THE TERM EXPIRING ON THE 1ST DAY OF DECEMBER, TWO THOUSAND AND TWENTY-FOUR, AND THAT YOU GIVE DUE AND PUBLIC NOTICE OF THE ELECTION THROUGHOUT THE DISTRICT IN THE FORM AND MANNER DIRECTED BY LAW.

GIVEN UNDER MY HAND AND THE SEAL OF THE HOUSE OF REPRESENTATIVES AT HARRISBURG, PENNSYLVANIA, THIS 7TH DAY OF DECEMBER, A.D. TWO THOUSAND TWENTY-TWO.




MAJORITY LEADER OF THE
HOUSE OF REPRESENTATIVES

ATTEST:



CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

SERVICE OF THE WRITTEN WRIT AND RECEIPT OF SAME IS HEREBY

ACKNOWLEDGED THIS 7th DAY OF December, 2022

BY



EXHIBIT F

WRIT OF ELECTION

**TO LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH,
AND TO RICH FITZGERALD, BETHANY HALLAM, AND SAM DEMARCO, III,
CONSTITUTING THE BOARD OF ELECTIONS OF ALLEGHENY COUNTY.**

**GREETINGS: WHEREAS, A VACANCY EXISTS IN THE OFFICE OF
REPRESENTATIVE OF THE COMMONWEALTH OF PENNSYLVANIA FOR
THE THIRTY-FIFTH LEGISLATIVE DISTRICT OF THE COUNTY OF
ALLEGHENY, CAUSED BY THE RESIGNATION OF AUSTIN DAVIS, THE
REPRESENTATIVE-ELECT FROM SAID DISTRICT ON THE 7TH DAY OF
DECEMBER, TWO THOUSAND TWENTY-TWO.**

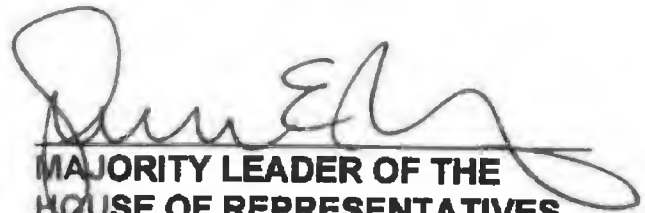
**NOW, THEREFORE, THE HOUSE OF REPRESENTATIVES BEING
ADJOURNED SINE DIE AND THUS A VACANCY CURRENTLY EXISTING IN
THE OFFICE OF SPEAKER, I, JOANNA E. MCCLINTON, MAJORITY LEADER
OF THE HOUSE OF REPRESENTATIVES, BY VIRTUE OF THE AUTHORITY
VESTED IN ME BY THE CONSTITUTION OF PENNSYLVANIA AND BY THE
ACTS OF ASSEMBLY IN SUCH CASE MADE AND PROVIDED, DO HEREBY
COMMAND:**

**THAT YOU CAUSE AN ELECTION TO BE HELD IN THE THIRTY-FIFTH
LEGISLATIVE DISTRICT OF THE COUNTY OF ALLEGHENY ON THE 7TH**

DAY OF FEBRUARY, TWO THOUSAND TWENTY-THREE, TO CHOOSE A PERSON TO REPRESENT THE LEGISLATIVE DISTRICT IN THE HOUSE OF REPRESENTATIVES OF PENNSYLVANIA FOR THE REMAINDER OF THE TERM EXPIRING ON THE 1ST DAY OF DECEMBER, TWO THOUSAND AND TWENTY-FOUR, AND THAT YOU GIVE DUE AND PUBLIC NOTICE OF THE ELECTION THROUGHOUT THE DISTRICT IN THE FORM AND MANNER DIRECTED BY LAW.

GIVEN UNDER MY HAND AND THE SEAL OF THE HOUSE OF REPRESENTATIVES AT HARRISBURG, PENNSYLVANIA, THIS 7TH DAY OF DECEMBER, A.D. TWO THOUSAND TWENTY-TWO.




