

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioner,

v.

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

Respondents.

Docket No. 588 M.D. 2022

ANSWER OF RESPONDENTS

**LEIGH M. CHAPMAN, ACTING SECRETARY OF THE
COMMONWEALTH, AND THE PENNSYLVANIA DEPARTMENT
OF STATE TO PETITIONER'S EMERGENCY APPLICATION FOR
SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION**

Respondents Leigh M. Chapman, Acting Secretary of the Commonwealth
("Acting Secretary Chapman"), and the Pennsylvania Department of State ("the

Department”) (Acting Secretary Chapman and the Department are collectively referred to as the “Commonwealth Respondents”), by and through their counsel, Troutman Pepper Hamilton Sanders LLP, submit this Response to the Emergency Application for Special Relief in the Nature of a Preliminary Injunction (the “Application”) filed by Representative Bryan Cutler (“Representative Cutler”).

PRELIMINARY STATEMENT

This matter involves the process by which special elections may be noticed to fill vacant seats in the Pennsylvania House of Representatives. On December 7, 2022, Representative Joanna E. McClinton, Leader of the Democratic Caucus of the House of Representatives, issued writs of election (the “December Writs”) that directed Acting Secretary Chapman to conduct special elections to fill three vacancies in the House of Representatives that arose after the commencement of the 207th House of Representatives. The December Writs identified Representative McClinton as the Majority Leader of the House of Representatives and were attested to by the Chief Clerk of the House of Representatives. Upon receipt of the December Writs, the Department began the process of preparing for special elections in the 32nd, 34th, and 35th Legislative Districts in the County of Allegheny to be held on

February 7, 2023, as directed in the writs. The preparations for those elections are ongoing today.

In this declaratory judgment action, Representative Cutler seeks emergency injunctive relief to stop the process of preparing for these special elections to fill vacant seats in the House of Representatives. Representative Cutler contends that Representative McClinton is not the Majority Leader of the 207th House of Representatives and, therefore, she lacked authority to issue the December Writs. In his Application, Representative Cutler asks this Court to enjoin Acting Secretary Chapman, the Department, and the Board of Elections of Allegheny County from effectuating the December Writs.

Representative Cutler's request for injunctive relief fails as a matter of law. Pennsylvania's declaratory judgment act requires that indispensable parties be joined: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." 42 Pa. C.S. § 7540. The absence of such a person goes to the court's jurisdiction and unless all indispensable parties are made parties to an action, a court is powerless to grant relief. *O'Hare v. Cnty. of Northampton*, 782 A.2d 7, 13 (Pa. Commw. Ct.

2001) (“The failure to join an indispensable party deprives the court of subject matter jurisdiction[.]”). Representative McClinton’s December Writs have been challenged, yet Representative McClinton has not been joined as a party to this action. Accordingly, the Application is deficient and this Court lacks subject matter jurisdiction.

Additionally, Acting Secretary Chapman and the Department have acted (and are acting) lawfully and appropriately in scheduling and preparing for special elections to fill vacant seats in the House of Representatives in the manner directed by December Writs and Pennsylvania’s Election Code. No elections were scheduled to fill these vacancies before the receipt of the December Writs, and after a writ of election is issued, the Election Code states that an election “shall be held” as described in the writ. 25 P.S. § 2778.¹ Since the receipt of the facially valid

¹ Representative Cutler issued a purported writ of election on November 30, 2022, for a special election to be held on February 7, 2023, to fill a vacancy in the 32nd Legislative District of Allegheny County. That purported writ was returned because, *inter alia*, the vacancy for the then-current legislative session ended on November 30, 2022, and an election could not be scheduled for that vacancy pursuant to 25 P.S. § 2778. Additionally, a vacancy for the legislative session that would begin on December 1, 2022, did not exist when the purported writ was issued. *See* Application, Ex. I.

December Writs, the Commonwealth Respondents have been preparing for special elections to be held on February 7, 2023.²

Representative Cutler's dispute is with Representative McClinton and not with Acting Secretary Chapman or the Department. To enjoin the special elections to fill vacancies in the House of Representatives would only create harm—wasting resources that have already been deployed to prepare for special elections on February 7, 2023, delaying those elections, and forcing Pennsylvania citizens to go even longer without the benefit of elected representation in their legislature.

In response to the Application, Secretary Chapman and the Department state as follows:

1. Admitted.
2. Admitted.

² On December 15, 2022, Representative Cutler submitted two additional writs of election for the vacancies in the 34th and 35th Legislative Districts. These vacancies were the subject of the December Writs, and the special elections to fill these vacancies were already scheduled for February 7, 2023. Given that special elections were already scheduled for the vacancies identified in Representative Cutler's December 15, 2022 writs, the Commonwealth Respondents are following the first facially valid writs received unless this Court instructs otherwise.

3. Admitted in part, denied in part. The Commonwealth Respondents admit only that Representative Cutler filed the Petition for Review on December 9, 2022. The Commonwealth Respondents deny that Representative Cutler is entitled to the relief requested in the Petition for Review.

