

**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,

REPRESENTATIVE JOANNA  
MCCLINTON, LEADER OF THE  
DEMOCRATIC CAUCUS OF THE  
PENNSYLVANIA HOUSE OF  
REPRESENTATIVES,

Intervenor.

588-MD-2022

AND NOW, this \_\_\_ day of \_\_\_\_\_, 202\_\_, and upon consideration of the preliminary objections filed by the Pennsylvania Democratic Party (“PA Dems”) pursuant to this Court’s December 22, 2022 Order, and in response to the Petitioner’s Petition for Review in the Nature of a Complaint for Declaratory Judgment (the “Complaint”) and the pending application for intervention, it is hereby ORDERED

that the PA Dems are admitted as intervenors, the preliminary objections are docketed, and the PA Dems' preliminary objections are SUSTAINED. The Petitioner's Complaint is hereby DISMISSED.

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.

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

Respondents,

REPRESENTATIVE JOANNA  
MCCLINTON, LEADER OF THE  
DEMOCRATIC CAUCUS OF THE  
PENNSYLVANIA HOUSE OF  
REPRESENTATIVES,

Intervenor.

588-MD-2022

**PRELIMINARY OBJECTIONS OF**  
**THE PENNSYLVANIA DEMOCRATIC PARTY**

Pursuant to this Court's Order of December 22, proposed intervenor the Pennsylvania Democratic Party ("PA Dems") files these Preliminary Objections.

## INTRODUCTION

This Court is called upon to answer a narrow question: is the Petitioner entitled to halt the Department of State and Allegheny County Board of Elections from administering the ongoing special elections in House Districts 34 and 35, scheduled for February 7, 2023, the same date as the scheduled special election for House District 32?

Because Petitioner has not met his burden, the Court should sustain the objections below and dismiss the Petition for Review in the Nature of a Complaint for Declaratory Judgment (the “Complaint”).

At its core, the Complaint asks this Court to insert itself in the resolution of a non-justiciable political question regarding the issuance of writs of elections, an act that is constitutionally vested solely with the Legislative Branch. The Secretary of the Commonwealth—who is cognizant of the requirements imposed by the Pennsylvania Constitution and Election Code requiring legislative special elections be called according to law—processed the facially valid writs of election issued by Leader Joanna McClinton. Petitioner has not set forth in the Complaint why this Court should disregard longstanding principles respecting the separation of powers amongst the three branches of government.

Representative McClinton was the sworn Majority Leader and the selected leader of the party that prevailed in the majority of seats on Election Day, and she

adopted as her date for these elections the very day that former Speaker Bryan Cutler had attempted to select, albeit unsuccessfully, for one of the three special elections.

Were this Court to decide to delve into whether Leader McClinton was authorized to issue the writs on December 7, 2022, as a pure technical matter Leader McClinton led the caucus with a majority of certified members because, as of that moment, the Department of State had certified more Democratic House seats than Republican House seats as a result of delays arising from court challenges to 23 seats.

The Acting Secretary of the Commonwealth acted reasonably in processing Leader McClinton's facially valid writs. The elections in the 34<sup>th</sup> and 35<sup>th</sup> Districts<sup>1</sup> have been scheduled, the parties have nominated candidates, the campaigns have begun, and the Allegheny County Board of Elections has proceeded to take the required steps, on an expedited schedule, to ensure that the special elections can be conducted on February 7, 2023. Leader Cutler has offered no support for the proposition that this Court should nullify that process and deprive the residents of House Districts 34 and 35 timely representation in the General Assembly.

---

<sup>1</sup> The date of the election in the 32<sup>nd</sup> District has been resolved by a stipulation of all parties and the proposed intervenor.

## **BACKGROUND**

1. Legislators’ “term of service shall begin on the first day of December next after their election.” Pa. Const. art. II, § 2.

2. The first vacancy for the 207<sup>th</sup> General Assembly occurred on the first day of the term because the Hon. Anthony DeLuca passed away in October but was reelected posthumously.