MAJORITY LEADER OF THE
HOUSE OF REPRESENTATIVES

ATTEST:


CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

SERVICE OF THE WRITTEN WRIT AND RECEIPT OF SAME IS HEREBY
ACKNOWLEDGED THIS 7th DAY OF December, 2022
BY Jessie Mathis.

EXHIBIT G

WRIT OF ELECTION

**TO LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH,
AND TO RICH FITZGERALD, BETHANY HALLAM, AND SAM DEMARCO, III,
CONSTITUTING THE BOARD OF ELECTIONS OF ALLEGHENY COUNTY.**

**GREETINGS: WHEREAS, A VACANCY EXISTS IN THE OFFICE OF
REPRESENTATIVE OF THE COMMONWEALTH OF PENNSYLVANIA FOR
THE THIRTY-FOURTH LEGISLATIVE DISTRICT OF THE COUNTY OF
ALLEGHENY, CAUSED BY THE RESIGNATION OF SUMMER LYNN LEE,
THE REPRESENTATIVE-ELECT FROM SAID DISTRICT ON THE 7TH DAY
OF DECEMBER, TWO THOUSAND TWENTY-TWO.**

**NOW, THEREFORE, THE HOUSE OF REPRESENTATIVES BEING
ADJOURNED SINE DIE AND THUS A VACANCY CURRENTLY EXISTING IN
THE OFFICE OF SPEAKER, I, JOANNA E. MCCLINTON, MAJORITY LEADER
OF THE HOUSE OF REPRESENTATIVES, BY VIRTUE OF THE AUTHORITY
VESTED IN ME BY THE CONSTITUTION OF PENNSYLVANIA AND BY THE
ACTS OF ASSEMBLY IN SUCH CASE MADE AND PROVIDED, DO HEREBY
COMMAND:**

**THAT YOU CAUSE AN ELECTION TO BE HELD IN THE THIRTY-FOURTH
LEGISLATIVE DISTRICT OF THE COUNTY OF ALLEGHENY ON THE 7TH**

DAY OF FEBRUARY, TWO THOUSAND TWENTY-THREE, TO CHOOSE A PERSON TO REPRESENT THE LEGISLATIVE DISTRICT IN THE HOUSE OF REPRESENTATIVES OF PENNSYLVANIA FOR THE REMAINDER OF THE TERM EXPIRING ON THE 1ST DAY OF DECEMBER, TWO THOUSAND AND TWENTY-FOUR, AND THAT YOU GIVE DUE AND PUBLIC NOTICE OF THE ELECTION THROUGHOUT THE DISTRICT IN THE FORM AND MANNER DIRECTED BY LAW.

GIVEN UNDER MY HAND AND THE SEAL OF THE HOUSE OF REPRESENTATIVES AT HARRISBURG, PENNSYLVANIA, THIS 7TH DAY OF DECEMBER, A.D. TWO THOUSAND TWENTY-TWO.




MAJORITY LEADER OF THE
HOUSE OF REPRESENTATIVES

ATTEST:


CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

SERVICE OF THE WRITTEN WRIT AND RECEIPT OF SAME IS HEREBY

ACKNOWLEDGED THIS 7th DAY OF December, 2022

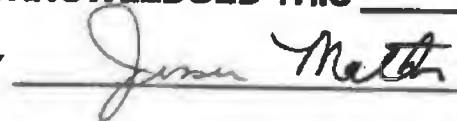
BY 

EXHIBIT H

Commonwealth of Pennsylvania

Legislative Reference Bureau

December 7, 2022

LEGAL OPINION

This opinion is issued to the requestor and the requestor's staff for individual use. The Legislative Reference Bureau issues only advisory opinions and does not issue rulings or binding legal opinions.

Vim

Vincent C. DeLiberato, Jr.

Director

SUBJECT: Whether the Democratic Caucus holds a majority of seats in the House of Representatives.

