

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPRESENTATIVE BRYAN CUTLER, :
Leader of the Republican Caucus of the :
Pennsylvania House of Representatives, :
 :
Petitioner, :

v. :

No. 588 MD 2022

:
LEIGH M. CHAPMAN, Acting Secretary :
of the Commonwealth of Pennsylvania, :
THE PENNSYLVANIA DEPARTMENT :
OF STATE, and THE BOARD OF :
ELECTIONS OF ALLEGHENY :
COUNTY, :
 :
Respondents. :

**PROPOSED INTERVENOR JOANNA E. MCCLINTON'S
PRELIMINARY OBJECTIONS TO PETITION FOR REVIEW**

Pursuant to Rule 1516(b) of the Pennsylvania Rules of Appellate Procedure and Rule 1028 of the Pennsylvania Rules of Civil Procedure, Proposed Intervenor Joanna E. McClinton, by and through her undersigned counsel, states the following as her Preliminary Objections in response to the Petition for Review in the above-captioned matter:

1. This action is an effort by Petitioner Bryan D. Cutler, Leader of the Republican Caucus of the Pennsylvania House of Representatives, to circumvent valid and timely Writs of Election issued by House Democratic Caucus Leader McClinton to fill vacant seats in the House of Representatives.

2. The Petition for Review includes a single count for declaratory relief under the Declaratory Judgments Act, 42 Pa. C.S.A. §§ 7531-7541, seeking a pronouncement that the Writs of Election issued by Leader McClinton on December 7, 2022 scheduling the special elections for February 7, 2023 are invalid.

3. The claim asserted by Leader Cutler is devoid of legal merit and procedurally flawed and the Petition for Review should be dismissed pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure.

I. Preliminary Objection Raising Legal Insufficiency, Pa. R. Civ. P. 1028(a)(4).

4. Leader Cutler's claim for declaratory relief rests on the incorrect legal premise that the Writs of Election issued by Leader McClinton are invalid.

5. As Leader of the House Democratic Caucus, Leader McClinton issued Writs of Election scheduling special elections on February 7, 2023 to fill seats rendered vacant by death and resignation.

6. Pursuant to Article II, § 2 of the Pennsylvania Constitution, when a vacancy occurs, "the presiding officer" of the House of Representatives "shall issue a writ of election to fill such vacancy for the remainder of the term." Pa. Const. art. II, § 2.

7. Writs of election must be issued within 10 days after a vacancy. 25 P.S. § 2778.

8. Under 46 P.S. § 42.121m, when the office of Speaker is vacant, the duties of the Speaker are performed by the Majority Leader.

9. Democrats won a majority of the 203 House districts at the general election on November 8, 2022—a total of 102 seats—whereas House Republicans won 101 seats. Pet. for Review ¶¶ 17.

10. Leader McClinton was re-elected to serve as Democratic Leader of the House of Representatives on November 15, 2022 and was sworn in as Representative of the 191st Legislative District for the 2023-2024 legislative session on December 7, 2022. Pet. for Review ¶¶ 2, 17, 25.

11. On December 7, 2022, after being duly sworn into office, Leader McClinton issued Writs of Election to the Secretary of the Commonwealth and the Board of Elections of Allegheny County setting February 7, 2023 as the date for special elections to fill vacancies in the 32nd Legislative District caused by the death of Representative Anthony DeLuca and vacancies in the 34th and 35th Legislative Districts caused by the resignations of Summer Lee and Austin A. Davis, respectively. *Id.* ¶ 28 & Exs. E, F & G.

12. As the leader of the caucus that won a majority of the seats at the November 8, 2022 election, *id.* ¶¶ 17, 25, Leader McClinton issued Writs of Election to fill the vacant seats in the 32nd, 34th and 35th Legislative Districts under 46 P.S. § 42.121m and 25 P.S. § 2778. *See Perzel v. Costa*, 870 A.2d 759, 763-64 (Pa. 2005)

(holding that Majority Leader is authorized to issue writ of election after General Assembly adjourns *sine die*).

13. The Writs of Election issued by Leader McClinton on December 7, 2022 are valid under Article II, § 2 and 25 P.S. § 2778.

14. Leader Cutler’s challenge to the Writs of Election issued by Leader McClinton is without legal merit and therefore the Petition for Review is properly dismissed for failure to state a claim upon which relief can be granted.

WHEREFORE, the Petition for Review fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

II. Preliminary Objection Raising Legal Insufficiency, Pa. R. Civ. P. 1028(a)(4).

15. Representative Cutler alleges that Acting Secretary of the Commonwealth Leigh M. Chapman incorrectly rejected the document that he issued on November 30, 2022 calling for a special election on February 7, 2023 (the same date later selected by Leader McClinton) to fill the vacancy in the 32nd Legislative District resulting from the death of Representative DeLuca. Pet. for Review ¶ 32.

16. On November 30, 2022, Representative Cutler purported to declare a special election to fill the “remainder of [Representative DeLuca’s] term expiring November 30th, Two Thousand Twenty-Four.” Pet. for Review, Ex. A.

17. As detailed in the December 7, 2022 letter from Acting Secretary of the Commonwealth Leigh M. Chapman (attached to the Petition for Review as Exhibit I), the Writ of Election issued by Leader Cutler on November 30, 2022 is invalid as a matter of law for at least two reasons.