3. On December 6, 2022, Congresswoman-Elect Summer Lee announced she would resign her seat representing the 34<sup>th</sup> District—to which she had been reelected for the 2023-2024 term—effective 10 am on December 7.

4. On December 7, with an effective time of 10:30 am, Lieutenant Governor-Elect Austin Davis resigned his seat representing the 35th House District, to which he was also reelected in November.

5. All three districts are in Allegheny County and are adjacent to one another.

6. Joanna McClinton has, at all times relevant hereto, been the Democratic Leader. She served as Minority Leader during the 206<sup>th</sup> General Assembly and was selected as Democratic Leader for 207<sup>th</sup> General Assembly, which commenced on December 1, 2022. Leader McClinton has publicly stated that she intends to be the next Speaker of the House.

7. Bryan Cutler was the Speaker of the House for the 206<sup>th</sup> General Assembly and has been selected as Republican Leader for the 207<sup>th</sup> General Assembly. Leader Cutler has publicly stated that he does not intend to stand for another term as Speaker.

8. On November 30, 2022, after adjournment *sine die* and before the end of the then-current term, then-Speaker Cutler issued a writ of election for a Special Election in District 32 for February 7, 2023, to provide for representation in the upcoming 207<sup>th</sup> General Assembly.

9. Though Leader McClinton publicly disagreed with the validity of the November 30 writ on several grounds, she announced she would respect the date Former Speaker Cutler attempted to set and would issue a subsequent valid writ for the special election in House District 32 for February 7, 2023.

10. On December 7, the Acting Secretary of the Commonwealth rejected Leader Cutler's November 30 writ for multiple technical reasons including, but not solely, on the grounds correctly identified by Leader McClinton.

11. On December 7, Representative McClinton was sworn in as Majority Leader by the Honorable Richard H. Lowe. After being sworn, Majority Leader McClinton issued writs of election for special elections to fill the three vacant seats for February 7, 2023, the date previously—but improperly—set by the former

Speaker. The writs were each attested to by the Chief Clerk of the House of Representatives.

12. Upon receiving the facially valid writs, in accordance with governing state law, the Secretary of the Commonwealth scheduled all three special elections for February 7, notified the political parties, and publicly promulgated the timeline for political body candidates to qualify for the ballot.

13. Both the Democratic and Republican parties have selected candidates in all three races, campaigns are underway, and the Allegheny County Board of Elections has begun preparations for the February 7 special elections.

14. On December 15, 2022, Leader Cutler issued invalid documents purporting to be writs of election attempting to schedule special elections in the 34<sup>th</sup> and 35<sup>th</sup> House Districts on May 16, 2023.

15. On December 23, 2022, a stipulation was filed agreeing that the 32<sup>nd</sup> House District election should proceed on February 7, 2023.

### **ARGUMENT**

16. The Pennsylvania Rules of Civil Procedure allow for preliminary objections for “lack of jurisdiction” (non-justiciability). Pa. R. Civ. P. 1028(a)(1); *see also Dintzis v. Hayden*, 606 A.2d 660, 661 (Pa. Commw. 1992) (sustaining preliminary objection for non-justiciability of a political question and dismissing complaint). The Rules of Civil Procedure also allow for preliminary objections for



“legal insufficiency of a pleading” (demurrer). Pa. R. Civ. P. 1028(a)(4). “Where the complaint fails to set forth a valid cause of action, a preliminary objection in the nature of a demurrer is properly sustained.” *Lerner v. Lerner*, 954 A.2d 1229, 1235 (Pa. Super. 2008).

**A. This Court Lacks Jurisdiction Because the Dispute is Non-Justiciable and Involves Questions to be Resolved Solely by the Legislative Branch.**

17. The internal workings of the Pennsylvania House of Representatives generally, and specifically with respect to the calling of special elections, are questions that the judicial branch should not determine.