TO: Jake Smeltz
Chief of Staff
Rep. Bryan Cutler, Republican Leader

FROM: Peter Klein *PKK*
Associate Counsel

QUESTION PRESENTED

Does the Democratic Caucus hold a majority of seats in the House of Representatives for the 2022-2024 session?

BRIEF ANSWER

No. While the Democratic Party won a total of 102 elections to the House of Representatives at the 2022 general election, the Democratic Caucus is able to seat only 101 members due to the death of a member-elect, falling short of the 102 members necessary for a majority.

STATEMENT OF FACTS

On the basis of a phone call between Vince DeLiberato, Director of the Legislative Reference Bureau, and Jake Smeltz, Chief of Staff to Republican Leader Bryan Cutler, this legal opinion has been issued.

DISCUSSION

There is disagreement as to which caucus holds a majority in

the House of Representatives {hereinafter referred to as the House} for the 2022-2024 legislative session. The Democratic Party won a total of 102 House elections at the November 8, 2022, general election, but the House Democratic Caucus is able to seat only 101 members due to the death of member-elect Anthony DeLuca. The vacant seat will be filled at a special election. Pa. Const. (2018 Ed.) Art. II, § 2, *Purdon's Statutes* Art. 2, § 2 (2011). The Republican party won 101 House elections, and is able to seat all of its elected members. The House comprises 203 seats, so a caucus would need 102 seats to have a majority.

The House Democratic Caucus does not have a majority in the House. The limited caselaw on this topic suggests that the House Democratic Caucus may only count its 101 living members toward a majority, short of the 102 members necessary for a majority. The House is thereby left without a majority caucus.

Our Supreme Court ventured into similar territory in deciding who qualifies as a member "elected to the Senate" for the purposes of establishing a majority vote on a gubernatorial appointment under Article IV, § 8(a) of the Pennsylvania Constitution. *Zemprelli v. Daniels*, 496 Pa. 247, 251, 436 A.2d 1165, 1166 (1981); see Pa Const. (2018 Ed.) Art. IV, § 8(a), *Purdon's Statutes*, Const. Art. 4, § 8(a) (2011). At the time of

the vote, 25 members constituted a majority due to only 48 of the possible 50 Senators taking office: one member had not yet taken the oath of office, and one member resigned his position to become State Treasurer. *Id.* at 250 n.1, 436 A.2d at 1166 n.1. A number of Senators sued, arguing that the 25 votes in favor of the appointment did not constitute a majority of the Senate's full 50-member complement.

The *Zemprelli* Court rejected petitioners' argument. Senate Rule XXII(8), currently Senate Rule 20(g), stated that "[a] majority of the Senators elected shall mean a majority of the Senators elected, living, sworn, and seated." *Id.* at 250, 436 A.2d at 1166. The *Zemprelli* Court adopted the definition of elected member under Senate Rule XXII(8) and affirmed the appointee's confirmation by the 25 member majority vote of the Senators elected, living, sworn, and seated. *Id.* at 261, 436 A.2d at 1172. With apologies for any crassness, Mr. DeLuca, while elected, is not living. Such a member would not count toward a caucus's majority under *Zemprelli*.

It can be argued that *Zemprelli* does not apply to the current set of facts. The most recent House general operating rules also use the phrase "majority of the members elected" but do not have a similar rule stating what constitutes a majority

vote. See, e.g., House Rule 77 (2021-2022) (requiring majority vote to change a House operating rule).¹ Nor do the House Rules contain a provision defining what constitutes a House member. To that end, the *Zemprelli* Court does not explicitly state that the Court would have come to the same conclusion absent a Senate Rule defining what constitutes a majority.