18. *First*, a writ of election is required to be issued within ten days of the vacancy. 25 P.S. § 2778. The Writ of Election issued by Leader Cutler on November 30, 2022 was issued more than 10 days after Representative DeLuca's death on October 9, 2022 and therefore, as a matter of law, was ineffective to call for an election to fill his term ending in 2022. Further, a writ may only fill an unexpired term and may only call for a special election more than 60 days after the vacancy and therefore no special election could be held to fill Representative DeLuca's term which expired on November 30, 2022. *See* 25 P.S. § 2778.

19. *Second*, because Representative DeLuca was elected to a new two-year term at the November 8, 2022 General Election, a new vacancy for his seat was created on December 1, 2022. Pa. Const. art. II, § 2. Therefore, the first date for issuance of a writ of election to fill the current term was December 1, 2022. The document issued by Leader Cutler on November 30, 2022 predated the vacancy that occurred following the November 8, 2022 General Election and Leader Cutler could not call for a special election for a term that had not yet commenced.

20. As a matter of law, the document issued by Leader Cutler on November 30, 2022 was ineffective and could not validly seek to fill a vacancy in Representative DeLuca's unexpired term ending in 2024 which would not occur until the following day.

WHEREFORE, the Petition for Review fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

III. Preliminary Objection Raising Lack of Jurisdiction and Legal Insufficiency, Pa. R. Civ. P. 1028(a)(1), (4).

21. Leader Cutler proposed February 7, 2023 as the date for the special election—the *same date* in the Writs of Election issued by Leader McClinton which he is seeking to invalidate.

22. It is well settled in Pennsylvania that a declaratory judgment is unavailable where the relief sought would have no practical effect. *See Gulnac by Gulnac v. South Butler Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991) (“A declaratory judgment must not be employed . . . as a medium for the rendition of an advisory opinion which may prove to be purely academic.”) (citations omitted); *McCandless Twp. v. Wylie*, 100 A.2d 590, 592 (Pa. 1953) (“[A] petition for declaratory judgment is properly dismissed where the proceeding may prove to be merely academic.”); *Brown v. Commonwealth, Liquor Control Bd.*, 673 A.2d 21, 23 (Pa. Cmwlth. 1996); *Funk v. Wolf*, 144 A.3d 228, 251 (Pa. Cmwlth. 2016) (denying request for declaratory

relief that “would have no practical effect”), *aff’d*, 158 A.3d 642 (Pa. 2017); *Stackhouse v. Commonwealth, Pa. State Police*, 892 A.2d 54, 62 (Pa. Cmwlth. 2006) (“[i]t is improper to utilize declaratory pronouncements to issue advisory opinions which can have no practical effect on the parties.”) (citation omitted).

23. Where, as here, “the matter does not present a case or controversy, the courts have consistently held that they were without jurisdiction to hear the matter.” *Brown*, 673 A.2d at 23.

24. Because Leader McClinton selected the same date for the Allegheny County special elections proposed by Leader Cutler for the vacancy in the 32nd Legislative District, there is no case or controversy and this Court lacks jurisdiction to hear the matter.

WHEREFORE, the Petition for Review fails to state a claim upon which relief can be granted and this Court lacks jurisdiction over this matter and therefore the Petition for Review should be dismissed pursuant to Rule 1028(a)(1) and/or Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

IV. Preliminary Objection Raising Lack of Jurisdiction, Pa. R. Civ. P. 1028(a)(1).

25. To the extent Leader Cutler is alleging that the document he issued on November 30, 2022 should take precedence over the Writ of Election that Leader McClinton validly issued on December 7, 2022, his claim raises a political question that is not within the scope of this Court’s jurisdiction.

26. The Supreme Court made clear in *Perzel v. Cortes* that “[t]he 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.” 870 A.2d 759, 765 (Pa. 2005).

27. Accordingly, to the extent Leader Cutler is challenging Leader McClinton’s authority as Majority Leader to serve the Writs of Election, his claim is a non-justiciable political question which this Court lacks jurisdiction to consider or decide.

WHEREFORE, the Petition for Review should be dismissed for lack of jurisdiction pursuant to Rule 1028(a)(1) of the Pennsylvania Rules of Civil Procedure.

Respectfully submitted:

/s/ Daniel T. Brier

Daniel T. Brier
Donna A. Walsh
Richard L. Armezzani

Myers, Brier & Kelly, LLP
425 Biden Street, Suite 200
Scranton, PA 18503

/s/ Michael A. Comber

Michael A. Comber

Reisinger Comber & Miller LLC
300 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219

Attorneys for Joanna E. McClinton,
Leader of the Democratic Caucus of
the Pennsylvania House of
Representatives

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 requires filing confidential information and documents differently than non-confidential information and documents.

/s/ Daniel T. Brier
Daniel T. Brier

Date: December 16, 2022

PROOF OF SERVICE

I, Daniel T. Brier, hereby certify that I served the forgoing Application for Leave To Intervene upon all counsel of record via the Court's PACFile eService system, which service satisfies the requirements of Pa.R.A.P. 121.

/s/ Daniel T. Brier
Daniel T. Brier

Date: December 16, 2022