18. “The authority to issue a writ for a special election for a vacant seat in the General Assembly is vested exclusively in that body pursuant to Article II, Section 2 of the Pennsylvania Constitution. No branch shall exercise authority exclusively vested in another branch.” *Perzel v. Cortes*, 582 Pa. 103, 113 (Pa. 2005), (citing *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977)); *see also Dintzis*, 606 A.2d at 662 (citing *Sweeney*, 375 A.2d at 706) (“where there is a challenge to legislative power, which the Constitution commits exclusively to the legislature, a non-justiciable political question is presented”).

19. This Court has repeatedly refused to intervene in the inner workings of the Legislature, having confirmed that the “Pennsylvania House of Representatives has exclusive power over its internal affairs and proceedings and that [the Courts]

would not review the legislature’s internal affairs.” *See Dintzis*, 606 A.2d at 662 (citing *Ritter v. Commonwealth*, 548 A.2d 1317 (Pa. Commw. 1988), *aff’d per curiam*, 557 A.2d 1064 (Pa. 1989)).

20. Separately, whether Leader McClinton had the authority to issue the writs raises another non-justiciable political question, this one concerning which party held the majority of seats in the House of Representatives on December 7.

21. As the Supreme Court held in *Perzel*, it is not for this Court to wade into the process of leadership selection or elections within the Legislative Branch. To that end, facially valid writs issued by the General Assembly are to be honored by the Executive and Judicial Branches. *See Perzel*, 582 Pa. at 113.

22. Here, the Secretary of the Commonwealth appropriately accepted the writs issued by Leader McClinton, setting special elections on the same date originally agreed upon by Leaders McClinton and Cutler. There is no basis, therefore, for Leader Cutler to ask this Court to intervene now that the special election process is well underway.

**B. Even if this Complaint is Justiciable, It Fails to State a Claim Because When Majority Leader McClinton Issued the December 7 Writs, She Was the Presiding Officer by Statute.**

23. It is undisputed that “[p]ursuant to the Pennsylvania Constitution, as well as the Election Code, the authority to issue writs of election [for State

Representative] rests with the presiding officer of the House of Representatives[.]” Pa. Const. Art. II, § 2; Complaint, at ¶ 30(A).

24. There is no Speaker until one is elected in the reorganization and, as such, in the interregnum, the Majority Leader is responsible for the statutory duties that are usually left to the Speaker. 46 Pa. Stat. § 42.121m (“If 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.”).

25. Statutorily, the Presiding Officer must issue a writ of election within 10 days of the vacancy occurring in each instance. 25 P.S. § 2778. As a result, the Majority Leader was required to issue a writ for the special election for the 32<sup>nd</sup> District between December 1 and December 11, and for the special elections for the 34<sup>th</sup> and 35<sup>th</sup> Districts between December 7 and December 17.

26. Recognizing the need for timely action, as leader of the party and caucus with the most election winners in the general election and, critically, the certified vote winners, on December 7, Leader McClinton took the oath of office as Majority Leader and issued all three writs.

27. Leader McClinton issued writs of election pursuant to her authority as Majority Leader. *See Perzel*, 582 Pa. at 113; *see also* 46 Pa. Stat. § 42.121m.

28. At the time that Majority Leader McClinton took the oath and issued the writs, the Secretary had certified 180 elections for the House of Representatives. The Secretary certified the Democratic candidate as the winner of 94 races (91 after accounting for the three seats then vacant), whereas Republican candidates were certified as winners in 86 races. *See Exhibits A-D.*<sup>2</sup>

29. Petitioner’s Complaint fails to state a claim because it relies on the incorrect premise that Leader McClinton was not the statutory presiding officer—in this case, the Majority Leader—when she issued the writs of election.

30. As of December 7, 2022, Leader McClinton was the presiding officer pursuant to applicable statutes and certifications, and she validly issued the writs pursuant to her authority.

---

<sup>2</sup> This was not some accident of timing, as baseless challenges in multiple counties delayed election returns across the state causing the Secretary to certify counties in a staggered process. From the commencement of the session on December 1 until the issuance of the writs on December 7, and for some significant time thereafter, Leader McClinton was always the clear leader of a majority caucus of certified members.