That argument, however, would likely fail. The *Zemprelli* Court provides enough detailed analysis and reasoning to suggest it would have reached the same result without Senate Rule XXII(8) guiding its decision. The majority requirement under Article IV, § 8 is intended to require participation by the Senate as a body, as opposed just to a quorum. *Id.* at 259, 436 A.2d at 1171. Rather than merely absent, the Senate's two missing members were not entitled to vote. Including vacant seats in the total number of elected members would require a majority vote greater than the majority of the members qualified to vote since neither vacant seat could actually cast a vote. *Id.* To make its point, the Court presented a hypothetical in which half of the Senate membership are killed in a disaster. *Id.* at 260, 436 A.2d at 1171. If the deceased members' seats counted toward the majority, the Senate would be incapable of taking any action requiring a majority

¹ The House Operating Rules use the phrases "majority vote of the members elected" and "majority vote of the members" interchangeably. The phrases are used to describe the vote necessary to change, add, modify or delete a House Operating Rule. House Rule 77 (2021-2022).

vote. *Id.*

Likewise, taking a literal meaning of "member elected" would lead to a situation in which "members elected" outnumber the total number of constitutionally mandated members. *Id.* To describe such a situation, the *Zemprelli* Court posited another hypothetical in which "members elected" would include a senator who dies or resigns *and* the member elected to fill the seat, effectively allowing two members to hold the same seat. *Id.* (emphasis added). The *Zemprelli* Court's hypothetical suggests that a seat left vacant by the death of a member could not be used to calculate a majority of the members elected.

It should be noted that the *Zemprelli* decision contemplated the Senate's constitutional duty to provide advice and consent regarding gubernatorial appointments. House Majority Leader, on the other hand, is not a constitutional office. Likewise, the constitution does not speak to any role that a majority caucus plays in selecting the House Speaker or other officers. Pa. Const. (2018 Ed.) Art. II, § 9, *Purdon's Statutes* Art. 2, § 9 (2011). That is, the determination of a majority caucus does not implicate the kind of constitutional concerns raised in *Zemprelli*, and a court, assuming this is not a political question, might not utilize the *Zemprelli* Court's policy

arguments in determining who constitutes a member for the purposes of electing a Majority Leader.

The Pennsylvania Supreme Court has seemingly, though not explicitly, lowered the *Zemprelli* bar for qualifying as a member to simply elected and living. In *Perzel v. Cortes*, the Court upheld a writ of election issued by then Majority Leader Samuel Smith and Rep. John Perzel, the immediately preceding Speaker of the House, after the start of the newly elected members' terms but prior to the start of session. 582 Pa. 103, 870 A.2d 759 (2005). Our Constitution requires that the presiding officer of the House issue a writ of election to fill any vacancy. *Id.* at 106, 870 A.2d at 761; see also Pa. Const. (2018 Ed.) Art. II, § 2, *Purdon's Statutes* Art. 2, § 2 (2011). The House general operating rules at the time stated that the Speaker is the presiding officer. *Perzel* at 106, 870 A.2d at 761.

A Speaker, however, had not yet been elected. *Id.* The Majority Leader assumes the duties of the Speaker during any recess of the House in which the office of Speaker is vacant. *Id.* at 106-07, 870 A.2d at 761; see section 21.13 of the act of January 10, 1968 (1967) (P.L.925, No.417), as added December 10, 1979 (P.L.488, 492, No.104), 46 P.S. § 42.121m (2020). Both Speaker and Majority Leader signed the writ of election and

submitted the writ to Secretary of the Commonwealth Cortes on December 7, 2004. *Id.* at 106, 870 A.2d at 761. Secretary Cortes rejected the writ as invalid due to neither member as yet being sworn or seated. *Id.* at 107, 870 A.2d at 762.

To cure this infirmity, the Republican Caucus, which Secretary Cortes did not dispute was the majority caucus, elected Rep. Smith as Majority Leader on December 9, 2004. *Id.* at 107 n.3, 870 A.2d at 761 n.3. Judge Batton of the Dauphin County Court of Common Pleas administered the oath of office to Rep. Smith that same day. *Id.* at 107, 870 A.2d at 762. Majority Leader Smith, newly sworn into office, and Rep. Perzel reissued the writ of election to Secretary Cortes. *Id.* Secretary Cortes again rejected the writ as invalid due, in part, to the lack of a presiding officer with the authority to issue the writ. *Id.* at 108, 870 A.2d at 762.