4. Admitted.

5. Admitted in part, denied in part. The Commonwealth Respondents admit only that all 203 seats of the House of Representatives were up for election in the 2022 General Election. The Commonwealth Respondents deny the remaining allegations.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Denied as stated. The Commonwealth Respondents admit only that Representative DeLuca's death created a vacancy in the House of Representatives for his term that expired on November 30, 2022, and that, following his re-election, a new vacancy arose on December 1, 2022 for the term beginning on that date.

11. Admitted in part, denied in part. The Commonwealth Respondents admit only that a true and correct copy of the purported writ of election issued by then-Speaker Cutler on November 30, 2022, is attached to the Application as Exhibit A. Exhibit A is a written document that speaks for itself and any characterizations inconsistent with the express terms thereof are denied.

12. Admitted only that the Department acknowledged receipt of the purported November 30, 2022 writ of election. By way of further response, the purported writ was returned for facial deficiencies as set forth in the letter attached to the Application as Exhibit I.

13. Admitted in part, denied in part. The Commonwealth Respondents admit only that December 1, 2022, constituted the start of the 207th General Assembly. The remaining allegations of this paragraph are conclusions of law to which no responsive pleading is required and they are deemed denied.

14. Admitted in part, denied in part. The Commonwealth Respondents admit only that Representative McClinton identified herself as the Majority Leader of the House of Representatives on December 7, 2022. After a reasonable investigation, the Commonwealth Respondents are without knowledge or information sufficient to form a belief as to whether Exhibit B is a true and correct

copy of a press release issued by Representative McClinton. The remaining allegations of this paragraph are conclusions of law to which no responsive pleading is required and they are deemed denied.

15. Admitted in part, denied in part. The Commonwealth Respondents admit only that Representatives Davis and Lee resigned from the House of Representatives. After reasonable investigation, the Commonwealth Respondents are without sufficient knowledge or information to form a belief as to whether Exhibits C and D are true and correct copies of resignation letters of Representatives Davis and Lee and, accordingly, that allegation is denied.

16. The allegations of this paragraph are conclusions of law to which no responsive pleading is required and are deemed denied. If a response is required, after reasonable investigation, the Commonwealth Respondents are without sufficient knowledge or information to form a belief as to truth of the averments of this paragraph.

17. Admitted in part, denied in part. The Commonwealth Respondents admit only that true and correct copies of the writs of election issued by Representative McClinton on December 7, 2022, are attached to the Application as Exhibits E, F, and G. The December Writs are written documents that speak for

themselves, and any characterizations contrary to the express terms thereof are denied. The remaining allegations of this paragraph are conclusions of law to which no responsive pleading is required and they are deemed denied.

18. Admitted in part, denied in part. The Commonwealth Respondents admit only that this paragraph quotes a portion of the document attached to the Application as Exhibit H. After a reasonable investigation, the Commonwealth Respondents are without knowledge or information sufficient to form a belief as to the truth of whether Exhibit H is a true and correct copy of Legal Opinion of the Legislative Reference Bureau issued on December 7, 2022, and, accordingly, the remaining allegations of this paragraph are denied.

19. Admitted in part, denied in part. The Commonwealth Respondents admit only that the Legal Opinion of the Legislative Reference Bureau attached as Exhibit H is a written document that speaks for itself. The Commonwealth Respondents deny that the Legal Opinion of the Legislative Reference Bureau is a binding legal opinion or authoritative interpretation of law.

20. Admitted in part, denied in part. The Commonwealth Respondents admit only that this paragraph quotes a portion of the Legal Opinion of the Legislative Reference Bureau. The Legal Opinion of the Legislative Reference

Bureau is a written document that speaks for itself, and any characterizations contrary to the express terms thereof are denied. By way of further response, the Commonwealth Respondents deny that the Legal Opinion of the Legislative Reference Bureau is a binding legal opinion or authoritative interpretation of law.

21. Admitted in part, denied in part. The Commonwealth Respondents admit only that a true and correct copy of Acting Secretary Chapman's December 7, 2022 letter is attached to the Application as Exhibit I and that the purported writ was rejected for the reasons stated in the letter. Acting Secretary Chapman's December 7, 2022 letter is a written document that speaks for itself, and any characterizations contrary to the express terms thereof are denied.

22. Admitted in part, denied in part. Acting Secretary Chapman and the Department admit only that Representative Cutler disputes that Acting Secretary Chapman was correct in rejecting the purported writ of election issued by him on November 30, 2022. The Commonwealth Respondents deny that Acting Secretary Chapman erred in rejecting that document.

23. Admitted in part, denied in part. The Commonwealth Respondents admit only that Representative Cutler asks this Court to preliminarily enjoin Respondents and all government officials employed by Respondents from

effectuating the writs of election. Whether Representative Cutler is entitled to such relief is a conclusion of law to which no responsive pleading is required. To the extent a response is deemed required, the Commonwealth Respondents deny that Representative Cutler is entitled to the relief requested in the Application.

24. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied.

25. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied.

26. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied.

27. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied.

28. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied.

29. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied.

30. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied. If a response is

required, the Commonwealth Respondents admit only that the Pennsylvania Constitution and the Election Code authorize the presiding officer of the House of Representatives to issue writs of election and that in the event of a vacancy in the Office of Speaker, those duties are to be performed by the Majority Leader. *See* 46 P.S. § 42.121m. By way of further response, the Commonwealth Respondents admit only that the Department received the December Writs identifying Representative McClinton as Majority Leader and those writs were attested to by the Chief Clerk of the House of Representatives. After a reasonable investigation, the Commonwealth Respondents are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph and they are denied.

31. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied. If a response is required, they are admitted in part, and denied in part. The Commonwealth Respondents admit only that Representative Cutler requests that this Court preliminarily enjoin Respondents and all government officials employed by Respondents from effectuating the December Writs issued by Representative McClinton. The Commonwealth Respondents deny that Representative Cutler is entitled to such relief.

32. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied. If a response is required, the Commonwealth Respondents deny that the special elections at issue are unlawful, and further deny that Representative Cutler would be deprived of lawful authority by the occurrence of the special elections. To the contrary, the special elections were scheduled and are proceeding consistent with the terms of the Election Code.

33. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied. If a response is required, they are admitted in part, and denied in part. The Commonwealth Respondents admit only that holding an election expends taxpayer resources. The Commonwealth Respondents deny that it is a “waste” of taxpayer resources to hold the special election required pursuant to the Election Code. To the contrary, holding special elections to fill vacancies for any elected office is a valid and constitutionally mandated function, justifying the expenditure of resources.

34. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied.

35. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied. To the extent a response is required, the allegations of this paragraph are admitted in part, and denied in part. The Commonwealth Respondents admit only that money damages are improper. The Commonwealth Respondents deny that there is harm caused by the effectuation of the December Writs.

36. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied. To the extent a response is required, the allegations of this paragraph are denied. The Commonwealth Defendants deny that “greater injury would result from refusing the injunction” because holding the special elections as scheduled would cause no harm to Representative Cutler but, instead, would harm the Commonwealth Respondents by delaying or preventing them from discharging their duties and would also harm Commonwealth citizens in the 32nd, 34th, and 35th Districts by increasing the time when they will be without the benefit of elected representation in their legislature.

37. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied. To the extent a response is required, the allegations of this paragraph are denied. The

Commonwealth Defendants deny that “greater injury would result from refusing the injunction” because holding the special elections as scheduled would cause no harm to Representative Cutler but, instead, would harm citizens of this Commonwealth in the 32nd, 34th, and 35th Districts by increasing the time when they will be without the benefit of elected representation in their legislature.

38. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied.

39. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied.

40. The allegations of this paragraph are conclusions of law to which no responsive pleading is required, and they are deemed denied. To the extent a response is required, the allegations of this paragraph are denied. The Commonwealth Defendants deny that granting an injunction is in the public interest because doing so would increase the time when Commonwealth citizens in the 32nd, 34th, and 35th Districts will be without the benefit of elected representation in their legislature.

41. Admitted in part, denied in part. The Commonwealth Respondents admit only that the Department must begin, has begun, and is currently undertaking

preparations for the February 7, 2023 special elections. It is denied that emergency relief is warranted because of that need to prepare. To the contrary, preparations for the February 7, 2023 special elections are proceeding on schedule and an injunction would waste Commonwealth resources by forcing the Department and the Board of Elections of Allegheny County to cease preparations only to have to begin them anew if this Court holds that the December Writs are valid.

WHEREFORE, Acting Secretary Chapman and the Department request that this Honorable Court deny the Application and grant such further relief as this Court deems just and proper.

Date: December 16, 2022

Respectfully Submitted,

/s/ Justin G. Weber

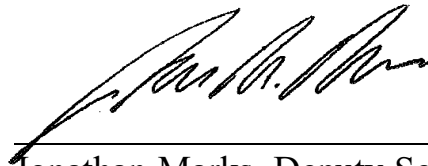
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VERIFICATION

I, Jonathan Marks, am the Deputy Secretary for Elections and Commissions of the Pennsylvania Department of State and authorized to make this verification. I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I understand that the statements herein are made subject to the penalties of perjury 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

A handwritten signature in black ink, appearing to read 'Jonathan Marks', written over a horizontal line.

Jonathan Marks, Deputy Secretary for
Elections and Commissions

CERTIFICATE OF COMPLIANCE

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

/s/ Justin G. Weber
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PROOF OF SERVICE

I hereby certify that on December 16, 2022, I caused a copy of the forgoing document to be served via the Court's electronic filing system upon the following, which service satisfies the requirements of Pa. R.A.P. 121:

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