PA Dems recognizes that, particularly after the bad-faith election denial litigation in both 2020 and 2022, there is a theoretical risk of improper election disputes for the purpose of delaying certifications and altering leadership elections. That risk must be the subject of statutory revision, and in the interim, courts may need to address such actions through an application of the doctrine of unclean hands. However, there is no application or allegation of unclean hands here; in fact, all 2022 certification delaying litigation in Pennsylvania was filed by Republicans, including a county party chair and a Representative-Elect. No one has accused PA Dems, Leader McClinton, or anyone associated with either of them, of delaying certification in any of the 67 counties.

31. Once the facially valid writs were submitted, the Secretary was required to process the valid writs Leader McClinton issued and cause the elections to occur, and the Acting Secretary did just that.

32. Eight days later, Leader Cutler issued writs in his own name, providing for alternate election dates.

33. The December 15 writs were for vacancies for which elections had already been scheduled and, as such, are nullities as a matter of law, without requiring a determination whether Leader Cutler was the Majority Leader on December 15.

34. Voters have “a clear legal right to elected representation, which right must be vindicated at special elections.” *See Fagan v. Smith*, 41 A.3d 816, 818 (Pa. 2012) (*per curiam*) (citing the Free and Equal Elections Clause, Pa. Const. art I, § 5). If the December 15 writs controlled, the voters of the 34<sup>th</sup> and 35<sup>th</sup> Districts would be without representation for over six months.

35. Leader Cutler has failed in his complaint to set forth a legal basis by which this Court should undo the special elections now underway.

WHEREFORE, this Court must sustain the PA Dems' Preliminary Objections and dismiss the case in its entirety.

Dated: December 28, 2022

**GREENBERG TRAURIG, LLP**

By: /s/ Kevin Greenberg

Kevin Greenberg (PA I.D. No. 82311)

Adam Roseman (PA I.D. No. 313809)

Peter Elliot (PA I.D. No. 327465)

1717 Arch Street, Suite 400

Philadelphia, PA 19103

P: (215) 988-7800

greenbergk@gtlaw.com

rosemana@gtlaw.com

elliotp@gtlaw.com

**DENTONS COHEN & GRIGSBY P.C.**

Clifford B. Levine (PA I.D. No. 33507)

Conor T. Daniels (PA I.D. No. 332318)

625 Liberty Avenue, 5th Floor

Pittsburgh, PA 15222-3152

P: (412) 297-4900

clifford.levine@dentons.com

conor.daniels@dentons.com

*Counsel for the Pennsylvania Democratic Party*

**CERTIFICATE OF COMPLIANCE**

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/ Kevin Greenberg* \_\_\_\_\_  
Kevin Greenberg

## **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was served upon all counsel of record on December 28, 2022, via the following email addresses:

*Counsel for Bryan Cutler:*

Kandice Kerwin Hull: khull@mcneeslaw.com;  
Drew Crompton: dcrompton@mcneeslaw.com;  
Ryan Gonder: rgonder@mcneeslaw.com;  
Austin D. Hughey: ahughey@mcneeslaw.com;

*Counsel for Acting Secretary of the Commonwealth, and the  
Pennsylvania Department of State:*

Justin Weber: justin.weber@troutman.com;  
Adam Martin: adam.martin@troutman.com;  
John Schweder: john.schweder@troutman.com;  
Samuel Harrison: samuel.harrison@troutman.com;

*Counsel for the Board of Elections of Allegheny County:*  
George M. Janocsko: george.janocsko@alleghenycounty.us;  
Allan J. Opsitnick: aopsitnick@opsitnickslaw.com;  
Lisa G. Michel: lmicel@jblmlaw.com;

*Counsel for Joanna E. McClinton:*

Daniel T. Brier: dbrier@mbklaw.com;  
Donna A. Walsh: dwalsh@mbklaw.com;  
Richard L. Armezzani: rarmezzani@mbklaw.com;  
Michael A. Comber: mcomber@reisingercomber.com

*/s/ Peter Elliot*

\_\_\_\_\_  
Peter Elliot