The *Perzel* Court held, in pertinent part, that Rep. Smith held the office of House Majority Leader and had the authority to issue the writ of election during a vacancy in the office of House Speaker. *Id.* at 110-11, 870 A.2d at 763-64. While Secretary Cortes questioned the ability of a common pleas court judge to swear in a member of the House, he conceded that matters related to seating an individual member were solely within the discretion

of House members. *Id.* at 110, 870 A.2d at 763. As such, and without further explanation, the Court upheld Rep. Smith as Majority Leader "as that term is used in Section 21.13." *Id.* Notably, the Court quoted Secretary Cortes as not questioning "issues pertaining to the *seating* of an individual member" in regards to the swearing in of Rep. Smith. *Id.* (emphasis added). The Court, then, seems to consider seating and swearing in as one and the same.

The Court did not speak as to whether Rep. Perzel was also sworn into office or what effect his signature had on the writ of election as an unsworn, but living and elected, member of the House. The Court did take notice of the House tradition that a House Speaker who is reelected, and whose party remains in the majority, continues to carry out the duties of Speaker during the period between December 1 and the first Tuesday of January when the General Assembly comes back into session. *Id.* at 110 n.7, 870 A.2d at 763, n.7. The Court failed to discuss the interplay between section 21.13, which clearly contemplates the inability of the previous Speaker to issue a writ of election during adjournment, and the House tradition of a former Speaker who is reelected to office wielding the powers of Speaker during the recess.

The *Perzel* decision stands for the proposition that an individual who is elected and living counts as a member of a particular caucus for the purpose of determining a majority caucus and electing a Majority Leader. The *Perzel* Court accepted the Republican Caucus's election of Rep. Smith as Majority Leader, despite none of the members as yet being sworn or seated. While *Perzel* functionally, though not explicitly, dilutes *Zemprelli's* requirement that a member must also be sworn and seated, we see no reason to further extend *Perzel* to overrule *Zemprelli's* requirement that a member must be living.

Both cases contemplated a living member. The *Zemprelli* Court makes this point explicit: a member must be "elected, living, sworn, and seated." *Zemprelli* at 262, 436 A.2d at 1172. The *Perzel* Court does so implicitly. In upholding Rep. Smith's election to Majority Leader, the *Perzel* Court suggests that a vote is necessary. A deceased individual, regardless of his election victory, simply cannot cast a vote. It would be a step too far to suggest a member must vote, and therefore be alive, to elect a Majority Leader, but not require that member to be alive to count toward the majority caucus. At the very least, the *Perzel* decision is silent on the requirements necessary to be considered a member of the House.

It can be argued that the *Zemprelli* and *Perzel* decisions should be distinguished from the current facts. Both *Zemprelli* and *Perzel* contemplated constitutionally required duties. House Majority Leader, on the other hand, is not a constitutional office. Likewise, the constitution does not speak to the role a majority caucus plays in selecting the House Speaker or other officers. Pa. Const. (2018 Ed.) Art. II, § 9, *Purdon's Statutes* Art. 2, § 9 (2011). That is, the determination of a majority caucus does not implicate the kind of constitutional concerns raised in *Zemprelli* or *Perzel*, and a court, assuming this is not a political question, might not utilize the *Zemprelli* or *Perzel* policy arguments in determining who constitutes a member for the purposes of electing a Majority Leader.

We are confined, however, to the state of the law as it is and are not concerned with how a court might decide. Under *Zemprelli*, however diluted by *Perzel*, an individual must be elected and living to qualify as a member of the legislature. Including members in a caucus who are elected but not living would overrule *Zemprelli* and *Perzel*, which only a court can do.

Under *Zemprelli* and *Perzel*, the Democratic Caucus has 101 members who are living and elected. The Republican Caucus has the same number. Neither caucus can claim the 102 members necessary

for a majority and the House is left without a majority caucus until a special election fills the vacant seat.

CONCLUSION

Under current law, an individual must at least be elected and living to qualify as a member of a legislative caucus. The Democratic Party won 102 House elections at the November 2022 general election, but the House Democratic Caucus is able to seat only 101 members due to the death of member-elect Anthony DeLuca. The House Democratic Caucus falls short of the 102 members necessary for a majority.

EXHIBIT I



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

December 7, 2022

VIA EMAIL AND HAND DELIVERY

Brooke Wheeler, Chief Clerk
Pennsylvania House of Representatives
129 Main Capitol Building
Harrisburg, PA 17120-2020

Re: Writ of Election for the 32nd Legislative District

Dear Chief Clerk Wheeler:

As you are aware, on December 3, 2022, my staff acknowledged receipt of the document entitled a “writ of election” signed by Bryan Cutler, the then-Speaker of the House of Representatives, and dated November 30, 2022. This document directed that a special election be held in Allegheny County on February 7, 2023, for “a person to represent [the 32nd] Legislative District in the House of Representatives of Pennsylvania, for the remainder of the term expiring November 30th, [2024].” Unfortunately, that document is a nullity, and therefore I must reject it.

When Representative Anthony DeLuca died on October 9, 2022, a vacancy in that seat occurred immediately. However, the term of such vacancy expired on November 30, 2022—that is, the end of the then-current legislative session and Representative DeLuca’s then-unexpired term. Section 628 of the Election Code, 25 P.S. § 2778, requires that at least 60 days elapse between a writ of special election and the date of the special election. Because a writ may only fill an unexpired term, and less than one day of Representative DeLuca’s term remained unexpired on the date that then-Speaker Cutler provided the document, no special election could be held to fill such term.

In addition, per Section 628 of the Election Code, 25 P.S. § 2778, a writ of election is required within 10 days of the vacancy. As set forth above, Representative DeLuca died on October 9, 2022. The Office did not receive a writ of election within 10 days of that date. As such, the document that was provided to this Office was untimely and ineffective with respect to seeking an election to fill Representative DeLuca’s unexpired term ending in 2022.

Finally, Representative DeLuca was re-elected to a new two-year term at the November 8, 2022, General Election. Thus, a new vacancy for his seat was created on December 1, 2022, as the term of service of legislators begins on the first day of December next following their election. *See* Pa. Const., art. II, sec. 2. Therefore, the first date for issuance of a writ of election for the current term was December 1, 2022. Because the document issued by then-Speaker Cutler was dated November 30, 2022 but purported to fill the term that concludes in 2024 that had not yet commenced, that document was premature. As such, that document could not validly seek to fill a vacancy in Representative DeLuca's unexpired term ending in 2024, which vacancy would not occur until the following day, when the next term and legislative session begins under our Constitution.

As such, for the foregoing reasons, the writ is being returned.

Sincerely,

A handwritten signature in cursive script that reads "Leigh M. Chapman".

Leigh M. Chapman

Acting Secretary of the Commonwealth

Enclosure

cc: Allegheny County Board of Elections (w/out enclosure)

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: December 9, 2022

By: 
Kandice K. Hull

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2022, I will cause a true and correct copy of the foregoing Petitioner's Emergency Application for Special Relief in the Nature of a Preliminary Injunction to be served via hand delivery on Respondents, as follows:

Leigh M. Chapman, Acting Secretary of the Commonwealth
302 North Office Building
401 North Street
Harrisburg, PA 17120

Pennsylvania Department of State
306 North Office Building
401 North Street
Harrisburg, PA 17120

Board of Elections of Allegheny County
542 Forbes Avenue, Suite 601
Pittsburgh, PA 15219

Pennsylvania Office of Attorney General
16th Floor
Strawberry Square
Harrisburg, PA 17120

McNEES WALLACE & NURICK LLC

Date: December 9, 2022

By: 
Kandice K. Hull